

McCurdy, Lauren

From: Kevin Mohr [kemohr@charter.net]
Sent: Tuesday, May 25, 2010 8:08 AM
To: McCurdy, Lauren; Difuntorum, Randall
Cc: JoElla L. Julien; Ellen Peck; Ignazio J. Ruvolo; Mark Tuft; Lee, Mimi; Harry Sondheim; Kevin Mohr G
Subject: RRC - 1.6 [3-100] - 6/4/10 Meeting Materials
Attachments: RRC - 3-100 [1-6] - Public Comment Chart - By Commenter - XDFT2 (05-22-10)KEM.doc;
RRC - 3-100 [1-6] - Rule - DFT13 (05-24-10) - Cf. to DFT12.1 (02-28-10).doc

Greetings Lauren:

I've attached the following:

1. Public Comment Chart, XDraft 2 (5/22/10)KEM.
2. Rule, Draft 13 (5/24/10), redline, compared to PCD [#12.1] (2/28/10).

Please use the attached as the materials for the 6/4/10 meeting. The proposed responses to the public comment are self-explanatory (Nace & Ellen have signed off on them). I've annotated the rule draft to explain the changes there.

I have not made any revisions to the Dashboard, Introduction or Rule & Comment Chart pending the Commission's decisions at the 6/4/10 meeting. In addition, any changes are premature until the end of the public comment period on 6/15/10.

Please let me know if you have any questions. Thanks,

Kevin

Attached:

RRC - 3-100 [1-6] - Rule - DFT13 (05-24-10) - Cf. to DFT12.1 (02-28-10).doc
RRC - 3-100 [1-6] - Public Comment Chart - By Commenter - XDFT2 (05-22-10)KEM.doc

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**Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)].
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	Alex, Glenn C.	M	No		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>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: 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

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)].
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 Disagree = __
 Modify = __
 NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						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.

**Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)].
[Sorted by Commenter]**

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No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						<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.

**Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)].
[Sorted by Commenter]**

TOTAL = __ Agree = __
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NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	COPRAC	A	Yes		COPRAC supports the adoption of Proposed Rule 1.6 and the Comments to the Rule.	No response required.
3	San Diego County Bar Association ("SDCBA") Legal Ethics Committee	M	Yes	1.6(a) 1.6(b)(3)	<p>The Commission's proposal to define information protected from disclosure by Section 6068(e)(1) as "confidential information relating to the representation" could be read to weaken California's traditional protection of client confidences. The wording proposed by the minority is preferable and clearer:</p> <p>The information protected from disclosure by section 6068(e)(1) is referred to as "confidential information" in this Rule.</p> <p>This paragraph, although intended by the Commission to track Cal. Evid. Code Section 958, in fact goes far beyond the statutory exception. The exception set forth in 958 applies only when a court determines that the exception applies. By contrast, proposed Rule 1.6(b)(3) would allow each individual attorney to make that determination. This determination is better left to an impartial court. Nonetheless, in the interest of uniformity, our recommendation is to replace proposed Rule 1.6(b)(3) with the provision of the ABA Model Rules, set forth in 1.6(b)(5).</p>	<p>The Commission changed the defined term from "confidential information relating to the representation" to "information protected from disclosure by Business and Professions Code section 6068(e)" to assuage concerns that Rule 1.6 might be viewed as narrowing the protections afforded to client information under section 6068(e).</p> <p>The Commission did not make the suggested change. The Model Rule permits a lawyer to disclose confidential information not only in disputes with the client, but also in actions filed against the lawyer by third parties. The Commission does not understand how the Model Rule is narrower than proposed Rule 1.6(b)(3), which permits a lawyer to disclose confidential information only in controversies with the client. Further, the Model Rule does not provide for the intervention of "an impartial court," which appears to be the fault SDCBA finds with the Commission's proposal.</p>

**Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)].
[Sorted by Commenter]**

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No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
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.	At this stage of the Rules Revision process, the Commission recommends against the adoption of an exception to confidentiality in proposed Rule 1.6 in situations involving wrongful incarceration. As the commenter notes, only one state provides for such an exception, and the Model Rules have not been amended to include one. Moreover, 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 is it well-settled in California decisional law. Any such exception would require a counterpart exception in section 6068. This is a matter that is best left to be pursued at a future date in cooperation with the Legislature.

Rule 1.6 Confidentiality of Information

(Commission's Proposed Rule – Draft 13 (5/24/10) – COMPARED TO DFT12.1 (2/28/10))

- (a) A lawyer shall not reveal information protected ~~from disclosure~~¹ by Business and Professions Code section 6068(e)~~(1)~~² 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.

¹ [Drafters' Note: The defined term is "information protected by Business and Professions Code section 6068\(e\)," so we recommend deleted the phrase, "from disclosure," which adds nothing to the term.](#)

² [Drafters' Note: At present, the defined term for what information is protected provides: "information protected by Business and Professions Code section 6068\(e\)\(1\)." We recommend deleting "\(1\)" and simply refer to "section 6068\(e\)." That's the term we've defined in Rule 1.0.1\(e-2\) and we tend to refer generally to "6068\(e\)" in other rules \(e.g., Rule 3.3\).](#)

- (e) A lawyer who does not reveal information protected by Business and Professions Code section 6068(e)(4) 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)(4) 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)(4). (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)(4)" 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)(4) 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)(4) 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)(4)" 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)(4). 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)(4) 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)(4) 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)(4)

[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)(4) 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)(4), 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

RRC - 3-100 [1-6] - Rule - DFT13 (05-24-10) - Cf. to DFT12.1 (02-28-10).doc

[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)(4) 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)(4) 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)(4) 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)(~~4~~), 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.

Government Lawyers

[27] This Rule applies to lawyers representing governmental organizations. See Rule 1.13, cmt. [15].³

³ **Drafters' Note:** In light of public comment received that recommends including a government lawyer whistle blower exception, the Commission can consider adding this Comment, which cross-references Comment [15] to proposed Rule 1.13, which provides:

RRC - 3-100 [1-6] - Rule - DFT13 (05-24-10) - Cf. to DFT12.1 (02-28-10).doc

[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.

As you may recall, the Supreme Court has rejected an amendment to Rule 3-600 that would have provided for a government lawyer whistle blower exception, and two different governors (Davis & Schwarzenegger) have vetoed legislation to the same effect. See Public Comment Chart, response to comment submitted by Glenn C. Alex.

Drafters' Recommendation: Two members of the drafting team do not think this comment necessary but do not oppose its inclusion. One member of the drafting team favors it.

Rule 1.6 – Public Comment – File List

X-2010-410 Patrick Santos [1.6]	1
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DATE: April 6, 2010

Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re – public comment on new rules

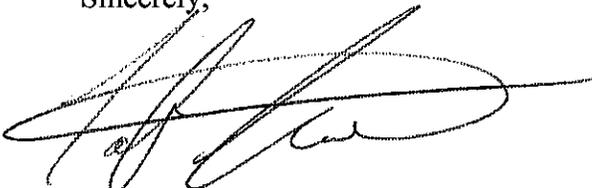
Dear Mr. Hollins:

The enclosed comment is in response to the new proposed amendments to the ethical standards for California Lawyers. I hope that you will find my work helpful in the matter and extremely comprehensive regarding Confidentiality, both on the state and the ABA level. (Bus. & Prof. Code § 6068(e) re rule 1.6.)

The comment advocates for the adoption of an exception in the case of wrongful incarceration - currently Massachusetts is the only state which has a rule like it. The ABA is currently considering a counterpart. The research in the comment might be useful for the public debate.

Please do not hesitate to contact me if you have an questions concerns or comments.

Sincerely,



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WHY THE ABA SHOULD PERMIT LAWYERS TO USE THEIR GET- OUT-OF-JAIL FREE CARD: A THEORETICAL AND EMPIRICAL ANALYSIS

*Patrick Santos**

INTRODUCTION

A recent study in Southern California questioned law students about the following attorney-client communication:

A, a stranger to you, has been convicted by a jury of his peers and sentenced to life imprisonment. B, also a stranger, comes into your law office and you agree to represent him on an unrelated matter. During the course of your representation, B tells you that he committed the crime for which A is currently serving his life sentence. After some probing questions on the matter you reasonably believe that B is telling the truth and he is the one who did the crime. B refuses to voluntarily disclose this information.¹

The current American Bar Association (ABA) standard under the Model Rules of Professional Conduct (Model Rules), Model Rule 1.6

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1. See *infra* app., question three.

specifically, requires that the hypothetical lawyer remain silent.² Although lawyers within the individual states are not bound by Rule 1.6, just one state permits a different response.³ Only 26% of the law students in this survey agreed with the position of the ABA.⁴ This Comment presents the results of the “lawyers-to-be” study, and uses them to advocate for the amendment of Model Rule 1.6, to include a narrow exception that could lead to the exoneration of “A.”

The benefits of the rules on attorney-client confidentiality oftentimes depend upon assumptions about human behavior—i.e. how will a client react if she knew of a new exception that allowed attorneys to divulge her secrets? Might the adoption of such an exception reduce candor? Will it turn lawyers into compliance officers? Will it change the fundamental relationship that secrecy has nurtured between lawyers and clients for centuries? These questions necessarily require more than theory to answer, they require data. Conclusory examinations are no longer sufficient. “Too often, the fundamental precepts of professionalism remain unexamined; arguments over candor, confidentiality and client loyalty proceed without rigorous empirical or philosophical foundation.”⁵ Too much professional responsibility scholarship is data-free doctrinal analysis: the functional equivalent of “geology without rocks.”⁶

2. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002) (providing in pertinent part: “A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime of fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used the lawyer’s services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client had used the lawyer’s services.”).

3. MASS. RULES OF PROF'L CONDUCT R. 1.6 (1998) (b)(1) (providing in pertinent part: “A lawyer may reveal . . . such information . . . to prevent the wrongful execution or incarceration of another.”).

4. See *infra* tbl. V.

5. Deborah L. Rhode, *Ethical Perspective on the Legal Practice*, 37 STAN. L. REV. 589, 589 (1985).

6. Deborah L. Rhode, *Law, Lawyers, and the Pursuit of Justice*, 70 FORDHAM L. REV. 1543, 1560 (2002) (citing PAUL WICE, JUDGES AND LAWYERS: THE HUMAN SIDE OF JUSTICE 16 (1991), citing Lawrence M. Friedman, quoted in JAMES WILLIAM HURST, THE GROWTH OF AMERICAN LAW 265–66 (1950)); see WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYER’S ETHICS 56 (1998) (recognizing confidentiality’s justifications depends upon assumptions about behavioral trends, of which are supported by only causal empiricism); see also Albert W. Alschuler, *The Preservation of a Client’s Confidences: One Among Many or a Categorical Imperative?*, 52 U. COLO. L. REV. 349 (1981) (recognizing the question of whether protecting client confidences has any affect on truth seeking is an unresolved empirical question); Roger C. Crampton & Lori P. Knowles, *Professional*

Although conjuring up hypotheticals in which confidentiality's exceptions fall short has become something of a law school parlor game, this admittedly exceptional scenario is based on many real life situations.⁷ The organized bar has recognized as much, as the ABA's Criminal Justice Section's Ethics, Gideon & Professionalism Committee is presently considering a draft proposal to amend Model Rule 1.6 that might allow disclosure of confidential information to prevent wrongful incarceration.⁸ The question the committee will face is deceptively simple: whether the benefits of confidentiality to B are outweighed by its costs to A. To answer this question, confidentiality's

Secrecy and Its Exceptions: Spaulding v. Zimmerman Revisited, 83 MINN. L. REV. 63, 115 (1998) (stating “[i]t must be conceded that there is little solid empirical evidence to support firm conclusions in either direction.”); Mary C. Daly, *To Betray Once? To Betray Twice?: Reflections on Confidentiality, a Guilty Client, an Innocent Condemned Man, and an Ethics-Seeking Defense Counsel*, 29 LOY. L.A. L. REV. 1611, 1625 (“Another and even more significant difficulty . . . is the paucity of empirical data demonstrating that a guarantee of confidentiality is an essential precondition to the ‘full and frank communication between attorneys and their clients [that is necessary to] promote broader public interest in the observance of law and administration of justice.’ However, only intuition supports the fundamental assertion upon which the attorney-client privilege and ethical obligation of confidentiality rest. Empirical data are virtually nonexistent.”); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 352–53 (1989) [hereinafter *Rethinking Confidentiality I*] (stating “[e]minent commentators thus have called for empirical research testing the benefits of strict confidentiality. The academic community has, however, uniformly ignored the call.”).

7. See *Frank v. Magnum*, 237 U.S. 309 (1915) (explaining that while Frank was serving his life sentence, and ultimately was lynched by fellow inmates, a client of attorney Arthur Powell revealed to Powell that he, not Frank, was responsible for the murder); see also *State v. Macumber*, 544 P.2d 1084 (Ariz. 1976) (describing how the Arizona Supreme Court affirmed the trial court, which asserted the attorney-client privilege after the death of the client); *Commonwealth v. Sullivan*, 239 N.E.2d 5 (Mass. 1968), *cert. denied*, 393 U.S. 1056 (U.S. Jan. 20, 1969); *State v. Hunt*, 659 S.E.2d 6 (N.C. 2008) (detailing how two men, Hunt and Cashwell, were convicted of a murder only to have Cashwell subsequently confess to his public defender of being the sole perpetrator, which the attorney did not reveal until after Cashwell's death); Editorial, *Imprisoned in the '66 Killing, He Goes Free in Boston*, N.Y. TIMES, Aug. 31, 1982, at A10, available at 1982 WLNR 290599 (detailing how Mr. Reissfelder spent years incarcerated at Walpole State Prison for a crime he did not commit); 60 Minutes: 26-Year Secret Kept Innocent Man in Prison (CBS television broadcast Mar. 9, 2008), available at <http://www.cbsnews.com/stories/2008/03/06/60minutes/main3914719.shtml> (showing that Andrew Wilson confessed to his public defenders that he committed a shotgun murder which Alton Logan served 26 years of a life sentence for before the public defenders released an affidavit, which they kept in a lock box for a quarter century).

8. See Peter A. Joy & Kevin C. McMunigal, *Confidentiality and Wrongful Incarceration*, 23 CRIM. JUST. 46 (2008) (describing that co-chairs Bruce Green and Ellen Yaroshevsky have drafted the following exception: “(c) A lawyer may reveal information relating to the representation of a deceased client to the extent the lawyer reasonably believes necessary to prevent or rectify the wrongful conviction of another.”).

foundations must be examined, both theoretically and empirically.⁹ This Comment will provide assistance on both fronts.

Part I briefly but thoroughly explores attorney-client confidentiality's theoretical justifications and its critiques. Part II discusses the ABA's relevant third-party harm exceptions to confidentiality and their justifications. Part II provides insight into how and why exceptions to confidentiality are adopted and which costs have outweighed confidentiality's benefits in the past. Part III presents the results of primary research based on the hypothetical in the introduction above, distributed in the form of a survey to 260 law students in an effort to add to the ongoing debate. Part IV then presents the proposed amendment to Model Rule 1.6 and a supporting argument that explores the fundamental policy implications behind the adoption of such an exception. Part IV asserts that the justifications supporting strict confidentiality do not apply to this hypothetical, and even if they did, a new narrow exception, which might exonerate A, would do much less harm to attorney-client confidentiality than the current exceptions have already done—especially considering the scenario's high level of improbability. In the interests of justice, secrecy can do more harm than good. The conclusion points out that only one step remains to bring the rules of attorney-client confidentiality up to date with the modern realities of an imperfect justice system—a new exception that could exonerate an innocent convict.

I. CONFIDENTIALITY'S JUSTIFICATIONS AND FOUNDATIONS

The attorney's duty of confidentiality was incorporated into lawyer codes as an obligation beginning 100 years ago.¹⁰ The duty to maintain the confidence and to preserve the secrets of the fruits of representation is, arguably, the most important feature of the attorney-client relationship.¹¹ The ABA contends that confidentiality contributes to the trust that is the hallmark of the attorney-client relationship and induces and promotes assistance of legal counsel in a full and frank

9. *Rethinking Confidentiality I*, *supra* note 6, at 355.

10. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 287 (1953) (providing that a lawyer has an "obligation to represent the client with undivided fidelity and not divulge his secrets or confidences . . ."); *but see* L. Ray PATTERSON, *LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY* (Mathew Bender 1984) (noting that confidentiality, as an ethical duty, made its first appearance as such in the 1887 Alabama Code of Ethics).

11. David Rosenthal, *The Criminal Defense Attorney, Ethics and Maintaining Client Confidentiality: A Proposal to Amend Rule 1.6 of the Model Rules of Professional Conduct*, 6 ST. THOMAS L. REV. 153, 159 (1993).

environment.¹² Confidentiality's justifications have been shaped and molded *ad nauseam* over the past several decades.¹³

The following sub-sections will discuss and review these justifications, which are at the heart of attorney-client confidentiality rules, because the first step in assessing whether strict rules err in rejecting exceptions that allow disclosure is to analyze the strength of the rules' justifications.¹⁴ Most of confidentiality's justifications are abstract,¹⁵ and oftentimes lines of demarcation can blur. This section

12. See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2002).

13. Crampton & Knowles, *supra* note 6, at 123–24 (suggesting a complete substitute for Model Rule 1.6, including an exception for wrongful incarceration); Daly, *supra* note 6; Amanda Vance & Randi Wallach, *Updating Confidentiality: An Overview of the Recent Changes to Model Rule 1.6*, 17 GEO. J. LEGAL ETHICS 1003 (2004) (describing a step-by-step overview of the Model Rule changes in August 2003 and examination of the benefits and drawbacks of confidentiality); Krysten Hicks, *Thresholds for Confidentiality: The Need for Articulate Guidance in Determining When to Breach Confidentiality to Prevent Third-Party Harm*, 17 TRANSNAT'L LAW 295 (2004) (arguing that a rule which explicitly denotes factors that a lawyer might consider before breaching confidentiality will serve to remove ambiguity); Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyers Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81 (1994) (showing another empirical study, which inspired this study, in which Professor Levin surveyed 776 lawyers in New Jersey); Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberations as Ethical Obligation*, 37 IND. L. REV. 21, 36 (2003) (positing a Deliberative Model of ethical decision making, imposing on lawyers an obligation to exercise their discretion through ethical decisions that are the product of articulable and justifiable ethical deliberation); Samuel J. Levine, *Taking Ethical Obligations Seriously: A Look at American Codes of Professional Responsibility Through a Perspective of Jewish Law and Ethics*, 57 CATH. U. L. REV. 165 (2007) (arguing, in part, that formulating and interpreting various ethics provisions to impose a greater degree of mandatory ethical conduct, comparable to Jewish law, might demonstrate a resolve among lawyers to take their ethical obligations more serious); David McGowan, *Why Not Try the Carrot? A Modest Proposal to Grant Immunity to Lawyers Who Disclose Client Financial Misconduct*, 92 CAL. L. REV. 1825 (2004) (using a cost-benefit analysis to argue that the recent amendments to Rule 1.6 will do little to change the actual practice of lawyers in disclosing client misconduct); *Rethinking Confidentiality I*, *supra* note 6 (describing an empirical study, which inspired this study, concerning Professor Zacharias surveying 108 Laypersons and 125 Lawyers in an effort to question and rethink attorney-client confidentiality and its justifications); Rhode, *supra* note 6, at 613; SIMON, *supra* note 6 (pointing out that such justifications are easy to produce and depend on social contingencies regarding behavior which are pointless to try and refute because "as soon as I had shown one to be false, a horde of new ones would show up like ants at a picnic."); Gilda M. Tuoni, *Society Versus the Lawyers: The Strange Hierarchy of Protections of the "New" Client Confidentiality*, 8 ST. JOHN'S J. LEGAL COMMENT. 439, 470–92 (1993) (using hypotheticals to argue for a more ethical outcome under the Model Rules which would require lawyers to disclose in life or death situations and would also require use immunity); Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601, 635 (1990) [hereinafter *Rethinking Confidentiality II*] (analyzing whether attorneys have a constitutional right to disclose confidential information).

14. *Rethinking Confidentiality I*, *supra* note 6, at 363.

15. *Rethinking Confidentiality II*, *supra* note 13, at 637.

seeks to remedy this flaw by clearly denoting the justifications and separating them as a means to avoid the jumbling of justifications.

A. Client Candor

Confidentiality's primary systemic justification is simple: strict confidentiality promotes client candor.¹⁶ Stated differently, if the duty has been eroded, clients will have an incentive to hide information from their attorneys.¹⁷ Anything short of strict attorney-client confidentiality would have a chilling effect on client communications.¹⁸ This would result in lawyers giving less effective advice, thereby affecting the adversarial system and overall truth-seeking.¹⁹ Thus, the protection of confidentiality serves the public interest by encouraging client disclosure, which enables lawyers to better advise and assist their clients.²⁰ Lacking full disclosure, the lawyer might apply the wrong law or give incorrect legal advice or both, which in turn will reduce public confidence in the legal system and in lawyers.²¹

As early as 1888, the United States Supreme Court explained:

The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.²²

Prior to 2004 when the California Supreme Court approved a new confidentiality rule, Rule 3-100,²³ California's duty of confidentiality

16. See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 129 (LexisNexis/Matthew Bender 3d ed. 2004) (1990).

17. See MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 87-108 (Matthew Bender 1990).

18. Cal. Rules of Prof'l Conduct R. 3-100 cmt. 10 (2009).

19. SIMON, *supra* note 6, at 54.

20. *In re Jordan*, 500 P.2d 873, 879-80 (Cal. 1972) (describing the duty to preserve confidentiality as being of "paramount" importance).

21. See DEBORAH L. RHODE & GEOFFREY C. HAZARD, JR., PROFESSIONAL RESPONSIBILITY AND REGULATION 64 (Foundation Press 2002).

22. *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

23. Cal. Rules of Prof'l Conduct R. 3-100 (2009) (providing in the pertinent part: "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 that disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in

perhaps best exemplified this systemic justification, as the state had the strictest duty of confidentiality in the country, with no express exceptions.

Opponents have attacked this justification on several fronts. Professor Fred C. Zacharias has pointed out that this systematic syllogism requires two premises to be met, without which, the justification falls apart.²⁴ The argument presupposes that (1) the client is aware of the rule, and (2) the client understands the rule.²⁵ Given the many aspects of confidentiality, the argument goes, clients are unlikely to ever meet these requirements.²⁶ Indeed, the instant study supports as much: only 60% of the sample understood the ABA's current rule.²⁷ Therefore, critics argue that creating limited additional disclosure exceptions are unlikely to affect a client's decision to confide.²⁸

More recently, others have pointed out that although this justification has been repeatedly asserted, it is an "empty" argument used as a front for the real reason strict confidentiality is promoted: to raise the demand for lawyers.²⁹ It is argued that the historical origins of the privilege are related to nothing more than the need to create incentives for clients to hire lawyers.³⁰

B. Client Autonomy and Privacy

The arguments for autonomy and privacy are fairly straightforward, but mainly philosophical in substance. There is a distinguished tradition in Western philosophy enshrining autonomy as a fundamental right of all human beings.³¹ Promoting autonomy and protecting privacies enhances the attorney-client relationship itself: it often makes the client *feel* as if the lawyer is a true fiduciary, with

death of, or substantial bodily harm to, an individual."); see Kevin E. Mohr, *California's Duty of Confidentiality: Is It Time for a Life-Threatening Criminal Act Exception?*, 39 SAN DIEGO L. REV. 307, 309 (2002) (pointing out that the California duty requires every lawyer "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.").

24. See Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 1 (1998); see also *Rethinking Confidentiality I*, *supra* note 6, at 365–66.

25. See *Rethinking Confidentiality I*, *supra* note 6, at 365–66.

26. *Id.* at 365 ("As a practical matter clients thus probably end up with only a general understanding that attorney-client conversations usually remain confidential but occasionally may be revealed.").

27. See *infra* tbl. I.

28. See *Rethinking Confidentiality I*, *supra* note 6, at 366.

29. Fischel, *supra* note 24, at 1.

30. *Id.* at 2.

31. Daly, *supra* note 6, at 1623.

loyalty to no one other than the client.³² This enhances the client's comfort level and serves to buttress the client's feeling that the lawyer will never take the stand against him. Without the assurance of confidentiality, a client will not jeopardize the privacy of intimate details, which will ultimately corrupt the client's autonomy because the lawyer's advice will be hobbled.³³

Under this view, autonomy (client-centered decision making) is enhanced along with the client's dignity.³⁴ Protecting the client's confidential information respects the autonomy and personal integrity of the client, recognizing that the client retains the right to make ultimate decisions regarding the outcome of the engagement.³⁵ This deontological view holds that confidentiality promotes respect for client autonomy by guaranteeing trust and privacy in the attorney-client relationship.³⁶ By promoting a sphere of privacy, confidentiality advances the individual's right to personal space required to plan and define his own meaning of life, free from government intervention in the form of the legal system that may seek to invade it.³⁷ Thus, confidentiality serves to foster the lawyer's central obligation to "enhance . . . the client's autonomy as a free citizen in a free society."³⁸

This justification is not without its critics.³⁹ Those against strict confidentiality argue that client distrust may actually increase if the lawyer insists that she will always act in accordance with the client's wishes.⁴⁰ Further, clients are not always "free citizens," but are also many times profit-driven corporations whose costs of confidentiality are borne by individuals whose health, safety and autonomy are not adequately represented.⁴¹

32. *Rethinking Confidentiality I*, *supra* note 6, at 367.

33. Daly, *supra* note 6, at 1624.

34. *Rethinking Confidentiality II*, *supra* note 13, at 635.

35. *Blanton v. Womancare, Inc.*, 696 P.2d 645, 648-51 (Cal. 1985); see MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1983) (amended 2002) (stating "[a] lawyer shall abide by a client's decisions concerning the objectives of representation . . ."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21 cmt. e (2000) (discussing the allocation of authority).

36. SUSAN R. MARTYN & LAWRENCE J. FOX, *TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW AND PROFESSIONAL RESPONSIBILITY* 122 (Aspen Publishers 1st ed. 2004).

37. *Id.* at 123.

38. Monroe H. Freedman, *How Lawyers Act in the Interests of Justice*, 70 *FORDHAM L. REV.* 1717, 1727 (2002).

39. MARTYN & FOX, *supra* note 36, at 123.

40. *Id.* (citing JONATHAN D. CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE* (Prentice Hall 1972) (explaining that since criminal defendants perceive public defenders to be on the side of the state, counterintuitive claims by attorneys that they will never act against the client can only serve to put them on guard even further)).

41. Rhode, *supra* note 5, at 1546.

C. Preventing Client Misconduct

Perhaps the most persuasive justification provided for confidentiality⁴² is that confidentiality allows lawyers to obtain information that enables them to advise clients against committing improper acts or filing frivolous claims.⁴³ By refusing to disclose to outsiders, the lawyer may give up some deterrent leverage in the short run, but she remains free to dissuade the client from illegal conduct in the long run.⁴⁴ This justification is built into the new exception to confidentiality in California, as well as the ABA's rule.⁴⁵ Thus, confidentiality remains an essential incentive for clients to disclose their plans to lawyers, who then are in the best position to dissuade clients from engaging in the illegal activity.⁴⁶

Although dealing with the attorney-client privilege, the rationale in the landmark case of *Upjohn v. United States* lends a relevant understanding.⁴⁷ The Court in *Upjohn* found that the attorney-client privilege "promote[s] broader public interests in the observance of law and administration of justice."⁴⁸ The Court asserted that, "[i]n light of the vast and complicated array of regulatory legislation confronted by modern corporations, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law."⁴⁹

Furthermore, proper legal advice, given under the assurances that confidentiality guarantees, can prevent massive personal and social

42. See Levin, *supra* note 13, at 111–12, 115–16 (noting that the author bases his belief on a significant empirical study done by Professor Leslie Levin in New Jersey in which 67 out of 776 lawyers surveyed stated that they had encountered at least one occasion where they reasonably believed a client was going to commit harm to a third party. The lawyers would often respond strongly to the client's statements in order to deter the client from making serious plans to commit these acts); see also *Rethinking Confidentiality I*, *supra* note 6, at 381 (describing a study which found that over three-quarters of lawyers in the sample claimed to have at some point in their careers used the fruits of confidentiality to dissuade their clients from engaging in improper conduct).

43. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2002).

44. SIMON, *supra* note 6, at 55.

45. Cal. Rules of Prof'l Conduct R. 3-100(c) (2009) (requiring that "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)"); see MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 12 (2002) (explaining that "[w]here practical, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure").

46. See RHODE & HAZARD, JR., *supra* note 21, at 177.

47. *Upjohn v. United States*, 449 U.S. 383 (1981).

48. *Id.* at 389.

49. *Id.* at 392.

costs of criminal and fraudulent activity.⁵⁰ Information solicited from a client based on her faith in secrecy may prevent injury to the economic system itself: fraudulent practices can undercut competition, raise the price of goods, and cause a loss of confidence in the market system, thereby creating barriers to entry.⁵¹ Thus, confidentiality may actually serve to protect consumers in the free market economy itself.

Not everyone accepts this rationale. Critics argue that allowing clients to discuss planned misconduct with no fear of consequence might actually help the client commit wrongdoing.⁵² If the client discovers that the penalty for the illegal conduct is less than what she thought it would be, and in some cases much less, the lawyer's attempted dissuasion might have the opposite tendency of promoting client misconduct.⁵³ This might be especially apt in the cases of complex regulatory requirements. When a client is unclear as to whether a certain activity might be sanctionable, a client who had decided to avoid the activity (under a better-safe-than-sorry rationale) might reverse this decision after having been given confidential advice pertaining to either the likelihood of detection or the probability of being sanctioned.⁵⁴ This client, after receiving more accurate information, may conclude the expected gains from engaging in the activity outweigh its costs.⁵⁵

Critics also argue correlation is not causation.⁵⁶ How can we be sure it is strict confidentiality that provokes client candor about such intentions?⁵⁷ The available studies suggest that strict confidentiality rules serve this rational only marginally.⁵⁸ Furthermore, some have pointed out, to the extent an exception to confidentiality might force a lawyer to think about moral issues or enhance a client's respect for his attorneys (i.e. fear of possible disclosure), it is the exception rather than

50. RHODE & HAZARD, JR., *supra* note 21, at 196.

51. *Id.*

52. *Rethinking Confidentiality I*, *supra* note 6, at 370.

53. SIMON, *supra* note 6, at 60.

54. Fischel, *supra* note 24, at 30; see *Rethinking Confidentiality I*, *supra* note 6, at 375 (noting that "[t]he attorney will be happy to describe options, in secret, for getting around government regulations or contractual obligations – to the point of evaluating which of the options are illegal, which are not, and which are shady but unlikely to be punished.").

55. Fischel, *supra* note 24, at 30.

56. *Rethinking Confidentiality I*, *supra* note 6, at 369.

57. *Id.*

58. *Rethinking Confidentiality II*, *supra* note 13, at 640.

the basic rule that may produce the lawyer's ability to dissuade the client from misconduct.⁵⁹

D. Facilitating Effective Representation

Another argument for strict confidentiality concerns past conduct. Here, the argument is that a client who is not legally sophisticated may fail to disclose information that is highly relevant to a present cause of action because the client misunderstands her interests or rights.⁶⁰ If the lawyer cannot gather all the necessary information, free from the threat that these confidential communications will be shared with those whose interests may be adverse to the client, the lawyer's ability to serve her client will be hindered.⁶¹ Although at first glance this may seem duplicative of confidentiality's systemic justification (confidentiality promotes candor), this justification addresses the genuinely confused client who needs advice and representation but misunderstands the nature of the attorney-client relationship. By providing confidential guarantees, a lawyer may best serve both the client's instant legal needs and the public interests of conformity to law and sound administration of justice.⁶² Thus, confidentiality may facilitate effective legal representation.

Critics respond that any injustice that may result from a client withholding relevant information is an appropriate price for her dishonesty.⁶³ The law should not be written for liars and perjurers.⁶⁴ Furthermore, the argument assumes an unlikely scenario: a client who does not know enough to discern what information might help her cause, yet knows enough to understand the confidentiality rules that define what she can tell her lawyer.⁶⁵

59. Robert Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1032-34 (1981).

60. SIMON, *supra* note 6.

61. RHODE & HAZARD, JR., *supra* note 21, at 147 (citing ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992)).

62. Crampton & Knowles, *supra* note 6, at 102.

63. *Id.*

64. *Rethinking Confidentiality I*, *supra* note 6, at 366 (citing Edmund M. Morgan, Foreword to MODEL CODE OF EVIDENCE 27 (1942)).

65. Morgan, *supra* note 64, at 61.

E. Preventing Negative Externalities and Promoting Positive Externalities

Externalities are forms of market failure, and thus are an oft-stated justification for government intervention in the market system.⁶⁶ Since much of economic analysis begins with the assumption that decision makers bear all the costs and receive all the benefits of their actions, the picture becomes askew when some of the costs of production spill over and injure third parties that are not part of the process—negative externalities.⁶⁷ Similarly, in many instances, some of the benefits of creating or consuming a product may spill over and benefit third parties—positive externalities.⁶⁸ These secondary and unforeseen third party effects are called externalities.⁶⁹

Conduct regulation of lawyers, which includes the rules on confidentiality, has also been justified as a means to prevent externalities that might spill over onto third parties as a result of substandard practitioners.⁷⁰ Negative externalities might be grouped into three general categories: harm to adversaries, harm to the court system, and harm to the public at large.⁷¹ As noted above, confidentiality guarantees can conceivably prevent severe market mishaps by encouraging a client not to engage in fraudulent activities that might severely affect the market and damage social ties, many of which depend upon trust.⁷² Thus, confidentiality can prevent this public harm.

Conduct regulating devices, such as Model Rule 1.6, can also promote positive externalities. The total cost to society in terms of resources consumed is the sum of the private costs paid by the producer and the external costs that must be borne by third parties.⁷³ This cost can be minimized by regulatory devices such as Model Rule 1.6. For example, confidentiality can prevent unnecessary bargaining costs between the parties themselves, and can save precious time on matters not directly connected with the provision of justice.⁷⁴ Society's faith in

66. HENRY N. BUTLER & CHRISTOPHER R. DRAHOZAL, *ECONOMIC ANALYSIS FOR LAWYERS* 175 (Carolina Academic Press 2006).

67. *Id.*

68. *Id.*

69. *Id.*

70. Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429 (2001).

71. *Id.* at 470.

72. RHODE & HAZARD, JR., *supra* note 21, at 196.

73. BUTLER & DRAHOZAL, *supra* note 66.

74. *Id.* at 450.

the justice system might also ascend if lawyers were perceived as upstanding citizens who have the best interests of the public in mind, instead of the interests of the guild and other smaller groups.⁷⁵ Arguably, consumers in society are better protected in the legal system as a result of such regulatory devices, insofar as across the board confidentiality rules protect those unsophisticated clients who might not otherwise think to bargain for such consideration.⁷⁶ Clearly stated and fairly applied rules, including rules on confidentiality, promote an evenly distributive outcome when members of society enter the legal system, which in turn allows individuals to adjust their behavior to the law and better predict the outcome of their actions.⁷⁷ This translates into a positive externality, which supports the bases of modern liberal democracy: fostering maximum personal freedom and protecting individual rights. Therefore, by protecting consumers and effecting greater faith in the legal system and lawyers in general, confidentiality rules can have positive secondary effects.

II. RELEVANT THIRD PARTY HARM EXCEPTIONS

Rules regarding strict confidentiality have undergone several changes in recent years.⁷⁸ Those changes relevant to this analysis (third party harm prevention) will be explored in this section. The ABA's vision of the role the lawyer should play in this new millennium has been revolutionized with respect to secrecy and keeping client confidences.⁷⁹ The dawn of evolving corporate scandal and national security concerns has ushered in new guidelines for lawyers to follow, and the ABA is leading the way.

75. *Id.* at 469–470 (citing HARPER LEE, *TO KILL A MOCKINGBIRD* (HarperCollins Publishers 1988) (1961)).

76. *See Rethinking Confidentiality I*, *supra* note 6, at 361 n. 45 (arguing that in the absence of rules, sophisticated clients might negotiate for confidentiality while less educated clients would then be protected by across the board confidentiality rules).

77. Barton, *supra* note 70, at 479 (citing JOHN RAWLS, *A THEORY OF JUSTICE*, 239–40 (Belknap Press of Harvard Univ. Press 1971), stating that “[t]he principle of legality has a firm foundation, then, in the agreement of rational persons to establish for themselves the greatest equal liberty”).

78. *Id.* at 430.

79. *THE ATTORNEY–CLIENT PRIVILEGE IN CIVIL LITIGATION: PROTECTING AND DEFENDING CONFIDENTIALITY* 114 (Vincent S. Walkowiak ed., American Bar Association 4th ed. 2008).

A. Model Rule 1.6(b)(1): Preventing Physical Injury

The physical harm exception has broadened significantly since it was first recognized by the ABA in 1983.⁸⁰ Model Rule 1.6 provides that a lawyer may reveal information relating to the representation of the client if she reasonably believes it necessary to prevent reasonably certain death or substantial bodily harm.⁸¹ This exception does not require an element of client criminality as the original Model Rule 1.6(b)(1) required.⁸² The effect of this change is that a lawyer may breach confidentiality in order to prevent bodily harm, even for rectifying past harms, even if the harm is general to the public, and even if the harm is not statutorily criminal. Also, the exception no longer requires that the harm be imminent, as was previously required, only reasonably certain.⁸³

B. Justifications and Critiques

“As soon as any part of a person’s conduct affects prejudicially the interests of others, society has jurisdiction over it.”⁸⁴

The rationale behind the new rule is simple: the value of human life and bodily integrity trumps keeping client confidences. The interests that confidentiality preserves, as discussed above, seem less important when juxtaposed with another human good—such as when life itself is at stake. Even Professor Monroe Freedman, the nation’s most prominent and ardent defender of strict confidentiality, declines to defend it to the detriment of human life.⁸⁵ According to the ABA, the overriding value of life and physical integrity outweigh client trust.⁸⁶

80. ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 95 (American Bar Association Center for Professional Responsibility, 5th ed. 2003).

81. MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 6 (2002) (explaining “paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm”; using toxic waste in the water example for illustrational purposes).

82. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2000) (stating “a lawyer may reveal such information to the extent the lawyer reasonably believes necessary: to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm”).

83. *Id.*

84. JOHN STUART MILL, ON LIBERTY 99 (Alan Ryan ed., W.W. Norton & Co. 1996) (1859).

85. Freedman, *supra* note 17, at 103.

86. See MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 6 (2002).

The ABA's view is in line with most attorneys' views, insofar as saving lives is worth relaxing the duty of confidentiality.⁸⁷

Although most lawyers would agree with the ABA's Model Rule 1.6, opponents remain. Critics' arguments usually rest on the premise that the new exception has turned the attorney-client relationship on its head,⁸⁸ turning lawyers into "compliance officers forced to monitor, prosecute, and judge their clients."⁸⁹ Others have maintained that it is unfair to both clients and themselves to require lawyers to "serve two masters."⁹⁰ All fifty states currently agree, in some form, that a lawyer either may or must disclose confidences to prevent serious bodily injury.⁹¹ California was the last state to concede as much, doing so in 2004.⁹²

C. Model Rule 1.6(b)(2) & (b)(3): Preventing Financial Injury

In August 2003, the ABA welcomed the two newest members of the Model Rules' exceptions to confidentiality in the midst of corporate misdeeds and the SEC's proposed rules implementing section 307 of the Sarbanes-Oxley Act.⁹³ In March 2002, in response to the changes in the ethical climate, the ABA appointed a Task Force on Corporate Responsibility to once again reexamine the ethics rules in light of the "tumultuous effects of major corporate failures."⁹⁴ Two brand new exceptions emerged. The first, Model Rule 1.6(b)(2), provides that a lawyer may reveal information relating to the representation of the client if the lawyer reasonably believes it necessary to prevent the client from committing a crime or fraud that is reasonably certain to result in

87. See Sarah Boxer, *Lawyers Are Asking, How Secret Is a Secret?*, N.Y. TIMES, Aug. 11, 2001, at B7.

88. Vance, *supra* note 13, at 1014 (citing Mohr, *supra* note 23, at 356–57).

89. *Id.* (citing Emiley Zalesky, *When Can I Tell a Client's Secret? Potential Changes in the Confidentiality Rule*, 15 GEO. J. LEGAL ETHICS 957, 966 (2002)).

90. Alschuler, *supra* note 6, at 354.

91. JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 109–115 (Thomson/West 2007–2008 ed.) (indicating that Arizona, Connecticut, Florida, Illinois, Nevada, New Jersey, North Dakota, Tennessee, Texas, Vermont, Virginia, and Wisconsin currently require a lawyer to disclose in this situation, New Mexico states a lawyer "should" disclose, and all other states permit the lawyer to use their discretion).

92. Nancy McCarthy, *New Ethics Rule Clarifies Confidentiality Exception*, CAL. B.J., Aug. 2004, available at http://www.calbar.ca.gov/state/calbar/calbar_home.jsp (in "Search Calbar Site" type "McCarthy 'New Ethics Rule'").

93. McGowan, *supra* note 13, at 1827 (enacting of § 307 required the SEC to establish minimum standards of conduct for attorneys practicing before the commission, including rules requiring counsel who learn of unlawful corporate conduct to report it).

94. John K. Villa, *Final Report of the ABA's Task Force on Corporate Responsibility: A Look at the Proposed Amendments to the Model Rules*, 21 No. 7 ACCA DOCKET 116, 116 (2003).

substantial loss to the financial interests or property of another, but only if the client has used or is using the lawyer's services to commit the crime or fraud.⁹⁵ The client can, of course, prevent such disclosure by refraining from the wrongful conduct, unlike the next exception, wherein the client no longer has the option of preventing disclosure.⁹⁶

The second new rule, Model Rule 1.6(b)(3), addresses the situation in which the lawyer does not learn of the client's crime of fraud until after it has been consummated.⁹⁷ It allows the lawyer to disclose in order to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud, but again, only if the client has used the lawyer's services in furtherance of the crime or fraud.⁹⁸

D. Justifications and Critiques

The new exceptions, the latter being a rectification provision, are forfeiture provisions. The rule recognizes that the client forfeits her protections of secrecy when the relationship is abused in such a manner that causes financial harm to third parties.⁹⁹ The exceptions are similar to the Restatement (Third) of the Law Governing Lawyers, sent to press a few years before the ABA adopted its new position.¹⁰⁰ The exceptions are a basic recognition that a human's willingness to lie can cause serious harm; confidentiality exceptions have long been recognized when clients seek to use lawyers to promote fraudulent activity.¹⁰¹ The efficient market economy and democratic government require honesty and the ability of a client to use lawyers to practice his own illegal deception undercuts these fundamental premises.¹⁰² The Ethics 2000 Commission explained that the interests of the affected persons in

95. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2002).

96. See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmts. 7-8 (2002).

97. See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 8 (2002).

98. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(3) (2002).

99. See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 7 (2002).

100. See generally RESTATEMENT (THIRD) OF LAW GOVERNING LAW § 67 (2000); see, e.g., David W. Raack, *The Ethics 2000 Commission's Proposed Revision of the Model Rules: Substantive Change or Just a Makeover?*, 27 OHIO N.U. L. REV. 233, 240 (2001) ("The new or redrafted confidentiality exceptions in 1.6(b)(1)-(3) are very similar to the Restatement provisions. This is one clear example of the influence that the Restatement had on the work of the Ethics 2000 Commission.").

101. RHODE & HAZARD, JR., *supra* note 21, at 177.

102. *Id.*

mitigating or recouping their substantial losses outweighs the interests of the client who has so abused the attorney-client relationship.¹⁰³

Rebuilding a broken connection to the public trust can also be seen as justification for the new exception. Since in the public eye, lawyers are often seen as individuals who are willing to cover up damaging information, some see the need to break down the strong confines of confidentiality as a means to regaining the public trust.¹⁰⁴ It has been argued that perhaps this drastic step towards breaking down confidentiality is, at least in part, due to the ABA's effort to "beat the government to the punch" given the public demand for such disclosure in light of Enron and its progeny, and concerns for security after September 11.¹⁰⁵

Opponents copiously object on the ground that the new rule leaves them in a precarious position, facing a troubling duality: zealous representation versus policing client's conduct. Critics have argued that the new exception completely redefines what it means to be a lawyer and has created a situation in which corporate clients will be discouraged from seeking legal advice at all—lest they turn their trusted legal advisor into a "cop on the beat."¹⁰⁶ The new exceptions have also been labeled as "snitch provision[s]."¹⁰⁷ Many see the new exceptions as overbroad, and feel that clients may hide quite a bit of information from their lawyers, whether that information be illegal or not.¹⁰⁸ Others have argued that the exception operates from a false premise that fraud is something which is apparent on its face, when in reality it does not appear that way except in the rarest of cases.¹⁰⁹ "That is why it's called

103. MODEL RULES OF PROF'L CONDUCT R. 1.6 (Reporter's Explanation Memo 2000), <http://www.abanet.org/cpr/e2k/e2k-rule16rem.html>.

104. Vance & Wallach, *supra* note 13, at 1015 (citing *Whose Side Are They on?*, THE ECONOMIST, Jan. 25, 2003, at 58).

105. *Id.* at 1016; *see also* MODEL RULES OF PROF'L CONDUCT pmb1. (2002) ("In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."); American Bar Association Task Force on Corporate Responsibility, *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility*, 58 BUS. LAW 189, 207 (2002); Tuoni, *supra* note 13, at 498–99 (pointing out that public dissatisfaction has led to greater involvement of public regulatory authorities in matters of lawyer conduct, which was previously wholly regulated by the bar, and adopting changes in client confidentiality may preserve the autonomy of the legal profession).

106. Lawrence J. Fox, *It Takes More Than Cheek to Lose Our Way*, 77 ST. JOHN'S L. REV. 277, 286 (2003).

107. *Id.* at 278.

108. Vance & Wallach, *supra* note 13, at 1017.

109. Fox, *supra* note 106, at 284.

fraud.”¹¹⁰ Whatever objections and concerns may arise, it is undeniable that the ABA’s new exceptions have fundamentally changed the attorney-client relationship. The extent to which it has been altered remains to be seen.¹¹¹

III. PRESENTATION OF EMPIRICAL RESEARCH

A. Methodology

The Ethics, Gideon & Professionalism Committee of the ABA’s Criminal Justice Section is presently considering a draft proposal to amend Model Rule 1.6 to allow disclosure of confidential information to prevent wrongful incarceration.¹¹² This Comment seeks to lend a hand to the scholarly debate, which is ongoing and in a state of flux, by presenting the findings of the lawyers-to-be study. This study presents some much-needed data on the issue in the form of survey responses voluntarily and anonymously given by law students at the University of La Verne College of Law in Southern California. The survey was distributed to a pool of nearly 300 law students in one of the country’s most diverse law schools.¹¹³ This survey should expand the limited research data available in this field.¹¹⁴ Law students stand in a unique position between the layperson and the lawyer, and thus provide edification in a way never done before.

The survey, listed in the appendix, sought to discover what lawyers-to-be would do if presented with the vexing hypothetical posed at the outset of this Comment. By distinguishing between those who understand the rules in their current form and those who do not, the results serve to undercut those that might argue that because law students are not lawyers, they do not understand the issues and what is really at stake. Arguably, a law student who has recently taken a professional responsibility course, and who is thereby required to know

110. *Id.*

111. The author has found no situations in which a lawyer has disclosed such information.

112. See Joy & McMunigal, *supra* note 8, at 46 (proposing “(c) A lawyer may reveal information relating to the representation of a deceased client to the extent the lawyer reasonably believes necessary to prevent or rectify the wrongful conviction of another”).

113. See *Law School Diversity*, U.S. NEWS & WORLD REPORT, May 1, 2009, at 76, available at 2009 WLNR 8463941. See *infra* app.

114. Levin, *supra* note 13, at 110 n.118 (explaining that Professor Levin surveyed 776 lawyers in New Jersey); *Rethinking Confidentiality I*, *supra* note 6, at 377 (stating that the Yale study surveyed 108 laypersons and 125 lawyers); Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962).

the rules in their current form, is more familiar with such issues than a long-standing practicing attorney. Furthermore, a law student who has only learned the rules of confidentiality in their newly revised form is more attuned, and perhaps better suited, to analyze the hypothetical. As discussed above, confidentiality rules are not what they used to be, and law students are not tainted by the rules in their previous form. In any event, the results will serve to provide fresh results of what up-and-coming attorneys will do when codified ethics and personal morals clash.

B. Findings

A total of 260 law students were surveyed regarding the wrongful incarceration hypothetical. Of this number, 115 were first-year students, ninety-one were second-year students, and fifty-four were third or fourth-year students. At this law school, law students are not confronted with confidentiality and its exceptions until the second year when they take a professional responsibility course. Thus the 115 first-year students might better be understood as laypersons. Of the total second-year students, 70% had either taken or were currently taking the professional responsibility class when the survey was administered. Thus, they stood somewhere between the first-year lay students and the third-year students, who had all taken professional responsibility and therefore more closely resembled practicing attorneys.

1. Question One – Separating the Laypersons from the Pack

The first question was designed to gauge the respondent's understanding of the rules. It asked whether, under the current ABA standards, the hypothetical lawyer might disclose B's confession. The correct answer is that the lawyer must not disclose because none of Model Rule 1.6's exceptions apply.¹¹⁵ Among the entire pool, only 56% understood that B's confession must not be disclosed ("got-it-right" hereinafter). At first blush this might seem like a grave problem, but when adjusted to reflect the year of study the respondents were in, the results are rational. Among the first-year students, 59% got-it-right as did 50% of the second-year students and 81% of the third and fourth-year students. This is reflective of a direct correlation between the

115. *But see* Colin Miller, *Ordeal by Innocence: Why There Should Be a Wrongful Incarceration/Exception to Attorney-Client Confidentiality*, 102 NW. U. L. REV. COLLOQUY 391, 397 (arguing that inmates are exposed to a substantially higher risk of substantial bodily harm inherent in incarceration, and therefore, a wrongful incarceration exception can be implied from the current rules).

completion of a professional responsibility course and a firm understanding of the rule of confidentiality and its exceptions. Therefore, third-year students best resembled practicing attorneys.

TABLE I- QUESTION ONE: UNDER CURRENT ABA STANDARDS, MAY YOU DISCLOSE THIS INFORMATION?

<u>Year of Study</u>	<u>Must Disclose</u>	<u>May Disclose</u>	<u>Must Not Disclose</u>
1 st (115)	26%	15%	59%
.....			
2 nd (91)	7%	43%	50%
.....			
3 rd (54)	4%	15%	81%
.....			
Overall	15%	25%	56%

2. Question Two – Reflections on Ambiguity

The second question in the survey changed the facts of the hypothetical slightly in an effort to show that determining whether an exception applies to a given set of facts can be tricky business. The question added the fact that the innocent convict, A, was being assaulted in jail, causing him substantial bodily harm. This question was also designed to test the limits of student's understanding of the rules. Under current Model Rule 1.6(b)(1), this situation is one in which the hypothetical lawyer should be able to disclose B's confession because the lawyer knows (is reasonably certain) that the disclosure is necessary to prevent reasonably certain substantial bodily injury. However, since the lawyer has heard of the assault (knows of it) after it happens, the implication could be that it has *already taken place*. Thus, one could argue that the hypothetical lawyer's disclosure is no longer permitted because she will not be *preventing* anything. On the other hand, the question asks if disclosure is allowed where the hypothetical lawyer knew that "A was *being assaulted* in prison," which implies a sense of perpetuity in the assault, and thereby falling back into the exception.

Certainly this added fact rings loud to show just some of the issues that might arise on the part of the lawyer trying to decide whether or not his situation falls within the exception. It is somewhat of a trick question in the sense that the answer may change based on interpretations of the ambiguity. In any event, of those that got-it-right (those which most closely resemble practicing lawyers), 38% thought that B's confession may be disclosed on these facts. Among the lay

first-year student pool, 77% felt that B's confession either must not or must be disclosed (39/115 must; 50/115 must not). Of the third-year students, 61% felt that B's confession must not be disclosed, and exactly one-third felt that it may be disclosed. Given the ambiguity of the question, any results are questionable, and this Comment does not conclude anything based on these responses. The question was designed to reflect upon the exception's inherent ambiguities, which some would argue need to be resolved.¹¹⁶

TABLE II - QUESTION TWO: UNDER THE CURRENT ABA STANDARDS, MAY YOU DISCLOSE THIS INFORMATION IF YOU KNEW THAT "A" WAS BEING ASSAULTED IN PRISON CAUSING HIM SUBSTANTIAL BODILY HARM?

Year of Study	Must Disclose	May Disclose	Must Not Disclose
1 st (115)	34%	23%	43%
.....			
2 nd (91)	19%	60%	21%
.....			
3 rd (54)	6%	33%	61%
.....			
Overall	23%	38%	39%

3. Question Three – Rule Breakers

*“The legal system itself needs people who are willing to break the law for political reasons The legitimacy of the system itself requires confrontation with disobedience defended by individuals who view compliance as immoral or by individuals seeking to persuade lawful officials to change.”*¹¹⁷

This question was designed to determine to what extent the lawyers-to-be would engage in civil disobedience.¹¹⁸ The pool of

116. Hicks, *supra* note 13, at 319.

117. Martha L. Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723, 741 (1991).

118. Daly, *supra* note 6, at 1628 (“Civil disobedience is traditionally associated with acts that are ‘public, nonviolent, conscientious yet political . . . done with the aim of bringing about a change in the law or policies of government.’ Although . . . I have located no instances of civil disobedience directed at the judicial branch in its capacity as the regulator of the legal profession . . . I see no reason why the absence of precedent should be should be fateful to my claim.”).

students was asked whether they would disclose *regardless* of what the rules said. Among the entire sample, 41% said they would disclose B's confession regardless (first-year students: 34%; second-year students: 43%; third-year students: 46%). If adjusted to include those who said they might disclose (maybe), the number changes to 68%. This shows that as students become more familiar with the rules, they are more willing to disregard them and engage in civil disobedience.¹¹⁹ However, among the total number of students that got-it-right, 80% said they *would not* disclose, regardless of what the rules say. This serves to undercut the conclusion that as students become more familiar with the rules, they are more willing to break them. Conversely, it suggests an opposite conclusion: those who know the rules and their exceptions are intent on following them.

TABLE III - QUESTION THREE: WOULD YOU DISCLOSE REGARDLESS OF WHAT THE RULES MIGHT SAY?

Year of Study	Would Disclose	Would Not Disclose	Maybe
1 st (115)	34%	41%	25%
.....			
2 nd (91)	43%	32%	25%
.....			
3 rd (54)	46%	22%	30%
.....			
Overall	41%	34%	27% ¹²⁰

4. Question Four – Putting the Client First

Question four was created to measure where the lawyers'-to-be considerations lie when deciding whether to disclose. The question asked whether they might disclose if they knew that releasing the information *might* lead to A's release from prison and if they *knew* that their client B would not be implicated and suffer criminal consequences. The question provided a win-win for the hypothetical lawyer: she could possibly exonerate A and simultaneously protect B from criminal prosecution.

119. The survey tried to gauge why the students were willing to break the rule. Many responses included words or phrases such as "the right thing," or "morally right," or "A should not suffer because of B," and "justice."

120. The numbers throughout the section were rounded up. Thus, the percentages may not always equal exactly 100%.

This question brought the second highest level of agreement among the pool. Sixty-two percent (161/260) said they would disclose if they knew that their client B would not be implicated and suffer criminal consequences. If adjusted to include those who thought they might disclose (maybe), the percentage becomes 76% (197/260). Of those who got-it-right and said they might disclose (maybe), nearly half (49%) changed their minds and decided they would disclose if their client B would not suffer any criminal implications.

