

To: Rules Revision Commission

From: Rule 3-100[1.6/1.14] Drafting Team [Mark Tuft, Lee Harris, Judge Stout, Dean Zipser]

Re: Proposed Rule 1.14 (Client with Diminished Capacity)

Date: January 6, 2016

As part of its assignment, the Rule 3-100 Drafting Team was asked to consider the feasibility of the Commission recommending a rule similar to Model Rule 1.14 (Client with Diminished Capacity).¹ In response to the Drafting Team's request for further guidance from the Commission at the August 14, 2015 meeting, the Commission directed the Drafting Team to draft a rule consistent with the Commission's charge that addresses protective action that can be taken on behalf of a client with diminished capacity in absence of an express exception in Business and Professions Code §6068(e). The Drafting Team has considered various options and impute from several lawyers and organizations that represent clients with diminished capacity. The attached proposed rule and comments intended to be consistent with the current rules and case law and not require legislative action.

The rule includes the following concepts and principles:

1. Lawyers representing clients with diminished capacity are required to act in the best interest of the client and, to extent reasonable possible, to 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. Protective action is limited to matters that relate to the representation of the client.
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 §6068(e)(2) and Rule 3-100(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 protective action and obtaining the client's consent to take such action. The lawyer may employ the assistance of a family member or a trained professional or skilled facilitator in communicating with the client with significant diminished capacity and obtaining client consent, provided the communications remain privileged under Evidence Code §952.
6. A lawyer may obtain advance informed written consent to take limited protective action from a client without diminished capacity provided the advance consent include certain written disclosures as provided in paragraph (d).

¹ At present, every jurisdiction in the country except California and Texas has adopted some version of Model Rule 1.14.

7. Protective action under the rule is limited to:
 - a. Matters relating to the representation;
 - b. notifying an individual or organization that have the ability to protect the client from substantial physical, financial or other harm (or possibly seeking the appointment of a guardian ad litem in a litigation matter).
8. In taking protective action, the lawyer must act in the client's best interest and may not take action on behalf of another person that the lawyer would not be able to take under Rule 1.7 or that would violate the client's right to due process of law.
9. In taking protective action, the lawyer may not disclose more information than is reasonably necessary to protect the client from substantial harm.
10. With the exception of paragraph (a), the rule does not apply to clients who are (i) minors, (ii) involved in criminal matters, (iii) who are conserved or (iv) who have a guardian or other person legally entitled to act for the client.
11. A lawyer is not subject to discipline who chooses to take, or not to take, protective action authorized by the rule.

Rule 1.14 Client with Diminished Capacity

- (a)¹ 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 act in the best interest of the client and, as far as reasonably possible, maintain a normal lawyer-client relationship with the client.
- (b)² Taking Limited Action on Behalf of a Client With Significantly Diminished Capacity. Except where the lawyer represents a minor, a client in a criminal matter, or a client who is the subject of a conservatorship or who has a guardian or other person legally entitled to act for the client, when the lawyer reasonably believes that:
- (1)³ the client has significantly diminished capacity such that the client is unable to make adequately considered decisions in a matter related to the representation,

¹ **Paragraph (a)** is based on the introductory clause to Model Rule 1.14. The clause, “shall act in the best interest of the client,” is derived from Restatement §24(1) and is intended to underscore that actions permitted under paragraphs (c) and (d) must always be in the best interest of the client.

Importantly, any action that a lawyer is permitted to take under this Rule is limited to “decisions in connection with the representation.” The lawyer is not given *carte blanche* to insert himself or herself generally into the client’s matters but only those matters related to the representation.

Headings are used throughout this rule to facilitate a reader’s understanding of what is permitted under the Rule. New Mexico takes a similar approach in its Rules.

² **Paragraph (b)** establishes the requirements that must be present for the application of the rule’s provisions.

The introductory clause (i) identifies four categories of person/client that are excepted from the rule’s application and (ii) sets out the standard (a lawyer’s “reasonable belief”) that must be satisfied for the lawyer to take protective action on the client’s behalf. “Reasonable belief” is a defined term in MR 1.0(i), which provides: “‘Reasonable belief’ or ‘reasonably believes’ when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.”

³ **Subparagraphs (b)(1) to (3)** establish three conditions that must be satisfied under the foregoing standard before the lawyer may take protective action to protect the interests of a client with significantly diminished capacity.

