

McCurdy, Lauren

From: Kevin Mohr [kemohr@charter.net]
Sent: Wednesday, August 12, 2009 12:07 PM
To: McCurdy, Lauren; Difuntorum, Randall
Cc: JoElla L. Julien; Ellen Peck; Mark Tuft; Kevin Mohr G; Harry Sondheim; Lee, Mimi
Subject: RRC - 3-100 [1.6] - III.D. - 8/28-29/09 Meeting Materials
Attachments: RRC - 3-100 [1-6] - Compare - Rule Explanation - DFT1.1 (08-11-09).pdf; RRC - 3-100 [1-6] - Compare - Comment Explanation - DFT1.1 (08-11-09).pdf

Greetings Lauren & Randy:

I've attached the following for inclusion in the agenda materials for the August 2009 meeting:

1. Rule 1.6 [3-100], Rule Comparison Chart, Draft 1.1 (8/11/09), compared to MR 1.6, in Scaled PDF.
2. Rule 1.6 [3-100], Comment Comparison Chart, Draft 1.1 (8/11/09), compared to MR 1.6, in Scaled PDF.

Comments:

1. Item #1. Rule Comparison Chart. It includes not only a comparison to the Model Rule (pages 1-6), but also a comparison to current rule 3-100 (pages 7-10). We thought it would be helpful for the Commission to see the changes that we've made to current rule 3-100 but do not recommend providing it to the BOG. Therefore, there are no explanations for the changes to rule 3-100.
 - a. Please note that the other drafters have not yet weighed in on the Explanation column.
 - b. In addition, please review my inquiries at notes 4 and 6.
3. Item #3. Comment Comparison Chart. This chart is a bit complicated because some of the comments are derived from the Model Rule comment and some from the rule 3-100 Discussion. If we just compared the comments to the Model Rule comment, the 13 Discussion paragraphs from current rule 3-100 that we've largely retained would simply appear in the comparison as additional comments. We thought it would make more sense to show the changes to each. Therefore, 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. Put another way, 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.
 - a. 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.
 - b. We are leaning toward taking this same approach for the public comment and BOG

submissions.

c. The Explanation for proposed comment [6] on page 11 of 30 will probably be inserted in the Introduction.

d. We might want to revisit the deletion of Model Rule Comments [16] & [17] at pages 28 & 29 of the chart. That decision was made in April 2008, well before we received guidance from BOG.

e. Again, please note that the other drafters have not yet weighed in on the Explanation column.

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

Kevin

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<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). <u>The information protected from disclosure by section 6068(e)(1) is referred to as "confidential information relating to the representation" in this Rule.</u>¹</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 second sentence has been added because of an anomaly in the language 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, subparagraph (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</p>

* Proposed Rule, Discussion Draft 8 (8/8/09). Redline/strikeout showing changes to the ABA Model Rule

¹ **Drafters' Note:** The RRC has twice voted to include the phrase, "information relating to the representation" in proposed Rule 1.6. At the 5/8-9/09 meeting, Jerry **Sapiro** stated his DISSENT from paragraph (a). See 5/8-9/09 KEM Meeting Notes, III.F., at ¶. 1A.c.

<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>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). Although section 6068(e)(2) refers to “confidential information relating to the representation,” it has no counterpart in section 6068(e)(1). To resolve this anomaly, the Commission recommend that proposed Rule 1.6 expressly link the two concepts. “Confidential information relating to the representation” is then defined in Comment [3]. See below.</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 <u>confidential</u> information relating to the representation of a client to the extent <u>that</u> the lawyer reasonably believes <u>the disclosure is</u> necessary:</p>	<p><u>COMPARISON TO MODEL RULE 1.6</u></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). Because the duty of confidentiality is in a statute, section 6068(e)(1), any exceptions must also be in the statute, in this case, section 6068(e)(2). The language of current rule 3-100(B) copies section 6068(e)(2) verbatim, as does the introductory clause of proposed paragraph (b). The remainder of current rule 3-100(B) is found in subparagraph (b)(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>(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 substantial bodily harm to, an individual, as provided in paragraph (c);</u>²</p>	<p>COMPARISON TO MODEL RULE 1.6 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>(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)³ 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</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</p>	<p>COMPARISON TO MODEL RULE 1.6 See Explanation of Changes to Model Rule 1.6(b)(2).</p>

