

Rule 1.14 Client with Diminished Capacity
(Commission's Proposed Rule Adopted on January 22 – 23, 2016 – Clean Version)

- (a) Duties Owed Client with Diminished Capacity. 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 lawyer-client relationship with the client.
- (b) Taking Protective Action on Behalf of a Client With Significantly Diminished Capacity.
 - (1) Except where the lawyer represents a minor, a client in a criminal matter, or a client who is the subject of a conservatorship proceeding or who has a guardian ad litem or other person* legally entitled to act for the client, the lawyer may, but is not required to take protective action, provided the lawyer has obtained the client's consent as provided in paragraph (c) or (d), and the lawyer reasonably believes* that:
 - (i) there is a significant risk that the client will suffer substantial* physical, psychological, or financial harm unless protective action is taken,
 - (ii) the client has significantly diminished capacity such that the client is unable to understand and make adequately considered decisions regarding the potential harm, and
 - (iii) the client cannot adequately act in the client's own interest.
 - (2) Information relating to the client's diminished capacity is protected by Business and Professions Code § 6068(e)(1) and Rule 1.6. In taking protective action as authorized by this paragraph, the lawyer must:
 - (i) act in the client's best interest, and
 - (ii) disclose no more information than is reasonably* necessary to protect the client from substantial* physical, psychological, or financial harm, given the information known* to the lawyer at the time of disclosure.
- (c) Obtaining Consent To Take Protective Action.
 - (1) Before taking protective action as authorized by paragraph (b), a lawyer must take all steps reasonably* necessary to preserve client confidentiality and decision-making authority, which includes:
 - (i) explaining to the client the need to take protective action, and

- (ii) obtaining the client's consent to take the protective action.
- (2) In seeking the consent of a client to take protective action under paragraph (b), the lawyer may obtain the assistance of an appropriate person* to assist the lawyer in communicating with the client. In obtaining such assistance, the lawyer must:
 - (i) act in the client's best interest;
 - (ii) disclose no more information than is reasonably* necessary to protect the client from substantial* physical, psychological, or financial harm, given the information known* to the lawyer at the time of disclosure; and
 - (iii) take all reasonable* steps to ensure that the information disclosed remains confidential.
- (d) Obtaining Advance Informed Written Consent to Take Protective Action. A lawyer may obtain a client's advance informed written consent* to take protective action in the event the circumstances set forth in paragraphs (b)(1)(i) – (iii) should later occur. The advance consent must include the following written* disclosures:
 - (1) the authorization to take protective action is valid only when the lawyer reasonably believes* that the circumstances set forth in (b)(1)(i) – (iii) are present; and
 - (2) the client retains the right to revoke or modify the advance consent at any time.
- (e) Restrictions on Lawyer's Actions. This Rule does not authorize the lawyer to take:
 - (1) any action that is adverse to the client, including the filing of a conservatorship petition or other similar action;
 - (2) any action on behalf of a person* other than the client that the lawyer would not be permitted to take under Rule 1.7 or 1.9; or
 - (3) any action that would violate the client's right to due process of law under the United States or California Constitutions, or the California Probate Code.
- (f) Definitions. For purposes of this Rule:
 - (1) "Protective action" means to take action to protect the client's interests by:

- (i) notifying an individual or organization that has the ability to take action to protect the client, or
 - (ii) seeking to have a guardian ad litem appointed.
- (g) Discipline. Neither a lawyer who takes protective action as authorized by this Rule, nor a lawyer who chooses not to take such action, is subject to discipline.

Comment

[1] The purpose of this Rule is to allow a lawyer to act competently on behalf of a client with significantly diminished capacity, to further the client's goals in the representation, and to protect the client's interests.

[2] A client with significantly diminished capacity, such that the client cannot make adequately considered decisions regarding potential harm, often has the ability to understand, deliberate upon, express preferences concerning, and reach conclusions about matters affecting the client's own well-being, including the ability to provide consent. (See Probate Code §§ 810 – 813.)

[3] In determining whether a client has significantly diminished capacity such that the client is unable to make adequately considered decisions, a lawyer may seek information or guidance from an appropriate diagnostician or other qualified medical service provider. In doing so, the lawyer may not reveal client confidential information without the client's authorization or except as otherwise permitted by these Rules. See Rule 1.6(b) and Business and Professions Code § 6068(e)(2).

[4] Where it is reasonably* foreseeable that a client may suffer from significantly diminished capacity in the future such that the client will likely be unable to make adequately considered decisions, the lawyer may have an obligation to explain to the client the need to take measures to protect the client's interests, including using voluntary surrogate decision-making tools such as durable powers of attorney and seeking assistance from family members, support groups and professional services with the client's informed written consent.* See Rule 1.4.

[5] In obtaining the assistance another person* such as a trained professional to assist in communicating with and furthering the interests of the client pursuant to paragraph (c), the lawyer must look to the client, and not the other person,* for authorization to take protective measures on the client's behalf. See Evidence Code § 952. The lawyer must advise the person* who assists the lawyer that the person* is not authorized to disclose information protected by Business and Professions Code § 6068(e)(1) to any third person.*

[6] This Rule does not apply in the case of a client who is (i) a minor, (ii) involved in a criminal matter, (iii) is the subject of a conservatorship; or (iv) has a guardian or other person* legally entitled to act for the client. The rights of such persons* are regulated under other statutory schemes. See Family Code § 3150; Welfare and Institutions Code § 1368 et seq.; Lanterman-Petris-Short Act, Welfare and Institutions Code

Division 5, Part 1, § 5000-5579; Probate Code, Division 4, Parts 1-8, § 1400-3803; and Code of Civil Procedure §§ 372-376.

