

MEMORANDUM

To: ABA Working Group on Model Rule of Professional Conduct 1.14
From: NYSBA Committee on Standards of Attorney Conduct (“COSAC”)
Re: Request for Comment on Second Discussion Draft of Possible Amendments to Model Rule of Professional Conduct 1.14
Date: September 2, 2025

Thank you for the opportunity to comment on possible amendments to Model Rule 1.14 proposed by the ABA Working Group on Model Rule of Professional Conduct 1.14. We have reviewed the proposed changes to Rule 1.14 as well as the Memorandum explaining the proposed changes. Overall, we believe that the Working Group’s proposed changes will make Rule 1.14 (1) significantly clearer that protective action by lawyers on behalf of clients with decision-making limitations should be used in very limited circumstances, and (2) more useful generally for lawyers who must determine their ethical obligations when working with clients who have decision-making limitations. We have more specific suggestions below that we hope will further advance those two goals. The views expressed in this memorandum are solely those of COSAC and have not been reviewed or approved by the New York State Bar Association.

ABA Working Group Proposed Rule 1.14(a):

A lawyer shall, as far as reasonably possible, maintain an ordinary client-lawyer relationship with a client with decision-making limitations, including when the client’s decision-making limitations impact the client’s ability to provide direction to the lawyer or make reasoned, informed choices.

COSAC Suggestion:

COSAC suggests that the word “reasoned” be removed from the end of this portion of the rule. A lawyer should not be obligated to assess whether a client’s decisions are “reasoned.” Rather, the focus of the lawyer’s assessment should be on the client’s ability to make informed choices.

[One COSAC Member’s View: I think it is better to keep “reasoned” in the Rule. There might be times when the client with decision-making limitations can make an informed decision, but cannot use that information to reason out what option to take. For example, there are developmental disabilities that do not impact the ability to retain information, but do impact the ability to analyze the information.

Response: MY SUGGESTION THAT WE REMOVE THE WORD “REASONED” IS BASED ON MY BELIEF THAT CLIENTS WITHOUT LIMITATIONS ARE FREE TO MAKE UNREASONED DECISIONS AND AS COUNSEL TO A PERSON WITH LIMITATIONS OUR DUTY SHOULD NOT BE TO EVALUATE WHETHER THE CLIENT’S DECISIONS ARE IN OUR OPINION REASONED.]

ABA Working Group Proposed Rule 1.14(a) with COSAC Suggestion:

A lawyer shall, as far as reasonably possible, maintain an ordinary client-lawyer relationship with a client with decision-making limitations, including when the client’s decision-making limitations impact the client’s ability to provide direction to the lawyer or make

~~reasoned~~, informed choices.

ABA Working Group Proposed Rule 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.

COSAC Suggestion:

COSAC suggests deleting “receiving and,” and deleting “or making or communicating decisions.” Decision-making limitations should not be defined by difficulties with receiving and communicating information. While a person may have significant difficulties receiving or communicating information such difficulties do not implicate “decision-making” ability and are typically not insurmountable or justify a “decision-making limitations” label. We understand that limitations in the ability to *communicate* poses challenges to effective client representation, but those are distinct challenges from limitations in the ability to *make* those decisions, and we do not believe that a client’s difficulties in *communicating* a decision should be a basis for determining that they have decision *making* limitations. Instead, direction on how to work ethically with clients who have challenges communicating may merit re-consideration of Rule 1.4 and its comments, and issuance of relevant ABA Formal Opinions.

ABA Working Group Proposed Rule 1.14(b) with COSAC Suggestion:

A person has decision-making limitations if the person has substantial difficulty, even with appropriate supports or accommodations, ~~receiving and~~ understanding information, evaluating information, or making ~~or communicating~~ decisions.

ABA Working Group Proposed Rule 1.14(c):

When the lawyer reasonably believes that the client: (1) has decision-making limitations, (2) is at risk of substantial physical, financial or other harm unless action is taken, and (3) cannot adequately act in the client’s own interest to address the risk, the lawyer may take reasonably necessary protective action to address the risk.

COSAC Suggestion:

COSAC suggests substituting “reasonable” for “reasonably necessary” at the end of the section. The lawyer should not be held to a standard of establishing that protective action taken was “necessary.” It should be sufficient if the lawyer acts reasonably.

