

Rule 1.14 Client with Diminished Capacity
(Proposed Rule Adopted by the Board on March 9, 2017)

- (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 OF PROFESSIONAL CONDUCT 1.14
(No Current Rule)
Client With Diminished Capacity

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) proposed the adoption of Rule 1.14, a new rule that has no counterpart in the current Rules of Professional Conduct. In developing the proposed rule, the Commission reviewed and evaluated ABA Model Rule 1.14 (Client With Diminished Capacity), the Restatement of the Law of Lawyering, section 24 (A Client With Diminished Capacity), current California statutory and rule sections, including Business & Professions Code § 6068(e)(1) and Probate Code §§ 810-813, and California case law relating to issues addressed by the proposed rule. Nevertheless, the Commission was also guided by a deep appreciation, assisted in part by contributions to its deliberations by representatives from the Trusts and Estates Section of the State Bar, 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. Notwithstanding that consideration, however, the Commission also recognized that California’s strict duty of confidentiality, as reflected in Business & Professions Code § 6068(e)(1) and current rule 3-100, does not permit a rule as broadly 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. The result of the evaluation is proposed Rule 1.14 (Client With Diminished Capacity).

Rule As Issued For 90-day Public Comment

The starting point for considering proposed Rule 1.14 is Business & Professions Code § 6068(e)(1), which is the statement of a lawyer’s duty of confidentiality in California. It provides it is the duty of an attorney:

(e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

The only express exception to § 6068(e)(1) is in § 6068(e)(2), which permits – but does not require – a lawyer to disclose confidential client information to prevent a life-threatening criminal act. Current rule 3-100(A) also recognizes that a client can provide informed consent to disclosure of confidential information. However, unlike the Model Rule on confidentiality, neither section 6068(e) nor current rule 3-100 recognizes that a lawyer might be impliedly authorized to take actions to advance the client’s interests. Given the foregoing *statutory* and rule constraints, a rule as broadly sweeping and permissive as Model Rule 1.14 is not possible absent conforming changes to existing California law. In recognition of that limitation, and with the understanding that a client can consent to disclosures, the Commission determined that any rule addressing the diminished capacity client must hew to two fundamental principles: First, client autonomy must be acknowledged and vindicated by maintaining to the extent possible a normal lawyer-client relationship. Second, any protective action a lawyer might take under the rule requires the client’s consent. In addition to these two basic principles, the Commission decided that, unlike the Model Rule, any action that the lawyer might take under the Rule to protect the client’s interests must be expressly limited to a specific course of conduct.

Paragraph (a) sets forth the principle underlying the Rule: Notwithstanding that a client might suffer from diminished capacity, a lawyer shall to the extent reasonably possible maintain a normal lawyer-client relationship with the client. At its heart, this requires that the lawyer recognize client autonomy and obtain the client's consent to take any action that will affect the client's substantial rights. See *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].

Paragraph (b) establishes the parameters for a lawyer taking protective action on behalf of the client. Subparagraph (b)(1) identifies three threshold conditions that must be satisfied before a lawyer can even embark on a course of conduct to seek a client's consent to take protective action: (i) a significant risk that the client will suffer substantial physical, psychological or financial harm if no protective action is taken, (ii) the client has significantly diminished capacity; and (iii) the client cannot adequately act in the client's own interest. Subparagraph (b)(2) emphasizes that regardless of what action the lawyer may take with the client's consent, such action must be in the client's best interest *and* in taking such action, the lawyer may reveal no more confidential information than is necessary to protect the client.

Unlike paragraph (a), which imposes a disciplinable duty on the lawyer, paragraph (b) is emphatically permissive, i.e., the lawyer "may, but is not required to" take steps to obtain the client's consent to take protective action.