These results clearly reflect that the lawyers-to-be put the client's interests first. Thus, the notion that the duty of confidentiality is meant to protect the interests of the client first and foremost is supported by the instant study. The high level of across-the-board agreement shows that lawyers-to-be recognize and relate to the best interests of the client when considering whether to breach confidentiality. However, given the fact that the question provided a win-win for the hypothetical lawyer, these results are not surprising. They are, however, informative.

TABLE IV - QUESTION FOUR: WOULD YOU DISCLOSE INFORMATION THAT MIGHT RESULT IN "A's" RELEASE FROM PRISON IF YOU KNEW THAT YOUR CLIENT "B" WOULD NOT BE IMPLICATED AND SUFFER CRIMINAL CONSEQUENCES?

<u>Year of Study</u>	<u>Yes</u>	<u>No</u>	<u>Maybe</u>
1 st (115)	61%	28%	10%
.....			
2 nd (91)	64%	20%	14%
.....			
3 rd (54)	61%	19%	20%
.....			
Overall	62%	23%	14%

5. Question Five – Hypothetical Consequences and Their Implications

Question five added more facts to the hypothetical in the form of consequences that the hypothetical lawyer would face.¹²¹ It asked whether they would disclose if they knew what consequences they would suffer. The consequences were, ranging from highest to lowest: disbarment, suspension for an unspecified period, monetary sanction of unspecified amount, and a public reprimand. The question was

121. See *infra* app., question five.

designed to assess if, and to what extent, the students' own self-interest might determine whether they chose to breach confidentiality. Without such a question, it might be argued that the entire survey is without merit because it would not take into account the hypothetical lawyer's own costs and benefits.

As the consequences became less severe, the lawyers-to-be became more willing to breach confidentiality. Among the entire pool, 79% said they would not disclose if the consequences were disbarment. If suspension would result, with an unspecified time period, 58% would not disclose. If the consequences were an unspecified monetary sanction, 43% said they would not disclose. If the consequences were public reprimand, 48% would not disclose. Thus, at least some see public reprimand as a more taxing consequence than a monetary sanction. This is likely because of the role that a reputation can play in an attorney's career, and concerns over what other attorneys may think or how potential clients would react.

Of those who knew that the confession could not be disclosed under the Model Rules (got-it-right) and said they would disclose (knowing-rule-breakers), 87% changed their minds if they knew that the consequence was disbarment. However, only 26% changed their minds if they knew that an unspecified monetary sanction would result. Of those who got-it-right and of those who said they might disclose (potential knowing-rule-breakers), 63% changed their minds and said they *would* disclose if the consequence was merely an unspecified monetary sanction.

The implication from these hypothetical consequences, although not conclusive, is that the lawyers-to-be are in some sense self-interested (not surprisingly). Thus, although protecting the client's interests reflected a very high level of agreement among the pool (197/260), disbarment as a consequence reflected the highest level of agreement (200/260), but only by 1%. Therefore, although client concerns in a large part dictate the lawyer's course of action, most lawyers-to-be will not sacrifice their careers to save A.

6. *Question Six – Consensus Versus Divergence*

This question was designed specifically with the proposal of this Comment in mind. It sought to discover whether an exception, which would allow the hypothetical lawyer to disclose B's confession and thereby possibly exonerate A, would be supported by popular opinion.

The question, partially in line with the Tomkins study,¹²² asked if the lawyers-to-be thought the hypothetical lawyer should be able to disclose B's confession, and why.

Of those who got-it-right and said they would not disclose (the knowing-rule-followers—arguably the most skeptical of such an exception) nearly half (44%) thought that lawyers should be able to disclose B's confession. Not surprisingly, of those who got-it-right and of those who said they would disclose (the knowing-rule-breakers—arguably the most welcoming of such an exception), there was a consensus (100% thought that lawyers should be able to disclose this information). Among the entire pool, 61% thought that lawyers should be able to disclose B's confession. If adjusted to include those who were unsure (maybe lawyers should be able to disclose), the percentage becomes 74%. Thus, of the entire pool, only 26% of the lawyers-to-be believed that lawyers should not be able to disclose B's confession. Although not a consensus, this data suggests that the lawyers-to-be believe that the interests of confidentiality are outweighed by A's interests in physical liberty and being exonerated.

TABLE V - QUESTION SIX: DO YOU THINK YOU SHOULD BE ABLE TO DISCLOSE THIS INFORMATION? WHY OR WHY NOT?

<u>Year of Study</u>	<u>Yes</u>	<u>No</u>	<u>Maybe</u>
1 st (115)	57%	23%	15%
.....			
2 nd (91)	66%	21%	14%
.....			
3 rd (54)	61%	20%	11%
.....			
Overall	61%	26%	13%

7. Question Seven – Affecting Client Candor?

The last question of the survey covertly attempted to gauge to what extent the pool accepted confidentiality's primary systemic justification, which, as discussed in Part I, is promoting client candor. The question, also partially in line with the Tomkins study,¹²³ asked the lawyers-to-be whether people's willingness to use attorneys might be affected by an exception allowing the hypothetical lawyer to disclose B's confession.

122. *Rethinking Confidentiality I*, *supra* note 6, at 392.

123. *Id.* at 395.

If potential clients are not willing to use an attorney's services, then it might easily be conceded that client candor is being discouraged.

Of those who thought lawyers should be able to disclose B's confession, 39% were willing to make the sacrifice, insofar that they believed that people's willingness to use attorneys would be affected, thereby discouraging candor. Of the entire pool, almost half (47%) thought that such an exception would decrease demand for lawyers, thereby chilling client candor. If adjusted to include those who were unsure (maybe it would affect willingness to use attorneys), 74% felt that it would or it might. Only 23% felt that such an exception would not affect client candor. Therefore, a significant majority of the lawyers-to-be accept confidentiality's primary systemic justification—that protecting secrets promotes client candor and the data supports the warning that such an exception to confidentiality would impact the way clients use attorneys. On the other hand, it simultaneously casts doubt on whether the effect is as substantial as proponents of confidentiality presume—only 47% were completely sure.

TABLE VI - QUESTION SEVEN: IF ATTORNEYS WERE ALLOWED TO DISCLOSE IN CASES SUCH AS THESE, DO YOU THINK THAT WOULD MAKE PEOPLE LESS WILLING TO USE ATTORNEYS SERVICES?

<u>Year of Study</u>	<u>Yes</u>	<u>No</u>	<u>Maybe</u>
1 st (115)	51%	17%	32%
.....			
2 nd (91)	50%	29%	19%
.....			
3 rd (54)	31%	30%	30%
.....			
Overall	47%	23%	27%

C. Significance

Several of these results are telling. First, the study revealed widespread misunderstanding among first and second-year law students, who more closely resemble laypeople, as to confidentiality and its scope. Half of the second-year students, and 40% of the first-year students, answered incorrectly by concluding that the hypothetical

lawyer either may or must reveal B's confession. These findings are consistent with the other limited empirical data on confidentiality.¹²⁴

Second, of the entire pool, 63% stated that they either would or might disclose regardless of what the rules say. This result is also remarkably consistent with comparable empirical data.¹²⁵ For those who believe in professional codes of conduct, the picture that results from these responses is disturbing because, despite the fact that the code forbids disclosure, many lawyers-to-be might nonetheless disclose if their personal morals conflicted with the ABA's codified ethics. However, among those who understood the rules (those answering question one correctly—"got-it-right")—those most closely resembling practicing attorneys, 80% said they would not disclose.

Third, an amendment to the confidentiality rules allowing lawyers to disclose B's confession would clearly be popular. Only 26% of the entire pool thought that lawyers should not be able to disclose this information. Thus, 74% of the survey takers thought either that a lawyer should be able to disclose (158/260) or maybe should be able to disclose (34/260). This figure is also markedly consistent with similar studies.¹²⁶

Fourth, the results suggest that the lawyers-to-be place their client's interests in high regard when considering a breach of confidentiality. Reflecting the second highest level of agreement among the lawyers-to-be, 161/260, or 62%, replied that they would disclose the information if they knew that their client B would not be implicated or suffer criminal consequences. If one includes those who thought they might disclose in this situation, the number increases to 76% (197/260).

Fifth, the lawyers-to-be showed a noteworthy level of selflessness, as 42% of the pool actually said that they would take a suspension of unspecified time in order to disclose and potentially exonerate A. However, the highest level of agreement, perhaps not surprisingly, was reflected by an unwillingness to be disbarred—200/260 lawyers-to-be,

124. *Rethinking Confidentiality I*, *supra* note 6, at 381 (explaining how half of the clients relied on confidentiality and wrongly assumed the governing standard was absolute); *see also* Comment, *supra* note 114, at 1236 (revealing widespread misinformation concerning privileges in various professions and particularly the attorney-client privilege).

125. *Rethinking Confidentiality I*, *supra* note 6, at 392 (finding in the Tompkins study that 65% of the lawyers asked stated that they thought a good attorney would disclose in the innocent convict hypothetical and noting that the study did not provide for a "maybe" answer; the only options were "would disclose" or "would not disclose").

126. *Id.* at 395 (finding in the Tompkins study that 80% of clients thought lawyers should have to disclose in order to save the innocent defendant).

or 77%, said they would not disclose if they knew they would be disbarred.

Inconsistent with the Tomkins study were the results regarding what effect disclosure would have on potential clients' willingness to use attorneys (thereby affecting client candor). In the Tomkins study, 19% of the clients surveyed felt that disclosure of the innocent defendant information would affect their willingness to use an attorney.¹²⁷ In the lawyers-to-be survey, almost half (47%) felt that if disclosure were allowed to exonerate A, people would be less willing to use an attorney's services. Twenty-two percent thought that it might. Thus, the lawyers-to-be, unlike the actual clients in the Tomkins study, implicitly accepted confidentiality's primary systemic justification—i.e., confidentiality promotes client candor. Therefore, to the extent that a new exception would negatively affect demand for lawyers, the justification that confidentiality promotes client candor is supported by this data.

Ultimately, this study is not conclusive on these issues. It merely attempts to draw upon its data in an objective manner in order to provide code drafters with a way to avoid unsupported assumptions about client behavior.

IV. PROPOSAL & ARGUMENT

*"It is better that 100 guilty men go free than 1 innocent man go to jail."*¹²⁸

The Model Rules' Preamble states that a lawyer's responsibilities to serve the interests of the client, the demands of the legal system, and the public are *usually* harmonious.¹²⁹ The innocent convict hypothetical, which was designed to force a clash of the hypothetical lawyer's personal morals and codified ethics, highlights a troubling duality: the categorical mandates that Model Rule 1.6 provides versus the morally conscious lawyer seeking justice. The extreme, although not uncommon, example is one that pits three duties against themselves: duty to client, duty to self, and duty to society. The resolution of this

127. *Id.*

128. 4 WILLIAM BLACKSTONE, COMMENTARIES *352.

129. MODEL RULES OF PROF'L CONDUCT pmb1. (2002).

conflict is one that the ABA has yet to provide, although it is currently considering at least one possibility.¹³⁰

This section seeks to help resolve the problem, arguing that the ABA should adopt a narrow, permissive, wrongful incarceration exception for two reasons: (1) because none of the interests attorney-client confidentiality is meant to serve apply in this hypothetical; and (2) because, after balancing the utilities, B's secrets are far outweighed by A's fundamental right to freedom from physical restraint.

This Comment proposes that the ABA should adopt the following additional exception to attorney-client confidentiality under Model Rule 1.6(b): *a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the wrongful incarceration of another person.*

In order to decide if the rules err by not adopting such a wrongful incarceration exception to cover the hypothetical scenario, three central policy issues in drafting exceptions to confidentiality must be addressed. First, the justifications providing for strict confidentiality, as outlined in Part I, should be applied to the current hypothetical to determine if they are properly served in this context. Next, the interests that justify a possible sacrifice of attorney-client confidentiality must be clearly defined.¹³¹ Last, whether the proposed exception should be permissive or mandatory must be addressed.¹³²

A. Justifications Applicable?

1. Client Candor

The major argument against broadening exceptions to confidentiality, as fully discussed above, is that clients will be deterred

130. See Joy & McMunigal, *supra* note 8, at 46–47 which considers the ABA's proposed amendment to comment [15] of MODEL RULE 1.6. This amendment states that the drafters:

[R]ecognize[] the important societal interest in preventing and rectifying wrongful convictions The interests underlying the confidentiality obligation are usually paramount in the case of living clients. . . . However, the societal interests in disclosure may be paramount when the client is deceased, particularly when the client's reputation and estate will not be prejudiced by disclosure.

Id. at 47–48. Therefore, the rationale behind the exception is that deceased client's secrets are outweighed by society's interest in disclosure. This Comment asserts that this rationale is flawed because it misstates what the real interest should be: "A's" physical liberty.

131. See Crampton & Knowles, *supra* note 6, at 112.

132. *Id.*

from confiding information to their lawyers, thereby chilling attorney-client communications. Here, the client, B, has already provided the lawyer with full and frank information. He has entered a law office and told a lawyer that he broke the law by committing the crime for which A is currently serving his life sentence. It might easily be conceded that this client is as full and frank as a client can possibly be.

Necessarily, the justification applies not only to the present client, but also to other potential clients. Given the rarity of this exceptional scenario, it is highly unlikely that overall attorney-client communications would be chilled.¹³³ Moreover, currently recognized exceptions, such as those pertaining to third-party injury as outlined in Part II, seem much more likely to be triggered than the proposed wrongful incarceration exception, and thus more likely to impede the full and frank communication that confidentiality is designed to facilitate.¹³⁴ Therefore, the proposed exception would do little more than the current exceptions have already done to chill communications.

Opponents to such an exception face another hurdle because in order to argue that such a narrow exception would affect client candor, or at the very least lead to some lay hesitation, they must concede that clients understand the rules. This necessary premise, which is the very bedrock of attorney-client confidentiality's justifications, is called into question with the data presented herein. The survey revealed a widespread misunderstanding of the rules—nearly 40% of the 260 polled thought that B's confession either may or must be disclosed.¹³⁵ These findings are also consistent with other limited empirical data.¹³⁶ At least one third-year respondent in the lawyers-to-be survey exclaimed, “[t]hey won't know!” (referring to potential clients). Thus, potential clients that are unaware of the exception would not be affected by an exception they do not know exists. Perhaps more importantly, however, those clients who are aware of such an exception already have good reason not to confess to a crime for which another person has been charged or convicted.¹³⁷

133. See generally *Rethinking Confidentiality I*, *supra* note 6, at 365–66 (“[a]s a practical matter, clients thus probably end up with only a general understanding that attorney-client conversations usually remain confidential but occasionally may be revealed. If that is the case, creating limited additional disclosure exceptions is unlikely to affect a client's decision to confide.”).

134. Joy & McMunigal, *supra* note 8, at 46.

135. See *supra* tbl. I (showing poll of student opinion regarding client confidentiality).

136. See *Rethinking Confidentiality I*, *supra* note 6, at 381 (citing authority evidencing confidentiality issues).

137. Miller, *supra* note 115, at 401.

Widespread misunderstanding of the rules aside, the lawyers-to-be lend at least some credence to those who feel that such an exception would affect client candor and chill communications. Seventy-four percent of the lawyers-to-be felt that if lawyers were allowed to disclose B's confession that people either would, or might be, less likely to use an attorney's services.¹³⁸ However, only 47% were sure (26% answered "maybe"). Thus, this data might also support those who argue that an exception would negatively affect client candor, but it simultaneously casts doubt on whether the effect is as substantial as proponents of confidentiality presume. Furthermore, the level of understanding of the rules on confidentiality is objective—i.e., measurable—whereas whether demand for lawyers might be affected by a new exception is a subjective and conjectural question. Thus, the former is less speculative than the latter and seriously undercuts those who argue that a narrow exception for wrongful incarceration might chill client communications.

2. Client Autonomy and Privacy

Next, regarding client autonomy, privacy, and dignity, the argument, as explained above, is that the client's autonomy demands a certain level of dignity that allows the client to exercise her private decisions under a veil of secrecy as a free citizen in a free society. The application of this *purely* philosophical justification to the hypothetical is tenable at best. This justification is, by its very nature, an abstract one that cannot be proven. The position of this Comment is that when a person's physical liberty is at stake, the reality of that more certain harm should clearly trump dubious assumptions about effects on a client's personal feelings or autonomous dignity. Furthermore, studies indicate that mistrust and suspicion are already frequently encountered in the attorney-client relationship as it stands.¹³⁹ Therefore, even though adding an exception to cover the hypothetical scenario might philosophically affect a client's intangible subjective feelings and autonomy, such considerations should be overlooked in light of the objective and tangible harm faced by A.

138. See *supra* tbl. VI.

139. See, e.g., Robert A. Burt, *Conflict & Trust Between Att'y & Client*, 69 GEO. L.J. 1015 (1981) (arguing that expanding exceptions to confidentiality would enhance trust between attorney and client).

3. Preventing Misconduct

The strongest justification for confidentiality,¹⁴⁰ preventing client misconduct, does not apply here. It cannot meritoriously be argued that the hypothetical lawyer might use B's confession to prevent B's misconduct because the harm *has already occurred* and is therefore impossible to prevent. Ironically, there is a stronger guarantee of preventing harm in general under the proposed exception than there is under the current exceptions.¹⁴¹ This is because a client that discloses an intention to commit a *future* crime might actually change her mind, whereas under the proposed exception, the lawyer cannot disclose until *after* the harm has already been committed and is ongoing—i.e., the wrong person has been sentenced and is incarcerated. Therefore, since there is nothing the hypothetical lawyer can conceivably do to prevent the client's misconduct, this justification does not apply on these facts.

Incidentally, it is professional misconduct for a lawyer to engage in conduct which is prejudicial to the administration of justice.¹⁴² Arguably, by disclosing B's confession to a prosecutor, for example, a lawyer would be serving the interests of justice overall and would greatly promote the administration of justice. In August 2008, the ABA amended Model Rule 3.8 ("Special Responsibilities of a Prosecutor") to address a prosecutor's obligations, in particular with respect to wrongful incarcerations/convictions.¹⁴³ It codified prosecutors' post conviction obligations of disclosure and investigation when they know of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit the offense for which the defendant was convicted.¹⁴⁴ This new amendment is proof positive of the ABA's willingness and commitment to preventing wrongful convictions in general. Specifically, however, the amendment proposed herein would give non-prosecutors—i.e., defense attorneys—the tools they need to assist the prosecutor in his new duty of investigation, and thereby promote the overall administration of justice.

4. Facilitating Effective Representation

The fourth justification, which is partially duplicative, posits that lawyers need all relevant information in order to be effective and to

140. Again, the author uses this language because, as pointed out above, there is at least some empirical data on the matter.

141. Miller, *supra* note 115, at 399.

142. MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2003).

143. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2008).

144. MODEL RULES OF PROF'L CONDUCT R. 3.8(g) (2008).

facilitate effective representation for the client. Here, however, the information at issue has not been disclosed for the purpose of seeking legal advice and will not result in such advice because the hypothetical lawyer is representing "B" on an *unrelated matter*. The crime has already been committed. Since the matter is wholly unrelated, it necessarily has no bearing on the facilitation of effective legal advice. Furthermore, there is at least some evidence that professional and legal rules have little effect on the willingness or unwillingness of clients to talk to their lawyers, as legal advice is usually sought out as a matter of necessity, especially in the criminal defense realm.¹⁴⁵ However, there is no evidence that the current broad exceptions, which are much more likely to be triggered than the proposed exception, have had any undesirable effect on facilitating effective representation. Therefore, since this justification does not apply on these facts, ABA code drafters should have no problem disregarding it.

5. Preventing Negative Externalities and Promoting Positive Externalities

An externality, as discussed above, is an unforeseen cost placed on a third party as a result of a producer or consumer creating or consuming goods.¹⁴⁶ Here, disclosure by the hypothetical lawyer might actually promote positive externalities in several ways. The disclosure of this information will actually deflect costs associated with housing inmates and appellate review.¹⁴⁷ Society's view of lawyers might increase if they knew lawyers were allowed to disclose this type of information and were driven to do so in order to uphold justice, as opposed to protecting those narrower groups with special interests.¹⁴⁸ The more that professional standards prescribe conduct inconsistent

145. See Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 683 (1978). Murray claims that, in general, lay persons visit accountants, psychiatrists, social workers, and other specially trained professionals expecting secrecy of most information. *Id.* However, there are circumstances which allow the shield of confidentiality to be pierced. *Id.* Nevertheless, clients continue to use these services because the risk of disclosure is simply insignificant in the face of the benefits the client obtains. *Id.*

146. See generally BUTLER & DRAHOZAL, *supra* note 66.

147. *McCoy v. Court of Appeals of Wis.*, 486 U.S. 429, 436 (1988) (holding that the State is required to provide counsel for first appeal by right).

148. *But see* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYER'S ETHICS 147 (Lexisnexis/Matthew Bender 2d ed. 2002) (worrying that under a permissive exception to confidentiality "lawyers will be more likely to use or disclose a client's confidential information . . . when the client is an indigent . . . than any other client," resulting in "an even greater divide between the kind of legal services- and loyalty- provided to some clients than that provided to others").

with society's general ethical perceptions, the more likely society is to view the profession with cynicism.¹⁴⁹ Indeed, such a result is not unlikely given the fact that wrongful convictions have attained such prominence in today's legal and popular culture.¹⁵⁰ It may also prevent negative externalities because the failure to recognize an exception for the innocent convict is likely to attract public attention and undermine public confidence both in lawyers and our criminal justice system in general.¹⁵¹ Therefore, the hypothetical lawyer's disclosure of B's confession might actually help serve the very interests which confidentiality currently is supposed to serve. Thus, the argument actually cuts the other way.

B. Balancing the Interests: Physical Liberty Versus Confidentiality

*"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are . . . Liberty."*¹⁵²

Confidentiality rules have always recognized exceptions.¹⁵³ The comments to Model Rule 1.6 reveal that the ABA code drafters engage in a balancing act to determine whether an exception should exist. This utilitarian balancing runs parallel to the process courts may employ in the area of attorney-client privilege, which is beyond the scope of this Comment.¹⁵⁴ Thus, in order for the ABA to adopt a new exception, they must find a countervailing interest that outweighs the interests confidentiality preserves.

The search for utility need not extend past the current comments to Model Rule 1.6, which recognize *physical integrity* as such an interest. Physical integrity is part and parcel of physical liberty, which is a value upon which this country was founded. The right to be free from physical restraint is so basic a human right and fundamental to our precepts as just beings that it must not be overlooked or taken for granted. Currently, America is engaged in two wars that are, at least nominally, to fight for liberty and freedom. Any conceivable

149. *Rethinking Confidentiality I*, *supra* note 6, at 376 (citing Note, *Attorney Client Confidentiality: A New Approach*, 4 HOFSTRA L. REV. 685, 688 (1976)).

150. Joy & McMunigal, *supra* note 8, at 48–49.

151. *Id.*

152. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

153. *Id.*

154. See generally Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 486–87 (1977).

justification for confidentiality pales in comparison to spending every waking hour behind bars. Clearly, Model Rule 1.6, as applied here, results in the maintenance of confidentiality, even in light of wrongful incarceration and the great physical, mental, emotional, and spiritual harm that such incarceration would cause to an innocent human being.¹⁵⁵ The data provided by the lawyers-to-be supports such notions—68% said that they either would or might disclose *regardless* of what the rules might say, and only 26% thought that lawyers should *not* be able to disclose this information.¹⁵⁶ This result is also supported by similar empirical research.¹⁵⁷ If the notion that an innocent man's physical liberty outweighs attorney-client confidentiality is a notion so commonly shared by lay persons, why as lawyers is it so hard to accept? Are the profession's interests really all that different from society's?

Currently, the two utilities on the ABA's balancing hierarchy that sufficiently outweigh attorney-client confidentiality are lawyer-centered.¹⁵⁸ These two interests are collecting fees and self-defense.¹⁵⁹ When juxtaposed against the right to be free from physical restraint, collecting fees and defending against professional negligence actions seem quite small in stature. Moreover, the high likelihood that such exceptions will be triggered, versus the low likelihood that a lawyer might have a client admit to committing a crime for which another is incarcerated, must not go unnoticed. Nonetheless, the same lawyer that is prohibited from disclosing on these facts is perfectly free to disclose confidential information when he or she is the one accused, whether falsely or not. There is no requirement that the lawyer's liberty be at stake; a simple fee dispute will suffice. At least one scholar has noted, "[n]o exception to the attorney-client privilege has done as much to draw [confidentiality] into question as the exception allowing lawyer self-protection."¹⁶⁰ Others have pointed out that allowing lawyers to disclose confidences for the purpose of collecting fees "is sanction for

155. Tuoni, *supra* note 13, at 473; *see also* Miller, *supra* note 115, at 397 (citing Jeff Potts, *American Penal Institutions and Two Alternative Proposals for Punishment*, 34 S. TEX. L. REV. 443, 462–65 (1993) and pointing out that inmates face an increased risk of physical violence based upon factors such as concentration of violent individuals, overcrowding, prison culture, the inability of prisoners to physically separate themselves, the prevalence of drug use, and prison guard brutality).

156. *See supra* tbls. III & V.

157. *See e.g. Rethinking Confidentiality I*, *supra* note 6, at 394 (stating that 80% of clients surveyed believed that lawyers should be able to disclose information regarding an innocent defendant).

158. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(4), (5) (2003).

159. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2003).

160. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 308 (West Publishing Co. 7th ed. 2005).

blackmail.”¹⁶¹ Professor Daniel R. Fischel has argued that confidentiality rules benefit lawyers but are of dubious value to clients and society as a whole, and do nothing more than increase the demand for lawyers.¹⁶² Other scholars have shared their views on the ABA’s current enigmatic position.¹⁶³ If nothing else, this Comment can assist code drafters in basing confidentiality’s exceptions on empirically supported contentions and thereby forestalling the public perception, both by lawyers and laypersons alike,¹⁶⁴ that ethical regulations merely protect the guild.

161. FREEDMAN & SMITH, *supra* note 16, at 155.

162. *See* Fischel, *supra* note 24, at 33.

163. Tuoni, *supra* note 13, at 446, 469 (“It is difficult to understand how a lawyer’s self-reputational interests are regarded as more worthy of protection than societal and individual interests in not being victimized The Model Rules set forth a very strange hierarchy of protections in the area of client confidentiality Perhaps the *coup de grace* of the model Rules’ ‘slap in the face’ to the needs of those outside of the legal system is the enhancement of lawyer’s ability to protect themselves through the use of confidential client information.”); *see also* FREEDMAN & SMITH, *supra* note 16, at 144 (“[S]ome of the ABA’s exceptions to lawyer-client confidentiality are a mockery of an ideal”); Cramton & Knowles, *supra* note 6, at 111 (“[A] profession that justifiably asks for and receives permission to disclose confidential information when its own economic self-interests are at stake (e.g. to collect a fee from a client) cannot plausibly take the position that the threatened death or serious injury of another does not justify an occasional sacrifice of confidentiality.”); Daly, *supra* note 6, at 1625 (“Less noble and even more firmly established is the exception that permits disclosure to the extent necessary to collect a lawyer’s fee or to defend against an accusation of wrongdoing.”); Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 738 (1977) (explaining that the code effectively ends attorney’s obligations of confidentiality when it becomes uncomfortable for an attorney); William H. Simon, *The Belated Decline of Literalism in Professional Responsibility Doctrine: Soft Deception and the Rule of Law*, 70 FORDHAM L. REV. 1881, 1901 (2002) [hereinafter Simon, *Belated Decline*] (“Literalism has at least a modest correlation with the economic self-interest of the bar. It is consistent with the bar’s perceived material interest in minimizing the lawyer’s responsibilities to people who do not pay for legal services. Moreover, it seems to have a tendency to enlarge demand for legal services.”); William H. Simon, *Who Needs the Bar?: Professionalism Without Monopoly*, 30 FLA. ST. U. L. REV. 639, 652 (2003) [hereinafter Simon, *Professional*] (“[T]hese [confidentiality] rules are less often seen as an expression of economic self-interest than the rules specifically focused on admission and marketing. Critics are as likely to explain the bar’s ethical orientation in terms of ideological commitments as in terms of economic self-interest.”). *See generally* *Rethinking Confidentiality I*, *supra* note 6, at 353–71 (“[T]he tradition of strict confidentiality has helped teach lawyers and clients to rationalize amoral representation The resulting patchwork of standards governing attorney-client secrets casts doubt on the ideals to which confidentiality rules aspire.”).

