Unlike attorneys who practice within the field of ethics and ethics scholars who are appropriately steeped in the rules, for everyday practitioners the ethics rules function like the voice of a conscience. The rules are like quiet whisperings that sound a cautionary note just before an action or a forbearance; are you sure this is alright? Or the rules may lead the attorney to set a procedure in order, like a conflict check, that is done routinely in the way established without further thought about deeper issues that may lurk below the surface of a presumptively routine procedure until something bad happens. Or the lawyer may see something done by another lawyer that seems odd and wonder if what they are seeing is actually permitted.

Unless pressed in these and like ways by a perceived problem or confronted with a threatened or actual complaint lawyers probably do not think much about ethics. This is hardly a surprise or dramatic observation. Recognition or at least suspicion of this reality is surely part of the reason jurisdictions across the country require attorneys to take ethics as part of the annual continuing education requirement, to get lawyers to spend at least a little bit of time on an on-going basis thinking about ethics and professionalism.

This observation is not intended in the least as a criticism of lawyers. My impression is that most lawyers not only practice within the bounds of the ethics rules and professionalism principles but that most lawyers want and intend to do so. The sad
and arguably dangerous image of mostly unethical lawyers as portrayed on fictional television programs and in the movies is a caricature far distant from reality. It may make for good story-telling to draw an audience for marketing purposes but it bears little similarity to what goes on customarily in the practice of everyday lawyers. Certainly, there are unethical lawyers, and, even more, unprofessional lawyers, but they are the distinct minority. For the most part lawyers carry on their lives within the bounds of the rules, far more focused on serving their clients in ethically and professionally acceptable ways than on crossing boundaries in pursuit of a better outcome than they can achieve within the established boundaries.

For most, perhaps nearly all of the everyday lawyers the challenge is not to resist the temptation to cross the boundaries, but rather to recognize an ethical problem when it is there. The everyday lawyer likely benefits most from educational experiences that involve getting one’s consciousness raised about when and how the lawyer may confront ethical and professionalism problems in everyday practice. To that end, the everyday lawyer would benefit greatly from an understanding of some of the principles and goals that underlie the rules, to then be better able to recognize situations that implicate the ethical rules and the professionalism principles, and to suggest a direction in which to go in responding and reacting to those situations.

These observations are not intended either to denigrate in the least the benefit of deeper analyses of the ethical issues presented in specific circumstances, like business transactions with clients, trust accounts, and communicating with former employees of target companies. Such analyses, whether in writings or presentations would be
immensely helpful to lawyers who find themselves in such situations frequently or to lawyers immersed in a single situation trying to make sense of how to deal with the ethical problems then presented. There is a place for close inspection of an individual rule and for deep doctrinal analyses.

Neither is this observation intended to take anything away from the enormous benefit conferred on everyday lawyers who have ready access to ethics counsel, whether on retainer or in-house. Such resources are not available to most everyday practitioners, though. And even when available such resources are not likely to be used unless the everyday lawyer recognizes a situation as implicating an ethical or professionalism issue. Finally, some situations call for immediate action and the opportunity to confer with retained ethics counsel or in-house ethics counsel may have to wait until later.

The point here is that for better or worse most lawyers carry on with a rather general conception of what it means to engage in ethical practice. That conception is surely better than what “paralawyer” Deck Shefflit said to recent law school graduate Rudy Baylor in the movie version of John Grisham’s The Rainmaker after they stomped on Rule 7.3(a)\(^1\) by soliciting business from and then signing up a hospital patient being treated for extensive, serious personal injuries:

Rudy: What if the guy has a lawyer?

Deck: We came with nothing. If he had thrown us out of his room for whatever reason, what have we lost?

Rudy: A little dignity, maybe a little self-respect.

\(^1\) Actually, you need a calculator to count all of the ethics violations in this one scene.
Deck: You see, in law school Rudy they don’t teach you what you need to know. It’s all theories and lofty notions and big fat ethics books.
Rudy: What’s wrong with ethics?

Deck: Nothing I guess. I mean, I believe a lawyer should fight for his client, refrain from stealing money and try not to lie. You know, the basics.

Rudy: But that was blatant ambulance chasing.

