

**Rule 1.14 Client with Diminished Capacity**

- (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 be in a separate writing signed by the client and 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, may have 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 Prob. Code § 810)

[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 in Probate Code §§ 811 and 812. A 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 Business and Professions Code § 6068(e)(2) and Rule 1.6(b).

[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.

[4A] In taking protective action as authorized by paragraphs (b) and (c), a lawyer may not substitute his or her own judgment in deciding what is in the client's best interest but must abide by the client's expressed interests and decisions concerning the objectives of the representation. This Rule does not apply if the lawyer is unable to ascertain the client's expressed interests and objectives.

[5] In obtaining the assistance of 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) and Rule 1.6 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.



**Rule 1.14 Client with Diminished Capacity**

- (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 be in a separate writing signed by the client and must<sup>1</sup> 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.

---

<sup>1</sup> [Language added to address concerns raised by some public commenters](#)

## 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~~ may have<sup>2</sup> 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 Prob. 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 in Probate Code §§ 811 and 812. ~~a~~ A 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) and Rule 1.6(b).

[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.

[4A] In taking protective action as authorized by paragraphs (b) and (c), a lawyer may not substitute his or her own judgment in deciding what is in the client's best interest but must abide by the client's expressed interests and decisions concerning the objectives of the representation. This Rule does not apply if the lawyer is unable to ascertain the client's expressed interests and objectives.

[5] In obtaining the assistance of 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) and Rule 1.6 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.;

---

<sup>2</sup> During the 9/30/16 meeting it was suggested that the comment should not state that a person with significantly diminished capacity "often" has the ability to make decisions, etc. The drafters believed the word "often" is language from the statute. A review of the statute after the meeting revealed it does not use "often," so the language has been changed to conform to the statute.

The remaining changes to Comment [2] and Comment [3] had been made previously.

**RRC2 – Rule 1.14**

**Draft 5.2 (10/15/2016) – COMPARED TO DFT3.2 [PCD] (1/23/2016)**  
**For October 21-22, 2016 Meeting**

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.



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

**TOTAL = 21**      **A = 10**  
**D = 1**  
**M = 10**  
**NI = 0**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
2016-10	Kauffman, Kenneth (07-19-16)	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 (08-01-16)	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>

<sup>1</sup> A = AGREE with proposed Rule      D = DISAGREE with proposed Rule      M = AGREE ONLY IF MODIFIED      NI = NOT INDICATED

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					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 (08-02-16)	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

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
						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	Section 8 (B1) (C)	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 the suggested changes to the proposed rule, nor does it believe that revisiting the first Commission's proposed rule would be productive. The

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<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>Commission believes the 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>

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<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>

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<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>

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					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	A		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.

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<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>	
X-2016-66k	San Diego County Bar Association (SDCBA) (Riley) (09-15-16)	Yes	D		<p>We believe that California lawyers would be better off if the State Bar did not adopt this discipline rule as drafted with respect to dealing with a client with diminished capacity. We recognize that, in light of Business and Professions Code section 6068, subdivision (e)(1), California cannot adopt wholesale the ABA Model rule 1.14.</p> <p>If, however, the Commission believes that it should adopt the proposed rule, we recommend that the Commission consider making the following changes to subsection (c):</p>	The Commission appreciates the commenter's recognition of the constraints imposed by Bus. & Prof. Code § 6068(e). However, the Commission believes that the rule strikes an appropriate balance among the various policy interests, including confidentiality, client autonomy and public protection. See also response to ALAS, X-2016-87c, below.