164. *See* Daniel R. Fischel, *Lawyers & Confidentiality*, 65 U. CHI. L. REV. 1 (1998) (providing that lawyers are the beneficiaries of the rule of confidentiality); *see also* Colin Miller, *Ordeal by Innocence: Why There Should be a Wrongful Incarceration/Execution Exception to Attorney-Client Confidentiality*, 102 NW. U. L. REV. COLLOQUY 391 (discussing the importance of the wrongful incarceration exception).

After all is said and done and both sides have made their arguments, what remains is a hierarchy of interests that places lawyer self interest higher than the exoneration of A. When viewed in this light, the primary beneficiary of the rules of confidentiality is not the client, as the ABA contends, but rather it is the lawyer. This argument is not an attack on the ABA, because as recent amendments have proved, their concerns are headed in the right direction; it simply is made to show that one last step needs to be taken. The recognition of a wrongful incarceration exception is consistent with the recent trend to ease confidentiality restrictions when doing so allows lawyers to serve an important public purpose. This trend expands a lawyer's duty to act cooperatively in preventing and remedying wrongdoing, emphasizing the lawyer's role as an officer of the court rather than the lawyer's role as a zealous advocate for the client.¹⁶⁵

C. Permissive Versus Mandatory: Practical Considerations

This Comment suggests that the discretion to disclose should remain with the lawyer herself despite the fact that a mandatory rule might lead to a more uniform and predictable outcome. The Model Rules are just that; they are guidelines for the professional lawyer and they are rules of reason.¹⁶⁶ The rules do not exhaust the moral and ethical considerations that should inform a lawyer, "for no worthwhile human activity can be completely defined by legal rules."¹⁶⁷ The rules are primarily an ethical framework that stitch appropriate considerations into a lawyer's moral fiber. As such, the lawyer should be able to exercise her discretion in each individual context whilst considering and weighing what the lawyer "may" do if need be, as opposed to what she shall do no matter what. This also allows proper time and peace of mind to consider all the relevant factors before disclosing. Much of the law of lawyering makes room for morals by giving lawyers discretion in determining what they ought to do; confidentiality exceptions should provide the same level of flexible regulation.¹⁶⁸ Furthermore, few

165. Joy & McMunigal, *supra* note 8, at 49.

166. MODEL RULES OF PROF'L CONDUCT, scope 14 (2002).

167. *Id.* at 16.

168. Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551, 596 (1991). *see also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 69 (West Publishing Co. 1986) ("Most lawyer decisions are open-ended and discretionary in the sense that a lawyer can choose between a variety of tactics or outcomes with no fear of violating any legal rule. In making those decisions, lawyers rely on some innate sense of proper behavior. One lawyer's sense might be the result of a very thought out and consciously followed system of moral values. Another lawyer's sense might be nothing more complicated than an instinct

States, nor either the current Model Rule 1.6 or the Restatement (Third) Governing Lawyers, mandate disclosure, they merely allow it.¹⁶⁹

A mandatory rule would not reflect the complexity this hypothetical presents. Disclosing B's confession can be costly to lawyers. Such costs can present themselves in a variety of ways. A more realistic ramification for the lawyer who decides to disclose might be professional martyrdom.¹⁷⁰ From an economic standpoint, harm facing the attorney can be staggering in a freely competitive market, and disclosure can jeopardize a young criminal defense attorney's career, possibly resulting in occupational suicide.¹⁷¹ Such a notion is supported by the lawyers-to-be study, insofar that more were willing to disclose in the event a monetary sanction would result than when the consequence was a public reprimand.¹⁷²

Some have used the rational actor model to argue that allowing the attorney to maintain discretion in deciding whether to disclose confidences will not result in actual disclosure in practice.¹⁷³ If the costs outweigh the benefits, then the simple economic model dictates that the lawyer will not disclose. This much is supported by the instant study: the highest level of agreement among the lawyers-to-be was reflected in the consensus that if disbarment would result, then they would not disclose (200/260). The significance of the self-interest assumption is that it allows economists to predict changes in individual behavior in response to changes in economic variables.¹⁷⁴ However, the self-interested rational actor model does not take into consideration the subjective costs and benefits of the decision not to disclose—another type of cost. The model fails to account for the guilt associated with allowing an innocent man spending his life in prison. The potential psychological ramifications that may result from non-disclosure elude

that a lawyer may engage in any conduct that leads to a higher fee. Both lawyers are making decisions about the rightness or wrongness of conduct.”).

169. See DZIENKOWSKI, *supra* note 91, at 109–15 (providing that Arizona, Connecticut, Florida, Illinois, Nevada, New Jersey, North Dakota, Tennessee, Texas, Vermont, Virginia, and Wisconsin are the only states which require a lawyer to disclose confidential information); Mohr, *supra* note 23, at 351.

170. Rosenthal, *supra* note 11, at 168.

171. *Id.* at 167 (pointing out that the reputation of a criminal defense attorney travels swiftly through the ranks of criminal defendants and once the attorney is labeled as untrustworthy, that attorney may be hard pressed to retain any future clients).

172. See app., question five (providing that 48% of lawyers would not disclose if public reprimand would result, whereas 43% would not if unspecified monetary sanction would result).

173. See McGowan, *supra* note 13, at 1828 (“A simple rational actor assumption suggests that lawyers are reluctant to create costs for themselves.”).

174. BUTLER & DRAHOZAL, *supra* note 66, at 5.

measurement and the hypothetical lawyer cannot be made whole unless disclosure is made. Certainly, not all lawyers would feel a sense of perpetual guilt, but indeed some may.¹⁷⁵ Whatever the personal costs and benefits may be, the discretion should remain with the lawyer to weigh them accordingly in a contextual setting.

A mandatory rule might cause more harm than good. A lawyer's professional responsibility necessarily carries with it a duty to exercise discretion by considering the relevant legal issues.¹⁷⁶ Since a rigid rule dictates what the lawyer shall do when given a particular happening of a small number of factors, it thereby leaves the lawyer with no discretion to consider factors that are not specified under the rules. This presents a problem because given the nature of the legal practice, few fact patterns are the same. Ultimately, by requiring a given response, a mandatory disclosure rule disregards this fundamental premise. Consider the client's confession in the hypothetical. After some probing questions, the lawyer reasonably believes that B is telling the truth and he is the one who committed the crime. Now consider a second situation in which the client's confession is questionable and the alleged facts are not adding up. Out of a fear of disciplinary action against her if she did not disclose, the second lawyer reveals the information that turns out to be false. She might have caused more harm than would have resulted under a discretionary rule, which would have allowed a proper consideration of all the relevant factors. A person's credibility is unquestionably relevant and may be hard to make. A discretionary rule might have allowed the second lawyer to meet with the prosecuting attorneys to get a stronger understanding of the facts of the case, thereby leading to the conclusion that the client is not credible. Now, subject to potential civil damages and being stigmatized amongst potential clients, lawyer two has done more harm than good; both to herself and to the administration of justice. This admittedly exceptional situation demonstrates at least one way in which a rigid rule might be counterproductive and not allow for contextual judgment.

Credibility aside, a permissive exception recognizes the importance in allowing the lawyer to assess the substantive merit (i.e., admissible evidence) and to decide whether or not she should disclose. This allows the lawyer to determine if the confession is or might be admissible as evidence, and even if the confession is admissible, if it is

175. The lawyer in Logan's case said he thought about it every day; there wasn't a day that went by where he didn't consider it. 60 Minutes, *supra* note 7.

176. Levine, *supra* note 13, at 188 (citing Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265 (2006)).

enough to vindicate A and induce a court to overturn his conviction. Several actual cases are illustrative of the issues a lawyer may face when confidentiality rules clash with evidentiary rules relating to the attorney-client privilege.¹⁷⁷ The rules of hearsay also present troubling and arguably unresolved legal issues to the hypothetical lawyer, which are beyond the scope of this Comment.¹⁷⁸

Furthermore, the hypothetical attorney, after having decided that she has admissible evidence, must then decide if said evidence is sufficient to meet the burden of production and burden of persuasion. In most jurisdictions, the burden of proof at trial differs from the burden in post-conviction proceedings.¹⁷⁹ To obtain an acquittal, a defendant bears no burden of proof and the state must prove each element of the charged offense beyond a reasonable doubt.¹⁸⁰ A defendant on a post conviction writ, however, typically bears a heavy burden.¹⁸¹ Thus, what burden will apply to a given proceeding indefinitely raises yet another question a rigid rule cannot conceivably address: *when* should the disclosure occur? The proposed permissive exception states that the lawyer may reveal the information to *prevent* the wrongful incarceration of another person. Considering the fact that juries are unpredictable,

177. See *Morales v. Portuondo*, 154 F. Supp. 2d 706, 730–31 (S.D.N.Y. 2001) (relying on *Chambers v. Mississippi*, 410 U.S. 284, 302–03 (1973) (permitting a lawyer to disclose that his deceased client had confessed to a murder for which another man was convicted on the grounds that habeas action due process required admission of the evidence to guarantee fundamental fairness to the defendant)); see also *State v. Macumber*, 544 P.2d 1084, 1086 (Ariz. 1976) (refusing to admit the testimony of the attorneys which might have revealed the wrongful conviction on the grounds that it violated attorney-client privilege); *State v. Valdez*, 618 P.2d 1234, 1237 (N.M. 1980) (holding attorney-client privilege prevented lawyer from testifying that a former client confessed to a robbery); *State v. Doster*, 284 S.E.2d 218, 220 (S.C. 1981) (applying attorney-client privilege to prevent lawyer from testifying about deceased client's statements that may have exonerated defendant).

178. See generally FED. R. EVID. 801–804. Since “B” in the hypothetical scenario would likely plead the 5th in a proceeding, it is likely he would be “unavailable” under FRE 804(a)(1). In consequence, the key question is whether the declarant, in this case “B”, made a statement against interest under FRE 804(b)(3) becomes at least one potential issue. Also, if introduced during trial by defense counsel of the accused, the statement then becomes double hearsay: statements relating to someone else's statements. See, e.g., *Portuondo*, 154 F. Supp. 2d at 730–31.

179. See generally Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449 (2001).

180. *In re Winship*, 397 U.S. 358, 361 (1970).

181. See, e.g., *Ex parte Thompson*, 153 S.W.3d 416, 417 (Tex. Crim. App. 2005). A defendant seeking to overturn a conviction based on newly discovered evidence indicating actual innocence must show “that the newly discovered evidence unquestionably establishes his or her innocence.” *Id.* (quoting *Ex parte Elizando*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996)). To grant relief, “the reviewing court must believe that no rational juror would have convicted the applicant in light of the newly discovered evidence.” *Id.* (quoting *Ex parte Elizando*, 947 S.W.2d 202, 207 (Tex. Crim. App. 1996)).

one lawyer may choose to await the verdict before disclosing while another may decide to disclose before the jury comes back. While different states may place different burdens on defendants seeking post-conviction relief on actual innocence grounds, the burden of proof is yet another factor the hypothetical lawyer must consider, as it might be insurmountable in certain contexts. Such questions are contextually driven and should be left up to the lawyer under a permissive exception.

Still other considerations remain. Although the lawyer in the hypothetical might be barred from disclosing such information in a court of law because of evidentiary barriers, the lawyer may reveal the information to the accused's defense counsel, the prosecutor, the governor, or the press. Such disclosures might lead to revelations about the case that otherwise might not have been available, which could prevent wrongful incarceration.¹⁸² For example, the revelation might help a wrongfully convicted person attract public support and attention, prompt the prosecution to re-examine the case, or lead a state governor to consider his unchecked executive power of pardon. It might also lead to a re-investigation that might reveal, for example, DNA evidence, transforming the underlying dispute into a matter of science as opposed to a matter of law.

The hypothetical lawyer also has one last consideration, which is arguably the most important: the effect that disclosure would have on his client, B. Fundamental to the rules on confidentiality are two notions: (1) it is a duty, which is a basic obligation; and (2) it is owed to the client, and not to society in general. Thus, in considering a breach of this duty, the hypothetical lawyer must be cognizant of the client's interests, and what a breach would mean to the client. Reflecting the second highest level of agreement among the pool, the lawyers-to-be recognized the importance of the client's interests and how the client would be affected. One hundred and ninety-seven of the 260 surveyed, or 77%, responded that they might or would disclose client B's confession if they knew he would not be implicated and suffer criminal consequences (62% would; 15% might).¹⁸³ The question is concededly imperfect because it lacks a pecuniary element of consequence; but it is informative. Interestingly, of those who understood the rules (got-it-right) and also said they might disclose regardless of what the rules said, nearly half (49%) changed their minds and said they would disclose if their client, B, would not suffer criminal consequences. Overall, the client's interests add another piece of the puzzle for the lawyer to

182. See e.g., Joy & McMunigal, *supra* note 8, at 47.

183. See *supra* tbl. IV.

consider, and a permissive rule, as opposed to a mandatory one, would allow the lawyer to mull over these considerations.

The multitude of both legal and practical considerations facing the hypothetical lawyer are astounding and cannot be taken into account by the rules of professional responsibility. Discretionary disclosure allows for an analytical and efficient case-by-case determination, resulting in proper service to the court, the client and society.¹⁸⁴ Therefore, by allowing the discretion to remain with the lawyer, the rules better serve the interests of all parties involved and better promote the overall administration of justice—something a one-size-fits-all rule could never accomplish.

CONCLUSION

The study presented herein is by no means meant to be conclusive; it seeks only to uniquely add to the scholarly debate on confidentiality and wrongful incarceration. Thus, overreliance on the study is cautioned against because its methodology is somewhat unscientific.¹⁸⁵ Although this Comment advocates the adoption of a new exception to confidentiality, the relevant data it provides should prove important to both proponents and opponents of confidentiality exceptions alike because, as with most empirical evidence, differing interpretations are possible. The study's methodologies are imperfect and the results are not definitive, but they serve an important function for ABA code drafters: avoiding unsupported theoretical assumptions about attorney-client behavior and its relation to confidentiality's exceptions.

This Comment is not the first to advocate for the inclusion of a wrongful incarceration exception to the ABA's Model Rule 1.6,¹⁸⁶ and it should not be the last. As of June 1997, only Massachusetts' Rules of

184. Hicks, *supra* note 13, at 317 (citing Limor Zer-Gutman, *Revising the Ethical Rules of Attorney-Client Confidentiality Towards a New Discretionary Rule*, 45 LOY. L. REV. 669, 689 (1999)).

185. NOREEN CHANNELS, *SOCIAL SCIENCE METHODS IN THE LEGAL PROCESS* 53–81, 148–81 (Rowan & Allanheld 1985).

186. See Cramton & Knowles, *supra* note 6, at 124; see also Miller, *supra* note 115, at 393 (pointing out that in 1979, the ABA's Kutak Commission prepared a draft proposal which allowed a lawyer to disclose to the extent necessary to prevent wrongful detention (citing Daniel Walfish, *Making Lawyers Responsible for the Truth: The Influence of Marvin Frankel's Proposal for Reforming the Adversary System*, 35 SETON HALL L. REV. 613, 631 n.99 (2005))); see generally Alschuler, *supra* note 6, at 355 (“[W]hen a client has confessed that he is guilty of a crime and has given his lawyer information that he would not have known unless he were guilty in fact, the lawyer ought at least attempt to prevent the imprisonment . . . of another person for this crime.” (citing THE AMERICAN LAWYER'S CODE OF CONDUCT: PUBLIC DISCUSSION DRAFT, JUNE 1980 §1.2 Alternative A) (1980))).

Professional Conduct has adopted an exception for wrongful incarceration.¹⁸⁷ The Innocence Project has reported that there have been 223 post-conviction DNA exonerations in United States history.¹⁸⁸ Another recent study indicates that there were 340 exonerations in our criminal justice system between 1989 and 2003, including 196 that did not involve DNA evidence.¹⁸⁹ The common themes that run through these cases and that plague our criminal justice system are eyewitness misidentifications, corrupt scientists, overzealous police and prosecutors, and inept defense counsel.¹⁹⁰ Whatever the cause, the effect cannot continue to be ignored. The ABA's motto is "Defending Liberty, Pursuing Justice."¹⁹¹ It is the assertion of this Comment that the ABA can best defend liberty by announcing the adoption of a new exception to confidentiality, which is grounded in the fundamental notion that physical liberty outweighs client candor. The recent trend to relax the duty of confidentiality in the face of a greater good is a testament to our partial progress. Only one step remains.

Only one-quarter of lawyers find that legal practice has lived up to their expectations in contributing to the social good, and this lack of contribution is the greatest source of career dissatisfaction.¹⁹² Ethical mandates can frequently conflict with moral initiative, oftentimes making a good person and a good lawyer mutually exclusive creatures. Lawyers who feel compelled to do the right thing deserve more support from the organized bar. A great number of law students enter the profession partly out of a commitment to social justice, only to find out that the connection has been partially lost. Too often, lawyers have "file[ed] a demurrer, rather than an answer, to the charge of immorality."¹⁹³ Lawyers must not be deterred by what has been, but rather, use the profession as a means to rebuild the bond with society and push the system closer to justice as most Americans conceive it. The special obligations to pursue justice and uphold the rule of law necessarily carry with it a greater accountability for the performance of

187. MASS. RULES OF PROF'L CONDUCT R. 1.6(b)(1) ("A lawyer may reveal . . . such information . . . to prevent the wrongful execution or incarceration of another.").

188. Innocence Project Case Profiles, available at <http://www.innocenceproject.org/know/> (last visited Nov. 14, 2008).

189. ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY, REPORT OF THE ABA CRIMINAL JUSTICE SECTION'S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS (2006).

190. *Id.*

191. See ABA Home Page, <http://www.abanet.org>.

192. ABA Young Lawyers Division Survey: Career Satisfaction 19 (2000).

193. Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 674 (1978).

the system as a whole. The system, although efficient, is not perfect. The rules which lawyers model their behavior after should reflect this imperfection by allowing lawyers to correct grave misfortunes had by the likes of Alton Logan, who spent more than a quarter century in prison, while an affidavit attesting to his innocence remain locked away in a lawyer's closet.¹⁹⁴

194. See generally Miller, *supra* note 115.

APPENDIX¹⁹⁵

Instructions to read before distributing survey: I have been asked to administer a survey to you to gather law student's perspective and opinion on a matter. I would ask that you take it seriously and think about your answers as the issues it presents may one day effect you as future attorneys. It should not take more than a few minutes. I cannot say anything more about the survey. Your responses will remain completely anonymous unless you choose otherwise.

Instructions for law students: all answers will remain anonymous.

Please answer the questions in the order they appear. Do not read the next question until you have answered the first. Answer to the best of YOUR knowledge.

1) What year of law school are you currently in?

2) Have you taken Professional Responsibility yet?

3) Under current ABA standards regarding lawyer-client confidentiality, please read the following hypothetical and answer the questions that follows.

"A", a stranger to you, has been convicted by a jury of his peers and sentenced to life imprisonment. "B", also a stranger, comes into your law office and you agree to represent him on an unrelated matter. During the course of your representation, B tells you that he committed the crime for which A is currently serving his life sentence. After some probing questions on the matter you reasonably believe that B is telling the truth and he is the one who did the crime. "B" refuses to voluntarily disclose the information.

1) UNDER CURRENT ABA STANDARDS, MAY YOU DISCLOSE THIS INFORMATION?

(Please Check One)

Must Disclose _____ May Disclose _____ Must Not Disclose _____

2) UNDER CURRENT ABA STANDARDS, MAY YOU DISCLOSE THIS INFORMATION IF YOU KNEW THAT "A" WAS BEING ASSAULTED IN PRISON CAUSING HIM SUBSTANTIAL BODILY HARM? (Please Check One)

195. The survey has been recreated exactly as it appeared when utilized by the author.

Must Disclose _____ May Disclose _____ Must Not Disclose _____

3) WOULD YOU DISCLOSE REGARDLESS OF WHAT THE RULES MIGHT SAY?

(Please Check One)

Would Disclose _____ Would not disclose _____ Maybe _____

If you answered maybe, please explain why.

4) WOULD YOU DISCLOSE INFORMATION THAT MIGHT RESULT IN "A's" RELEASE FROM PRISON IF YOU KNEW THAT YOUR CLIENT "B" WOULD NOT BE IMPLICATED AND SUFFER CRIMINAL CONSEQUENCES?

Yes _____ No _____ Maybe _____

If you answered maybe, please explain why.

5) WOULD YOU DISCLOSE THIS INFORMATION IF THE CONSEQUENCES WOULD BE . . .

Disbarment: Yes ___ No ___

Suspension: Yes ___ No ___

Monetary Sanction: Yes ___ No ___

Public Reprimand: Yes ___ No ___

6) DO YOU THINK YOU SHOULD BE ABLE TO DISCLOSE THIS INFORMATION? WHY OR WHY NOT?

Yes _____ No _____ Maybe _____

7) IF ATTORNEYS WERE ALLOWED TO DISCLOSE IN CASES SUCH AS THIS, DO YOU THINK THAT WOULD MAKE PEOPLE LESS WILLING TO USE AN ATTORNEY'S SERVICES?

Yes _____ No _____ Maybe _____

OVERALL RESULTS

Question One: Under current ABA standards, may you disclose this information?

Year of Study	Must Disclose	May Disclose	Must Not Disclose
1 st (115)	30	17	68
.....			
2 nd (91)	6	39	46
.....			
3 rd (54)	2	8	44
.....			
Overall	38	64	145

Question Two: Under the current ABA standards, may you disclose this information if you knew that "A" was being assaulted in prison causing him substantial bodily harm?

Year of Study	Must Disclose	May Disclose	Must Not Disclose
1 st (115)	39	26	50
.....			
2 nd (91)	17	55	19
.....			
3 rd (54)	3	18	33
.....			
Overall	59	99	102

Question Three: Would you disclose regardless of what the rules might say?

Year of Study	Would Disclose	Would Not Disclose	Maybe
1 st (115)	39	47	31
.....			
2 nd (91)	39	29	24
.....			
3 rd (54)	25	12	16
.....			
Overall	103	88	71

Question Four: Would you disclose information that might result in "A"'s release from prison if you knew that your client "B" would not be implicated and suffer criminal consequences?

Year of Study	Yes	No	Maybe
1 st (115)	70	32	12
.....			
2 nd (91)	58	18	13
.....			
3 rd (54)	33	10	11
.....			
Overall	161	60	36

Question Five:

Would you disclose this information if the consequences would be disbarment?

Year of Study	Yes	No
1 st (115)	19	86
.....		
2 nd (91)	20	68
.....		
3 rd (54)	13	36
.....		
Overall	52	200

Would you disclose this information if the consequences would be suspension?

Year of Study	Yes	No
1 st (115)	46	59
.....		
2 nd (91)	37	49
.....		
3 rd (54)	18	30
.....		
Overall	101	138

Would you disclose if the consequences would be monetary sanction?

Year of Study	Yes	No
1st (115)	65	39
.....		
2nd (91)	47	38
.....		
3rd (54)	28	20
.....		
Overall	130	97

Would you disclose if the consequences would be public reprimand?

Year of Study	Yes	No
1st (115)	49	57
.....		
2nd (91)	48	37
.....		
3rd (54)	29	20
.....		
Overall	126	114

Question Six: Do you think you should be able to disclose this information? Why or why not?

Year of Study	Yes	No	Maybe
1 st (115)	65	26	17
.....			
2 nd (91)	60	19	13
.....			
3 rd (54)	33	11	6
.....			
Overall	158	56	36

Question Seven: If attorneys were allowed to disclose in cases such as these, do you think that would make people less willing to use attorneys services?

Year of Study	Yes	No	Maybe
1 st (115)	59	19	37
.....			
2 nd (91)	45	26	17
.....			
3 rd (54)	17	16	16
.....			
Overall	121	61	70



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

May 6, 2010

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.6

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 1.6 - Confidentiality of Information. COPRAC supports the adoption of proposed Rule 1.6 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

May 6, 2010

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re:

RULE	TITLE
Rule 1.0	Purpose and Scope of the Rules of Professional Conduct
Rule 1.0.1	Terminology *BATCH 6*
Rule 1.1	Competence
Rule 1.2	Scope of Representation and Allocation of Authority Between Client and Lawyer
Rule 1.4	Communication
Rule 1.4.1	Disclosure of Professional Liability Insurance *BATCH 6*
Rule 1.5	Fee for Legal Services
Rule 1.5.1	Financial Arrangements Among Lawyers
Rule 1.6	Confidential Information of a Client
Rule 1.7	Conflict of Interests: Current Clients
Rule 1.8.1	Business Transactions with a Client and Acquiring Interests Adverse to the Client
Rule 1.8.2	Use of a Current Client's Confidential Information
Rule 1.8.3	Gifts from Client
Rule 1.8.5	Payment of Personal or Business Expenses Incurred by or for a Client
Rule 1.8.6	Payments Not From Client
Rule 1.8.7	Aggregate Settlements
Rule 1.8.8	Limiting Liability to Client
Rule 1.8.9	Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review
Rule 1.8.10	Sexual Relations with Client
Rule 1.8.11	Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9)
Rule 1.9	Duties to Former Clients
Rule 1.11	Special Conflicts for Former and Current Government Officers and Employees *BATCH 6*
Rule 1.12	Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
Rule 1.13	Organization as Client
Rule 1.14	Client with Diminished Capacity
Rule 1.15	Handling Funds and Property of Clients and Other Persons
Rule 1.16	Declining or Terminating Representation
Rule 1.17	Purchase and Sale of a Law Practice *BATCH 6*
Rule 1.18	Duties to Prospective Clients *BATCH 6*
Rule 2.1	Advisor
Rule 2.4	Lawyer as a Third-Party Neutral
Rule 2.4.1	Lawyer as a Temporary Judge
Rule 3.1	Meritorious Claims
Rule 3.3	Candor Toward the Tribunal
Rule 3.4	Fairness to Opposing Party and Counsel
Rule 3.5	Impartiality and Decorum of the Tribunal
Rule 3.6	Trial Publicity
Rule 3.7	Lawyer As A Witness

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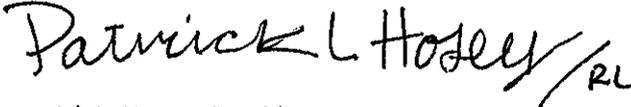
Rule 3.8	Special Responsibilities of a Prosecutor
Rule 3.9	Advocate in Non-adjudicative Proceedings *BATCH 6*
Rule 3.10	Threatening Criminal, Administrative, or Disciplinary Charges
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Rule 5.1	Responsibilities of Partners, Managers, and Supervisory Lawyers
Rule 5.2	Responsibilities of a Subordinate Lawyer
Rule 5.3	Responsibilities Regarding Nonlawyer Assistants
Rule 5.3.1	Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member
Rule 5.4	Duty to Avoid Interference with a Lawyer's Professional Independence
Rule 5.5	Unauthorized Practice of Law; Multijurisdictional Practice
Rule 5.6	Restrictions on Right to Practice
Rule 6.1	Voluntary Pro Bono Publico Service *BATCH 6*
Rule 6.2	Accepting Appointments *BATCH 6*
Rule 6.3	Legal Services Organizations
Rule 6.4	Law Reform Activities
Rule 6.5	Limited Legal Services Programs *BATCH 6*
Rule 7.1	Communications Concerning the Availability of Legal Services
Rule 7.2	Advertising
Rule 7.3	Direct Contact with Prospective Clients
Rule 7.4	Communication of Fields of Practice and Specialization
Rule 7.5	Firm Names and Letterheads
Rule 8.1	False Statement Regarding Application for Admission to Practice
Rule 8.1.1	Compliance with Conditions of Discipline and Agreements in Lieu of Discipline
Rule 8.2	Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6*
Rule 8.3	Reporting Professional Misconduct
Rule 8.4	Misconduct
Rule 8.4.1	Prohibited Discrimination in Law Practice Management and Operation
Rule 8.5	Disciplinary Authority; Choice of Law

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,



Patrick L. Hosey, President
San Diego County Bar Association



**SAN DIEGO COUNTY
BAR ASSOCIATION**

November 11, 2009

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Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Comments to Proposed Amendments to the Rules of Professional Conduct of
The State Bar of California (Batch 5)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit
the attached comments to Batch 5 of the Proposed Amendments to the Rules of
Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics
Committee, and have been approved by our Board of Directors.