² **RRC Action:** At the 5/8-9/09 meeting, the RRC voted 6-0-3 to add the phrase, "as provided in paragraph (c)," to the end of paragraph (b)(1). See 5/8-9/09 KEM Meeting Notes, III.F., at ¶. 2A.

³ **RRC Action:** At the 4/25/08 meeting, the RRC defeated by a 10-1-0 vote a motion to include Model Rule 1.6(b)(2) and (3), which would permit a lawyer to disclose information relating to the representation to prevent or rectify a crime or fraud resulting in substantial financial injury to a third person. See 4/25/08 KEM Meeting Notes, III.A., at ¶. 3.

<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>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>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>(4) to secure legal advice about the lawyer's compliance with these Rules;</p>	<p>(42) to secure <u>confidential</u>⁴ 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>(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>,⁵ or</p>	<p>COMPARISON TO MODEL RULE 1.6 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." 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,</p>

⁴ **Consultant's Question:** Is "confidential" really necessary here? Can we restore the Model Rule language and delete it?

⁵ **RRC Action:** At the 4/25/08 meeting, the RRC defeated a motion to delete paragraph (b)(3) by a 5-5-2 vote. See 4/25/08 KEM Meeting Notes, III.A., at ¶. 7. See also Comment [M10]. Both Bob Kehr and Jerry Sapiro DISSENT from paragraph (b)(3). See 5/4/09 Kehr E-mail, #2; 5/4/09 Sapiro E-mail, #4.

<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>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>(6) to comply with other law or a court order.</p>	<p>(6) to comply with other law or a court order.</p>	<p>COMPARISON TO MODEL RULE 1.6 The Commission recommends that Model Rule 1.6(b)(6) not be adopted because it is too vague.⁶</p>
	<p><u>(4) to protect the interests of a client under the limited circumstances identified in Rule 1.14(b).</u>⁷</p>	<p>COMPARISON TO MODEL RULE 1.6 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>

⁶ **Consultant's Question:** I'm fine w/ deleting the reference to “other law” because of its implication that a lawyer would be justified in complying with SEC Rules and Sarbanes-Oxley. However, I have misgivings about sending to the Supreme Court a rule that does not provide an exception to confidentiality for a lawyer to comply w/ a court order. I am not aware of any state that has similarly rejected 1.6(b)(6).

⁷ **RRC Action:** At the 5/8-9/09 meeting, the RRC voted 5-4-0 to include paragraph (b)(4) in the Rule. See 5/8-9/09 KEM Meeting Notes, III.F., at ¶. 3A. Mark **Tuft** DISSENTS to its inclusion and is joined by Jerry Sapiro. See 7/20/09 Sapiro E-mail #1.

<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>(c)⁸ Further obligations under paragraph (b)(1). Before revealing confidential information relating to the representation⁹ in order to prevent a criminal act as provided in paragraph (b)(1), a lawyer shall, if reasonable under the circumstances:</p>	<p>COMPARISON TO MODEL RULE 1.6</p> <p>Proposed Rule 1.6(c) carries forward current rule 3-100(C), the only changes made to conform the rule to California rule style and substitute “lawyer” for “member.”</p>
	<p>(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</p>	<p>COMPARISON TO MODEL RULE 1.6</p> <p>See Explanation of changes for introductory clause to paragraph (c).</p>

⁸ **RRC Action:** The minimum number of objections to the drafters’ recommendation to leave paragraph (c)(1) as drafted before the April 2008 meeting not having been received, paragraph (c)(1) was deemed approved. Aside from the addition of the header and changes to conform to RRC style and format, it is identical to current rule 3-100(C).

