RRC2 – Rule 3-100 [1.6][1.8.2][1.14]
Post-Agenda E-mails, etc. – Revised (January 19, 2016)
Zipser (Lead), Harris, Rothschild, Stout & Tuft

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January 12, 2016 OCTC Memo to RRC2:

* * *

H. ABA Model Rule 1.14: Client with Diminished Capacity

ABA Model Rule 1.14 attempts to address difficulties that arise in an attorney-client relationship, including providing exceptions to the rules of confidentiality, when the client suffers diminished capacity. However, the rule presents certain challenges. It recommends exceptions to the rules of confidentiality that exceed those provided in Business and Professions Code, section 6068(e). It also relies on attorneys to assess the abilities of their clients in areas the attorney may not be trained or qualified to assess. The rule is more aspirational than it is enforceable.

In short, the issues addressed by Model Rule 1.14 are significant. However, it is not clear that those issues are best addressed within the Rules of Professional Conduct. Additionally, if decisions are to be made for someone incapable of acting for themselves, greater oversight should be provided by the court than that suggested by Model Rule 1.14.

January 12, 2016 Tuft Email to Drafting Team, cc Difuntorum & Mohr:

I do not believe OCTC's comments regarding Rule 1.14 require another conference call of the drafting team. Let me know if you disagree.

January 12, 2016 Rothschild Email to Drafting Team, cc Difuntorum & Mohr:

I agree. I think we have addressed OCTC's concerns with the ABA rule.

January 12, 2016 Stout Email to Drafting Team, cc Difuntorum & Mohr:

I agree. Thanks.

January 12, 2016 Harris Email to Drafting Team, cc Difuntorum & Mohr:

I agree.

January 12, 2016 Zipser Email to Drafting Team, cc Difuntorum & Mohr:

Same.

January 16, 2016 Kehr Email re 1.14 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

<u>Editor's Note</u>: Please refer to the January 19, 2016 Harris Email re 1.14 to Drafting Team, cc Difuntorum, Mohr, McCurdy & A. Tuft:, below, which gathers in one place Mr. Kehr's original comments and the responses of drafting team members.

Here are my thoughts on this draft ---

1) In paragraph (b)(1) and in several other places, the proposed is Rule limited to potential client harm that is related to the lawyer's representation of the client. That limitation is not so

obvious either in the first Commission version or in the Model Rule, and this paragraph (b)(1) seems to conflict with paragraphs (b)((2) and (3). What, then, if a lawyer represents a client in, say, a tort matter but comes to learn that a client having diminished capacity is subject to efforts to cause the client to change the client's estate plan? I don't think this is a point that we should leave unclear.

2) In both version of paragraph (c)(1), I would remove "diminished" from the first line. Isn't it any information related to the client's capacity that is protected?

3) In the second sentence of both versions of paragraph (c)(1), I am not certain of the meaning of the phrase: "...a lawyer must take all steps reasonably necessary to preserve client confidentiality ...." Does this add something to the first sentence of that paragraph, which already refers to 6068(e) and Rule 1.6? It might make sense to put the confidentiality issue in one sentence and place the distinct topic of client decision-making authority in a separate sentence. Perhaps this would work: "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 A lawyer acting under this Rule must take all steps reasonably necessary to comply with the lawyer's duties under Business and Professions Code § 6068(e)(1), Rule 1.6, and Evidence Code §§ 950, et seq. The lawyer also 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."

4) Both versions of paragraph (c)(2) use the word "employ", and this might cause confusion. What about: "...the lawyer may employ seek the assistance of another person, ..."

5) Both versions of paragraph (c)(2) end with: "...provided the communications remain protected by the lawyer-client privilege pursuant to Evidence Code § 952." My earlier suggestion includes a way to joint that with the confidentiality requirement. Also, I am concerned that the quoted phrase might be seen as making the lawyer a guarantor that the privilege will be maintained and, among other things, the lawyer cannot control what any other person will do.

6) In the first line of paragraph (c)(3), I think that "... this paragraph... " should be: "... paragraph (b) ...." [ALT2] already refers to paragraph (b).

