

**REQUEST THAT THE SUPREME COURT OF CALIFORNIA  
APPROVE PROPOSED RULE 3-100 OF THE RULES OF PROFESSIONAL  
CONDUCT OF THE STATE BAR OF CALIFORNIA, AND MEMORANDUM AND  
SUPPORTING DOCUMENTS IN EXPLANATION**

**MEMORANDUM**



**PREPARED BY  
THE OFFICE OF GENERAL COUNSEL AND THE PROFESSIONAL  
COMPETENCE UNIT OF  
THE STATE BAR OF CALIFORNIA**

**180 Howard Street  
San Francisco, California 94105-2399**

**June 2004**

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**SUPPORTING DOCUMENTS**

The following enclosures are attached to this Memorandum for the Court's convenience:

- ENCLOSURE 1:** Proposed New Rule 3-100 of the Rules of Professional Conduct of the State Bar of California
- ENCLOSURE 2:** Resolution Adopted by the Board of Governors at its May 22, 2004 Meeting
- ENCLOSURE 3:** Chaptered Version of Assembly Bill No. 1101
- ENCLOSURE 4:** Member Roster for the State Bar of California AB 1101 Advisory Task Force
- ENCLOSURE 5:** State Bar of California Internet Web-Site Public Comment Notice of Proposed New Rule 3-100
- ENCLOSURE 6:** Synopsis Chart and Text of Written Public Comment Received on Proposed Amended Rule 3-100
- ENCLOSURE 7:** Text of Proposed New Rule 3-100, in Legislative Style, Showing Revisions Made Following Consideration of Public Comment

The following attachments are appended to this Memorandum for the Court's convenience:

- ATTACHMENT A:** State Bar of California AB 1101 Advisory Task Force Briefing Binder
- ATTACHMENT B:** "Request that the Supreme Court of California Approve Proposed Rule 3-100 of the Rules of Professional Conduct of the State Bar of California and Memorandum and Supporting Documents in Explanation" (May, 1998, S070520)

**REQUEST THAT THE SUPREME COURT OF CALIFORNIA  
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**I**

**RECOMMENDATION**

The Board of Governors of the State Bar of California (hereinafter "Board") respectfully requests that this Court approve proposed new rule 3-100 (Confidential Information of a Client) of the Rules of Professional Conduct of the State Bar of California<sup>1</sup> in the form set forth in Enclosure 1.<sup>2</sup>

Proposed new rule 3-100 was adopted by the Board at its May 22, 2004 meeting. (The resolution adopted by the Board at its May 22, 2004 meeting is set forth in Enclosure 2.) Proposed new rule 3-100 was developed in response to Assembly Bill No. 1101 (hereinafter "AB 1101"). Operative July 1, 2004, AB 1101 amends the statutory duty of attorney-client confidentiality, Business and Professions Code section 6068, subdivision (e) (hereinafter "§6068(e)"), to permit, but not require, an attorney to reveal a client's confidential information to prevent a criminal act that is likely to result in the death of, or substantial bodily harm to, an individual. (The chaptered version of AB 1101 is provided in Enclosure 3.) In considering AB 1101, the Legislature recognized that a Rule of Professional Conduct could be adopted to address professional responsibility issues relating to the implementation of the new statutory exception. To this end, an uncodified section 3 of the bill was included stating the Legislature's intent that the State Bar develop a new Rule of Professional Conduct. Proposed new rule 3-100 responds to this legislative intent. A history and summary of the proposed new rule follow.

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<sup>1</sup> Unless otherwise indicated, all rule references are to the Rules of Professional Conduct of the State Bar of California.

<sup>2</sup> Business and Professions Code section 6076 provides: "With the approval of the Supreme Court, the Board of Governors may formulate and enforce rules of professional conduct for all members of the bar of this State."

Rules of Professional Conduct adopted by the Board are binding upon members of the State Bar only when approved by this Court. (See Business and Professions Code section 6077.)

II

**HISTORY OF FORMULATION OF PROPOSED NEW RULE 3-100**

**A. AB 1101**

*Amendment to §6068(e).* AB 1101 was introduced in the 2003-2004 legislative session by Assembly Member Darrell Steinberg to amend §6068(e), the statutory duty of attorney-client confidentiality.<sup>3</sup> Operative July 1, 2004, AB 1101 amends the statutory duty to include an express exception that permits, but does not require, an attorney's disclosure of certain confidential information. As amended, the statutory duty states:

6068. It is the duty of an attorney to do all of the following:

.....

(e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual. (Bus. & Prof. Code §6068(e), as amended operative July 1, 2004.)

