

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]. [Sorted by Commenter]						TOTAL = <u>6</u> Agree = <u>2</u> Disagree = <u> </u> Modify = <u>4</u> NI = <u> </u>
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	Alex, Glenn C.	M	No		<p>Not all governmental agencies in California are subject to “whistleblower” statutes, and even where these statutes do apply to public agency employees generally, the State Bar has declined, so far, to sanction a whistleblower exception to attorney confidentiality requirements. In the public interest, the Rule should be augmented to allow public attorneys to reveal confidential information as a matter of conscience where the attorney concludes that there are no other reasonable, effective means of protecting the public interest.</p>	<p>The Commission does not recommend the adoption of a government lawyer “whistle blower” exception in the proposed Rules. Previous attempts to effectuate such an exception by the State Bar, in cooperation with the legislature, and by the Legislature, have failed. The rejection of this proposed exception by two separate branches of government, the Court and the Executive, indicates that the policies underlying lawyer-client privilege and confidentiality trump the policies favoring such an exception.</p> <p>First, an attempt by the State Bar to include such an exception was rejected by the Supreme Court, which stated: “The State Bar Board of Governors' request to adopt amendments to the Rules of Professional Conduct, rule 3-600, is denied because the proposed modifications conflict with B & P Code section 6068(e).” See Supreme Court Order re Request for Rule Change filed by the State Bar, Case No. S104682 (2/27/02), available at:</p> <p>http://appellatecases.courtinfo.ca.gov/search/case/ dockets.cfm?dist=0&doc_id=1836361&doc_no=S104682 [last visited 5/22/10]</p> <p>The Supreme Court’s statement indicates that such an exception cannot be accomplished without a</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

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						concomitant amendment of Bus. & Prof. Code § 6068(e) by the Legislature. Second, two subsequent attempts by the Legislature to amend section 6068(e) to provide for a government lawyer "whistle blower" exception resulted in vetoes by two different governors. See Veto Message of Gov. Gray Davis re AB 363 (9/30/02), ² available at: http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0351-0400/ab_363_vt_20020930.html [last visited 5/22/10] See also Veto Message of Gov. Arnold Schwarzenegger re AB 2713 (9/28/04), ³ available at:

² In his veto message, Gov. Davis stated:

I am returning Assembly Bill 363 without my signature.

While this bill is well intended, it chips away at the attorney-client relationship which is intended to foster candor between an attorney and client. It is critical that clients know they can disclose in confidence so they can receive appropriate advice from counsel.

The effective operation of our legal system depends on the fundamental duty of confidentiality owed by lawyers to their clients. For these reasons, I must return this bill without my signature.

³ In his veto message, Gov. Schwarzenegger stated:

I am returning Assembly Bill 2713 without my signature.

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						<p>http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_2701-2750/ab_2713_vt_20040928.html [last visited 5/22/10]</p> <p>Notwithstanding the foregoing, the Commission has provided some guidance in this area in proposed Rule 1.13, Comment [15], which provides:</p> <p>[15] Although this Rule does not authorize a governmental organization's lawyer to act as a whistle-blower in violation of Rule 1.6 or Business and Professions Code section 6068(e), a governmental organization has the option of establishing internal organizational rules and procedures that identify an official, agency, organization, or other person to serve as the designated recipient of whistle-blower reports from the organization's lawyers.</p>

This is a well-intended bill and I applaud the efforts to expose wrongdoing within government. However, this bill would condone violations of the attorney-client privilege, which is the cornerstone of our legal system. This bill will have a chilling effect on when government officials would have an attorney present when making decisions. It is an attorneys duty to advise the governmental officials when they are about to engage in illegal activity. This bill will ensure that advice is not conveyed in every situation and therefore it is too broad to affect the intended purposes.

Existing law already addresses the most egregious situations, which is the only time the attorney-client relationship should be breached. It is critical to evaluate the recent changes to the law as it relates to the attorney-client privilege prior to further eroding this important legal principle.

For the reasons stated I am unable to support this measure.