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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>1. Change the heading to: “<i>Attempt to Obtain Consent To Take Protective Action</i>;”</p> <p>2. Add: “<i>as far as reasonably possible, attempting to</i>” before “obtaining” in (ii);</p> <p>3. Substitute: “<i>attempting to obtain</i>” for “seeking” before “the consent” in (2); and</p> <p>4. Add: “<i>if attempting to obtain the consent of the client,</i>” before “the lawyer” in the first sentence of Comment [5]. [Proposed new language in italics.]</p> <p>Our reasons for the suggested changes are to give lawyers the flexibility to act to protect a client who is being, or at risk of being, victimized and may be unable to consent to the lawyer’s action, either because he/she is so diminished and/or because he/she is unable to exercise their own free will due to the control of the abuser. The strict requirement of client consent, in many instances, could result in the lawyer being unable to take any action to protect a client.</p>	<p>1-4. The Commission did not make the suggested changes. While the commenter suggested language might at first glance appear to be more precise, the Commission believes including the qualifying language would create confusion over whether an attempt to obtain the client’s consent was sufficient to enable taking protective action. In fact, the commenter’s position that lawyers should have more “flexibility” to assist a client with significantly diminished capacity creates a substantive problem with the proposed Rule. It would in effect sanction a lawyer’s conduct that is contrary to section 6068(e and accordingly, inconsistent with the Commission’s Charter.</p>
X-2016-43b	Committee on Professional Responsibility and Conduct (COPRAC)	Yes	M		<p>1. COPRAC generally supports the proposed rule, however we offer the observation that the</p>	<p>The Commission has not made the suggested change. The Commission appreciates</p>

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
	(Baldwin) (09-08-16)				<p>discussion of “consent” under paragraph (c) might be more accurately cast as one of “lawful consent.”</p> <p>The consent envisioned by the proposed rule, as elaborated upon in Comment [2] through its references to Probate Code §§ 810-813, appears to differ from the concept of "informed consent" as the term is defined in Rule 1.0.1(e).</p> <p>2, The Committee also notes that while the proposed rule provides protection to clients who currently have apparent capacity to provide informed written consent as protection against future incapacity (subsection (d)) and those who may be demonstrating signs of diminishing capacity but still meet the standard for capacity established pursuant to Probate Code Sections 810-813, it provides no mechanism for addressing the problem of a client whose capacity has fallen below that latter standard. In those instances, the proposed rule provides none of the protections of Model Rule of Professional Conduct 1.14, and leaves this class of clients unprotected.</p>	<p>the commenter’s recognition that the consent described in the proposed rule does not completely align with the “informed consent” standard as defined in 1.0.1(e). However, the Commission believes that importing a new term, “lawful consent,” into the Rule would cause more confusion than assistance to a lawyer seeking guidance from the Rule.</p> <p>2. Please see response to SDCBA, X-2016-66k, above, and ALAS, X-2016-87c, below. See also proposed Comment [4A] of the revised public comment rule draft.</p>

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					3. The Committee recognizes that the Commission believes existing confidentiality statutes preclude it from proposing such a rule, and therefore recommends that the Commission urge modification of the statute to make protection of these clients possible.	3. The Commission appreciates the commenters' recommendation and intends to emphasize the confidentiality constraints in the proposed rule when the Rules are submitted to the Supreme Court.
X-2016-68f	Law Professors (Zitrin) (09-21-16)	Yes	A		See X-2016-52f Law Professors (Zitrin) dated August 24, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	No response required.
X-2016-76g	Los Angeles County Bar Association (LACBA) – Professional Responsibility and Ethics Committee of Los Angeles (PREC) (Schmid) (09-24-16)	Yes	M	Paragraph (g)	1. Paragraph (g) attempts to clarify that a lawyer will not be subject to discipline for taking, or choosing not to take, protective action authorized by this Rule. However, as written this statement is far too broad and incorrect. For example, some of the provisions of this Rule are mandatory (not permissive), and the lawyer should not have the option to choose not to follow such requirements. Further, even where the provision is permissive, taking or choosing not to take action may subject the lawyer to discipline under other rules – e.g., competence. As a result,	1. The Commission agrees with the first suggested change and has substituted “permitted” for “authorized.” The Commission, however, did not make the second suggested changes. Including the phrase “pursuant to this Rule” at the end of paragraph (g) would effectively render the provision meaningless and in fact, would contradict the terms of the Rule itself. Adding that language would effectively state a lawyer might exercise discretion in compliance with the Rule but the lawyer might still be disciplined under a different rule because the lawyer acted incompetently by