Deck: Right, who cares. There’s a lot of lawyers out there. It’s a marketplace, a competition. What they don’t teach you in law school can get you hurt.²

But that conception very likely is nowhere close to what it would be if lawyers had even the rules at the forefront of their thinking, much less the appellate decisions, ethical opinions and treatise analyses that interpret those rules. It would be great if they did, but it is probably wrong to think that they do.

The reality is likely closer to what the memory of a mind educated at Father Guido Sarducci’s Five Minute University looks like. Father Guido Sarducci is a fictional character created by comedian Don Novello in the early 1970’s. In one of his routines he talked about how in the course of higher education students learn what they need to know to pass tests and then forget most of what they learned. He suggested creating an education institution that would teach students what they would remember five years after they were out of school.³

Sarducci: You know, like in college you have to take foreign language. Well, at the Five-Minute University you can have your choice. Any

² https://www.youtube.com/watch?v=LLKjyk8N8Wk
³ https://www.youtube.com/watch?v=kO8x8eoU3L4
language you want you can take it. Say if you want to take Spanish. What I teach you is “como estás usted.” That means “how are you?” And the answer is “muy bien.” Means “very well.” And believe me if you took two years of college Spanish, five years after you get out of school, “como estás usted” and “muy bien” is about all you are going to remember. So, at my school that’s all they learn. You see, you don’t have to waste your time with conjugations, vocabulary, all that junk. You just forget it anyway and what’s the difference.

Economics. Supply and demand. That’s it. Business, business is you buy something and you sell it for more.

If everyday lawyers are not likely to remember the detail they had to know, for example, when they took the MPRE (Multistate Professional Responsibility Examination), then what do we want them to recall?

The answer, in my view, is enough to be able to recognize an ethics or professionalism issue when they see it and to have some idea about how to deal with it. This means as a practical matter having an idea about what situations that raise ethical and professional issues look like, knowing the general concepts or principles that underlie the applicable rules, and knowing where to look to find out more information or to get help where a more intense look and more intense thought is needed. This is not to deny for a heartbeat the enormous value of deeper doctrinal analyses of a kind of problem or a particular rule. It is just an impression what the everyday lawyer needs at a minimum to be not just a substantively competent lawyer, but to have good start on being an ethical and professional one as well.

There are any number of ways to provide this kind of educational experience. My preference has been to use movie clips, television clips and game show-like scenarios to posit situations and circumstances that raise ethical and professionalism issues. There are
any number of other possibilities as well. For a few years I tried a variety show format. One uses drama scenes, sometimes acted out by performers or even the audience. Sometimes I mix in real life circumstances as described in decided disciplinary cases. One could build an education program around published appellate court disciplinary decisions, which carry with them a “scared straight” kind of quality that may well aid memory even more.

Over the years I have usually made the point at the start of the different iterations of the hundreds of ethics programs I have presented by telling those attending that if they have come for a deep doctrinal analysis of the any particular or even a few of the ethics rules they have come to the wrong place. My goal is breadth, not depth. My purpose is to raise the consciousness of lawyers about the different ways in which ethical rules and professionalism principles bear on what lawyers can and do confront in the everyday practice of law. Lawyers should know an ethics problem when they see it and they should have some idea about how to deal with it.

My focus has been on the lawyer who must recognize an ethics problem in the moment, make sense of the issue presented in that same moment and then respond to that issue presented, again in that same moment. For example, a client asks the lawyer for the signals that will be used to guide the client through deposition. What do you mean, the client is likely to say, that there are no signals. The client will go on that the client knows that’s not true because a friend told her that her lawyer gave her signals that helped her immensely through her deposition. A client I had represented for five years fired me on the spot when I would not give the client signals for a deposition scheduled for later in
the week. The issue came up again recently with a client who saw a lawyer giving a client signals during a trial and so knew it was what lawyers did.

Another client trying to negotiate a contingent fee many years ago proposed that I reduce his fee if he delivered as clients the seven other people who were in vehicle at the time of the crash. Then there was the claim representative negotiating with me over the hourly rate for the next year who suggested I keep my hourly rate low, and live by the adage, “I lose money on every sale, but I make it up in volume.” It took me a few moments to realize he was encouraging me to “pad” my hours to make up the difference between the hourly fee I wanted to charge and the hourly fee the representative wanted me to use so the representative can impress the bosses with the representative’s negotiating skills. It all comes out the same in the end, the representative said.

