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Ethics of Representing the Disabled Client: Does Model Rule 1.14 Adequately Resolve the Best Interests\Advocacy Dilemma, The

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THE ETHICS OF REPRESENTING THE DISABLED CLIENT: DOES MODEL RULE 1.14 ADEQUATELY RESOLVE THE BEST INTERESTS/ ADVOCACY DILEMMA?

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I. INTRODUCTION

Lawyers working with clients under a disability, primarily one involving mental or psychiatric disorders, have had only a rather amorphous provision to guide the ethics of their actions. Model Code of Professional Responsibility Ethical Consideration 7-12 merely "casts additional responsibilities upon" the lawyer representing the disabled client.¹ This standard presented the lawyer

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1. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12 (1981). This section provides:

Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified

with two choices in providing representation: advocate the express desires of the client, regardless of how those desires were affected by the client's disabled condition; or determine what he or she believed were the "best interests" of the client and advocate those interests, regardless of the actual desires of the client. Thus, the Code merely restated the advocacy/best interests dichotomy which has traditionally faced lawyers representing mentally-disabled clients.²

from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.

See also *id.* EC 7-11 (lawyer's obligations may depend upon "the intelligence, experience, mental condition or age of a client").

In the context of this Article, unless otherwise indicated, the phrase "disabled client" is intended to include only the client disabled by reason of a mental or psychiatric problem. It is the disabling condition caused by such illness that creates the greatest difficulty for the lawyer.

2. See, e.g., Andalman & Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic, and a Proposal*, 45 MISS. L.J. 43, 46-49 (1974); Brakel, *The Role of the Lawyer in the Mental Health Field*, 1977 AM. B. FOUND. R.J. 467, 467; Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424, 446-57 (1966); Gupta, *New York's Mental Health Information Service: An Experiment in Due Process*, 25 RUTGERS L. REV. 405, 439-41 (1971); Johnson, *Due Process in Involuntary Civil Commitment and Incompetency Adjudication Proceedings: Where Does Colorado Stand?*, 46 DEN. L.J. 516, 535-37, 565-66 (1969); Note, *The Role of Counsel in the Civil Commitment Process: A Theoretical Framework*, 84 YALE L.J. 1540, 1541-42 (1975).

At least part of the dichotomy arises from the failure to determine the legal basis for commitment of the mentally ill. Under a *parens patriae* view of commitment, the relationship between the state and the individual is one of guardianship, protection of the individual. See Comment, *A Constitutional Right to Court Appointed Counsel for the Involuntarily Committed Mentally Ill: Beyond the Civil-Criminal Distinction*, 5 SETON HALL L. REV. 64, 67-68 & nn.13-14 (1973). The power, indeed the right and obligation of courts of equity to protect both the person and property of those unable to care for themselves, is inherent in those courts and has often been extended to the care of mentally ill persons and juveniles. See Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 MICH. L. REV. 945, 956-57 (1959). Thus, proceedings instituted under a *parens patriae* concept are not adversarial. See Comment, 5 SETON HALL L. REV., *supra*, at 69 & n.18. Because these proceedings are designed to protect the person involved, there is no conflict between the state and the person who is the object of the proceedings. See *id.* at 70.

The other legal justification for commitment is the police power of the state. Under the police power, commitment is allowed where a person is likely to commit acts of violence against persons or property. See Ross, *supra*, at 955-56. In such a circumstance, the state is seeking to protect *society*, rather than the alleged mentally ill person. See Comment, 5 SETON HALL L. REV., *supra*, at 74. In exercising its police power, due process becomes important because the proceedings have become adversarial. *Id.*

During the 1970's, however, the general trend in the courts favored the disabled client's right to unfettered advocacy. In *Quesnell v. State*,³ for example, the Washington Supreme Court, in reversing a denial of a motion to vacate a civil commitment,⁴ gave detailed instructions regarding the "additional responsibilities" placed upon attorneys representing disabled clients. The court stated that the attorney should be an advocate for the patient, rather than a non-adversary guardian.⁵ The attorney must advance for the client all relevant legal claims or defenses to the proceedings.⁶ It is therefore necessary for the lawyer to fully investigate the facts that are alleged to support the cause against the client by reviewing appropriate records and interviewing family and other involved persons.⁷ The court stated that the client must always be kept informed of the attorney's actions and the choices available to him.⁸ The attorney may not unilaterally waive substantive rights without the client's informed consent.⁹

Decisions over the past fifteen years have tended to expand the legal rights of the mentally handicapped and increase the ethical obligations of counsel.¹⁰ These decisions reveal that the dichotomous standard in the Code

3. 83 Wash. 2d 224, 517 P.2d 568 (1974) (en banc).

4. *Id.* at 244, 517 P.2d at 580. Quesnell was ordered committed to a psychiatric hospital following a hearing, in which she was represented by privately retained counsel and a court-appointed attorney denominated a guardian ad litem. Although Quesnell and her private counsel requested a jury trial on the issue of commitment, the attorney-guardian waived the right. At the commitment hearing, the court ruled that a jury trial had been waived by Quesnell through the attorney-guardian ad litem. A motion to vacate the consequent order of commitment was denied and the appeal followed. Although the appeal was taken to determine the issue of the authority of the attorney-guardian ad litem to waive jury trial, the court chose to discuss all due process aspects of the case. *Id.* at 226-27, 517 P.2d at 570-71.

5. *Id.* at 234, 517 P.2d at 574-76. The court noted that much of the difficulty resulted from a "lack of judicially enunciated, appropriate standards or guidelines defining the role of the guardian ad litem and the scope of his authority." *Id.* at 235, 517 P.2d at 575. The court pointed out the difficulties for the lawyer representing the disabled client under the current code: "The lawyer representing a prospective patient in a typical civil commitment proceeding is a stranger in a strange land without benefit of guidebook, map, or dictionary." *Id.* at 235 n.15, 517 P.2d at 575 n.15 (quoting Cohen, *supra* note 2, at 424).

6. 83 Wash. 2d at 236, 517 P.2d at 576.

7. *Id.* at 237-38, 517 P.2d at 576-77.

8. *Id.*

9. *Id.*

10. In 1967, the Supreme Court indicated that due process was necessary before a juvenile could be deprived of liberty in a juvenile proceeding. *In re Gault*, 387 U.S. 1 (1967). Because juvenile proceedings and commitment proceedings have been viewed together under the *parens patriae* theory, see note 2 *supra*, it was only logical to extend the rationale of *Gault*, implicitly making the juvenile proceeding adversarial, to the commitment proceeding. In 1968, the Tenth Circuit linked the *parens patriae* power to the police power after recognizing that *Gault* would apply to commitments:

Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in *parens patriae*, it has the inescapable duty to

has become an incorrect statement of the law.

In August, 1983, the American Bar Association adopted the Model Rules of Professional Conduct.¹¹ Model Rule 1.14 is the first explicit ethical guide for the lawyer faced with the difficult task of representing the disabled client.¹² This Article explores the provisions of this new Rule to determine if guidance is really provided to the lawyer.