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>PREC recommends changing the word “authorized” to “permitted” and making clear that the statement is limited to discipline for violation of this Proposed Rule, such that paragraph (g) would be revised to read as follows:</p> <p>“(g) Discipline. Neither a lawyer who takes protective action as <b>authorized</b> <b>permitted</b> by this Rule, nor a lawyer who chooses to not take such action, is subject to discipline <b>pursuant to this Rule.</b>”</p>	that very exercise of discretion. There is a logical problem with taking that approach. In obtaining client consent to take action pursuant to the Rule as provided in paragraph (c), the lawyer “must take all steps <i>reasonably necessary</i> to preserve client confidentiality and decision-making authority.” The Commission does not see how a lawyer who acted in compliance with the rule (the only permitted action available), i.e., has acted “reasonably,” could be found to have acted incompetently. Nor does the Commission believe that a rule should hold out the possibility that there might be some other rule violation that might be identified at some time in the future that would trump the rule’s permissive provisions without specifically identifying them. Being aware of no such rule or rules, the Commission declines to make the suggested change.
x-2016-72	Ascher, Yvonne (09-23-16)	No	A	Paragraph (c)	In speaking to colleagues, a question has arisen as to whether an attorney who has obtained advance consent must reconfirm	The Commission cannot identify the source of the commenter’s concern in the rule. The proposed rule does

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>that consent under the provisions of paragraph (c) before relying on such consent. Requiring that the Lawyer reconfirm consent at a time when a client's capacity may be diminished seems to defeat the protection afforded by an advance consent, given when a Client was clearly competent and adequately informed.</p> <p>The proposed clarification is warranted to ensure that Lawyers may, in such limited situations as are outlined in paragraph (b), rely on an advanced consent. If advance consent is to be meaningful, the Lawyer should not have to comply with the provisions of paragraph (c) at a future date. To clarify the intent of the proposed Rule, I suggest either or both of the following: Adding the following language to paragraph (c)(1): If no advance consent as specified in Paragraph (d) has been obtained, or if such consent has been revoked, before taking protective action...</p> <p>Adding the following language to paragraph (d) after the first sentence:</p> <p>A lawyer may rely upon an</p>	<p>not require that the lawyer obtain further consent from the client under the stated circumstances. 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>

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					advanced consent that complies with this paragraph unless the client affirmatively revokes that consent in writing.	
X-2016-87c	Attorney's Liability Assurance Society, Inc. (ALAS) (Garland) (09-27-16)	Yes	M		Unlike ABA Rule 1.14, the Proposed Rule does not allow lawyers to act to protect their clients' interests if action required disclosing client confidential information without consent.	The Commission recognizes the difference between Model Rule 1.14 and the proposed Rule. The difference is occasioned by two considerations. First, unlike other jurisdictions that have adopted the Model Rule framework and MR 1.14, California's duty of confidentiality is set forth in a statute, which contains neither an exception that recognizes a lawyer's implied authority to take actions to advance the client's interest nor an express exception to disclose confidential information without client consent specifically to assist a client with diminished capacity. A rule of professional conduct cannot create an exception for, or modify, the statute. Second, the Commission believes that MR 1.14 is too broad and not sufficiently protective of a client's interests and autonomy.