Sincerely,

Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee
Edward J. McIntyre, Co-Chair, SDCBA Legal Ethics Committee

SDCBA Legal Ethics Committee
Subcommittee for Responses to Requests for Public Comment
Coversheet to Recommendations on State Bar of California Rules Revision Commission
Batch 5

- Rule 1.2 Scope of Representation [N/A]
APPROVE
- Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]
APPROVE WITH MODIFICATIONS – see comments**
- Rule 1.8.2 Use of Confidential Information [3-100, 3-310]
APPROVE
- Rule 1.8.13 Imputation of Personal Conflicts [N/A]
APPROVE
- Rule 1.9 Duties to Former Clients [3-310]
APPROVE
- Rule 1.10 Imputation of Conflicts: General Rule [N/A]
APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)
- Rule 1.12 Former Judge, Arbitrator, Mediator [N/A]
APPROVE WITH MODIFICATIONS – see comments
- Rule 1.14 Client with Diminished Capacity [N/A]
APPROVE
- Rule 2.1 Advisor [N/A]
APPROVE
- Rule 3.8 Responsibilities of a Prosecutor [5-110]
NO POSITION TAKEN – see comments
- Rule 8.5 Choice of Law [1-100(D)] SIMMONS
APPROVE

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC) Batch 5
SDCBA Legal Ethics Committee Deadline October 8, 2009
Subcommittee Deadline October 26, 2009
State Bar Comment Deadline November 13, 2009

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: 3-100, B&P § 6068(e)

Proposed New Rule No./ Title: 1.6

QUESTIONS (please use separate sheets of paper as necessary):

(1) Is the **policy** behind the new rule correct? If “yes,” please proceed to the next question. If “no,” please elaborate, and proceed to Question #4.

Yes [– in part] No [– in part]

Given Cal. Bus. & Prof. Code § 6068(e), the Rules Revision Commission very smartly departed from Model Rule 1.6 and adhered more closely to California Rule 3-100 and § 6068(e)’s high level of respect for the protection of client confidences.

The only questionable policy concerns are raised by proposed Rule 1.6(a) and 1.6(b)(3). If the Committee decides against adoption of Rule 1.14(b), then Rule 1.6(b)(5) also should be addressed. Rule 1.6(b)(5) refers lawyers to Rule 1.14(b), and allows disclosures to protect the interests of a client under the limited circumstances identified in Rule 1.14(b). Although Rule 1.6(b)(5) adds a significant exception to the duty to keep client confidences, the policy behind its addition is correct in light of proposed Rule 1.14(b), which allows a lawyer to act on behalf of a client with significantly diminished capacity.

Rule 1.6(a)

The Introduction to Proposed Rule 1.6 notes that the Commission is substantially divided regarding the addition to Rule 1.6(a) appearing in **bold** below:

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). **The information protected from disclosure by section 6068(e)(1) is referred to as “confidential information relating to the representation” in this Rule.**

By adding the sentence in bold, the majority of the Commission attempted to harmonize § 6068(e)(2) with § 6068(e)(1). However, this harmonization is unnecessary given the clear statutory language of § 6068(e), and the result of the Commission’s attempt at harmonization is to weaken § 6068(e)’s protection for client confidences overall.

Section 6068(e)(1) protects all client confidences, and not just those “related to the representation.” Section 6068(e)(2) permits the disclosure of confidences “related to the representation” in a very narrow instance, i.e., to prevent a crime that will result in death or substantial bodily harm. In other words, under § 6068(e)(1), an attorney has a duty to preserve all client confidences, regardless of whether they are related to the representation. Under § 6068(e)(2), an attorney may reveal only those confidences “related to the representation” in a very narrow instance.

The Commission’s proposal to define information protected from disclosure by § 6068(e)(1) as “confidential information relating to the representation” could be read to weaken California’s traditional protection of client confidences. Given its express wording, the second sentence of proposed Rule 1.6(a) is confusing at best, because it could arguably allow attorneys to reveal confidences not related to the representation. It interprets only confidences “related to the representation” as protected by § 6068(e)(1). The proposed sentence also is confusing as to whether Rule 1.6(b)(2) (exception for attorney to secure legal advice) and 1.6(b)(5) (exception in Rule 1.14(b) circumstances) would apply only when the confidential information of a client was “related to the representation.” The wording proposed by the **minority** is preferable and clearer.

Minority Proposal for Rule 1.6(a), (b)(1).

- (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). **The information protected from disclosure by section 6068(e)(1) is referred to as “confidential information” in this Rule.**

- (b) A lawyer may, but is not required to, reveal confidential information of a client to the extent that the lawyer reasonably believes the disclosure is necessary:
 - (1) **when the information relates to the representation of a client,** 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);

Rule 1.6(b)(3)

Rule 1.6(b)(3) provides an exception to the duty to keep client confidences when a duty relating to the attorney-client relationship has been breached:

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;

This paragraph, although intended by the Commission to track Cal. Evid. Code § 958, in fact goes far beyond the statutory exception to the attorney-client privilege in California. The exception set forth in § 958 applies only when a court determines that the exception applies. By contrast, proposed Rule 1.6(b)(3) would allow each individual attorney to make that determination. As a practical matter, it seems impossible for any attorney involved in such a client conflict to make a truly impartial determination of whether the Rule 1.6(b)(3) exception applies. This determination is better left to an impartial court. *See* Evid. Code § 958. California's respect for client confidences should not be lessened by the inclusion of Rule 1.6(b)(3).

Nonetheless, in the interest of uniformity, the recommendation is to replace the proposed paragraph with the provision of the ABA Model Rules, set forth in 1.6(b)(5).

(2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [] No []

(3) Is the new rule **worded correctly and clearly**? If "yes, please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [– in part] No [– in part]

Yes, with the exception of sub-part 1.6(a) and (b)(3), as stated above.

(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [] No []

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

CONCLUSIONS (pick one):

[] We approve the new rule in its entirety.

[] We approve the new rule with modifications.* Modify 1.6(a) and 1.6(b)(3) as indicated above.

[] We disapprove the new rule and support keeping the old rule.

We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*

We abstain from voting on the new rule but submit comments for your consideration.*

* If you select one of the * options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.

May 16, 2010

2715 Alcatraz Ave.
Berkeley, CA 94705

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Comments on proposed new or amended rules of Professional Conduct:
adjustments needed for non-litigators and government attorneys

Dear Ms. Hollins:

I appreciate this opportunity to comment on the draft new or amended rules of Professional Conduct under consideration by the Special Commission for the Revision of the Rules of Professional Conduct. I have been a member of the California bar for 28 years, much of that time as a non-litigating, in-house attorney for a non-regulatory governmental agency, and I comment from that perspective.

The proposed rules, understandably, are meant to apply to attorneys in California in all types of public and private employment. In a number of places, the proposed rules do recognize unique considerations applicable to attorneys engaged in differing types of work. But I believe that several proposed rules could be strengthened by specifying the particular manner in which they are meant to affect public, in-house attorneys, or by the addition of clarifying, official comments. I have described some potential problems below, and have made some suggestions.

- ~~1. Proposed Rule 1.7 (Conflict of Interest: Current Clients). The proposed Rule should be modified slightly to more fully recognize additional types of potential conflicts faced by some public sector attorneys.~~

~~Governmental attorneys employed by one public agency, are sometimes asked or expected by their employer to provide advice, often transactional or other non-litigation advice, on a long-term, continuing basis to one or more other, especially small, agencies that lack or cannot afford their own counsel— a city and a port district or a redevelopment agency, a county and a resource conservation district, two or more different boards that may have overlapping subject or geographical jurisdiction. In these situations, potential or actual conflicts of interest may arise at any time, at the very least risking a material limitation on the scope of the representation to one entity or the other. The~~

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Comments on Draft Rules of Professional Conduct

~~conflict issues are not always foreseeable before they arise or before one entity or the other has confided in the attorney. Under the Rule, an attorney may sometimes proceed, but only upon obtaining the informed consent of both entities. Yet an “informed” consent by the two entities in advance, pertaining to a contemplated, general course of conduct for the indefinite future, is almost a contradiction, and difficult to invent.~~

~~The first question in these situations is, who is the attorney’s client? The employer public agency only, or also the other public entity to which the employer asks the attorney to provide services? Who may rely or can reasonably expect to rely on the advice? Who may confide and rely on the confidentiality of the communication?~~

~~These issues arise in at least two ways in non-litigation contexts: first, in direct relations between the two entities – for example a contract between the two entities that requires legal review. Second, and more usually, with respect to legal advice related to intended agency positions on substantive governmental issues, competition for budgets, or competing desires of the two potential “masters,” each of which may expect undivided loyalty. Further complicating the matter is the fact that most public agencies must act “on the record”; a complete discussion and informed consent might well require revealing confidential information at a public meeting, thus posing an awkward problem, as well as a paradox, possibly to the detriment of the two entities.~~

~~While the draft official comments do mention conflicting instructions and inconsistent interests (see draft official comment [29], for example), they do not adequately address potential conflicts that can arise at any time during the long-term assignment of a public attorney to also provide advice to a second, non-employing entity. As a practical matter, to allow the provision of adequate legal services to small public agencies, I suggest a limited exception to the client-consent requirement, allowing the public attorney to inform the two agencies in writing generally about the types of conflicts that could arise. The Rule could also specify that it is not meant to apply to non-litigation representation of public agencies.~~

- Proposed Rule 1.6 (Confidential Information of a Client). The proposed Rules should be augmented to allow a limited public attorney right to breach confidentiality in the public interest.

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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.

- ~~3. Proposed Rule 1.16 (Declining Or Terminating Representation). The proposed Rule should be clarified as to the meaning of the term “a representation.”~~

~~In-house governmental attorneys are sometimes pushed, by their own entities or by “control agencies” into rendering or withholding advice in substance contrary to their professional judgment, or aiding an activity of questionable propriety in a particular matter, or otherwise acting in an inappropriate manner. These circumstances can arise with respect to transactional as well as with litigation attorney positions. (See Rule 1.16(b)(1), in relevant part: “making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument.”) The Rule should make clear that the in-house governmental attorney may or must (depending on the circumstances) withdraw from “a representation” in the particular matter, but would not be expected (except under the most extreme circumstances) to terminate the attorney’s full-time career employment with his or her agency. In other words, the term “a representation” should be clarified to refer, in most cases, to a particular matter, and not to the overall relationship between an in-house public counsel and his or her employer.~~

- ~~4. Proposed Rule 3.1 (Meritorious Claims and Contentions). The proposed Rule should be clarified as to the meaning of the term “proceeding.”~~

~~Under subdivision (a), “[a] lawyer shall not bring, continue or defend a proceeding. . . unless there is a basis in law and fact for doing so that is not frivolous. . . .” Official comment [4] states that “[t]his Rule applies to proceedings of all kinds, including appellate and writ proceedings.” But neither this Rule nor (draft) Rule 1.0.1 (Terminology) defines “proceeding.” (Compare Rule 3.3 (Candor Toward the Tribunal), pertaining to an “adjudicative proceeding”; and Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6]: “A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding. . . .”~~

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~~(Emphasis added.) Rule 3.1 should be clarified to indicate the extent to which it does or does not apply to arbitrations, mediations, and non-adjudicatory hearings and other matters (awards of grants by public bodies, for example; and processes by which public agencies select contractors and enter into agreement with them). Perhaps this can be accomplished through better integration of cross-references with proposed Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6], and rule 4.1 (Truthfulness in Statements to Others).~~

- ~~5. Proposed Rule 4.2 (Communication With a Person Represented By Counsel). The proposed Rule should clarify which public employees may be contacted by an outside attorney without permission of agency counsel.~~

~~Existing Rule 2-100 (Communication With a Represented Party) provides in subdivision (A) that a member may not “communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter. . . .” Subdivision (C)(1) provides an exception for “Communications with a public officer, board, committee, or body[.]” Perhaps because of the ambiguities inherent in the existing rule, it is often honored in the breach; outside lawyers frequently contact general public agency staff members regarding matters on which the agency is represented, without permission of agency counsel.~~

~~Proposed Rule 4.2 (Communication With a Person Represented By Counsel) provides in subdivision (a) that “a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter. . . .” Subdivision (c) states that the rule “shall not prohibit: (1) Communications with a public official, board, committee or body[.]” Unlike the existing rule, which does not define “public officer,” the proposed rule then defines “public official” in subdivision (g) as a “public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization, with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1).” Subdivision (b), in turn, identifies a “person” as: “(1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization[.]”~~

~~The proposed rule is more clear than the existing rule that it applies to non-litigation situations as well as to litigation situations, and that not all non-~~

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~~attorney governmental employees may be contacted by an outside lawyer without permission. However, the rule is still not adequately clear as to which governmental employees an outside lawyer may contact directly without violating the rule. "Officer" and "director" are reasonably clear. But "partner" and "managing agent" are not clear in the context of a governmental agency. "Partner" would not seem to apply at all. As for "managing agent," official comment [12] states that the term means "an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority."~~

~~Public agencies generally have supervisors, and sometimes a separate class of "managers" or "management employees." Lower level "line" staff often exercise at least some "discretion and judgment" with respect to their work, for example, the initial proposed content of a contract under negotiation. So, does the exception allowing contact by an outside attorney apply to all management employees? To supervisors? To all staff who exercise some judgment with respect to a particular matter? Public agencies and attorneys representing parties who deal with them need more clarity about whom they may contact without permission of agency counsel. A better approach would be to define "public official" in subdivision (g) with more detail, and independent of the cross-reference to business entities in subdivision (b). Outside lawyers should need to obtain permission of agency counsel before discussing most legal matters with non-attorney public agency staff.~~

- ~~6. Rule 6.1 (Voluntary Pro Bono Publico Service) [BATCH 6]. While attorneys should be encouraged to provide pro bono services, Rule 6.1 should not be included in the Rules of Professional Conduct, for several reasons.~~

~~Our society has many unmet needs, legal and otherwise. Whether and how these needs are met is a question of economics, the study of production and distribution of goods and services; and, primarily, politics. The Rule takes a particular political position, perhaps inadvertently, and is subject to political controversy and attack from both left and right. Should social production of wealth be distributed in a different manner, through revisions to the tax system and otherwise? Is an attempt to encourage or force attorneys to provide free services a form of indentured servitude? The Bar should avoid entangling itself in these disputes.~~

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~~Second, the Rule would appear to apply equally to very differently situated attorneys, including those who work for large private firms. After several decades of work, attorneys who have chosen to devote their careers to public service or nonprofit organizations often earn less than first-year associates at these private interest firms. There is something untoward about purporting to equally require affluent attorneys in large, private firms and less affluent attorneys engaged full time in public service to donate time to pro bono work, or, alternatively, donate money as part of "professional responsibility."~~

~~Third, as a practical matter, many public sector attorneys have donated many hours to their work, working during mandatory furlough days, weekends, and otherwise. They also, typically, do not receive time off to perform pro bono work, unlike many in private practice. Further, the State of California does not pay its attorneys for continuing legal education unrelated to an attorney's work, so that a state attorney seeking to perform pro bono work in another field would need to find additional time for training and funds to pay for it. The time and money required for this and the pro bono work itself are a far greater burden to less-affluent, governmental attorneys.~~

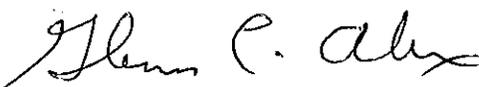
~~Finally, the Rule is largely written for litigation attorneys; non-litigation attorneys are not as well placed to provide direct representation to the indigent, at least not without substantial additional training to ensure competence.~~

~~The Bar should conclude, as it has in other contexts within the Rules that this subject is beyond the scope of the Rules. Instead of including Rule 6.1, the Bar should periodically send emails to all attorneys recommending pro bono work and listing numerous possibilities with contact information.~~

- ~~7. Proposed Rule 6.5 (Limited Legal Services Programs) [BATCH 6].
Subdivisions (a)(2) and (b), and official comments [1], [3], [4], and [5] refer to Rule 1.10, which does not seem to be included in the draft Rules.~~

Thank you again for the opportunity to comment on the draft Rules.

Yours truly,



Glenn C. Alex

Proposed Rule 1.6 [RPC 3-100; B&P §6068(e)] “Confidentiality of Information”

(ALT3, Draft #12, 2/28/10)

Summary: This amended rule refers to the duty of confidentiality encompassed by B&P §6068(e) and identifies limited exceptions, such as the permissive exception for revealing information to prevent a criminal act likely to result in death or substantial bodily harm. Following public comment, the Commission implemented a change in rule language to address concerns raised by several public commenters. See Introduction, paragraph 4.

Comparison with ABA Counterpart

Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input checked="" type="checkbox"/> Some material additions to ABA Model Rule	<input checked="" type="checkbox"/> Some material additions to ABA Model Rule
<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule	<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

- Existing California Law

Rule	RPC 3-100
Statute	Bus. & Prof. Code § 6068(e); Evid. Code §§950 et seq.
Case law	

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- Other Primary Factor(s)

California’s policy on client confidentiality has been historically and fundamentally different from the approach taken in the Model Rules. (See the introduction to the Model Rule comparison chart.)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 8
Opposed Rule as Recommended for Adoption 0
Abstain 1

Approved on Consent Calendar

Approved by Consensus

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority/Dissenting Position Included on Model Rule Comparison Chart: Yes No
(See the introduction and the explanation of paragraphs (a), (b)(3), (b)(4), and (b)(5) in the Model Rule comparison chart.)

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

See the introduction and the Explanation of paragraphs (a), (b)(3), (b)(4), and (b)(5) in the Model Rule comparison chart.

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.6* Confidentiality of Information

March 2010

(Draft rule following consideration of public comment)

INTRODUCTION:

1. Proposed Rule 1.6 is derived primarily from current California rule 3-100 and is only loosely based on Model Rule 1.6 for two principal reasons: First, there are inherent limitations on a Rule of Professional Conduct that addresses confidentiality because in California, the lawyer's duty of confidentiality is based on Business & Professions Code section 6068(e)(1). Rule 3-100 did not come into existence until July 2004, when the Legislature, as part of an enactment to create the first express exception to the statutory duty of confidentiality, engaged the Supreme Court and State Bar to draft and promulgate a rule of professional conduct to assist in the implementation of the amendment. Second, Model Rule 1.6 and its numerous exceptions are based on policy decisions that are inimical to California's traditional emphasis on client protection.
2. Accordingly, although proposed Rule 1.6 follows the basic Model Rule framework, the Commission recommends a Rule that more closely adheres to current rule 3-100, a rule that affords clients substantially more notice and protection than the Model Rule. To the extent the Rule includes exceptions not currently found in rule 3-100, they are exceptions already recognized in well-settled California law. What follows is a roadmap for consideration of the proposed Rule.
3. *Genesis of current California rule 3-100 and its continuation in proposed Rule 1.6.* In 2003, the Legislature passed and the Governor signed into law Assembly Bill 1101, which amended Bus. & Prof. Code § 6068(e) to provide for an exception that permits but does not require a lawyer to reveal confidential information to prevent a criminal act likely to result in death or

* Proposed Rule 1.6, ALT3, Draft 12 (2/28/10)

substantial bodily harm. AB1101 also provided in Section 3 of the Act 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.” The Legislature also identified in Section 3 a series of issues for the Task Force to address, including whether a lawyer must inform a client or a prospective client about the attorney's ability to reveal the client's or prospective client's confidential information to prevent a criminal act likely to result in death or substantial bodily harm, and whether the lawyer must take steps to dissuade a client from committing a criminal act before revealing the client's confidential information. In conformance with its statutory mandate, the Task Force drafted and proposed rule 3-100, which was adopted by the State Bar and approved by the Supreme Court, effective July 1, 2004. Current rule 3-100 is thus limited in scope to providing guidance to lawyers seeking to conform their conduct to sections 6068(e)(1) and (2). With one major exception, (see item #4, below), the Commission has, for the most part, retained the black letter and discussion paragraphs of rule 3-100. See paragraphs (a), (b)(1), (c), (d) and (e) of the black letter rule, and Comments [2]-[6], and [9]-[18], and the Explanation of Changes for each.

4. *Proposed change to language in public comment version of the Rule following public comment.* The Commission recommends a material change from the public comment draft of the Rule: the deletion of the second sentence of paragraph (a) in that draft. The second sentence had been added because of an apparent disjunction in language between the subdivisions of Bus. & Prof. Code § 6068(e), from which current rule 3-100 is derived, California being the only jurisdiction in which a lawyer's duty of confidentiality is set forth in a statute. Section 6068(e)(1) provides that it is the duty of every lawyer: “(e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” However, subdivision (2) of section 6068(e) provides an exception to the duty of confidentiality that permits a lawyer 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.” (Emphasis added). The Commission added a sentence to paragraph (a) of the public comment version of the Rule to link the concepts of “confidence” and “secret” in subdivision (e)(1) to the concept of “confidential information relating to the representation” in subdivision (e)(2), which it understood to be coterminous with the language in subdivision (e)(1).

However, both a minority of the Commission and a number of public commenters argued that the term “confidential information relating to the representation” is narrower than the very broad protection provided client confidential information in subdivision (e)(1) and, as a result, continued use of the term “confidential information relating to the representation” in proposed Rule 1.6 would have the effect of lessening protection for client confidential information. The minority, armed with the public comment that had expressed concerns with the continued importation of subdivision (e)(2)’s language into proposed Rule 1.6, convinced a majority of the Commission that the concerns were well-placed. That newly-created majority then voted to reject the public comment version and instead recommend that rule 3-100, revised to conform to new Rules format and style, be carried forward.

Subsequently, however, the drafters proposed an alternative to simply carrying forward current rule 3-100. This alternative involved deleting the second sentence of paragraph (a) of the public comment version and replacing the defined term, “information relating to the representation of a client” with “information protected by Business and Professions Code section 6068(e)(1).” By using the latter term, the breadth of protection provided by proposed Rule 1.6 is coterminous with the breadth of protection provided under section 6068(e)(1), which should assuage the concerns of the public commenters who communicated their concerns with using the phrase, “information relating to the representation of a client.” As to the concern that Rule 1.6 will now conflict with the statute, specifically the language of section 6068(e)(2), the Commission has concluded that there is nothing in the legislative history of either AB 1101 or the deliberations of the AB 1101 Task Force that would indicate that the Legislature intended to provide a scope of protection in subdivision (e)(2) that is different from the scope of protection in subdivision (e)(1). With that fact expressly recognized in proposed Rule 1.6, the Rule will give effect to the legislative intent and confusion and concern with the scope of protection provided under the Rule will be obviated.

5. *Model Rule exceptions to confidentiality are inimical to California’s strong policy favoring confidentiality.* Soon after the financial debacles involving Enron, Global Crossing and WorldCom early this decade, the ABA adopted by a close margin controversial exceptions to confidentiality that permit a lawyer to reveal a client’s confidential information to prevent or rectify a criminal act reasonably certain to result in financial injury or property loss to a third party. These provisions run

counter to California's policy of providing assurance to clients that their secrets are safe, which encourages client candor in communicating with the lawyer and provides the lawyer with the information necessary to promote client compliance with the law. In addition, the Model Rule incorporates the concept of "implied authority," a dangerous catchall that threatens to swallow the duty of confidentiality. Accordingly, the Commission recommends rejection of Model Rule 1.6(b)(2) and (3), as well as the Model Rule's concept that the lawyer has "implied authority" to disclose and use confidential client information, even without the client's consent.

6. *Minority.* A minority of the Commission objects to several provisions of the proposed Rule. See Explanation of Changes for paragraphs (b)(3), (b)(4) and (b)(5).
7. *Variation in Other Jurisdictions.* Model Rule 1.6 has arguably been subject to more variation among the jurisdictions that have adopted it (or perhaps more accurately, have adapted it) than any other Model Rule, ranging from states that prohibit disclosures of any information except to prevent death or substantial bodily harm, to those that *permit* disclosure to prevent financial injury, or even some states that mandate disclosure to prevent death or substantial bodily harm, or even to prevent a criminal act likely to result in financial injury. See "Selected State Variations," Model Rule 1.6, from Gillers, Simon & Perlman, REGULATION OF LAWYERS: STATUTES AND STANDARDS (2009), attached.