*Amendment to Evidence Code section 956.5.* AB 1101 also amends the evidentiary attorney-client privilege by expanding an existing statutory exception, Evidence Code section 956.5, applicable to confidential communications concerning a client's criminal act that is likely to result in death or substantial bodily harm. As amended, this exception to the evidentiary privilege deletes the

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<sup>3</sup> The Legislature's bill analyses of AB 1101 are found in Attachment A - the State Bar of California AB 1101 Advisory Task Force Briefing Binder, at Tab 2.

limitation that the criminal act be an act perpetrated by a client, thus making the evidentiary standard parallel to the amended statutory duty of confidentiality. As amended, Evidence Code section 956.5 states:

956.5. There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual. (Evid. Code §956.5, operative July 1, 2004.)

Section 3 of AB 1101 – Issues Raised by the Implementation of the Statutory Changes. In developing the foregoing changes to California statutory law concerning an attorney’s professional obligation to keep secret the confidential information of a client, the Legislature determined that there are issues raised in implementing the statutory changes that could be addressed by an amendment to the Rules of Professional Conduct. This is found in section 3 of AB 1101, an uncodified portion of the bill, which states:

SEC. 3. (a) It is the intent of the Legislature that the President of the State Bar shall, upon consultation with the Supreme Court, appoint an advisory task force to study and make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act.

(b) The task force should consider the following issues:

(1) Whether an attorney must inform a client or a prospective client about the attorney’s discretion to reveal the client’s or prospective client’s confidential information to the extent that the attorney reasonably believes that the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.

(2) Whether an attorney must attempt to dissuade the client from committing the perceived criminal conduct prior to revealing the client's confidential information, and how those conflicts might be avoided or minimized.

(3) Whether conflict-of-interest issues between the attorney and client arise once the attorney elects to disclose the client's confidential information, and how those conflicts might be avoided or minimized.

(4) Other similar issues that are directly related to the disclosure of confidential information permitted by this act.

(c) Members of the task force shall include the following:

(1) Civil and criminal law practitioners, including criminal defense practitioners.

(2) Representatives from the judicial, executive, and legislative branches.

(3) Representatives from the State Bar Commission for the Revision of the Rules of Professional Conduct and from the State Bar Committee on Professional Responsibility and Conduct.

In accordance with this legislative intent, the State Bar President, in consultation with this Court, appointed an advisory task force.

**B. The State Bar of California AB 1101 Advisory Task Force**

The State Bar of California AB 1101 Advisory Task Force (hereinafter "Task Force") consisted of twenty-one members, including eighteen attorney members and three non-lawyer, public members. (A member roster for the Task Force is provided in Enclosure 4.) Each of the stakeholder groups identified in section 3(c) of AB 1101 was represented on the Task Force. Professor Kevin Mohr,

representative of the State Bar Committee on Professional Responsibility and Conduct, served as the Task Force Chair. (A briefing binder prepared for the Task Force is provided as Attachment A to this memorandum.)

The Task Force was given a narrow charge. It was assigned to develop a recommendation for an amendment to the Rules of Professional Conduct after consideration of the issues posed by the Legislature in section 3 of AB 1101. It was understood that the Task Force's recommendation would be made to the State Bar, and that the State Bar would use its normal procedures in adopting the rule and submitting the rule to this Court for approval.

The Task Force conducted an initial half-day meeting followed by three day-long meetings to study the issues presented and to draft a proposed new rule.<sup>4</sup> Meetings were held in Sacramento, Los Angeles, and San Francisco. The meetings were conducted in open session. The Task Force's development of a proposed rule included consideration of the following resources: prior versions of rule 3-100 adopted by the State Bar; American Bar Association Model Rule of Professional Conduct 1.6; and section 66 of the American Law Institute's Restatement of the Law, the Law Governing Lawyers, Third Edition.<sup>5</sup> The Task Force sought to draft a rule that would effectuate the public policies favoring the preservation of life and protection of the public, while at the same time provide guidance to lawyers about how, where feasible, to achieve those goals within the confines of the attorney-client relationship. At its meeting on March 12, 2004, the Task Force met to consider the proposed language of a draft rule 3-100. The Task Force considered each paragraph of the draft rule and the rule discussion section and voted to submit the draft rule to the State Bar as its completed work product.

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<sup>4</sup> The Task Force meetings were held on: January 23, 2004 (Sacramento); February 11, 2004 (San Francisco); February 27, 2004 (Los Angeles); and March 12, 2004 (San Francisco).

<sup>5</sup> These references are found in Attachment A - the State Bar of California AB 1101 Advisory Task Force Briefing Binder, at: Tab 4 (prior versions of rule 3-100 adopted by the State Bar); Tab 8 (American Bar Association Model Rule of Professional Conduct 1.6); Tab 9 (section 66 of the American Law Institute's Restatement of the Law, the Law Governing Lawyers, Third Edition).

**C. Request for Public Comment on Proposed New Rule 3-100**

At its meeting on March 19, 2004, the State Bar of California's Board Committee on Regulation, Admissions and Discipline Oversight (hereinafter "Board Committee") considered a State Bar staff request that the rule developed by the Task Force be authorized for a public comment distribution. The Board Committee authorized proposed new rule 3-100 for a 60-day public comment period with a deadline of May 17, 2004.