II. A BRIEF HISTORY OF MODEL RULE 1.14

The Model Rules arose from the appointment, in 1977, of the American Bar Association Commission on Evaluation of Professional Standards, popularly known as the Kutak Commission. The initial draft of Model Rule 1.14 proposed by the Commission provided:

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer shall secure the appointment of a guardian or other legal representative, or seek a protective order with respect to a client, only when the lawyer reasonably believes that the client cannot adequately communicate or exercise judgment in the client-lawyer relationship.¹³

discharge due process and this necessarily includes the duty to see that a subject of an involuntary commitment proceedings is afforded the opportunity to the guiding hand of legal counsel at every step of the proceedings. . . . Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968), cited in Lessard v. Schmidt, 349 F. Supp. 1078, 1097 (E.D. Wis. 1972) (due process mandates "that a person detained on grounds of mental illness has a right to counsel").

The *parens patriae* theory of commitment was dealt a death blow in 1975, when the Supreme Court held that the Constitution required that any commitment be posited on dangerousness to society. O'Conner v. Donaldson, 422 U.S. 563, 576 (1975). Such confinement "is a deprivation of liberty which the State cannot accomplish without due process of law." *Id.* at 580 (Burger, C.J., concurring). By moving to a standard requiring danger, the Court permitted the police power protection of society while rejecting the *parens patriae* notion of protective guardianship.

Further decisions make clear the limitations on that permitted police power. For a state to confine an allegedly mentally ill person, the state must justify that deprivation of liberty clearly and convincingly. See Addington v. Texas, 441 U.S. 418, 433 (1979). Likewise, where parents or the state seek the "voluntary" commitment of a child, due process will require some degree of objective fact finding to sanction the parent or state's determination to seek commitment and regular reviews of such a decision. See Parham v. J.R., 442 U.S. 584, 606-07 (1979).

11. Annual Meeting of the American Bar Association, 52 U.S.L.W. 2077, 2077 (Aug. 29, 1983). A full reprint of the Model Rules is contained in *Model Rules of Professional Conduct*, 52 U.S.L.W. 3 (August 16, 1983).

12. An earlier draft of Model Rule 1.14 indicated that it had no counterpart in the current disciplinary rules. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 code comparison (Proposed Final Draft 1981).

13. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 (Discussion Draft 1980).

Unlike the Discussion Draft, the Proposed Final Draft was accompanied by legal background. The legal comments to Rule 1.14 outlined the conflicting literature regarding the lawyer's duty to the disabled client.¹⁴ In addition, the alterations suggested in the Proposed Final Draft also lessened the obligation of the lawyer to seek protection for the client from "when doing so is necessary in the client's best interest,"¹⁵ to "only when the lawyer reasonably believes that the client cannot adequately communicate or exercise judgment in the client-lawyer relationship."¹⁶ The Proposed Final Draft and its comments, however, indicated that the "lawyer's relationship with a disabled client ordinarily should not differ from the normal client-lawyer relationship."¹⁷

Further comments were solicited following publication of the Proposed Final Draft. As a result, a Revised Final Draft, dated June 30, 1982, was published prior to the 1982 Annual Meeting of the American Bar Association House of Delegates.¹⁸ The Revised Final Draft was partially considered by the House of Delegates at the 1982 annual meeting. Action on the full body of the rules, including Model Rule 1.14, was deferred, however, until the February 1983 meeting.¹⁹ At the February meeting, all final amendments to the rules were considered and the Final Draft of the Rules was formulated.²⁰ The Final Draft was approved by the House of Delegates at the annual meeting in August 1983.²¹ Model Rule 1.14 remained unchanged from the Revised Final Draft in June 1982 through final adoption of the Rules in August 1983. This final revision of the Rule is the subject of this Article.

Model Rule 1.14(a) provides: "When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."²² This rule makes the traditional obligations and ethical responsibilities of an attorney applicable to the client with a disability. When read in conjunction with other rules,²³ the duties envisioned by Rule 1.14(a)

14. *Id.* legal background (Proposed Final Draft 1981).

15. *Id.* Rule 1.14 (Discussion 1980).

16. *Id.* Rule 1.14 (Proposed Final Draft 1981).

17. *Id.* comment.

18. MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft with Revisions through June 30, 1982) (Red Line Draft).

19. *See* Midyear Meeting of the American Bar Association, 51 U.S.L.W. 2488, 2488 (Feb. 22, 1983).

20. *Id.*

21. *See* note 12 *supra*.

22. MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.14(a) (ABA Adopted Version 1983).

23. "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." MODEL RULES OF PROFESSIONAL CONDUCT scope (ABA Adopted Version 1983). The 1981 Proposed Final Draft made it even clearer that the rules were to be interpreted *in pari materia*: "Taken together, the Rules provide elements of the lawyer's professional role." *Id.* (Proposed Final Draft 1981). The elimination of this sentence from the

are virtually identical to the role of the lawyer as viewed by decisions like *Quesnell*.

In representing a disabled client, a lawyer must abide by the client's decisions and should not be influenced by the advice or payment of the legal fee by another.²⁴ As a result, the lawyer represents only the interests of the person with the disability and consequently advocates only that person's interests. Those interests can be fully advanced so long as they appear lawful.²⁵ The duty to investigate, as seen in *Quesnell*, is covered by Model Rules 1.1²⁶ and 1.3,²⁷ dealing with competence and diligence. The rules also require communication with a client.²⁸ Finally, Model Rule 1.2 requires that the client control the substantive aspects of any litigation.²⁹

Rule 1.14(a) fits neatly into the philosophy of Chairman Robert Kutak, whose Introduction to the Proposed Final Draft indicates an attempt by the drafters of the Model Rules to restate attorney-client law.³⁰ It nicely summarizes current attitudes toward the representation of the disabled client and should be a welcome addition.

Because Rule 1.14(a) is so precise in summarizing the current law, the apparent inconsistency of Rule 1.14(b) is evident on initial reading. As adopted, Rule 1.14(b) provides: "A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."³¹ It thus appears that Rule 1.14(b) takes away what Rule 1.14(a) has given. On one hand, a normal attorney-client relationship is re-

Adopted Version cannot be considered an abandonment of the requirement that the rules should be read together.

24. See e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (ABA Adopted Version). The payment of a lawyer's fee by another is permissible, so long as payment does not compromise the loyalty of the lawyer to the client. *Id.* comment; see also *id.* Rule 1.8(f)(1) (ABA Adopted Version, 1983) ("A lawyer shall not accept compensation for representing a client from one other than the client unless . . . the client consents after consultation.").

25. See *id.* Rules 3.1, 3.3 (ABA Adopted Version 1983). Rule 3.1 deals with meritorious claims and provides that a lawyer should not bring, defend, or assert a frivolous issue or claim. Rule 3.3 concerns the lawyer's duties of candor to a tribunal.

26. See *id.* Rule 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

27. See *id.* Rule 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

28. The lawyer must "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.* Rule 1.4.

29. See *id.* Rule 1.2. If the lawyer in *Quesnell* had followed the obligations set out in notes 24-28 *supra*, he would have fulfilled the duties imposed by the court.