[One COSAC Member’s View: I believe that “reasonably necessary” is more protective of client autonomy, and we should not suggest a change to only “reasonable.”

Response: MY PREFERENCE FOR REMOVING THE “NECESSARY” IS THAT COUNSEL SHOULD NOT HAVE TO JUSTIFY SOME PROTECTIVE ACTION BY

ESTABLISHING THAT IT WAS NECESSARY, ESPECIALLY IN AN EMERGENCY. A REASONABLE STANDARD BALANCES THE INTERESTS OF CLIENT AND COUNSEL.]

ABA Working Group Proposed Rule 1.14(c) with COSAC Suggestion:

When the lawyer reasonably believes that the client: (1) has decision-making limitations, (2) is at risk of substantial physical, financial or other harm unless action is taken, and (3) cannot adequately act in the client's own interest to address the risk, the lawyer may take reasonably necessary reasonable protective action to address the risk.

ABA Working Group Proposed Comment 1:

A client's decision-making limitations do not diminish the lawyer's obligations under the Rules and the importance of treating the client with attention and respect. Except as provided in this Rule, a client with decision-making limitations is owed all the protections under the Rules ordinarily afforded by the client-lawyer relationship.

COSAC Suggestion:

COSAC suggests that a non-inclusive list of "protections" be added at the end of the last sentence to this Comment. COSAC believes there are some ethical responsibilities to which lawyers for clients with decision-making limitations can be less likely to give appropriate attention. Those responsibilities typically involve counseling and communicating with clients. We believe those responsibilities are particularly important to enumerate here in the first Comment to the Rule, even though some of them are referenced in later Comments. In particular, we believe that the following responsibilities should be explicitly stated here: abiding by a client's decisions concerning the objectives of the representation (Rule 1.2); keeping a client informed about the status of the matter (Rule 1.4); explaining matters to the extent reasonably necessary for a client to make informed decisions regarding the representation (Rule 1.4); and rendering candid advice to a client (Rule 2.1).

ABA Working Group Proposed Comment 1 with COSAC Suggestion:

A client's decision-making limitations do not diminish the lawyer's obligations under the Rules and the importance of treating the client with attention and respect. Except as provided in this Rule, a client with decision-making limitations is owed all the protections under the Rules ordinarily afforded by the client-lawyer relationship, including abiding by a client's decisions concerning the objectives of the representation (Rule 1.2); keeping a client informed about the status of the matter (Rule 1.4); explaining matters to the extent reasonably necessary for a client to make informed decisions regarding the representation (Rule 1.4); and rendering candid advice to a client (Rule 2.1).

ABA Working Group Proposed Comment 3:

An ordinary client-lawyer relationship is based, in part, on the assumption that the client, when properly advised and assisted, can make and communicate reasoned, informed decisions about important matters...In particular, a client with decision-making limitations may have limited

ability to make or communicate legally binding decisions.

COSAC Suggestion:

COSAC suggests deleting "communicate reasoned" in the first sentence above, and deleting "communicate" in the second sentence above. Decision-making limitations should not be defined by difficulties with receiving and communicating information. While a person may have significant difficulties receiving or communicating information such difficulties do not implicate "decision-making" and are typically not insurmountable or justify a "decision-making limitations" label. Instead, lawyers should be required, as section (b) of the Rule states, to seek appropriate supports or accommodations prior to determining that they cannot discern the client's decision.

ABA Working Group Proposed Comment 3 with COSAC Suggestion:

An ordinary client-lawyer relationship is based, in part, on the assumption that the client, when properly advised and assisted, can make ~~and communicate~~ reasoned, informed decisions about important matters...In particular, a client with decision-making limitations may have limited ability to make ~~or communicate~~ legally binding decisions.

ABA Working Group Proposed Comment 4:

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 may 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 (c), must look to the client, and not family members or other persons, to make decisions on the client's behalf. Whenever possible, the lawyer should afford the client the opportunity to communicate privately with the lawyer without the presence or influence of others.

COSAC Suggestion:

COSAC suggests deleting the word "not" in the second sentence above. The comment should not suggest, which it does by including the word "not", that there is no risk of waiver of privilege when persons other than the client and lawyer participate in an attorney-client communication.

ABA Working Group Proposed Comment 4 with COSAC Suggestion:

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 may ~~not~~ affect the applicability of the attorney-client evidentiary privilege...