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
X-2016-94a	Disability Rights California (Mudryk) (09-27-16)	Yes	M		<p>We support the Commission's language requiring attorneys to obtain the consent of clients before taking protective action, protecting the confidentiality of any information disclosed, and limiting the information that may be disclosed.</p> <p>We urge amendments to better ensure that the proposed Rule would not inappropriately compromise clients' personal autonomy and confidentiality in situations where it is not warranted or when there are other less intrusive options, as follows:</p> <p>1. In evaluating whether to maintain other than "a normal lawyer-client relationship with the client," consider the lawyer's responsibility to provide reasonable accommodations to clients with disabilities to assist them with decision-making and to clearly communicate their wishes, pursuant to the Americans with Disabilities Act,</p> <p>The obligation to provide reasonable accommodations should include the lawyer</p>	<p>The Commission thanks the commenter for endorsing the approach the Commission has taken in drafting proposed Rule 1.14. The Commission, however, has not made the specific suggested changes, but has made some revisions to the Rule to address the concerns raised.</p> <p>1. The Commission has not made the suggested change. Although the proposed Rule states the general rule that a lawyer must maintain as far as reasonably possible a normal lawyer-client relationship, the Commission believes that identifying specific means to do so is beyond the scope of the Rules and the principles in its Charter to recommend rules of professional conduct that set forth a clear and enforceable articulation of</p>

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>permitting, with the client's consent, the use of a third party selected by the client to assist with decision-making or communication and ensure the confidentiality and privilege of those communications.</p> <p>2. When taking protective action on behalf of a client with diminished capacity, the Rule should do the following: Make clear that the protective action can only be taken when the significant risk of harm is the result of action by a third party, either by more clearly defining the standard of "significant risk that the client will suffer substantial physical, psychological, or financial harm" or referencing a standard in current law such as the abuse and neglect standards defined in the California Elder Abuse and Dependent Adult Civil Protection Act, used by other professionals</p>	<p>disciplinary standards and to use Comments sparingly.<sup>2</sup> With respect to prohibitions on a lawyer discriminating against clients on the basis of disability, see proposed Rule 8.4.1 [2-400].</p> <p>2. The Commission has not made the suggested change. Whether a set of circumstances creates a significant risk is fact-specific. The Commission does not believe it is possible to draft a succinct explanation of "significant risk." It has considered this in relation to other rules, e.g., proposed Rule 1.7(b), and has ultimately decided not to do so.</p>

<sup>2</sup> Commission Charter, Principle #2, states:

2. The Commission should consider the historical purpose of the Rules of Professional Conduct in California, and ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives.

Commission Charter, Principle #5 states in pertinent part:

5. \* \* \* Official commentary to the proposed rules should not conflict with the language of the rules, and should be used sparingly to elucidate, and not to expand upon, the rules themselves.



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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>including financial advisors.</p> <p>3. When taking protective action on behalf of a client with diminished capacity or when seeking the assistance of a person to communicate with the client under Paragraphs (b)(2) and (c)(2), change the standard from “best interest” to “expressed interest.” In other words, the attorney should take direction based on the client’s expressed wishes rather than on what the attorney thinks is in the client’s best interest. If the interest cannot be ascertained, even with reasonable accommodations, the attorney could use a best interest standard.</p> <p>4. Regarding (d), Obtaining Advance Informed Written Consent to Take Protective Action, the Rule should include safeguards to ensure that clients fully understand what they</p>	<p>3. The Commission has not made the suggested change. However, it has added a new comment [4A], which is intended to clarify the term “best interests” as used in the rule:</p> <p>[4A] In taking protective action as authorized by paragraphs (b) and (c), a lawyer may not substitute his or her own judgment in deciding what is in the client’s best interest but must abide by the client’s expressed interests and decisions concerning the objectives of the representation. This Rule does not apply if the lawyer is unable to ascertain the client’s expressed interests and objectives.</p> <p>4. The degree of specificity suggested by the commenter is not appropriate to a disciplinary rule and it would be inconsistent with the Commission’s Charter.<sup>3</sup></p>

<sup>3</sup> See note 2, above.