30. See MODEL RULES OF PROFESSIONAL CONDUCT chairman's introduction (Proposed Final Draft 1981).

31. *Id.* Rule 1.14(b) (ABA Adopted Version 1983).

quired when the client is disabled. On the other hand, the lawyer can also take actions that the lawyer believes are in the client's interest. As noted in the comment to the rule, "[t]he lawyer's position in such cases is an unavoidably difficult one."³²

The general thrust of Model Rule 1.14 apparently remained the same throughout the history of its drafting. Nevertheless, there is a significant change in the adopted version of Model Rule 1.14(b), which did not exist in either the Discussion Draft or the Proposed Final Draft. In the adopted version, the lawyer no longer is obligated to seek the appointment of a guardian or to take protective action on behalf of a client. Instead, the duty becomes one of permission—"a lawyer *may* seek the appointment." By using "may," the drafters changed the obligations of the lawyer. When "shall" is used in the Model Rules, as it was in the initial two versions of Model Rule 1.14(b), it means that a violation of the rule subjects the lawyer to discipline. When "may" is used in the adopted version, the lawyer must exercise professional discretion. "No disciplinary action should be taken when the lawyer chooses not to act . . . within the bounds of such discretion."³³ It initially appears that the provision of Model Rule 1.14(b) advises the lawyer of the possible available choices when the client is unable to exercise judgment in the client-lawyer relationship. The fallacy of that logic rests not in the provisions of the rule itself, but rather in the mechanics of the rule.

The decision by a lawyer to secure a representative or take other protective action for the disabled client, even where such action is permissive, will almost always require a revelation of so much of the client's condition as caused the lawyer to believe that the client could not effectively act in the client's own interest. If litigation is pending, the lawyer seeking the relief permitted by the rule would probably ask the court to determine the mental status of the client. This would be done by a request for a mental examination.³⁴ Examination is allowed only "upon good cause," which should require the lawyer to advise the court of the underlying factual basis for suspecting that the client is unfit.³⁵

If no action is pending involving the client, the lawyer must ask for a guardian to be appointed through a guardianship proceeding alleging incompetence. In such a proceeding, the lawyer will have to reveal the client's condition to a person qualified to be the representative, and then to the court. The court will determine the competence of the client after appointing another lawyer to represent the client in the competency hearing.³⁶ The decision to

32. *Id.* Rule 1.14 comment.

33. *Id.* scope.

34. *See, e.g.*, FED. R. CIV. P. 35(a).

35. At issue in such orders is the "sanctity of the person, by virtue of which personal examinations were at one time regarded as abhorrent. . . . [T]he motion is not a mere formality but requires individualized exercise of the court's discretion." F. JAMES & G. HAZARD, CIVIL PROCEDURE § 6.6, at 189 (2d ed. 1977).

36. A proceeding to have a person declared incompetent is usually adversarial.

seek protection for the client requires the lawyer to collect, synthesize, evaluate, and then reveal information communicated to the lawyer by the disabled client in the context of the relationship. Therefore, a lawyer must consider the provisions of Model Rule 1.6, which forbid unconsented revelation of "information relating to representation of a client," unless revelation is sanctioned by the rule.³⁷ Model Rule 1.6 is mandatory, so a violation can result in discipline.³⁸ Thus, when a lawyer chooses to exercise professional discretion under the "may" standard of Rule 1.14, he can easily run afoul of the "shall" standard of Rule 1.6. Under the confidence provisions of Rule 1.6, disclosure of information is permitted when disclosure is: (1) impliedly authorized; (2) necessary to prevent the client's commission of a criminal act likely to result in death or serious bodily harm; or (3) necessary to protect the interest of the lawyer in a proceeding brought by the client, to defend the lawyer against a claim based on the conduct of the client, or to respond in any type of action dealing with the lawyer's representation of the client.³⁹ Because the third exception is inapplicable here, the focus must be on the first two exceptions, together with any additional exceptions which might be applicable.

III. CONFIDENTIALITY EXCEPTIONS

A. Rule 1.6(a)—Revelation Impliedly Authorized

Initially, it might seem that revelation of the client's disability is always impliedly authorized; disclosure would enable the lawyer to fully carry out what the lawyer believes to be the purpose of the representation. Assuming

See, e.g., Wise v. Berman, 282 F. Supp. 282, 284 (M.D. Fla. 1967). Accordingly, statutory schemes often require the appointment of counsel for the alleged incompetent. *See, e.g.,* ILL. ANN. STAT. ch. 110, § 11a-10 (Smith-Hurd Supp. 1983-84); MO. REV. STAT. § 475.075 (1978). Some statutes refer to the appointed attorney as a guardian ad litem. *See, e.g.,* IDAHO CODE § 15-5-303 (1979); N.M. STAT. ANN. § 45-5-303 (1978).

37. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (ABA Adopted Version 1983):

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

38. *See id.* scope.

39. *See id.* Rule 1.6.

that the client does not wish the revelation made, such a reading is impermissible.⁴⁰ The comments to Model Rule 1.6(a) make it clear that the rule is not intended to substitute the lawyer's judgment for the client's. This rule is designed instead to be a substitute for DR 4-101, which authorizes disclosure upon the client's consent.⁴¹ Since consent to take certain procedural actions on the client's behalf may be implied,⁴² the real meaning of this exception is to permit the lawyer to negotiate for the client, by revealing information conveyed to the lawyer, on the theory that such disclosure will advance the lawful objectives of the client.⁴³ The exception thus works in harmony with Model Rule 1.2(a), which obligates the lawyer to abide by the client's decisions concerning the subject matter of the representation.⁴⁴

The exception in Model Rule 1.6(a) would not authorize disclosure of the client's condition, a disclosure almost certain to adversely affect the client's

40. Currently, a lawyer is authorized to reveal confidences "with the consent of the client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(1) (1981). The exception to confidentiality currently contained in Model Rule 1.6(a), permitting disclosure of "impliedly authorized" information, was a specific exception in earlier versions of the Model Rules. Under the Proposed Final Draft, a lawyer was permitted to reveal information "to serve the client's interest, unless it is information the client has specifically requested not be disclosed." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (Proposed Final Draft 1981). Under these earlier drafts, a conflict with Model Rule 1.14 is even more pronounced. It was permissible, under Model Rule 1.6, to reveal information when revelation was in the interests of the client, and such revelation was apparently compelled under Model Rule 1.14(b) "when the lawyer reasonably believes that the client cannot adequately communicate or exercise judgment in the client-lawyer relationship." *Id.* Rule 1.14(b) (Proposed Final Draft 1981). Thus, it could have been argued that the "interests" standard of Rule 1.6 was met when the "best interests" standard of Rule 1.14(b) was satisfied. The legal background to the same draft, however, indicated that the Model Rules were adopting the "advocacy" rather than "best interests" approach to representing the mentally ill. *See id.* legal background; *compare* note 2 *supra*.

Under the early written drafts, the comments to Rule 1.6 also indicated that the "interest" standard of that rule applied only to disclosures necessary to the "proper representation of the client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (Proposed Final Draft 1981). The same commentary appears in the adopted version. *Id.* Rule 1.6 comment (ABA Adopted Version 1983). Thus, even under the adopted version, it appears that there has been no reference between Model Rules 1.6 and 1.14 on this issue.

41. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 code comparison (Proposed Final Draft 1981). MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(1) (1981) provides that revelation may be made of "[c]onfidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them."

42. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (ABA Adopted Version 1983).

43. "[A] client impliedly consents to disclosures ordinarily necessary to effect the purposes of representation." *Id.* Rule 1.6 legal background (Proposed Final Draft 1981).