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2	COPRAC	A	Yes		COPRAC supports the adoption of Proposed Rule 1.6 and the Comments to the Rule.	No response required.
6	Office of Chief Trial Counsel ("OCTC")	M	Yes		<p>1. OCTC remains concerned that this proposed rule might create confusion and enforcement problems as Business & Professions Code section 6068(e) already addresses the issues raised in proposed rule 1.6. (We have already expressed in this letter our concern with the definition in rule 1.0 (e)(2).) If California is to have a rule to cover this issue, OCTC suggests that paragraph (a) use the same terms as Business & Professions Code section 6068(e)(1) to ensure that the rule is not interpreted to change the duty of an attorney to preserve the confidences and secrets of a client as provided in Business & Professions Code section 6068(e). For the same reason, OCTC believes that paragraph (a) should refer to all of Business & Professions Code section 6068(e) including (e)(2)'s statement when an attorney may reveal the information ordinarily protected under section (e)(1).</p> <p>2. OCTC is further concerned that subparagraph (b)(1) does not address what happens if any further changes are adopted to Business & Professions Code section 6068(e).</p>	<p>1. The Commission uses the language of 6068(e) by reference by using the defined term, "information protected by Business and Professions Code section 6068(e)." The Commission has deleted the reference to subdivision (1) of 6068(e).</p> <p>2. The Commission has not made any change. First, there is no guarantee that the Legislature would place exceptions to § 6068(e)(1) in § 6068(e) or even in § 6068. In the past, proposed exceptions have appeared in different-numbered sections of the State Bar Act. Second, the experience of AB 1101,</p>

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					<p>3. OCTC still agrees with the concerns of the Minority of the Commission that paragraph (b)(3) permits disclosure to establish a claim or defense on behalf of the lawyer without a court determination. We believe a court, not an attorney, should make this determination. This will also aid in the enforcement of violations of this paragraph.</p> <p>4. OCTC continues to disagree with the removal from subparagraph (b)(4) of the term "other law" and agrees with the Model Rules that this term should be included in this paragraph. OCTC does not believe that the term "other law" is too vague or imprecise. It simply provides that if there is other law preventing or permitting disclosure, it will be complied with. It should be followed in California's rule. In fact, other proposed rules use similar terms. (See e.g. proposed rule 1.11 (a) [Except as law may otherwise expressly permit].) There are statutes that require certain disclosures and the rules</p>	<p>which resulted in the exception for death and substantial bodily harm that is in current rule 3-100 indicates that the Legislature is unlikely to enact any exceptions that would become operative before the Supreme Court has had an opportunity to approve a parallel rule.</p> <p>3. Please see response to SDCBA, below. The provision is narrowly drafted and revisions to Comment [19] emphasize that a lawyer may reveal information only to the extent that it is necessary to establish a claim or defense. As the lawyer will be revealing such information only before a tribunal in which the lawyer-client controversy plays out, the necessary protections should be present.</p> <p>4. the Commission notes that including the "other law" exception would effectively permit disclosures under stricken MR 1.6(b)(2) and (3), at least for publicly-traded companies under the Sarbanes-Oxley Act.</p>

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					<p>should not encourage disobedience of those statutes.</p> <p>OCTC agrees that the term "court order" should be in this paragraph.</p> <p>5. As to paragraph (b)(5), OCTC refers to its discussion of proposed rule 1.14(b).</p> <p>6. OCTC has concerns about subparagraph (e). It appears subparagraph (e) is an attempt to carry forward the concept in Business & Professions Code section 6068(e)(2) that an attorney may but is not required to reveal some information. The problem is that proposed subparagraph (e) is too broad. It covers all of proposed subparagraph (b), but that would include that an attorney could not be disciplined for disobeying a law or court order to reveal the information. (See our discussion of paragraph (b)(4).) Although the Commission states this paragraph is just what current rule 3-100(E) states, proposed subparagraph (b)'s language is broader than current rule 3-100(B). Proposed subparagraph (e), unlike current rule 3-100, includes allowing an attorney to refuse to reveal confidences required by a court order, apparently even after all the appeals and writs have been completed. This paragraph needs</p>	<p>No response necessary.</p> <p>5. See response to Rule 1.14 comment.</p> <p>6. The Commission does not believe any change need be made to paragraph (e), which provides only that "[a] lawyer who does not reveal confidential information as permitted by paragraph (b) does not violate this Rule." If, after an appeal, an appellate court has determined that the lawyer must disclose what the lawyer has argued is protected under Rule 1.6, the court in effect is stating that the information is not protected under the Rule, and so the lawyer cannot rely on the rule to oppose disclosure. Regardless, refusal to disclose should not subject a lawyer to discipline under a Rule that only permits disclosure. Further, the lawyer otherwise would be subject to discipline under other provisions of the State Bar Act.</p>