There is quite a lot of no harm, no foul in the law. In tort law, for example, the failure to establish causation between the admitted misconduct and an adverse outcome necessitates dismissal of many kinds of claims. Not so with ethics violations. The absence of harm is a factor to consider in mitigation but not an excuse for the violation. Yet one would be hard pressed to find a lawyer who has not been “saved” by the fact that an otherwise aggrieved client decided not to complain to the “bar” about unethical conduct when that lawyer achieved a favorable outcome in the representation for the client.

The point here is not that there is an ocean of unreported ethics violations, though there may well be. Rather, the point is that ethical issues come up all of the time in everyday practice. When I taught ethics courses at the law school for many years, a
course each semester for two semesters a year, I would start each class with the “ethical issue of the day,” drawing on something I had experienced, observed, read about or heard about that very day, or within a day or two of class. I never had a shortage of subject matter. But then I was sensitized to seeing ethical and professionalism issues in a way that most lawyers do not. It was a function of teaching ethics at the law school two semesters a year for many years at the law school and then tens of continuing education ethics courses around the country every year.

For me, ethics was and is a fun and interesting topic. For virtually all everyday lawyers, though, ethics is not fun. The ethics rules are not seen as light reading and so not usually found on bedside tables or in bathroom reading racks. Lawyers know the rules are out there but do think about them much beyond the big ones: keep confidences, don’t steal a client’s money, avoid representing both sides in the same case, don’t lie to the Court, and don’t solicit business from people you don’t know. Beyond that, everyday lawyers deal with ethics and professionalism problems on an as experienced basis.

The “musings” that follow are directed to those everyday lawyers. They are intended to assist by offering concepts and ideas about the purposes of and principles or goals underlying the rules. These musings are also intended to help lawyers organize their thinking about the content of the rules, in terms of where to find what in the rules that may be helpful. In short, these musings are intended to provide guidance in recognizing ethical and professionalism issues as they come up in practice and to begin thinking about

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4 I readily acknowledge this fact when I teach ethics, but then readily admit I am the most boring person I know.
what to do in light of what is presented. They are intended to be in service of the initial thinking everyday lawyers do about what they observe, not the end point where lawyers will go, whether relying on their own research and analysis or the assistance that may be sought and otherwise available from others.

**Sections**

The ethics rules are divided into eight sections:

Rules dealing with the relationship between an attorney and a client will be found in Section I, referred to as the Client-Lawyer Relationship.

Section II deals with candor with the client and the lawyer’s role facilitating outcomes, collectively, the lawyer as Counselor.

The lawyer’s duties to the Court and other adjudicative bodies are covered in Section III, the lawyer as Advocate.

Section IV deals with what lawyers are expected to do in Transactions with Persons Other than Clients.

Section V addresses ethical issues that arise in Law Firms and Associations.

Public Service is the focus of Section VI.

Acquiring business is addressed in Section VII, Information about Legal Services.

The remaining rules, in Section VIII, deal with Maintaining the Integrity of the Profession.

The Section with which everyday lawyers are most familiar, in the sense of what they would refer to if asked to state the first thing that comes to mind when prompted
with the word “ethics” is Section I, dealing with the attorney-client relationship. It is the longest section with the most rules.

The Section least likely to come to the everyday lawyer’s mind when prompted with the word “ethics” is Section IV, dealing with the lawyer’s duty to third parties. This is because for most lawyers ethics is primarily about the people lawyers represent, and secondarily about how they obtain outcomes for the people they represent when dealing with third party decision makers. The idea that lawyers might have duties to people they do not represent, people they happen to deal necessarily or even incidentally as they pursue their client’s interests, is an odd concept. Yet the profession is concerned, and in my view rightly so, with the risk of abuse of those third parties that lawyers come across as they carry on their professional business.

More on all of this to follow.5

Starting Off

The Scope and Preamble would be a worthy place to start for the professionalism principles set out there. In Arizona, the content of the Scope and Preamble are especially worthy of attention because they have been incorporated into the ethical rules. This means that the aspirations set forth in the Scope and Preamble are actually

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5 Caveat: My goal ultimately is to have a single piece, however long that may turn out to be, that collects all of my “musings.” For those reading this standalone “Part” I am limiting the content to about 20 plus pages. I will muse about as many rules as that page limit allows, focusing on the rules that seem worthy of discussion in the course of my writing. Nothing about the selection of rules or the order in which they are presented is intended to suggest any one ethical rule is more or less important than any other. For purposes of Part I several rules are included for discussion here because they are ethical rules that lawyer probably should think about more, but likely do not. The others are there simply because I felt like talking about them.
responsibilities of attorneys in the same way that the content of the ethical rules are responsibilities. There is much to discuss here.