Notice of the request for public comment was posted on the State Bar of California's internet website and sent via e-mail to two distribution lists of persons interested in State Bar proposals. (A print-out of the State Bar of California internet website notice of request for public comment on proposed new rule 3-100 is provided in Enclosure 5. This enclosure includes the text of proposed new rule 3-100 as distributed for public comment.) A summary of proposed new rule 3-100, as released for public comment follows.

*Summary of Proposed New Rule 3-100 as Released for Public Comment.* Paragraph (A) of the rule incorporates by reference the statutory duty of confidentiality found in the Business and Professions Code. Paragraph (A) also identifies two exceptions to the duty of confidentiality: informed consent of the client to reveal confidential information; and disclosure of confidential information under paragraph (B) of the rule. The first five paragraphs of the rule Discussion Section<sup>6</sup> clarify the scope of the duty of confidentiality and the balanced policy of allowing a limited exception to prevent a

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<sup>6</sup> Proposed new rule 3-100 includes a proposed new format style for the rule Discussion Section. The new format is the addition of discussion paragraph numbering and title headings. The Task Force noted that the American Bar Association Model Rules of Professional Conduct utilize comment numbering and titles. Also, it was reported to the Task Force that the State Bar's Special Commission for the Revision of the Rules of Professional Conduct is utilizing this format in its working drafts of proposed rule amendments and likely will recommend that the Board adopt the new format for all of the rules. (The Charter for the State Bar's Special Commission for the Revision of the Rules of Professional Conduct is found in Attachment A - the State Bar of California AB 1101 Advisory Task Force Briefing Binder, at Tab 13.)

criminal act likely to result in death or substantial bodily harm. In particular, paragraph [4] of the discussion states that an attorney is not subject to discipline for revealing confidential information in accordance with the terms of the rule and §6068(e)(2).

Paragraph (B) of the rule restates the statutory language of the new exception §6068(e)(2) that permits, but does not require, disclosure of confidential information to prevent a criminal act likely to result in death or substantial bodily harm. The language used in paragraph (B) is identical to the exception language used in §6068(e)(2), as operative on July 1, 2004. The factors to be considered by an attorney in deciding whether to disclose are set forth in paragraph [6] of the discussion.

Paragraph (C) of the rule identifies two steps that an attorney must consider before exercising discretion to reveal confidential information to prevent a criminal act of death/substantial bodily harm. Subparagraph (C)(1) states that an attorney must, if reasonable under the circumstances, attempt to persuade the client (i) not to commit or to continue the criminal act, (ii) to otherwise pursue a course of conduct that will prevent the threatened death/substantial bodily harm, or, if necessary, do both. Paragraph [7] of the discussion clarifies that if this remonstrance with the client is successful in preventing the threatened harm, then the option to make a permissive disclosure would no longer be open to the member as the threat of harm posed by the criminal act would no longer be present. Subparagraph (C)(2) states that an attorney must, if reasonable under the circumstances, inform the client, at an appropriate time, of the attorney's ability (or if reached, the attorney's decision) to reveal information to prevent a criminal act likely to result in death or substantial bodily harm. Paragraph [9] of the discussion sets forth factors to be considered in determining an appropriate time, if any, to inform a client, and paragraph [10] of the discussion explains that this flexible "factor analysis" approach is intended to avoid, where possible, chilling the relationship of trust between client and attorney that is essential to effective legal representation.

Paragraph (D) of the rule states that disclosure of confidential information under the rule must be no more than is necessary to prevent the criminal act, given the information known to the attorney at the time of the disclosure. Paragraph [8] of the discussion elaborates on this requirement and also clarifies that in some circumstances, an attorney may decide that the best course to pursue is to make an anonymous tip to law enforcement agencies or potential victims.

Paragraph (E) of the rule states that an attorney who does not reveal confidential information permitted under the limited exception does not violate the rule. Paragraph [5] of the discussion explains that revealing confidential information to prevent a criminal act likely to result in death or substantial bodily harm is a matter for the individual attorney to decide, based on all the facts and circumstances.

Other matters addressed in the rule Discussion Section include: an attorney's consideration of the "imminence" of harm as a factor to consider in deciding to reveal confidential information, but not a prerequisite to disclosure (paragraph [6] of the discussion); clarification that the scope of the limited exception applies to future or ongoing crimes (paragraph [3] of the discussion); and identification of other consequences to the attorney-client relationship once an attorney discloses confidential information under the limited exception (paragraphs [11] and [12] of the discussion).

Regarding other consequences to the attorney-client relationship once an attorney discloses confidential information, the discussion identifies the following issues of concern and relevant Rules of Professional Conduct: mandatory withdrawal under rule 3-700; attorney acting as witness in the client's case under rule 5-210; the obligation to perform legal services with competence under rule 3-110; and the common law duty of loyalty.

