



Proposed Changes to Model Rule 1.14:
How They Will Affect Practice

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Proposed Changes to Model Rule 1.14:
How They Will Affect Practice

Keep in mind:

1. Final version will be different than that in your materials.
2. Final not available until formally added to the agenda of ABA Midyear Meeting, February 2026.
3. Comment numbers I refer to are those in your materials.
4. What you have reflects about 90% of the final version.
5. Everything is proposed and can change, but not much.
6. I'm hitting highlights, not every jot and tittle.

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**Five
Quandaries
we will
cover**

(but not all the
possible issues)



- Diminished Capacity?



- Protective Action Guidance?



- 3rd Parties—Supporter/Exploiter?



- How Much Can I Disclose in and out of Litigation?



- Meaningful Access to Counsel when a surrogate is in place

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- New Comment on representing clients in criminal matters, new Cmt. 6
- New Comment on representing Minors, new Cmt. 7
- Change “normal client-lawyer relationship” to “ordinary client-lawyer relationship”
- There will be another new comment on skills needed for competent representation of client with d-m limitatons.

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1.14(a) Says Act Normal...
...as far as reasonably possible, maintain a normal client-lawyer relationship....

- 1.14(b) Except when you can't...
Lawyer may take reasonably necessary protective action,
But only if the “lawyer reasonably believes
- the client has diminished capacity,
 - is at risk of substantial physical, financial or other harm unless action is taken and
 - the client cannot adequately act in the client's own interest.

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More Guidance
than Rule

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Rule 1.14(c) – impliedly authorized disclosure

When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

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- Lives alone in an apartment she has rented for years. Neighbor refers her.
- She has gotten eviction notice due to 3 months past due rent and inability to maintain her apartment in safe condition.
- Comes in using a walker, disheveled, and malodorous.
- Almost no understanding of problems with her apartment or her person. Does not remember exactly when she last paid rent.
- She's only here because neighbor insisted she needed to see you.

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Does she have the capacity to hire you?

Yes?

No?

I need more info?

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What is "Diminished Capacity"?

Quandary 1

The Rule and Comments refer to Diminished Capacity several times but do not define it, although Comment 6 provides some factors to consider:

- ▶ Ability to articulate reasoning leading to decision,
- ▶ Variability of state of mind & ability to appreciate consequences;
- ▶ Substantive fairness of decision; &
- ▶ Consistency of decision with known long-term commitments & values.

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DG1 Spelling on Malodorous updated.
David Godfrey, 2025-09-05T18:51:37.254

Does the person possess sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of the act or transaction in which the person is engaged.

17 C.J.S. *Contracts* 45 (2000)

Compare:

Contract to buy a
multi-state business



vs.

Contract to buy
a cup of coffee



Consider: Accommodations needed to ensure access to justice.

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Response to
Quandary 1:

- ▶ Substitute "Decision-making Limitations" for "diminished capacity" throughout.
- ▶ New 1.14(b): "A person has decision-making limitations if the person has substantial difficulty receiving and understanding information, evaluating information, or making or communicating decisions even with appropriate supports or accommodations."

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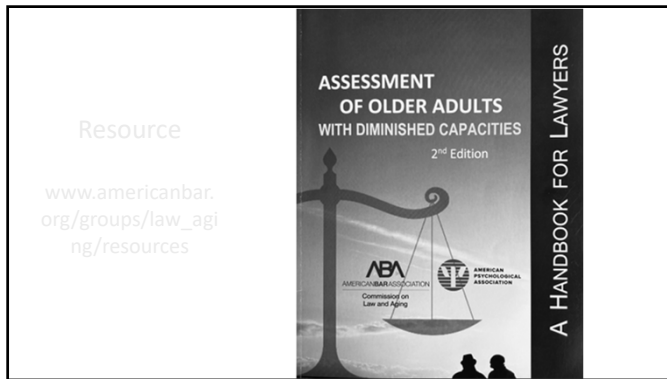
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- ▶ Further elaboration of decision-making abilities and limitations in:
 - Cmt. 1 (Lawyers duties)
 - Cmt. 2 and 3 (eg's of abilities and Supported Decision-Making)

"Examples of supports and accommodations include communication devices or services, assistance of appropriate third parties or supported decision-making, environmental changes (e.g., conducting client meetings in a familiar setting), and using plain language or otherwise modifying the lawyer's communication and counseling techniques for the client."

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Resource

www.americanbar.org/groups/law_aging/resources

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- You agree to assist and learn Ms. M actually has funds to pay the back rent which you pay. You connect her to a local money management service to help manage her bills. Eviction withdrawn - for time being.
- Shortly later, landlord informs you that she has twice left her stove's gas burner on heating a pan of food to cinders, setting off building smoke alarms. She says she forgot she was cooking something.