<p align="center"><u>ABA Model Rule</u> Rule 1.6 Confidentiality of Information</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.6 Confidentiality of Information</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).</p>	<p>(a) A lawyer shall not reveal information relating to the representation of a client <u>protected from disclosure by Business and Professions Code section 6068(e)(1)</u> unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).</p>	<p>COMPARISON TO MODEL RULE 1.6</p> <p>Paragraph (a) is based on both Model Rule 1.0(a) and Cal. rule 3-100(A).</p> <p>The first sentence is taken from Cal. rule 3-100(A), revised to conform to the syntax and structure of the Model Rule.</p> <p>The Model Rule's concept of "implied authorization" has been stricken. The Commission recommends its rejection because it is an exclusion from the general rule of confidentiality that would threaten to become a catchall exemption that swallows the rule of confidentiality.</p> <p>The Commission also recommends a material change from the public comment draft of the Rule: the deletion of the second sentence of paragraph (a) in that draft. The second sentence had been added because of an apparent disjunction in language between the subdivisions of Bus. & Prof. Code § 6068(e), from which rule 3-100 is derived, California being the only jurisdiction in which a lawyer's duty of confidentiality is set forth in a statute. Section 6068(e)(1) provides that it is the duty of every lawyer: "(e)(1) To maintain inviolate the <i>confidence</i>, and at every peril to himself or herself to preserve the <i>secrets</i>, of his or her client."</p> <p>However, subdivision (2) of section 6068(e) provides an exception to the duty of confidentiality that permits a lawyer to "reveal <i>confidential information relating to the representation</i> of a client to the extent that the attorney reasonably believes the disclosure is</p>

* Proposed Rule 1.6, ALT3, Draft 12 (2/28/10). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 1.6 Confidentiality of Information</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.6 Confidentiality of Information</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>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.” (Emphasis added). The Commission added a sentence to paragraph (a) of the Rule to link the concepts of confidence and secret in subdivision (e)(1) to “confidential information relating to the representation” in subdivision (e)(2), which it understood to be coterminous. However, as explained in the Introduction, the public comment suggested this approach created confusion and concern among the public commenters, so the Commission instead revised paragraph (b) of the Rule and deleted the second sentence of paragraph (a).</p>
<p>(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:</p>	<p>(b) A lawyer may, <u>but is not required to</u>, reveal information relating to the representation of a client protected by Business and Professions Code section 6068(e)(1) to the extent <u>that</u> the lawyer reasonably believes <u>the disclosure is</u> necessary:</p>	<p>COMPARISON TO MODEL RULE 1.6</p> <p>The introductory clause of paragraph (b) is also based on both the introductory clause of Model Rule 1.6(b) and the first part of current rule 3-100(B). The language of current rule 3-100(B) restates section 6068(e)(2) verbatim. However, as explained in the Introduction, the Commission recommends substituting the term “information protected by Business and Professions Code section 6068(e)(1)” for “confidential information relating to the representation of a client” as is provided in current rule 3-100(B). The remainder of current rule 3-100(B) is found in subparagraph (b)(1).</p>
<p>(1) to prevent reasonably certain death or substantial bodily harm;</p>	<p>(1) to prevent <u>a criminal act that the lawyer reasonably certain believes is likely to result in death of, or</u> substantial bodily harm <u>to, an individual, as provided in paragraph (c)</u>;</p>	<p>COMPARISON TO MODEL RULE 1.6</p> <p>See Explanation of Changes, introductory clause of proposed Rule 1.6(b), above. The language included in subparagraph (1) is taken verbatim from current rule 3-100, with the only change being the substitution of “lawyer” for “member.”</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.6 Confidentiality of Information</p>	<p align="center"><u>Commission’s Proposed Rule*</u> Rule 1.6 Confidentiality of Information</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;</p>	<p>(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;</p>	<p>COMPARISON TO MODEL RULE 1.6 The Commission recommends rejection of Model Rule 1.6(b)(2) and (b)(3), two exceptions to confidentiality that the ABA adopted in 2003. Both sections, which would permit a lawyer to disclose client information relating to the representation to prevent or rectify fraud, are inimical to California’s strong policy on lawyer-client confidentiality and, in the view of the Commission, misguided attempts to protect the public that ultimately are more harmful to the public.</p>
<p>(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;</p>	<p>(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;</p>	<p>COMPARISON TO MODEL RULE 1.6 See Explanation of Changes to Model Rule 1.6(b)(2).</p>
<p>(4) to secure legal advice about the lawyer’s compliance with these Rules;</p>	<p>(4) to secure legal advice about the lawyer’s compliance with these Rules <u>the lawyer’s professional obligations</u>;</p>	<p>COMPARISON TO MODEL RULE 1.6 Proposed Rule 1.6(b)(2) is based on Model Rule 1.6(b)(4). The substitution of “the lawyer’s professional obligations” for “these Rules” recognizes that, in California, a lawyer’s duties to a client derive not only from the Rules of Professional Conduct, but also from statutes and case law.</p>

<p style="text-align: center;"><u>ABA Model Rule</u> Rule 1.6 Confidentiality of Information</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u> Rule 1.6 Confidentiality of Information</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or</p>	<p>(53) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; <u>relating to establish a defense to a criminal charge or civil claim against an issue of breach by the lawyer based upon conduct in which or by the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of a duty arising out of the lawyer-client relationship;</u> or</p>	<p>COMPARISON TO MODEL RULE 1.6</p> <p>Proposed Rule 1.6(b)(3) is based on Model Rule 1.6(b)(5), which has been modified to track the language of Cal. Evidence Code § 958, which provides: "There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship."</p> <p>The exception in the Evidence Code to the lawyer-client privilege for a breach of duty arising from the lawyer-client relationship is substantially narrower than the corresponding exception in Model Rule 1.6(b)(5), which would permit the lawyer to reveal confidential information not only in controversies between the lawyer and client, but also between the lawyer and a third person. The breadth of Model Rule 1.6(b)(5) runs counter to California confidentiality policy and the Commission recommends its rejection.</p> <p><u>Minority.</u> A minority of the Commission opposes the inclusion of paragraph (b)(3). Proposed paragraph (b)(3) is based on an exception to the lawyer-client privilege found in Evidence Code section 958. However, the minority takes the position that exception applies only when a court makes that determination. The minority maintains that paragraph (b)(3) – uniquely among all of the statutory privilege exceptions – would strip the client of that impartial determination by allowing the lawyer to determine when to disclose information the lawyer is required to maintain under section 6068(e)(1).</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.6 Confidentiality of Information</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.6 Confidentiality of Information</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(6) to comply with other law or a court order.</p>	<p>(64) to comply with other law or a court order; <u>or</u></p>	<p>COMPARISON TO MODEL RULE 1.6</p> <p>Although the Commission recommends adoption of that part of Model Rule 1.6(b)(6) that permits compliance with a court order, it does not recommend adoption of the “other law” part of that provision. That phrase is too indeterminate to provide guidance to lawyers about when they might be permitted to reveal confidential client information and risks the unjustified disclosure such information.</p> <p><u>Minority.</u> A minority of the Commission objects to the inclusion of subparagraph (b)(4) in the Rule. The minority believes a lawyer’s duty is to resist the court order (per Section 6068(e)(1)) “at every peril to himself or herself.” A lawyer may not acquiesce in a court order. Rather, the lawyer is required to resist the order. That is what <i>People v. Kor</i>, cited at page 24 of the spreadsheet, says. “At every peril” does not merely require the lawyer to assert claims that the order is not authorized by other law or that the information is protected from disclosure. It requires the lawyer not to disclose, on pain of contempt. That duty is not cast aside as lightly as the proposed rule and Comment 18 suggest.</p>
	<p>(5) <u>to protect the interests of a client under the limited circumstances identified in Rule 1.14(b).</u></p>	<p>COMPARISON TO MODEL RULE 1.6</p> <p>The Commission recommends adoption of proposed paragraph (b)(4), which refers lawyers to proposed Rule 1.14, which would permit a lawyer to reveal confidential information to the extent necessary to protect the interests of a client who has “significantly diminished capacity” and is “at risk of substantial physical, financial or other harm unless action is taken.”</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.6 Confidentiality of Information</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.6 Confidentiality of Information</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p><u>Minority.</u> A minority of the Commission objects to proposed Rule 1.14, and thus to the inclusion of subparagraph (b)(5) in the Rule.</p>
	<p><u>(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:</u></p>	<p>COMPARISON TO MODEL RULE 1.6 Proposed Rule 1.6(c) carries forward current rule 3-100(C). In addition to the substitution of the term “information protected by Business and Professions Code section 6068(e)(1)” for “confidential information,” see Explanation of Changes to paragraphs (a) and (b), the only changes made conform the rule to California rule style and substitute “lawyer” for “member.”</p>
	<p><u>(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</u></p>	<p>COMPARISON TO MODEL RULE 1.6 See Explanation of changes for introductory clause to paragraph (c).</p>
	<p><u>(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).</u></p>	<p>COMPARISON TO MODEL RULE 1.6 See Explanation of changes for introductory clause to paragraph (c).</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.6 Confidentiality of Information</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.6 Confidentiality of Information</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(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 member at the time of the disclosure.</p>	<p>COMPARISON TO MODEL RULE 1.6</p> <p>Proposed Rule 1.6(d) carries forward current rule 3-100(D). In addition to including within paragraph (d)'s scope the additional exceptions in the proposed Rule (i.e., subparagraphs (b)(2), (b)(3) and (b)(4)), the only changes made are the substitution of the defined term, "information protected by Business and Professions Code section 6068(e)(1)," changes to conform the rule to California rule style, and the substitution of "lawyer" for "member."</p>
	<p>(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.</p>	<p>COMPARISON TO MODEL RULE 1.6</p> <p>See Explanation of changes for introductory clause to paragraph (c).</p>

<p align="center">ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment¹</p>	<p align="center">Commission’s Proposed Rule Rule 1.6 Confidentiality of Information Comment²</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
<p>[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client 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(b) 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.</p>	<p>[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client 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(b)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.</p>	<p>COMPARISON TO MODEL RULE 1.6</p> <p>Comment [1] is based on MR 1.6, cmt. [2]. As explained in the Introduction and the Explanation to paragraphs (a) and (b) of the Rule, the term “information protected by Business & Professions Code section 6068(e)(1) has been substituted for “information relating to the representation of a client.” The only other change is to substitute “1.8.2” for “1.8(b),” which conforms the cross-reference to the Commission’s numbering convention for the 1.8 series of rules.</p>
<p>[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby</p>	<p>Policies Furthered by the Duty of Confidentiality</p> <p>[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0a Paragraph (a) relates to the lawyer’s obligations</p>	<p>COMPARISON TO MODEL RULE 1.6</p> <p>Comment [2] is based on current California rule 3-100, Discussion ¶. 1, which in turn is based on Model Rule 1.6, cmt. [1]. The changes made during the original drafting of rule 3-100 were intended to emphasize California’s strong policy of protecting client confidentiality.</p>

¹ **Note:** Rows that are not shaded contain comments that are derived from the comments to Model Rule 1.6. Rows that are shaded contain comments derived from the Discussion paragraphs to current Cal. rule 3-100. Therefore, the red-line comparisons in the non-shaded rows are to the Model Rule comment; the red-line comparisons in the shaded rows are to the Discussion paragraph from current rule 3-100.

However, Comment [2] carries forward Comment [1] to current rule 3-100, which in turn is based closely on MR 1.6, cmt. [2]. Therefore, redline comparisons for proposed Comment [2] are to BOTH the Model Rule comment and the California rule Discussion paragraph.

² Proposed Rule, Discussion Draft 9 (8/30/09).

<p align="center"><u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment</u>¹</p>	<p align="center"><u>Commission’s Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment</u>²</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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.</p>	<p>under Business and Professions Code section 6068(e) for the definition(1), which provides it is a duty of informed consent lawyer: “To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.—This” 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 client-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 legally damaging subject matterdetrimental 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].)</p>	<p>In addition, the Commission has substituted “lawyer-client” for “client-lawyer” throughout the proposed Rules to conform the term to the usage in the Business & Professions and Evidence Codes.</p> <p>The substitution of “detrimental subjects” for “legally damaging subject matter” conforms the language in this Comment to the definition of “information protected by Business and Professions Code section 6068(e)(1)” that appears in Comment [3], which in turn is based on long-standing California authority concerning the scope of the terms “confidence” and “secrets” in Bus. & Prof. Code § 6068(e).</p> <p>See also Explanation of Changes for paragraphs (a) and (b), which explain the Commission’s recommended use of the defined term, “information protected by Business and Professions Code section 6068(e)(1).”</p>

<p align="center">ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment¹</p>	<p align="center">Commission’s Proposed Rule Rule 1.6 Confidentiality of Information Comment²</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
<p>[1] <i>Duty of confidentiality.</i> 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].)</p>	<p>[42] <i>Duty of confidentiality.</i> Paragraph (Aa) relates to a member’s <u>lawyer’s</u> obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a member <u>lawyer</u>: “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 <u>lawyer’s</u> duty to preserve the confidentiality of client information involves public policies of paramount importance. (In Re <u>Re</u> 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-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 legally damaging subject matter <u>detrimental subjects</u>. 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 (Aa) thus recognizes a fundamental principle in the client-lawyer-client relationship, that, in the absence of the client’s informed consent, a member <u>lawyer</u> must not reveal information relating to the representation protected by Business and</p>	<p>COMPARISON TO CAL. RULE 3-100 See Explanation of Changes in previous row.</p>

<p align="center">ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment¹</p>	<p align="center">Commission’s Proposed Rule Rule 1.6 Confidentiality of Information Comment²</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
	<p>Professions Code section 6068(e)(1). (See, e.g., <i>Commercial Standard Title Co. v. Superior Court</i> (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)</p>	
<p>[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.</p>	<p>[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.</p>	<p>COMPARISON TO MODEL RULE 1.6</p> <p>The Commission has substituted new proposed Comments [3] to [6] to define the term, “information protected by Business and Professions Code section 6068(e)(1).” These comments use as their starting point California rule 3-100, Discussion ¶. 2, which in turn is based on Model Rule 1.6, cmt. [3]. See Explanation of Changes for Comment [3], below.</p>
<p>[2] <i>Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine and ethical standards of confidentiality.</i> The</p>	<p>Information protected by Business and Professions Code section 6068(e)(1).</p> <p>[23] <i>Client-lawyer confidentiality encompasses the attorney-client privilege</i>As used in this Rule, <i>the work-product doctrine and ethical standards of</i></p>	<p>COMPARISON TO CAL. RULE 3-100</p> <p>As noted, the Commission recommends substitution of new proposed Comments [3] to [6], using as their starting point California rule 3-100, Discussion ¶. 2, which in turn is based</p>

<p align="center">ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment¹</p>	<p align="center">Commission’s Proposed Rule Rule 1.6 Confidentiality of Information Comment²</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
<p>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 <i>In the Matter of Johnson</i> (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; <i>Goldstein v. Lees</i> (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.</p>	<p>confidentiality. The principle of client-lawyer confidentiality applies to“information relating to 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, and encompasses matters communicated in confidence by the client, and therefore that (a) is protected by the attorney-lawyer-client privilege, matters protected by (b) is likely to be embarrassing or detrimental to the work-product doctrine client if disclosed, and matters protected under ethical standards or (c) the client has requested be kept confidential. Therefore, the lawyer’s duty of confidentiality, all as established defined in law, rule Business and Professions Code section 6068(e) is broader than lawyer-client privilege. (See <i>In the Matter of Johnson</i> (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; <i>Goldstein v. Lees</i> (1975) 46 Cal. App.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.</p>	<p>loosely on Model Rule 1.6, cmt. [3].</p> <p>The purpose of Comments [3] to [6] is to delimit the scope of a lawyer’s duty of confidentiality, as well as provide a definition for “information protected by Business and Professions Code section 6068(e)(1)”. Because of California’s strong policy of protecting client confidentiality and the apparent disjunction in language between subdivisions (1) and (2) of Bus. & Prof. Code § 6068(e), (see Explanation of Changes for proposed paragraphs (a) and (b)), the Commission views the expansion of rule 3-100, Discussion ¶. 2, as critical to providing guidance to lawyers in this important area and protection to clients.</p>

<p align="center">ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment¹</p>	<p align="center">Commission's Proposed Rule Rule 1.6 Confidentiality of Information Comment²</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
	<p><u>Scope of the Lawyer-Client Privilege</u></p> <p>[4] <u>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.</u></p>	<p>COMPARISON TO CAL. RULE 3-100</p> <p>See Explanation of Changes for proposed Comment [3].</p>
	<p><u>Scope of the Duty of Confidentiality</u></p> <p>[5] <u>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</u></p>	<p>COMPARISON TO CAL. RULE 3-100</p> <p>See Explanation of Changes for proposed Comment [3].</p>

<p align="center">ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment¹</p>	<p align="center">Commission’s Proposed Rule Rule 1.6 Confidentiality of Information Comment²</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
	<p>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.</p>	
	<p>Relationship of Confidentiality to Lawyer Work Product</p> <p>[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 <i>In the Matter of Johnson</i> (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)</p>	<p>COMPARISON TO CAL. RULE 3-100</p> <p>See Explanation of Changes for proposed Comment [3].</p>

<p align="center">ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment¹</p>	<p align="center">Commission’s Proposed Rule Rule 1.6 Confidentiality of Information Comment²</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
<p>[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. 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 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.</p>	<p>[47] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client <u>protected by Business and Professions Code section 6068(e)(1)</u>. 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 <u>client’s</u> 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.</p>	<p>COMPARISON TO MODEL RULE 1.6</p> <p>Comment [4] is identical to Model Rule 1.6, cmt. [4], except for the substitution of “information protected by Business and Professions Code section 6068(e)(1),” a defined term, for the Model Rule’s “information relating to the representation,” and the addition of “client’s” to modify “representation” for clarification.</p>
<p>Authorized Disclosure</p> <p>[5] Except to the extent that the client’s instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm’s practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.</p>	<p>Authorized Disclosure</p> <p>[58] Except to the extent that the client’s instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm’s practice, disclose to each other information <u>relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.</u></p>	<p>COMPARISON TO MODEL RULE 1.6</p> <p>Comment [8] is based on Model Rule 1.6, cmt. [5]. The first two sentences of the Model Rule comment have been deleted because the Commission has rejected the ABA’s theory of implied authority with respect to confidentiality because it is an exclusion from the general rule of confidentiality that would threaten to become a catchall exemption that swallows the rule of confidentiality. See Explanation of Changes for paragraph (a).</p>

<p align="center">ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment¹</p>	<p align="center">Commission's Proposed Rule Rule 1.6 Confidentiality of Information Comment²</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
<p>Disclosure Adverse to Client</p> <p>[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.</p>	<p>Disclosure Adverse to Client <u>as Permitted by Paragraph (b)(1)</u></p> <p>[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.</p>	<p><u>COMPARISON TO MODEL RULE 1.6</u></p> <p>In place of Model Rule 1.6, cmt. [1], which is the Model Rule comment intended to provide guidance to lawyers with respect to Model Rule 1.6(b)(1), the Commission has substituted proposed Comments [9] to [18], which are carried over largely unchanged from current rule 3-100, Discussion ¶¶. 3 to 12. See Explanation of Changes for proposed Comment [9].</p>
<p>[3] <i>Narrow exception to duty of confidentiality under this Rule.</i> 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</p>	<p>[3] <i>Narrow exception to duty of confidentiality under this Rule.</i> Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits <u>certain</u> disclosures otherwise prohibited</p>	<p><u>COMPARISON TO CAL. RULE 3-100</u></p> <p>As noted, the Commission has carried forward Discussion paragraphs 3 to 12 of current rule 3-100 largely unchanged. Assembly Bill 1101, which amended Bus. & Prof. Code § 6068(e)</p>

<p align="center"><u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment</u>¹</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment</u>²</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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.</p>	<p>under Business & Professions Code section 6068(e), subdivision(1). Paragraph (B)(1), which restates is based on Business and Professions Code section 6068, subdivision(e)(2), identifies which narrowly permits a narrow confidentiality exception, absent the client's informed consent, when a member reasonably believes that disclosure is necessary <u>lawyer</u> 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 <u>disclose information protected by Business and Professions Code section 6068(e)(1) even without client consent.</u> Evidence Code section 956.5, which relates to the evidentiary attorney <u>lawyer</u>-client privilege, sets forth a similar express exception. Although a member <u>lawyer</u> is not permitted to reveal confidential <u>protected</u> 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.</p>	<p>to provide for an exception that would permit a lawyer to reveal confidential information to prevent a criminal act likely to result in death or substantial bodily harm, also provided in Section 3 of the Bill for the appointment of a task force "to make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act."</p> <p>The legislature also identified in Section 3 a series of issues for the Task Force to address:</p> <p>"(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.</p> <p>(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.</p> <p>(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.</p> <p>(4) Other similar issues that are directly related to the disclosure of confidential information permitted by this act."</p> <p>After reviewing rule 3-100, Discussion ¶¶. 3-12, the Commission determined first, that the Model Rule comment inadequately</p>

<p align="center"><u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment</u>¹</p>	<p align="center"><u>Commission’s Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment</u>²</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>addressed the issues the Legislature had identified; (2) did not provide the guidance to lawyers found in the rule 3-100 Discussion; and (3) that few changes, other than those to conform to California rule style and numbering, were warranted. Consequently, the Discussion to current rule 3-100 remains largely intact.</p> <p>As previously noted, the Commission recommends the substitution of “information protected by Business and Professions Code section 6068(e)(1)” for “confidential information relating to the representation of a client,” the term used in section 6068(e)(2). See Introduction and Explanation of Changes for paragraphs (a) and (b),</p>
<p>[4] <i>Member not subject to discipline for revealing confidential information as permitted under this Rule.</i> 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.</p>	<p><u>Lawyer Not Subject to Discipline for Revealing Protected Information as Permitted Under Paragraph (b)(1)</u></p> <p>[4]10 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 1.6(e)(21); reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a member<u>lawyer</u> reasonably believes is likely to result in death or substantial bodily harm to an individual. A member<u>lawyer</u> who reveals <u>protected</u> information as permitted under this rule<u>paragraph (b)(1)</u> is not subject to discipline.</p>	<p><u>COMPARISON TO CAL. RULE 3-100</u></p> <p>See Explanation of Changes for proposed Comment [9].</p>

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<p>[5] <i>No duty to reveal confidential information.</i> 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.</p>	<p><u>No Duty to Reveal Information protected by Business and Professions Code section 6068(e)(1)</u></p> <p>[511] <i>No duty to reveal confidential information.</i> Neither Business and Professions Code section 6068, subdivision (e)(2) nor this rule paragraph (b)(1) imposes an affirmative obligation on a member lawyer to reveal information <u>protected by Business and Professions Code section 6068(e)(1)</u> in order to prevent harm. (See rule 1-100(A).) A member lawyer may decide not to reveal confidential such information. Whether a member lawyer chooses to reveal confidential protected information as permitted under this rule Rule is a matter for the individual member lawyer to decide, based on all the facts and circumstances, such as those discussed in paragraph Comment [612] of this discussion Rule.</p>	<p>COMPARISON TO CAL. RULE 3-100</p> <p>See Explanation of Changes for proposed Comment [9].</p>
<p>[6] <i>Deciding to reveal confidential information as permitted under paragraph (B).</i> 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</p>	<p><u>Deciding to Reveal Protected Information as Permitted Under Paragraph (b)(1)</u></p> <p>[612] <i>Deciding to reveal confidential information as permitted under paragraph (B).</i> 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 <u>protected</u> information as permitted under paragraph (B)(1), the member lawyer must, if reasonable</p>	<p>COMPARISON TO CAL. RULE 3-100</p> <p>See Explanation of Changes for proposed Comment [9].</p>

<p align="center"><u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment</u>¹</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment</u>²</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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:</p> <p>(1) the amount of time that the member has to make a decision about disclosure;</p> <p>(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;</p> <p>(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;</p> <p>(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;</p> <p>(5) the extent of other adverse effects to the client that may result from disclosure contemplated by the member; and</p>	<p>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<u>such</u> information are the following:</p> <p>(1) the amount of time that the member<u>lawyer</u> has to make a decision about disclosure;</p> <p>(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;</p> <p>(3) whether the member<u>lawyer</u> believes the member's<u>lawyer's</u> efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;</p> <p>(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<u>lawyer</u>;</p> <p>(5) the extent of other adverse effects to the client that may result from disclosure contemplated by the member<u>lawyer</u>; and</p>	

<p align="center"><u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment</u>¹</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment</u>²</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.</p> <p>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.</p>	<p>(6) the nature and extent of <u>protected</u> information that must be disclosed to prevent the criminal act or threatened harm.</p> <p>A member<u>lawyer</u> may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the confidential<u>protected</u> information. However, the imminence of the harm is not a prerequisite to disclosure, and a member<u>lawyer</u> may disclose the <u>protected</u> information without waiting until immediately before the harm is likely to occur.</p>	
<p>[7] <i>Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm.</i> 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</p>	<p><u>Counseling Client or Third Person Not to Commit a Criminal Act Reasonably Likely to Result in Death of Substantial Bodily Harm</u></p> <p>[7]<u>13</u> <i>Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm.</i> Subparagraph (C)<u>Paragraph</u> (C)<u>(1)</u> provides that, before a member<u>lawyer</u> may reveal confidential<u>protected by Business and Professions Code section 6068(e)(1)</u>, the member<u>lawyer</u> 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, <u>including persuading the client to take action to prevent a</u></p>	<p><u>COMPARISON TO CAL. RULE 3-100</u></p> <p>See Explanation of Changes for proposed Comment [9].</p>

<p align="center">ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information <u>Comment</u>¹</p>	<p align="center">Commission's Proposed Rule Rule 1.6 Confidentiality of Information <u>Comment</u>²</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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 - 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 harm. 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.</p>	<p><u>third person from committing</u> or if<u>continuing a criminal act.</u> If necessary, <u>the client may be persuaded to</u> do both. The interests protected by such counseling is<u>are</u> the client's interest<u>interests</u> in limiting disclosure of confidential<u>protected</u> information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the member's<u>lawyer's</u> counseling or otherwise, takes corrective action – such as by ceasing the <u>client's own criminal act or by dissuading a third person from committing or continuing a</u> criminal act before harm is caused – the option for permissive disclosure by the member<u>lawyer</u> would cease as<u>because</u> 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<u>lawyer</u> who contemplates making adverse disclosure of confidential<u>protected</u> information may reasonably conclude that the compelling interests of the member<u>lawyer</u> or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the member<u>lawyer</u> should, if reasonable under the circumstances, first advise the client of the member's<u>lawyer's</u> intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the member<u>lawyer</u> 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</p>	

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	<p>the memberlawyer has concluded that paragraph (B)(1) does not permit the memberlawyer to reveal confidentialprotected information, the memberlawyer nevertheless is permitted to counsel the client as to why it maymight be in the client's best interest to consent to the attorney'slawyer's disclosure of that information.</p>	
<p>[9] <i>Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2).</i> 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.</p>	<p><u>Requirement under Paragraph (c)(2) to Inform Client of Lawyer's Ability or Decision to Reveal Protected Information</u></p> <p>[9]14 <i>Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2).</i> A memberlawyer is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 3-5001.4; Business and Professions Code, section 6068, subdivision(m). Paragraph (C)(2), however, recognizes that under certain circumstances, informing a client of the member'slawyer's ability or decision to reveal confidentialprotected 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 memberlawyer or the member'slawyer's family or associates. Therefore, paragraph (C)(2) requires a memberlawyer to inform the client of the member'slawyer's ability or decision to reveal confidentialprotected information as provided in</p>	<p>COMPARISON TO CAL. RULE 3-100</p> <p>See Explanation of Changes for proposed Comment [9].</p> <p>Note also that the Commission has recommended reversing the order of current rule 3-100, Discussion ¶¶. 8 and 9, to better track the order of the Rule paragraphs.</p>

<p align="center">ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment¹</p>	<p align="center">Commission's Proposed Rule Rule 1.6 Confidentiality of Information Comment²</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
<p>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:</p> <ul style="list-style-type: none"> (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. 	<p>paragraph (Bb)(1) only if it is reasonable to do so under the circumstances. Paragraph (Cc)(2) further recognizes that the appropriate time for the <u>memberlawyer</u> to inform the client may vary depending upon the circumstances. (See paragraphcomment [1016] of this discussion.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:</p> <ul style="list-style-type: none"> (1) whether the client is an experienced user of legal services; (2) the frequency of the <u>member'slawyer's</u> contact with the client; (3) the nature and length of the professional relationship with the client; (4) whether the <u>memberlawyer</u> and client have discussed the <u>member'slawyer's</u> duty of confidentiality or any exceptions to that duty; (5) the likelihood that the client's matter will involve information within paragraph (Bb)(1); (6) the <u>member'slawyer's</u> 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 <u>member'slawyer's</u> belief, if 	

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	<p>applicable, that good faith efforts to persuade a client not to act on a threat have failed.</p>	
<p>[8] <i>Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act.</i> 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.</p>	<p><u>Disclosure of Protected Information as Permitted by Paragraph (b)(1) Must Be No More Than is Reasonably Necessary to Prevent the Criminal Act</u></p> <p>[815] Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act. Under Paragraph (d) requires that disclosure of confidential <u>protected</u> information <u>as permitted by paragraph (b)(1)</u>, when made, must be no more extensive than the lawyer reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the confidential <u>protected</u> information to only those persons who the member-lawyer reasonably believes can act to prevent the harm. Under some circumstances, a member-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 member-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 member-lawyer.</p>	<p>COMPARISON TO CAL. RULE 3-100</p> <p>See Explanation of Changes for proposed Comments [9] and [14].</p>

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<p>[10] <i>Avoiding a chilling effect on the lawyer-client relationship.</i> 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.</p>	<p><u>Avoiding a Chilling Effect on the Lawyer-Client Relationship</u></p> <p>[10] <i>Avoiding a chilling effect on the lawyer-client relationship.</i> The foregoing flexible approach to the member’s <u>a lawyer</u> informing a client of his or her ability or decision to reveal confidential <u>protected</u> information recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Discussion paragraph comment [4].) To avoid that chilling effect, one member <u>lawyer</u> may choose to inform the client of the member’s <u>lawyer’s</u> ability to reveal <u>protected</u> information as early as the outset of the representation, while another member <u>lawyer</u> may choose to inform a client only at a point when that client has imparted information that may fall under <u>comes within</u> paragraph (B)(1), or even choose not to inform a client until such time as the member <u>lawyer</u> attempts to counsel the client as contemplated in Discussion paragraph <u>under Comment [7]</u>. In each situation, the member <u>lawyer</u> will have discharged properly <u>satisfied</u> the requirement <u>lawyer’s obligation</u> under subparagraph <u>paragraph</u> (C) (2), and will not be subject to discipline.</p>	<p><u>COMPARISON TO CAL. RULE 3-100</u></p> <p>See Explanation of Changes for proposed Comment [9].</p>