44. *Compare* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (ABA Adopted Version 1983).

interest.⁴⁵ Implied authority to reveal applies to procedural revelation in furtherance of the client's objectives.⁴⁶ It cannot authorize the revelation contemplated by Rule 1.14(b).

B. *Rule 1.6(b)(1)—Revelation to Prevent the Commission of a Crime*

The longstanding exception in Rule 1.6(b)(1) may permit some revelation by the lawyer representing a disabled client.⁴⁷ It would be a serious mistake, however, to allow this exception to sanction all of the revelation permitted by Rule 1.14(b). If a client, because of mental deficiencies, advises the lawyer of an intent to commit an act substantially likely to seriously injure or kill a

45. *Id.* Rule 1.14 comment.

46. Any implied authority is somewhat limited by the lawyer's obligation both to keep the client informed about the status of any matters and to fully explain matters to enable the client to make informed decisions. *See id.* Rule 1.4 (ABA Adopted Version 1983).

47. Under current DR 4-101(C)(2), a lawyer is permitted to reveal confidential information received from a client when revelation is permitted by disciplinary rule or required by law. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(2) (1981). Under *id.* DR 7-102(B)(1), a lawyer is permitted by the disciplinary rules to reveal a fraud perpetrated by a client upon a person or tribunal. In 1974, the current DR 7-102 was amended to permit the foregoing revelation, except when such revelation would be prevented because the information given to the lawyer was protected by the attorney-client privilege. *See id.* *See generally* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975). As of 1980, however, only about 29 states had adopted the amendment to this rule. *See CODE OF PROFESSIONAL RESPONSIBILITY BY STATE DR 7-102* (1980).

The exception created in Model Rule 1.6(b)(1) grew from the common law exception to the attorney-client privilege that exempted aid or advice in furtherance of a crime or fraud. *See* 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2298 (J. McNaughton rev. 1961); *see also* C. McCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 95 & n.48 (2d ed. J. Cleary 1972); E. WEEKS, ATTORNEYS AND COUNSELLORS AT LAW § 166 (2d ed. 1892). Through the multiple drafts of the Model Rules, this exception was extensively debated. In the original discussion draft, the attorney was permitted to disclose confidential information when "necessary to prevent or rectify the consequences of a deliberately wrongful act by the client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(c)(2) (Discussion Draft 1980). By the Proposed Final Draft, however, that exception was changed to permit the lawyer to reveal only when the lawyer's services had been used in the commission of a criminal or fraudulent act by the client. *Id.* Rule 1.6(b)(3) (Proposed Final Draft 1981). This position was softened by the "red line" draft to change the rule from use of the lawyer's services in the commission of such an act, to use of the lawyer's services in "furtherance" of a criminal or fraudulent act. *Id.* Rule 1.6(b)(2) (Revised Final Draft 1982). The exception was eliminated entirely. Midyear Meeting of American Bar Association, 51 U.S.L.W. 2488, 2488-89 (Feb. 22, 1983). Under the rules adopted, it appears that ethical "confidentiality" under Model Rule 1.6 and evidentiary attorney-client privilege are treated somewhat differently, with the latter being defined by state evidence law. Whether specific attorney-client privilege rules will displace the provisions of Model Rule 1.6 is left to substantive law, although a presumption will exist against the revelation of confidential information. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (ABA Adopted Version 1983).

person,⁴⁸ revelation is permitted to the extent necessary to prevent the act.⁴⁹ If the lawyer is convinced that such a decision is the product of a defect, the client's ability to make judgments arguably is impaired enough to satisfy the reasonable belief standard of Rule 1.14(b). Such an assumption would be in error.

When the two rules are read together, the lawyer apparently has permission to reveal information about a disabled client to prevent that disabled client from committing an act of substantial bodily harm, as announced by the client, or to secure a personal representative or seek protective action against the client. This reading is a mixture of two distinct mental health standards—commitment and incompetence. One can be committed to a psychiatric facility when the individual poses a strong likelihood of committing "significant physical or psychological injury to persons."⁵⁰ Thus, if a client meets this legal standard of commitment, then the standard for revelation within the exception of Rule 1.6(b)(2) is satisfied.

If the disabled client meets the commitment standard, revelation is necessary only to prevent the imminent bodily harm expressed in Rule 1.6. Satisfying a commitment standard does not automatically sanction revelation of the totality of the client's mental condition. For a person to be declared incompetent and require a personal representative, there must be a determination that the person "is unable to care for himself or for his property."⁵¹ This standard is akin to Model Rule 1.14(b), but distinct from the commitment-like standard of Model Rule 1.6. In fact, the two standards are totally separate. In Missouri, for example, no committed person "shall be presumed to be incompetent, to forfeit any legal right, responsibility or obligation or to suffer any legal disability as a citizen," as a result of the commitment.⁵² In New Jersey, persons committed to a state facility for the mentally retarded do not, by virtue of that fact, lose their right to vote.⁵³ By itself, commitment does not authorize a court to appoint a guardian without a full competency proceeding.⁵⁴ Thus, the exception permitting the revelation of a client's intent to commit a crime does not necessarily constitute permission to reveal the information that would be disclosed under Rule 1.14(b).⁵⁵ Otherwise, the provisions of Rule 1.14(b)

48. At least one decision has indicated that the intent of the client to do injury must be established for the lawyer beyond a reasonable doubt before revelation is required. See *Hawkins v. King County*, 24 Wash. App. 338, 345, 602 P.2d 361, 365 (1979).

49. See *id.* (intent need be communicated only to the person who is the object of the client's intent).

50. See, e.g., *State v. Krol*, 68 N.J. 236, 259, 344 A.2d 289, 301 (1975).

51. See CAL. PROB. CODE § 1801 (West 1981) (conservators).

52. See MO. REV. STAT. § 630.120 (Supp. 1983).

53. See *Carroll v. Cobb*, 139 N.J. Super. 439, 448, 354 A.2d 355, 359 (App. Div. 1976).

54. See, e.g., *In re B.*, 156 N.J. Super. 231, 383 A.2d 760 (Law Div. 1977).

55. The foregoing analysis focuses on the difference between a commitment standard and a competence standard. In dealing with revelation under the final version

would directly conflict with Rule 1.14(a).

If a lawyer represents a person who has been committed at a commitment review hearing, Rule 1.14(a) obligates the lawyer to be an advocate for the client. At some point during that proceeding, even after following the guidelines set out in *Quesnell*,⁵⁶ the lawyer may develop a reasonable belief that the client is dangerous within the "commitment" definition. If that reasonable belief triggers the duties of Rule 1.14(b), the lawyer's duty as an advocate within the meaning of Rule 1.14(a) might cease in favor of permission to take protective action for the client, thus perpetuating the commitment. Consequently, the lawyer is acting "not as an advocate for the [client,] but as a traditional guardian whose function is to evaluate for himself what is in the best interests of his client-ward and proceed, almost independent of the will of the client-ward, to accomplish this."⁵⁷ Such representation by non-adversary counsel is not only unconstitutional in the commitment setting,⁵⁸ but apparently violates Rule 1.2's command that the lawyer abide by the client's decisions.