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					are agreeing to, much in the same way that the Health Care Decisions Law.	However, the Commission has added a further requirement to paragraph (d) that the advance informed written consent “must be in a separate writing signed by the client” to provide assurance that the disclosures required are not hidden in a lengthy engagement agreement.
X-2016-104ac	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	A		<p>1. OCTC supports this rule as a good compromise on this complicated and difficult issue.</p> <p>2. OCTC supports Comments 3,4,5 and 6 although Comment 5 is missing the word “of” in the first line.</p> <p>3. Comments 1 and 2 are more appropriate for treatises, law review articles, and ethics opinions.</p>	<p>1. No response required.</p> <p>2. No response required as to first observation. The Commission has added the missing word to Comment [5].</p> <p>3. The Commission disagrees with the commenter’s assessment. Comment [1] explains the policy underpinning the rule and thus provides interpretative guidance in applying the rule. Comment [2] provides a cross-reference to the Probate Code sections that provide a framework for initially assessing a client’s capacity. Those sections are much more preferable than the corresponding Model Rule provision, MR 1.14, cmt. [6], which is aspirational in nature.</p>

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
X-2016-93e	Los Angeles County Public Defender (Brown) (09-23-16)	Yes	A		The vast majority of Rule 1.14 does not affect the practice of the Public Defender and Alternate Public Defender. The only portion that does affect our practice is subdivision (a), which requires a lawyer to maintain as far as possible a normal lawyer-client relationship with the client. We support the adoption of proposed Rule 1.14.	No response required.
X-2016-103-CA	Advocates for Nursing Home Reform (Chicotel) (09-27-16)	Yes	D		<p>Proposed Rule 1.14 is a watered down but still highly objectionable version of the ABA Model Rule 1.14.</p> <p>The proposed rule gives ethical clearance to attorneys to take actions their clients oppose by packaging those actions in the guise of client consent. In that regard the model rule has two main provisions:</p> <ul style="list-style-type: none"> <li>•Permitting attorneys to take “protective action” with a client’s contemporaneous consent;</li> <li>•Permitting attorneys to take “protective action” through a pre-arranged written waiver of confidentiality.</li> </ul> <p>1. The first provision seems entirely unnecessary. Clients with capacity have always been free</p>	<p>1. The Commission disagrees with the commenter’s assessment of the provision</p>

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>to waive their confidences. We fear this provision may be interpreted by some attorneys as an endorsement of taking protective action for clients who have no capacity to understand the possible risks, benefits, and alternatives of such action. It strains common sense to think a client could be “unable to understand and make adequately considered decisions regarding potential harm” but have the capacity to understand and make adequately considered decisions about abstract concepts such as attorney-client confidentiality, duty of loyalty, and protective actions.</p> <p>2. The second provision, permitting an advance waiver of</p>	<p>that permits – but does not require – a lawyer to take protective action on the client’s behalf. The Commission understands the apparent paradox but believes that an initial determination that a client has significantly diminished capacity should not end the lawyer’s attempts to serve the client’s best interests. The provision does not permit the lawyer to take protective action unless the lawyer is able to obtain the client’s consent. If that consent cannot be obtained, even with the assistance of a trained professional, the lawyer may not proceed further. The Commission believes it would be a breach of loyalty to simply walk away from such a client. It also believes that the proposed rule, while not perfect, provides 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>2. The Commission disagrees with the Commenter’s</p>

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>an attorney's central duties, is an unwelcome and distasteful concept for at least three reasons.</p> <p>a. We doubt that most clients would read or understand the advance waiver clause in their multi-page attorney retainer agreements. We expect that most advance waivers would be reduced to a boilerplate clause as with pre-dispute arbitration agreements: important rights lost and waived without</p>	<p>assessment of paragraph (d), the advance <i>consent</i> provision. The Commission initially observes that the provision does not provide for an advance waiver, i.e., a "relinquishment of known rights," that is not revocable. On the contrary, the consent contemplated in paragraph (d) is revocable "<i>at any time</i>" by the client. The Commission believes, supported by ALAS and trusts and estates attorneys, that the advance consent provision strikes an appropriate balance between protecting an impaired client from significant harm and protecting the client's autonomy.</p> <p>The Commission also responds to each of the commenter's points, below:</p> <p>a. The Commission also recognizes this concern and has added a further requirement to paragraph (d) that the advance informed written consent "must be in a separate writing signed by the client" to provide assurance that the disclosures required are not hidden in a lengthy</p>