ABA Working Group Proposed Comment 5:

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. When representing a client in such situations, the lawyer must take direction from the client and advocate for the client's objectives.

When a court has appointed a guardian, conservator or other appointee to act on behalf of a client or prospective client, a lawyer should ordinarily look to the court appointee for those decisions on behalf of the client or prospective client over which the appointee has authority. However, 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. However, 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.

COSAC Suggestions:

1. COSAC suggests deleting "to the extent feasible" in the second line of the first paragraph. The duty to maintain communication to the client should not be limited by the words "to the extent feasible" to avoid the attorney having to make a determination of the feasibility.
2. COSAC suggests either removing the first sentence of the second paragraph that states that a lawyer should "ordinarily" look to the court appointee for decisions on behalf of a client, or clarifying that a lawyer should only look to a court appointee for legal decisions where the lawyer's appointment or retainer explicitly so indicates. We recognize that there are circumstances where a court has appointed an individual to make decisions on behalf of a person with limited decision-making capacity, but the default for a lawyer representing an individual with limited decision-making capacity should be to seek direction from that individual, not from the court appointee. The complete usurpation of a client's decision-making authority is an extremely "restrictive" intervention by that client's lawyer, and should therefore only be used when explicitly authorized by the appointment or retainer agreement, or by a relevant applicable law. COSAC believes this will more closely align this Comment with the sentiments expressed in the Working Group's April 1, 2025 Memorandum that generally encourage less restrictive interventions by lawyers for clients with decision-making limitations.
3. COSAC suggests adding "that has deprived that person the right to make decisions about the matter or matters about which the lawyer has been consulted" before "who seeks" in the fifth line of the second paragraph above. The suggested additional language is necessary since guardianships or conservatorship orders do not always remove all of a person's decision-making authority, and the additional language makes clear that the lawyer may take direction from the lawyer's client on matters still within the client's authority to direct.

ABA Working Group Proposed Comment 5 with COSAC Suggestion:

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. When representing a client in such situations, the lawyer must take direction from the client and advocate for the client's objectives.

*When a court has appointed a guardian, conservator or other appointee to act on behalf of a client or prospective client, a lawyer should ordinarily look to the court appointee for those decisions on behalf of the client or prospective client over which the appointee has authority only when explicitly authorized by the lawyer's appointment or retainer agreement, or by a relevant applicable law. However, a lawyer may consult with and represent a person subject to guardianship or conservatorship **that has deprived that person the right to make decisions about the matter or matters about which the lawyer has been consulted** 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. However, 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.*

ABA Working Group Proposed Comment 7:

A lawyer representing a minor should be mindful that the minor may have decision-making limitations due to age and stage of development. As with adult clients with decision-making limitations, the lawyer for a minor with decision-making limitations should, as far as reasonable, maintain an ordinary client-lawyer relationship. A lawyer for a minor capable of providing direction should advocate for the minor's objectives of the representation. See Rule 1.2(a).

COSAC Suggestion:

COSAC believes that this Comment, in conjunction with the Rule, could inadvertently render many child representation regulations unethical. In New York, for example, Rule 7.2 (Function of the attorney for the child) states that, while lawyers for children in family court must ordinarily zealously advocate the child's position, the lawyer is nevertheless permitted to advocate for a position contrary to the child's position where she "is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child."¹ The current Rule and Comment does not address this type of "substituting judgement" action when representing minors that is permitted in New York family court matters and other jurisdictions. COSAC suggests simply adding a

¹ N.Y. COMP. CODES R. & REGS. tit. 22, § 7.2 (2007).

clause that indicates pursuing this course of action, when permitted by applicable law in the jurisdiction, is not unethical.

ABA Working Group Proposed Comment 7 with COSAC Suggestion:

A lawyer representing a minor should be mindful that the minor may have decision-making limitations due to age and stage of development. As with adult clients with decision-making limitations, the lawyer for a minor with decision-making limitations should, as far as reasonable, maintain an ordinary client-lawyer relationship. A lawyer for a minor capable of providing direction should advocate for the minor's objectives of the representation, consistent with substantive and procedural law of the applicable jurisdiction. See Rule 1.2(a).

ABA Working Group Proposed Comment 8:

A lawyer acting as guardian ad litem for a person is typically tasked with advocating for the best interest of that person. Because a person's best interest may diverge from the person's objectives, lawyers who simultaneously act as a guardian ad litem for a person and provide direct legal representation of that person may find themselves in an ethically untenable position.

