



To: Laura Gibson, Board Chair

From: Lewis Kinard, Committee Chair

Date: January 10, 2019

RE: Submission by Committee on Disciplinary Rules and Referenda of Proposed Rules

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Dear Ms. Gibson:

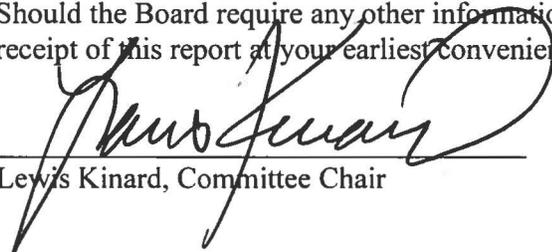
Pursuant to Government Code section 81.0876, the Committee on Disciplinary Rules and Referenda (CDRR) initiated three rule change proposals that were published in the Texas Bar Journal and the Texas Register. The CDRR held a public hearing and solicited and considered public comments on each. Subsequently, at its November 2019 meeting, the CDRR voted to send all three to the Board:

- Rule 1.02 Scope and Objectives of Representation
- Rule 1.05 Confidentiality of Information
- Rule 1.16 Clients with Diminished Capacity

Please find attached the proposed rule changes and recommended comments related to those changes. Per Government Code section 81.0877, the Board of Directors is to vote on each proposed disciplinary rule recommended by the committee not later than the 120th day after the date the rule is received from the CDRR. The Board can vote for or against each rule, or return a rule to the CDRR for additional consideration.

As a reminder, if a majority of the Board of Directors approves a rule, the Board then petitions the Supreme Court to order a referendum on the rule(s) as provided by Section 81.0878.

Should the Board require any other information, please do not hesitate to contact me. Please confirm receipt of this report at your earliest convenience.

  
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Lewis Kinard, Committee Chair

cc: Joe K. Longley  
Trey Appfel  
Randy Sorrels  
Tom Vick

# Committee on Disciplinary Rules and Referenda

## Proposed Rule Changes

Provided here is the rationale for proposed rule changes being considered by the Committee on Disciplinary Rules and Referenda (CDRR). A Committee poll was conducted in May 2018 to select initial rules for the Committee to review. The Committee submits the following summary to provide context for the proposed rule changes:

- Committee Deliberation – A review of rules began in April 2018. Members were assigned rules to review and present to the Committee for its May 2018 meeting.
- Committee Vote to Initiate – Proposed rules were discussed and initiated on June 11, 2018.
- Publication – Proposed rules were published in the September 1, 2018, issue of the Texas Bar Journal and the August 31, 2018, issue of the Texas Register.
- Comments – The Committee extended the 30 day comment period to 60 days. Comments were collected from September 1, 2018, through November 1, 2018. A total of 16 individuals provided 20 comments. Of those, 60% (12 comments) were related to Rule 1.16, 25% (5 comments) for Rule 1.02, and 15% (3 comments) for Rule 1.05.
- Public Hearing – A public hearing on the proposed rules was held on October 10, 2018, at 10:00 a.m. at the Texas Law Center.

### **Rule 1.02(g) Scope and Objectives of Representation and Rule 1.16 Clients with Diminished Capacity**

The Committee voted to recommend deletion of TDRPC Rule 1.02(g), dealing a lawyer's duties to a client who may lack competency. The Committee voted to recommend that this Rule be replaced with a new Rule 1.16, dealing with a lawyer's duties to a client with diminished capacity. Proposed Rule 1.16 is designed to give more guidance to lawyers than current Rule 1.02(g), and to be more detailed in what actions a lawyer is permitted to take when a client's mental capacity is significantly diminished.

The committee received a variety of comments relating to the proposed changes. Among the comments pertaining to proposed Rule 1.16 (and current Rule 1.02(g)) included concerns that the term "diminished capacity" needed to be defined, concerns about the disclosure of confidential client information, concerns about the use of the permissive term "may" in proposed Rule 1.16(b) and (c), concerns about the differing standards for and of action between current Rule 1.02(g) and proposed Rule 1.16, concerns that proposed Rule 1.16(b) should include additional actions a lawyer may take when applicable, concerns that changes should generally follow the ABA Model Rules insofar as possible, and concerns that more explanation of proposed rule changes should be provided.

### **Rule 1.05 Confidentiality of Information**

The Committee voted to recommend amending TDRPC Rule 1.05 by adding an additional exception for when a lawyer may divulge client confidential information. To be added as Rule 1.05(c)(9), the exception permits a lawyer to reveal confidential client information to secure legal advice about the lawyer's compliance with the rules of professional conduct.