**D. Public Comments Received on Proposed New Rule 3-100**

Twelve written comments were received on proposed new rule 3-100 (ten received timely and two received after the public comment deadline). (A synopsis chart and the full text of the written public comments received are provided in Enclosure 6.) Of these twelve written comments, two support the proposed rule, one opposes the proposed rule, and nine generally recommend amendments to the proposed rule without expressly supporting or opposing the proposal.<sup>7</sup>

State Bar staff reviewed all of the public comments received in consultation with Professor Mohr. In addition, the full text and synopsis of the comments that were timely submitted were provided to the members of the Task Force with an invitation for individual informal input. This informal input also was considered by State Bar staff in consultation with Professor Mohr. In presenting the public comments to the Board Committee, staff reported its conclusion that: (1) the various points raised in the comments were issues that were discussed thoroughly by the Task Force and resolved by consensus or vote on the language of proposed new rule 3-100; and (2) several comments concerning significant material amendments to the rule language warranted a State Bar response. These specific comments, together with the State Bar's response, are set forth below.

- (1) *Comment:* The toxic waste illustration found in paragraph [6] of the discussion exceeds the limited scope of the statutory exception. As worded, the illustration and the accompanying discussion inappropriately suggests that the confidentiality exception allows disclosure of future harm that may follow from a criminal act even where the criminal act, itself, is

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<sup>7</sup> The two comments supporting the proposed rule are from: Assemblymember Darrell Steinberg; and Robert Kehr. The one comment opposing the proposed rule is from Phillip Feldman. The nine comments recommending amendments are from: Cristina Arguedas (also signed by Taylor Carey, Michael Judge, David LaBahn, Gene Wong, and Richard Zitrin); the Executive Committee of the Trust & Estates Section of the State Bar; JoElla Julien (also signed by Diane Karpman, Kurt Melchior, and Jerome Sapiro, Jr.); Stanley Lamport; Orange County Bar Association; San Diego County Bar Association; Harry Sondheim; Anthonie Voogd; and an anonymous comment.

completed and not capable of being “prevented” by a lawyer’s disclosure of confidential information. Consistent with the language used in paragraph (B) of proposed new rule 3-100 and §6068(e)(2), the exception should be limited to future criminal acts and not extended to reach ongoing criminal acts.

*Response:* The State Bar agreed that the illustration could be clarified and modified the illustration to convey the important point that the statutory exception applies in situations where the harm resulting from a criminal act may not be “imminent” while at the same time avoiding a confusing inference that the exception extends to past, completed criminal acts. The issue of ongoing criminal acts was discussed by the Task Force which determined to include the illustration.

- (2) *Comment:* The portions of proposed new rule 3-100 that seek to control or direct a lawyer with regard to the conduct of a non-client third party should be deleted. While it makes sense to impose a burden on a lawyer to predict the future conduct of a client and to interact with that client accordingly, it is inappropriate to impose a similar burden with regard to a non-client third party.

*Response:* No change was made in response to this comment. This issue was discussed by the Task Force. Proposed new rule 3-100 is not confined to client conduct because the statutory policy, itself, extends beyond client conduct and covers any criminal act, including acts threatened by non-client third parties. Accordingly, paragraph [7] of the discussion provides guidance to lawyers concerning situations where the actor is a non-client. The guidance provided grants an attorney great discretion on how to proceed. For example, although paragraph [7] of the discussion suggests that an attorney consider counseling a non-client against an anticipated criminal act, it also notes that an attorney’s interest in safety likely will preclude any contact with the non-client.

- (3) *Comment:* The concept of “informed consent” referenced in paragraph (A) of proposed new rule 3-100 should be defined.

*Response:* No change was been made in response to this comment. The issue of including the concept of “informed consent” was discussed by the Task Force. Proposed new rule 3-100 does not include a definition of “informed consent” because the concept arises from common law. Thus, there is guidance available to attorneys who seek to reveal confidential information based upon a client’s informed consent. Both case law and advisory ethics opinions<sup>8</sup> address the concept of a client’s informed decision to authorize an attorney’s disclosure confidential information (see, for example, *Maxwell v. Superior Court* (1982) 30 Cal.3d 606 [re criminal defendant’s consent to grant defense counsel media rights in the defendant’s life story, including the capital crime defended by counsel] and State Bar Formal Opinion No. 1989-115 [re ethical considerations involved when a lawyer seeks an advanced “blanket waiver” of confidential information]). The precise term “informed consent” already appears in the Rules of Professional Conduct (see rule 4-200(B) enumerating the “informed consent” of the client as a factor to consider in determining the existence of an unconscionable fee).

- (4) *Comment:* The text of proposed new rule 3-100 should state that members are not subject to discipline for revealing information pursuant to the exception in the rule and in §6068(e)(2).

*Response:* No change was made in response to this comment. This issue was discussed by the Task Force. Paragraph (E) was added to the rule to make clear that a lawyer who does not reveal information under the permissive exception does not violate the rule.

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<sup>8</sup> Rule 1-100(A) (Purpose and Function), in part, states: “Members [of the State Bar] are also bound by . . . opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct.”

