AGENDA MATERIALS FOR

III.D. Rule 3-100 [1.14] (Client with Diminished Capacity)

- Drafting Team's Memo on Rule 3-100 [1.14]
- Attachments
  - Previous Commission's Proposed Rule 1.14 (2010)
  - Stern Comment (2015)
  - TEXCOM Comment (2015)
  - OCTC Comment (2015)
  - Trust and Estates Proposal CFD (2004)
- Initial Public Comment Synopsis Table on Rule 1.14 (2015)

To: Rules Revision Commission
From: Rule 3-100 [1.6] Drafting Team (Dean Zipser, Chair; Mayor Aja Brown, Lee Harris, Judge Stout, Mark Tuft)
Re: Proposed Rule 1.14 (Client With Diminished Capacity)
Date: July 27, 2015

Summary

The Drafting Team seeks further guidance from the Commission concerning a proposed rule that would correspond to Model Rule 1.14 (Client With Diminished Capacity), which would permit a lawyer in limited circumstances to disclose information protected by Bus. & Prof. Code § 6068(e)(1) in order to protect the interests of a client with diminished capacity.

Introduction & Background

As part of its assignment, the Rule 3-100 Drafting Team was asked to consider the feasibility of the Commission recommending a rule similar to Model Rule 1.14 (Client With Diminished Capacity),[1] which has been part of the Model Rules since their initial adoption by the ABA in 1983.[2] At present, every jurisdiction in the country except California and Texas has adopted some version of the Model Rule 1.14.[3]

The first Commission recommended a substantially revised version of the Model Rule, which would have been triggered only when a client has "significantly diminished capacity." In such circumstances, a lawyer would be authorized to disclose information protected by Business and Professions Code § 6068(e) to take other "reasonably necessary protective action" to protect the client when "the lawyer reasonably believes the client is at risk of substantial physical, financial or other harm unless action is taken." The first Commission's proposed rule also included 10 detailed comments that were intended to provide guidance to lawyers when representing a client with significantly diminished capacity. (A copy of the Commission's proposed rule, in a clean and a redline version showing changes to Model Rule 1.14, is provided with this memo.)

The first Commission's proposed rule was substantially more limited the Model Rule in terms of the actions a lawyer was permitted to take. As seen from a review of the

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[1] In addition to rule 3-100 (corresponding to Model Rule 1.6) and Model Rule 1.14, the Drafting Team was also asked to consider Model Rules 1.8(b) (Use of current client's confidential information) and 1.18 (Duties to Prospective Client). The Drafting Team has submitted a Report & Recommendation for proposed rule 1.6 (Confidentiality of Information) and 1.8.2 (Use of Current Client's Information). It has recommended that Rule 1.18 be considered by the Drafting Team that is assigned to review Model Rule 1.9 (Duties To Former Client).

[2] Initially titled "Client Under A Disability," the title was changed to its current form with the Ethics 2000 Commission amendments in 2001 and 2002.

[3] See *Variations of the ABA Model Rules of Professional Conduct, Model Rule 1.14: Client With Diminished Capacity*, Revised (5/13/15), available at: http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_14.pdf

accompanying redline of the proposed rule, the six principal differences from the Model Rule were that the proposed rule:

> (1) carved out an exception for minors, defendants in criminal matters and persons who are the subject of guardianship or conservatorship proceedings because the rights of such individuals are separately regulated by California statutes;
> (2) established a stricter standard for when a lawyer can reveal confidential information to protect the client's interests, i.e., "significantly diminished capacity";
> (3) provided more detailed guidance regarding what constitutes "significantly diminished capacity";
> (4) provided that acting pursuant to paragraph (b) of the proposed Rule to reveal confidential client information in the client's interests is a last resort, and enumerated factors the lawyer should consider before taking such action;
> (5) emphasized that the nature and extent of any disclosure pursuant to paragraph (b) was to be strictly circumscribed; and
> (6) clarified that taking action pursuant to paragraph (b) was permissive, not mandatory, and that a lawyer would not be subject to discipline for failing to take such action.

Despite there being no express exception to Bus. & Prof. Code § 6068(e)(1) that would have permitted such disclosures,[4] the first Commission recommended the adoption of proposed Rule 1.14 and the then Board of Governors agreed, adopting the rule as part of the first Commission's comprehensive rules package. Proposed Rule 1.14, however, was never filed with or reviewed by the Supreme Court before the Court requested that the State Bar appoint this Commission.

As part of its comprehensive rules submission, the first Commission also included an exception in proposed Rule 1.6(b), which provided that a lawyer may disclose § 6068(e)(1) information to the extent reasonably necessary "(5) to protect the interests of a client under the limited circumstances identified in Rule 1.14(b)."[5]

The first Commission was assisted in drafting proposed Rule 1.14 by members of the Executive Committee of the Trusts & Estates Section of the State Bar ("TexComm"), who provided the initial impetus for considering the Model Rule by identifying for the Commission the risks faced by such clients and how lawyers, in the absence of a rule similar to Model Rule 1.14 that would expressly permit disclosure of § 6068(e)(1) protected information to protect the client's interests, were often left with the option of violating their duty of confidentiality by anonymously alerting ("dropping the anonymous dime") the appropriate authorities (e.g., a county's Adult Protective Services) in order to obtain necessary assistance and protection for the client.

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[4] Not every situation concerning a client with diminished capacity will involve a criminal act that is reasonably likely to result in death or substantial bodily harm. Injury to the client's property or finances are also problems for which there is no exception in the statute.

[5] A minority of the first Commission did not believe such a provision in proposed rule 1.6 was necessary. No jurisdiction that has adopted a version of Model Rule 1.6 has a similar provision in its Rule 1.6 counterpart.

As part of the initial public comment outreach, both TexComm (through its current chair, Yvonne Ascher) and Peter Stern, a TexComm member who assisted the first Commission in drafting its proposed Rule 1.14, submitted comments urging the Commission to adopt rules similar to the first Commission's proposed Rules 1.6 and 1.14. (These comments are attached.)

Discussion

The Drafting Team has considered whether to recommend a rule patterned on Model Rule 1.14 and determined that in light of the breadth of its assignment, time was too limited to give the rule sufficient study prior to the August 2015 meeting. In addition, the Drafting Team is concerned whether the Supreme Court would approve such a proposed rule absent an express exception in section 6068(e) or well-settled case law that has recognized such an exception to confidentiality. The team requests that the Commission as a whole provide it with guidance on how to proceed. In determining how the Drafting Team should approach the Rule 1.14 project, the Commission might consider the following points.

1. The first Commission's Rule 1.14 was proposed within the context of that body's attempt to draft a comprehensive rule of confidentiality, Rule 1.6. The first Commission's rule included several exceptions that are recognized in California law but have no express counterpart in § 6068(e). Given the first Commission's approach to rule 1.6 and its charge to align the California Rules with the Model Rules, including a rule similar to Model Rule 1.14 that recognized a confidentiality exception to protect a person with significantly diminished capacity, that Commission's proposed Rule 1.14 seemed a natural result.

   For the reasons set forth in its report, the Drafting Team has recommended that this Commission not pursue such an ambitious goal for rule 3-100 [1.6] and instead retain current rule 3-100, a limited rule of confidentiality that provides guidance on a single exception that permits disclosure to prevent a life-threatening criminal act.[6] However, the history of rule 3-100 prior to 2004 included three rejections by the Supreme Court of a rule that would have created an exception to prevent a life-threatening crime, apparently because section 6068(e) itself provided for no such exception.[7] It is the Drafting Team's consensus that absent express exceptions in § 6068(e), submitting any exceptions, even if recognized in California case law, would likely be futile.

2. The Drafting Team is also hesitant to recommend an expanded rule 1.6 because of its determination that the black letter exceptions recommended by the first Commission cannot stand by themselves and require detailed comments to understand how and when they can be applied. The added guidance would be imperative to ensure that a lawyer does not inadvertently violate the lawyer's duty of confidentiality through a misunderstanding of the scope of the exception. Unlike current rule 3-100, whose Discussion paragraphs are responses to inquiries from the California Legislature when it amended § 6068(e) in 2003 and have already been approved by the Supreme Court, the Drafting Team does not believe extensive comments drafted without Legislative

[6] See Report & Recommendation, Section VIII.A. (Introduction).