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					<p>clarification and it should be a violation to disobey a court order or law.</p> <p>7. The Comments are more appropriate for treatises, law review articles, and ethics opinions. We are particularly concerned that the first sentence of Comment [1] implies that OCTC can only discipline under this rule and not under Business & Professions Code section 6068(e). If that is what is meant, OCTC strongly disagrees. It should also be noted that by creating a rule that covers the subject of section 6068(e) the Commission may be eliminating the good faith defense that might exist to a violation of section 6068(e). As already discussed, the good faith defense generally applies to the Business & Professions Code and not to the Rules of Professional Conduct.</p> <p>8. OCTC finds the first sentence of Comment 3 too narrow and may exclude information protected by section 6068(e). OCTC would strike that first sentence and only keep the second sentence.</p> <p>9. OCTC finds Comment 9 confusing. It states that the overriding value of life permits disclosure otherwise protected by Business & Professions Code section 6068(e)(1), but</p>	<p>7. As the Commission has noted with respect to other rules, the Comments to this Rule, many of which have simply been carried from current rule 3-100, provide important clarification of the Rule and guidance to lawyers in fulfilling this important duty. The Commission also wants to clarify that it did not “create” this Rule. The Rule carries forward rule 3-100, which is a creation of AB 1101 (2003-2004), and represents a cooperative undertaking among the three branches of government to provide guidance in this important area of attorney-client interaction. There should be no misunderstanding that it is the exclusive source of duties – or discipline – for lawyers.</p> <p>8. The Commission disagrees. The sentence is the classic definition of confidential information that has been used in California for decades.</p> <p>9. The Commission has not made any changes. The specific comment to which OCTC refers, Cmt. [9], is in the Discussion to current rule 3-100 (¶. 3). The drafting of rule 3-100 was a cooperative venture</p>

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					<p>Business & Professions Code section 6068 (e)(2) already provides for this. More importantly, OCTC does not think the rules should or can be adding Comments that are explaining a statute passed by the Legislature. OCTC recommends that this Comment be stricken.</p> <p>10. Comment [15] is overly narrow and seems to imply that the rule of limited disclosure applies only to prevent criminal conduct. If that is what is meant, OCTC strongly disagrees and believes that such an interpretation is contrary to established law. OCTC would strike the Comment or significantly modify it.</p> <p>11. Comment [19] could result in a claim that, in an investigation commenced under the State Bar's own authority and not the result of a client's complaint, the respondent does not have to provide certain information. It does not explain what it means by cooperation. What if OCTC subpoenas the client or the client consents?</p>	<p>among the Legislature, the Supreme Court, and the State Bar, as provided in AB 1101, which expressly provided for the appointment of a task force by the State Bar President in consultation with the Supreme Court "to make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act." In addition, the bill identified a number of issues that should be addressed in the rule, which are the subject of the Comments [9] to [18] of the proposed Rule.</p> <p>10. The Commission has not made the suggested change. Comment [15] concerns only subparagraph (b)(1), which itself is limited to preventing criminal conduct.</p> <p>11. The Commission notes that Comment [19] provides only that a lawyer may disclose information without the client's permission in order to defend himself or herself against the client's allegations. Neither paragraph (b)(3) nor Comment [19] is intended to provide OCTC with the ability to force a lawyer to breach his or her duty of confidentiality without the client's permission.</p>

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					proposed Rule 1.6(b)(3) with the provision of the ABA Model Rules, set forth in 1.6(b)(5).	SDCBA finds with the Commission's proposal.
1	Santos, Patrick T.	M	No		Commenter attached his 49-page Law Review Comment advocating for the adoption of an exception to Proposed Rule 1.6 in the case of wrongful incarceration, noting that currently Massachusetts is the only state which has a rule like it and the ABA is currently considering a counterpart.	The Commission recommends against the commenter's suggested adoption of an exception to confidentiality in proposed Rule 1.6 in situations involving wrongful incarceration. First, such an exception would undermine the policy underlying confidentiality of encouraging clients to be fully candid with a lawyer to enable lawyer to represent the client effectively. Second, as the commenter notes, only one state provides for such an exception, and the Model Rules have not been amended to include one. Finally, unlike the other exceptions the Commission has recommended in proposed Rule 1.6(b), an exception for wrongful incarceration is neither provided in Bus. & Prof. Code § 6068, nor well-settled in California decisional law.
5.	Zitrin, Richard (on behalf of law professors)	NI	Yes		The commenter notes that this rule is based on the statutory modification to Bus. & Prof. Code § 6068(e) of 2004 and that the Board of Governors should take care to ensure that the Commission has not overstepped the bounds created by the legislature in drafting the original exceptions to confidentiality.	Although the comment is directed to the Board of the Governors, the Commission notes that the exceptions to confidentiality in paragraph (b) are either expressly provided for in Bus. & Prof. Code § 6068(e) or are settled in California law. More important, the Commission believes that that the proposed rule not only is within the Commission's charge, but also it is ultimately within the purview of the Supreme Court to determine whether the rule should be adopted.

