



TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

January 21, 2016

To: Justice Lee Edmon, Chair, Commission for the Revision of the Rules of Professional Conduct of the State Bar of California

From: Executive Committee, Trusts and Estates Section of the State Bar of California (TEXCOM)

Re: Proposed Rule 1.14

Dear Justice Edmon:

TEXCOM greatly appreciates the Commission's willingness to revisit this issue and explore possible solutions to a growing crisis of financial abuse among California's citizens, and in particular, its elderly population.

Attached are TEXCOM's comments to the Commission's proposed Rule 1.14. They look more extensive than they really are. Many are just stylistic or organizational.

The primary substantive items in the proposed Rule that TEXCOM believes should be revised are the following:

- a. In Paragraph (a), the reference to "best interests" should be deleted. The underlying purpose of this paragraph is to confirm that an attorney still owes a client with diminished capacity all the same duties as any other client. There are established rules that govern what is a "normal" client relationship. These rules provide that the nature of the advocacy depend on when the client-lawyer relationship began and whether the lawyer has knowledge of the client's wishes. Injecting a "best interests" judgement on the lawyer makes the lawyer akin to a court-appointed guardian ad litem, who is appointed to determine the "client's best interests" when the client is found to be incapacitated, incompetent or with significant diminished capacity. If the lawyer-client relationship begins when the client has capacity, in most instances, "normal" representation may be to continue to advocate as the client wishes, which may not necessarily be in the "best interests of the client."
- b. The application of the Rule to the situation when the client is unable to make adequately considered decisions "in a matter related to the representation" does not appear appropriate or necessary. As the permitted notification can only occur if the client has "significantly diminished capacity," it is implied that they cannot make any adequately considered decisions as it pertains to protecting

themselves from harm. The focus should be on whether they can make decisions to protect themselves from harm, not whether they can make decisions pertaining to representation. Furthermore, in Business and Professions Code §6068(e)(2), the phrase is used to refer to the source of the information that is to be disclosed. As it is hoped that this Rule will be used as the model for crafting a second exception to said Statute, it is recommended that the phrase “matter related to representation,” if determined necessary, be used in a similar fashion.

- c. TEXCOM believes that paragraph (c) of the Proposed Rule is not practical or appropriate. If a lawyer has a client that he/she believes has significant diminished capacity, it is implied that the client cannot consent to any disclosure. If the client has capacity to consent, the lawyer would not need to turn to this Rule. To imply that a client with significant diminished capacity could be in a position to give free and informed consent if the lawyer sought assistance from others, appears to undermine the initial and important requirement that a lawyer can only turn to this proposed Rule if there is significant diminished capacity.
- d. TEXCOM urges the Commission to adopt a Rule that permits the limited disclosure of confidential information, in the form of a notification, in the limited situations outlined in the proposed Rule where no prior consent has been obtained. [Proposed paragraph (b)] Given the fact that such a Rule would be in conflict with the existing Business and Professions Code, TEXCOM suggests that the Commission could structure the proposed Rule so that it’s application was conditional upon a corresponding change having been made to the Business and Professions Code. Once the Commission has agreed that such a limited relaxation of the rules on confidentiality to protect the public is appropriate, TEXCOM will begin to formulate a legislative proposal to implement the legislative change. Given that approval of the proposed changes on both fronts will take time to work through the process, TEXCOM is willing to start working on a parallel “track” to implement a change in the Code, once the Commission has signaled that they believe a very modest expansion to the “confidentiality” exception is in the best interest of the public and will not detract from the lawyer-client relationship.

Your consideration of this matter is greatly appreciated. I look forward to discussing this matter with you in greater detail.

Sincerely,

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Ethics Chair 2015-2016
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Monterey, CA 93940

Proposed 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, ~~act in the best interests of the client and,~~¹ as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) Taking Limited Action on Behalf of a Client with Significantly Diminished Capacity. ~~²Information 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 comply with the lawyer's duties under Business and Professions Code §6068(e), Rule 1.6 and Evidence Code §§950, et seq. Except as expressly authorized hereinbelow, the lawyer must preserve client confidentiality and decision making authority³. However, notwithstanding the foregoing, E~~except where the lawyer represents a minor, a client in

¹ TEXCOM believes that adding a “best interests” requirement is not appropriate. Depending on the nature of the representation, what is appropriate will differ. For example, if appointed by the Courts to represent an individual with diminished capacity in a conservator hearing with whom the lawyer had no prior relationship, the standard may be “best interests”; but if the representation is of a long time client, where the attorney has knowledge of what the client wants, representation may be what the client has requested, regardless of whether the attorney believes such a position is really in the client’s best interest. The retention of the deleted language would change existing law. The phrase “best interests” is NOT in the ABA model rule.