⁹ **Drafters’ Note/Recommendation:** Bob Kehr has suggested that the full, defined term, “confidential information relating to the representation,” be used in this paragraph. See 7/19/09 Kehr E-mail #1 & 2. Although the reference to paragraph (b) in the same sentence arguably makes it clear what confidential information is being referred to, the Drafters agree that the defined term should be used. Although this results in a change to current rule 3-100, the drafters believe the change is warranted because we have added the defined term – not found in current rule 3-100 – in paragraph (a). The drafters do not agree w/ Mr. Kehr’s alternative, i.e., to change the language of the sentence to, “Before making a disclosure to prevent a criminal act as provided in” Such a change to current rule 3-100’s language might raise unnecessary questions as to whether the meaning or intent of the provision had been changed.

<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) inform the client, at an appropriate time, of the lawyer's ability or decision to reveal confidential information relating to the representation as provided in paragraph (b)(1).</p>	<p>COMPARISON TO MODEL RULE 1.6 See Explanation of changes for introductory clause to paragraph (c).</p>
	<p>(d)¹⁰ In revealing confidential information relating to the representation 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, or protect the interests of the client, given the information known to the member at the time of the disclosure.</p>	<p>COMPARISON TO MODEL RULE 1.6 Proposed Rule 1.6(d) carries forward current rule 3-100(D). In addition to including with 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 to conform the rule to California rule style and substitute "lawyer" for "member."</p>
	<p>(e)¹¹ A lawyer who does not reveal confidential information as permitted by paragraph (b) does not violate this Rule.</p>	<p>COMPARISON TO MODEL RULE 1.6 Proposed Rule 1.6(e) carries forward current rule 3-100(E), the only changes made to conform the rule to California rule style and substitute "lawyer" for "member."</p>

¹⁰ **RRC Action:** At the 5/8-9/09 meeting, paragraph (d) was deemed approved. See 5/8-9/09 meeting, III.F., at ¶. 5.

¹¹ **RRC Action:** At the 5/8-9/09 meeting, paragraph (d) was deemed approved. See 5/8-9/09 meeting, III.F., at ¶. 6.

<p align="center">Cal. Rule 3-100 Rule 3-100 Confidential Information of a Client</p>	<p align="center">Commission's Proposed Rule* Rule 3-1001.6 Confidentiality of Information of a Client</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
<p>(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.</p>	<p>(Aa) A memberlawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without unless the client gives the informed consent of the client, or as provided inthe disclosure is permitted by paragraph (Bb)of. <u>The information protected from disclosure by section 6068(e)(1) is referred to as "confidential information relating to the representation" in this Rule.</u></p>	<p align="center">COMPARISON TO CAL. RULE 3-100</p>
<p>(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.</p>	<p>(Bb) A memberlawyer may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the memberlawyer reasonably believes the disclosure is necessary.</p>	<p align="center">COMPARISON TO CAL. RULE 3-100</p>

* Proposed Rule, Discussion Draft 8 (8/8/09). Redline/strikeout showing changes to current Cal. rule 3-100.

<p align="center"><u>Cal. Rule 3-100</u> Rule 3-100 Confidential Information of a Client</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 3-1001.6 Confidentiality of Information of a Client</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(1) 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, <u>as provided in paragraph (c)</u>;</p>	<p>COMPARISON TO CAL. RULE 3-100</p>
	<p>(2) <u>to secure confidential legal advice about the lawyer's compliance with the lawyer's professional obligations;</u></p>	<p>COMPARISON TO CAL. RULE 3-100</p>
	<p>(3) <u>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; or</u></p>	<p>COMPARISON TO CAL. RULE 3-100</p>
	<p>(4) <u>to protect the interests of a client under the limited circumstances identified in Rule 1.14(b).</u></p>	<p>COMPARISON TO CAL. RULE 3-100</p>