[7] See Rule 3-100 Assignment Memo, provided as part of these agenda materials, at Section II.A.

direction as in the case of rule 3-100 would likely receive a welcome reception by the Supreme Court given the Commission's Charter. In sum, the context in which the first Commission recommended rule 1.14 is not present.

3. For the same reasons the Drafting Team is recommending against expanding the exceptions in current rule 3-100 [1.6], it is hesitant to engage in substantial study and drafting of a rule similar to Model Rule 1.14. As with the possible exceptions that could have been added to current rule 3-100, there is no express exception in section 6068(e) that would permit a lawyer to disclose §6068(e) information to protect the interests of a client with diminished capacity.

   Further, just as the added rule 3-100 exceptions would require extensively detailed comments, so also would a diminished capacity rule to provide sufficient guidance to a lawyer contemplating violating his or her duty of confidentiality. For example, assuming such a rule would be more similar to the first Commission's rule, i.e., more limited than the Model Rule, how would a lawyer determine when a client has "*significantly* diminished capacity"? Moreover, once a lawyer determines the client fits within the rule, how would the lawyer determine what are acceptable or appropriate courses of action to take under the particular facts and circumstances? These issues and possible resolutions are not readily susceptible to a black letter framework. Yet the Commission's Charter provides a disincentive to the use of the kind of comments that the Drafting Team believes would best provide the guidance needed to achieve the rule's purposes of protecting vulnerable clients without unnecessarily infringing the clients' right to the lawyer's loyalty and confidentiality.[8]

Given the foregoing, the Drafting Team hesitated to embark on proposing a rule that likely would be rejected, at least not without further guidance from the Commission as a whole. Therefore, the Drafting Team presents the following non-exhaustive list of issues for the Commission's consideration:

1. Should California adopt a provision of professional conduct similar to Model Rule 1.14, i.e., would provide an exception to confidentiality that would permit a lawyer to disclose confidential information to protect the interests of a person with diminished capacity?[9]

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[8] In addition to the foregoing considerations, the Committee should also consider that a minority of the Commission dissented from the recommendation of proposed rule 1.14. The minority's reasons for dissenting can be summarized: The proposed Rule is also opposed based on the following: (1) paragraph (b) does not impose a primary requirement that a lawyer act in a client's best interest; (2) the Rule excludes representations of a minor, a client in a criminal matter, or a conservatee and this has an unintended effect of chilling the consideration of protective action by the lawyers for those clients; (3) the Rule improperly treats disclosure of confidential information as a first resort rather than a last resort for protecting a client; (4) the Rule does not require a lawyer to ask for a client's permission before contacting a third party; and (5) the comments to the Rule fail to warn lawyers that the loss of trust and candor in the client-lawyer relationship, following a disclosure of confidential information, may be so severe that it warrants mandatory withdrawal from the client's representation.

[9] See attached 2010 comment from the Office of Chief Trial Counsel submitted to the first Commission that raises issues concerning the both the general policy of a rule and the specific application for disciplinary purposes.

2. Assuming there should be a provision, should the provision be limited along the lines of the first Commission's proposed rule or should it be broader similar to Model Rule, i.e., provide more options such as seeking to have a conservator appointed for the client?
3. Regardless of the scope of the exception, assuming there should be a provision, should the provision be: (a) a statute (e.g., in 6068(e)); (b) a rule of professional conduct; (c) a rule of court; (d) some combination of the foregoing?
4. Assuming that rule 3-100 [1.6] recognized that lawyers are "impliedly authorized" to make disclosures of § 6068(e)(1)-protected information "in order to carry out the representation," (cf. MR 1.6(a)), would that "implied authority" be sufficient to support a proposed rule 1.14 without further amendment to § 6068(e)?
5. Assuming that a rule of professional conduct would not be approved by the Supreme Court absent an amendment to § 6068(e), should the Commission recommend to the Court and the State Bar that a collaborative process with the Legislature be initiated to explore the possibility of adding an exception to the duty of confidentiality in Business & Professions Code § 6068(e) that would permit limited disclosures to protect a client with significantly diminished capacity.
6. If the Commission agrees with the approach in item #5, should the Drafting Team propose a rule of professional conduct that might be promulgated should an amendment to § 6068(e) be enacted?
7. If the Commission agrees with the approach in item #5, should the Drafting Team propose statutory language, including a provision that would direct the State Bar to draft a rule of professional conduct, similar to what was done with current rule 3-100?[10]
8. Would there be a need for a corresponding change to the Evidence Code as was made when § 6068(e) was amended to permit disclosures to prevent a life-threatening criminal act? (See Evidence Code §956.5.)

Conclusion

The Drafting Team has not recommended a proposed rule that would correspond to Model Rule 1.14 because it believes such an endeavor would be futile without an amendment to Bus. & Prof. Code § 6068(e). The Drafting Team seeks to determine whether the Commission as a whole agrees with this assessment and, if yes, seeks guidance from the Commission on how it should proceed regarding this Rule.

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[10] See attached Conference of Delegates resolution 10-3-04 for an example of just one of the statutory initiatives that have been proposed over the years to address this issue given the absence of a rule.

Rule 1.14 Client with Diminished Capacity
(Commission's Proposed Rule –Clean Version)

(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, the lawyer shall, as far as reasonably possible, maintain a normal lawyer-client relationship with the client.

(b) Except where the lawyer represents a minor, a client in a criminal matter, or a person who is the subject of a conservatorship proceeding, when the lawyer reasonably believes

(1) that the client has significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a representation and further that, as a result of such significantly diminished capacity,

(2) the client is at risk of substantial physical, financial or other harm unless action is taken, and

(3) the client cannot adequately act in his or her own interest,

the lawyer may, but is not required to, notify an individual or organization that has the ability to take action to protect the client.

(c) Information relating to a client with diminished capacity is protected by Business and Professions Code section 6068(e) and Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under this Rule to reveal information about the client, but only to the extent the lawyer reasonably believes disclosure is necessary to protect the client's interest, given the information known to the lawyer at the time of the disclosure.

COMMENT

[1] The purpose of this Rule is to allow the lawyer to act competently on behalf of the client with diminished capacity, to further the client's goals in the representation, and to protect the client's interests. The normal lawyer-client relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client suffers from diminished mental capacity, however, maintaining the ordinary lawyer-client relationship may not be possible in all respects. In particular, a client with significantly diminished capacity may not be competent to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about many matters affecting the client's own well-being. For example, some persons of advanced age are capable of handling routine financial matters but may need special legal protection concerning major transactions. In addition to the obligations of a lawyer provided in this Rule, lawyers may be required to make reasonable accommodations for clients with disabilities that will permit them to enjoy the provision of full and equal legal services provided by the lawyer. See California Civil Code section 51 (Unruh Civil Rights Act).

[2] The fact that a client suffers from diminished capacity does not affect the lawyer's obligation to treat the client with attention and respect. Even if the client has a legal representative, the lawyer should as far as possible accord the represented person the full status of client, particularly in maintaining communication. As used in paragraph (a) of this Rule, the lawyer's obligation to "maintain a normal lawyer-client relationship with the client" may require the lawyer to use a

manner and means of communication adapted to the client's ability to comprehend and deliberate.

[3] As used in paragraph (b), "significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a representation" 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. However, the reference herein 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. In appropriate circumstances, lawyers are encouraged to seek guidance from an appropriate diagnostician, but a lawyer who seeks such guidance must advise the diagnostician of the confidential nature and circumstances of the consultation. In addition, the lawyer should request the diagnostician to maintain the information disclosed in confidence.

[4] Before taking action pursuant to paragraph (b), the lawyer should take all reasonable steps to preserve client confidentiality and decision-making authority including explaining to the client the need to take such action and requesting the client's permission to do so. However, if the client refuses or is unable to give such permission, the lawyer may proceed under paragraph (b), (i) if no other action is available to the lawyer that is reasonably likely to protect the client from the harm the client faces; and (ii) the lawyer has taken into account such factors as:

(1) the amount of time that the lawyer has to make a decision about disclosure;

(2) whether the disclosure is likely to lead to proceedings such as involuntary commitment proceedings, which the client may perceive as adverse to her or his interests;

(3) whether the disclosure is likely to lead to proceedings which could have an effect on the client's rights under the Fourteenth Amendment to the United States Constitution or analogous rights and privacy rights under Article 1 of the Constitution of the State of California;

(4) the extent of any other adverse effects to the client that may result from disclosure contemplated by the lawyer; and

(5) the nature and extent of information that must be disclosed to prevent the risk of harm to the client.