² TEXCOM recommends adopting this limited exception to the confidentiality rules notwithstanding any potential statutory contradictions. If the Commission has agreed to include such a proposal in the new Rules, TEXCOM will begin drafting a corresponding legislative proposal. We believe the Commission’s endorsement of this limited exception to confidentiality would have a positive impact on any such legislative proposal. If the Commission is concerned about potential statutory inconsistency, another option is to provide that such limited action is conditional on a corresponding change having been made to B&P Code Section 6068(e). Such a condition could be set forth in the Rule itself, or in a footnote. For example, the Rule could state, “to the extent permitted by B&P Code Section 6068(e), when a lawyer reasonably believes... (and then move the types of client for when the rule is not applicable to the end.)

³ Moved from deleted Paragraph C, and revised per drafting committee’s recommendation. However, the additional language in the committee’s emails does not appear appropriate as the Rule is only applicable if you have a significantly diminished client. Hence, explaining anything to the client or seeking consent is not appropriate. Note, unlike the existing exception, where there is no capacity threshold, the exception being sought implies that the client is not capable of making informed decisions. See further discussion concerning Paragraph c below.

a criminal matter, or a client who is the subject of conservatorship or has a guardian or other person legally entitled to act on behalf of ~~for~~ the client, when the lawyer reasonably believes that:

- (1) the client has significantly diminished capacity such that the client is unable to make adequately considered decisions ~~in a matter related to the representation~~⁴,
- (2) there is a substantial 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 interest⁵,

[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. Such notification, referred to in this rule as “protective action” may involve revealing confidential information relating to the representation of the client. ⁶; ~~provided the lawyer has obtained the client's consent as provided in paragraph (c) or (d)~~

[alt b] the lawyer may, but is not required to, take action to protect the client's interests, including (1) notifying an individual or organization that has the ability to take

⁴ TEXCOM believes that the rule should not be limited to matters related to representation. The test is whether the client can understand the nature of the impending harm and whether they can act in their own best interest. Absent that, action should be allowed even if the harm is not directly related to the matter related to representation. For example, if a lawyer is representing someone in a personal injury dispute and becomes aware of the fact that the client (who the lawyer now believes suffers from significant diminished capacity) intends to give the entire settlement to his caregiver, protective action should be permitted even though the proposed gift has nothing to do with settling the personal injury case. Furthermore, it should be noted that B&P Code §6068(e)(2), in the current exception to the disclosure rule, references “scope of representation” in relation to the “confidential information” being revealed. TEXCOM believes that the use of such a phrase in the current exception is appropriate. See proposed additional language to [alt a] and [alt b] of this paragraph.

⁵ TEXOM has no major objections to this factor but feels that it really doesn't add anything as in paragraph (1) it has already been determined that the client has significant diminished capacity and is unable to make adequately considered decisions – this implies that the client is unable to determine what is in his/he best interests. .

⁶ TEXCOM does not believe the proposed consent described in paragraph (c) is appropriate; if the client has significant diminished capacity, any attempt by the attorney to get consent, of any type, could be further abuse. The whole premise is that the client cannot appreciate the harm, and thus, he/she lacks the capacity to voluntarily consent to disclose. If they could (and did) consent, no issue would exist as the disclosure would then be permitted.

action to protect the client, or (ii) seeking to have a guardian ad litem appointed⁷. Such notification may involve revealing confidential information relating to the representation of the client, provided the lawyer has obtained the client's consent as provided in paragraph (c) or (d). Action taken as specified in this paragraph is referred to in this Rule as "protective action."

~~⁸(c) — [ALT1] Obtaining Consent of a 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 with the client, provided the communications remain protected by the attorney-client privilege pursuant to Evidence Code § 952.~~
- ~~(3) 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 a matter related to the representation given the information known to the lawyer at the time of disclosure~~

~~(-dc-) Obtaining Advance Informed Written Consent to Take Limited Protective Action⁹~~

- ~~(1) [Alt-a] A lawyer may obtain a client's advance informed written consent to take action to protect the client's interests in the event the client later¹⁰ suffers from significantly diminished capacity. An advance consent under~~

⁷ Many on TEXCOM favor this alternative as seeking a guardian ad litem will serve to best protect the client from further harm.

⁸ As stated above, TEXCOM does not believe that such consent is valid or appropriate. If a client is capable of providing consent, the lawyer does not need to rely on this rule. Currently, a lawyer can seek, with the client's consent, input from third parties.

⁹ It should be noted that ACTEC has concluded that such advance consents are appropriate. In their publications of sample engagement letters, this matter is discussed.

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, unless at the time of the attempted revocation, the lawyer reasonably believes the client has, at the time of the attempted revocation, significant diminished capacity.

- (2) ~~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.¹¹~~

~~(e-d) Restrictions on Lawyer's Actions. Neither paragraph (c) or (d) This Rule does not~~ authorizes the lawyer to take any action on behalf of a person other than the client that the lawyer would be permitted to take under Rule 1.7. ~~Neither paragraph (c) or (d) This Rule does not~~ authorizes the lawyer to take any action that would violate the client's right to due process of the law under the United States or California Constitutions, or the California Probate Code.