<p align="center">Cal. Rule 3-100 Rule 3-100 Confidential Information of a Client</p>	<p align="center">Commission's Proposed Rule* Rule 3-1001.6 Confidentiality of Information of a Client</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
<p>(C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:</p>	<p>(C) <i>Further obligations under paragraph (b)(1).</i> Before revealing confidential information <u>relating to the representation in order</u> to prevent a criminal act as provided in paragraph (B)1), a memberlawyer shall, if reasonable under the circumstances:</p>	<p>COMPARISON TO CAL. RULE 3-100</p>
<p>(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</p>	<p>(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</p>	<p>COMPARISON TO CAL. RULE 3-100</p>
<p>(2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).</p>	<p>(2) inform the client, at an appropriate time, of the member'slawyer's ability or decision to reveal <u>confidential</u> information <u>relating to the representation</u> as provided in paragraph (B)1).</p>	<p>COMPARISON TO CAL. RULE 3-100</p>

<p align="center">Cal. Rule 3-100 Rule 3-100 Confidential Information of a Client</p>	<p align="center">Commission's Proposed Rule* Rule 3-1001.6 Confidentiality of Information of a Client</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
<p>(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.</p>	<p>(Dd) In revealing confidential information <u>relating to the representation</u> as provided in <u>permitted by</u> paragraph (Bb), the member's <u>lawyer's</u> disclosure must be no more than is necessary to prevent the criminal act, <u>secure confidential legal advice, establish a claim or defense in a controversy between the lawyer and a client, or protect the interests of the client</u>, given the information known to the member at the time of the disclosure.</p>	<p>COMPARISON TO CAL. RULE 3-100</p>
<p>(E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.</p>	<p>(Ee) A member <u>lawyer</u> who does not reveal <u>confidential</u> information <u>as</u> permitted by paragraph (Bb) does not violate this rule <u>Rule</u>.</p>	<p>COMPARISON TO CAL. RULE 3-100</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] [M1] This Rule governs the disclosure by a lawyer of <u>confidential</u>³ 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 <u>confidential</u> information relating to the lawyer’s prior representation of a former client, and [Rules 1.8(b) <u>1.8.2</u> 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.⁴</p>	<p>COMPARISON TO MODEL RULE 1.6</p> <p>Comment [1] is based on MR 1.6, cmt. [2], the only changes being to conform the language to the defined term, “confidential information relating to the representation,” that appears in Bus. & Prof. Code § 6068(e)(1), (see Explanation of Changes for paragraph (a)), and 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>

¹ **Drafters’ 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 8 (8/8/09).

³ **Drafters’ Note:** “Confidential information relating to the representation” is a term of art in this Rule (paragraph (a) and in Bus. & Prof. Code § 6068(e)(2). Accordingly, the “confidential” modifier has been added throughout the Rule.

⁴ **Drafters’ Note:** The minimum number of objections to the Drafters’ recommendation to include Comment [M1] not having been received, the comment is deemed approved but is subject to the RRC approving the referenced rules in brackets.

<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>[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 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>[2] <u>[C1]⁵ <i>Policies furthered by the duty of confidentiality.</i></u> A fundamental principle in the client-lawyer relationship is that, in the absence the client’s informed consent, the lawyer must not reveal information relating <u>Paragraph (a) relates to the representation. See Rule 1.0a lawyer’s obligations under Business and Professions Code section 6068(e) for the definition (1), which provides it is a duty of informed consent</u> a lawyer: “<u>To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.</u>” This <u>A lawyer’s duty to preserve the confidentiality of client information involves public policies of paramount importance. (<i>In re Jordan</i> (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information</u> 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</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> <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>Finally, the substitution of “detrimental subjects” for “legally damaging subject matter” conforms the language in this Comment to the definition of “confidential information relating to the representation” 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>

⁵ **Drafters’ Note:** No objection having been registered, Comment [2] has been deemed approved.