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Rule 1.6 Confidentiality of Information

(Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068(e)(1) unless the client gives informed consent or the disclosure is permitted by paragraph (b).
- (b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068(e)(1) to the extent that the lawyer reasonably believes the disclosure is necessary:
 - (1) to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, as provided in paragraph (c);
 - (2) to secure legal advice about the lawyer's compliance with the lawyer's professional obligations;
 - (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client relating to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship;
 - (4) to comply with a court order; or
 - (5) to protect the interests of a client under the limited circumstances identified in Rule 1.14(b).
- (c) *Further obligations under paragraph (b)(1).* Before revealing information protected by Business and Professions Code section 6068(e)(1) in order to prevent a criminal act as provided in paragraph (b)(1), a lawyer 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 lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068(e)(1) as provided in paragraph (b)(1).
- (d) In revealing information protected by Business and Professions Code section 6068(e)(1) as permitted by paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, secure confidential legal advice, establish a claim or defense in a controversy between the lawyer and a client, protect the interests of the client, or to comply with a court order given the information known to the lawyer at the time of the disclosure.
- (e) A lawyer who does not reveal information protected by Business and Professions Code section 6068(e)(1) as permitted by paragraph (b) does not violate this Rule.

Comment

- [1] This Rule governs the disclosure by a lawyer of information protected by Business and Professions Code section 6068(e)(1) during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a

prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and Rules 1.8.2 and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

Policies Furthered by the Duty of Confidentiality

- [2] Paragraph (a) relates to a lawyer's obligations under Business and Professions Code section 6068(e)(1), which provides it is a duty of a lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A lawyer'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 lawyer-client relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or detrimental subjects. 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 lawyer-client relationship, that, in the absence of the client's informed consent, a lawyer must not reveal information protected by Business and Professions Code section 6068(e)(1). (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

Information protected by Business and Professions Code section 6068(e)(1).

- [3] As used in this Rule, "information protected by Business and Professions Code section 6068(e)(1)" consists of information gained by virtue of the representation of a client, whatever its source, that (a) is protected by the lawyer-client privilege, (b) is likely to be embarrassing or detrimental to the client if disclosed, or (c) the client has requested be kept confidential. Therefore, the lawyer's duty of confidentiality as defined in Business and Professions Code section 6068(e) is broader than lawyer-client privilege. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal. Rptr. 253].)

Scope of the Lawyer-Client Privilege

- [4] The protection against compelled disclosure or compelled production that is afforded lawyer-client communications under the privilege is typically asserted in judicial and other proceedings in which a lawyer or client might be called as a witness or otherwise compelled to produce evidence. Because the lawyer-client privilege functions to limit the amount of evidence available to a tribunal, its protection is somewhat limited in scope.

Scope of the Duty of Confidentiality

- [5] A lawyer's duty of confidentiality, on the other hand, is not so limited as the lawyer-client privilege. The duty protects the relationship of trust between a lawyer and client by preventing the lawyer from revealing the client's protected information, regardless of its source and even when not confronted with compulsion. As a result, any information the lawyer has learned during the representation, even if not relevant to the matter for which the lawyer was retained, is protected under the duty so long as the lawyer acquires the information by virtue of being in

the lawyer-client relationship. Information protected by Business and Professions Code section 6068(e)(1) is not concerned only with information that a lawyer might learn after a lawyer-client relationship has been established. Information that a lawyer acquires about a client before the relationship is established, but which is relevant to the matter for which the lawyer is retained, is protected under the duty regardless of its source. The duty also applies to information a lawyer acquires during a lawyer-client consultation, whether from the client or the client's representative, even if a lawyer-client relationship does not result from the consultation. See Rule 1.18. Thus, a lawyer may not reveal information protected by Business and Professions Code section 6068(e)(1) except with the consent of the client or an authorized representative of the client, or as authorized by these Rules or the State Bar Act.