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>consideration, mixed among inscrutable legalese.</p> <p>b. Advance waivers could end up as leverage for attorneys to compel clients into certain acts or omissions. Once the client has agreed to a waiver, an attorney might threaten “protective actions,” like calling Adult Protective Services or revealing confidences to family members, in order to get the client to do as the attorney has recommended. What’s meant as a client’s shield from harm could be turned into a sword for attorneys.</p> <p>c. Finally, advance waivers of fundamental attorney requirements just seem inappropriate. As previously mentioned, the duty of loyalty and confidentiality are at the heart of what attorneys do. To subject this fundamental duty to the whims of negotiation between attorney and client as they formalize their relationship</p>	<p>engagement agreement.</p> <p>b. A lawyer who attempts to use the rule as a “sword” for gaining “leverage” over a client would be in violation of numerous statutes and rules and Bus. &amp; Prof. Code §§ 6068(e) and 6106, as well as proposed Rules 1.6, 1.7, 1.8.2 and 1.9. An advance consent would not provide “cover” for a lawyer who engages in the kind of conduct that the commenter describes. Further, as noted, the consent is revocable “at any time.” See also paragraph (b)(2).</p> <p>c. The Commission disagrees. With appropriate disclosures, including those required by paragraph (d) and those required under proposed Rule 1.0.1(e),<sup>4</sup> a person should be permitted to provide informed advance consent.</p>

<sup>4</sup> Proposed Rule 1.01(e) provides:

(e) “Informed consent” means a person’s agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>renders the duty dispensable. We feel it is indispensable.</p> <p>3. Most Attorneys Are Poorly Suited to Assess a Client's Capacity.</p> <p>If proposed Rule 1.14 is adopted, a prerequisite for an attorney taking self-directed "protective action" would be the attorney's determination that the client lacks sufficient capacity to protect himself from harm. Nothing in American legal education prepares an attorney to make such a determination. If physicians trained and experienced in assessing cognitive capacity produce largely unreliable capacity assessments, we are certain that assessments by attorneys will be entirely untrustworthy. Having such untrustworthy assessments used as a central justification for disregarding the most fundamental tenet of the attorney-client relationship is foolhardy.</p>	<p>3. The proposed rule does not mandate that the lawyer take steps to protect the client's interests as provided in the rule but only permits the lawyer to do.</p> <p>As to the assertion that lawyers are ill-equipped to evaluate clients, the Commission notes the lawyer must have a reasonable belief (see Rule 1.0.1(h) and (i)). This means having an objectively reasonable belief. Comments (2) and (3) provide some guidance. A possible additional protection of requiring a certificate of significant diminished incapacity from a qualified and trained medical professional may not always be available or practical if the client faced with imminent harm.</p> <p>Further, as noted below in response to the commenter's suggested changes to the rule, there are protections written into the rule.</p>

