

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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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) (07-25-16)	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.
2016-52f	Law Professors (Zitrin) (08-24-16)	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.
Public Hearing	Stern, Peter (Provided oral public hearing testimony on July 26, 2016. See pages 10-14 of the public hearing transcript.)	No	M	(b)(1)-(3); (c); (d)	There is no discussion in the executive summary of the rule that was developed for 1.14 by the first Rules Revision Commission (RRC1). If the Commission chooses to step away from the concept in that	The Commission does not recommend changes to the proposed rule, nor does it believe that revisiting the first Commission's proposed rule would be productive. The Commission believes the

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					<p>earlier rule of implied authority for action by an attorney to protect a client, it would be helpful to provide context to the evolution of the currently proposed rule 1.14.</p> <p>I fear that the current rule does not afford adequate protection for the client who is significantly disabled and is about to be harmed by an action. And attorneys are not authorized to protect that person unless we have the consent of the client. I hope the Commission might be willing to take another look at RRC1's version of this rule and perhaps take a big step and try to go from the implied authority until such time as 6068 (e) can be amended.</p> <p>One technical difference between RRC1's version of the rule and the current rule has to do with paragraphs (b)(1)-(3) of RRC1's rule and subparagraphs (i) to (iii) in (b)(1) of the proposed rule. The linkage in RRC1's rule made it clear that there was a causal consequence between a client who has significantly diminished capacity so that the client cannot make decisions to protect him or herself. And then, as a result of the diminished capacity, was at</p>	<p>proposed rule conforms to the Commission's charge which is not the same as the charge to the first Commission. The proposed rule strikes an appropriate balance between the lawyer's duty to act competently on behalf of a client with significantly diminished capacity and the duty of confidentiality under existing California law.</p> <p>The concept of "implied authorization" found in Model Rules 1.6 and 1.14(c) is not a part of the current California rules, which is the starting point for the Commission, or in State Bar Act.</p> <p>The absence of "causal linkage" the commenter refers to in paragraph (b) and subparagraphs (b)(1) – (3) of the proposed rule is for a reason. While it may be true that not every client with significantly diminished capacity may be able to make a reasoned decision to give consent, it have been empirically shown that lawyers representing clients with significant diminished capacity</p>

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					<p>risk for ... harm and cannot adequately act in his or her own interest. The causal linkage is no longer present in the current rule. And I believe the Commission might want to consider putting the causal lineage back into the rule.</p> <p>Next, since the rule is predicated on client consent, either prospective or simultaneous to the awareness of the problem, a number of the restrictions in the rule do not really make sense to me.</p> <p>For example, I have a client who comes to me clearly impaired, yet is listening, willing to accept my advice and give his consent to what I propose. There doesn't seem to be a need, in my mind, to restrict the actions that I can take as long as I am working with consent of my client (in notifying the people that he is willing to have me notify, for instance). It looks like the very restricted scope of action that I could take under RRC1, has been superimposed on the situation where, with client consent, such restriction would not be necessary.</p> <p>In obtaining client consent, I</p>	<p>can and often are able to obtain client consent to take protective action even where the client is in imminent danger under the provisions in the proposed rule. See Comment [2]. The Probate Code also recognizes that this is the case. Paragraph (b) applies to clients with significantly diminished capacity and would not apply in the example the commenter gives where the impaired client is capable of listening, understanding and making an adequately considered decision.</p>

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					<p>agree with the comments that it often would be difficult to surmise how the client with significant diminished capacity can actually give informed consent. And, of course, without that informed consent, I would not be able to act.</p> <p>Paragraph (c) of the proposed rule raises a very serious issue of inconsistency. Under (c), the lawyer can disclose: "No more information than is reasonably necessary to protect the client... by going to a third party to help get the client's consent." This is essentially what we were able to do without the client's consent under the old rule. Here it is introduced as a mechanism for obtaining the client's consent. We, the attorneys, can go to third parties and make disclosures of the minimal information necessary to try to get help for the client. But that itself is a violation of 6068(e). And the comment notes that if we give such information disclosure, whoever we give it to is bound by 6068 (e) not to disclose it. But, of course, the information may be given to non-attorneys not bound by our Rules.</p>	<p>The Commission does not agree that paragraph (c) raises an issue of inconsistency. Comment [5] explains that lawyers are able to obtain assistance from another person in communicating with and furthering the interests of a client without violating the attorney-client privilege and §6068(e).</p>

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					There are a number of issues raised regarding “advanced informed written consent”. My question is this: If I have obtained the client’s consent when the client is fine, then what duty do I have to inform the client when the client is not fine, that he or she has given this advanced consent and then offer them the opportunity to revoke it.	<p>A lawyer who has complied with the requirements of paragraph (d) in obtaining a client’s advance informed consent to take protective action is not required to inform the client who subsequently has significantly diminished capacity that he or she previously consented to take protective action that the client can revoke it before taking protective action under paragraph (b).</p> <p>In summary, the Commission believes that although the rule does not afford a lawyer the same broad discretion as Model Rule 1.14, the rule will achieve greater public protection under current California law.</p>
Public Hearing	Law Professors (Zitrin, Richard) (Provided oral public hearing testimony on July 26, 2016. See pages 17-18 of the public hearing transcript.)	Y			When I was chair of COPRAC, the question was asked: “Can’t we have some way of saving people from themselves so that they’re not giving their estates to the gardener... And we said, “unfortunately, no”. We can’t do anything about it according to the legislature.” The reasons are many. One of them is the limitations of 6068(e). Another is the need for client autonomy and the fact that we do not as	No response required.

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					<p>lawyers, have the right to superimpose our determination of what's in the client's best interest when we have a fiduciary duty to the client to act of what he or she says is his or her best interest.</p> <p>This rule is terrific because it is: nuanced, allows for consent, allows for limited disclosure under limited circumstances. It's an improvement over the ABA rule and the ABA ought to take a look at the California draft and think about adopting it into the ABA rule.</p>	