Subparagraph (1) limits these actions to (i) a client with *significantly* diminished capacity and (ii) decisions with respect to matters that are related to the representation. See note 1.

Subparagraphs (2) and (3) require a “significant risk” of harm to the client and the fact that the client cannot act in the client’s own interest.

- (2) there is a significant risk that the client will suffer substantial physical, financial or other harm unless protective action is taken, and
- (3) the client cannot adequately act in the client's own interest,

[Alt-a] the lawyer, may, but is not required to, notify an individual or organization that has the ability to take action to protect the client, provided the lawyer has obtained the client's consent as provided in paragraph (c) or (d).⁴

[Alt-b] the lawyer, may, but is not required to, take action to protect the client's interests, including (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, provided the lawyer has obtained the client's consent as provided in paragraph (c) or (d).⁵

- (c) **[ALT1] Obtaining Consent of a Client with Significantly Diminished Capacity.**⁶

⁴ The last clause of paragraph (b) describes the limited protective action a lawyer is permitted to take, and further limits a lawyer's authority to those situations where the lawyer has been able to obtain the client's consent as provided in paragraph (c) or (d). The drafting team bases its recommendation to limit the ability of a lawyer to act to those situations where the lawyer has obtained the client's consent on the following factors: (1) there is no exception to confidentiality in Bus. & Prof. Code § 6068(e) that would permit such disclosures except where there is evidence of a crime reasonably likely to result in death or substantial bodily harm; (2) the question whether lawyers have "implied authority" to make disclosures of client confidential information has not been decided in California and neither §6068(e) nor the current rules includes the concept of "implied authorization." (compare, Model Rules 1.6(a) and 1.14(c)); (3) Rule 3-100(a) authorizes disclosure of information protected by §6068(e) with the client's informed consent; (4) the drafting team is informed that clients with diminished capacity often have the ability to understand and reach conclusions about matters affecting their own well-being, sometimes with the assistance of a professional facilitator. There are two alternative end clauses of paragraph (b):

Alt-a only permits a lawyer, with the client's consent, to notify an individual or organization that has the ability to take action to protect the client, e.g., Adult Protective Services or a family member. **Alt-b** is described in the next note.

⁵ **Alt-b**, in addition to permitting the lawyer to notify individuals or organizations that can act to protect the client, also would permit a lawyer to seek to have a guardian ad litem appointed to protect the client's interests in litigation matters pursuant to CCP §§372-376. Again, however, a lawyer's authority to seek such appointment is limited to when the lawyer has obtained the client's consent under paragraph (c) or (d).

⁶ **Paragraph (c), ALT1**, sets forth a process by which a lawyer might obtain the consent of a client with significantly diminished capacity. Each of the three subparagraphs (1) through (3) is described in the following footnotes. The drafting team is unanimous in recommending recommend adoption of this provision.

The drafting team also discussed the concepts contained in an alternative provision, **ALT2**, which is set out in **note 10, below**. ALT2 is not being recommended for consideration by the (footnote continued)

- (1)⁷ Information relating to the client's diminished capacity is protected by Business and Professions Code § 6068(e)(1) and Rule 1.6. Before taking protective action as authorized by this Rule, 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 specific action as provided in paragraph (b), and (ii) obtaining the client's consent to take the recommended action.
- (2)⁸ In seeking the consent of a client with significantly diminished capacity to take specific action to protect the client in connection with a matter related to the representation, the lawyer may employ the assistance of another person, such as a family member or trained professional to assist the lawyer in communicating with the client, provided the communications remain protected by the attorney-client privilege pursuant to Evidence Code § 952.
- (3)⁹ In taking protective action as authorized by this paragraph, the lawyer must act in the client's best interest and must disclose no more information than is reasonably necessary to protect the client from substantial harm in

Commission but is being presented as a **concept considered but rejected**. As noted in note 4, the drafting team is not recommending adoption of the concept that, absent client consent or a life-threatening criminal act, (see Rule 3-100), a lawyer has implied authority to disclose the confidential information of a client with significantly diminished capacity to protect that client, even if the disclosure is limited to the notification permitted under paragraph (b) of the Rule.

⁷ **Subparagraph (1) of paragraph (c)** notes that a lawyer proceeding under this paragraph must take all steps reasonably necessary to protect client confidentiality and autonomy, and describes the minimum disclosure that must be made to the client for taking action to protect the client. A consent under this paragraph will authorize a lawyer's action only to the extent permitted by paragraph (b), i.e., notifying others in a position to protect the client.