Paragraph (c) provides a roadmap for a lawyer who determines it is in the client's best interest to seek the client's consent to take protective action. Subparagraph (1) identifies the minimal steps the lawyer must take in obtaining the client's consent. Subparagraph (2) notes that the lawyer may obtain assistance from an appropriate person, e.g., a trained professional, to communicate with the client and take the minimal steps, but cautions that the lawyer must take precautions to maintain the confidentiality of any communications.

Because the lawyer may seek the client's consent only in circumstances where the client has significantly diminished capacity, it might appear that such a client could never provide that consent. However, the Commission has been assured by experts in the disability rights field that such consent can be obtained. See also Probate Code §§ 810-813 and refer to discussion of Comment [2], below.

Paragraph (d) is also permissive and permits a lawyer to obtain a client's advance consent to the lawyer taking protective action in the future should the circumstances identified in (b)(i) to (iii) later arise. Subparagraph (d)(1) includes the important caveat that this consent is revocable at any time by the client. This is a potentially controversial provision. "Advance consents" in the arena of conflicts of interest have created substantial and pointed disagreement among lawyers and judges. The concern generally is whether the lawyer's original disclosure to the client was sufficient to support the breadth of the conflicts situations to which the client has allegedly consented. Some advance consents are very narrow and even identify the specific conflict to which the client is being asked to consent. Others are very broad and can be read to permit the lawyer or more often, the law firm, to represent a future client with interests adverse to the consenting client in situations that the consenting client might never have contemplated. The advance consent in paragraph (d), on the other hand, is drafted in such a way to permit an advanced consent limited to future protective action in the same narrowly constrained circumstances under which a lawyer might act under paragraph (b).

Paragraph (e) places further limitations on a lawyer's ability to proceed under paragraphs (c) and (d) of the rule, prohibiting a lawyer from taking actions adverse to the client (e.g., seeking a conservatorship), actions that would create a conflict under the conflicts rules, or any actions that would violate the client's Constitutional right to due process.

Paragraph (f) defines the term "protective action," a term used throughout the Rule, as being limited to notifying an individual or organization that has the ability to take action to protect the client or seeking to have a guardian ad litem appointed.

Paragraph (g). Neither paragraph (c) nor (d) mandates that a lawyer do anything. As noted, they are emphatically permissive. Paragraph (g) is a safe harbor for lawyers, whether they take protective action as authorized by the Rule, or choose not to take such action. A similar provision is found in current rule 3-100(E), which provides a discipline safe harbor concerning inaction under rule 3-100's provision permitting disclosure of confidential information to prevent life-threatening bodily injury.

Finally, non-substantive aspects of the proposed rule include rule numbering to track the Commission's general proposal to use the model rule numbering system and the substitution of the term "lawyer" for "member."

There are six comments to the Rule, all of which provide interpretative guidance or clarify how the rule should be applied. Comment [1] states the policy underlying the rule and its intent, and so explains how the rule should be applied to a contemplated course of conduct, an approved objective of a comment. Comment [2] addresses the conundrum, discussed in relation to paragraph (c), regarding how a client with significantly diminished capacity could provide consent. Importantly, it provides a reference to the Probate Code sections that emphasize the importance of respecting a client's autonomy and recognize the ability of severely compromised individuals to understand, deliberate and express preferences when provided with alternative courses of conduct. Comment [3] provides guidance on how to determine whether the client has significantly diminished capacity, including seeking the assistance of a diagnostician, and Comment [4] provides guidance on how to proceed when it is reasonably foreseeable that the client might suffer from significantly diminished capacity in the future. Comment [5] provides critical clarification of the lawyer's duty to protect confidentiality when the lawyer employs the assistance of an appropriate person, e.g., trained professional or family member, to communicate with the client. Finally, Comment [6] provides cross-references to the statutes that regulate those situations that are excepted from the rule's application, i.e., where the lawyer represents a minor, a client in a criminal matter, a client subject to a conservatorship proceeding, or a client who has a guardian ad litem.