Relationship of Confidentiality to Lawyer Work Product

- [6] "Information protected by Business and Professions Code section 6068(e)(1)" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates. However, the fact that information can be discovered in a public record does not, by itself, render that information "generally known" and therefore outside the scope of this Rule. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)
- [7] Paragraph (a) prohibits a lawyer from revealing information protected by Business and Professions Code section 6068(e)(1). This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the client's representation is permissible so

long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

- [8] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information protected by Business and Professions Code section 6068(e)(1) that is related to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client as Permitted by Paragraph (b)(1)

- [9] Notwithstanding the important public policies promoted by the duty of confidentiality, the overriding value of life permits certain disclosures otherwise prohibited under Business and Professions Code section 6068(e)(1). Paragraph (b)(1) is based on Business and Professions Code section 6068(e)(2), which narrowly permits a lawyer to disclose information protected by Business and Professions Code section 6068(e)(1) even without client consent. Evidence Code section 956.5, which relates to the evidentiary lawyer-client privilege, sets forth a similar express exception. Although a lawyer is not permitted to reveal protected 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.

Lawyer Not Subject to Discipline for Revealing Protected Information as Permitted Under Paragraph (b)(1)

- [10] Rule 1.6(b)(1) reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a lawyer reasonably believes is likely to result in death or substantial bodily

harm to an individual. A lawyer who reveals protected information as permitted under paragraph (b)(1) is not subject to discipline.

No Duty to Reveal Information protected by Business and Professions Code section 6068(e)(1)

[11] Neither Business and Professions Code section 6068(e)(2) nor paragraph (b)(1) imposes an affirmative obligation on a lawyer to reveal information protected by Business and Professions Code section 6068(e)(1) in order to prevent harm. A lawyer may decide not to reveal such information. Whether a lawyer chooses to reveal protected information as permitted under this Rule is a matter for the individual lawyer to decide, based on all the facts and circumstances, such as those discussed in Comment [12] of this Rule.

Deciding to Reveal Protected Information as Permitted Under Paragraph (b)(1)

[12] Disclosure permitted under paragraph (b)(1) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing protected information as permitted under paragraph (b)(1), the lawyer 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 such information are the following:

- (1) the amount of time that the lawyer 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 lawyer believes the lawyer'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 lawyer;
- (5) the extent of other adverse effects to the client that may result from disclosure contemplated by the lawyer; and
- (6) the nature and extent of protected information that must be disclosed to prevent the criminal act or threatened harm.

A lawyer may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the protected information. However, the imminence of the harm is not a prerequisite to disclosure, and a lawyer may disclose the protected information without waiting until immediately before the harm is likely to occur.

Counseling Client or Third Person Not to Commit a Criminal Act Reasonably Likely to Result in Death of Substantial Bodily Harm

[13] Paragraph (c)(1) provides that, before a lawyer may reveal information protected by Business and Professions Code section 6068(e)(1), the lawyer 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, including persuading the client to take action to prevent a third person from committing or continuing a criminal act. If necessary, the client

may be persuaded to do both. The interests protected by such counseling are the client's interests in limiting disclosure of protected information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the lawyer's counseling or otherwise, takes corrective action – such as by ceasing the client's own criminal act or by dissuading a third person from committing or continuing a criminal act before harm is caused – the option for permissive disclosure by the lawyer would cease because 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 lawyer who contemplates making adverse disclosure of protected information may reasonably conclude that the compelling interests of the lawyer or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the lawyer should, if reasonable under the circumstances, first advise the client of the lawyer's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the lawyer 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 harm. Even when the lawyer has concluded that paragraph (b)(1) does not permit the lawyer to reveal protected information, the lawyer nevertheless is permitted to counsel the client as to why it might be in the client's best interest to consent to the lawyer's disclosure of that information.