⁶ **Drafters’ Note/Recommendation:** Bob Kehr has suggested that Comments [2] and [3B] overlap and should be merged. See 7/19/09 Kehr E-mail #3. The drafters disagree. The subject of the comments are different – Comment [2] concerns the policies underlying the duty of confidentiality and Comment [3B] concerns the scope or breadth of the duty. Bob Kehr also recommended deleting the headings for comments [3] to [3C], in part because comments [2] and [3B] had the same heading. See 7/19/09 Kehr E-mail #7. The Drafters instead have revised the headings for those comments and for [3A] and [3C].

<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>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 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>[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</p>	<p>[2] [C1] Duty <i>Policies furthered by the duty of confidentiality.</i> Paragraph (A) 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 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</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>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., <i>Commercial Standard Title Co. v. Superior Court</i> (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)</p>	<p>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 (A) 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 confidential information relating to the representation. (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</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</p>	<p>COMPARISON TO MODEL RULE 1.6</p> <p>The Commission has substituted new proposed Comments [3] to [3C], using as the 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 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>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>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>[2] <i>Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine and ethical standards of confidentiality.</i> The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See In the Matter of Johnson (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; Goldstein v. Lees (1975) 46 Cal.3d 614, 621 [120 Cal. Rptr. 253].) The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member’s ethical duty of</p>	<p>[3] [ALT-C2] <i>Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine and ethical standards of confidentiality.</i> The principle of client-lawyer confidentiality applies <u>Confidential Information Relating to the Representation. As used in this Rule, “confidential information relating to the representation” consists of information gained by virtue⁷ of the representation of a client</u>, whatever its source, and encompasses matters communicated in confidence by the client, and therefore <u>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 in law, rule and policy is broader than lawyer-client privilege.</u> (See</p>	<p>COMPARISON TO CAL. RULE 3-100</p> <p>As noted, the Commission has substituted new proposed Comments [3] to [3C], using as the starting point California rule 3-100, Discussion ¶. 2, which in turn is based loosely on Model Rule 1.6, cmt. [3].</p> <p>The purpose of Comments [3] to [3C] is to delimit the scope of a lawyer’s duty of confidentiality, as well as provide a definition for “confidential information relating to the representation,” a term the ABA has chosen not to define in the Model Rules. Because of California’s strong policy of protecting client confidentiality and the anomaly in the language between sections (e)(1) and (e)(2) of Bus. & Prof. Code § 6068(e), (see Explanation of Changes for proposed paragraph (a)), 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>

⁷ **RRC Action:** No objection being registered to the drafters’ recommendation, we have substituted “by virtue of,” language taken from *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 574 15 P.2d 505, for “in connection with.”

<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>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><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>[3A]⁸ <i>Scope of the Lawyer-Client Privilege. 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</i></p>	<p><u>COMPARISON TO CAL. RULE 3-100</u> See Explanation of Changes for proposed Comment [3].</p>

⁸ **Drafters' Note:** No objection having been heard to the proposal, we've broken down the lengthy [Alt-C2] comment into four comments, [3], [3A], [3B], and [3C].

<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>amount of evidence available to a tribunal, its protection is somewhat limited in scope.⁹</p>	
	<p>[3B] <i>Scope of the Duty of Confidentiality.</i> 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 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 acquires¹⁰ the information by virtue of being in the lawyer-client relationship. Confidential information relating to the representation 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 is¹¹ established, but which is relevant to the matter for</p>	<p>COMPARISON TO CAL. RULE 3-100 See Explanation of Changes for proposed Comment [3].</p>

⁹ **RRC Action:** At the 4/25/08 meeting, the RRC defeated by a 4-4-3 vote a motion to delete this sentence. See 4/25/08 KEM Meeting Notes, at III.A., ¶. 24. Jerry Sapiro dissents. See 7/20/09 Sapiro E-mail #4.