Thus, while the exception contained in Rule 1.6(b)(1) may be useful to the lawyer representing a disabled client, it does not permit general revelation of the client's condition. The rule exists only to compel the lawyer to reveal the information necessary to prevent a client from committing a criminally injuring act.

C. Disclosures Required by Law

As stated in the comments to the adopted version of Model Rule 1.6, the Model Rules "in various circumstances permit or require a lawyer to disclose information relating to the representation. . . . In addition to these provisions,

of Model Rule 1.6, however, it is possible to add a third standard of review to mental health cases, the criminal standard. Under the traditional *M'Naghten* definition of culpability, there can be no finding of criminal guilt if "the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." *Daniel M'Naghten's Case*, 10 Cl. & F. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843).

Under the adopted version of Model Rule 1.6, a lawyer is permitted to reveal confidential information "to prevent the client from committing a criminal act." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (ABA Adopted Version 1983). If the lawyer is convinced that the client meets the *M'Naghten* test, and, therefore, the acts of the client would not result in criminal culpability, is the permission given to the lawyer to reveal necessarily eliminated? Certainly the rules of ethics should not be so narrowly interpreted.

56. 83 Wash. 2d 224, 517 P.2d 568 (1973); see notes 5-10 and accompanying text *supra*.

57. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1099 (E.D. Wis. 1972) (quoting *Dix, Hospitalization of the Mentally Ill in Wisconsin: A Need for a Reexamination*, 51 MARQ. L. REV. 1, 33 (1967)).

58. 349 F. Supp. at 1099.

a lawyer may be obligated or permitted by other provisions of law to give information about a client.”⁵⁹ The comments to the rules are intended as interpretive guides.⁶⁰ In earlier drafts of the Model Rules, this “other law” exception was part of the rule itself.⁶¹ The exception was eliminated from the adopted version.⁶² A similar exception exists under DR 4-101(C)(2), which allows an attorney to reveal “[c]onfidences or secrets when permitted under Disciplinary Rules or required by law or court order,”⁶³ and the adopted version of the Model Rules apparently includes this exception.⁶⁴ Thus, the adopted rules cannot be said to be substantially different from the current disciplinary rules.⁶⁵ DR 4-101(C)(2) was drafted to fill an evident gap in Original Canon 37.⁶⁶ Under that canon, it was clear that a lawyer should not reveal the confidence of a client who admitted to the lawyer commission of a past crime,⁶⁷ and equally clear that the client’s announced intent to commit a future crime had to be revealed. In 1936, however, the American Bar Association was asked about a situation that fit neither category.⁶⁸ A client admitted to a past crime, jumped bail and fled, but he kept his attorney informed of his whereabouts. The question was whether these actions were a past crime, a

59. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (ABA Adopted Version 1983).

60. *Id.* scope.

61. In the discussion draft, the exception permitted revelation “[a]s otherwise permitted by law or the Rules of Professional Conduct.” *Id.* Rule 1.7(b)(4) (Discussion Draft 1980). In the proposed final draft, the exception permitted revelation “[t]o comply with the Rules of Professional Conduct or other law.” *Id.* Rule 1.6(b)(5) (Proposed Final Draft 1981). In the Revised Final Draft, the exception permitted revelation “[t]o comply with other law.” *Id.* Rule 1.6(b)(4) (Revised Final Draft 1982).

62. *See id.* Rule 1.6 comment (ABA Adopted Version 1983).

63. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(2) (1981).

64. “The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (ABA Adopted Version 1983).

65. *See, e.g., id.* Rule 1.6 code comparison (Proposed Final Draft 1981).

66. *See* ABA CANONS OF PROFESSIONAL ETHICS Canon 37 (Canons withdrawn 1969):

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

67. *Compare* MODEL RULE OF PROFESSIONAL CONDUCT Rule 1.7(c)(2) (Discussion Draft 1980) (preventing revelation of a past act when the lawyer had been employed by the client after commission of the act by the client) *with id.* Rule 1.6(b)(3) (Proposed Final Draft 1981) (permitting revelation of past conduct when the lawyer’s services had been used only in furtherance of the past act) *and id.* Rule 1.6 (ABA Adopted Version 1983) (makes no reference to such revelation and therefore renders any revelation impermissible under the general ban in Rule 1.6(a)).

68. *See* ABA Comm. on Professional Ethics and Grievances, Formal Op. 155 (1936).

future crime, or both, and more importantly, whether they should be revealed by the attorney. The Committee on Professional Ethics and Grievances responded that the client, by jumping bail, was guilty of the separate offense of escape, and if the lawyer failed to reveal the whereabouts of the client, the lawyer was guilty of aiding the escape.⁶⁹ The opinion stated that the lawyer's duty to society compelled revelation of the whereabouts of the client.⁷⁰

The purpose of this confidentiality exception is clearer in dealing with physical evidence. When a client admits to the lawyer that he has committed an armed robbery and then gives the lawyer the weapon and the money, the lawyer is protected from revealing the client's commission of the robbery. The lawyer hiding the weapon and the money, however, has committed a crime.⁷¹ "A person commits the crime of tampering with physical evidence if he . . . conceals any record, document or thing with purpose to impair its . . . availability in any official proceeding or investigation."⁷² When such a statute is coupled with DR 7-102(A)(3), which prevents a lawyer from concealing that which by law is required to be revealed, the revelation of the weapon and the money may be required.⁷³

There are issues relating to revelation under DR 4-101(C)(2) that seem to fall into areas not quite covered by the crime or fraud exception.⁷⁴ DR 7-102(A)(3), (B)⁷⁵ is the section most often associated with this rule.⁷⁶ The

69. *Id.*

70. *Id.*

71. See *In re Ryder*, 263 F. Supp. 360, 369 (E.D. Va.), *aff'd*, 381 F.2d 713 (4th Cir. 1967); see also *In re January*, 1976, Grand Jury, 534 F.2d 719, 728 (7th Cir. 1976) (money received by lawyer from robbery suspects must be turned over); *Morrell v. State*, 575 P.2d 1200, 1206 (Alaska 1978) (legal pad containing kidnapping plan written by defendant given to defense attorney by third party); *People v. Lee*, 3 Cal. App. 3d 514, 524, 83 Cal. Rptr. 715, 721 (1970) (blood-stained shoes given to defense counsel by defendant's wife); *State ex rel. Sowers v. Olwell*, 64 Wash. 2d 828, 831, 394 P.2d 681, 683 (1964) (knife given by defendant to counsel).

In *People v. Meredith*, 29 Cal. 3d 682, 631 P.2d 46, 175 Cal. Rptr. 612 (1981), a defendant admitted to his counsel that he had stolen the victim's wallet, divided the money with a codefendant, and attempted to burn the wallet in a trash can. *Id.* at 686, 631 P.2d at 48, 175 Cal. Rptr. at 614. Defense counsel had his investigator remove the wallet so counsel could examine it, thereafter turning it over to police. At trial, this investigator was asked by the prosecution to reveal where the investigator had observed the wallet. In resolving the issue of whether the observation of the wallet was protected by the attorney-client privilege, the court held that if an attorney observes evidence in its original location, having learned of that location from the client, and leaves the evidence in that location, then the observation is privileged. If, however, the evidence is removed, its effect is to destroy the evidence and the observation is no longer protected. *Id.* at 694-95, 631 P.2d at 53-54, 175 Cal. Rptr. at 619-20.