Requirement under Paragraph (c)(2) to Inform Client of Lawyer's Ability or Decision to Reveal Protected Information

[14] A lawyer is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 1.4 and Business and Professions Code, section 6068(m). Paragraph (c)(2), however, recognizes that under certain circumstances, informing a client of the lawyer's ability or decision to

reveal protected information under paragraph (b)(1) 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 lawyer or the lawyer's family or associates. Therefore, paragraph (c)(2) requires a lawyer to inform the client of the lawyer's ability or decision to reveal protected information as provided in paragraph (b)(1) only if it is reasonable to do so under the circumstances. Paragraph (c)(2) further recognizes that the appropriate time for the lawyer to inform the client may vary depending upon the circumstances. See Comment [16]. 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 lawyer's contact with the client;
- (3) the nature and length of the professional relationship with the client;
- (4) whether the lawyer and client have discussed the lawyer's duty of confidentiality or any exceptions to that duty;
- (5) the likelihood that the client's matter will involve information within paragraph (b)(1);
- (6) the lawyer'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 lawyer's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

Disclosure of Protected Information as Permitted by Paragraph (b)(1) Must Be No More Than is Reasonably Necessary to Prevent the Criminal Act

[15] Paragraph (d) requires that disclosure of protected information as permitted by paragraph (b)(1), when made, must be no more extensive than the lawyer reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the protected information to only those persons who the lawyer reasonably believes can act to prevent the harm. Under some circumstances, a lawyer 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 lawyer. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the lawyer'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 lawyer.

Avoiding a Chilling Effect on the Lawyer-Client Relationship

[16] The foregoing flexible approach to a lawyer informing a client of his or her ability or decision to reveal protected information recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. See Comment [2]. To avoid that chilling effect, one lawyer may choose to inform the client of the lawyer's ability to reveal protected information as early as the outset of the representation, while another lawyer may choose to inform a client only at a point when that client has imparted information that comes within paragraph (b)(1), or even choose not to inform a client until the lawyer attempts to counsel the client under Comment [13]. In each situation, the lawyer will have satisfied the lawyer's obligation under paragraph (c)(2), and will not be subject to discipline.

Informing Client that Disclosure Has Been Made; Termination of the Lawyer-Client Relationship

[17] When a lawyer has revealed protected information under paragraph (b)(1), in all but extraordinary cases the relationship between lawyer and client that is based in mutual trust and confidence will have deteriorated so as to make the lawyer's representation of the client impossible. Therefore, when the relationship has deteriorated because of the lawyer's disclosure, the lawyer is required to seek to withdraw from the representation, see Rule 1.16, unless the client has given his or her informed consent to the lawyer's continued representation. The lawyer normally must inform the client of the fact of the lawyer's disclosure. If the lawyer has a compelling reason for not informing the client, such as to protect the lawyer, the lawyer's family or a third person from the risk of death or substantial bodily harm, the lawyer must withdraw from the representation. See Rule 1.16.

Other Consequences of the Lawyer's Disclosure

[18] Depending on the circumstances of a lawyer's disclosure of protected information as permitted by this Rule, there may be other important issues that a lawyer must address. For example, a lawyer who is likely to testify in a matter involving the client must comply with Rule 3.7. Similarly, the lawyer must also consider the lawyer's duty of competence (Rule 1.1) and whether the lawyer has a conflict of interest in continuing to represent the client (Rule 1.7).

Disclosure as Permitted by Paragraphs (b)(2) through (b)(5)

[19] If a legal claim by a client or the client's representative alleges a breach of duty by the lawyer involving representation of the client or a disciplinary charge filed by or with the cooperation of the client or the client's representative alleges misconduct of the lawyer involving

representation of the client, paragraph (b)(3) permits the lawyer to respond only to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving conduct or representation of a former client.

- [20] A lawyer entitled to a fee is permitted by paragraph (b)(3) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.
- [21] A lawyer may be ordered to reveal information protected by Business and Professions Code section 6068(e)(1) by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer must assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the lawyer-client privilege or other applicable law. See, e.g., *People v. Kor* (1954) 129 Cal. App. 2d 436 [277 P.2d 94]. In the event of an adverse ruling, the lawyer must consult with the client to the extent required by Rule 1.4 about the possibility of appeal. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order.
- [22] Paragraph (d) permits disclosure as permitted by paragraphs (b)(2) through (b)(5) only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that

limits access to the protected information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

- [23] Paragraph (b) permits but does not require the disclosure of information protected by Business and Professions Code section 6068(e)(1) to accomplish the purposes specified in paragraphs (b)(2) through (b)(5).

Acting Competently to Preserve Confidentiality

- [24] A lawyer must act competently to safeguard information protected by Business and Professions Code section 6068(e)(1) against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.
- [25] When transmitting a communication that includes information protected by Business and Professions Code section 6068(e)(1), the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[26] The duty of confidentiality continues after the lawyer-client relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.