COSAC Suggestion:

COSAC suggests deleting the phrase "may find themselves in an ethically untenable position" and adding "should consider the need to withdraw as counsel or request to be relieved of the guardian ad litem appointment." A lawyer should endeavor to be relieved from any appointment where the lawyer cannot advocate for a client's objectives.

ABA Working Group Proposed Comment 8 with COSAC Suggestion:

A lawyer acting as guardian ad litem for a person is typically tasked with advocating for the best interest of that person. Because a person's best interest may diverge from the person's objectives, lawyers who simultaneously act as a guardian ad litem for a person and provide direct legal representation of that person ~~may find themselves in an ethically untenable position~~ should consider the need to withdraw as counsel or request to be relieved of the guardian ad litem appointment.

ABA Working Group Proposed Comment 9:

...In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections...

COSAC Suggestion:

COSAC suggests adding language to this sentence that will explicitly encourage lawyers to consider the impact of potential protective actions on the client's trust in the lawyer and the legal system.

ABA Working Group Proposed Comment 9 with COSAC Suggestion:

...In taking any protective action When determining whether to take any protective action or which protective action to take, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities, preserving to the extent possible the client's trust in the lawyer and the legal system, and respecting the client's family and social connections...

ABA Working Group Proposed Comment 10:

In determining the extent of the client's decision-making limitations, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision; variability of state of mind and ability to understand consequences of a decision; the substantive fairness of a decision, the consistency of a decision with the known long-term commitments and values of the client, and whether supports or accommodations could alleviate factors contributing to decision-making limitations...

COSAC Suggestions:

1. COSAC believes that “the substantive fairness of a decision” should not be a factor in assessing a client’s decision-making limitations. This factor is the only one of those listed that is completely unrelated to the client’s individual abilities, values or consistency. Every other factor reflects considerations that relate to the client specifically (e.g. Is the decision different from what **the client** has articulated previously? Is it consistent with **the client’s** values? Is **the client** able to articulate reasons behind the decision?). Using “substantive fairness” as a factor permits unnecessary subjectivity into the analysis of a client’s decision-making abilities.
2. COSAC suggests adding language at the end of this Comment regarding the need for lawyers to be aware that medical diagnosticians may have evaluated the client under different ethical standards.

ABA Working Group Proposed Comment 10 with COSAC Suggestion:

In determining the extent of the client's decision-making limitations, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision; variability of state of mind and ability to understand consequences of a decision; the substantive fairness of a decision, the consistency of a decision with the known long-term commitments and values of the client, and whether supports or accommodations could alleviate factors contributing to decision-making limitations... In forming a reasonable belief, a lawyer who is aware that a healthcare professional's evaluation of the client's current abilities and limitations should take such evaluation into consideration. However, the lawyer should recognize that the evaluation may have been done for a different purpose and under different circumstances, and that the evaluator may have evaluated the client based on standards that differ from the relevant legal and ethical standards.

ABA Working Group Proposed Comment 11:

A determination of decisional incapacity need not have been made by a healthcare professional or court for a lawyer to form a reasonable belief that a client cannot make and communicate decisions. Nevertheless, in appropriate circumstances, the lawyer may seek guidance from a healthcare professional with relevant expertise or with knowledge of the client's abilities or limitations. If obtaining such guidance requires revealing confidential information about the client and the client does not or cannot give informed consent, it falls outside the ordinary client-lawyer relationship and is permissible only if it is a reasonably necessary protective action under Rule 1.14(c).

COSAC Suggestion:

COSAC suggests deleting “and communicate” in the second line above, and changing “reasonably necessary to “reasonable” in the last line. Incapacity should not be based on communication limitations. Also, a “reasonably necessary” standard may discourage a lawyer from taking protective actions. A reasonableness standard should be adequate.

[One COSAC Member’s View: I think it is better to keep “reasoned” in the Comment. There might be times when the client with decision-making limitations can make an informed decision, but cannot use that information to reason out what option to take. For example, there are developmental disabilities that do not impact the ability to retain information, but do impact the ability to analyze the information.