7) The [ALT1] version of paragraph (c)(3) says that "... the lawyer must act in the client's best interest ...." This could be read as an expression of the duty of undivided loyalty. However, it also might be read as authorizing the retroactive measurement of whether the lawyer's actions turned out to be the best course for the client. My view is that the standard should be one of purpose and intent and not a guaranty of outcome. Perhaps the simplest solution would be to leave this topic to paragraph (a), eliminate (c)(3), and add a Comment that refers to Rule 2.1 assuming we have that Rule.

8) A question for the members of the drafting team on the difference between the two versions of paragraph (d): In what situations do you envision a lawyer seeking advance consent even though it is not reasonably foreseeable that the client might become significantly diminished?

9) A minor drafting nit on [Alt-a] paragraph (d)(1) --- I suggest inserting "later" in the second line so that it reads: "... in the event the client later suffers from significantly diminished capacity." Given the length and complexity of the Rule, this addition would remind that the advance consent can come when the client only has diminished capacity.

10) Another minor drafting nit, this on both versions of (d)(1)(ii) --- "retains the right to" could be changed to "may", replacing four words with one.

11) And another minor drafting nit, this on the [Alt-b] version of paragraph (d)(2) --- I would insert "(d)" after the first word on the second line: "... this paragraph (d) ...."

12) I'm not clear on the meaning of the first sentence of paragraph (e).

13) I'm concerned that "may be required" in the first sentence of Comment [2] will be seen as conflicting with the Rule b/c the Rule contains no such requirement. This might be solved by editing the Comment on these lines: "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 subject to the confidentiality requirements of Rule 1.6(b) and Business and Professions Code § 6068(e)(2) and Evidence Code §§ 950, et seq.

14) Proposed Comment [4] provides practice guidance, as n. 19 acknowledges, rather than explaining the Rule. It could be removed.

15) The word "employing" in proposed Comment [5] could cause confusion. This could be avoided by: "In employing If another person, such as a family member or a trained professional, to assists a lawyer in communicating ...."

January 17, 2016 Tuft Email re 1.14 to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

Let me know if you think we should discuss Bob's comments or if we can arrive at a consensus by email. My responses are in blue:

1) In paragraph (b)(1) and in several other places, the proposed is Rule limited to potential client harm that is related to the lawyer's representation of the client. That limitation is not so obvious either in the first Commission version or in the Model Rule, and this paragraph (b)(1) seems to conflict with paragraphs (b)((2) and (3). What, then, if a lawyer represents a client in, say, a tort matter but comes to learn that a client having diminished capacity is subject to efforts to cause the client to change the client's estate plan? I don't think this is a point that we should leave unclear. The limitation is not in RRC-1's version or the Model Rule. I believe it is adequately stated in this draft and in the comments. Do we need to make it any clearer?

2) In both version of paragraph (c)(1), I would remove "diminished" from the first line. Isn't it any information related to the client's capacity that is protected? No change is recommended. The rules deals with diminished capacity.

3) In the second sentence of both versions of paragraph (c)(1), I am not certain of the meaning of the phrase: "…a lawyer must take all steps reasonably necessary to preserve client confidentiality …." Does this add something to the first sentence of that paragraph, which already refers to 6068(e) and Rule 1.6? It might make sense to put the confidentiality issue in one sentence and place the distinct topic of client decision-making authority in a separate sentence. Perhaps this would work: "~~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~~ A lawyer acting under this Rule must

take all steps reasonably necessary to comply with the lawyer's duties under Business and Professions Code § 6068(e)(1), Rule 1.6, and Evidence Code §§ 950, *et seq.* The lawyer also 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." I do not see the problem here. The sentences appear to be in the right order, but I am open to changes if it makes the paragraph clearer.

4) Both versions of paragraph (c)(2) use the word "employ", and this might cause confusion. What about: "…the lawyer may ~~employ~~ seek the assistance of another person, …." I think "employ" conveys the right message that the lawyer must utilize the assistance of a third person in a manner that preserves the client's privilege and not just seek out anyone. However, if the word, "employ" is a problem, I prefer "may obtain the assistance of another person."