Instead this discussion will begin elsewhere, the breadth over depth philosophy prevailing at the start. There will be more to say about professionalism later.

**Definitions**

A former partner reminds me often of what he was told when he started practicing law back in the 70’s. “There are good things in those rules.” And there are indeed. His mentor was not referring to the ethics rules but could have been. The good things include things that the everyday lawyer probably does not recall or perhaps never even knew about.

It is in this context that the first musing is about the definition rule, E.R.1.0., titled Terminology. Many, though importantly not all, of the common terms used in the ethical rules are defined here. In some instances, the definitions are helpful(e.g. 1.0(n), what is a writing) , and in some they are more or less tautological (e.g., 1.0(l), what is substantial). In any event, it bears knowing that there is a definition rule and it would be useful to have a general sense of what definitions are provided.

Some of the more useful definitions include the following:

E.R. 1.0(e) Informed Consent:

“Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.
Contrary to what many believe, informed consent does not always have to be in writing.

There is a writing requirement in many of the ethical rules, but a writing is not part of the definition of informed consent.

E.R. 10(a) Confirmed in Writing

“Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

When informed consent is required by the applicable ethical rule be confirmed in writing E.R. 1.0(a) sets forth what fundamentally is required. The applicable ethical rule imposing the writing requirement may require more.

It bears noting that there is an emphasis in this rule on contemporaneous documentation of the consent. This can be done by the person giving consent executing an appropriate document. It can also be done by the lawyer promptly transmitting a writing that confirms an oral consent. Where it is not feasible to do either then it must be done within a reasonable time.

E.R. 1.0(f) is interesting for what it says, albeit very briefly, about what it means to “know” something: “actual knowledge” of the fact in issue. However, actual knowledge may be “inferred from the circumstances.” This is not the same as “constructive” knowledge, but as a practical matter it seems like it may be close to that.
Three rules deal with what term “reasonable” means, including E.R. 1.0(h), 1.0(i) and 1.0(j). One rule defines it absolutely and the other two define it in context (“reasonable belief” and “reasonably should know”).

Finally, litigators would be well served reading the definition of a tribunal.

“Tribunal” denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

It is an expansive definition, with particular application to the matters addressed in E.R.’s 3.3 (Candor to the Tribunal), E.R. 3.5 (Impartiality and Decorum of the Tribunal). It is also noteworthy for the contexts in which it does not apply. (e.g., E.R. 3.1 (Meritorious Claims and Circumstances) and E.R. 3.4 (Fairness to Opposing Parties and Counsel).

**Jurisdiction**

While the obvious place to turn next is the first “substantive rule,” E.R. 1.1, dealing with competency, a more important rule for the everyday lawyer is E.R. 8.5, dealing with jurisdiction. This is a rule seemingly unfamiliar to most everyday lawyers, yet a rule that has application for any attorney who offers services outside Arizona.

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.
First and foremost, when a lawyer provides legal services in another state that attorney may be subject to the applicable ethical rules of that jurisdiction as well as the attorney’s home jurisdiction. Accordingly, any attorney providing legal services outside the attorney’s home state (e.g. taking a deposition or attending a meeting) should check the rules in the jurisdiction where they are going to see if by working professionally in that jurisdiction, whether licensed there or not, they are obligated to abide the rules of that jurisdiction and of course the attorney’s home jurisdiction.

This may not be simply a matter of being informed of the applicable rules, either. Most jurisdictions have chosen to a greater or lesser extent not to follow all of the model rules, and in any event other jurisdictions have rules that reflect their own distinctive policy interests. Accordingly, a lawyer may be confronted with a situation where the home jurisdiction rule and the rule of the jurisdiction where professional work is being done are actually in conflict.