Response: MY SUGGESTION THAT WE REMOVE THE WORD “REASONED” IS BASED ON MY BELIEF THAT CLIENTS WITHOUT LIMITATIONS ARE FREE TO MAKE UNREASONED DECISIONS AND AS COUNSEL TO A PERSON WITH LIMITATIONS OUR DUTY SHOULD NOT BE TO EVALUATE WHETHER THE CLIENT’S DECISIONS ARE IN OUR OPINION REASONED.]

ABA Working Group Proposed Comment 11 with COSAC Suggestion:

A determination of decisional incapacity need not have been made by a healthcare professional or court for a lawyer to form a reasonable belief that a client cannot make and communicate decisions. Nevertheless, in appropriate circumstances, the lawyer may seek guidance from a healthcare professional with relevant expertise or with knowledge of the client's abilities or limitations. If obtaining such guidance requires revealing confidential information about the client and is not done with the client's consent, it falls outside the ordinary client-lawyer relationship and is permissible only if it is a ~~reasonable reasonably necessary~~ protective action under Rule 1.14(c).

ABA Working Group Proposed Comment 12:

If a lawyer reasonably believes that the client meets the criteria set forth in subsection (b) of this Rule, the lawyer may consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. For example, if the client has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a guardian or conservator, which may be temporary or limited in nature, or a court order in lieu of such an appointment. In addition, rules of procedure in litigation sometimes provide that minors or persons with decision-making limitations must be represented

by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of such a legal representative may be more intrusive, expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should generally advocate the least restrictive action on behalf of the client, and be aware of any law that so requires. The lawyer should also communicate with the client regarding such protective action to the extent feasible unless doing so is not necessary for the client to make informed choices about the representation and would be detrimental to the client or the lawyer's ability to protect the client's interests. See Rule 1.4.

COSAC Suggestions:

1. COSAC suggests adding explicit references to subsection (c) of the Rule to the first and third sentence of the Comment in order to make clear that the lawyer should consider appointment of a guardian ad litem, conservator or guardian not when the client has decision-making limitations in general, but rather when the client has decision-making limitations that put the client at risk of substantial physical, financial or other harm and client cannot adequately act in the client's own interest to address the risk.
2. COSAC suggests adding language to the last sentence of the Comment to clarify that, if it is possible to do so without undermining the efficacy of the protective action, the lawyer should discuss the protective action with the client before taking it.

ABA Working Group Proposed Comment 12 with COSAC Suggestions:

If a lawyer reasonably believes that the client meets the criteria set forth in subsection (b) and (c) of this Rule, the lawyer may consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. For example, if the client has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a guardian or conservator, which may be temporary or limited in nature, or a court order in lieu of such an appointment. In addition, rules of procedure in litigation sometimes provide that minors or persons with decision-making limitations must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of such a legal representative may be more intrusive, expensive or traumatic for the client than circumstances in fact require to address the risk of substantial physical, financial or other harm to the client. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should generally advocate the least restrictive action on behalf of the client, and be aware of any law that so requires. The lawyer should also communicate with the client regarding a proposed protective action before taking such action, unless such communication is not feasible or is not necessary for the client to make informed choices about the representation and would be detrimental to the client or the lawyer's ability to protect the client's interests. See Rule 1.4.

ABA Working Group Proposed Comment 17:

A lawyer who in an emergency acts on behalf of a person with decision-making limitations who is unable to establish a client-lawyer relationship should keep the confidences of the person with

decision-making limitations as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of the lawyer's relationship with the person with decision-making limitations. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Ordinarily, a lawyer would not seek compensation for such emergency actions taken.

COSAC Suggestion:

COSAC suggests changing the last sentence to “A lawyer would not ordinarily seek compensation for such emergency actions taken, subject to the substantive and procedural law of the applicable jurisdiction.” COSAC believes that this more clearly indicates that, in some jurisdictions, compensation for certain actions taken in emergency matters may be a matter of local law.

ABA Working Group Proposed Comment 17 with COSAC Suggestion:

A lawyer who in an emergency acts on behalf of a person with decision-making limitations who is unable to establish a client-lawyer relationship should keep the confidences of the person with decision-making limitations as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of the lawyer's relationship with the person with decision-making limitations. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Ordinarily, a lawyer would not seek compensation for such emergency actions taken. A lawyer would not ordinarily seek compensation for such emergency actions taken, subject to the substantive and procedural law of the applicable jurisdiction.