5) Both versions of paragraph (c)(2) end with: "…provided the communications remain protected by the lawyer-client privilege pursuant to Evidence Code § 952." My earlier suggestion includes a way to joint that with the confidentiality requirement. Also, I am concerned that the quoted phrase might be seen as making the lawyer a guarantor that the privilege will be maintained and, among other things, the lawyer cannot control what any other person will do. The rule does intend to place the burden on the lawyer to assure that the communications remain privileged under §952, but no more so than in any situation in which the lawyer employs (obtains) the assistance of another person to further the lawyer's advice to the client. The lawyer can control to some extent what the other person will do by obtaining that person's agreement that the communications will remain privileged.

6) In the first line of paragraph (c)(3), I think that "… this paragraph… " should be: "… paragraph (b) …." [ALT2] already refers to paragraph (b). Ok

7) The [ALT1] version of paragraph (c)(3) says that "… the lawyer must act in the client's best interest …." This could be read as an expression of the duty of undivided loyalty. However, it also might be read as authorizing the retroactive measurement of whether the lawyer's actions turned out to be the best course for the client. My view is that the standard should be one of purpose and intent and not a guaranty of outcome. Perhaps the simplest solution would be to leave this topic to paragraph (a), eliminate (c)(3), and add a Comment that refers to Rule 2.1 assuming we have that Rule. I do not fully understand this comment. The requirement that the lawyer act in the client's best interest is, indeed, a duty of undivided loyalty. I do not see the risk of "retroactive application" of the requirement in this rule anymore than in rules such as Rule 1.13 that impose the same obligation.

8) A question for the members of the drafting team on the difference between the two versions of paragraph (d): In what situations do you envision a lawyer seeking advance consent even though it is not reasonably foreseeable that the client might become significantly diminished? I view this as a rhetorical question on the issue of whether we should include reasonably foreseeable in paragraph (d).

9) A minor drafting nit on [Alt-a] paragraph (d)(1) --- I suggest inserting "later" in the second line so that it reads: "… in the event the client later suffers from significantly diminished capacity." Given the length and complexity of the Rule, this addition would remind that the advance consent can come when the client only has diminished capacity. I don't think this is necessary but I have no strong objection.

10) Another minor drafting nit, this on both versions of (d)(1)(ii) --- "retains the right to" could be changed to "may", replacing four words with one. I prefer our language.

11) And another minor drafting nit, this on the [Alt-b] version of paragraph (d)(2) --- I would insert "(d)" after the first word on the second line: "… this paragraph (d) …." Ok.

12) I'm not clear on the meaning of the first sentence of paragraph (e). My memory is that this sentence is deprived from RRC-1's version of the rule.

13) I'm concerned that "may be required" in the first sentence of Comment [2] will be seen as conflicting with the Rule b/c the Rule contains no such requirement. This might be solved by editing the Comment on these lines: "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~~ subject to the confidentiality requirements of Rule 1.6(b) and Business and Professions Code § 6068(e)(2) and Evidence Code §§ 950, *et seq*. I don't see the conflict between the comment and the rule, but I have no objection to deleting the words "be required to." I prefer our second sentence to Bob's version.

14) Proposed Comment [4] provides practice guidance, as n. 19 acknowledges, rather than explaining the Rule. It could be removed. Since this is basically a permissive rule, I prefer to keep Comment [4] as providing valuable guidance to lawyers who will be in a tough situation if they come within this rule.

15) The word "employing" in proposed Comment [5] could cause confusion. This could be avoided by: "~~In employing~~ If another person, such as a family member or a trained professional, ~~to~~ assists a lawyer in communicating …." I still believe "employing" and "employ" in the rule and in the comment helps underscore the lawyer's obligation of assuring that the third person will qualify under §952 for purposes of maintaining the client's privilege.

January 17, 2016 Martinez Email re 1.14 to Drafting Team, cc Difuntorum & Mohr:

A few thoughts regarding this rule:

1. Paragraph (b) is long and difficult to follow. The exceptions appear at the beginning of a 140-word sentence. The noun and verb appear at the end ("lawyer, may, but is not required to…"). I would suggest an approach along the following lines:

> (b) In representing a client with significantly diminished capacity such that the client is unable to make adequately considered decisions in a matter related to the representation, a 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). In order to take such action the lawyer must reasonably believe that:
>
> (1) there is a significant risk that the client will suffer substantial physical, financial or other harm unless protective action is taken, and
>
> (2) the client cannot adequately act in the client's own interest.

> This paragraph shall not apply 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.

(This is just a suggestion to illustrate the problem; there are many possibilities and permutations.)