National Background – Adoption of Model Rule 1.14

As California does not presently have a direct counterpart to Model Rule 1.14, this section reports on the adoption of the Model Rule in United States' jurisdictions. The ABA State Adoption Chart reports that twenty-seven jurisdictions have adopted Model Rule 1.14 verbatim. Nineteen jurisdictions have adopted a variation of Model Rule 1.14, and five jurisdictions have no rule at all or an entirely different rule from the Model Rule.

Post Public Comment Revisions

Text. After consideration of comments received in response to the initial 90-day public comment period, the Commission made two changes to the black letter text of proposed Rule 1.14. It added to paragraph (d) the following clause: “must be in a separate writing signed by the client and” to clarify that an advance consent permitted under the Rule must be set forth in a separate writing. The Commission also revised the safe harbor paragraph (g) to more closely conform to the grammatical and substantive structure of current rule 3-100(E) [proposed Rule 1.6(e)].

Comments. Following consideration of public comment, the Commission made several changes or additions to the comment to Rule 1.14. In Comment [2], it substituted “may have” for “often has” to more closely track the language of Probate Code § 810. It also changed the citation to “§ 810” to provide a more accurate citation for the concept stated.

In Comment [3], the Commission added the clause “a lawyer should consider the factors in Probate Code §§ 811 and 812.” This provides a more accurate citation to the guidance provided in the Probate Code. The Commission also changed the positions of “Rule 1.6” and “Business and Professions Code § 6068(e)(2) to conform to Rule citation style. The Commission made a similar change in Comment [6].

The Commission added new Comment [5] to provide interpretative guidance on the meaning of the “client’s best interests.” The Commission also made two changes to Comment [7]. First, it substituted “Paragraph (b)” for “This Rule” in the first sentence. Second, it corrected a mistaken citation by replacing “Welfare and Institutions Code § 1368 et seq.” with “Penal Code § 1368 et seq.”

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Commission Modifications to the Proposed Rule Following 45-Day Public Comment Period

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

Board’s Consideration of the Commission’s Proposed Rule on March 9, 2017

At its meeting on March 9, 2017, the Board revised the Commission’s final version of the proposed rule. Paragraph (b)(1) was revised to add a comma as follows (underscore indicates addition):

- (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.

The addition of the comma in the above language was made as a non-substantive clarifying grammatical change. The revision made by the Board makes the phrase "the lawyer may, but is not required to, . . ." consistent with the punctuation used for this same phrase as it appears in other parts of the proposed rules. (See, for example, proposed rules 1.6(b) and 4.3(a).

COMMISSION REPORT AND RECOMMENDATION: RULE 1.14

Commission Drafting Team Information

Lead Drafter: Mark Tuft

Co-Drafters: Lee Harris, Tobi Inlender, Hon. Dean Stout, Dean Zipser

I. CURRENT ABA MODEL RULE

[There is no California Rule that corresponds to Model Rule 1.14, from which proposed Rule 1.14 is derived.]

Rule 1.14 Client with Diminished Capacity

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer-client relationship with the client.
- (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial

property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as

possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Date of Vote: January 20, 2017

Action: Recommend Board Adoption of Proposed Rule 1.14

Vote: 13 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 1.14

Vote: 11 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)¹

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.

¹ At its March 9, 2017 meeting, the Board made a non-substantive change by adding a comma to paragraph (b)(1). This change is implemented in this clean version of the proposed rule. Refer to the proposed rule 1.14 executive summary for more information.

- (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.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 1.14)

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.

~~(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.~~

(e2) Information relating to the ~~representation of a client with~~ client's diminished capacity is protected by Business and Professions Code § 6068(e)(1) and Rule 1.6. ~~When~~In taking protective action ~~pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.~~ 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.

~~[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.~~

~~[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.~~

~~[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.~~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.)

~~[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).~~

Taking Protective Action

~~[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity~~

~~to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.~~

~~[63] In determining the extent of the client's~~whether a client has significantly diminished capacity, the such that the client is unable to make adequately considered decisions, a lawyer should consider ~~and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the~~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).

