

MEMORANDUM

TO: Members of Rules Revision Commission

FROM: Linda Q. Foy, Ellen Peck, JoElla Julien

DATE: January 13, 2006

RE: Agenda Item III.E. (2/3/06 Meeting): Proposed New Rule 1.14 (Client With Diminished Capacity): Draft No. 4

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I. **Proposed Rule 1.14 Client with Diminished Capacity (adapted from ABA MR1.14)(Clean)**

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of mental impairment or some other reason<sup>1</sup>, the lawyer shall, as far as reasonably possible, maintain a normal attorney-client relationship with the client.

(b) When the lawyer reasonably believes that the client (i) has significantly diminished capacity<sup>2</sup> such that the client is unable to make adequately considered decisions in connection

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<sup>1</sup>Regarding the potential applicability of the rule in connection with the representation of minors, ABA Model Rule 1.14(a) and the previous draft of the proposed Rule 1.14 include "minority" among the types of impairment covered by the rule. However, in California, the representation of minors, specifically in custody, child endangerment and juvenile justice contexts, is extensively regulated by statute. See, e.g., Family Code §3150 *et seq.* (appointment of private counsel to represent child in custody or visitation proceedings, duties and rights of private counsel, procedure for motion for release relevant reports or files of child protective services agency, etc.); Welfare and Institutions Code §§300, 317 *et seq.* (procedures governing appointment of counsel and role of counsel re child endangerment), 602, 675 *et seq.* (procedures governing hearings and role of counsel re juvenile criminal violations). For this reason, the rule does not address the representation of minors, but a reference to applicable statutes is included in the draft Comments.

<sup>2</sup>The word "significantly" has been added to subsection (b) in order to address the concerns of several Commission members that the rule permits action only in extreme circumstances, i.e., only when the client is *substantially* impaired and only when that impairment affects his or her ability to make decisions regarding the representation. Similarly, the California Probate Code notes that "[a] person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions and that a judicial determination that a person suffers from a mental deficient so substantial as to constitute lack of legal capacity to perform a specific act "should be based on evidence of deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder." Probate Code §810. See

(continued . . . )

with a representation, except in a criminal matter<sup>3</sup> or other matter where the rights of the client are at issue<sup>4</sup> and, as a result of such significantly diminished capacity, the client both (ii) is at risk of substantial physical, financial or other harm unless action is taken and (iii) cannot adequately act in his or her own interest, the lawyer may consult with individuals or entities that have the ability to take action to protect the client.

(c) Confidential information and client secrets relating to the representation of an incapacitated client are protected by Business and Professions Code section 6068(e) [as potentially revised]. When taking protective action pursuant to paragraph (b), the lawyer is authorized<sup>5</sup> under section 6068(e) [as potentially revised] to reveal information about the client, but only to the extent reasonably necessary to protect the client's interest.<sup>6</sup>

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( . . . continued)

*also Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C.*, 109 Cal. App. 4th 1287, 1300 (2003) (“It has been held over and over in this state that old age, feebleness, forgetfulness, filthy personal habits, personal eccentricities, failure to recognize old friends or relatives, physical disability, absent-mindedness and mental confusion do not furnish grounds for holding that a testator lacked testamentary capacity [citation omitted]”).

<sup>3</sup>Regarding the potential applicability of the rule in criminal matters, William Balin, a criminal defense attorney in San Francisco and former member of COPRAC, advises that the rule should exclude the issue of incompetence of a defendant in a criminal matter, which is addressed in Penal Code section 1368 *et seq.*, which set forth specific procedures for determining the competence of a criminal defendant whom either the court or counsel believes to be, or possibly to be, incompetent, as well as the consequences of a finding of incompetence for the ongoing proceedings. In addition to the express limitation of the rule to representation in non-criminal matters, a specific reference to applicable sections of the Penal Code is included in the draft Comments.

<sup>4</sup>At the 10/28/05 meeting, Mark Tuft noted, and there was general consensus, that the exclusion should not be limited to criminal matters (and matters in which the client is a minor, addressed in Comment 4), but should also include any matter “where the rights of the client are at issue.” However, this language needs further limitation lest it be read so broadly to include *any* matter, e.g., a contract dispute where the property rights of the client are at issue. One possibility is a limitation to “fundamental rights,” which would itself require some elaboration. Guidance from Mark and from the Commission members is requested on this issue.

<sup>5</sup>Previous draft providing that the lawyer “is *impliedly* authorized under section 6068(e),” etc. has been revised to eliminate reference to implied authorization. Model Rule 1.14 relies in part on the lawyer's implied authority under Model Rule 1.16 to disclose client confidential information, but neither RPC 3-100(A) nor Business and Professions Code section 6068(e) refers to a lawyer's “implied authority.” Commissioner Tuft raised issue whether we should introduce the concept of implied authority in the RPC.

<sup>6</sup>As noted, the drafting of this rule will be coordinated with the drafting of the rule governing confidentiality, and appropriate cross-referencing should be added as appropriate.

**Comment:**<sup>7</sup>

1. The purpose of the rule is to allow the lawyer to act competently on behalf of the client, to further the client's goals in the representation and to protect the client's interest, in circumstances where the client suffers from a significantly diminished capacity that negatively affects the lawyer's ability to do so.