Paragraph (E) thus reinforces the exception’s language, which states, “A lawyer may, but is *not required to*, reveal confidential information. . . .” (Emphasis added). When a lawyer chooses to reveal confidential information, however, issues arise that are very fact dependent, making it inappropriate to include an absolute ‘safe harbor’ statement in the rule. Instead, paragraph [4] of the discussion, which provides that a member who reveals information *as permitted* under rule 3-100 is not subject to discipline, addresses this issue in the context of the overall Discussion Section that covers more thoroughly relevant issues of concern that could, in fact, lead to discipline. Paragraph [4] of the discussion is preceded by three paragraphs that acknowledge the balancing of important competing policies, and is followed by several paragraphs that are intended to guide the lawyer on the factors to consider in deciding when and how to the make a disclosure, including steps the lawyer might pursue to prevent the criminal act without having to disclose the client’s confidential information.

- (5) *Comment:* Proposed new rule 3-100 should state the rule is not a basis for civil liability.

*Response:* No change was made in response to this comment. This issue was discussed by the Task Force. In considering this point, it was noted that rule 1-100(A) (re the purpose and function of the rules) states expressly that the rules: “are intended to regulate professional conduct of members of the State Bar through discipline. . . . ¶¶These rules are not intended to create new civil causes of action.” This global principle applies to the entirety of the Rules of Professional Conduct and would apply to proposed new rule 3-100 upon its approval by this Court. Going beyond this global principle to add the requested change would be tantamount to suggesting affirmative civil immunity which is a substantive law area beyond the scope of the Rules of Professional Conduct.

- (6) *Comment:* Paragraph [13] of the discussion should be deleted as unnecessary and potentially confusing.

*Response:* No change was made in response to this comment. The language found in paragraph [13] of the discussion is intended to assure that action by this Court to approve a confidentiality rule, like the proposed new rule 3-100, would not be misinterpreted as undermining existing common law limitations on the statutory duty of confidentiality. Examples include this Court's decision in *General Dynamics v. Sup. Ct. (Rose)* (1994) 7 Cal.4th 1164, 1190 [§6068(e) does not prohibit a former in-house counsel from bringing a wrongful termination action against their former client/employer].

At the Board's May 21-22, 2004 meetings, the Board received a presentation from State Bar staff and Professor Mohr on proposed new rule 3-100 and the public comments received, including the informal input of members of the Task Force. Following discussion, the Board unanimously adopted proposed new rule 3-100 for transmission to this Court with a recommendation that the proposed new rule be approved. The next portion of this memorandum provides a summary of proposed new rule 3-100 as adopted by the Board and recommended for approval by this Court.

### III

#### **SUMMARY OF PROPOSED NEW RULE 3-100**

##### **A. The Concept of Proposed New Rule 3-100**

Consistent with the legislative intent in section 3 of AB 1101, the concept of proposed new rule 3-100 is to facilitate an attorney's consideration and exercise of the AB 1101 permissive exception to confidentiality in a professionally responsible manner.<sup>9</sup> The proposed rule is intended to guide a lawyer in understanding how the confidentiality exception works within the framework of other existing duties to clients.

The proposed rule conveys the important balancing of competing public interests: preserving confidentiality to encourage client candor and ensure the effective administration of justice vs. disclosure of confidential information to prevent the harm threatened by a criminal act. Under the terms of the proposed rule, an attorney is granted wide discretion as to how best to achieve the goal of preventing criminal acts of death or substantial bodily harm. The proposed rule recognizes that a client's informed consent to disclose confidential information is an existing approach that is available to an attorney who is considering options for preventing a criminal act of death or substantial bodily harm.

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<sup>9</sup> This Court previously considered a proposed new rule 3-100 submitted by the State Bar in May of 1998. (As background, and for this Court's convenient reference, a copy of the May, 1998 "Request that the Supreme Court of California Approve Proposed Rule 3-100 of the Rules of Professional Conduct of the State Bar of California and Memorandum and Supporting Documents in Explanation" is provided as Attachment B.) In an order dated September 2, 1998, this Court denied the request to approve that proposed rule (S070520). The 1998 proposal differs materially from the current proposed new rule primarily because the statutory regulation of attorney-client confidentiality in 1998 only included an evidentiary exception to the attorney-client privilege with no corresponding exception to §6068(e). In contrast, as a result of AB 1101, operative July 1, 2004, both §6068(e) and the codified attorney-client privilege will include corresponding exceptions that are intended to be facilitated by the State Bar's present proposal for a new rule 3-100.

When client consent is not an option, the proposed rule stresses the role of an attorney as a counselor who must, when reasonable, attempt to persuade a client not to commit a criminal act. It is important to note an attorney's role as counselor is not limited to the circumstances that would permit disclosure under the statute and rule. Thus, the proposed rule also addresses an attorney's role in counseling a client to take action to prevent anticipated harm even where a criminal act may be completed and not capable of prevention.