~~[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.~~

~~*Disclosure of the Client's Condition*~~

~~[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.~~

~~[85] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When in taking protective action pursuant to as permitted by paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one. 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.

Emergency Legal Assistance

~~[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes~~

~~to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.~~

~~[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.~~

V. RULE HISTORY

Although the origin and history of Model Rule 1.14 was not the primary factor in the Commission's consideration of proposed Rule 1.14, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 337 - 352, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016
(In response to 90-day public comment circulation):**

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.)

Commission Response: No response required.

2. OCTC supports Comments [3], [4], [5], and [6], although Comment [5] is missing the word "of" in the first line. (In obtaining the assistance [of] another person . . .")

Commission Response: No response required as to first observation. The Commission has added the missing word to Comment [5].

3. Comments 1 and 2 are more appropriate for treatises, law review articles, and ethics opinions.

Commission Response: 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, Model Rule 1.14, Cmt. [6], which is aspirational in nature.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
(In response to 45-day public comment circulation):

For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same.

- **State Bar Court:** No comments were received from State Bar Court.

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, twenty-one public comments were received. Ten comments agreed with the proposed rule, two comments disagreed, and nine comments agreed only if modified. During the 45-day public comment period, four public comments were received. One comment agreed with the proposed rule, two comments disagreed, and one comment agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony was in support of the proposed rule. That testimony and the Commission's response is also in the public comment synopsis table.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Disclosure of Confidential Information to Protect a Client with Diminished Capacity from Financial Harm. There is no provision in current rule 3-100 or Bus. & Prof. Code § 6068(e) that would permit a lawyer to disclose confidential information or take other reasonably necessary protective action involving such disclosures to protect a client with diminished capacity when the lawyer reasonably believes the client is at risk of financial harm. (Compare Model Rule 1.14.)

Informed Written Consent. Current rule 3-100 permits a lawyer to disclose information protected by Bus. & Prof. Code § 6068(e)(1) if the client gives "informed consent." (See current rule 3-100(A).) However, the consent does not have to be in writing.

Lawyer-Client Privilege. Unlike most jurisdictions in which the attorney-client privilege is created by common law, the lawyer-client privilege in California is a creation of statutory law. See Evidence Code §§ 951-962. It applies only to lawyer-client communications where the client has consulted the lawyer in the latter's professional capacity to secure legal service or advice. (Evid. Code §§ 951, 952). The lawyer-client privilege is a narrow evidentiary privilege that protects a client (and the client's lawyer) from being compelled to disclose privileged communications. (Evid. Code §§ 954, 955). The privilege can be waived. (Evid. Code § 912.) There are statutorily-created exceptions to the lawyer-client privilege. (Evid. Code §§ 956-962). A court cannot create, limit or expand a privilege in

California. (See, e.g., *Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal.4th 725, 739; *HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal.4th 54, 67.)

There are three things that should be considered when evaluating proposals involving the duty of confidentiality. First, it is important to recognize that California's treatment of confidentiality is unique. In every other jurisdiction in the country, the statement of a lawyer's duty of confidentiality resides in a rule of professional conduct that has been adopted by the jurisdiction's highest court. In California, on the other hand, the confidentiality duty is found in a statutory provision passed by the California legislature and enacted in 1871.

Second, confidentiality rules adopted in the various jurisdictions reflect the greatest variation of any rule derived from the Model Rules. For example, the rules range from some jurisdictions that *require* that a lawyer disclose confidential client information to prevent fraud, through jurisdictions that *permit* such disclosures, and on to jurisdictions that prohibit such disclosures, e.g., California. In fact, California law has the strictest confidentiality duty in the United States, with only a single exception expressly recognized in both the statutory provision and the rule.