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Is Protective Action Justified?

Yes, only with Consent?

Yes, even if she does not consent?

No?

Wven if yes, what can I do?

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Quandary 2

How to
understand
& apply
Protective
Action?

MRPC 1.14(b) says:

...the lawyer **may** take reasonably necessary protective action, **including** consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, **seeking the appointment of a guardian ad litem, conservator or guardian.**

The Rule may create a slippery slope towards guardianship.

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Quandary 2 Response

Unintended
encouragement of
Guardianship as a
Protective Action

Revisions:

1. Eliminate examples of protective action (especially guardianship) from the Rule and address in Comments.
2. Express emphasis on “supports and accommodations”
 - Rule 1.14(b) - in definition of d-m limitations
 - Cmt. 2 (under Client Abilities and Limitations) – several eg’s
 - Cmt. 10 (under Protective Action)

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Quandary 2 Response

Unintended
encouragement of
Guardianship as a
Protective Action

Revisions:

3. No substantive change to Protective Action examples in current Cmt. 5 (now 12) and factors for guiding lawyer’s actions.

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Protective
Action
Guidance in
Current Cmt.
5 (now 12)
unchanged

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.

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Protective
Action
Guidance in
Current Cmt.
5 (now 12)
unchanged

“... 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 minimizing intrusion into
the client's decision-making
autonomy to the least extent
feasible,
- maximizing client capacities and
- respecting the client's family and
social connections.”

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Is this a Protective Action Problem or
an Accommodation Challenge?

Accommodations and
Supports

Protective Action

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Slide 19

DG1 hyphenate or two words for decision making

David Godfrey, 2025-09-05T18:55:40.361

Supports and Accommodations: The Most Creative Part of Your Work

Will appropriate supports and accommodations improve situation?

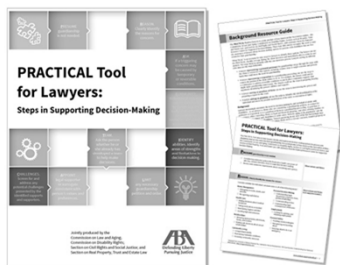
- ▶ E.g. communication devices, health alerts, plain language instructions, alarms, timers, & other tools.
- ▶ Is there available family, friends, and supporters (including from civic, religious, or social communities) who can help address the concerns.

▶ Is client amenable to referrals to available services. e.g.:

- ▶ Talk lines/Senior Call Check
- ▶ Friendly outreach programs
- ▶ Case managers
- ▶ Delivery services
- ▶ Visiting nurses
- ▶ Senior centers
- ▶ Credit monitoring/freeze
- ▶ Direct deposit/automatic bill payment

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ABA Supported Decision-Making Tool



www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/supported-decision-making/

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- **Two months later, Ms. M asks to see you. She comes in with her son, who moved in with Ms. M from out-of-state after losing his job.**
- **Son says Mom is increasingly frail and confused and needs him to manage things for her under a POA.**
- **Ms. M appears distraught and somewhat confused but tells you to do what her son thinks is best.**

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Yes?
No?
Depends?

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Quandary 3

How Helpful is Current Cmt. [3] which says:

- ▶ 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.

Also see, *Rule 4.3 Dealing with Unrepresented Person*

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Quandary 3 Response

Revisions: Additional guidance added to: Cmt. 3 (now 5) re family participation

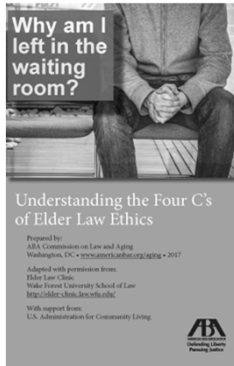
- ▶ "The lawyer should seek the client's informed consent to the presence of such persons"
- ▶ "Whenever possible, the lawyer should afford the client the opportunity to communicate privately with the attorney without the presence and influence of others."
- ▶ (There will likely be a new Comment on importance of Client Identification)

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Resource

www.americanbar.org/groups/law_aging/resources/ethics_and_counseling_older_clients/



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The 4 C's explained to those in the waiting room

1. Client Identification
2. Conflicts of Interest
3. Confidentiality
4. Capacity

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- Weeks later, Son contacts you. Mom received notice of termination of her Medicaid. You agree to help.
- Termination based on failure to provide financial records. Probing, you discover Son is bilking Mom's bank account. He admits using "some" of it for gambling. Poor explanations for the rest. Unrepentant.
- Ms. M now unable to understand at all what's going on financially, but says: "I don't want you to get him in trouble, so please don't tell anyone!"