A lawyer may also consider whether the prospective harm to the client is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure, and a lawyer may disclose the information without waiting until immediately before the harm is likely to occur.

[5] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally will not affect the applicability of the lawyer-client privilege. See Evidence Code section 952. However, the lawyer must keep the client's interests foremost and, except as authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[6] Paragraph (b) permits the lawyer to take protective measures deemed necessary to protect the client's interests. Such measures could include: consulting with family members; using a reconsideration period to permit clarification or improvement of circumstances; or using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the goals of minimizing intrusion into the client's decision-making autonomy, maximizing client capacities and respecting the client's family and social connections.

[7] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of protecting a client with significantly diminished capacity who is at risk of substantial physical, financial or other harm if no action is taken. A lawyer who reveals information as permitted under paragraph (b) is not subject to discipline.

[8] Paragraph (b) does not authorize a lawyer to file a guardianship or conservatorship petition or to take similar action concerning the client, or to take any action that is adverse to the client. Nor does paragraph (b) authorize a lawyer to take such actions on behalf of another person where the lawyer would not otherwise be permitted to do so under Rule 1.7.

[9] Paragraph (b) applies to the representation of a client with significantly diminished capacity, except in the case of a client who is (1) a minor, (2) involved in a criminal matter or (3) under conservatorship or the subject of a conservatorship or protective proceeding. The rights of such persons are regulated under other statutory schemes. See Family Code section 3150, Welfare and Institutions Code sections 300, 602, 675 et seq.; Penal Code section 1368 et seq.; Lanterman-Petris-Short Act, Welfare and Institutions Code, Division 5, Part 1, sections 5000-5579; Probate Code, Division 4, Parts 1-8, sections 1400-3803.

[10] A lawyer is permitted to act under paragraph (b) but is never required to do so. A lawyer who chooses not to reveal information permitted by paragraph (b) does not violate this Rule.

Rule 1.14 Client with Diminished Capacity
(Redline Comparison of the Proposed Rule to ABA Model Rule)

(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, the lawyer shall, as far as reasonably possible, maintain a normal ~~client~~ lawyer-client relationship with the client.

~~(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting 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.~~

(b) Except where the lawyer represents a minor, a client in a criminal matter, or a person who is the subject of a conservatorship proceeding, when the lawyer reasonably believes

(1) that the client has significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a representation and further that, as a result of such significantly diminished capacity,

(2) the *client is at risk of substantial physical, financial or other harm unless action is taken, and*

(3) the client cannot adequately act in his or her own interest,

the lawyer may, but is not required to, notify an individual or organization that has the ability to take action to protect the client.

(c) Information relating to ~~the representation of~~ a client with diminished capacity is protected by Business and Professions Code section 6068(e) and Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under this Rule ~~1.6(a)~~ to reveal information about the client, but only to the extent the lawyer reasonably believes disclosure is necessary to protect the client's ~~interests~~interest, given the information known to the lawyer at the time of the disclosure.

COMMENT

[1] The ~~normal client~~ purpose of this Rule is to allow the lawyer to act competently on behalf of the client with diminished capacity, to further the client's goals in the representation, and to protect the client's interests. The normal lawyer-client relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client ~~is a minor or~~ suffers from ~~a~~ diminished mental capacity, however, maintaining the ordinary ~~client~~ lawyer-client relationship may not be possible in all respects. In particular, a ~~severely incapacitated person~~client with significantly diminished capacity may ~~have no power~~not be competent to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about many matters affecting the client's own well-being. For example, ~~children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that~~ some persons of advanced age ~~can be quite~~are capable of handling routine financial matters ~~while needing~~but may need special legal protection concerning major transactions. In addition to the obligations of a lawyer provided in

this Rule, lawyers may be required to make reasonable accommodations for clients with disabilities that will permit them to enjoy the provision of full and equal legal services provided by the lawyer. See California Civil Code section 51 (Unruh Civil Rights Act).

[2] The fact that a client suffers ~~a disability~~from diminished capacity does not ~~diminish~~affect the lawyer's obligation to treat the client with attention and respect. Even if the ~~person~~client has a legal representative, the lawyer should as far as possible accord the represented person the full status of client, particularly in maintaining communication. As used in paragraph (a) of this Rule, the lawyer's obligation to "maintain a normal lawyer-client relationship with the client" may require the lawyer to use a manner and means of communication adapted to the client's ability to comprehend and deliberate.

[3] As used in paragraph (b), "significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a representation" 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. However, the reference herein 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. In appropriate circumstances, lawyers are encouraged to seek guidance from an appropriate diagnostician, but a lawyer who seeks such guidance must advise the diagnostician of the confidential nature and circumstances of the consultation. In addition, the lawyer should request the diagnostician to maintain the information disclosed in confidence.

[4] Before taking action pursuant to paragraph (b), the lawyer should take all reasonable steps to preserve client confidentiality and decision-making authority including explaining to the client the need to take such action and requesting the client's permission to do so. However, if the client refuses or is unable to give such permission, the lawyer may proceed under paragraph (b), (i) if no other action is available to the lawyer that is reasonably likely to protect the client from the harm the client faces; and (ii) the lawyer has taken into account such factors as:

(1) the amount of time that the lawyer has to make a decision about disclosure;

(2) whether the disclosure is likely to lead to proceedings such as involuntary commitment proceedings, which the client may perceive as adverse to her or his interests;

(3) whether the disclosure is likely to lead to proceedings which could have an effect on the client's rights under the Fourteenth Amendment to the United States Constitution or analogous rights and privacy rights under Article 1 of the Constitution of the State of California;

(4) the extent of any other adverse effects to the client that may result from disclosure contemplated by the lawyer; and

(5) the nature and extent of information that must be disclosed to prevent the risk of harm to the client.

A lawyer may also consider whether the prospective harm to the client is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure, and a lawyer may disclose the information without waiting until immediately before the harm is likely to occur.

[~~3~~5] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally ~~does~~will not affect the applicability of the ~~attorney~~lawyer-client ~~evidentiary~~ privilege. ~~Nevertheless~~See Evidence Code section 952. However, the lawyer must keep the client's interests foremost and, except ~~for protective action~~as authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

~~[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).~~

~~Taking Protective Action~~

[~~5~~6] ~~If a lawyer reasonably believes that a *client is at risk of substantial physical, financial or other harm unless action is taken, and* that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph~~Paragraph (b) permits the lawyer to take protective measures deemed necessary *to protect the client's interests*. Such measures could include: consulting with family members~~,~~; using a reconsideration period to permit clarification or improvement of circumstances~~,~~; or using voluntary surrogate ~~decisionmaking~~decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the goals of ~~intruding~~minimizing intrusion into the client's ~~decisionmaking~~decision-making autonomy~~ to the least extent feasible~~, maximizing client capacities and respecting the client's family and social connections.

~~[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.~~

[7] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of protecting a client with significantly diminished capacity who is at risk of substantial physical, financial or other harm if no action is taken. A lawyer who reveals information as permitted under paragraph (b) is not subject to discipline.

~~[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary *to protect the client's interests*. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons~~

~~with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.~~

[8] Paragraph (b) does not authorize a lawyer to file a guardianship or conservatorship petition or to take similar action concerning the client, or to take any action that is adverse to the client. Nor does paragraph (b) authorize a lawyer to take such actions on behalf of another person where the lawyer would not otherwise be permitted to do so under Rule 1.7.

~~Disclosure of the Client's Condition~~

[9] Paragraph (b) applies to the representation of a client with significantly diminished capacity, except in the case of a client who is (1) a minor, (2) involved in a criminal matter or (3) under conservatorship or the subject of a conservatorship or protective proceeding. The rights of such persons are regulated under other statutory schemes. See Family Code section 3150, Welfare and Institutions Code sections 300, 602, 675 et seq.; Penal Code section 1368 et seq.; Lanterman-Petris-Short Act, Welfare and Institutions Code, Division 5, Part 1, sections 5000-5579; Probate Code, Division 4, Parts 1-8, sections 1400-3803.

~~[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.~~

[10] A lawyer is permitted to act under paragraph (b) but is never required to do so. A lawyer who chooses not to reveal information permitted by paragraph (b) does not violate this Rule.