Third, it is helpful to consider the history behind current rule 3-100 and recognize that the rule was not intended solely as a disciplinary rule. As this history will briefly attempt to recount, the rule is an outgrowth of a legislative amendment to the California statute that encompasses a California lawyer's duty of confidentiality, Business and Professions Code § 6068(e). The rule was drafted with the intent of providing guidance to lawyers practicing in California on the application of the first express exception to confidentiality in California. Understanding this intent helps explain the large number of lengthy comments that the rule contains. This history also seems to suggest that any substantive amendment to the confidentiality duty in California requires an amendment of § 6068(e). This appears especially true of exceptions to the duty.

Confidentiality Exceptions Recognized in California Statutory & Case Law. The current rule contains a single express exception to the duty of confidentiality (disclosure permitted to prevent life-threatening criminal action) as compared to seven specific express exceptions in corresponding Model Rule 1.6. Despite this discrepancy, some of the exceptions appear to be recognized in case law or have counterparts in the Evidence Code.

- Exception to secure legal advice about the lawyer's compliance with the lawyer's professional obligations, similar to Model Rule 1.6(b)(4). (See, e.g., *Fox Seachlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308-309 [106 Cal.Rptr.2d 906].)
- Exception to establish a claim or defense in a controversy between lawyer and client, which is much narrower than Model Rule 1.6(b)(5), which permits a lawyer to disclose client confidential information in third party actions. (See Evidence Code

§ 958; *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164.²) A Commission dissent argued that such an exception would permit disclosure without a court determination. However, case law recognizes limitations on such claims and defenses. See, e.g., *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1190 (“Similarly, the in-house attorney who publicly exposes the client’s secrets will usually find no sanctuary in the courts. Except in those rare instances when disclosure is explicitly permitted or mandated by an ethics code provision or statute, it is never the business of the lawyer to disclose publicly the secrets of the client.”)

- Exception to permit a lawyer to comply with a court order, similar to Model Rule 1.6(b)(6). (Compare *People v. Kor* (1954) 129 Cal.App.2d 436.)

Other Points About the Duty. The duty of confidentiality is a disciplinary standard and lawyers have been subject to discipline for violating the duty. (See, e.g., *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179 and *Dixon v. State Bar* (1982) 32 Cal.3d 728.) A violation of the duty may also give rise to non-disciplinary consequences. (See, e.g., *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256].)

Other Laws in California Relate, and Refer, to the Duty. For example, the State Bar Act expressly states that a written fee contract shall be deemed to be confidential under the duty (see Bus. & Prof. Code sec. 6149) and also provides that a paralegal is subject to the same duty of confidentiality as an attorney (see Bus. & Prof. Code § 6453).

B. ABA Model Rule Adoptions

The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 1.14: Client with Diminished Capacity,” revised September 15, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_14.pdf [Last visited on 2/7/17.]
- Every jurisdiction in the country except for California and Texas has adopted some version of ABA Model Rule 1.14. Thirty jurisdictions have adopted Model Rule 1.14

² Compare *Solin v. O’Melveny & Myers, LLP* (2001) 89 Cal.App.4th 451 [107 Cal.Rptr.2d 456] [action dismissed where law firm could not defend itself against malpractice claim filed by lawyer it had advised with respect to plaintiff lawyer’s client, and client had refused to waive privilege as to communications necessary to law firm’s defense]; *McDermott Will & Emery v. Superior Court* (2000) 83 Cal.App.4th 378 [99 Cal.Rptr.2d 622] [action dismissed in shareholder derivative action against corporation’s outside counsel where only corporation, not shareholders, could waive the privilege, corporation had not waived the privilege, and corporation’s privileged communications were necessary to the law firm’s defense.]

verbatim.³ Nineteen jurisdictions have adopted a modified version of Model Rule 1.14.⁴

IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Introduction

As part of the consideration of proposed Rule 1.14, the Commission considered the feasibility of the recommending a rule similar to ABA Model Rule 1.14 (Client with Diminished Capacity). The Commission considered various options and received input from several lawyers and organizations that represent clients with diminished capacity. The Commission elected to approve a rule consistent with the Commission's charge that addresses protective action that may be taken on behalf of a client with diminished capacity in the absence of an express exception in Business and Professions Code § 6068(e). The proposed rule and Comments are intended to be consistent with the current rules and case law while not requiring legislative action.