The committee received comments pertaining to proposed Rule 1.05(c)(9). One comment submitted by five lawyers was generally supportive of the proposed amendment, which is substantially the same as a corresponding provision of the ABA Model Rules. A different person commenting expressed concerns about the duty of confidentiality for the lawyer providing advice under the proposed rule.

Detailed rationale for the proposed changes is provided below, as well as the public comments received by the Committee.

## **Rule 1.02(g) Scope and Objectives of Representation and Rule 1.16 Diminished Capacity**

### **March 11, 2016 Report**

A report issued on March 11, 2016 by the former State Bar of Texas Disciplinary Rules of Professional Conduct Committee makes a strong case for why the current disciplinary rules create confusion about the representation of clients with diminished capacity. That report is attached to this document and should be consulted directly (*see* Attachment A).

### **2011 Referendum**

The March 11, 2016 Report states that “[the 2011] Referendum proposed replacing [Texas Disciplinary Rules of Professional Conduct (TDRPC)] Rule 1.02(g) with . . . [a] Rule and Comments, which generally follow[ed] ABA Model Rule 1.14,” although the Committee recommended some deviation from Model Rule 1.14.

### **Proposed Texas Rule 1.16**

The CDRR recommends deletion of current Texas Disciplinary Rule 1.02(g) and the adoption of a new rule, Rule 1.16, which would read as follows:

#### **Rule 1.16 Clients with Diminished Capacity**

(a) 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 another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer 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. Such action may include, but is not limited to, 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, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.

(c) When taking protective action pursuant to (b), the lawyer may disclose the client’s confidential information to the extent the lawyer reasonably believes is necessary to protect the client’s interests.

## Proposed Comment

Paragraphs 1 to 8 generally correspond to the first eight paragraphs of the Comment for Model Rules of Professional Conduct Rule 1.14,<sup>1</sup> although the order is somewhat different. Paragraphs 9 and 10 are quoted from the Comments 9 and 10 to the current version of Model Rules of Professional Conduct R. 1.14.

If Proposed Rule 1.16 is adopted, the CDRR recommends the following as Comments to the rule:

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. However, maintaining the ordinary client-lawyer relationship may not be possible when the client suffers from a mental impairment, is a minor, or for some other reason has a diminished capacity to make adequately considered decisions regarding representation. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often can understand, deliberate on, and reach conclusions about matters affecting the client's own well-being. For example, some people of advanced age are capable of handling routine financial matters but need special legal protection concerning major transactions. Also, some children are regarded as having opinions entitled to weight in legal proceedings concerning their custody.

2. 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 lawyer's knowledge of the client's long-term commitments and values.

3. The fact that a client suffers from diminished capacity does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the client has a guardian or other legal representative, the lawyer should, as far as possible, accord the client the normal status of a client, particularly in maintaining communication. If a guardian or other legal representative has been appointed for the client, however, the law may require the client's lawyer to look to the representative for decisions on the client's behalf. 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.

4. The client may wish to have family members or other persons participate in discussions with the lawyer; however, paragraph (a) requires the lawyer to keep the client's interests foremost and, except when taking protective action authorized by paragraph (b), to look to the client, not the family members or other persons, to make decisions on the client's behalf. 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.

### Taking Protective Action

5. Paragraph (b) contains a non-exhaustive list of actions a lawyer may take in certain circumstances to protect a client who does not have a guardian or other legal representative. Such actions 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 existing 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 client's wishes and values 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. A client with diminished capacity also may cause or threaten physical, financial, or other harm to third parties. In such situations, the client's lawyer should consult applicable law to determine the appropriate response.

7. When a legal representative has not been appointed, the lawyer should consider whether an appointment is reasonably necessary to protect the client's interests. Thus, for example, 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, applicable law provides for the appointment of legal representatives in certain circumstances. For example, the Texas Family Code prescribes when a guardian ad litem, attorney ad litem, or amicus attorney should be appointed in a suit affecting the parent-child relationship, and the Texas Probate Code prescribes when a guardian should be appointed for an incapacitated person. 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 lawyer's professional judgment. In considering alternatives, the lawyer should be aware of any law that requires the lawyer to advocate on the client's behalf for the action that imposes the least restriction.

#### 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. As with any client-lawyer relationship, information relating to the representation of a client is confidential under Rule 1.05. However, when the lawyer is taking protective action, paragraph (b) of this Rule permits the lawyer to make necessary disclosures. Given the risks to the client of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or in 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 will act adversely to the client's interests before discussing matters related to the client.