72. MO. REV. STAT. § 575.100 (1978).

73. Compare MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (ABA Adopted Version 1983).

74. See note 47 *supra*.

75. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(3) (1981) (a "lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal"). *Id.* DR 7-102(B) provides:

Kutak drafters appear to carry this philosophy forward by indicating that rules requiring revelation under this exception include Rule 3.3, dealing with candor toward a tribunal,⁷⁷ and Rule 4.1, dealing with truthfulness in transactions with third parties.⁷⁸ It appears that the law requires a lawyer to reveal confidential information only when necessary to prevent ongoing fraud or crimes not covered by existing exceptions.⁷⁹ Such was the intent of the current disciplinary rules, and there is no evidence of an intent to expand the Model Rules to include revelation of a client's illness as envisioned by Rule 1.14(b). Under the Model Rules, disclosure under Rule 1.6 "is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a [disclosure]."⁸⁰

D. *The Result*

In referring to rules that could require a lawyer to reveal confidential information under the provisions of Model Rule 1.6, the drafters of the Kutak rules specifically mentioned: Rule 2.2 (intermediaries); Rule 2.3 (evaluations for third parties); Rule 3.3 (candor toward a tribunal); and Rule 4.1 (truthfulness toward others).⁸¹ The authors have failed to read Rule 1.14(b) in the context of Rule 1.6. Thus, while comments to Rule 1.14 recognize that the decision to disclose the disability could be adverse to the client,⁸² they make no reference to the general ban of Rule 1.6 on the use of such information relating to the representation. This is so even though the early drafts of Rule 1.6 make it clear that the information covered under the confidentiality provisions is broader than that currently covered in DR 4-101.⁸³

A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal except when the information is protected as a privileged communication.

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

76. See ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(2), at 176 (Am. B. Found. 1979).

77. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (ABA Adopted Version 1983).

78. *Id.* Rule 4.1.

79. See ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(2), at 176 (Am. B. Found. 1979).

80. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (ABA Adopted Version 1983).

81. *Id.*

82. *Id.*

83. See *id.* Rule 1.6 code comparison (Proposed Final Draft 1981). Except as permitted in the exceptions, the "lawyer shall not reveal information relating to representation of a client." *Id.* Rule 1.6(a). "The principle of confidentiality is enlarged . . . to all information about a client 'relating to the representation.'" See *id.* comment.

Two comments to 1.14(b) reflect that Rule 1.14 was not analyzed in the context of Rule 1.6 before being proposed. The first comment states: "If a legal representative has already been appointed for the client, the lawyer should look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests."⁸⁴ In the second comment, the lawyer is advised, before making disclosure, to "consult an appropriate diagnostician for guidance."⁸⁵ Neither comment advises the lawyer that cooperating with a legal representative, seeking the appointment of such a representative, or consulting a diagnostician will require revelation of the information protected from disclosure by Model Rule 1.6. The drafters have equated a decision by the lawyer under Rule 1.14(b) to seek the "best interests" for the client with actions impliedly authorized by Rule 1.6(a) in furtherance of the representation. The lawyer does not, however, have the tacit permission to reveal the condition of the client so as to have the individual liberty of the client restricted by the imposition of a guardian or a protective order. Such action by the lawyer would not just violate the client's confidence; it would also place the lawyer and client in an adversary posture, an impermissible conflict of interest.

IV. CONFLICTS OF INTEREST

Model Rule 1.7(b) forbids a lawyer from representing a client "if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests."⁸⁶ Under Rule 1.14(b), once a lawyer decides that the client is unable to make adequate decisions concerning the subject matter of the representation, the lawyer may choose to seek a representative or protective order for that client. As noted by the comment, "raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment."⁸⁷ Recognizing that appointing a representative or seeking a protective order could seriously affect the client's liberty, it must be equally apparent that the lawyer who invokes the provisions of the rule has developed interests adverse to the client's. Accordingly, once a lawyer makes the decision under Rule 1.14(b) to seek a guardian or protective order, the relationship with the client must terminate,⁸⁸ except in the rare instance where the client consents.

Even if the relationship terminates, however, the lawyer cannot follow the rule. Although the attorney-client relationship has terminated, the lawyer's ob-

84. *Id.* Rule 1.14 comment.

85. *Id.*

86. *Id.* Rule 1.7(b).

87. *Id.* Rule 1.14 comment.

88. Once the personal or other professional interest of the lawyer adversely impacts on the representation of the client, the lawyer must decline the representation. See *id.* Rule 1.7(b).

ligation of confidentiality remains, preventing disclosure of the client's condition.⁸⁹ By seeking a guardian or a protective order, the lawyer would be in plain violation of Rule 1.9.⁹⁰ Having represented the disabled client, the lawyer is prevented from using the information gained in that representation against the client. Nor may the lawyer represent someone qualified to seek a declaration of incompetency against the client, because the competency proceeding would be a substantially related transaction.⁹¹

Although Rule 1.7 permits a non-prohibitive conflict where the lawyer can determine that the best interests of the client can be served, these are not the kind of best interests that is often referred to in dealing with disabled persons. As stated in the comment to Rule 1.7: "[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."⁹² In determining whether the lawyer should reveal the disabling condition of the client over the client's liberty interests, no neutral lawyer could agree that such action meets this standard.

There are no exceptions to the general confidence rule that permit the disclosure apparently intended by Rule 1.14(b). Even if exceptions existed, conflict-of-interest considerations forbid the actions contemplated by the rule. It thus becomes important to determine the impact of eliminating Rule 1.14(b) upon the philosophy expressed in the remainder of the rules.

V. ELIMINATING MODEL RULE 1.14(b)

In adopting Model Rule 1.14(a), a decision was made to provide all clients with representation, regardless of their mental state. "The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect."⁹³ Having determined that the lawyer's role

89. *Id.* Rule 1.6 comment (ABA Adopted Version 1983).

90. *See id.* Rule 1.9:

A lawyer who has represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interest is materially adverse to the interest of the former client unless the former client consents after disclosure; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

91. The substantial relationship test has its genesis in *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953): "[T]he former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client."

92. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (ABA Adopted Version 1983).

93. *Id.* Rule 1.14 comment.

is primarily one of representative advocacy, it must be recognized that there will be clients who will make wrong decisions, whether due to age, education, or mental incapacity. If the lawyer is to be an advocate, clients must be permitted to make bad choices. The obligation of the lawyer is not to force an adversary position with the client, but to work with the client in an attorney-client relationship. The lawyer should counsel the client and help the client make decisions based on appropriate information. Only then does the lawyer fulfill all of the obligations imposed under Model Rules 1.1, 1.2, 1.3, and 1.4.