The proposed rule includes the following concepts and principles:

1. Lawyers representing clients with diminished capacity are required to act in the best interests of the client and, to the extent reasonably possible, maintain a normal lawyer-client relationship.
2. Protective action as defined in the rule is permitted only where a client has *significantly* diminished capacity, there is a *significant* risk the client will suffer *substantial* physical, financial or other harm, and the client cannot adequately act on the client's own behalf.
3. The lawyer's ability to take protective action is predicated on the lawyer being able to obtain the client's consent.
4. The lawyer may, but is not required to, take protective action as defined in the rule either with the client's consent or as permitted under Business and Professions Code § 6068(e)(2) and proposed Rule 1.6(b).
5. Where the client has significant diminished capacity, the lawyer must preserve client confidentiality and decision-making authority by explaining the need to take

³ The thirty jurisdictions are: Arizona, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wisconsin.

⁴ The nineteen jurisdictions are: Alabama, Alaska, Arkansas, District of Columbia, Florida, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, New York, North Dakota, Vermont, Virginia, and Wyoming.

protective action and obtaining the client's consent to take such action. The lawyer may employ the assistance of an appropriate person (such as a trained professional) in communicating with the client who is suffering from significant diminished capacity and obtaining client consent. However, in this situation the lawyer must: (1) act in the client's best interest; (2) disclose no more information that is reasonably necessary to protect the client; and (3) take all reasonable steps to ensure the disclosed information remains confidential. See, Evidence Code § 952.

6. A lawyer may obtain advance informed consent to take limited protective action from a client without diminished capacity provided the advance consent include certain written disclosures provided in paragraph (d).
7. A lawyer who takes protective action under the rule is not authorized to take any action that is adverse to the client, including filing a conservatorship petition, to take any action on behalf of a person other than the client that the lawyer would not be able to take under proposed Rule 1.7 or 1.9, or take any action that would violate the client's right to due process of law.
8. The rule is limited to permitting the lawyer to take protective action by either: (1) notifying an individual or organization that has the ability to take action to protect the client; or (2) seeking to have a guardian ad litem appointed.
9. A lawyer is not subject to discipline that chooses to take, or not to take, protective action authorized by the rule.

B. Concepts Accepted (Pros and Cons):

1. Adopt Paragraph (a): Duties Owed Client with Diminished Capacity. This paragraph establishes the principle that even though a client may suffer from diminished capacity, the lawyer must, as is reasonably possible, maintain a normal lawyer-client relationship with the client.
 - Pros: It is important for lawyer's to respect client autonomy and decision making authority as much as is reasonably possible as a general principle. This obligation requires the lawyer to obtain the client's consent prior to taking any action that will affect the client's substantial rights. See, *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404.
 - Cons: Lawyers are not medical professionals and not properly trained to determine when a client is suffering from diminished capacity.
2. Adopt Paragraph (b): Taking Protective Action on Behalf of a Client With Significantly Diminished Capacity. This paragraph establishes the conditions for when a lawyer may take protective action on behalf the client.
 - Pros: Clients in California, particularly elderly clients and those consuming legal services in the trust and estate area, are subject to serious harm by

others taking advantage of their condition when they suffer from significantly diminished capacity. The Commission recognizes the restrictions imposed upon lawyers in California under Bus. & Prof. Code § 6068(e); however, this rule limits the lawyer by prohibiting the lawyer from revealing no more confidential information than is reasonably necessary to protect the client from significant harm. Every jurisdiction other than California and Texas has adopted some version of Model Rule 1.14.