~~[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.~~

~~[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.~~

2015-030 Peter Stern [3-100] [1.6][1.14]

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below. *All information submitted is regarded as public record.*

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Professional Affiliation Member State Bar, former Chair TEXCOM

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*** Name** (Type 'Anonymous' if you would like to submit comments anonymously.) Peter S Stern

*** City** Palo Alto

*** State** California

Email address (You may, but are not required to, provide your email address. You will receive a copy of your comment submission, if you choose to do so.) pstern1939@aol.com

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Rule 3-100 Confidential Information of a Client

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To The Honorable Lee Edmon, Chair, RRC:
Justice Edmon: From 2005 to 2010, the State Bar's Trusts and Estates Executive Committee (TEXCOM) worked with the predecessor RRC in devising a Rule that would provide protection to a mentally impaired client who was at risk of substantial physical or financial harm and was not able to defend his or her own interests. The ABA's MRPC Rule 1.14 was our starting model. The MRPC has been adopted by 49 states, the District of Columbia, and the US Virgin Islands. The text of the rule and the list of states that have adopted the MRPC is included in the attachments that accompany this suggestion.

The RRC sent for public comment in November 2009 its proposed rules, and of the 69 responses to Rule 1.14 as proposed by the RRC, 64 were favorable, including the comments of COPRAC. Many commentators underscored how necessary it was for the State Bar's rules to provide a means for counsel to take action when a mentally impaired client was not able to do so.

After continued deliberations following the result of that public comment, the RRC adopted Rules 1.6 and 1.14, and the State Bar Board of Governors, in July and September 2010, adopted Rules 1.6 and 1.14. They are attached to this email.

I urge the RRC to take up Rules 1.6 and 1.14, as proposed and adopted by the predecessor RRC and as adopted by the Bar's Board of Governors, and to make these rules part of the Rules Package to be

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These rules meet the first of the commissions guiding principles: to promote confidence in the legal profession and the administration of justice and ensure adequate protection to the public. Presently, there is no Rule that permits an attorney to seek help for a client without that client's consent. The juncture between proposed 1.6 and 1.14 would allow an attorney to take the least intrusive step necessary to protect the interests of a client. The rules also would bring California into harmony with the ABA's Rule 1.14, in accordance with the third principle the RRC states that it should use in guiding its work.

It was my assignment as a TEXCOM member to work in conjunction with my TEXCOM colleague Meg Lodise, who like me is a former chair of TEXCOM, with the predecessor RRC members, notably Linda Foy and Ellen Peck, in fashioning Rule 1.14, attending RRC meetings, and answering questions about the Rules. Current members of TEXCOM will speak for the Executive Committee. I am prepared to attend meetings of the RRC as a private State Bar member, to add to the work of the Commission my experience and insights from he five year period we worked to develop Rule 1.14.

In the intervening five years since RRC sent Rules 1.6 and 1.14 to the Board of Governors, I have seen many instances of abuse where clients would not seek help themselves, and because of their lack of capacity or vulnerability to undue influence suffered financial loss and in some instances the loss of their independence. RRC should again pick up this project and adopt a rule or rules that will permit an attorney to act, when necessary, to protect an impaired client who cannot help him- or herself.

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information protected by Business and Professions Code section 6068(e) unless the client gives informed consent or the disclosure is permitted by paragraph (b).

(b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068(e) to the extent that the lawyer reasonably believes the disclosure is necessary:

(1) to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, as provided in paragraph (c);

(2) to secure legal advice about the lawyer's compliance with the lawyer's professional obligations;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client relating to an issue of breach, by the lawyer or by the

client, of a duty arising out of the lawyer-client relationship;

(4) to comply with a court order; or

(5) to protect the interests of a client under the limited circumstances identified in Rule 1.14(b).

(c) *Further obligations under paragraph (b)(1).* Before revealing information protected by Business and Professions Code section 6068(e) in order to prevent a criminal act as provided in paragraph (b)(1), a lawyer shall, if reasonable under the circumstances:

(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and

(2) inform the client, at an appropriate time, of the lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068(e) as provided in paragraph (b)(1).

(d) In revealing information protected by Business and Professions Code section 6068(e) as permitted by paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, secure confidential legal advice, establish a claim or defense in a controversy between the lawyer and a client, protect the interests of the client, or to comply with a court order given the information known to the lawyer at the time of the disclosure.

(e) A lawyer who does not reveal information protected by Business and Professions Code section 6068(e) as permitted by paragraph (b) does not violate this Rule.

Comment

[1] This Rule governs the disclosure by a lawyer of information protected by Business and Professions Code section 6068(e) during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and Rules 1.8.2 and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

Policies Furthered by the Duty of Confidentiality

[2] Paragraph (a) relates to a lawyer's obligations under Business and Professions Code section 6068(e)(1), which provides it is a duty of a lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. *In re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371]. Preserving the confidentiality of client information contributes to the trust that is the hallmark of the lawyer-client relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or detrimental subjects. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (a) thus recognizes a fundamental principle in the lawyer-client relationship, that, in the absence of the client's informed consent, a lawyer must not reveal information protected by Business and Professions Code section 6068(e). See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr. 393].

Information protected by Business and Professions Code section 6068(e).

[3] As used in this Rule, "information protected by Business and Professions Code section 6068(e)" consists of information gained by virtue of the representation of a client, whatever its source, that (a) is protected by the lawyer-client privilege, (b) is likely to be embarrassing or detrimental to the client if disclosed, or (c) the client has requested be kept

confidential. Therefore, the lawyer's duty of confidentiality as defined in Business and Professions Code section 6068(e) is broader than lawyer-client privilege. See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal.Rptr. 253].

Scope of the Lawyer-Client Privilege

[4] The protection against compelled disclosure or compelled production that is afforded lawyer-client communications under the privilege is typically asserted in judicial and other proceedings in which a lawyer or client might be called as a witness or otherwise compelled to produce evidence. Because the lawyer-client privilege functions to limit the amount of evidence available to a tribunal, its protection is somewhat limited in scope.

Scope of the Duty of Confidentiality

[5] A lawyer's duty of confidentiality, on the other hand, is not so limited as the lawyer-client privilege. The duty protects the relationship of trust between a lawyer and client by preventing the lawyer from revealing the client's protected information, regardless of its source and even when not confronted with compulsion. As a result, any information the lawyer has learned during the representation, even if not relevant to the matter for which the lawyer was retained, is protected under the duty so long as the lawyer acquires the information by virtue of being in the lawyer-client relationship. Information protected by Business and Professions Code section 6068(e) is not concerned only with information that a lawyer might learn after a lawyer-client relationship has been established. Information that a lawyer acquires about a client before the relationship is established, but which is relevant to the matter for which the lawyer is retained, is protected under the duty regardless of its source. The duty also applies to information a lawyer acquires during a lawyer-client consultation, whether from the client or the client's representative, even if a lawyer-client relationship does not result from the consultation. See Rule 1.18. Thus, a lawyer may not reveal information protected by Business and Professions Code section 6068(e) except with the consent of the client or an authorized representative of the client, or as authorized by these Rules or the State Bar Act.

Relationship of Confidentiality to Lawyer Work Product

[6] "Information protected by Business and Professions Code section 6068(e)" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates. However, the fact that information can be discovered in a public record does not, by itself, render that information "generally known" and therefore outside the scope of this Rule. See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

[7] Paragraph (a) prohibits a lawyer from revealing information protected by Business and Professions Code section 6068(e). This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the client's representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[8] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information protected by Business and Professions Code section 6068(e) that is related to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client as Permitted by Paragraph (b)(1)

[9] Notwithstanding the important public policies promoted by the duty of confidentiality, the overriding value of life permits certain disclosures otherwise prohibited under Business and Professions Code section 6068(e)(1). Paragraph (b)(1) is based on Business and Professions Code section 6068(e)(2), which narrowly permits a lawyer to disclose information protected by Business and Professions Code section 6068(e) even without client consent. Evidence Code section 956.5, which relates to the evidentiary lawyer-client privilege, sets forth a similar express exception. Although a lawyer is not permitted to reveal protected information concerning a client's

past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

Lawyer Not Subject to Discipline for Revealing Protected Information as Permitted Under Paragraph (b)(1)

[10] Paragraph (b)(1) reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a lawyer reasonably believes is likely to result in death or substantial bodily harm to an individual. A lawyer who reveals protected information as permitted under paragraph (b)(1) is not subject to discipline.