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>4. <u>Guidance to Representing Clients with Diminished Capacity is Needed.</u></p> <p>Despite our objections to the concept of attorneys taking “protective action” on behalf of clients, we believe proposed Rule 1.14 would be helpful to attorneys if it did the following:</p> <p>a. Clarify that the default position for any attorney is that their clients have both autonomy in decision-making and that the attorney has a nearly absolute duty to maintain client confidentiality, regardless of the client’s perceive capacity.</p> <p>b. Remind attorneys of their duty to provide disability-related accommodations to clients with physical and mental impairments.</p> <p>•c. Promote the use of supported decision-making, with the client’s consent, allowing the client to choose supporters to help them make and communicate choices and ensure the confidentiality and privilege of those communications.</p>	<p>4. The Commission has responded to each of the commenter’s suggestions below.</p> <p>a. This is already abundantly clarified in the Rule. Concerning confidentiality, see paragraph (b)(2) and Comments [3] and [5]. Concerning autonomy, see paragraph (a) and new Comment [4A].</p> <p>b. See response #1 to Disability Rights California, X-2016-94, above.</p> <p>c. The proposed rule already addresses the concept of seeking assistance with obtaining consent in (c)(2). To the extent the commenter is suggesting that the lawyer must obtain the client’s consent to retain the assistance of a trained professional, however, the Commission disagrees that is</p>



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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
						necessary to protect confidentiality. See Evid. Code § 952. <sup>5</sup> Otherwise, a potential “Catch 22” would be created. A lawyer who could not obtain the client’s consent without the assistance of a trained professional could never obtain the client’s consent to retain the trained professional in the first instance.
X-2016-98	Justice in Aging (Christ) (09-27-16)	Yes	M		We support the Commission’s language requiring attorneys to obtain the consent of clients before taking protective action, protecting the confidentiality of any information disclosed, and limiting the information that may be disclosed. We urge amendments to better ensure that the proposed Rule would not inappropriately compromise clients’ personal autonomy and confidentiality in situations where it is not warranted or when there are other less intrusive options, as follows:	The Commission thanks the commenter for its conditional approval of the Commission’s approach for this Rule.

<sup>5</sup> Evid. Code § 952 provides:

As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, *discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted*, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. (Emphasis added).

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>1. In evaluating whether to maintain other than “a normal lawyer-client relationship with the client,” consider the lawyer’s responsibility to provide reasonable accommodations to clients with disabilities to assist them with decision-making and to clearly communicate their wishes, pursuant to the Americans with Disabilities Act...</p> <p>2. The obligation to provide reasonable accommodations should include the lawyer permitting, with the client’s consent, the use of a third party selected by the client to assist with decision-making or communication and ensure the confidentiality and privilege of those communications.</p> <p>3. When taking protective action on behalf of a client with diminished capacity, the Rule should do the following: Make clear that the protective action can only be taken when the significant risk of harm is the result of action by a third party, either by more clearly defining the standard of “significant risk that the client will suffer substantial physical, psychological, or financial harm”</p>	<p>1. See response #1 to Disability Rights California, X-2016-94, above.</p> <p>2. See response 4.c. to Advocates for Nursing Home Reform, X-2016-103-CA, above.</p> <p>3. The Commission did not make the suggested changes. It does not believe that the rule should be limited to situations where the harm to a client with significantly diminished capacity is from another person. It also does not believe that the term “significant risk” needs clarification. The term is also used in proposed Rule 1.7, which is taken from Model</p>

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>or referencing a standard in current law such as the abuse and neglect standards defined in the California Elder Abuse and Dependent Adult Civil Protection Act... used by other professionals including financial advisors.</p> <p>4. When taking protective action on behalf of a client with diminished capacity or when seeking the assistance of a person to communicate with the client under Paragraphs (b)(2) and (c)(2), change the standard from “best interest” to “expressed interest.” In other words, the attorney should take direction based on the client’s expressed wishes rather than on what the attorney thinks is in the client’s best interest. If the interest cannot be ascertained, even with reasonable accommodations, the attorney could use a best interest standard.</p> <p>5. Regarding (d), Obtaining Advance Informed Written Consent to Take Protective Action, the Rule should include safeguards to ensure that clients</p>	<p>Rule 1.7 and the Commission is not aware of any problems that have arisen from its use. Further, “substantial” is defined in Rule 1.0.1(l) and is used in Rules 1.6 [which carries forward the relevant language of current rule 3-100), 1.13 and in other rules without reported problems.</p> <p>4. The Commission has not made the suggested change. However, it has added a new comment [4A], which is intended to clarify the term “best interests” as used in the rule. See Response 2 to Disability Rights California, X-2016-94a, above.</p> <p>5. See Response 2 to Advocates for Nursing Home Reform, X-2016-103-CA, above.</p>