- Cons: This paragraph is permissive and therefore is not a clear and enforceable minimum disciplinary standard. Further, by taking protective action through the notification of a third-party, this invariably will result in the disclosure of a client's confidential information.
3. Adopt Paragraph (c): Obtaining Consent To Take Protective: This paragraph states what steps the lawyer must take prior to taking protective action on behalf of a client with significantly diminished capacity.
- Pros: The rule preserves client autonomy by requiring that the lawyer first obtain the client's consent before taking action authorized by paragraph (b), including explaining to the client the need to take the protective action. In response to a critique that a client with diminished capacity cannot provide consent; the Commission has been assured by experts in the disability rights field that such consent can be obtained. See, Probate Code §§ 810-813. Further, communications with third-persons who are present to further the interest of the client or those whom disclosure is reasonably necessary for the transmission of the information are protected by the attorney-client privilege under Evidence Code § 952. See also, Comment [5].
 - Cons: A client with diminished capacity cannot provide consent. Paragraph (c)(2) permits the lawyer to obtain the assistance of an appropriate person to help the lawyer communicate with the client in order to receive consent from the client. Such assistance would presumably involve disclosure of a client's confidential information.
4. Adopt Paragraph (d): Obtaining Advance Informed Consent to Take Protective Action: This paragraph allows a lawyer to obtain a client's consent in advance to take protective action in the event the circumstances set forth in paragraph (b)(1)(i) – (iii) should later occur.
- Pros: The advance consent is limited to situations when the lawyer reasonably believes that the circumstances set forth in paragraph (b)(1)(i) – (iii) are present and the client must be empowered with the right to revoke the consent at any time. This type of advance consent is narrow and provides clients with an option to protect themselves in advance when they believe they may later suffer from diminished capacity and they wish to prevent a third party from taking advantage of their compromised state. In response to public comment, the provision was revised to require that any advance consent be in

- a separate writing signed by the client to avoid an unscrupulous lawyer from hiding the provision in a lengthy engagement agreement.
- Cons: This paragraph is permissive and therefore is not a clear and enforceable minimum disciplinary standard. Further, advance consents, at least concerning conflicts of interest, are an unsettled area of law. Should not adopt a rule of professional conduct permitting use of advance consent in such a delicate area concerning mental health when the threshold issue of whether advance consent is upheld typically turns on whether the client received adequate and sufficient disclosure concerning the issue the client is consenting to in advance. In some circumstances, it may be difficult to examine the client to determine whether he or she was aware of what they had consented to when they later suffer from a significantly diminished capacity.
5. Adopt Paragraph (e): Restrictions on Lawyer's Actions: This paragraph limits the actions the lawyer may take under paragraphs (b) and (c).
- Pros: It is important to inform the lawyer what this rule does not permit and to protect the client from any potential overreaching by the lawyer. Under this rule a lawyer may not take any action adverse to the client, including filing for a conservatorship. The lawyer must abide his or obligations to the client under the conflicts of interest rules. And the lawyer may not violate the client's due process rights. All of the limitations are appropriate in order to protect the client.
 - Cons: None identified.
6. Adopt Paragraph (f): Definitions: This paragraph defines the term "protective action" which is used throughout the rule.
- Pros: It is important to inform lawyers that the rule only permits a lawyer to notify an individual or organization that is able to take protective action, or seek to have a guardian ad litem appointed. It is client protective to authorize only limited, specific, conduct by the lawyer for the client's behalf and to prevent overreaching by the lawyer. Also, it is important to remember the lawyer is only authorized to take this action if he or she receives the client's consent.
 - Cons: None identified.
7. Adopt Paragraph (g): Discipline: This paragraph provides a safe harbor for lawyers by stating a lawyer who does not take action permitted by paragraph (b) does not violate the rule.
- Pros: Because both paragraph (c) and (d) are permissive, the lawyer is not required to do anything. This provision makes clear that a lawyer dealing with a client who suffers from diminished capacity does not violate the rule if the lawyer chooses not to attempt to obtain consent from the client in order to

inform an individual or organization that has the ability to take action to protect the client. A similar provision is found in current rule 3-100(E) which similarly provides that a lawyer does not violate rule 3-100 if the lawyer chooses not to disclose confidential information from a client as permitted by that rule to prevent life-threatening bodily injury.