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<p>[11] <i>Informing client that disclosure has been made; termination of the lawyer-client relationship.</i> 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.</p>	<p><u>Informing Client that Disclosure Has Been Made: Termination of the Lawyer-Client Relationship</u></p> <p>[4-17] <i>Informing client that disclosure has been made; termination of the lawyer-client relationship.</i> When a memberlawyer has revealed confidentialprotected information under paragraph (B)(1), in all but extraordinary cases the relationship between memberlawyer and client that is based in mutual trust and confidence will have deteriorated so as to make the member’slawyer’s representation of the client impossible. Therefore, when the member relationship has deteriorated because of the lawyer’s disclosure, the lawyer is required to seek to withdraw from the representation (, see rule 3-700(B))Rule 1.16, unless the member is able to obtain the client’sclient has given his or her informed consent to the member’slawyer’s continued representation. The memberlawyer normally must inform the client of the fact of the member’slawyer’s disclosure—unless. If the memberlawyer has a compelling interest in reason for not informing the client, such as to protect the memberlawyer, the member’slawyer’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.</p>	<p><u>COMPARISON TO CAL. RULE 3-100</u></p> <p>See Explanation of Changes for proposed Comment [9].</p>

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<p>[12] <i>Other consequences of the member's disclosure.</i> 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).</p>	<p><u>Other Consequences of the Lawyer's Disclosure</u></p> <p>[12] Other consequences of the member's disclosure. Depending upon the circumstances of a member's <u>lawyer's</u> disclosure of confidential <u>protected</u> information <u>as permitted by this Rule</u>, there may be other important issues that a member <u>lawyer</u> must address. For example, if a member will be called as a witness <u>lawyer who is likely to testify</u> in the client's <u>a</u> matter, then rule 5-210 should be considered <u>involving the client must comply with Rule 3.7</u>. Similarly, the member should <u>lawyer must also</u> consider his or her duties <u>the lawyer's duty</u> of loyalty <u>competence</u> (Rule 1.1) and competency <u>whether the lawyer has a conflict of interest in continuing to represent the client</u> (rule 3-110 <u>Rule 1.7</u>).</p>	<p><u>COMPARISON TO CAL. RULE 3-100</u></p> <p>See Explanation of Changes for proposed Comment [9].</p>
<p>[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such</p>	<p>[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such</p>	<p><u>COMPARISON TO MODEL RULE 1.6</u></p> <p>Because the Commission has recommended that Model Rule 1.6(b)(2) be stricken because it is inimical to California's strong policy on lawyer-client confidentiality, the Commission also recommends deletion of Model Rule 1.6, cmt. [7]. See Explanation of Changes for Model Rule 1.6(b)(2).</p>

<p align="center">ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information <u>Comment</u>¹</p>	<p align="center">Commission's Proposed Rule Rule 1.6 Confidentiality of Information <u>Comment</u>²</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c) which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.</p>	<p>disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c) which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.</p>	
<p>[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.</p>	<p>[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.</p>	<p>COMPARISON TO MODEL RULE 1.6</p> <p>Because the Commission has recommended that Model Rule 1.6(b)(3) be stricken because it is inimical to California's strong policy on lawyer-client confidentiality, the Commission also recommends deletion of Model Rule 1.6, cmt. [8]. See Explanation of Changes for Model Rule 1.6(b)(2).</p>

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<p>[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.</p>	<p><u>Disclosure as Permitted by Paragraphs (b)(2) through (b)(4).</u></p> <p>[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.</p>	<p><u>COMPARISON TO MODEL RULE 1.6</u></p> <p>The Commission recommends that Model Rule 1.6, cmt. [9], concerning implied authorization, be stricken for the same reasons it has recommended the deletion of the first two sentences of Model Rule 1.6, cmt. [5]. See Explanation of Changes for deleted Model Rule 1.6, Comment [5].</p>
<p>[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does</p>	<p>[10] <u>Where</u> if a legal claim <u>by a client</u> or <u>disciplinary charge</u> <u>the client's representative</u> alleges <u>complicity</u> <u>a breach of duty by</u> the lawyer <u>in a client's conduct</u> <u>involving representation of the client</u> or <u>other</u> <u>a disciplinary charge filed by or with the cooperation of the client or the client's representative</u> <u>alleges</u> misconduct of the lawyer involving representation of the client, <u>paragraph (b)(3) permits</u> the lawyer <u>may to</u> respond <u>only</u> to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a</p>	<p><u>COMPARISON TO MODEL RULE 1.6</u></p> <p>Comment [19] is based on Model Rule 1.6, cmt. [10]. The Model Rule comment has been revised to conform the comment to the more limited scope of proposed paragraph (b)(3), which is based on the limited exception in Evidence Code § 958. See Explanation of Changes for proposed paragraph (b)(3).</p>

<p align="center"><u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment</u>¹</p>	<p align="center"><u>Commission’s Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment</u>²</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.</p>	<p>third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer’s right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.</p>	
<p>[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) 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.</p>	<p>[1420] A lawyer entitled to a fee is permitted by paragraph (b)(53) to prove the services rendered in an action to collect it. This aspect of the ruleRule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.</p>	<p><u>COMPARISON TO MODEL RULE 1.6</u> Comment [20] is identical to Model Rule 1.6, cmt. [11], except that “(b)(3)” has been substituted for the cross reference to “(b)(5),” and “Rule” substituted for “rule” to conform to California rule style.</p>
<p>[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.</p>	<p>[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.</p>	<p><u>COMPARISON TO MODEL RULE 1.6</u> Because the Commission has recommended striking that part of Model Rule 1.6(b)(6) that permits disclosure if permitted by other law, see Explanation of Changes for paragraph (b)(6), it recommends the deletion of MR 1.6, cmt. [12].</p>

<p align="center">ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment¹</p>	<p align="center">Commission’s Proposed Rule Rule 1.6 Confidentiality of Information Comment²</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
<p>[13] A lawyer may be ordered to reveal information relating to the representation of a client 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 should 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 attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court’s order.</p>	<p>[1321] A lawyer may be ordered to reveal information relating to the representation of a clientprotected 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 shouldmust 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 attorneylawyer-client privilege or other applicable law. See, e.g., People v. Kor (1954) 129 Cal. App. 2d 436. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4 about the possibility of appeal. Unless review is sought, however, paragraph (b)(64) permits the lawyer to comply with the court’s order.</p>	<p>COMPARISON TO MODEL RULE 1.6</p> <p>Comment [21] is based on Model Rule 1.6, cmt. [13]. The phrase “must” has been substituted for “should” to emphasize the lawyer’s duty under this Rule to protect the client’s confidential information.</p> <p>The citation to <i>People v. Kor</i>, a seminal California Court of Appeal case on the lawyer’s duty of confidentiality to the client, has been added to provided guidance.</p>
<p>[14] Paragraph (b) permits disclosure 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</p>	<p>[1422] Paragraph (bd) 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</p>	<p>COMPARISON TO MODEL RULE 1.6</p> <p>Comment [22] is based on Model Rule 1.6, cmt. [14]. The clause, “as permitted by paragraphs (b)(2) through (b)(5)” has been added to emphasize that this Comment applies to the exceptions stated in those subparagraphs only. Proposed Comment [15], which provides guidance specific to the confidentiality exception in subparagraph (b)(1), is applicable to that paragraph.</p>

<p align="center">ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment¹</p>	<p align="center">Commission’s Proposed Rule Rule 1.6 Confidentiality of Information Comment²</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
<p>proceeding, the disclosure should be made in a manner that limits access to the 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.</p>	<p>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 <u>protected</u> 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.</p>	
<p>[15] Paragraph (b) permits but does not require the disclosure of information relating to a client’s representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer’s relationship with the client and with those who might be injured by the client, the lawyer’s own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer’s decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).</p>	<p>[15] [23] Paragraph (b) permits but does not require the disclosure of information relating to a client’s representation protected by Business and Professions Code section 6068(e)(1) to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer’s relationship with the client and with those who might be injured by the client, the lawyer’s own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer’s decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).</p>	<p>COMPARISON TO MODEL RULE 1.6</p> <p>Comment [23] is based on Model Rule 1.6, cmt. [15]. The phrase, “(b)(2) through (b)(5)” has been substituted for “(b)(1) through (b)(6)” to conform to the structure of the proposed Rule and to emphasize that this Comment applies to the exceptions stated in those subparagraphs only. Proposed Comment [11], which provides guidance specific to the confidentiality exception in subparagraph (b)(1), is applicable to that paragraph.</p> <p>The remainder of the Model Rule comment has been deleted because the points made are better presented in the Discussion paragraphs of current rule 3-100 that have been carried forward. See Comments [9]-[18] and Explanations thereto.</p>

<p align="center">ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment¹</p>	<p align="center">Commission’s Proposed Rule Rule 1.6 Confidentiality of Information Comment²</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
<p>Acting Competently to Preserve Confidentiality</p> <p>[16] A lawyer must act competently to safeguard information relating to the representation of a client 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.</p>	<p>Acting Competently to Preserve Confidentiality</p> <p>[16]^[24] A lawyer must act competently to safeguard information relating to the representation of a client 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.</p>	<p>COMPARISON TO MODEL RULE 1.6</p> <p>Comment [24] is identical to Model Rule 1.6, cmt. [16], except for the substitution of the defined term, “information protected by Business and Professions Code section 6068(e)(1)”. See Introduction and Explanation of Changes for paragraphs (a) and (b).</p>
<p>[17] When transmitting a communication that includes information relating to the representation of a client, 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</p>	<p>[17]^[25] When transmitting a communication that includes information relating to the representation of a client 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</p>	<p>COMPARISON TO MODEL RULE 1.6</p> <p>Comment [25] is identical to Model Rule 1.6, cmt. [17], except for the substitution of the defined term, “information protected by Business and Professions Code section 6068(e)(1)”. See Introduction and Explanation of Changes for paragraphs (a) and (b).</p>

<p align="center"><u>ABA Model Rule 1.6/Cal. Rule 3-100</u> Confidentiality of Information <u>Comment</u>¹</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.6 Confidentiality of Information <u>Comment</u>²</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>prohibited by this Rule.</p>	<p>Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.</p>	
<p>[13] <i>Other exceptions to confidentiality under California law.</i> 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. (Added by order of the Supreme Court, operative July 1, 2004.)</p>	<p>[13] <i>Other exceptions to confidentiality under California law.</i> 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. (Added by order of the Supreme Court, operative July 1, 2004.)</p>	<p>COMPARISON TO CAL. RULE 3-100 Discussion ¶. [13] to current rule 3-100 has been deleted as superfluous, as proposed Rule 1.6 is a comprehensive statement of the exceptions to confidentiality in California.</p>
<p>Former Client</p> <p>[18] The duty of confidentiality continues after the client-lawyer 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.</p>	<p>Former Client</p> <p>[18] The duty of confidentiality continues after the client-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.</p>	<p>COMPARISON TO MODEL RULE 1.6 Comment [26] is nearly identical to Model Rule 1.6, cmt. [18], the only change being to change “client-lawyer” to “lawyer-client” to conform with the convention used in the Bus. & Prof. and Evid. Codes.</p>

Rule 1.6 Confidentiality of Information

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- (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). ~~The information protected from disclosure by section 6068(e)(1) is referred to as "confidential information relating to the representation" in this Rule.~~
- (b) A lawyer may, but is not required to, reveal ~~confidential~~ information relating protected by Business and Professions Code section 6068(e)(1) to the representation of a client 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 ~~confidential~~ information ~~relating to the representation~~ 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 ~~confidential~~ information ~~relating to the representation~~ protected by Business and Professions Code section 6068(e)(1) as provided in paragraph (b)(1).
- (d) In revealing ~~confidential~~ information ~~relating to the representation~~ 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 ~~member~~ lawyer at the time of the disclosure.
- (e) A lawyer who does not reveal ~~confidential~~ 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 ~~confidential~~ information ~~relating to the representation of a client~~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 ~~confidential~~ 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

~~confidential~~ information protected by Business ~~&~~ 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].)

~~Confidential Information Relating to the Representation.~~ Information protected by Business and Professions Code section 6068(e)(1).

- [3] As used in this Rule, "~~confidential~~ information ~~relating to the representation~~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 ~~confidential~~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. ~~Confidential information relating to the representation~~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 ~~confidential~~information ~~relating to the representation~~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] ~~Confidential information relating to the representation and contained in lawyer work product is~~Information protected under this Rule. However, "confidential information relating to the representation 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 ~~confidential~~information ~~relating to the representation of a client~~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. [8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6. See also California Rules of Court, ~~Rules~~ 3.35-3.37 (limited scope rules applicable in civil matters generally), and 5.70-5.71 (limited scope rules applicable in family law matters).

Authorized Disclosure

- [8] Lawyers in a firm may, in the course of the firm's practice, disclose to each other ~~confidential~~information ~~relating~~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] ~~Narrow exception to duty of confidentiality under paragraph (b)(1).~~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) ~~restates~~ is based on Business and Professions Code section 6068(e)(2), which narrowly permits a lawyer to disclose ~~confidential~~ information ~~relating to the representation~~ 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 ~~confidential~~ 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. [11] Paragraph (d)(2) authorizes a lawyer to counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law, rule or ruling of a tribunal. Determining the validity, scope, meaning or application of a law, rule, or ruling of a tribunal in good faith may require a course of action involving disobedience of the law, rule, or ruling of a tribunal, or of the meaning placed upon it by governmental authorities. Paragraph (d)(2) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes to be unjust.

Lawyer Not Subject to Discipline for Revealing ~~Confidential~~ 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 ~~confidential~~ protected information as permitted under paragraph (b)(1) is not subject to discipline

No Duty to Reveal ~~Confidential~~ 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 ~~confidential~~ information protected by Business and Professions Code section 6068(e)(1) in order to prevent harm. A lawyer may decide not to reveal ~~confidential~~ such information. Whether a lawyer chooses to reveal ~~confidential~~ protected information as permitted under this ~~rule~~ Rule is a matter for the individual lawyer to decide, based on all the facts and circumstances, such as those discussed in ~~comment~~ Comment [12] of this Rule.

Deciding to Reveal ~~Confidential~~ 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 ~~confidential~~ 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 ~~confidential~~ 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 ~~confidential~~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 ~~confidential~~protected information. However, the imminence of the harm is not a prerequisite to disclosure, and a lawyer may disclose the ~~confidential~~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 ~~confidential~~ 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 ~~confidential~~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 ~~confidential~~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 ~~confidential~~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.

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

[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 ~~confidential~~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 ~~confidential~~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~~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 Confidential/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 ~~confidential~~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 ~~confidential~~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 ~~confidential~~protected information

recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. ~~(See comment~~[Comment \[2\].](#)~~)~~ To avoid that chilling effect, one lawyer may choose to inform the client of the lawyer's ability to reveal ~~confidential~~[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 ~~confidential~~[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 [3-700])~~, 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 ~~confidential~~[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~~(d)~~).

Disclosure as Permitted by Paragraphs (b)(2) ~~Through~~[through](#) (b)(4)~~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 ~~confidential~~ information ~~relating to the representation of a client~~[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 ~~about the~~

~~possibility of appeal~~ 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 ~~confidential~~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 ~~confidential~~ information ~~relating to a client's representation~~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 ~~relating to the representation of a client~~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 ~~relating to the representation of a client~~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.

Rule 3-100 Confidential Information 1.6 Confidentiality of a Client Information

(Comparison of the Current Proposed Rule to Current California Rule)

- ~~(A)~~(a) A ~~member~~lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, ~~subdivision~~(e)(1) ~~without the informed consent of~~unless the client, ~~gives informed consent or as provided in~~the disclosure is permitted by paragraph ~~(Bb)~~ of this rule.
- (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:
- ~~(B)~~(1) ~~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~~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)~~(c) Further obligations under paragraph (b)(1). Before revealing ~~confidential~~information protected by Business and Professions Code section 6068(e)(1) in order to prevent a criminal act as provided in paragraph ~~(Bb)~~(1), a ~~member~~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 ~~member's~~lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068(e)(1) as provided in paragraph ~~(Bb)~~(1).
- ~~(D)~~(d) In revealing ~~confidential~~information protected by Business and Professions Code section 6068(e)(1) as ~~provided in~~permitted by paragraph ~~(Bb)~~, the ~~member's~~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 ~~member~~lawyer at the time of the disclosure.
- ~~(E)~~(e) A ~~member~~lawyer who does not reveal information protected by Business and Professions Code section 6068(e)(1) as permitted by paragraph ~~(Bb)~~ does not violate this ~~rule~~Rule.

Discussion:
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

~~[1]~~^[2] Duty of confidentiality. Paragraph (Aa) relates to a ~~member's lawyer's~~ obligations under Business and Professions Code section 6068, ~~subdivision~~ (e)(1), which provides it is a duty of a ~~member lawyer~~: "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 lawyer's~~ duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Rere 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-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 ~~legally damaging subject matter~~ 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 (Aa) thus recognizes a fundamental principle in the ~~client-lawyer-client~~ relationship, that, in the absence of the client's informed consent, a ~~member lawyer~~ must not reveal information ~~relating to the representation~~ 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.)

~~[2]~~^[3] ~~Client-lawyer confidentiality encompasses the attorney-client privilege. As used in this Rule, the work-product doctrine and ethical standards of confidentiality. The principle of client-lawyer confidentiality applies to~~ 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, and encompasses matters communicated in confidence by the client, and therefore that (a) is protected by the attorney-lawyer-client privilege, matters protected by (b) is likely to be embarrassing or detrimental to the work-product doctrine client if disclosed, and matters protected under ethical standards or (c) the client has requested be kept confidential. Therefore, the lawyer's duty of confidentiality, all as established defined in law, rule Business and policy 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].) ~~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.~~

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 \(b\)\(1\)](#)

~~[3][9] 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 certain disclosures otherwise prohibited under ~~Business & Professions Code section 6068(e), subdivision (1).~~ Paragraph (B), ~~which restates Business and Professions Code section 6068, subdivision (e)(1).~~ Paragraph (b)(1) is based on Business and Professions Code section 6068(e)(2), identifies which narrowly permits a narrow confidentiality exception, absent the client's informed consent, when a member reasonably believes that disclosure is necessary lawyer 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 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 ~~attorney~~ lawyer-client privilege, sets forth a similar express exception. Although a member lawyer is not permitted to reveal ~~confidential~~ 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][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 1.6(eb)(21),~~ reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a member lawyer reasonably believes

is likely to result in death or substantial bodily harm to an individual. A member lawyer who reveals protected information as permitted under this rule paragraph (b)(1) is not subject to discipline.

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

~~[5][11] No duty to reveal confidential information.~~ Neither Business and Professions Code section 6068, ~~subdivision (e)(2)~~ nor this rule paragraph (b)(1) imposes an affirmative obligation on a member lawyer to reveal information protected by Business and Professions Code section 6068(e)(1) in order to prevent harm. ~~(See rule 1-100(A).)~~ A member lawyer may decide not to reveal ~~confidential~~ such information. Whether a member lawyer chooses to reveal ~~confidential~~ protected information as permitted under this rule Rule is a matter for the individual member lawyer to decide, based on all the facts and circumstances, such as those discussed in paragraph Comment [612] of this discussion Rule.

[Deciding to Reveal Protected Information as Permitted Under Paragraph \(b\)\(1\)](#)

~~[6][12] Deciding to reveal confidential information as permitted under paragraph (B).~~ Disclosure permitted under paragraph (B) (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) (b)(1), the member 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 ~~confidential~~ such information are the following:

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

A memberlawyer may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the confidentialprotected information. However, the imminence of the harm is not a prerequisite to disclosure, and a memberlawyer 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](#)

~~[7]13~~ ~~Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm.~~ Subparagraph Paragraph (C)(1) provides that, before a memberlawyer may reveal confidential information protected by Business and Professions Code section 6068(e)(1), the memberlawyer 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 isare the client's interestinterests in limiting disclosure of confidentialprotected information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the member'slawyer'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 memberlawyer would cease asbecause 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 memberlawyer who contemplates making adverse disclosure of confidentialprotected information may reasonably conclude that the compelling interests of the memberlawyer or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the memberlawyer should, if reasonable under the circumstances, first advise the client of the member'slawyer's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the memberlawyer 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 memberlawyer has concluded that paragraph (B)(1)

does not permit the [memberlawyer](#) to reveal [confidentialprotected](#) information, the [memberlawyer](#) nevertheless is permitted to counsel the client as to why it [maymight](#) be in the client's best interest to consent to the [attorney'slawyer'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.~~

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

~~[9][14]—Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2). A [memberlawyer](#) is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule [3-500;1.4 and](#) Business and Professions Code, section 6068, ~~subdivision (m)~~. Paragraph (C)(2), however, recognizes that under certain circumstances, informing a client of the [member'slawyer's](#) ability or decision to reveal [confidentialprotected](#) 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 [memberlawyer](#) or the [member'slawyer's](#) family or associates. Therefore, paragraph (C)(2) requires a [memberlawyer](#) to inform the client of the [member'slawyer's](#) ability or decision to reveal [confidentialprotected](#) 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 [memberlawyer](#) to inform the client may vary depending upon the circumstances. (See [paragraphComment \[1016\] 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'slawyer's](#) contact with the client;
- (3) the nature and length of the professional relationship with the client;
- (4) whether the [memberlawyer](#) and client have discussed the [member'slawyer'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 [member'slawyer'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~~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

[10][16] ~~—Avoiding a chilling effect on the lawyer-client relationship.~~ The foregoing flexible approach to ~~the member's~~a lawyer informing a client of his or her ability or decision to reveal ~~confidential~~protected information recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See ~~Discussion paragraph~~Comment [42].) To avoid that chilling effect, one ~~member~~lawyer may choose to inform the client of the ~~member's~~lawyer's ability to reveal ~~protected~~information as early as the outset of the representation, while another ~~member~~lawyer may choose to inform a client only at a point when that client has imparted

information that ~~may fall under~~comes within paragraph (Bb)(1), or even choose not to inform a client until ~~such time as~~the ~~member~~lawyer attempts to counsel the client ~~as contemplated in Discussion paragraph~~under Comment [713]. In each situation, the ~~member~~lawyer will have ~~discharged properly~~satisfied the ~~requirement~~lawyer's obligation under ~~subparagraph~~paragraph (Cc)(2), and will not be subject to discipline.

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

[11][17] ~~—Informing client that disclosure has been made; termination of the lawyer-client relationship.~~ When a ~~member~~lawyer has revealed ~~confidential~~protected information under paragraph (Bb)(1), in all but extraordinary cases the relationship between ~~member~~lawyer and client that is based in mutual trust and confidence will have deteriorated so as to make the ~~member's~~lawyer's representation of the client impossible. Therefore, ~~when~~ the ~~member~~relationship has deteriorated because of the lawyer's disclosure, the lawyer is required to seek to withdraw from the representation (see ~~rule 3-700(B)~~Rule 1.16, unless the ~~member is able to obtain the client's~~client has given his or her informed consent to the ~~member's~~lawyer's continued representation. The ~~member~~lawyer normally must inform the client of the fact of the ~~member's~~lawyer's disclosure ~~unless~~. If the ~~member~~lawyer has a compelling ~~interest in~~reason for not informing the client, such as to protect the ~~member~~lawyer, the ~~member's~~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

[12][18] ~~—Other consequences of the member's disclosure.~~ Depending upon the circumstances of a ~~member's~~lawyer's disclosure of

~~confidential~~protected information as permitted by this Rule, there may be other important issues that a ~~member~~lawyer must address. For example, ~~if a member will be called as a witness~~lawyer who is likely to testify in the client'sa matter, ~~then rule 5-210 should be considered~~involving the client must comply with Rule 3.7. Similarly, the ~~member should~~lawyer must also consider ~~his or her duties~~the lawyer's duty of ~~loyalty~~competence (Rule 1.1) and ~~competency~~whether the lawyer has a conflict of interest in continuing to represent the client (~~rule 3-110~~Rule 1.7).

~~[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. (Added by order of the Supreme Court, operative July 1, 2004.)~~

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.

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.

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)].
[Sorted by Commenter]

TOTAL = 10 **Agree = 0**
Disagree = 1
Modify = 9
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	California Attorneys for Criminal Justice (“CACJ”)	M		1.6(b)(4)	Our proposed modification would be to paragraph (b)(4) to add the following language to say: to comply with a “valid” court order.	The Commission did not make the requested change. Whether a court order is valid will require resolution by an appellate court. Comment [21] has been added to provide guidance for proceeding under the circumstances. The Comment requires the lawyer to “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,” and includes a citation to <i>People v. Kor</i> (1954) 129 Cal. App. 2d 436, a seminal Supreme Court case on a lawyer’s duty when ordered by a court to disclose confidential information. The comment also clarifies that in the event of an adverse ruling, the lawyer “must” consult the client concerning an appeal. Only after an appeal or if no appeal is taken, may a lawyer reveal confidential information to comply with a court order.
2	COPRAC	M		1.6(a)	COPRAC agrees with the minority position and believes the use of the phrase “relating to the representation” is too limited to conform to Business & Professions Code Section 6068(e)(1). This rule should extend the duty of confidentiality to the same extent	The Commission has substituted the defined term, “information protected by Business and Professions Code section 6068(e)(1)” for “information relating to the representation” throughout the Rule. See Introduction to Rule & Comment Comparison Charts.

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

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)].
[Sorted by Commenter]

TOTAL = 10 **Agree = 0**
Disagree = 1
Modify = 9
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				<p>Cmt. [3]</p> <p>Stricken 1.6(b)(2), (b)(3)</p> <p>1.6(b)(4)</p> <p>1.6(b)(4)</p>	<p>delineated by Section 6068(e).</p> <p>Comment [3] to the proposed Rule should be revised to reference Section 6068(e).</p> <p>COPRAC does not favor adoption of the so-called Enron exceptions permitting disclosure in certain situations involving financial harm.</p> <p>We agree that compliance with a court order addressing disclosure of confidential information should be permitted by the proposed rule, with the proviso set forth in the comment than an appeal should be considered.</p> <p>COPRAC members are divided on whether the compliance with “other law” should also be included as a scenario in which disclosure should be permitted. A majority of COPRAC members believe that this exception should not be included in the California rule.</p>	<p>The Commission made the requested change.</p> <p>No response is necessary.</p> <p>No response is necessary. See also response to CACJ, above.</p> <p>No response necessary. In any event, 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>
3	Judge, Michael P. Los Angeles County Public Defender	M		<p>1.6(a)</p> <p>1.6(b)(4)</p>	<p>We object to limiting “confidential information” to “relating to the representation” in 1.6(a). This protection should not be narrowed.</p> <p>Under <i>People v. Kor</i>, the lawyer is required to resist a court order to disclose confidential information, even upon pain of contempt. Thus, section (4) should be stricken, as should the part of section 1.6(d) allowing the lawyer to comply with a court order (to</p>	<p>Please see response to COPRAC comment re paragraph (a), above.</p> <p>Please see response to CACJ, above.</p>

**Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)].
[Sorted by Commenter]**

TOTAL = 10 **Agree = 0**
Disagree = 1
Modify = 9
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					disclose confidential information).	
4	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	M		Cmt. [5]	We are concerned about the broad reference to the State Bar Act at the end of the Comment. That is overbroad, and makes the rule difficult to analyze. The Comment should refer directly to the specific provisions of the State Bar Act that are intended to be incorporated, such as Section 6068(e).	The Commission did not make the requested change. A general reference is adequate in the event the legislature amends the State Bar Act to permit other exceptions.
				Cmt. [6]	Comment [6] should be clarified to distinguish between “generally known” information, which is not protected under the rule, and information in the public record, which is protected.	The Commission agrees and has added a sentence to Comment [6].
				Cmt. [9]	The first line of Comment [9] is an incomplete sentence. If this is intended as a title for the Comment, perhaps it should be italicized?	LACBA correctly noted the first “sentence” is a heading and it has been revised as a heading in conformance with the Rules format.
				Cmts. [23] & [26]	We also believe that Comments [23] and [26] do not add anything to the interpretation of the rule and should be deleted. These are simply repetitive of what is stated elsewhere in the comments or rules. Even though Comment [26] is derived from ABA Comments, we believe it is unnecessary and duplicative.	The Commission has not made the requested changes. Comment [23] corresponds to Comment [11], currently found in rule 3-100. What Comment [11] states with respect to paragraph (b)(1), Comment [23] does with respect to paragraphs (b)(2) – (b)(5). Comment [26] and its heading points lawyers to Rule 1.9 concerning their duties with respect to former clients’ confidential information.

**Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)].
[Sorted by Commenter]**

TOTAL = 10 **Agree = 0**
Disagree = 1
Modify = 9
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.6(b)(4)	to establish a claim or defense on behalf of the lawyer without a court determination. 4. OCTC disagrees with the removal of the Model Rule's phrase "other law" from subparagraph (b)(4).	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. 4. Please see response to COPRAC comment re 1.6(b)(4), above.
				1.6(b)(5)	OCTC agrees with retaining "court order" exception in subparagraph (b)(4). 5. OCTC has expressed concerns in relation to proposed Rule 1.14.	No response necessary. 5. Please see discussion in Chart re proposed Rule 1.14.
				1.6(e)	6. OCTC believes that paragraph (e) is too broad in extending current rule 3-100(E) to all subparagraphs of paragraph (b) and not limit it to subparagraph (b)(1) as in current rule 3-100. For example, OCTC believes paragraph (e) would permit a lawyer to escape discipline even if the lawyer refused a court order after an appeal determined the information sought must be disclosed.	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

**Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)].
[Sorted by Commenter]**

TOTAL = 10 **Agree = 0**
Disagree = 1
Modify = 9
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				General	7. OCTC believes that there are too many comments and does not believe a rule comment should explain a statute.	State Bar Act. 7. 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 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.
				Cmt. [15]	8. OCTC suggests that Comment [15] is too narrow and applies only to prevent criminal conduct and should be stricken.	8. The Commission has not made the suggested change. Comment [15] concerns only subparagraph (b)(1), which itself is limited to preventing criminal conduct.
				Cmt. [19]	OCTC also objects to Comment [19], arguing that it "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."	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 not intended to provide OCTC with the ability to force a lawyer to breach his or her duty of confidentiality without the client's permission.

**Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)].
[Sorted by Commenter]**

TOTAL = 10 **Agree = 0**
Disagree = 1
Modify = 9
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt. [21]	OCTC also suggests that Comment [21]'s last sentence "could be interpreted as implying that an attorney can disobey a court order or law, even if not appealing it."	The Commission disagrees with this assessment. The last sentence of Comment [21] provides: "Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order." See response concerning paragraph (e), at RRC Response, ¶. 6, above.
				Cmt. [23]	OCTC also believes that Comment [23] would permit a lawyer to disobey a court order or law.	Please see response to paragraph (e), at RRC Response, ¶. 6, above.
6	Orange County Bar Association	M		1.6(b)(3)	The OCBA recommends one revision to the proposed Rule, and a corresponding change in one of the Comments, in order to emphasize the scope of a lawyer's disclosure under certain circumstances. In paragraph (b)(3) of the proposed Rule, we suggest the following changes: "(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, but only to the extent necessary to establish a claim or defense ; or . . ."	The Commission did not make the requested change as to paragraph (b)(3) as the requested limitation already appears in the introductory paragraph to (b) ("(b) A lawyer may, but is not required to, reveal confidential information relating to the representation of a client <i>to the extent that the lawyer reasonably believes the disclosure is necessary.</i> " [Emphasis added].)
				Cmt. [19]	In addition, we recommend the following changes to the first sentence in Comment [19]: "If a legal claim by a client or the client's	The Commission agrees with this clarifying change and has implemented it.

**Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)].
[Sorted by Commenter]**

TOTAL = 10 **Agree = 0**
Disagree = 1
Modify = 9
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					representative alleges a breach of duty by the lawyer . . . paragraph (b)(3) permits the lawyer to respond only to the extent the lawyer reasonably believes necessary to establish a defense.”	
7	Sall, Robert K.	M		1.6(b) & Cmt. [22]	The “reasonable belief” standard is too subjective. It should be retained in subparagraph (b)(1) but should be removed from the introduction to paragraph (b). The same change should be made to Comment [22].	The Commission did not make the requested change. The “reasonable belief” standard is an objective standard; it appears in both B & P Code § 6068(e)(2) and in current rule 3-100(B).
				1.6(b)(3) & Cmt. [19]	There is a concern that a lawyer might use paragraph (b)(3) to justify disclosure of information not necessary to establish a claim or defense. Recommends revising Comment [19] to avoid any implication that a lawyer may do so.	Please see response to OCBA re Comment [19], above.
				1.6(c)(1)	Paragraph (c)(1) should be revised to require that the lawyer do both (i) and (ii). The commenter suggests the following: (1) make a good faith effort to persuade the client not to commit or to continue the criminal act and counsel the client to pursue a course of conduct that will prevent the threatened death or substantial bodily harm;	The Commission has not made the suggested change. The two courses of conduct in paragraph (c)(1) appear in current rule 3-100. They were written in the alternative because (1) addresses the situation where the client is the actor and (2) addresses the situation where a third person is the actor. In some instances where the client is acting with another person, the lawyer might want to do both. Comment [13] to proposed Rule 1.6 [which is taken nearly verbatim from paragraph 7 of current rule 3-100], clarifies this distinction.

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)].
[Sorted by Commenter]

TOTAL = 10 **Agree = 0**
Disagree = 1
Modify = 9
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt. [6]	There is a possibility that a person who reads Comment [6] will not understand the distinction between information that is "generally known" and information that is in the public record.	Please see response to LACBA, above.

**Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)].
[Sorted by Commenter]**

TOTAL = 10 Agree = 0
Disagree = 1
Modify = 9
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
9	Santa Clara County Bar Association	D		MR 1.6(b)(2), (3)	We oppose the revisions proposes by the RRC in completely deleting subsection (b)(2) and (3) regarding a crime or fraud involving a substantial financial/economic injury to another. The SCCBA recognizes that adopting the ABA Model Rule including subsection (b)(2) and (3) would create another exception to the attorney-client confidentiality. However, the SCCBA believes that the crime/fraud exception is a vital one, constrained in its scope and permissive in its application.	<p>The Commission did not make the suggested change. As noted in the Introduction to the Rule, MR 1.6(b)(2) and (3) are inimical to California's settled policy favoring strong confidentiality to better enable a lawyer to provide competent representation and compliance with the law:</p> <p>These provisions run counter to California's policy of providing assurance to clients that their secrets are safe, which encourages client candor in communicating with the lawyer and provides the lawyer with the information necessary to promote client compliance with the law.</p>
10	Trusts and Estates Section of the State Bar of California, Executive Committee	M		1.6(b)(4) 1.6(a)	<p>We urge (1) retaining subparagraph (b)(4) of the Proposed Rule which would allow disclosure of confidential client-information when necessary to comply with a court order;</p> <p>and (2) including in subparagraph (a) the Model Rule exception that allows for disclosure of confidential client information when "disclosure is impliedly authorized in order to carry out the representation." Otherwise, the only general exception to the Business & Professions Code Section 6068 prohibition on disclosure would be for when the client gives informed consent.</p>	<p>No response necessary to position (1).</p> <p>As to position (2), the Commission has already noted that the concept of "implied authority," which has been incorporated into the Model Rule, is a dangerous catchall that threatens to swallow the duty of confidentiality. Rather than incorporate a term the Model Rules do not define, the Commission in Comment [3] has defined "confidential information relating to the representation" (another term the Model Rules do not define). As provided in Comment [3], that term means "information gained by virtue of the</p>

**Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)].
[Sorted by Commenter]**

TOTAL = 10 **Agree = 0**
Disagree = 1
Modify = 9
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						<p>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.” The lawyer thus would be impliedly authorized to reveal information that does not fall within (a), (b) or (c) – that is, so long as it is not privileged, embarrassing or detrimental to the client, or which the client has expressly requested that the lawyer not divulge. The Commission has determined that this approach provides more of a bright-line standard and thus provides better guidance and predictability to lawyers in representing their clients.</p>

Rule 1.6: Confidentiality of Information

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Alaska, Arkansas, Connecticut, Maryland, New Hampshire, New Mexico, North-Dakota, Pennsylvania, and Utah permit a lawyer to reveal information necessary to prevent the client from committing a criminal act “likely to result in substantial injury to the financial interest or property of another” (or words to that effect). Of these, Arkansas, Connecticut, Maryland, North Dakota, and Utah also permit revelation when the client’s act is only fraudulent, but not criminal. See also the Arkansas entry below.

Arizona, Arkansas, Colorado, Idaho, Illinois, Kansas, Michigan, North Carolina, Ohio, Oregon, South Carolina, Washington, and Wyoming essentially retain the formulation of DR 4-101(C)(3) of the ABA Model Code of Professional Responsibility—they all permit a lawyer to reveal “the intention of a client to commit a crime” (or words to that effect).

Arizona, Connecticut, Illinois, Nevada, North Dakota, and Texas mandate disclosure of information to prevent the client from committing serious violent crimes. However, mandatory disclosure applies in North Dakota only if the harm is “imminent.”

Arizona: Rule 1.6(d)(5) applies only to “other law or a final order of a court or tribunal of competent jurisdiction directing the lawyer to disclose such information.” Arizona also has an unusual statute governing the attorney-client privilege for

corporations and other entities—see the Arizona entry in the Selected State Variations following ABA Model Rule 1.13.

Arkansas: Rule 1.6(c) contains a noisy withdrawal provision, which states as follows: “Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation or the like.”

California: California Business & Professions Code § 6068 (e)(1) provides that it is the duty of an attorney “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” However, §6068(e)(2) provides that 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.” In addition, Rule 3-100 of the California Rules of Professional Conduct provides as follows:

(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.

District of Columbia: Rule 1.6 combines language from the ABA Model Code and the ABA Model Rules plus other language unique to D.C. Rule 1.6(c)(2) permits a lawyer to reveal client confidences "to prevent the bribery or intimidation of witnesses, jurors, court officials, or other persons who are involved in proceedings before a tribunal if the lawyer

reasonably believes" such acts will likely occur without revelation. Rule 1.6(d) is substantially the same as Model Rule 1.6(b)(2) and (3), although differently phrased. Rule 1.6(h) applies the obligations of the Rule "to (confidences and secrets learned prior to becoming a lawyer in the course of providing assistance to another lawyer."

Florida: Rule 1.6 provides that a lawyer "shall reveal" information the lawyer believes "necessary (1) to prevent a client from committing a crime or (2) to prevent a death or substantial bodily harm to another." In addition, Florida Rule 1.6(c) permits a lawyer to reveal information necessary "(1) to serve the clients interest unless it is information the client specifically requires not to be disclosed . . . or (5) to comply with the Rules of Professional Conduct." Florida also adds Rule 1.6(d): "When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies." Finally, Florida adds Rule 1.6(e), which provides that "[w]hen disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule."

Georgia: Rule 1.6(a) combines language from ABA Model Rule 1.6 and DR 4-101(A) of the ABA Model Code of Professional Responsibility, as follows:

(a) A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client, unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, or are required by these rules or other law, or by order of the Court.

Georgia's Rule 1.6(b)(1) permits a lawyer to reveal protected information which the lawyer reasonably believes necessary "(i) to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct or third party criminal conduct clearly in violation of the law" or "(ii) to prevent serious injury or death not otherwise covered" by subparagraph (i). Georgia adds the following Rules 1.6(b)(2)-(3) and (c), (d), and (e):

(2) In a situation described in Subsection (1), if the client has acted at the time the lawyer learns of the threat of harm or loss to a victim, use or disclosure is permissible only if the harm or loss has not yet occurred.

(3) Before using or disclosing information pursuant to Subsection (1), if feasible, the lawyer must make a good faith effort to persuade the client either not to act or, if the client has already acted, to warn the victim.

(c) The lawyer may, where the law does not otherwise require, reveal information to which the duty of confidentiality does not apply under paragraph (b) without being subjected to disciplinary proceedings.

(d) The lawyer shall reveal information under paragraph (b) as the applicable law requires.

(e) The duty of confidentiality shall continue after the client-lawyer relationship has terminated.

Massachusetts: Rule 1.6(b) provides as follows:

A lawyer may reveal, and to the extent required by Rule 3.3, Rule 4.1(b) or Rule 8.3 must reveal, such information:

(1) to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another, or to prevent the wrongful execution or incarceration of another; . . . or

(3) to the extent the lawyer reasonably believes necessary to rectify client fraud in which the lawyer's services have been used, subject to Rule 3.3 (e) . . .

Michigan essentially retains the language of DR 4-101 of the ABA Model Code of Professional Responsibility but deletes the self-defense exception in DR 4-101(C)(4). Michigan also adds Rule 1.6(c)(3), which allows a lawyer to reveal "confidences and secrets to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used."

Minnesota: Rule 1.6 (b) provides, in relevant part, as follows:

(b) A lawyer may reveal information relating to the representation of a client if:

(1) the client gives informed consent;

(2) the information is not protected by the attorney-client privilege under applicable law, the client has not requested that the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client;

(3) the lawyer reasonably believes the disclosure is impliedly authorized in order to carry out the representation; . . .

(10) the lawyer reasonably believes the disclosure is necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. See Rule 8.3.

Missouri: Missouri omits ABA Model Rules 1.6(b)(2) and (b)(3).

New Hampshire: In the rules effective January 1, 2008, Rule 1.6(b)(1) also permit disclosure to prevent the client from committing "a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another," without any requirement that the client is using or has used the lawyer's services. New Hampshire omits ABA Model Rule 1.6(b)(3).

New Jersey: Rule 1.6(b) requires a lawyer to reveal confidential information "to the proper authorities . . . to prevent the client or another person (1) from committing a criminal, illegal or fraudulent act . . . likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another" or "(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal." Rule 1.6(c) permits a lawyer to reveal information as well "to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss."

New Mexico uses the word "should" to describe a lawyer's authority to reveal "a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."

New York: DR 4-101 is the same as DR 4-101 of the ABA Model Code of Professional Responsibility, except that New York adds a special exception to confidentiality in DR 4-101(C)(5) permitting a lawyer to reveal confidences and secrets "to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud." New York DR 7-102(B) tracks the ABA Model Code except that DR 7-102(B)(1) exempts disclosure "when the information is protected as a confidence or secret."¹

North Carolina combines modified language from ABA Model Rule 1.6 with language from DR 4-101 of the old ABA Model Code of Professional Responsibility. For example, North Carolina's equivalent to ABA Model Rules 1.6(b)(2) and (b)(3) provides simply that a lawyer may reveal confidential information to the extent the lawyer reasonably believes necessary "to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyers services were used." North Carolina also adds a Rule 1.6(c), which provides that the duty of confidentiality "encompasses information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme

¹ New York revised its rules effective 4/1/09 and the new rules no longer include this variation.

Court regarding another lawyer or judge seeking assistance or to whom assistance is being offered.”

Ohio: Rule 1.6(b) permits a lawyer “to reveal the intention of the client or other person to commit a crime and the information necessary to prevent the crime,” or to reveal confidential information “to mitigate substantial injury to the financial interests or property of another that has resulted from the client's commission of an illegal or fraudulent act, in furtherance of which the client has used the lawyer's services.” Ohio omits ABA Model Rule 1.6(b)(2).

Oklahoma: Rule 1.6(b)(2) permits revelation only if “the lawyer has first made reasonable efforts to contact the client so that the client can rectify such criminal or fraudulent act, but the lawyer has been unable to do so, or the lawyer has contacted the client and called upon the client to rectify such criminal or fraudulent act and the client has refused or has been unable to do so.”

Oregon: Rule 1.0(f) defines “information relating to the representation” as denoting “both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” In addition, Oregon permits a lawyer to disclose “the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime.” Also, Oregon Rule 1.6(b)(6) permits disclosure of specified information in discussions preliminary to the sale of a law practice under Rule 1.17, but states: “A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve confidences and secrets of such clients whether or not the sale of the practice closes or the

client ultimately consents to representation by the purchasing lawyer.”

Pennsylvania adds a Rule 1.6(d) that states: “The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.” In addition, a lawyer may reveal information relating to the representation of a client that the lawyer reasonably believes necessary to “effectuate the sale of a law practice consistent with Rule 1.17.”

Tennessee: Rule 1.6(b)(1) permits a lawyer to reveal client confidences “to prevent the client or another person from committing a crime, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another,” unless Rule 3.3 forbids revelation. Rule 1.6(c) provides that a lawyer “shall” reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to comply with an order of a tribunal requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law; or

(3) to comply with Rules 3.3, 4.1, or other law.

Texas: Rules 1.02(d) and (e) provide:

(d) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.

(e) When a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act in the commission of which the lawyer's services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.

Texas Rule 1.05 divides "confidential information" into two categories "privileged information," which means information protected by the attorney-client privilege, and "unprivileged client information," which "means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer in the course of or by reason of the representation of the client." A lawyer "may reveal confidential information" in eight instances, including when "the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act," and to "the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used." Rules 1.05(c)(7) and (8).

Virginia: Rule 1.6(a) contains the Code's definitions of "confidence" and "secret" without using these terms. A lawyer may reveal a client confidence "which clearly establishes that the client has, in the course of the representation, perpetrated

upon a third party a fraud related to the subject matter of the representation." Rule 1.6(b)(3). The lawyer must "promptly" reveal "the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime," but if feasible must first give the client the opportunity to desist and must advise the client of the lawyer's obligation. If "the crime involves perjury by the client," the lawyer must advise the client that he or she "shall seek to withdraw as counsel." Rule 1.6(c)(1). Rule 1.6(c)(2) also requires the lawyer to promptly reveal "information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal." Information is clearly established when "the client acknowledges to the attorney that the client has perpetrated a fraud."

**RRC –Rule 1.6 [3-100]
E-mails, etc. – Revised (6/1/2010)**

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May 5, 2010 McCurdy E-mail to Drafters (KEM, Julien, Tuft, Peck, Ruvolo), cc RRC:

Rule 1.6 Codrafters (MOHR, Julien, Peck, Tuft, Ruvolo):

The public comments received to date on this rule are attached in a combined PDF. I've also provided a Word copy of the draft public commenter chart with the comment synopses filled in. To keep pace with the comments being received, please consider beginning to add the RRC responses, and if desired, modifications to the synopses.

Of course, more comments continue to be received each day, and we will convey updated information periodically in order to keep abreast of the public comment review in anticipation of the work being carried out at your June 4 & 5, and June 25 & 26 meetings.

Attached:

RRC - 3-100 [1-6] - Public Comment Chart - By Commenter - XDFT1 (4-22-10).doc

RRC - 3-100 [1-6] - Public Comment Complete - REV (05-05-10).pdf

May 7, 2010 Julien E-mail to RRC:

I would like to have heard the story on the wrongful incarceration and how breaching a confidentiality would help. (I can envision someone lying to protect someone they really loved and, therefore, suffering incarceration for themselves. I suspect that there are not too many of these around so that we have to have an exception to the rule just for them.)

May 14, 2010 McCurdy E-mail to Drafters, cc RRC:

Rule 1.6 Codrafters (MOHR, Julien, Peck, Tuft, Ruvolo):

Two additional public comments have been received for this rule, bringing the total number of comments to 3. According to the Chair's guidelines this rule will be called for discussion at the June 4 & 5 meeting. Here are the instructions from the assignment agenda for all post public comment rules:

INSTRUCTIONS: For each rule listed below that has received three or more comments/testimony, the codrafters are assigned to review the comments/testimony received and to prepare a revised draft rule, if any revisions are recommended, and a Public Commenter Chart with RRC responses, for submission to staff by 12 noon on Tuesday, May 25, 2010 to distribute with the June 4 & 5 meeting agenda materials. An updated Dashboard, Introduction, and Model Rule comparison chart are also needed to complete the rule; however, the codrafters have the discretion of waiting until the end of the public comment period (on June 15th) to begin work on these documents. Additional comments will be sent to each drafting team by e-mail as they are received. Where three or more comments have been received, materials are enclosed for codrafters. Rules that have received less than three comments/testimony will not be considered until the June 25 & 26 meeting.

I've attached an updated comment compilation which is current. An updated public commenter chart, but the most recent comment from the SDCBA has not yet been added to the public commenter chart.

Attached:

RRC - 3-100 [1-6] - Public Comment Chart - By Commenter - XDFT1.1 (05-14-10).doc
RRC - 3-100 [1-6] - Public Comment Complete - REV (05-14-10).pdf

May 19, 2010 McCurdy E-mail to Drafters, cc RRC:

Rule 1.6 Codrafters (MOHR, Julien, Peck, Tuft, Ruvolo):

One additional comment has been received for Rule 1.6. An updated comment compilation and public commenter chart is attached.

Attached:

RRC - 3-100 [1-6] - Public Comment Chart - By Commenter - XDFT1.2 (05-19-10).doc
RRC - 3-100 [1-6] - Public Comment Complete - REV (05-19-10).pdf

May 19, 2010 Difuntorum E-mail to Drafters, cc Chair & Staff:

Rule 1.6 Codrafters (MOHR, Julien, Peck, Tuft Ruvolo):

One of the commenters suggests revising Rule 1.6 to address government lawyer whistleblowers. As you likely recall, comments were added to Rule 1.13 to give some guidance on this topic. See Rule 1.13 Comments [14] and [15] pasted below. If something must be added, then one approach would be to add a new 1.6 comment that cross references Rule 1.13 Comments [14] and [15]. –Randy D.

Governmental Organizations

- [14] In representing governmental organizations, it may be more difficult to define precisely the identity of the client and the lawyer's obligations. However, those matters are beyond the scope of these Rules. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. This Rule does not limit that authority.
- [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.

May 19, 2010 KEM E-mail to Difuntorum, cc Drafters, Chair & Staff:

Thanks, Randy. I'll review the materials this weekend. Kevin

May 22, 2010 KEM E-mail to Drafters, cc RRC:

Greetings Drafters (JoElla, Ellen, Mark & Nace):

1. I've attached a revised Public Comment Chart that includes responses to the four public comments received to date concerning proposed Rule 1.6. Please review.
2. Randy has suggested adding a comment that includes a cross-reference to Rule 1.13, Cmt. [15], which provides:

[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.

I'm agnostic on adding it. There are already 26 comments in the Rule. If we were to add it, I'd recommend tacking it on to the end of the comment to the Rule, under a heading "Government Lawyers". The Comment could state something along the following lines:

"[27] This Rule applies to lawyers representing governmental organizations. See Rule 1.13, cmt. [15]."

What do the drafters think?

3. At present, the defined term for what information is protected provides: "information protected from disclosure by Business and Professions Code section 6068(e)(1)." I recommend deleting "(1)" and simply refer to "section 6068(e)." That's the term we've defined in Rule 1.0.1(e-2) and we tend to refer generally to "6068(e)" in other rules (e.g., Rule 3.3).

Are the drafters O.K. with that change?

4. Our submission is due this Tuesday, May 25, @ noon. Please provide me with any comments you have by Monday, 5/24, @ 5:00 p.m.

Attached:

RRC - 3-100 [1-6] - Public Comment Chart - By Commenter - XDFT2 (05-22-10)KEM.doc

May 24, 2010 Ruvolo E-mail to KEM, cc RRC:

I agree to the deletion of (1) from the reference to 6068(e). Also, I do not feel we should add the cross-reference, but do not feel strongly about it.

May 25, 2010 Peck E-mail to RRC:

1. I like Kevin's chart a lot. Thanks for the hard work, Kevin.
2. I like Randy's suggestion a bit better than Kevin's, since Kevin is so Spartan that it may not shed much light (assuming light on this subject would make anything clearer--perhaps a doubtful proposition).

If I am outvoted, and a majority of the drafting team favors another approach, kindly make it unanimous.

3. I agree with Kevin's recommendation to delete "(1)."
4. Notwithstanding the foregoing, Kevin has my vote to do whatever it takes to get this in.

May 25, 2010 KEM E-mail to McCurdy, cc Drafters, Chair & Staff:

I've attached the following:

1. Public Comment Chart, XDraft 2 (5/22/10)KEM.
2. Rule, Draft 13 (5/24/10), redline, compared to PCD [#12.1] (2/28/10).

Please use the attached as the materials for the 6/4/10 meeting. The proposed responses to the public comment are self-explanatory (Nace & Ellen have signed off on them). I've annotated the rule draft to explain the changes there.

I have not made any revisions to the Dashboard, Introduction or Rule & Comment Chart pending the Commission's decisions at the 6/4/10 meeting. In addition, any changes are premature until the end of the public comment period on 6/15/10.

Please let me know if you have any questions. Thanks,

Attached:

RRC - 3-100 [1-6] - Rule - DFT13 (05-24-10) - Cf. to DFT12.1 (02-28-10).doc

RRC - 3-100 [1-6] - Public Comment Chart - By Commenter - XDFT2 (05-22-10)KEM.doc

May 31, 2010 Kehr E-mail to RRC:

I have only one comment on these materials: The response to S.D. (agenda p. 294) does not reply to the first four sentences of the S.D. comment. That part of the comment is correct that proposed paragraph (b)(3) would make a major and improper change in California law, or at least would create a misleading conflict between the Rule and the Evidence Code, by appearing to sanction a lawyer's unilateral determination as to the disclosure of privileged information while the statute requires a judicial decision.

June 1, 2010 Julien E-mail to RRC:

While I agree with most of what we are proposing, I cannot vote for this rule given its inclusion of 1.14 being an exception.

June 2, 2010 Sapiro E-mail to RRC List:

1. I agree with the substance of the responses to those who commented. However, I think we should expressly add something to the response to the statement by Mr. Santos.
2. While Mr. Santos makes a good argument for an exception in a case of wrongful incarceration, the fact that the Model Rule does not include such an exception should not inhibit our consideration of it. Rather, I would prefer us to state affirmatively that we do not recommend adoption of such an exception on its merits. Its adverse consequences to the client may be disastrous and would erode the trust that clients should be able to repose in lawyers.
3. If a client relies upon lawyer-client confidentiality to disclose in confidence to the lawyer that he or she has committed a crime for which another person has unjustly been convicted, and then the lawyer can “rat out” the client, there will be at least two consequences. First, clients who find out about this exception to the duty of confidentiality will feel entrapped. They may themselves be prosecuted and face jail time because of a statement made to their lawyers under circumstances they thought were confidential. If the client is then prosecuted and/or convicted, the client will have been betrayed by the fiduciary in whom the client has reposed the utmost dangerous confidence. Second, once clients realize that their lawyers may divulge client confidences to prosecutors or others and implicate clients in crimes, candor between client and lawyer will cease.
4. This inroad would continue the trend of eroding lawyer-client confidentiality. However, that is not a good thing, and we should say so expressly. Although lawyers need to know all potentially relevant facts, a client who fears that the lawyer will not keep the information confidential is not likely to give the lawyer facts that might be incriminating or embarrassing. *Upjohn Co. v. United States*, 449 U.S. 383, 389-90 [quoting *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)]. Confidentiality between lawyer and client is particularly important to the client if the client might face criminal charges when the lawyer is free to divulge confidential information.
5. The implications of the proposal are of constitutional magnitude. The relationship of trust and confidence between lawyer and client is the “cornerstone of the adversary system and effective assistance of counsel.” *Morris v. Slappy*, 461 U.S. 1, 21, fn. 4. “The relationship between attorney and client is highly confidential, demanding personal faith and confidence in order that they may work together harmoniously. *Lee v. United States*, 235 F.2d 219, 274, fn. 5 (1956). This proposal would permit lawyers to abrogate that relationship of confidentiality, trust, and confidence in a situation in which the client is particularly vulnerable, namely exposure of the client to criminal prosecution. Adopting it would make difficult, if not impossible, the job of a lawyer trying to obtain candid information from his or her client. It will destroy the “glory of our profession.” *United States v. Costen*, 38 Fed. 24 (Colo. Cir. Ct. 1889), disbarred a lawyer who sought employment by the adverse party and offered to give the adverse party important information:

Now, it is the glory of our profession that its fidelity to its client can be depended on; that a man may safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation with the absolute assurance that the lawyer's tongue is tied from ever disclosing it; and any lawyer who proves false to such an obligation, and betrays or seeks to betray any information or any facts that he has attained while employed on the one side, is guilty of the grossest breach of trust.

6. We should affirmatively state that we disagree with this proposal on the merits. That reason should be stated first. The lack of a Model Rule and the fact that only one state has such a rule should be the second and third reasons.