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					fully understand what they are agreeing to, much in the same way that the Health Care Decisions Law...provides protections.	
X-2016-108a	Law Foundation of Silicon Valley (Morris) (9-27-16)	A	M	(b)(1)(i), (c), (d)	<p>Proposed rule as written could lead to attorneys substituting their own judgment for that of their clients, acting against their client's expressed and legal interest in order to promote the attorney's view of what is "best" for the client.</p> <p>Commenter proposes following changes to rule:</p> <ol style="list-style-type: none"> <li>1. Rule should explicitly reference duty to provide reasonable accommodations.</li> <li>2. Term "significant risk" should be more clearly defined.</li> <li>3. References to "best interest" are confusing. Client's express interest as opposed to attorney's view of client's best interest should prevail.</li> <li>4. Subsection (d) should be</li> </ol>	<p>[<b>Note:</b> This comment was originally submitted for proposed Rule 1.4 but was subsequently moved to the 1.14 table because of the substance of the comment.]</p> <ol style="list-style-type: none"> <li>1. See response See Response 2 to Disability Rights California, X-2016-94a, above.</li> <li>2. See Response 3 to Justice in Aging, X-2016-98, above.</li> <li>3. The Commission has not made the suggested change. However, it has added a new comment [4A], which is intended to clarify the term "best interests" as used in the rule. See Response 2 to Disability Rights California, X-2016-94a, above.</li> <li>4. The Commission disagrees.</li> </ol>

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					deleted. A rule that would allow attorneys to act contrary to their clients' expressed interest when they perceive their clients' decision-making capacity to be "diminished," would effectively discriminate against people with disabilities in the attorney-client relationship.	See Response 2 to Advocates for Nursing Home Reform, X-2016-103-CA, above.
X-2016-120n	LGBT Bar Association of Los Angeles (LGBT Bar of LA) (King) (09-27-16)	Yes	A		Supports adoption of proposed Rule 1.14	No response required.
X-2016-121c	California Commission on Access to Justice (CCAJ) (Hartston) (09-23-16)	Yes	A	(b)(2), (c)(2)	<p>We support the proposed rule, but offer suggestions for strengthening it. The following amendments would ensure that clients' personal autonomy and right to confidentiality are not compromised when there are less intrusive options:</p> <p>1. A client with diminished capacity should be provided with disability related accommodations. A client who consents should be permitted to use supported decision-making, through the assistance of a third party selected by the client.</p> <p>2. A client's consent should be required when obtaining the assistance of a third party to assist in communicating with and</p>	<p>1. See response See Response 2 to Disability Rights California, X-2016-94a, above.</p> <p>2. See Response 4.c. to Advocates for Nursing Home Reform, X-2016-103-CA, above.</p>

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

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
					<p>furthering client interests pursuant to Proposed Rule 1.14 (c)(2).</p> <p>3. The standard of “significant risk that the client will suffer substantial physical, psychological, or financial harm” should more clearly be defined. For example, it may be appropriate to use the standards in the California Elder and Dependent Adult Abuse Civil Protection Act, Welfare &amp; Institutions Code §§ 15630-15632.</p> <p>4. Change the standard from “best interest” to “expressed interest” in Proposed Rule 1.14 (b)(2) and (c)(2), when that interest can be ascertained, and then only if it cannot be ascertained to best interest.</p>	<p>3. See Response 3 to Justice in Aging, X-2016-98, above.</p> <p>4. The Commission has not made the suggested change. However, it has added a new comment [4A], which is intended to clarify the term “best interests” as used in the rule. See Response 2 to Disability Rights California, X-2016-94a, above.</p>