- Cons: Such a provision reinforces the permissiveness of the rule and results in a rule that is not a clear and enforceable minimum disciplinary standard.

8. Adopt seven Comments, all of which provide interpretative guidance regarding the meaning or application of the proposed rule:

Comment [1] states the policy underlying the rule and its intent, and so explains how the rule should be applied to a contemplated course of conduct, an approved objective of a Comment.

Comment [2] addresses the conundrum, discussed in relation to paragraph (c), regarding how a client with significantly diminished capacity could provide consent. Importantly, it provides a reference to the Probate Code sections that emphasize the importance of respecting a client's autonomy and recognize the ability of severely compromised individuals to understand, deliberate and express preferences when provided with alternative courses of conduct.

Comment [3] provides guidance on how to determine whether the client has significantly diminished capacity, including seeking the assistance of a diagnostician.

Comment [4] provides guidance on how to proceed when it is reasonably foreseeable that the client might suffer from significantly diminished capacity in the future.

Comment [5], added in response to public comment questioning how a lawyer is to determine what is in the client's best interests. The Comment emphasizes that a lawyer may not substitute the lawyer's own judgment in deciding what is in the client's best interests, but rather must abide by the client's expressed interests and decisions regarding the objective of the representation.

Comment [6] provides critical clarification of the lawyer's duty to protect confidentiality when the lawyer employs the assistance of an appropriate person, e.g., trained professional or family member, to communicate with the client.

Comment [7] provides cross-references to the statutes that regulate those situations that are excepted from the rule's application, i.e., where the lawyer represents a minor, a client in a criminal matter, a client subject to a conservatorship proceeding, or a client who has a guardian ad litem.

- Pros: The proposed rule has been drafted to address a complex situation that requires a lawyer to exercise utmost care and good judgment to protect the

interests of the client. Although care has been taken to draft the black letter text clearly and succinctly, additional guidance is required to assist a lawyer in understanding how to proceed. Such an approach is particularly important and appropriate in situations, such as this, where a client's confidences can be put at risk if the lawyer fails to understand and follow the framework set forth in the permissive black letter provisions.

- Cons: The number and length of the Comments suggest that black letter text does not set forth sufficiently clear and articulable standards as is required under the Commission's Charter.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Concepts Rejected (Pros and Cons):

1. Draft a rule that recognizes an implied authority for the lawyer to disclose confidential information relating to the client when the client has significantly diminished capacity and there is a significant risk the client may suffer substantial harm unless protective action is taken.
 - Pros: The ABA Model Rule is predicated on implied authority, as are the majority of states who have adopted a Rule 1.14 derived from the Model Rule. Allowing California adopt a similar provision would conform California to the preponderance of states that have this rule, helping to promote a national standard.
 - Cons: California is unique in that it is limited by the statutory obligation imposed upon lawyers to preserve the client's secrets, at every peril to the lawyer's self, under Bus. & Prof. Code § 6068(e). Further, there is no known California Supreme Court authority regarding the implied authority to disclose confidential information.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

D. Non-Substantive Changes to the Current Rule:

None.

E. Alternatives Considered:

See Section IX.A, above. The main alternative considered was whether this rule could include a provision authorizing a lawyer to make a report to a person or entity outside of

the lawyer-client relationship even if the client has not given consent to do so. The Commission concluded that this alternative would conflict with the statutory duty of confidentiality and the statutory lawyer-client privilege.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.14 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.14 in the form attached to this Report and Recommendation.