No Duty to Reveal Information protected by Business and Professions Code section 6068(e)

[11] Neither Business and Professions Code section 6068(e)(2) nor paragraph (b)(1) imposes an affirmative obligation on a lawyer to reveal information protected by Business and Professions Code section 6068(e) in order to prevent harm. A lawyer may decide not to reveal such information. Whether a lawyer chooses to reveal protected information as permitted under this Rule is a matter for the individual lawyer to decide, based on all the facts and circumstances, such as those discussed in Comment [12].

Deciding to Reveal Protected Information as Permitted Under Paragraph (b)(1)

[12] Disclosure permitted under paragraph (b)(1) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing protected information as permitted under paragraph (b)(1), the lawyer must, if reasonable under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose such information are the following:

(1) the amount of time that the lawyer has to make a decision about disclosure;

(2) whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;

(3) whether the lawyer believes the lawyer's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;

(4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of 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 disclosure contemplated by the lawyer;

(5) the extent of other adverse effects to the client that may result from disclosure contemplated by the lawyer; and

(6) the nature and extent of protected information that must be disclosed to prevent the criminal act or threatened harm.

A lawyer may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the protected information. However, the imminence of the harm is not a prerequisite to disclosure, and a lawyer may disclose the protected information without waiting until immediately before the harm is likely to occur.

Counseling Client or Third Person Not to Commit a Criminal Act Reasonably Likely to Result in Death of Substantial Bodily Harm

[13] Paragraph (c)(1) provides that, before a lawyer may reveal information protected by Business and Professions Code section 6068(e), the lawyer must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, including persuading the client to take action to prevent a third person from committing or continuing a criminal act. If necessary, the client may be persuaded to do

both. The interests protected by such counseling are the client's interests in limiting disclosure of protected information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the lawyer's counseling or otherwise, takes corrective action – such as by ceasing the client's own criminal act or by dissuading a third person from committing or continuing a criminal act before harm is caused – the option for permissive disclosure by the lawyer would cease because the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the lawyer who contemplates making adverse disclosure of protected information may reasonably conclude that the compelling interests of the lawyer or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the lawyer should, if reasonable under the circumstances, first advise the client of the lawyer's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the lawyer should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent the harm. Even when the lawyer has concluded that paragraph (b)(1) does not permit the lawyer to reveal protected information, the lawyer nevertheless is permitted to counsel the client as to why it might be in the client's best interest to consent to the lawyer's disclosure of that information.

Requirement under Paragraph (c)(2) to Inform Client of Lawyer's Ability or Decision to Reveal Protected Information

[14] A lawyer is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 1.4 and Business and Professions Code section 6068(m). Paragraph (c)(2), however, recognizes that under certain circumstances, informing a client of the lawyer's ability or decision to reveal protected information under paragraph (b)(1) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the lawyer or the lawyer's family or associates. Therefore, paragraph (c)(2) requires a lawyer to inform the client of the lawyer's ability or decision to reveal protected information as provided in paragraph (b)(1) only if it is reasonable to do so under the circumstances. Paragraph (c)(2) further recognizes that the appropriate time for the lawyer to inform the client may vary depending upon the circumstances. See Comment [16]. Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

(1) whether the client is an experienced user of legal services;

(2) the frequency of the lawyer's contact with the client;

(3) the nature and length of the professional relationship with the client;

(4) whether the lawyer and client have discussed the lawyer's duty of confidentiality or any exceptions to that duty;

(5) the likelihood that the client's matter will involve information within paragraph (b)(1);

(6) the lawyer's belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and

(7) the lawyer's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

Disclosure of Protected Information as Permitted by Paragraph (b)(1) Must Be No More Than is Reasonably Necessary to Prevent the Criminal Act

[15] Paragraph (d) requires that disclosure of protected information as permitted by paragraph (b)(1), when made, must be no more extensive than the lawyer reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the protected information to only those persons who the lawyer reasonably believes can act to prevent the harm. Under some circumstances, a lawyer may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable depends on the circumstances known to the lawyer. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the lawyer's

prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the lawyer.

Avoiding a Chilling Effect on the Lawyer-Client Relationship

[16] The foregoing flexible approach to a lawyer informing a client of his or her ability or decision to reveal protected information recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. See Comment [2]. To avoid that chilling effect, one lawyer may choose to inform the client of the lawyer's ability to reveal protected information as early as the outset of the representation, while another lawyer may choose to inform a client only at a point when that client has imparted information that comes within paragraph (b)(1), or even choose not to inform a client until the lawyer attempts to counsel the client under Comment [13]. In each situation, the lawyer will have satisfied the lawyer's obligation under paragraph (c)(2), and will not be subject to discipline.

Informing Client that Disclosure Has Been Made; Termination of the Lawyer-Client Relationship

[17] When a lawyer has revealed protected information under paragraph (b)(1), in all but extraordinary cases the relationship between lawyer and client that is based in mutual trust and confidence will have deteriorated so as to make the lawyer's representation of the client impossible. Therefore, when the relationship has deteriorated because of the lawyer's disclosure, the lawyer is required to seek to withdraw from the representation, see Rule 1.16, unless the client has given his or her informed consent to the lawyer's continued representation. The lawyer normally must inform the client of the fact of the lawyer's disclosure. If the lawyer has a compelling reason for not informing the client, such as to protect the lawyer, the lawyer's family or a third person from the risk of death or substantial bodily harm, the lawyer must withdraw from the representation. See Rule 1.16.

Other Consequences of the Lawyer's Disclosure

[18] Depending on the circumstances of a lawyer's disclosure of protected information as permitted by this Rule, there may be other important issues that a lawyer must address. For example, a lawyer who is likely to testify in a matter involving the client must comply with Rule 3.7. Similarly, the lawyer must also consider the lawyer's duty of competence (Rule 1.1) and whether the lawyer has a conflict of interest in continuing to represent the client (Rule 1.7).

Disclosure as Permitted by Paragraphs (b)(2) through (b)(5)

[19] If a legal claim by a client or the client's representative alleges a breach of duty by the lawyer involving representation of the client or a disciplinary charge filed by or with the cooperation of the client or the client's representative alleges misconduct of the lawyer involving representation of the client, paragraph (b)(3) permits the lawyer to respond only to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving conduct or representation of a former client.

[20] A lawyer entitled to a fee is permitted by paragraph (b)(3) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[21] A lawyer may be ordered to reveal information protected by Business and Professions Code section 6068(e) by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer must assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the lawyer-client privilege or other applicable law. See, e.g., *People v. Kor* (1954) 129 Cal.App.2d 436 [277 P.2d 94]. In the event of an adverse ruling, the lawyer must consult with the client to the extent required by Rule 1.4 about the possibility of appeal. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order.

[22] Paragraph (d) permits disclosure as permitted by paragraphs (b)(2) through (b)(5) only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in

connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the protected information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[23] Paragraph (b) permits but does not require the disclosure of information protected by Business and Professions Code section 6068(e) to accomplish the purposes specified in paragraphs (b)(2) through (b)(5).

Acting Competently to Preserve Confidentiality

[24] A lawyer must act competently to safeguard information protected by Business and Professions Code section 6068(e) against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3.

[25] When transmitting a communication that includes information protected by Business and Professions Code section 6068(e), the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[26] The duty of confidentiality continues after the lawyer-client relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Government Lawyers

[27] This Rule applies to lawyers representing governmental organizations. See Rule 1.13, Comment [15].

Rule 1.14 Client with Diminished Capacity

(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, the lawyer shall, as far as reasonably possible, maintain a normal lawyer-client relationship with the client.

(b) Except where the lawyer represents a minor, a client in a criminal matter, or a person who is the subject of a conservatorship proceeding, when the lawyer reasonably believes

(1) that the client has significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a representation and further that, as a result of such significantly diminished capacity,

(2) the client is at risk of substantial physical, financial or other harm unless action is taken, and

(3) the client cannot adequately act in his or her own interest,

the lawyer may, but is not required to, notify an individual or organization that has the ability to take action to protect the client.

(c) Information relating to a client with diminished capacity is protected by Rule 1.6 and Business and Professions Code section 6068(e). When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under this Rule to reveal information about the client, but only to the extent the lawyer reasonably believes disclosure is necessary to protect the client's interest, given the information known to the lawyer at the time of the disclosure.