2. Substantively, I don't understand how a client with significantly diminished capacity (i.e., who cannot make considered decisions) can knowingly consent to the recommended action. This seems like a legal fiction especially given the definition of "informed consent" in Rule 1.0.1(e) and that the client must have a certain level of mental capacity in order to consent.

3. I'm not convinced consent is necessary, however. The lawyer should be able to take some limited protective action without the client's consent, as long as the client doesn't express a contrary desire and client confidentiality is maintained.

4. Paragraph (c) needs a predicate clause, such as (in rough terms): "In obtaining consent under paragraph (b) the lawyer must:…" Also, Paragraphs (c)(1-3) are not parallel.

5. I am not convinced we need a provision on advance consent. If the client is sufficiently competent to give advance consent, then the client can take other steps without the lawyer's intervention, such as a power of attorney to a family member that would take effect if the client becomes disabled or incapacitated, conservatorship proceedings, or other solutions in the Probate Code. Protective action by the lawyer should be the last resort.

6. Paragraph (d) uses the term "informed written consent," whereas paragraph (b) uses the word "consent."

January 18, 2016 Mohr Email re 1.14 to Drafting Team, cc Difuntorum, Mohr, McCurdy & A. Tuft:

Please note that Raul forgot to copy Randy and me on his email from last night. Please copy Randy and me with any email discussion you might have as we are trying to put together an email compilation for the rule for the benefit of the entire Commission.

Note also that Tobi Inlender, the new public member was added to the drafting team as a substitute for Mayor Brown, who originally had been assigned to the drafting team. Unfortunately, with the addition of Tobi, the "other Toby" was not included in the email distribution (that was our fault for never putting in writing that Toby had been assigned to this drafting team for the consideration of Rule 1.14). Regardless of whether you include Tobi Inlender on your emails concerning Raul's message, please do include Toby, Randy and me.

If one of you has already sent an email regarding Raul's message, or in response to a message that replied to Raul, please re-send it to everyone, including Toby, Randy and me.

I have not included Tobi on this email so as not to overload her before her first in-person meeting with the Commission; Commission emails can be very daunting, particularly given that she has not had the benefit of the team's detailed discussions regarding the rule. However, I defer to the drafting team on whether to include her in further emails on 1.14. Her address is: tobi@inlender.net

January 18, 2016 Rothschild Email re 1.14 to Drafting Team, cc Difuntorum, Mohr, McCurdy & A. Tuft:

Here are my thoughts on Bob's comments and Mark's responses:

1) I agree with Mark that the limitation is correct and is clear enough.

2) I agree with Mark.

3) I think it is OK the way it is, but would be comfortable with Bob's language if people think that is clearer.

4) I prefer Mark's proposed language of "may obtain the assistance of" to Bob's proposal. I also prefer it to the original draft, as "employ" can have different meanings that might make the provision less clear.

5) I like the current language better than Bob's. My concern with Bob's general reference (in item 3) to Evidence Code 950, et seq, is that it doesn't provide specific reference to 952, which I think is critical.

[6) (I don't have Bob's original email, but in Mark's comments to it there is no number 6.)] [Editor's Note: There was no #6. It was a formatting glitch in Mr. Tuft's email. Mr. Kehr made only 15 enumerated comments. The remaining comments, below, have been renumbered to correspond to the numbers in Mr. Kehr's email,]

6) Agree

7) I agree with Mark.

8) Agree

9) I agree with Bob that this sentence could be misunderstood.

10) I agree with Mark. I think the extra 3 words help.

11) Agree

12) I have also wondered what this sentence meant. Does this mean that the lawyer can't represent the client's relative in filing a conservatorship action? If so, maybe there is a clearer way to say that. If not, what does it mean?

13) I agree with Bob on deleting "may be required to", and with Mark on keeping our second sentence.

14) I agree with Mark.

15) See 4 above. I would make it "In obtaining the assistance of another person".

January 18, 2016 Rothschild Email re 1.14 to Drafting Team, cc Difuntorum, Mohr, McCurdy & A. Tuft:

Here are my thoughts on Raul's comments:

1) I understand and agree with Raul's concern. I think his draft, or something like it, would be much clearer.