A final important component in the concept of the proposed new rule is an educational function. The approach taken on the underlying duty of confidentiality in the proposed new rule informs attorneys that the duty of confidentiality resides in statute while at the same time giving lawyers ready access to the relevant statutory language in the rule Discussion section. This is significant because a different formulation of the rule could lead an unwary attorney into erroneously believing that California's duty of confidentiality, like those jurisdictions that follow the American Bar Association's Model Rules of Professional Conduct or Model Code of Professional Responsibility, is completely and exclusively addressed within the rules. To avoid this consequence, the format of proposed new rule 3-100 incorporates by reference the duty of confidentiality in §6068(e) and promotes an attorney's careful consultation of both the statute and the rule.

**B. Summary of Proposed New Rule 3-100 as Amended Following Public Comment**

Revisions to the public comment version of proposed new rule 3-100 were implemented in response to points made in the comments received and in response to informal input from the members of the Task Force who were afforded an opportunity to review the written comments and to contribute to the State Bar staff analysis. All of these revisions are summarized below.<sup>10</sup>

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<sup>10</sup> A general summary of proposed new rule 3-100, as issued for public comment, appears at pages 6 through 9 of this memorandum.

1. In paragraph [3] of the discussion, a new last sentence has been added clarifying that the policy underlying the statutory confidentiality exceptions permit disclosures to prevent a future or ongoing criminal act but that disclosure of a past, completed criminal act is prohibited. In addition, the second sentence of paragraph [3] of the discussion has been changed to track the exact language of the §6068(e)(2). In the public comment version, the language used in this sentence was a paraphrase.
2. The first sentence of paragraph [4] of the discussion also has been changed to track the exact language of §6068(e)(2) (i.e., the word “another” has been changed to “an individual.”)
3. The clause “based on all the facts and circumstances, such as those discussed in Discussion paragraph [6],” has been added to the last sentence of paragraph [5] of the discussion to emphasize that a member’s decision to reveal confidential information is subject to a fact-based consideration of the particular situation with which the member is confronted.
4. In paragraph [6] of the discussion, the criminal discharge of toxic waste illustration has been modified. The phrase “has discharged” has been changed to “is discharging or intends to discharge.” Also, in the phrase “present and substantial risk,” the words “present and” have been deleted. These changes clarify the illustration to convey the important point that the AB 1101 confidentiality exception applies in situations where the harm resulting from a criminal act may not be “imminent” while at the same time avoiding a confusing inference that the exception extends to past, completed criminal acts. The deletion of the description of the harm as posing a “present” risk is consistent with this clarification of the illustration. The illustration, as revised, continues to reflect the concept that future criminal acts, as a category, may be construed to include ongoing criminal acts.<sup>11</sup>

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<sup>11</sup> In jurisdictions that have a professional conduct rule on disclosure of confidential information “to prevent” a criminal act, at least one court has indicated that such language can be interpreted to cover an ongoing act. See *Prudential Ins. Co. of America v. Massaro* (D.N.J., 2000) 2000 WL 1176541.

5. The third sentence of paragraph [7] of the discussion has been changed to add the point that remonstrations may result in a client “expressing a genuine commitment not to proceed” with a threatened criminal act.
6. The fourth sentence of paragraph [7] of the discussion has been modified, including deletion of the word “necessary,” to avoid a possible misleading inference that permissive disclosure might be mandatory.
7. The fourth item enumerated in paragraph [9] of the discussion has been changed to use more direct and concise language.
8. The sixth and seventh items enumerated in paragraph [9] of the discussion have been modified to recognize the fact dependent nature of these particular factors to consider.

(The text of proposed new rule 3-100, in legislative style, showing the revisions made following public comment, is provided as Enclosure 7.)

**C. How Proposed New Rule 3-100 Responds to the Issues in Section 3 of AB 1101**

AB 1101 identified the following issues for consideration in developing an amendment to the Rules of Professional Conduct.

(1) Whether an attorney must inform a client or prospective client about the attorney’s discretion to reveal the client’s or prospective client’s confidential information to the extent the attorney reasonably believes that the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.

(2) Whether an attorney must attempt to dissuade the client from committing the perceived criminal conduct prior to revealing the client’s confidential information, and how those conflicts might be avoided or minimized.

(3) Whether conflict-of-interest issues between the attorney and client arise once the attorney elects to disclose the client's confidential information, and how those conflicts might be avoided or minimized.

Issue 1: Whether an attorney must inform the client of the attorney's discretion to reveal confidential information. Paragraph (C)(2) of proposed new rule 3-100 represents a policy decision to grant an attorney great flexibility in determining whether and when to inform a client or prospective client about the attorney's ability to reveal confidential information to prevent a criminal act of death or substantial bodily harm. Proposed new rule 3-100 rejects the argument that enactment of the AB 1101 confidentiality exception demands promulgation of a corresponding "Miranda-type" duty imposing an absolute obligation that all attorneys caution every client, at the outset of representation, that confidentiality does not extend to information that the attorney is permitted to reveal to prevent a criminal act of death or substantial bodily harm. Accordingly, paragraphs [9] and [10] of the discussion are intended to clarify that although proposed new rule 3-100 states that an attorney "shall" inform a client of the attorney's ability or decision to reveal confidential information, this requirement is imposed only if "reasonable under the circumstances."