Comment

[1] The purpose of this Rule is to allow the lawyer to act competently on behalf of the client with diminished capacity, to further the client's goals in the representation, and to protect the client's interests. The normal lawyer-client relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client suffers from diminished mental capacity, however, maintaining the ordinary lawyer-client relationship may not be possible in all respects. In particular, a client with significantly diminished capacity may not be competent to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about many matters affecting the client's own well-being. For example, some persons

of advanced age are capable of handling routine financial matters but may need special legal protection concerning major transactions. In addition to the obligations of a lawyer provided in this Rule, lawyers may be required to make reasonable accommodations for clients with disabilities that will permit them to enjoy the provision of full and equal legal services provided by the lawyer. See California Civil Code section 51 (Unruh Civil Rights Act).

[2] The fact that a client suffers from diminished capacity does not affect the lawyer's obligation to treat the client with attention and respect. Even if the client has a legal representative, the lawyer should as far as possible accord the represented person the full status of client, particularly in maintaining communication. As used in paragraph (a) of this Rule, the lawyer's obligation to "maintain a normal lawyer-client relationship with the client" may require the lawyer to use a manner and means of communication adapted to the client's ability to comprehend and deliberate.

[3] As used in paragraph (b), "significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a representation" 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. However, the reference herein 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. In appropriate circumstances, lawyers are encouraged to seek guidance from an appropriate diagnostician, but a lawyer who seeks such guidance must advise the diagnostician of the confidential nature and circumstances of the consultation. In addition, the lawyer should request the diagnostician to maintain the information disclosed in confidence.

[4] Before taking action pursuant to paragraph (b), the lawyer should take all reasonable steps to preserve client confidentiality and decision-making authority including explaining to the client the need to take such action and requesting the client's permission to do so. However, if the client refuses or is unable to give such permission, the lawyer may proceed under paragraph (b), (i) if no other action is available to the lawyer that is reasonably likely to protect the client from the harm the client faces; and (ii) the lawyer has taken into account such factors as:

(1) the amount of time that the lawyer has to make a decision about disclosure;

(2) whether the disclosure is likely to lead to proceedings such as involuntary commitment proceedings, which the client may perceive as adverse to her or his interests;

(3) whether the disclosure is likely to lead to proceedings which could have an effect on the client's rights under the Fourteenth Amendment to the United States Constitution or analogous rights and privacy rights under Article 1 of the Constitution of the State of California;

(4) the extent of any other adverse effects to the client that may result from disclosure contemplated by the lawyer; and

(5) the nature and extent of information that must be disclosed to prevent the risk of harm to the client.

A lawyer may also consider whether the prospective harm to the client is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure, and a lawyer may disclose the information without waiting until immediately before the harm is likely to occur.

[5] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally will not affect the applicability of the lawyer-client privilege. See Evidence Code section 952. However, the lawyer must keep the client's interests foremost and, except as authorized under

paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[6] Paragraph (b) permits the lawyer to take protective measures deemed necessary to protect the client's interests. Such measures could include: consulting with family members; using a reconsideration period to permit clarification or improvement of circumstances; or using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the goals of minimizing intrusion into the client's decision-making autonomy, maximizing client capacities and respecting the client's family and social connections.

[7] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of protecting a client with significantly diminished capacity who is at risk of substantial physical, financial or other harm if no action is taken. A lawyer who reveals information as permitted under paragraph (b) is not subject to discipline.

[8] Paragraph (b) does not authorize a lawyer to file a guardianship or conservatorship petition or to take similar action concerning the client, or to take any action that is adverse to the client. Nor does paragraph (b) authorize a lawyer to take such actions on behalf of another person where the lawyer would not otherwise be permitted to do so under Rule 1.7.

[9] Paragraph (b) applies to the representation of a client with significantly diminished capacity, except in the case of a client who is (1) a minor, (2) involved in a criminal matter or (3) under conservatorship or the subject of a conservatorship or protective proceeding. The rights of such persons are regulated under other statutory schemes. See Family Code section 3150, Welfare and Institutions Code sections 300, 602, 675 et seq.; Penal Code section 1368 et seq.; Lanterman-Petris-Short Act, Welfare and Institutions Code, Division 5, Part 1, sections 5000-5579; Probate Code, Division 4, Parts 1-8, sections 1400-3803.

[10] A lawyer is permitted to act under paragraph (b) but is never required to do so. A lawyer who chooses not to reveal information permitted by paragraph (b) does not violate this Rule.

State Adoption of the ABA Model Rules of Professional Conduct (previously the Model Code of Professional Responsibility)

Dates of initial adoption

Alphabetical Order

Jurisdiction	Date of Adoption
Alabama	5/2/90
Alaska	4/14/93
Arizona	9/7/84
Arkansas	12/16/85
Colorado	5/7/92
Connecticut	6/23/86
Delaware	9/12/85
District of Columbia	3/1/90
Florida	7/17/86
Georgia	6/12/00
Hawaii	12/6/93
Idaho	9/3/86
Illinois	2/8/90
Indiana	11/25/86
Iowa	4/20/05
Kansas	1/29/88
Kentucky	6/12/89
Louisiana	12/18/86
Maine	2/26/09
Maryland	4/15/86

Massachusetts	6/9/97
Michigan	3/11/88
Minnesota	6/13/85
Mississippi	2/18/87
Missouri	8/7/85
Montana	6/6/85
Nebraska	6/8/05
Nevada	1/26/86
New Hampshire	1/16/86
New Jersey	7/12/84
New Mexico	6/26/86
New York	12/16/08
North Carolina	10/7/85
North Dakota	5/6/87
Ohio	8/1/06
Oklahoma	3/10/88
Oregon	1/1/05
Pennsylvania	10/16/87
Rhode Island	11/1/88
South Carolina	1/9/90
South Dakota	12/15/87
Tennessee	8/27/02
Texas	6/20/89
Utah	3/20/87
Vermont	3/9/99
Virgin Islands	1/28/91
Virginia	1/25/99
Washington	7/25/85
West Virginia	6/30/88
Wisconsin	6/10/87
Wyoming	11/7/86

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Rule 1.14: Client with Diminished Capacity

Client-Lawyer Relationship
Rule 1.14 Client With Diminished Capacity

(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, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting 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 relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

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THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below. *All information submitted is regarded as public record.*

DEADLINE TO SUBMIT COMMENT IS: JUNE 16, 2015

Your Information

Professional Affiliation TEXCOM

Commenting on behalf of an organization
- (•) Yes
- ( ) No

*** Name** (Type 'Anonymous' if you would like to submit comments anonymously.) Yvonne A. Ascher

*** City** Monterey

*** State** California

Email address (You may, but are not required to, provide your email address. You will receive a copy of your comment submission, if you choose to do so.) yascher@ascherlaw.com

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The current Rules of Professional Conduct can be viewed by clicking on the following link: Current Rules of Professional Conduct.

*** Select the current California rule that you would like to comment on from the drop down list. To submit comments not specific to a current California rule, please select "General Comments" from the drop down list.**

Rule 3-100 Confidential Information of a Client

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Attachments

You may upload up to **three** attachments commenting on the rule you selected from the drop down box in the previous section. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. **Files must be less than 1 megabyte (1,000,000 bytes) in size.** For help with uploading file attachments, click the next to **Attachment**.

Attachment Browse... No file selected.

proposed_rules_1.14_and_1.6.pdf (731k) Upload Delete

Attachment Browse... No file selected.

RRC_ltr_-_TEXCOM.pdf (113k) Upload Delete

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* Date	File :	Submitted via:
06/15/2015	2015-032 TEXCOM [3-100][1.14]	Online

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Close

TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

June 15, 2015

To: Justice Lee Edmon, Chair, Commission for the Revision of the Rules of Professional Conduct of the State Bar of California

From: Executive Committee, Trusts and Estates Section of the State Bar of California

Re: Proposed Rule 1.14 and Rule 1.6

Dear Justice Edmon:

The Executive Committee of the Trusts and Estates Section of the State Bar of California (TEXCOM) urges the Commission for the Revision of the Rules of Professional Conduct (RRC) to adopt Rule 1.14 and Rule 1.6, as adopted by the previous Commission. The text of the Rules as previously adopted, with commentary, are attached for your review. [1]

The Model Rules of Professional Conduct (MRPC), developed by the American Bar Association (ABA) and adopted in one form or another in 46 states and other US jurisdictions, have long included a rule similar to the proposed Rule 1.14. MRPC 1.14 specifically addresses a lawyer's obligations with respect to his or her representation of a client with diminished capacity.