#### 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.

<sup>1</sup> The Comment to Model Rules of Professional Conduct R. 1.14 (2018) is shown below:

#### 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 decisionmaking 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.

[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.

**ATTACHMENT A: MARCH 11, 2016 REPORT**

**Rule 1.02(g)—“Diminished Capacity”**

**State Bar Texas Disciplinary Rules of Professional Conduct Committee**

March 11, 2016

**I. Current Rule Concerning Clients with Diminished Capacity and Related Comments**

Comment 5 to Texas Disciplinary Rule of Professional Conduct 1.03 suggests that a lawyer representing a disabled client attempt to maintain a normal attorney-client relationship.<sup>2</sup> However, Rule 1.02(g) requires that, in some instances, a lawyer profoundly alter this relationship by, among other things, seeking a guardianship for a client the lawyer believes is disabled. Rule 1.02(g) reads as follows (with emphasis added):

(g) A lawyer **shall** take reasonable action to secure the **appointment of a guardian** or other legal representative for, or **seek other protective orders** with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.

Comments 12 and 13 to the Rule, which are quoted below, elaborate on this requirement.

12. The usual attorney-client relationship is established and maintained by consenting adults who possess the legal capacity to agree to the relationship. Sometimes the relationship can be established only by a legally effective appointment of the lawyer to represent a person. Unless the lawyer is legally authorized to act for a person under a disability, an attorney-client relationship does not exist for purposes of the rule.

<sup>2</sup> See Texas Disciplinary Rule of Professional Conduct [hereinafter Rule] 1.03, Comment 5 (“In addition to communicating with any legal representative, a lawyer should seek to maintain reasonable communication with a client under a disability, insofar as possible. When a lawyer reasonably believes a client suffers a mental disability or is not legally competent, it may not be possible to maintain the usual attorney-client relationship. Nevertheless, the client may have the ability to understand, deliberate upon, and reach conclusions about some matters affecting the client’s own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence... The fact that a client suffers a disability does not diminish the desirability of treating the client with attention and respect.”).

13. 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. If a legal representative has not been appointed, paragraph (g) requires a lawyer in some situations to take protective steps, such as initiating the appointment of a guardian. The lawyer should see to such appointment or take other protective steps when it reasonably appears advisable to do so in order to serve the client's best interests. See Rule 1.05(c)(4), d(1) and (d)(2)(i) in regard to the lawyer's right to reveal to the court the facts reasonably necessary to secure the guardianship or other protective order.<sup>3</sup>

## II. Issues Raised by the Current Rule

### 1. Rule 1.02(g) is often disregarded.

Initiating a usually public proceeding to appoint a guardian or to obtain a protective order is a drastic action potentially more damaging to the client than the disability the lawyer is trying to address, even if the action is in the client's best interests. For this reason, we believe Rule 1.02(g) is often ignored, replaced by an informal and tacit system of work-arounds. Unfortunately, these work-arounds leave the lawyer potentially exposed to discipline, because the requirements of Rule 1.02(g) are not being followed.

### 2. Rule 1.02(g) is too vague.

When the Rule is not ignored, lawyers often do not know what "other protective orders" should be sought to discharge their professional responsibilities. Moreover, the "protective orders" language appears to limit the lawyer to taking only formal legal action, when informal action may provide adequate protection.

<sup>3</sup> Rule 1.05(c)(4) provides: "A lawyer may reveal confidential information:[w]hen the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law." 1.05(d) states as follows: "A lawyer may also reveal unprivileged client information: (1) When impliedly authorized to do so in order to carry out the representation. (2) When the lawyer has reason to believe it is necessary to do so in order to: (i) carry out the representation effectively." Comment 17 to Rule 1.05 states as follows: "In some situations, Rule 1.02(g) requires a lawyer representing a client under a disability to seek the appointment of a legal representative for the client or to seek other orders for the protection of the client. The client may or may not, in a particular matter, effectively consent to the lawyer's revealing to the court confidential information and facts reasonably necessary to secure the desired appointment or order. Nevertheless, the lawyer is authorized by paragraph (c)(4) to reveal such information in order to comply with Rule 1.02(g). See also paragraph 5, Comment to Rule 1.03, which states as follows: "In addition to communicating with any legal representative, a lawyer should seek to maintain reasonable communication with a client under a disability, insofar as possible. When a lawyer reasonably believes a client suffers a mental disability or is not legally competent, it may not be possible to maintain the usual attorney-client relationship. Nevertheless, the client may have the ability to understand, deliberate upon, and reach conclusions about some matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence... The fact that a client suffers a disability does not diminish the desirability of treating the client with attention and respect."

