

The full text of this comment is being provided because it was not previously circulated or considered. This comment appears to have been timely submitted on 9-27-16, however, we have no record of prior receipt. This was called to our attention on 10-19-16.

September 27, 2016

**Comment on Proposed Rule # 1.14  
Client with Diminished Capacity**

**We need a rule on dealing with clients who have diminished capacity.  
The proposed rule creates more problems than it solves. Existing ABA  
Rule 1.14 is a much better rule.**

Proposed Rule 1.14(b)(1) leaves unclear, what an attorney is supposed to do in a criminal case; and is contrary to long standing case law on an attorney's duties in dependency cases.

Penal Code 1368(b) recites, "If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to Sections 1368.1 and 1369...." It is unclear if proposed Rule 1.14 intends that the Penal Code supersedes the proposed rule, or if the proposed rule attempts to circumvent the Penal Code.

In *In Re Sara D* (2001) 87 Cal App 4<sup>th</sup> 661, 667, the court stated that an attorney should first seek consent from the adult parent to appoint a guardian ad litem for that parent. But the parent does not give consent, the attorney should inform the court that the client lacks legal mental capacity, and the court should appoint a guardian ad litem. *Sara D* was cited with approval in *In Re Jessica G* (2001) 93 Cal App 4<sup>th</sup> 1180. Thus, the proposed rule would purport to overrule case law.

Proposed Rule 1.14(b)(2) recites a false premise: "Information relating to the client's diminished capacity is protected by Business and Professions Code §6068(e)(1) and Rule 1.6." The primary vice in this statement is that often the information is already known to people attempting to take advantage of the client. If the attorney cannot refer to the information, the fraudfeasor has the upper hand. This section creates a conclusive presumption and should be deleted.

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**September 27, 2016****Page 2**

Proposed Rule 1.14(c)(ii) creates a standard that requires the attorney to obtain consent from a client who is legally incapable of providing consent. The crux of the problem is, what does an attorney do in such a situation?

Proposed Rule 1.14(e) assumes that in all cases, a conservatorship is adverse to the client. In fact, in many cases the conservatorship is the precise legal method to protect the client, since the conservatee lacks legal capacity to make a contract. Prob C. 1872(b).

There is no present statute, rule, or case that gives guidance on what an attorney can do when the client appears to be lacking in legal mental capacity. Most existing ethics opinions summarily conclude that any mention of the problem to anyone other than the client violates confidentiality. They assume that protective action is adverse to the client. Both assumptions are false and leave the attorney with no option other than to withdraw and leave the client defenseless.

The power to take protective action is subject to abuse, as are many other attorney actions. In this field, the abuse is tempered when court intervention is required.

The problem is real. The sort of problems that my attorney clients have brought to me include such issues as

- (1) Children are dividing up parent's estate while parent is living with one of the children
- (2) Fraudfeasor seeks investment in risky venture from a person who is addicted to drugs
- (3) Friend of nursing home patient has rented out her home below market, and is permitting her car to be driven without insurance.
- (4) Bedridden client has asked attorney to manage her finances
- (5) Out of state relative seeks to impose conservatorship on grandparent, who prefers next door neighbor
- (6) Son has obtained conservatorship of parent, then takes over parent's residence while moving parent to nursing home

September 27, 2016

Page 3

- (7) Son sues father and stepmother for fraud after father makes stepmother a beneficiary of father's trust
- (8) Elderly person makes radical change in estate plan: Consider these scenarios
  - (a) Testator asks attorney of many decades to make the changes; or
  - (b) Testator comes to new attorney's office by appointment; or
  - (c) Testator shows up in new attorney's office with a new "friend."

The point of the foregoing list is to show that there are a myriad of difficult factual and legal issues that can arise. The ABA Rule leaves flexibility, while the proposed new rule is unworkable.

In the Third Edition of "Guide to the California Rules of Professional Conduct for Estate Planning, Trust, and Probate Counsel," §7.5, the Section asks for legislation that would not permit a petition for conservatorship but would permit the attorney to contact "individuals or entities that have the ability to take action to protect the client." That could be a spouse or other relative, the Public Administrator – somebody, rather than abandoning the client. The earlier editions of the Guide have similar asked for legislation.

The Restatement of the Law - The Law Governing Attorneys (3<sup>rd</sup> ed), the American Law Institute recites at §24(4) that an attorney may take protective action that "will advance the client's objectives" when the client has diminished capacity.

I propose that the Board recommend the existing ABA Rule in lieu of this proposed rule. Otherwise, I propose that that this proposed Rule be withdrawn.

*I have been an attorney for 45 years. For the past 25 years, I have specialized in advising attorneys on professional responsibility matters. Attorneys who have clients with diminished capacity – or appear to be totally without legal mental capacity – consult me on a regular basis. I have come to believe that some sort of flexibility is needed. I am not aware of widespread problems in ABA states that would indicate a need to use a different version of current ABA Rule 1.14.*

*Jerome Fishkin*