A good example is the use of email to communicate privileged information. The requirements for email communications do vary among states. The question then presented is which requirements the lawyer should follow. E.R. 8.5(b) provides an answer but that answer is not entirely clear. Where in doubt, a lawyer is well served by following the more restrictive rule, the one more protective of the client’s confidentiality interests.

That approach, by the way, is good advice for any situation, including of course situations involving ethical and professionalism issues. When in doubt about what to do, and when doing something immediately is required, go in the direction that most protects
the client’s interests. That direction may not always be the one strictly required by the applicable ethical rule,⁶ but it should be defensible for its concern about and its protection of the client.

Those cautions having been offered, E.R. 8.5(b) provides an answer for the problem of conflicting jurisdictional authorities.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

While this rule is pretty straight-forward in explaining how the lawyer’s responsibilities are affected across jurisdictions, there are some ambiguities here from the standpoint of predicting exactly how the choice of law will be involved. Eventually that issue will be resolved, even if only by ruling from the applicable tribunal about what laws it will

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⁶ For example, there are conflicts in the rules between the interests of the client and other institutions and persons, as between the requirements of confidentiality set out in E.R. 1.6 and the duty of candor to the Court, E.R. 3.3, that are resolved by rule in favor of the court. A lawyer should be aware of that conflict and how it is resolved, by maintaining candor to the Court even at the client’s expense. Still, if through ignorance of E.R. 3.3 the lawyer protects the client and is not candid with the Court then a sincere explanation of what motivated the lawyer may be significant in how the violation is addressed and the consequences that follow. This is not to suggest there is an excuse for lawyers being ignorant of E.R. 3.3, but only to suggest that when ignorant of the rule, unsure about what to do and action is required in the moment, protecting the client is a motivation that may draw some sympathy.
apply. The problem for the lawyer looking ahead to providing legal services outside that lawyer’s home jurisdiction may not, indeed likely will not, know for certain what law will apply. The best course of action would seem to be to know what the rules are, and when there are differences consult with counsel, perhaps the applicable state bar’s ethics hotline or like service or ethics counsel within the jurisdiction (1) about any conflicting jurisdictional requirements and (2) how those jurisdictional conflicts are resolved.

**Dealing with the Client with Diminished Capacity**

It is very likely that most lawyers do not envision themselves dealing with clients with mental health problems and so assume this rule will never apply to them. Those lawyers are wrong! This Ethical Rule is likely come into play at one point or another in every lawyer’s practice. This is because of the myriad of ways in which a client may come to have diminished capacity.

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

The obvious way, one specifically recognized by the ethical rule, is when clients have mental health problems. Such problems are typically thought of as chronic mental health illnesses that are either developmental in nature or acquired in some way. Those circumstances certainly can create situations covered by this ethical rule.

Another way specifically contemplated by the ethical rule is minority. It is interesting that the ethical rule does not reference older persons specifically, as advancing
age would seem to present an obvious occasion for diminished capacity. Advanced age is referenced in Comment 1, albeit briefly.

Even if it were not mentioned specifically in the Comment, aging certainly falls within the catch phrase, “for some other reason.” Many other circumstances do as well: intense depression, sleep deprivation, severe physical illness, anxiety over finances, excessive stress, addictions (alcohol, drugs, sex, gambling and others), loss of close others (by death or otherwise), extreme worry about the well being of another, and on and on and on. The ways may not be countless, but they certainly are many, that could lead to a “normal” client to become a client of diminished capacity.

When that happens, the everyday lawyer has to determine how to deal with that now “altered” client. The rule calls for the lawyer to maintain so far as reasonably possible “a normal client-lawyer relationship.” The problem is that most lawyers have little experience and even less training at knowing how to deal with such circumstances. Continuing education courses that address this rule are few and far between. Law school certainly does not prepare the lawyer to deal with a person of diminished capacity. And while in life generally, or even in their personal lives, lawyers may come across people with diminished capacity, the fact of those experiences does not mean that the lawyer learns enough to know what to do when confronted in their professional practice with a previously “normal” client who now exhibits diminished capacity.

Under other circumstances when presented with such a person it would be appropriate to seek guidance from someone else. However, the requirements of confidentiality limit what a lawyer can discuss about the client and with whom. Obtaining
client consent to have such communications with other persons can be awkward to the point of beyond discussion, especially if the client does not see himself or herself as suffering from diminished capacity or is overly sensitive about it. The bottom line is that it is a very challenging situation for the lawyer, ill-equipped most likely to deal, or perhaps even to recognize diminished capacities when the lawyer sees it.