3. The concerns addressed by Rule 1.02(g) may be better addressed by consultation prohibited by Rule 1.05.

A lawyer often will be able to address concerns about a client's capacity less obtrusively by consulting with friends or family members about the client's behavior and mental acuity, but such consultation may violate Rule 1.05, which generally prohibits lawyers' revelation of confidential information. The comments to Rules 1.02 and 1.05 appear to limit the lawyer to consulting with the client, the client's "legal representative," and a court. See footnote 2.

4. Compliance with Rule 1.02(g) requires lawyers to parse several Rules and Comments.

A lawyer who consults the Rules for guidance on the lawyer's responsibilities regarding a client who may have diminished capacity faces a challenge. The relevant information must be gathered from Rule 1.02(g) and comments to Rules 1.02, 1.03, and 1.05. One or more of these requirements or guidelines therefore may be missed in the search. All of the ethical guidance should be in one distinct rule.

5. Rule 1.02(g) Can Be Used as a Threat of Grievance

Rule 1.02(g) can be used to threaten the lawyer by a person who is not interested in the well-being of the client.

III. Proposed Replacement for Rule 1.02(g)

The Texas Supreme Court in the last Referendum proposed replacing Rule 1.02(g) with the following Rule and Comments, which generally follow ABA Model Rule 1.14<sup>4</sup>:

**Rule 1.\*\* Clients with Diminished Capacity**

- (a) 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 another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer 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

<sup>4</sup>The Committee had referred to this as Rule 1.14, and this was the number the Court assigned it for the February 2011 Referendum, with other Rules having been renumbered accordingly.

interest, the lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, 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, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.

- (c) When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests, unless otherwise prohibited by law.

**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. But maintaining the ordinary client-lawyer relationship may not be possible when the client suffers from a mental impairment, is a minor, or has a diminished capacity for some other reason to make adequately considered decisions regarding representation. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often can understand, deliberate on, and reach conclusions about matters affecting the client's own well-being. For example, some people of advanced age are capable of handling routine financial matters but need special legal protection concerning major transactions. Also, some children are regarded as having opinions entitled to weight in legal proceedings concerning their custody.
2. 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 lawyer's knowledge of the client's long-term commitments and values.
3. The fact that a client suffers from diminished capacity does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the client has a guardian or other legal representative, the lawyer should, as far as possible, accord the client the normal status of a client, particularly in maintaining communication. If a guardian or other legal representative has been appointed for the client, however, the law may require the client's lawyer to look to the representative for decisions on the client's behalf. 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.
4. The client may wish to have family members or other persons participate in discussions with the lawyer; however, paragraph (a) requires the lawyer to keep the client's interests foremost and, except when taking protective action authorized by paragraph (b), to look to the client, not the family members or other persons, to make decisions on the client's behalf. 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.

## **Taking Protective Action**

5. Paragraph (b) contains a non-exhaustive list of actions a lawyer may take in certain circumstances to protect a client who does not have a guardian or other legal representative. Such actions 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 existing 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 client's wishes and values 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. A client with diminished capacity also may cause or threaten physical, financial, or other harm to third parties. In such situations, the client's lawyer should consult applicable law to determine the appropriate response.
7. When a legal representative has not been appointed, the lawyer should consider whether an appointment is reasonably necessary to protect the client's interests. Thus, for example, 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, applicable law provides for the appointment of certain legal representatives in certain circumstances. For example, the Texas Family Code prescribes when a guardian ad litem, attorney ad litem, or amicus attorney should be appointed in a suit affecting the parent-child relationship, and the Texas Estates Code prescribes when a guardian should be appointed for an incapacitated person. 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 lawyer's professional judgment; but, in considering alternatives, the lawyer should be aware of any law that requires the lawyer to advocate on the client's behalf for the action that imposes the least restriction.

## **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. As with any client-lawyer relationship, information relating to the representation of a client is confidential under Rule 1.05. But when the lawyer is taking protective action, paragraph (b) of this Rule permits the lawyer to make necessary disclosures. Given the risks to the client of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or in 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 will act adversely to the client's interests before discussing matters related to the client.