This is not to say that the lawyer should never reveal information about a disabled client learned during the course of the representation. The instances, however, in which such revelation should be permitted are the same as those for which revelation is permitted with a traditional client. Two examples prove useful. First, if a client is underage or declared incompetent, the law requires the appointment of a guardian ad litem.⁹⁴ Permitting the client to proceed without such appointment violates civil procedure provisions, and would thus be outside the provisions of the Model Rules.⁹⁵

Second, if a client, because of mental illness, indicates to the lawyer an intent to injure someone, Rule 1.6(b)(1) permits a limited amount of revelation. While earlier drafts of this rule seemed to require that revelation could be made only when the intent appeared to injure a third party,⁹⁶ the adopted version permits revelation whenever it appears that the acts of the client are likely to result in "imminent death or substantial bodily harm" to anyone, including the client.⁹⁷ Since suicide is a crime at common law,⁹⁸ a lawyer would therefore be required to reveal a client's contemplated suicide. Elimination of Rule 1.14(b) would also force a lawyer representing a disabled client to take actions short of revelation in certain circumstances. Again, such actions would be consistent with similar representation of non-disabled clients. For example, if a lawyer is appointed to represent a committed client, Rules 1.14(a) and 1.14(b) could indeed conflict with the lawyer's constitutional obligations to provide representative advocacy.⁹⁹ If Rule 1.14(b) is eliminated, the lawyer's representation may be limited in scope by Rule 1.2(c) to advocating the desires of the client, regardless of the determination by the lawyer of the client's apparent mental state.¹⁰⁰ "The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms

94. See, e.g., FED. R. CIV. P. 17(c).

95. The lawyer must disclose information when required by court order. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (ABA Adopted Version 1983).

96. See, e.g., *id.* Rule 1.6(b)(1) (Revised Final Draft 1982) (permitting revelation only when the intent to injure was directed at the property interests of another).

97. *Id.* Rule 1.6(b)(1) (ABA Adopted Version 1983).

98. See R. PERKINS, CRIMINAL LAW 82-83 (2d ed. 1969). The ABA has agreed that the Model Code of Professional Responsibility permits a lawyer to reveal the intent of a client to commit suicide. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1500 (1983).

99. See note 58 and accompanying text *supra*.

100. See Rule 1.2(c).

under which the lawyer's services are made available to the client."¹⁰¹ In the commitment hearing, the lawyer is obligated to advocate the client's desires, and the client usually desires not to remain committed.¹⁰² The appointment of a lawyer in such a situation is intended as a limited appointment and should be treated as such. Without the conflict created by granting permission to reveal information under Rule 1.14(b), that limited scope can be fully realized.

Civily committed clients also have problems in more traditional civil law areas.¹⁰³ Because commitment does not automatically render a client incompetent,¹⁰⁴ eliminating Rule 1.14(b) would permit the lawyer to render loyal service to the disabled client without revealing the client's condition. Such representation would not be unchecked. If illness was influencing the client to file lawsuits that were frivolous or worthless or designed only to harass or embarrass another person, revelation would not be the answer because the lawyer is already precluded from such actions by virtue of other rules.¹⁰⁵

Occasionally, because of some underlying disability, the assistance sought by the client will result in financial catastrophe for the client. Revelation does not solve this problem. Such cases usually arise by unwise judgment on the part of the client or by someone else attempting to defraud the unsuspecting client. The duties of the lawyer in such circumstances are both correlative and corresponding.¹⁰⁶ Correlative duties of the lawyer include the duties of competence, communication, and the absence of conflicts of interest.¹⁰⁷ These obligations flow directly from the lawyer/client relationship¹⁰⁸ and give the client a remedy for the lawyer's breach.

Corresponding duties, on the other hand, arise through the client. They are derivative in the lawyer because the lawyer is acting for the client.¹⁰⁹ The right to file suit on behalf of a client is the client's right. If the client has no right of action, the lawyer has no greater right to file the suit simply because of the relationship of attorney and client. Thus, when the lawyer interacts with others on behalf of a client, the duties of candor and fairness imposed on the lawyer in those dealings are really duties imposed on the client, because it is the client who is actually dealing with the others through the lawyer.¹¹⁰

101. *Id.* comment.

102. For persons committed to psychiatric hospitals, problems associated with release from the institution present the greatest concerns. See Brakel, *Legal Problems of People in Mental Hospitals: An Exploratory Study*, 1978 AM. B. FOUND. R.J. 567, 578-85.

103. See Brakel, *The Role of the Lawyer in the Mental Health Field*, 1977 AM. BAR FOUND. R.J. 467, 469-71.

104. See notes 52-54 and accompanying text *supra*.

105. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1.

106. See Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 961-62 (1980). Professor Patterson was a consultant to the Model Rules.

107. *Id.* at 963.

108. See *id.* at 965.

109. See *id.* at 963.

110. See *id.* at 962.

Confidentiality is a corresponding duty. The lawyer has no greater obligation to maintain the confidences or secrets of a client than does the client to maintain those same confidences and secrets.¹¹¹ Thus, if information can be obtained from a client in discovery, or through subpoena, it can also be obtained from the lawyer by the same process.¹¹² Confidentiality is like other corresponding rights of the client, such as the right to file a lawsuit, because it depends on the legal rights and obligations of the client.¹¹³ If the client violates his own legal obligations, confidentiality, being corresponding, will not permit the lawyer to protect that violation. This appears to be the thrust of many of the Model Rules, most notably Rule 1.6(b). In all of the exceptions to confidentiality, the client will have violated a legal obligation. As a result, the violation cannot be hidden by the lawyer, because he has no greater rights than the client.

The client violates no legal obligation when he makes an imprudent decision which has an adverse effect on his property; thus, the duty of confidentiality remains. The law presumes that all persons are competent absent a declaration of incompetency. Therefore, the lawyer who reveals confidences regarding poor decisions of a disabled client violates the duty of confidentiality because there is no corresponding obligation on the client to do the same. This situation creates a conflict of interest for the lawyer. If the lawyer can no longer fulfill the correlative duties, even after communication and counseling with the client,¹¹⁴ the lawyer should withdraw¹¹⁵ rather than reveal.

To require revelation in this context goes well beyond the spirit of the Rules. As expressed by Chairman Kutak, the Model Rules relating to confidentiality are not intended to make the lawyer a policeman.¹¹⁶ If a non-committed disabled client makes imprudent decisions regarding his own property, there is probably a family in the background. The lawyer cannot serve as both representative and conscience. A failure to act by those who should be concerned with the client's welfare will not be resolved by the nature of the attorney-client relationship.¹¹⁷

111. *See id.* at 963.

112. *Id.*

113. *Id.* at 962.

114. *See, e.g.,* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.2, 1.4, 2.1 (ABA Adopted Version 1983).

115. *See id.* Rule 1.16.

116. *See* Kutak, *A Commitment to Clients and the Law*, 68 A.B.A. J. 804, 805 (1982).

117. The comment to the adopted version notes that a lawyer sometimes becomes a de facto guardian for an incapacitated client. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 comment (ABA Adopted Version 1983). The legal background to an earlier version clearly prevents the lawyer from becoming the actual guardian of the client or from substituting the judgment of the lawyer for that of the client. *Id.* Rule 1.14 legal background (Proposed Final Draft 1981). The adoption of the final version of Rule 1.6 does, however, create a problem. If the client owns property with another, as in a community property jurisdiction, then it would be possible for the client to attempt to dispose of that property in contravention of the co-owner's rights. In addi-

As the foregoing examples demonstrate, there is no detriment from the repealing of Rule 1.14(b). Elimination of the Rule, however, should not end the matter. One of the greatest weaknesses of the Model Code is its failure to consider that the entire legal basis of the attorney-client relationship may be flawed by the existence of a disability preventing the effective creation of an agency.¹¹⁸ All of the rules, including Rule 1.14(a), presume that the relationship is entered into by consenting competent persons, and therefore the client has *some* decision-making ability, at least over the subject matter of the representation. Throughout the preceding sections, it has been assumed that Rule 1.14(b) also relates to an absence of ability by the client to make subject matter decisions and thereby address the evils which result if the lawyer follows the dictates of the rule in that situation. This follows from a literal reading of both the rules and the comments. If, however, a construction of Rule 1.14(b) applies that rule only to an impairment of the client in the ability to enter the transactional relationship of attorney and client or to exercise judgment with regard to that relationship, then the rule may have a basis. Such a construction would require a rule drafted to make the distinction clear.