2) I disagree. As noted in Comment 1 in both the ABA and RRC1 versions of the rule, it is possible that a client may have the capacity to make some decisions and still be substantially impaired as to other, more complex matters.

3) I'm not sure what Raul has in mind. What kind of protective action could the lawyer take without breaching client confidentiality?

4) I think this is fine the way it is.

5) Of course the client can take other protective measures, and comment 4 addresses this issue. That does not diminish the idea that it may be useful for the lawyer to obtain the consent. Even if the client does have a durable power of attorney or some other solution, the advance consent would allow the lawyer to notify the holder of such power, which may not otherwise be possible.

6) I think Raul is right. Either (b) should use "informed written consent" or (c)(1)(ii) should, or both.

January 19, 2016 Harris Email re 1.14 to Drafting Team, cc Difuntorum, Mohr, McCurdy & A. Tuft:

My notes [concerning Mr. Kehr's comments] below in red. Lee

Editor's Note:
Black = Mr. Kehr's original comment Blue = Mr. Tuft's response Green = Mr. Rothschild's response Red = Mr. Harris's response

1) In paragraph (b)(1) and in several other places, the proposed is Rule limited to potential client harm that is related to the lawyer's representation of the client. That limitation is not so obvious either in the first Commission version or in the Model Rule, and this paragraph (b)(1) seems to conflict with paragraphs (b)((2) and (3). What, then, if a lawyer represents a client in, say, a tort matter but comes to learn that a client having diminished capacity is subject to efforts to cause the client to change the client's estate plan? I don't think this is a point that we should leave unclear. The limitation is not in RRC-1's version or the Model Rule. I believe it is adequately stated in this draft and in the comments. Do we need to make it any clearer? I agree with Mark that the limitation is correct and is clear enough. I agree with Mark and would be concerned about broadening the scope of representation without agreement with the client.

2) In both version of paragraph (c)(1), I would remove "diminished" from the first line. Isn't it any information related to the client's capacity that is protected? No change is recommended. The rules deals with diminished capacity. I agree with Mark. I think it is ok as drafted.

3) In the second sentence of both versions of paragraph (c)(1), I am not certain of the meaning of the phrase: "…a lawyer must take all steps reasonably necessary to preserve client confidentiality …." Does this add something to the first sentence of that paragraph, which

already refers to 6068(e) and Rule 1.6? It might make sense to put the confidentiality issue in one sentence and place the distinct topic of client decision-making authority in a separate sentence. Perhaps this would work: "~~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~~ A lawyer acting under this Rule must take all steps reasonably necessary to comply with the lawyer's duties under Business and Professions Code § 6068(e)(1), Rule 1.6, and Evidence Code §§ 950, *et seq.* The lawyer also 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." I do not see the problem here. The sentences appear to be in the right order, but I am open to changes if it makes the paragraph clearer. I think it is OK the way it is, but would be comfortable with Bob's language if people think that is clearer. I think it is OK now but Bob's language is clear and I have no problem with it.

4) Both versions of paragraph (c)(2) use the word "employ", and this might cause confusion. What about: "…the lawyer may ~~employ~~ seek the assistance of another person, …." I think "employ" conveys the right message that the lawyer must utilize the assistance of a third person in a manner that preserves the client's privilege and not just seek out anyone. However, if the word, "employ" is a problem, I prefer "may obtain the assistance of another person." I prefer Mark's proposed language of "may obtain the assistance of" to Bob's proposal. I also prefer it to the original draft, as "employ" can have different meanings that might make the provision less clear. I think "may obtain the assistance of another person" is the better choice.

5) Both versions of paragraph (c)(2) end with: "…provided the communications remain protected by the lawyer-client privilege pursuant to Evidence Code § 952." My earlier suggestion includes a way to joint that with the confidentiality requirement. Also, I am concerned that the quoted phrase might be seen as making the lawyer a guarantor that the privilege will be maintained and, among other things, the lawyer cannot control what any other person will do. The rule does intend to place the burden on the lawyer to assure that the communications remain privileged under §952, but no more so than in any situation in which the lawyer employs (obtains) the assistance of another person to further the lawyer's advice to the client. The lawyer can control to some extent what the other person will do by obtaining that person's agreement that the communications will remain privileged. I like the current language better than Bob's. My concern with Bob's general reference (in item 3) to Evidence Code 950, et seq, is that it doesn't provide specific reference to 952, which I think is critical. I agree with Mark and prefer the language in the draft.