~~(fe) 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)].~~

(f) Limitation on action. In taking protective action as authorized by this ~~paragraph~~Rule, the lawyer must act to preserve client confidentiality consistent with this Rule¹² in the client's best interest and may disclose no more information than is reasonably

¹⁰ Proposed change by drafting committee.

¹¹ Duplicative to include here and in paragraph (f) below.

¹² The purpose of this limitation is to confirm that the general rule and goal is the preservation of confidentiality and that disclosure is to be limited. Any discussion of "best interests", if determined appropriate, is already addressed in Paragraph (a) and thus does not need to be restated in this Paragraph. This was also a recommendation of one on the drafting committee.

necessary to protect the client from substantial harm ~~in a matter related to the representation~~¹³—given the information known to the lawyer at the time of disclosure.¹⁴

Additional comment: Many on TEXCOM believe that all references to “client” should be revised to also include “former clients.” For example, lawyer prepares estate plan for client, and send disengagement letter. Client, now a “former client” calls and wants to schedule an appointment to change is power of attorney so that the sweet lady from the sweepstakes company can access his account. Lawyer meets with former client and determines that he suffers from significant diminished capacity and thus cannot form a new client-lawyer relationship. Assuming notification was permitted under this Rule, the lawyer in this situation should also be permitted to notify the appropriate individual or authority, notwithstanding the fact that person subject to potential harm, and in need of protection, is a former client. Other’s believe that it is implied that the Rule would be applicable to both current and former clients, and the duty of confidentiality applies equally to both.

¹³ The harm should not be limited to harm related to representation.

¹⁴ Restated from the deleted Paragraph c. and paragraph (d)(2)

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(b) Taking Limited Action on Behalf of a Client with Significantly Diminished Capacity. ²Information 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 comply with the lawyer's duties under Business and Professions Code §6068(e), Rule 1.6 and Evidence Code §§950, et seq. Except as expressly authorized hereinbelow, the lawyer must preserve client confidentiality and decision making authority³. However, notwithstanding the foregoing, except where the lawyer represents a minor, a client in a

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criminal matter, or a client who is the subject of conservatorship or has a guardian or other person legally entitled to act on behalf of the client, when the lawyer reasonably believes that:

- (1) the client has significantly diminished capacity such that the client is unable to make adequately considered decisions⁴,
- (2) there is a substantial 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 interest⁵,

[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. Such notification, referred to in this rule as “protective action” may involve revealing confidential information relating to the representation of the client. ⁶

[alt b] the lawyer may, but is not required to, take action to protect the client’s interests, including (1) 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 appointed⁷. Such notification may involve revealing confidential information relating to the representation

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of the client. Action taken as specified in this paragraph is referred to in this Rule as “protective action.”

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(c) Obtaining Advance Informed Written Consent to Take Limited Protective Action⁹

- (1) **[Alt-a]** A lawyer may obtain a client’s advance informed written consent to take action to protect the client’s interests in the event the client later¹⁰ 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, unless at the time of the attempted revocation, the lawyer reasonably believes the client has, at the time of the attempted revocation, significant diminished capacity.¹¹

(iii)

(d) Restrictions on Lawyer’s Actions. This Rule does not authorize the lawyer to take any action on behalf of a person other than the client that the lawyer would be permitted to take under Rule 1.7. This Rule does not authorize the lawyer to take any action that would violate the client’s right to due process of the law under the United States or California Constitutions, or the California Probate Code.

(e) 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 (c).

⁸ As stated above, TEXCOM does not believe that such consent is valid or appropriate. If a client is capable of providing consent, the lawyer does not need to rely on this rule. Currently, a lawyer can seek, with the client’s consent, input from third parties.

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(f) Limitation on action. In taking protective action as authorized by this Rule, the lawyer must act to preserve client confidentiality consistent with this Rule¹² and may disclose no more information than is reasonably necessary to protect the client from substantial harm¹³ given the information known to the lawyer at the time of disclosure.¹⁴

Additional comment: Many on TEXCOM believe that all references to “client” should be revised to also include “former clients.” For example, lawyer prepares estate plan for client, and send disengagement letter. Client, now a “former client” calls and wants to schedule an appointment to change is power of attorney so that the sweet lady from the sweepstakes company can access his account. Lawyer meets with former client and determines that he suffers from significant diminished capacity and thus cannot form a new client-lawyer relationship. Assuming notification was permitted under this Rule, the lawyer in this situation should also be permitted to notify the appropriate individual or authority, notwithstanding the fact that person subject to potential harm, and in need of protection, is a former client. Other’s believe that it is implied that the Rule would be applicable to both current and former clients, and the duty of confidentiality applies equally to both.

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