VI. A SUBSTITUTE

It is entirely possible that a person is incapable of being a client—of living up to the obligations of what has been seen as a mutual agency, with both lawyer and client each serving as both principal and agent.¹¹⁹ Though not necessarily specifically addressing these client obligations, the rules implicitly presume that there are qualifications to undertaking the role of client. While rules such as Model Rule 1.14(a) make it clear that those qualifications are extremely limited, they must still be present. Thus, a disabled client may reach the point where a relationship is no longer possible. When this occurs, the contract of attorney and client must cease, because one of the parties, the client, is no longer capable of performing the obligations necessary to continue this legal relationship. “[T]he after-occurring insanity of the principal, or his

tion to creating title problems, such actions by the client could constitute a fraud upon the property rights of the co-owner. Under earlier versions of the Model Rules, a lawyer could have revealed the intent by the client to injure the property rights of another. *See id.* Rule 1.7(c)(2) (Discussion Draft 1980) (permitting revelation when necessary to prevent client from committing a deliberately wrongful act); *id.* Rule 1.6(b)(2) (Proposed Final Draft 1981) (permitting revelation when the lawyer believes the act of the client will be a fraud on the property of another); *id.* Rule 1.6(b)(1) (Revised Final Draft 1982) (permitting revelation when the lawyer reasonably believes the client's act will perpetrate a fraud on the property interests of another). Reports of the final debate on Rule 1.6 do not indicate any concern for this problem. *See* Midyear Meeting of American Bar Association, 51 U.S.L.W. 2488, 2488-89 (Feb. 22, 1983). Under the current disciplinary rules, DR 7-102(B)(1) would require revelation in such a circumstance, at least in those jurisdictions which did not adopt the 1974 Amendment to that rule. *Compare* note 47 *supra*.

118. *See* Patterson, *supra* note 106, at 968-69.

119. *See id.* at 926-29.

inability to exercise any volition upon the subject by reason of an entire loss of mental power, operates as a revocation or suspension for the time being, of the authority of an agent. . . ."¹²⁰

When such a situation arises, the attorney may have some duty to reveal. Upon suspension of the agency, the attorney loses all power to act for the client. If the attorney continues to act knowing that there is no authority, the attorney should probably be held personally liable for the actions.¹²¹ Thus, revelation could be permitted to the extent reasonably necessary to "establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a . . . civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client."¹²² The revelation required, however, would not be of the client's condition so as to have a representative appointed. Rather, it would be the type required under Rule 4.1.¹²³ If a lawyer has been acting for a client in a particular transaction and the client has become so incapacitated as to render the agency relationship suspended, failure to disclose this fact to the third party would amount to a "material misrepresentation" within the meaning of Rule 4.1(b)(1).

What is needed, therefore, is a new Rule 1.14(b), which embodies this concept and provides an outer limit on the advocacy required under Rule 1.14(a). The following is a suggestion:

When, after undertaking representation of a client it becomes reasonably clear to the lawyer that the client is suffering from a disability and is thereby no longer capable of aiding the lawyer in furthering the attorney-client relationship, the lawyer may make such disclosure of this fact to third parties as is reasonably necessary to comply with the provisions of Rule 4.1, except that no such disclosure is authorized where the lawyer is employed for the limited purpose of representing the client in any matter wherein the disability of the client is the subject matter of the representation.

Under this substitute, the lawyer would be permitted to advise others that the authority to act for the client is absent, thereby preventing the lawyer from being personally liable and preventing a material misrepresentation of fact to the third party with whom the lawyer has dealt on behalf of the client. The rule is limited to a disability arising after the relationship of attorney and

120. F. MECHEM, *LAW OF AGENCY* § 253, at 166-67 (1889).

121. *See id.* § 543.

122. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (ABA Adopted Version 1983).

123. *See id.* Rule 4.1:

In the course of representing a client a lawyer shall not knowingly:
 (a) make a false statement of material fact or law to a third person; or
 (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client unless disclosure is prohibited by Rule 1.6.

client is already established. If the disability existed before the creation of the relationship, agency law would prevent the client as principal from retaining the lawyer as agent.¹²⁴ The rule is also limited to prevent disclosure in cases, such as incompetency and other proceedings, where the lawyer is either appointed or retained to contest the issue of the client's disability. Such representation is limited in scope. Because such representation is often constitutionally required to satisfy the due process rights of the client, the lawyer is, in essence, undertaking the role of public agent—a person employed “to do some act for [an individual] in an official capacity, under a special and particular obligation to him as an individual.”¹²⁵ The general agency rule when dealing with public agents is that when such agency is known by the other party, as it would be in a case in which an attorney represents a client whose mental status is questioned, the warranty of authority of the agent will not encompass personal liability in the absence of fraud or misrepresentation. Thus, there is no need to disclose, either to protect the attorney under Rule 1.6, or to prevent a material misrepresentation under Rule 4.1.

VII. CONCLUSION

Proposed Model Rule 1.14(a) makes a valiant attempt to resolve the best interests/advocacy dichotomy by adopting a philosophy which sees the lawyer as an advocate of the disabled client. Consequently, the lawyer's obligation toward the disabled client is no different than the obligation to any other client. Having made the policy decision that a normal attorney-client relationship should exist, it is error to permit, as does Rule 1.14(b), disclosure of information learned during the course of the representation. Such disclosure violates the spirit as well as the letter of the rules dealing with confidences and conflicts-of-interest. While injury and danger can and should be revealed in any attorney-client relationship, provisions already exist outside Rule 1.14(b) which permit such disclosure. In other circumstances, actions by the lawyer far short of revelation may be indicated.

Rule 1.14(a) cannot exist alone. The basis of the relationship of attorney and client, being one primarily of agency, presupposes an ability on the part of the client to continue its existence. When that ability terminates, so does the relationship. The duties of the lawyer, as agent, as officer of the court, and as citizen, require revelation to those with whom the lawyer has dealt of the absence of authority to continue to act for the client.

A rule constructed with these factors in mind aids the lawyer in fulfilling the obligations imposed by our courts in the representation of the disabled. It permits advocacy, yet prevents a legal relationship of attorney and client from existing under impermissible conditions. As a result, the rule would fulfill the ideals of the drafters in making the new draft the restatement that it was

124. See F. MECHEN, *supra* note 120, § 47.

125. *Id.* § 547.

intended to be. It will effectively “make distinctions based on the nature of the client, the role of the lawyer, and the legal process involved.”¹²⁶

126. Patterson, *supra* note 106, at 969.