6) In the first line of paragraph (c)(3), I think that "… this paragraph… " should be: "… paragraph (b) …." [ALT2] already refers to paragraph (b). Ok Agree. OK

7) The [ALT1] version of paragraph (c)(3) says that "… the lawyer must act in the client's best interest …." This could be read as an expression of the duty of undivided loyalty. However, it also might be read as authorizing the retroactive measurement of whether the lawyer's actions turned out to be the best course for the client. My view is that the standard should be one of purpose and intent and not a guaranty of outcome. Perhaps the simplest solution would be to leave this topic to paragraph (a), eliminate (c)(3), and add a Comment that refers to Rule 2.1 assuming we have that Rule. I do not fully understand this comment. The requirement that the lawyer act in the client's best interest is, indeed, a duty of undivided loyalty. I do not see the risk of "retroactive application" of the requirement in this rule anymore than in rules such as Rule 1.13 that impose the same obligation. I agree with Mark. I agree with Mark

8) A question for the members of the drafting team on the difference between the two versions of paragraph (d): In what situations do you envision a lawyer seeking advance consent even though it is not reasonably foreseeable that the client might become significantly diminished? I view this as a rhetorical question on the issue of whether we should include reasonably foreseeable in paragraph (d). Agree. The question is what is "reasonably foreseeable". It is a very broad term.

9) A minor drafting nit on [Alt-a] paragraph (d)(1) --- I suggest inserting "later" in the second line so that it reads: "… in the event the client later suffers from significantly diminished capacity." Given the length and complexity of the Rule, this addition would remind that the advance consent can come when the client only has diminished capacity. I don't think this is necessary but I have no strong objection. I agree with Bob that this sentence could be misunderstood. I am OK with the suggested change

10) Another minor drafting nit, this on both versions of (d)(1)(ii) --- "retains the right to" could be changed to "may", replacing four words with one. I prefer our language. I agree with Mark. I think the extra 3 words help. I also prefer our draft.

11) And another minor drafting nit, this on the [Alt-b] version of paragraph (d)(2) --- I would insert "(d)" after the first word on the second line: "… this paragraph (d) …." Ok. Agree. Agree

12) I'm not clear on the meaning of the first sentence of paragraph (e). My memory is that this sentence is deprived from RRC-1's version of the rule. I have also wondered what this sentence meant. Does this mean that the lawyer can't represent the client's relative in filing a conservatorship action? If so, maybe there is a clearer way to say that. If not, what does it mean?

13) I'm concerned that "may be required" in the first sentence of Comment [2] will be seen as conflicting with the Rule b/c the Rule contains no such requirement. This might be solved by editing the Comment on these lines: "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~~ subject to the confidentiality requirements of Rule 1.6(b) and Business and Professions Code § 6068(e)(2) and Evidence Code §§ 950, *et seq*. I don't see the conflict between the comment and the rule, but I have no objection to deleting the words "be required to." I prefer our second sentence to Bob's version. I agree with Bob on deleting "may be required to", and with Mark on keeping our second sentence. I prefer keeping the second sentence but have no problem deleting "be required to".

14) Proposed Comment [4] provides practice guidance, as n. 19 acknowledges, rather than explaining the Rule. It could be removed. Since this is basically a permissive rule, I prefer to keep Comment [4] as providing valuable guidance to lawyers who will be in a tough situation if they come within this rule. I agree with Mark. I would keep the comment.

15) The word "employing" in proposed Comment [5] could cause confusion. This could be avoided by: "~~In employing~~ If another person, such as a family member or a trained professional~~,~~ ~~to~~ assists a lawyer in communicating …." I still believe "employing" and "employ" in the rule and in the comment helps underscore the lawyer's obligation of assuring that the third person will qualify under §952 for purposes of maintaining the client's privilege.

See 4 above. I would make it "In obtaining the assistance of another person". I would conform it (if necessary) so it is consistent with the language ultimately decided in 4. above.

January 19, 2016 Stout Email re 1.14 to Drafting Team, cc Difuntorum, Mohr, McCurdy & A. Tuft:

I agree with Lee's comments as provided below.