Paragraph [9] of the discussion conveys two important points: (1) that in some situations informing a client should be regarded as unreasonable if such conduct would increase the risk of death or substantial bodily harm; and (2) where informing the client is reasonable, there are factors that an attorney may consider in determining an appropriate time, if any, to inform the client. Paragraph [10] of the discussion is intended to recognize a continuum of possible approaches to satisfying the requirement to inform a client while maintaining, as best as possible, the trust relationship between attorney and client.

Issue 2: Whether an attorney must attempt to dissuade the client from committing the criminal act before disclosure is permitted. Proposed new rule 3-100 includes a requirement, in subparagraph (C)(1), that an attorney must, if reasonable under the circumstances, make a

good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm. As in the above approach used to address the issue of informing a client, subparagraph (C)(1) does not create an absolute duty. Instead, paragraph [7] of the discussion notes the important role of an attorney as a counselor, and that “conflicts” between the attorney and client concerning disclosure of confidential information can be minimized by ending the threat through counseling. Further, with the added leverage conferred by permissive disclosure, efforts to dissuade a client against a threatened criminal act may find greater success. As indicated in paragraph [7] of the discussion, however, the requirement to counsel a client is not absolute due to concerns for personal safety that may arise.

*Issue 3: Conflicts of Interest.* Paragraphs [11] and [12] of the discussion informs attorneys that permitted disclosure of confidential information, when accomplished without the informed consent of the client, likely reflects a deterioration of the client-lawyer trust relationship rendering continued representation impossible. Paragraph [11] of the discussion directs attorneys to rule 3-700 (Termination of Employment) and paragraph (b) of rule 3-700 identifies the mandatory causes for withdrawal from employment, including subparagraph (B)(2) stating that an attorney shall “withdraw from employment if: . . .(2) The member knows or should know that continued employment will result in a violation of these rules or of the State Bar Act. . . .”

Notwithstanding the likelihood of a breakdown in the client-lawyer relationship, in circumstances where there is no such breakdown, the client’s informed consent may allow that representation to continue. For example, as indicated in paragraph [12] of the discussion, if the attorney is called as a witness in the client’s matter, then rule 5-210 (Member as Witness) would allow an attorney to act as both advocate and witness before a jury, provided the attorney has the informed written consent of the client. Paragraph [12] of the discussion also guides attorneys to consider their duty of loyalty and rule 3-110 (Failing to Act Competently). Depending upon the specific circumstances, both loyalty and competency may be implicated following disclosure

of confidential information and an attorney must be cognizant of these concerns when seeking to continue in the representation of the client.

Finally, regarding the issues posed in section 3 of AB 1101, it bears noting that Assemblymember Darrell Steinberg, the author of AB 1101, submitted a written comment stating, in part, that “[t]he rule thoroughly addresses all three issues identified by the legislature. . . . ¶¶Proposed new rule 3-100 provides an excellent road map for attorneys considering action under AB 1101.” (May 17, 2004 letter from Assemblymember Darrell Steinberg to Audrey Hollins, State Bar of California, at p. 2. See Enclosure 6.)

#### IV

#### **CONCLUSION**

The Board of Governors of the State Bar of California respectfully requests that this Court approve proposed new rule 3-100 of the Rules of Professional Conduct of the State Bar of California in the form set forth in Enclosure 1.

**ENCLOSURE 1:**

**Proposed New Rule 3-100 of the Rules of Professional Conduct  
of the State Bar of California**

### **Rule 3-100. Confidential Information of a Client**

- (A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.
- (B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.
- (C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:
  - (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and
  - (2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).
- (D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.
- (E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.

#### **Discussion:**

[1] *Duty of confidentiality.* Paragraph (A) relates to a member's obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a member: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A member's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (A) thus recognizes a fundamental principle in the client-lawyer relationship, that, in the absence of the client's informed consent, a member must not reveal information relating to the representation. (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

[2] *Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine and ethical standards of confidentiality.* The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.3d 614, 621 [120 Cal. Rptr. 253].) The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member's ethical duty of confidentiality is not so limited in its scope of protection for the client-lawyer relationship of trust and prevents a member from revealing the client's confidential information even when not confronted with such compulsion. Thus, a member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law.

[3] *Narrow exception to duty of confidentiality under this Rule.* Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited under Business & Professions Code section 6068(e), subdivision (1). Paragraph (B), which restates Business and Professions Code section 6068, subdivision (e)(2), identifies a narrow confidentiality exception, absent the client's informed consent, when a member reasonably believes that disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in the death of, or substantial bodily harm to an individual. Evidence Code section 956.5, which relates to the evidentiary attorney-client privilege, sets forth a similar express exception. Although a member is not permitted to reveal confidential information concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

[4] *Member not subject to discipline for revealing confidential information as permitted under this Rule.* Rule 3-100, which restates Business and Professions Code section 6068, subdivision (e)(2), reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a member reasonably believes is likely to result in death or substantial bodily harm to an individual. A member who reveals information as permitted under this rule is not subject to discipline.