Currently, California has neither a rule of professional conduct nor a statute that specifically authorizes a lawyer to disclose confidential communications in order to protect a client with diminished capacity from harm. To the extent that California statutory and case authority address the issue, those authorities tend to conflict with the majority of other jurisdictions. Furthermore, various organizations within the State reach conflicting positions on this issue.

Ethics opinions from the State Bar of California and the Bar Associations of Los Angeles and San Diego Counties interpret the current statutory framework as prohibiting an attorney with a client who has diminished capacity from taking any action with respect to disclosing confidential information. However, the Bar Association of San Francisco has issued an opinion that allows an attorney to take limited action to protect such a client from harm.

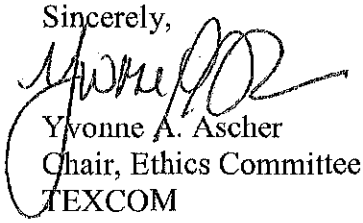
[1] The legal community strongly supported the proposed Rules adopted by the prior Commission. TEXCOM would be glad to provide the current Commission with the comments the prior Committee received supporting such proposed Rule revisions, upon request.

Proposed Rules 1.14 and 1.6 would remedy the lack of formal authority and would provide attorneys with guidelines they may follow to protect a client with diminished capacity from harm. The proposed Rules are limited in their expansion of current law and do not go as far as the ABA Model Rule which would allow an attorney to take steps to conserve a client. The proposed Rules preserve, to the greatest extent possible, California's strict prohibition against an attorney taking a position adverse to a client. Under the proposed Rules, an attorney may disclose confidential communications only if the attorney makes a factual determination that a client has diminished capacity, is unable to act in his or her own interest, and is at substantial risk. The attorney's disclosure would be limited to notifying an individual or organization that has the ability to take action to protect the client.

As the senior population increases, physical and financial abuse of elders has become epidemic. Although the proposed Rules may affect clients other than elders, they are the largest segment of the population that would benefit from them. The current prohibition on disclosure of confidential communications leaves attorneys with no viable option to protect their clients from abuse and harm. Proposed Rules 1.14 and 1.6 will afford protections that will benefit the lives of many vulnerable Californians.

Thank you for your consideration of the proposed Rules.

Sincerely,



Yvonne A. Ascher
Chair, Ethics Committee (2014-2015)
TEXCOM
yascher@ascherlaw.com
444 Pearl Street A-1
Monterey, CA 93940

cc: Jeremy B. Crickard, Chair, TEXCOM
Patrick A. Kohlmann, Vice Chair, TEXCOM

THE STATE BAR OF CALIFORNIA

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning &
Development
State Bar of California
180 Howard Street
San Francisco, California 94105

re: Comments of the Office of the Chief Trial Counsel to Proposed Amendments to the Rules of Professional Conduct

Dear Ms. Hollins:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Vice-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with many of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

SUMMARY

[TEXT OMITTED]

GENERAL COMMENTS

[TEXT OMITTED]

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

Rule 1.14. Client with Diminished Capacity.

1. OCTC is concerned that, while this rule attempts to address some important issues, it does not appear to be an enforceable rule as written and appears to undermine the confidentiality rules. Subparagraph (b) leaves too much discretion to an attorney's unqualified personal assessment of a client's abilities and using that unqualified assessment to permit the attorney to reveal a client's confidences. Further, this rule appears to be broadening the exceptions to confidentiality beyond what is permitted by Business & Professions Code section 6068(e).
2. The Comments are more appropriate for treatises, law review articles, and ethics opinions.
3. Comment 1 is problematic as to when and how to utilize the rule. When and who decides a client is not capable of making decisions - - and how and to whom does the attorney reveal this? If the client is not capable of making the decisions, is the lawyer able to give advice, take direction, or do anything on the client's behalf as to the matter? Comment 3 attempts to address this, but in such broad terms that it is vague and leaves too much discretion to the attorney. It also states that the attorney may in appropriate situations seek the advice of a diagnostician. While this may be appealing, the Comment creates its own exception to confidentiality not specifically in the rule or section 6068(e). Moreover, the Comment does not define diagnostician. Is it a psychiatrist, a psychologist, a marriage counselor, a priest, or some other person? If this exception is to be permitted, it should be in the rule and more specific.
4. Comment 4 states that before taking any action on this rule the lawyer should take all reasonable steps to preserve the client's confidence and decision-making authority, including explaining to the client the need to take such action and requesting the client's permission to do so. However, the Comment states that, if the client refuses or is unable to give this permission, the lawyer may still proceed under paragraph (b). The Comment then lists a number of considerations for the lawyer in making the decision to reveal the client's confidences. There is, however, nothing in the rule that specifically provides for these considerations. OCTC is concerned that this Comment may make enforcement of the confidentiality rules much more difficult.
5. Comments 5 and 6 state the lawyer may discuss these matters with the client's family members, although the lawyer must keep the client's interest foremost. Again, the question is to what extent is this consistent with Business & Professions Code section 6068(e)? This Comment may make enforcement of the confidentiality rules much more difficult. Comment 7, which is different than the Model Rules Comment 7, explains that section (b) is a balancing between the interest of preserving client confidences and of protecting a client with significantly diminished capacity. It also states that a lawyer who reveals such information is not subject to discipline. This would prevent discipline of almost any attorney who claims that he or she revealed the confidences because they believed it was appropriate under this rule. Thus, what safeguards exist for the client?
6. Comment 8 states that the lawyer may not file guardianship or conservatorship or similar action or take actions that would violate proposed rule 1.7 (current rule 3-310.) According to this comment, an attorney may reveal confidences to others that may take this action, but not do it themselves. The reason for this is not explained. Is it better to disclose the confidences than to file under seal a motion to the court disclosing the confidences?

[TEXT OMITTED]

We, again, thank the Commission for the opportunity to present our views. We also thank the members of the Commission for the considerable efforts they made in crafting the proposed rules of conduct for California attorneys. If you have any questions, please feel free to contactus.

Very truly yours,

Russell G. Weiner
Interim Chief Trial Counsel

RESOLUTION 10-03-04

DIGEST
Attorney: Revelation of Confidential Information to Protect Client
Amends Business and Professions Code section 6068 to permit an attorney to reveal confidential client information to protect an aged client with diminished mental capacity.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Business and Professions Code section 6068 to permit an attorney to reveal confidential client information to protect an aged client with diminished mental capacity. This resolution should be disapproved because it is underinclusive and vague.

California maintains an exceptionally strict duty of attorney-client confidentiality. Only in very limited circumstances-when an attorney believes disclosure is necessary to prevent a criminal act that is likely to result in death or substantial bodily harm-may an attorney reveal confidential client information. (Bus. & Prof. Code, § 6068(e).)

This resolution is underinclusive because it is restricted to clients over the age of 65. In contrast, ABA Model Rule of Professional Conduct 1.14-adopted by thirty-three states-permits an attorney to reveal confidential information related to the representation of a client with diminished capacity, when necessary to protect such client's welfare, irrespective of such client's age. This resolution, though in principle fundamentally sound, is too narrowly drawn.

This resolution is also too vague as drafted. The resolution states that an attorney may, under certain circumstances, act to protect his or her client from "substantial physical harm," yet it does not define "substantial physical harm."

SECTION/COMMITTEE REPORTS

OFFICE OF PROFESSIONAL COMPETENCE RECOMMENDATION
DISAPPROVE

This position is solely that of the State Bar's Office of Professional Competence and has not been adopted or endorsed by the State Bar's Board of Governors. The State Bar Office of Professional Competence opposes resolution 10-03-2004. This position should not be construed as an opinion on the merits of the sponsor's proposal. Rather, this opposition is based on the current study being conducted by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. The Rules Revision Commission is charged with conducting a cover-to-

cover review of the entirety of the California rules and proposing comprehensive amendments for Board consideration. In particular, the Rules Revision Commission's charter includes the task of evaluating the proposed amendments to the ABA Model Rules of Professional Conduct developed by the ABA Ethics 2000 Commission, including ABA Model Rule 1.14. ABA Model Rule 1.14 provides:

> "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, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting 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 relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Consistent with this charge and in response to the Rule Revision Commission's January 2002 solicitation for member and public input, the Executive Committee of the Trusts and Estates Section of the State Bar commended to the Rules Revision Commission the consideration of the ABA Model Rule 1.14. In its April 5, 2002 memorandum to the Commission, the Executive Committee states that it "strongly supports in principle the adoption in California of new [ABA Model] Rule 1.14."