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Tell him you will report him to APS, unless he seeks gambling addiction counseling and pays Mom back?

Tell him you will report him to APS, unless he resigns as Mom's agent?

File a petition for an accounting and removal of Son as agent?

File petition for guardianship?

Something else?

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Quandary 4

Current Rule 1.14(c) states:

When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

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How helpful is Comment 8 re Disclosures?

Current Cmt. 8 Excerpt:

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.*

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Quandary 4 Response

Revision: Rule 1.14(d) will eliminate implied consent

~~(d)~~ Information relating to the representation of a client with decision-making limitations ~~diminished capacity~~ is protected by Rule 1.6. However, ~~when~~ taking protective action pursuant to paragraph ~~(c)~~, the lawyer is ~~impliedly authorized under Rule 1.6(a) to~~ may reveal information related to the representation about the client, but only to the extent the lawyer reasonably believes necessary to protect the client's interests.

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Quandary 4 Response

Revision:

Additional guidance added to Cmt. 8, now 18 (re disclosure of client's condition)

"Disclosure of the client's diminished capacity could adversely affect the client's interests, which may include constitutional and legal rights."

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- Lo and behold! A formerly estranged daughter of Ms. M shows up and tells you her brother is a scam bag and she is going to file for guardianship over Mom.
- Court appoints you to represent Ms. M who insists she does not need or want a guardian.
- A couple weeks before hearing, she tells you that she has very good news – she has won a Publishers Clearinghouse lottery for \$2 million, which she will get soon because she just paid \$10,000 to cover taxes and fees. You quickly confirm it's a scam, but she insists it's real.

What do you do?

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What would you do?**Quandary 4a**

- Since the 1.14(c) criteria are met, disclose to the petitioner, Court, GAL, or visitor?
- Don't disclose. Your representation is directed by her goal of preventing guardianship?
- Something else?

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Revision:**Quandary 4a
Response****Additional guidance added to Cmt. 5, now 9 (re protective actions):**

"In litigation involving the capacity of the client, such as a guardianship proceeding, the attorney should advocate for the client's expressed position when deciding what, if any, protective action should be taken."

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Revision: New Cmt. 13**Quandary 4a
Response**

If another person has petitioned a court for an appointment of a conservator or a guardian or another restriction on the client's legal capacity, the lawyer may not advocate for such an appointment or restriction if the client opposes it. If the lawyer represents a client who is a respondent in a proceeding for guardianship or conservatorship, the lawyer must advocate for the client's objectives if known or ascertainable.

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Suppose Ms. M already had a guardian,

and

You first meet her when she calls you to ask your help to terminate the guardianship. She had been having serious health problems but is now better. She informs you that the guardian will absolutely oppose ending the guardianship.

Can you represent her?

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Can you agree to represent her?

Yes?
No?
Only if guardian consents?
Approval of court required?

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Quandary 5

Current Cmt. 4 to Rule 1.14 states:

If a legal representative has already been appointed for the client, the attorney should ordinarily look to the representative for decision on behalf of the client.

But Current Cmt. 2 states:

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."

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Nina A. Kohn & Catheryn Koss, 91 Wash. L. Rev. 581 (June, 2016)

- (1) agency principles do not bar such representation;
 (2) contract principles do not bar such representation; and
 (3) even if such representation were inconsistent with state law
 ..., constitutional due process protections would require
 that exceptions be made to permit representation of
 persons subject to guardianship, at the very minimum to
 challenge the terms or existence of their guardianships....⁴³

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Quandary 5 Response

Revision:

Cmt. 4, now 7, re Guardianship:

...a lawyer may consult with and represent a person subject to guardianship or conservatorship who seeks representation to challenge or modify the terms of that arrangement, or who seeks representation with regard to any other matter over which the person retains decision-making authority. When representing a client in such situations, the lawyer must take direction from the client and advocate for the client's objectives.

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Quandary 5 Response

Revision: Cmt. 4, now 7, re Agent:

When the client has granted an agent authority to make decisions, including an agent acting under a power of attorney, the lawyer nevertheless should take direction from the client and maintain communication with the client to the extent feasible unless the client has otherwise directed or is unable to provide direction. In addition, a lawyer may consult with and represent a person who seeks to challenge the actions of an agent or terminate or modify the agent's appointment.

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Five Quandaries Recap of Rule 1.14



▪ What is Diminished Capacity?



▪ Protective Action Guidance



▪ 3rd Parties—Supporter/Exploiter?



▪ How Much Can I Disclose in and out of Litigation?



▪ Meaningful Access to Counsel when a surrogate is in place?

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It was dawning on Ed that maybe his conscience wasn't such a good guide after all

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