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[2] A client with significantly diminished capacity, such that the client cannot make adequately considered decisions regarding potential harm, often has the ability to understand, deliberate upon, express preferences concerning, and reach conclusions about matters affecting the client's own well-being, including the ability to provide consent. (See Probate Code §§ 810 – 813.)

[3] In determining whether a client has significantly diminished capacity such that the client is unable to make adequately considered decisions, a lawyer [should consider the factors set forth in Probate Code §§ 811 and 812. The lawyer](#) may [also](#) seek information or guidance from an appropriate diagnostician or other qualified medical service provider. In doing so, the lawyer may not reveal client confidential information without the client's authorization or except as otherwise permitted by these Rules. See Rule 1.6(b) and Business and Professions Code § 6068(e)(2).

[4] Where it is reasonably foreseeable that a client may suffer from significantly diminished capacity in the future such that the client will likely be unable to make adequately considered decisions, the lawyer may have an obligation to explain to the client the need to take measures to protect the client's interests, including using voluntary surrogate decision-making tools such as durable powers of attorney and seeking assistance from family members, support groups and professional services with the client's informed written consent. See Rule 1.4.

[5] In obtaining the assistance another person such as a trained professional to assist in communicating with and furthering the interests of the client pursuant to paragraph (c), the lawyer must look to the client, and not the other person, for authorization to take protective measures on the client's behalf. See Evidence Code §952. The lawyer must advise the person who assists the lawyer that the person is not authorized to disclose information protected by Business and Professions Code § 6068(e)(1) to any third person.

[6] This Rule does not apply in the case of a client who is (1) a minor, (2) involved in a criminal matter, (3) is the subject of a conservatorship; or (4) has a guardian or other person legally entitled to act for the client. The rights of such persons are regulated under other statutory schemes. See Family Code §3150; Welfare and Institutions Code §1368 et seq.; Lanterman-Petris-Short Act, Welfare and Institutions Code Division 5, Part 1, §5000-5579; Probate Code, Division 4, Parts 1-8, §1400-3803; [Code Civ. Pro. §§ 372-376].

**Proposed Rule 1.14 Client with Diminished Capacity
Synopsis of Public Comments**

TOTAL = XX **A = X**
 D = X
 M = X
 NI = X

| No. | Commenter/Signatory | Comment on Behalf of Group? | A/D/M/NI ¹ | Rule Section or Cmt. | Comment | RRC Response |
|---------|-----------------------------|-----------------------------|-----------------------|----------------------|---|--|
| 2016-10 | Kauffman, Kenneth (7-19-16) | No | M | 1.14 | ABA Comment [6] should be incorporated into the final rule in its entirety. Full incorporation provides the factors that should be considered and balanced in making a determination of diminished capacity. Providing that lawyers may rely on an outside medical provider “leaves it as a free-for-all with respect to how attorneys will determine diminished capacity.” | <p>The factors in ABA MR 1.14, cmt. [6] are too amorphous to provide useful guidance to lawyers. Inclusion of that comment would not advance client interests.</p> <p>Nevertheless, although the Commission does not agree with the commenter’s premise that reference to outside medical providers will result in a “free-for-all” determination of diminished capacity, the Commission has recommended revisions to proposed Comment [2] that reference factors in Probate Code §§ 811 and 812 that provide specific guidance in making a determination as to a client’s capacity.</p> |
| 2016-24 | Rosenblatt, Carolyn | No | A | 1.14 | <p>I totally support proposed rule 1.14. It is about time that the State Bar clearly permitted lawyers who encounter financial elder abuse to take protective action.</p> <p>The only phrase with which I take issue is the piece that says one is supposed to “maintain a normal attorney-client relationship with a</p> | <p>No response required.</p> <p>The Commission disagrees. The commenter has focused on the phrase without the important qualifier, “as far as</p> |

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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| | | | | | client who has diminished capacity. This sounds like fantasy. The words “normal attorney-client relationship” should be omitted. Those words are outdated, given what we now know about diminished capacity. | reasonably possible.” The issue is client autonomy. California recognizes that even persons who suffer from mental or physical disorders may still have capacity to make decisions. See Probate Code § 810. |
| 2016-29 | Musser, Elaine | No | M | 1.14 | In my opinion, the proposed rule does not go far enough in permitting an attorney to protect a client with diminished capacity who is at risk. Under the proposed rule, the attorney is required to obtain consent from a client with diminished capacity before being able to take any protective action – even if the client is in imminent danger. The reality is that a client with diminished capacity may be incapable of making a reasoned decision to give consent. ABA Model Rule 1.14, which permits a lawyer to take action regardless of client consent, is a much better rule. | In drafting proposed Rule 1.14, the Commission was guided by a deep appreciation that developing a rule addressing the issue of a significantly diminished capacity client is a matter of critical importance in assuring protection for some of the most vulnerable individuals who come within the justice system. At the same time, , the Commission recognized that California’s duty of confidentiality, as reflected in Business & Professions Code § 6068(e)(1) and current rule 3-100, does not permit a rule as sweeping as Model Rule 1.14, which authorizes the unconsented disclosure of client confidential information to take action to protect the client interests, or even to take action adverse to the client’s interests, such as seeking the appointment of a conservator. Consequently, proposed Rule |

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|----------|-------------------------|-----------------------------|-----------------------|----------------------|---|--|
| | | | | | | 1.14 is necessarily narrower in scope than the model rule. |
| 2016-32f | Law Professors (Zitrin) | Yes | A | 1.14 | The commission has wisely avoided the pitfalls of the similar ABA rule by developing a nuanced position that protects the sanctity of the attorney-client confidential relationship while at the same time providing alternatives to help deal with serious dangers to clients who are not fully able to make decisions by themselves. The ABA should take note of this commendable approach. | No response required. |
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