Accordingly, the sponsor's desired initiative is in process appropriately with the State Bar through its Rules Revision Commission as that group will consider whether to recommend adoption of a California counterpart to ABA Model Rule 1.14. Conference action, if any, at this time, would be referred by the State Bar to the Rules Revision Commission.

TRUSTS AND ESTATES SECTION RECOMMENDATION
APPROVE AS AMENDED

The Trusts and Estates Section executive committee of the State Bar takes the position that it will approve the resolution if amended to conform to the language being proposed by the trusts and estates section to add Business and Professions Code §6068.5 to read as follows:

6068.5.

Notwithstanding Section 6068, above,

(a) If a client's capacity to make adequately considered decisions in connection with a representation is significantly impaired, the attorney shall, as far as reasonably possible, maintain a normal attorney-client relationship with the client.

(b) If the attorney reasonably believes that the client has significantly impaired capacity and as a result thereof 1) is at risk of substantial physical, financial, or other harm unless action is taken, and 2) cannot adequately act in the client's own interest, the attorney may, but is not required to, notify those individuals or entities that have the ability to take action to protect the client.

(c) If an attorney takes action pursuant to paragraph (b), above, the attorney is authorized to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

(d) Nothing in this section permits an attorney to file, or represent a person filing, a conservatorship petition or similar action concerning the attorney's client, where the attorney would not otherwise be permitted to do so, nor to take a position adverse to the client beyond the notification permitted in paragraph (b), above.

(e) "Significantly impaired capacity" as used in this section shall mean that the client suffers from an impairment that would be sufficient to support a determination of incapacity under Probate Code Sections 811(a) and (b).

(f) An attorney shall not be held liable for taking or forbearing to take the action authorized by this section.

This position is only that of the of the Executive Committee of the Trusts and Estates Section of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Membership in the Trusts and Estates Section is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend Business and Professions Code section 6068 as follows:

1 § 6068
2 It is the duty of an attorney to do all of the following:
3 (a) To support the Constitution and laws of the United States and of this state.
4 (b) To maintain the respect due to the courts of justice and judicial officers.

(c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.

(d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

(e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(3) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client over the age of 65 that the attorney reasonably believes has diminished mental capacity and who is at risk of substantial physical harm unless action is taken. The attorney may take reasonably necessary protective action including consulting with individuals or entities that have the ability to take action to protect the client. When taking protective action pursuant to this subparagraph, the attorney is authorized to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

(f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.

(h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.

(i) To cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. However, this subdivision shall not be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privileges. This subdivision shall not be construed to require an attorney to cooperate with a request that requires him or her to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the attorney's practice. Any exercise by an attorney of any constitutional or statutory privilege shall not be used against the attorney in a regulatory or disciplinary proceeding against him or her.

(j) To comply with the requirements of Section 6002.1.

(k) To comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.

(l) To keep all agreements made in lieu of disciplinary prosecution with the agency charged with attorney discipline.

(m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

49 (n) To provide copies to the client of certain documents under time limits and as
50 prescribed in a rule of professional conduct which the board shall adopt.
51 (o) To report to the agency charged with attorney discipline, in writing, within 30
52 days of the time the attorney has knowledge of any of the following:
53 (1) The filing of three or more lawsuits in a 12-month period against the attorney
54 for malpractice or other wrongful conduct committed in a professional capacity.
55 (2) The entry of judgment against the attorney in a civil action for fraud,
56 misrepresentation, breach of fiduciary duty, or gross negligence committed in a
57 professional capacity.
58 (3) The imposition of judicial sanctions against the attorney, except for sanctions
59 for failure to make discovery or monetary sanctions of less than one thousand
60 dollars($1,000).
61 (4) The bringing of an indictment or information charging a felony against the
62 attorney.
63 (5) The conviction of the attorney, including any verdict of guilty, or plea of guilty
64 or no contest, of a felony, or a misdemeanor committed in the course of the practice of
65 law, or in a manner in which a client of the attorney was the victim, or a necessary element
66 of which, as determined by the statutory or common law definition of the misdemeanor,
67 involves improper conduct of an attorney, including dishonesty or other moral turpitude, or
68 an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor
69 of that type.
70 (6) The imposition of discipline against the attorney by a professional or
71 occupational disciplinary agency or licensing board, whether in California or elsewhere.
72 (7) Reversal of judgment in a proceeding based in whole or in part upon
73 misconduct, grossly incompetent representation, or willful misrepresentation by an
74 attorney.
75 (8) As used in this subdivision, "against the attorney" includes claims and
76 proceedings against any firm of attorneys for the practice of law in which the attorney was
77 a partner at the time of the conduct complained of and any law corporation in which the
78 attorney was a shareholder at the time of the conduct complained of unless the matter has
79 to the attorney's knowledge already been reported by the law firm or corporation.
80 (9) The State Bar may develop a prescribed form for the making of reports required
81 by this section, usage of which it may require by rule or regulation.
82 (10) This subdivision is only intended to provide that the failure to report as
83 required herein may serve as a basis of discipline.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

Existing Law: California now allows attorneys to reveal confidential information in representing clients to protect third parties from death or substantial bodily harm. It does not allow the

attorney to reveal confidential information to protect the client himself.

This Resolution: Allows an attorney to take protective action for an elderly client with diminished capacity when the attorney believes such action is necessary to protect the client when the client is at risk.

The Problem: The fastest growing segment of our society is the age group 85 years and above. Representing elderly clients sometimes presents unique challenges for the attorney. Occasionally an attorney becomes aware of an elderly client with diminished capacity who is at a severe risk of harm. Presently a lawyer may not ethically make a report to Adult Protective Services or seek other means to protect the client who is at risk. California is one of a minority of states who prohibit an attorney from protecting the client by seeking help when needed. There are many seniors who are alone and do not have others who can protect them. It presents a terrible conflict between personal ethics and professional ethics to the California attorney who cannot protect her client.

IMPACT STATEMENT:

This proposed resolution will not affect any other regulation or law.

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COUNTERARGUMENTS

SAN DIEGO COUNTY BAR ASSOCIATION

This resolution would further dilute the duty of an attorney to maintain inviolate the confidential information of his or her attorney on the pretext of protecting the client. Moreover, this resolution may fall under the category of action unnecessary, since the revelation exception contained in sub-paragraph (e)(2) of B&P Code Section 6068 includes the necessity to protect an individual which logically includes the attorney's client.

SANTA CLARA COUNTY BAR ASSOCIATION

This resolution would undermine clients' assurance that information given to their attorneys in confidence will be kept confidential. It would, therefore, make clients less candid with their attorneys, thereby undermining attorneys' effectiveness and the administration of justice. Attorneys are not qualified to determine whether their clients have diminished mental capacity. In most cases, under the existing rules, attorneys can take steps to protect their clients by either seeking the clients' consent to the disclosure of confidential communications or notifying the appropriate authorities of the risk of harm without disclosing confidential information. The change called for by this resolution would make attorneys vulnerable to claims for negligent

failure to protect clients from physical harm even though they may not have intended to assume a duty to do so.

Initial Public Comments
[Rule 3-100 (1.14) – Confidential Information of a Client]

No.	Commenter	Comment on Behalf of Group?	Rule	Comment	RRC Response
2015-030	Stern, Peter	No	3-100 (1.14)	Former chair of TEXCOM, recounted first RRC process of adopting a rule to protect mentally impaired clients. Recommend adoption of former proposed rules 1.6, 1.14.	
2015-032	State Bar Trusts and Estates Executive Committee (TEXCOM)	Yes	3-100 (1.14)	Concerned that current Rules prohibit attorneys from taking steps to protect a client with diminished capacity. Recommends adoption of former proposed rules 1.6 and 1.14 permitting limited disclosures necessary to protect the client.	
2015-036	Anderson, Michelle	No	3-100 (1.14)	Commenter notes an example demonstrating the need for a rule to protect clients with diminished capacity. Recommends adoption of former proposed rule 1.14.	
2015-035	Hoehler, William	No	3-100 (1.14)	Endorses TEXCOM's proposal to adopt former proposed rules 1.6 and 1.14.	
2015-026c	COPRAC	Yes	3-100 (1.14)	Recommend adoption of new rules, similar to model rules to address representation of clients with diminished capacity with guidance on how to protect clients while maintaining professional duties.	