[5] *No duty to reveal confidential information.* Neither Business and Professions Code section 6068, subdivision (e)(2) nor this rule imposes an affirmative obligation on a member to reveal information in order to prevent harm. (See rule 1-100(A).) A member may decide not to reveal confidential information. Whether a member chooses to reveal confidential information as permitted under this rule is a matter for the individual member to decide, based on all the facts and circumstances, such as those discussed in paragraph [6] of this discussion.

[6] *Deciding to reveal confidential information as permitted under paragraph (B).* Disclosure permitted under paragraph (B) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing information as permitted under paragraph (B), the member must, if reasonable under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose confidential information are the following:

- (1) the amount of time that the member has to make a decision about disclosure;
- (2) whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;
- (3) whether the member believes the member's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;
- (4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the member;
- (5) the extent of other adverse effects to the client that may result from disclosure contemplated by the member; and
- (6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A member may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure and a member may disclose the information without waiting until immediately before the harm is likely to occur. Thus, a member who knows that a client is discharging or intends to discharge toxic waste into a town's water supply in violation of the criminal law may reveal this information to the authorities if there is a substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the member's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] *Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm.* Subparagraph (C)(1) provides that before a member may reveal confidential information, the member must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, or if necessary, do both. The interests protected by such counseling is the client's interest in limiting disclosure of confidential information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the member's counseling or otherwise, takes corrective action – such as by ceasing the criminal act before harm is caused – or by expressing a genuine commitment not to proceed with a threatened criminal act, then the option for permissive disclosure by the member would cease as the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the member who contemplates making adverse disclosure of confidential information may reasonably conclude that the compelling interests of the member or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the member should, if reasonable under the circumstances, first advise the client of the member's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the member should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent the criminal act. Even when the member has concluded that paragraph (B) does not permit the member to reveal confidential information, the member nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.

[8] *Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act.* Under paragraph (D), disclosure of confidential information, when made, must be no more extensive than the member reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the confidential information to only those persons who the member reasonably believes can act to prevent the harm. Under some circumstances, a member may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable depends on the circumstances known to the member. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the member's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the member.

[9] *Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2).* A member is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 3-500; Business and Professions Code, section 6068, subdivision (m). Paragraph (C)(2), however, recognizes that under certain circumstances, informing a client of the member's ability or decision to reveal confidential information under paragraph (B) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the member or the member's family or associates. Therefore, paragraph (C)(2) requires a member to inform the client of the member's ability or decision to reveal confidential information as provided in paragraph (B) only if it is reasonable to do so under the circumstances. Paragraph (C)(2) further recognizes that the appropriate time for the member to inform the client may vary depending upon the circumstances. (See paragraph [10] of this discussion.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

- (1) whether the client is an experienced user of legal services;
- (2) the frequency of the member's contact with the client;
- (3) the nature and length of the professional relationship with the client;
- (4) whether the member and client have discussed the member's duty of confidentiality or any exceptions to that duty;
- (5) the likelihood that the client's matter will involve information within paragraph (B);
- (6) the member's belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and
- (7) the member's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

[10] *Avoiding a chilling effect on the lawyer-client relationship.* The foregoing flexible approach to the member's informing a client of his or her ability or decision to reveal confidential information recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Discussion paragraph [1].) To avoid that chilling effect, one member may choose to inform the client of the member's ability to reveal information as early as the outset of the representation, while another member may choose to inform a client only at a point when that client has imparted information that may fall under paragraph (B), or even choose not to inform a client until such time as the member attempts to counsel the client as contemplated in

Discussion paragraph [7]. In each situation, the member will have discharged properly the requirement under subparagraph (C)(2), and will not be subject to discipline.

[11] *Informing client that disclosure has been made; termination of the lawyer-client relationship.* When a member has revealed confidential information under paragraph (B), in all but extraordinary cases the relationship between member and client will have deteriorated so as to make the member's representation of the client impossible. Therefore, the member is required to seek to withdraw from the representation (see rule 3-700(B)), unless the member is able to obtain the client's informed consent to the member's continued representation. The member must inform the client of the fact of the member's disclosure unless the member has a compelling interest in not informing the client, such as to protect the member, the member's family or a third person from the risk of death or substantial bodily harm.

[12] *Other consequences of the member's disclosure.* Depending upon the circumstances of a member's disclosure of confidential information, there may be other important issues that a member must address. For example, if a member will be called as a witness in the client's matter, then rule 5-210 should be considered. Similarly, the member should consider his or her duties of loyalty and competency (rule 3-110).

[13] *Other exceptions to confidentiality under California law.* Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law.