If merely having a client with diminished capacity is challenging, it becomes much more problematic when the client with diminished capacity decompensates and now puts the client at risk of “substantial physical, financial or other harm.”

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

With this ethical rule, E.R. 1.14(b), the challenges go from great to extraordinary for the everyday lawyer. Now the inexperienced, untrained lawyer must evaluate the extent of the disability, evaluate whether the client is at risk for any kind of harm and then determine whether to take protective action that may well not be what the client would have chosen on the client’s own.

It is important to recognize what is going on here. This is the only ethical rule which permits the lawyer to impose the lawyer’s judgment about what is in the client’s interest over the expressed preference or choice of the client about what is in the client’s interest. There may be some solace in believing that the lawyer’s choice is the better one, and that the client does not see that because of the client’s disability. Still, unlike
everywhere is the ethical rules, this is the one time where the lawyer gets to make this
determination and act on it. At all other times it is for the client to decide what the goals
are outcomes will be, not the lawyer. And to this extent E.R. 1.14 imposes an awesome
responsibility on the lawyer.

Fortunately, the rule goes on to help the lawyer to a limited extent.

(c) Information relating to the representation of a client with diminished
capacity is protected by ER 1.6. When taking protective action pursuant to
paragraph (b), the lawyer is impliedly authorized under ER 1.6(a) to reveal
information about the client, but only to the extent reasonably necessary to
protect the client’s interests.

The rule authorizes the lawyer, when taking protective action, to breach confidentiality to
the limited extent of communicating with others to act to protect the client’s interests.
The comments provide a good deal of guidance about how to proceed with this, and
rightly so. Not only is the lawyer moving in a direction likely to be different than what
the client would have chosen, but now the lawyer is revealing client confidences to third
party, also potentially contrary to the client’s wishes. It would hardly be surprising for
the client upon recovering from diminished capacity, if that happens, to question the
lawyer’s loyalty for having acted contrary to what the client wanted, and trust for having
breached the client’s confidences.

This is not the place to delve into all of the issues presented by Ethical Rule 1.14.
The point is that every lawyer should delve into those issues in advance of being
confronted not only with a client with diminished capacity but a client who being at risk
of harm presents a situation in which the lawyer should take protective action. Close
study of the comments is a good start, but much more is needed to understand what it
means for a client to be diminished and to have at least a sense of how to proceed when, as inevitable it will, the diminished capacity client comes along.

**Competence**

The first rule appears as simple and straight-forward as can be in its instruction to lawyers:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Ask any lawyer if the ethical rules require competence and the lawyer will answer yes. Ask any lawyer what that means and nearly all lawyers will say something like a lawyer has to know the law and has to know to apply the law to the circumstances presented by the situation, problem or need presented by the client.

The lawyer who gives that answer about what it means to be competent will be half-right, and only half-right. Competence requires not just that the lawyer have the knowledge, skills and work ethics needed to achieve the goals set by the client or complete the project assigned by the client, but competence also means being able to apply those skills.

In other words, a competent lawyer has the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation” and the ability to implement all of that to do the work. There are many things that could prevent or at least compromise that: sleep deprivation, physical illness, severe stress, deep depression, anxiety about the well-being of loved once, addictions, financial duress, time or resource limitations and on and on and on. Lawyers need to consider and address these capacity
limitations equally as much as the knowledge, skill and work ethic considerations to put themselves in a position to be a competent lawyer.

Some lawyers are keenly aware of this side of competence and ready themselves to deal with it. For example, a very accomplished trial lawyer would move out of his home and into a hotel near the courthouse for the duration of a trial to avoid distractions that could compromise the lawyer’s trial preparation. Some lawyers chose not to consume alcohol, not because they dislike it or because they have any philosophical objection to it, but simply because they know that with their personality it would be very difficult to avoid using alcohol to excess when confronted with the enormous stress of legal practice. Other lawyers plan vacations years in advance and take actions, often financial, to commit themselves to those vacations, so they cannot be tempted not to get the emotional and physical rest they need. These are just a few of the many kinds of things lawyers can do to maximize the likelihood of maintaining the level of competence the ethical rules require, and more.