⁸ **Subparagraph (2) of paragraph (c)** describes a permissible approach to obtaining consent of a client with diminished capacity to take protective action authorized by the rule. Consistent with the provisions of Evidence Code §952, a lawyer may employ the services of a family member or trained professional to assist the lawyer in communicating with the client. As noted in relation to subparagraph (b)(1), a lawyer could seek consent only as to decisions on matters related to the representation. The reference to Evid. Code § 952, is included to caution the lawyer that precautions must be taken to ensure the privileged nature of lawyer-client communications are maintained. See also Comment [5], below.

⁹ **Subparagraph (3) of paragraph (c)** cautions that in taking protective action, the lawyer must limit any disclosures to third persons to information that is necessary to protect the client from substantial harm in a matter related to the representation. Similar language is used in current rule 3-100(D), which provides:

(D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.

a matter related to the representation given the information known to the lawyer at the time of disclosure.¹⁰

(d)¹¹ Obtaining Advance Informed Written Consent to Take Limited Protective Action.

¹⁰ **Paragraph (c), ALT2**, is a concept considered but rejected by the drafting team. As noted, the drafting team rejected this provision because it would have required accepting the concept of a lawyer's implied authority to disclose confidential information protected by Bus. & Prof. Code § 6068(e)(1). (See notes 4 and 6, above.) **ALT2** provided:

- (c) [ALT2] Limited Authority to Protect Interests of Client with Significantly Diminished Capacity.
- (1) Information relating to the client's diminished capacity is protected by Business and Professions Code § 6068(e)(1) and Rule 1.6. Before taking protective action as authorized by this Rule, 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 specific action as provided in paragraph (b), and (ii) obtaining the client's consent to take the recommended action.
 - (2) In seeking the consent of a client with significantly diminished capacity to take specific action to protect the client in connection with a matter related to the representation, the lawyer may employ the assistance of another person, such as a family member or trained professional to assist the lawyer in communicating to the client those disclosures required to obtain the client's consent, provide the communications remain protected by the lawyer-client privilege pursuant to Evidence Code § 952.
 - (3) If, after making all reasonable efforts to communicate with the client and obtain the client's consent, the lawyer is unable to obtain the client's consent, and no other action is available to the lawyer that is reasonably likely to protect the client from the threatened harm, the lawyer may, but is not required to, take protective action as provided in paragraph (b).
 - (4) In notifying such individual or organization, the lawyer must disclose no more information than is reasonably necessary to protect the client from substantial harm in connection with the representation given the information known to the lawyer at the time of disclosure.

ALT2 largely tracks ALT1 but differs in subparagraph (3), which permits a lawyer to take protective action as permitted under paragraph (b) even without client consent, so long as the lawyer has made all reasonable efforts to obtain that consent.

¹¹ **Paragraph (d)** allows a lawyer to obtain an advance written informed consent that would permit a lawyer to take limited protective action as permitted by paragraph (b) so long as the requirements of subparagraph (1) are satisfied.

Although the advance consent would have to an informed written consent, the drafting team does not recommend defining in this Rule the terms "informed consent" or "informed written (footnote continued)

(1)¹² **[Alt-a]** A lawyer may obtain a client’s advance informed written consent to take action to protect the client interests in the event the client suffers from significantly diminished capacity. An advance consent under this paragraph shall be limited to authorizing the lawyer to disclose information protected by Business and Professions Code §6068(e) and Rule 1.6 to notify an individual or organization that has the ability to protect the client from the substantial physical, financial or other harm. The advance consent must include the following written disclosures:

- (i) the authorization to disclose information is intended to be valid only in circumstances where the lawyer reasonably believes that the client has significantly diminished capacity; and

consent” as those terms are currently under consideration by the rule 1-100(B) [1.0.1] drafting team. (See Agenda Materials for proposed Rule 1.0.1 to be considered at the January 22-23, 2016 meeting.

¹² There are two versions of **subparagraph (d)(1)** for the Commission’s consideration. A majority of the drafting team favors **Alt-a**, which does not limit the availability of an advance consent to situations where is it “reasonably foreseeable” that the client may become significantly diminished and not be able to act to protect himself or herself against threatened harm. Under **Alt-a**, a lawyer would be able to obtain any client’s advance consent, regardless of whether there is something in the client’s family’s history or a recent diagnosis that would make a client’s impending significant diminished capacity “reasonably foreseeable”.