Notably, paragraph (b) permits a lawyer to take legally restrictive action (like getting a guardian or conservator for the client) or to utilize less intrusive means (like talking to family members) to address a client's disability. Additionally, paragraph (c) provides an exception to the confidentiality Rule if the lawyer takes any action – legally restrictive or less intrusive – limiting the disclosure of such information to that reasonably necessary to protect the client's interests. As paragraph (b) authorizes legally restrictive measures to the same extent it does less intrusive methods, then the lawyer could disclose whatever information is necessary to achieve the method the lawyer selects. We believe that this proposed Rule adequately addresses the issues noted above and therefore endorse its promulgation.<sup>5</sup>

<sup>5</sup> The Committee recommended further deviation from ABA Rule 1.14 (see attached comparison table).

## Proposed Rule 1.02(g) and Rule 1.16 Redlined

### **Rule 1.02 Scope and Objectives of Representation**

- (a) Subject to paragraphs (b), (c), (d), ~~and (e)~~, and (f), ~~and (g)~~, a lawyer shall abide by a client's decisions:
- (1) concerning the objectives and general methods of representation;
  - (2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law;
  - (3) In a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.
- (b) A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation.
- (c) A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law.
- (d) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.
- (e) When a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act in the commission of which the lawyer's services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.
- (f) When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.
- ~~(g) A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.~~

### Comment:

#### **Client Under a Disability**

12. Paragraph (a) assumes that the lawyer is legally authorized to represent the client. The usual attorney-client relationship is established and maintained by consenting adults who possess the legal capacity to agree to the relationship. Sometimes the relationship can be established only by a legally

effective appointment of the lawyer to represent a person. Unless the lawyer is legally authorized to act for a person under a disability, an attorney-client relationship does not exist for the purpose of this rule.

13. 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. If a legal representative has not been appointed, paragraph (g) requires a lawyer in some situations to take protective steps, such as initiating the appointment of a guardian. The lawyer should see to such appointment or take other protective steps when it reasonably appears advisable to do so in order to serve the client's best interests. See Rule 1.05(c)(4), d(1) and (d)(2)(i) in regard to the lawyer's right to reveal to the court the facts reasonably necessary to secure the guardianship or other protective order.

## **Rule 1.16 Clients with Diminished Capacity**

(a) 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 another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer 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. Such action may include, but is not limited to, 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, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.

(c) When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is 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. However, maintaining the ordinary client-lawyer relationship may not be possible when the client suffers from a mental impairment, is a minor, or for some other reason has a diminished capacity to make adequately considered decisions regarding representation. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often can understand, deliberate on, and reach conclusions about matters affecting the client's own well-being. For example, some people of advanced age are capable of handling routine financial matters but need special legal protection concerning major transactions. Also, some children are regarded as having opinions entitled to weight in legal proceedings concerning their custody.

2. 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 lawyer's knowledge of the client's long-term commitments and values.

3. The fact that a client suffers from diminished capacity does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the client has a guardian or other legal representative, the lawyer should, as far as possible, accord the client the normal status of a client, particularly in maintaining communication. If a guardian or other legal representative has been appointed for the client, however, the law may require the client's lawyer to look to the representative for decisions on the client's behalf. 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.

4. The client may wish to have family members or other persons participate in discussions with the lawyer; however, paragraph (a) requires the lawyer to keep the client's interests foremost and, except when taking protective action authorized by paragraph (b), to look to the client, not the family members or other persons, to make decisions on the client's behalf. 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.

### **Taking Protective Action**

5. Paragraph (b) contains a non-exhaustive list of actions a lawyer may take in certain circumstances to protect a client who does not have a guardian or other legal representative. Such actions 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 existing 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 client's wishes and values 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. A client with diminished capacity also may cause or threaten physical, financial, or other harm to third parties. In such situations, the client's lawyer should consult applicable law to determine the appropriate response.

7. When a legal representative has not been appointed, the lawyer should consider whether an appointment is reasonably necessary to protect the client's interests. Thus, for example, 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, applicable law provides for the appointment of legal representatives in certain circumstances. For example, the Texas Family Code prescribes when a guardian ad litem, attorney ad litem, or amicus attorney should be appointed in a suit affecting the parent-child relationship, and the Texas Probate Code prescribes when a guardian should be appointed for an incapacitated person. 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 lawyer's professional judgment. In considering alternatives, the lawyer should be aware of any law that requires the lawyer to advocate on the client's behalf for the action that imposes the least restriction.

### **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. As with any client-lawyer relationship, information relating to the representation of a client is confidential under Rule 1.05. However, when the lawyer is taking protective action, paragraph (b) of this Rule permits the lawyer to make necessary disclosures. Given the risks to the client of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or in 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 will act adversely to the client's interests before discussing matters related to the client.

## 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.