

Rule 1.14 Client with Diminished Capacity
(Commission's Proposed Rule Adopted on October 21-22, 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 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. A lawyer who does not take protective action as permitted by paragraph (b) does not violate this Rule.

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.

[5] In taking protective action as permitted by paragraph (b), 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. Paragraph (b) does not apply if the lawyer is unable to ascertain the client's expressed interests and objectives.

[6] 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.*

[7] Paragraph (b) 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; Penal 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.

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

TOTAL = 4 **A = 1**
D = 2
M = 1
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-24	Fishkin, Jerry (09-27-16)	N	D		<p>1. 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.</p> <p>2. 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</p>	<p>1. The Commission disagrees with the commenter's assessment that the rule is unclear or contradicts existing law regarding criminal or dependency law. Paragraph (b)(1) expressly states "Except where the lawyer represents a minor, a client in a criminal matter or a client who is the subject of a conservatorship proceeding" As paragraph (b) describes the conditions under which a lawyer may act in conformance with the rule, these exceptions clearly state that the rule does not apply in criminal or dependency matters. See also proposed Comment [7].</p> <p>2. Regardless of whether "information" about the client's situation that permits a lawyer to proceed under the proposed rule is "already known" to people who allegedly are taking advantage of a client with diminished capacity, the fact is that the lawyer only knows of such conduct by virtue of the lawyer's representation of the client,</p>

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

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					<p>refer to the information, the fraudfeasor has the upper hand. This section creates a conclusive presumption and should be deleted.</p> <p>3. 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?</p> <p>4. 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</p>	<p>typically through the client's communication or through the lawyer's investigation of the client's situation to provide competent legal service to the client. That information is privileged or confidential under § 6068(e) and rule 1.6 regardless of whether third persons are aware of the information. The lawyer is not permitted to reveal such information without the client's consent, or if disclosure is otherwise permitted under section 6068(e) without that consent.</p> <p>3. The Commission assumes the commenter is referring to paragraph (c)(1)(ii). The Commission disagrees with the commenter's premise that the described client necessarily is "legally incapable of providing consent." The Commission's research suggests otherwise. See also Comment [2] and Prob. Code § 810.</p> <p>4. Regardless of whether a conservatorship might in some instances protect the client and is arguably not adverse to the client's interests generally,</p>

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					<p>legal method to protect the client, since the conservatee lacks legal capacity to make a contract. Prob C. 1872(b).</p> <p>5. 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.</p> <p>6. The commenter cites to ABA Model Rule 1.14 & Rest (3d) Law Governing Lawyers § 24(4), which are described as providing a more flexible approach, and recommends that the Board of Trustees adopt a similar rule.</p>	<p>the Commission continues to believe that a lawyer would violate the lawyer's duty of loyalty and confidentiality owed to the client by instituting conservatorship proceedings based on information learned by the virtue of the representation.</p> <p>5. The Commission disagrees with the commenter's opinion that a lawyer's disclosure of the client's condition to third persons is not adverse or a violation of the duty of confidentiality. See points 2 & 4, above.</p> <p>6. As noted in point 2, above, the Commission has concluded that neither ABA Model Rule 1.14 nor Rest § 24(4) could be implemented in California given the constraints on the lawyer's duty of confidentiality set forth in Bus. & Prof. Code § 6068(e).</p>

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					7. The commenter cites to the Third Edition of the "Guide to the California Rules of Professional Conduct for Estate Planning, Trust, and Probate Counsel," §7.5, and notes that "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."	7. The Commission is unsure whether the commenter is suggesting that a legislative exception to § 6068(e) should be pursued. If that is the case, the commenter's suggestion is now part of the Commission's record.
Y-2016-17	California Advocates for Nursing Home Reform (CANHR) (Chicotel) (01-06-17)	Y	D	1.14	<p>CANHR continues to oppose the adoption of proposed rule 1.14. A client's contemporaneous consent to the revelation of otherwise confidential information in an effort to assist or protect the client is already permitted under the current ethical rules. In general, only mischief can come from re-stating the obvious: clients can consent to waive the confidentiality of their information.</p> <p>In particular, regarding the proposal to permit advance consent to take protective action, we disagree that the RRC-cited client protections (revocability, attorney ethical prohibitions, and requiring a separate writing) are enough to ensure that clients are</p>	<p>The Commission understands the position the commenter has taken in generally objecting to the concept of the proposed rule. However, the Commission continues to believe that the rule will achieve greater public protection than what is currently available under current California law. The basic proposition underlying the rule and which paragraph (a) expressly states is that a lawyer must strive to maintain a normal attorney-client relationship in difficult circumstances.</p> <p>Regarding the specific issue of providing notice to a client before revealing information,</p>

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					<p>giving truly informed consent to advance confidentiality waivers. Attorneys who obtain advance consent are not required to tell the client when confidential information is actually going to be revealed, thus giving the client no opportunity to make a relevant revocation.</p> <p>Accordingly, it is strongly recommended that the advance consent provisions include a requirement that clients be told of the attorney's intent to reveal confidential information in advance of the revelation - to give the client a meaningful opportunity to revoke the consent.</p> <p>We urge the Board to drop Rule 1.14 and allow clients with cognitive impairments to enjoy the same protections of their confidential information as any other client.</p>	the provisions of this rule do not exempt a lawyer from compliance with other duties. A lawyer's duty to communicate significant developments to a client (see proposed rule 1.4 and Bus. & Prof. § 6068(m)) remains applicable when a lawyer has obtained advanced consent and is deciding to act on that authorization.
Y-2016-210	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Y	M		1. OCTC supports this rule as a good compromise on this complicated and difficult issue. (See In the Matter of Karnazes (Review Dept. 2014) Case No. 10-O-334, 2014 WL 232500; In re Eugster (Wa. 2009) 209 P.3d 435.)	1. No response required.

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					<p>2. OCTC supports Comments 3, 4, 5, and 6.</p> <p>3. Comments 1 and 2 are unnecessary and in the nature of ethics opinions. Comment 7 is unnecessary, as it is already covered by the text of the rule.</p>	<p>2. No response required.</p> <p>3. The Commission continues to disagree with the commenter's assessment. As previously noted, it believes that 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. Comment [7] provides cross-references to statutory sections that are applicable in those situations where the rule is not applicable. Lawyers remain obligated to provide competent legal services to clients with diminished capacity even when not proceeding within the framework of the proposed rule. Directing the lawyers to relevant applicable law is a public protection measure.</p>

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Y-2016-7m	State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (01-06-17)		A	1.14	COPRAC generally supports the proposed rule as drafted. As we stated in our previous letter dated September 8, 2016, the Committee recognizes that the Commission believes existing confidentiality statutes preclude it from proposing a rule that includes the protections provided by Model Rule of Professional Conduct 1.14. We appreciate the fact that the Commission intends to emphasize the confidentiality constraints in the proposed rule when the Rules are submitted to the Supreme Court.	No response required.