2. As used in paragraph (b), a client with "significantly diminished capacity in his or her ability to make adequately considered decisions" shall mean that the client is materially impaired in his or her capacity to understand and appreciate the rights and duties affected by the decision and the significant risks, consequences and reasonable alternatives involved in the decision, as described in Probate Code section 812, by virtue of a deficit in mental function of the types described in Probate Code section 811.<sup>8</sup> However, the reference to relevant portions of the Probate Code is intended only to provide guidance to a lawyer who seeks to take protective action pursuant to paragraph (b) and does not require the lawyer to seek a legal determination that the client meets the standards of incapacity under Probate Code section 811 *et seq.*

3. This rule addresses the representation of a client only in non-criminal matters. The issue of a client with diminished capacity in a criminal matter is addressed in Penal Code section 1368 *et seq.*

4. This rule does not address the representation of a client who has diminished capacity by reason of minority. The rights and duties of lawyers representing minors are regulated by pertinent statutes. *See, e.g.,* Family Code § 3150, Welfare and Institutions Code §§300, 602, 675 *et seq.*

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<sup>7</sup>The Comments included in this draft have been specifically discussed and proposed by Commission members in reviewing the Proposed Rule. ABA Model Rule 1.14 includes extensive comments addressing, *inter alia*, the fact that incapacity is a relative matter and may vary with respect to particular kinds of issues or decisions in the course of the representation; the involvement of family members or others to assist in the representation; factors to consider in determining extent of the client's incapacity; under what circumstances the lawyer should seek appointment of a guardian *ad litem* or conservator (a course of action permitted under ABA Model Rule 1.14 but which the Commission has decided to expressly prohibit in the comments to this rule). The drafters will not address adoption of a complete set of Discussion comments until the Commission has agreed upon the broad outlines of the black letter rule.

<sup>8</sup>The definition contained in Comment 2, like the rule itself, focuses on impairment in the client's decision-making ability (referencing section 812), as evidenced by the specific kinds of deficits identified in the referenced section 811. The intent of the statutory references is to provide guidance to the lawyer evaluating such functional capacity, not to require the lawyer to make a clinical assessment and judgment of mental competence.

5. This rule addresses the representation of a client who is not the subject of a guardianship or conservatorship. This rule does not permit a lawyer to file or to represent a party in filing a guardianship or conservatorship petition or to take similar action concerning the client, where the lawyer would not otherwise be permitted to do so under Rule 3-310 [as revised] or Rule 3-600 [as revised], or to take a position adverse to the client beyond the notification permitted in paragraph (b).

6. The lawyer's "reasonable belief" that the client suffers from diminished capacity to make adequately considered decisions in connection with the representation or to adequately act in his or her own interest may require consultation with a health care provider or other person qualified to make an assessment.

7. In taking action pursuant to paragraph (b), the lawyer must avoid any adverse effect on the client's rights under the Fourteenth Amendment to the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from any disclosure contemplated by the member.<sup>9</sup>

## II. **Redline: Proposed Rule 1.14 Against ABA Model Rule 1.14**

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of ~~minority~~, mental impairment or ~~for~~ some other reason<sup>1</sup>, the lawyer shall, as far as reasonably possible, maintain a normal attorney-client-lawyer relationship with the client.

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<sup>9</sup>This comment generally tracks the language of Rule 3-100 (Confidential Information of a Client), Discussion note [6](4), but because, unlike Rule 3-100, the scope of this rule is limited to representation in non-criminal matters, the reference in Discussion note [6](4) to a client's rights under the Fifth and Sixth Amendments to the United States Constitution have been omitted.

<sup>1</sup>Regarding the potential applicability of the rule in connection with the representation of minors, ABA Model Rule 1.14(a) and the previous draft of the proposed Rule 1.14 include "minority" among the types of impairment covered by the rule. However, in California, the representation of minors, specifically in custody, child endangerment and juvenile justice contexts, is extensively regulated by statute. See, e.g., Family Code §3150 et seq. (appointment of private counsel to represent child in custody or visitation proceedings, duties and rights of private counsel, procedure for motion for release relevant reports or files of child protective services agency, etc.); Welfare and Institutions Code §§300, 317 et seq. (procedures governing appointment of counsel and role of counsel re child endangerment), 602, 675 et seq. (procedures governing hearings and role of counsel re juvenile criminal violations). For this reason, the rule does not address the representation of minors, but a reference to applicable statutes is included in the draft Comments.

(b) When the lawyer reasonably believes that the client (i) has significantly diminished capacity,<sup>2</sup> such that the client is unable to make adequately considered decisions in connection with a representation, except in a criminal matter<sup>3</sup> or other matter where the rights of the client are at issue<sup>4</sup> and, as a result of such significantly diminished capacity, the client both (ii) is at risk of substantial physical, financial or other harm unless action is taken and (iii) cannot adequately act in ~~the client's~~ his or her own interest, the lawyer may ~~take reasonably necessary protective action, including consulting~~ consult with individuals or entities that have the ability to take action to protect the client ~~and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.~~

~~(c) Information~~ (c) Confidential information and client secrets relating to the representation of an incapacitated client with diminished capacity ~~is~~ are protected by **Rule 1.6**, Business and Professions Code section 6068(e) [as potentially revised]. When taking protective

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action pursuant to paragraph (b), the lawyer is ~~impliedly~~ authorized<sup>5</sup> under ~~Rule 1.6(a)~~ section 6068(e) [as potentially revised] to reveal information about the client, but only to the extent reasonably necessary to protect the client's ~~interests.~~ 's interest.<sup>6</sup>

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<sup>5</sup>Previous draft providing that the lawyer "is impliedly authorized under section 6068(e)," etc. has been revised to eliminate reference to implied authorization. Model Rule 1.14 relies in part on the lawyer's implied authority under Model Rule 1.16 to disclose client confidential information, but neither RPC 3-100(A) nor Business and Professions Code section 6068(e) refers to a lawyer's "implied authority." Commissioner Tuft raised issue whether we should introduce the concept of implied authority in the RPC.

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