Favoring **Alt-a**, i.e., the non-limiting approach is the concern that often a client’s future condition is not reasonably foreseeable and the client should be given the option to authorize the lawyer to protect the client. In any event, the actions that a lawyer may take under an advance consent is very limited, which obviates the concern that the lawyer would take unscrupulous advantage of the client’s diminished condition. Further, there is a concern that if “reasonably foreseeable” were the test, it would raise difficult problems of proof for a lawyer who attempts to act in the client’s best interests on the basis of the advance consent. As the argument that the provision would become boilerplate in a retention agreement, that is contradicted by the requirement that the client must give informed written consent, requiring a specific written disclosure.

In favor of **Alt-b**, i.e., limiting advance consents to situations where it is reasonably foreseeable the client will become diminished and unable to protect himself or herself is the concern that the consent would become a standard provision in a retention agreement. There is a further concern that the client will not fully comprehend what she is agreeing to – waiving control of confidential information and autonomy – unless there is a specific, foreseeable set of circumstances that the advance consent is intended to address. The “reasonably foreseeable” standard does not raise difficult problems of proof because it is an objective standard and is used in other lawyer conduct rules (e.g., Rule 3-310(A)). The “reasonably foreseeable” standard protects clients from having to make critical decisions that affect their autonomy where there is no foreseeable need. The standard limits advance consent to situations where protective action is reasonably necessary for the lawyer to carry out the representation and avoids over-reaching and unnecessary interference with the right of clients to manage their affairs.

- (ii) the client retains the right to revoke or modify the advance consent at any time.
- (1) **[Alt-b]** When it is reasonably foreseeable that a client's capacity to make informed decisions in matters related to the representation may become significantly diminished such that the client will not be able to adequately act in the event there is a significant risk that the client will suffer substantial physical, financial or other harm, the lawyer may obtain the client's advance informed written consent to take action to protect the client interests in the event the client suffers from significantly diminished capacity. An advance consent under this paragraph shall be limited to authorizing the lawyer to disclose information protected by Business and Professions Code §6068(e) and Rule 1.6 to notify an individual or organization that has the ability to protect the client from the substantial physical, financial or other harm. The advance consent must include the following written disclosures:
- (i) the authorization to disclose information is intended to be valid only in circumstances where the lawyer reasonably believes that the client has significantly diminished capacity; and
 - (ii) the client retains the right to revoke or modify the advance consent at any time.
- (2)¹³ When taking protective action pursuant to an advance consent under this paragraph, the lawyer must act in the client's best interest and may disclose no more information than is reasonably necessary to enable the individual or organization to take action to protect the client in a matter related to the representation, given the information known to the lawyer at the time of disclosure.
- (e) Restrictions on Lawyer's Actions. Neither paragraph (c) nor (d) authorizes the lawyer to take any action on behalf of a person other than the client that the lawyer would not be permitted to take under Rule 1.7.¹⁴ Neither paragraph (c) nor (d) authorizes the lawyer to take 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.

¹³ Subparagraph (2) of paragraph (d) is identical to subparagraph (3) of paragraph (c). See note 9, above.

¹⁴ The reference to Rule 1.7 [3-310] is intended to require lawyers to avoid conflicts of interest in taking protective measures on behalf of clients with diminished capacity.

- (f)¹⁵ Discipline. Neither a lawyer who takes protective action as authorized by this Rule, nor a lawyer who chooses not to take such action, is subject to discipline[, nor is a lawyer who obtains an advance informed written consent that complies with paragraph (d)].

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 in matters related to the representation.¹⁶

[2] In determining whether a client has significantly diminished capacity such that the client is unable to make adequately considered decisions related to the representation, a lawyer may be required to seek information or guidance from an appropriate diagnostician or other qualified medical service provider. In doing so, the lawyer may not reveal client confidential information without the client's authorization or except as otherwise permitted by these Rules. See Rule 1.6(b) and Business and Professions Code § 6068(e)(2).¹⁷

¹⁵ **Paragraph (f)** is modeled on rule 3-100(E), which states: "(E) A member who does not reveal information permitted by paragraph (B) does not violate this rule," and comment [4] to that rule, which states in relevant part: "A member who reveals information as permitted under this rule is not subject to discipline."

In addition, the last clause that excepts from discipline a lawyer who obtains an advance consent in compliance with paragraph (d), is placed in brackets and presented as an open issue for the Commission to decide. Those who favor not including it point out that protective action taken – or not taken – as permitted by an advance consent would be "protective action as authorized by this Rule," so it is already covered. Those who favor its inclusion are concerned, given the mixed reception afforded advance consents to conflicts in case law, that even the act of obtaining an advance consent might be viewed as subjecting a lawyer to discipline.

¹⁶ In addition to stating the purpose of the Rule, Comment [1] is intended clarify that the rule limits the lawyer's discretion to take protective measures to protect a client with significantly diminished capacity only in connection with the representation. Cf. Massachusetts rule 1.14(b).

¹⁷ Comment [2] is intended to take the place of comment [3] in RRC1's version of the rule, which provided guidance on what constitutes "substantial diminished capacity." It is beyond the scope of the Commission's charge to provide such guidance and attempting to define what constitutes "significantly diminished capacity" could undermine the client's right to have a court make that determination under the Probate Code. The comment also reminds lawyers that in seeking guidance, the lawyer is not authorized to reveal client confidential information, including the client's diminished capacity. The comment also cross references proposed Rule 1.6(b), which would apply if the risk of substantial bodily harm involves a criminal act.

RRC1's Comment [3] provided:

[3] As used in paragraph (b), "significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a
(footnote continued)

[3] Paragraph (b) does not apply in the case of a client who is (1) a minor, (2) involved in a criminal matter, (3) is the subject of a conservatorship; or (4) has a guardian or other person legally entitled to act for the client. The rights of such persons are regulated under other statutory schemes. See Family Code §3150; Welfare and Institutions Code §1368 et seq.; Lanterman-Petris-Short Act, Welfare and Institutions Code Division 5, Part 1, §5000-5579; Probate Code, Division 4, Parts 1-8, §1400-3803; [Code Civ. Pro. §§ 372-376].¹⁸

[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 in matters related to a representation, 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 1.4.¹⁹

[5] In employing another person such as a family member or a trained professional to assist in communicating with the client pursuant to paragraph (c), the lawyer must keep the client's interests foremost and must look to the client, and not the other person, for authorization to take protective measures on the client's behalf. See Evidence Code

representation” shall mean that the client is materially impaired in his or her capacity to understand and appreciate the rights and duties affected by the decision and the significant risks, consequences and reasonable alternatives involved in the decision, as described in Probate Code section 812, by virtue of a deficit in mental function of the types described in Probate Code section 811. However, the reference herein to relevant portions of the Probate Code is intended only to provide guidance to a lawyer who seeks to take protective action pursuant to paragraph (b) and does not require the lawyer to seek a legal determination that the client meets the standards of incapacity under Probate Code section 811 et seq. In appropriate circumstances, lawyers are encouraged to seek guidance from an appropriate diagnostician, but a lawyer who seeks such guidance must advise the diagnostician of the confidential nature and circumstances of the consultation. In addition, the lawyer should request the diagnostician to maintain the information disclosed in confidence.

¹⁸ Comment [3] is based on RRC1's Comment [9]. The only change is to add a fourth category of persons excepted from the scope of the rule, those clients who have “a guardian or other person legally entitled to act for the client,” and add a citation to the Code of Civ. Procedure.

¹⁹ Comment [4] is included to provide guidance to lawyers on potential duties a lawyer might have when it is reasonably foreseeable that a client will likely be unable to make adequately considered decisions in matters related to a representation. It also contains an important reminder that the lawyer may have a duty to communicate those concerns under Rule 1.4(b) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”)

§952. The lawyer must advise a person who assists the lawyer in communicating with the client that the person is not authorized to disclose information protected by Business and Professions Code § 6068(e)(1) to any third person.²⁰

[6] A lawyer may be required to make reasonable accommodations for clients with disabilities that will permit the clients to enjoy the provision of full and equal legal services provided by the lawyer. See California Civil Code §51 (Unruh Civil Rights Act).²¹

[7] This Rule does not authorize a lawyer to take any action that is adverse to the client, including filing [a guardianship or]²²conservatorship petition concerning the client.

²⁰ Comment [5] is included to explain a lawyer's duties to protect privileged communications with a client when a third person is employed to assist in communicating with the client.

²¹ Comment [6] is carried over from the last sentence in RRC1's Comment [1].

²² The phrase "a guardianship or" is placed in brackets pending decision regarding Alt-b of paragraph (b).