¹⁰ **Drafters' Note/Recommendation:** Change made to present tense per suggestion of Bob Kehr. See 7/19/09 Kehr E-mail #4.

¹¹ See footnote 10, above.

<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>which the lawyer is retained, is protected under the duty regardless of its source.¹² 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 except with the consent of the client or an authorized representative of the client, or as authorized¹³ by these Rules or the State Bar Act. See comment [M9].</p>	
	<p>[3C] Relationship of Confidentiality to¹⁴ Lawyer Work Product. Confidential information relating to the representation and contained in lawyer work product is protected under this Rule.¹⁵ However, “confidential information relating to the representation” does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local</p>	<p>COMPARISON TO CAL. RULE 3-100 See Explanation of Changes for proposed Comment [3].</p>

¹² **RRC Action:** At the 4/25/08 meeting, the concept of this sentence was deemed approved. See 4/25/08 KEM Meeting Notes, III.A., at ¶. 29.b. The sentence is intended to address Tony Voogd’s observation made at the 2/29-3/1/08 meeting. See 2/29-3/1/08 KEM Meeting Notes, at III.F., ¶. 3.e.(3).

¹³ **RRC Action:** To conform to RRC practice, the phrase, “or required,” has been deleted. See also 5/8-9/09 KEM Meeting Notes, III.F., at ¶. 11.

¹⁴ **Drafters’ Note/Recommendation:** Bob Kehr expressed concern that the heading for Comment [3C] might lead readers to think it refers to work product. See 7/19/09 Kehr E-mail #7. We have revised the title to avoid that confusion.

¹⁵ **RRC Action:** At the 4/25/08 meeting, the RRC voted 8-0-2 to include this sentence in the comment. See 4/25/08 KEM Meeting Notes, III.A., at ¶. 13. Deletion of other references to “work product” throughout the comment was deemed approved. Id. at ¶. 13.d.

<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>community or in the trade, field or profession to which the information relates.</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>[4] [M4] Paragraph (a) prohibits a lawyer from revealing confidential 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>COMPARISON TO MODEL RULE 1.6 Comment [4] is identical to Model Rule 1.6, cmt. [4], except for the substitution of "confidential information relating to the representation," a defined term, for the Model Rule's "information relating to the representation."</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</p>	<p>Authorized Disclosure</p> <p>[5] [M5] 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 confidential information relating to a client of the firm, unless the client has instructed that particular</p>	<p>COMPARISON TO MODEL RULE 1.6 Comment [5] 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 recommended 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 proposed 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>confined to specified lawyers.</p>	<p>information be confined to specified lawyers.</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>COMPARISON TO MODEL RULE 1.6</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 [6] to [15], which are carried over largely unchanged from current rule 3-100, Discussion ¶¶. 3 to 12. See Explanation of Changes for proposed Comment [6].</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>[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 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</p>	<p>[6] [C3] <i>Narrow exception to duty of confidentiality under this Rule paragraph (b)(1).</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 under Business & Professions Code section 6068(e); subdivision (1). Paragraph (Bb), which (1) restates 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 <u>disclose confidential information relating to result in the death of, or substantial bodily harm to an individual information even without client consent.</u>¹⁶ 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 information concerning a client’s past, completed criminal acts, the policy favoring the</p>	<p>COMPARISON TO CAL. RULE 3-100</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) 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 3¹⁸ 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</p>

¹⁶ **Drafters’ Note/Recommendation:** Bob Kehr suggested substituting the following sentence for the second sentence of Comment [7]:

Paragraph (b)(1) restates Business & Professions Code section 6068(e)(2), narrowly permitting a lawyer to disclose confidential information relating to a representation even without client consent.

See 7/19/09 Kehr E-mail #8. We agree in principle, but have modified his proposal to remove ambiguity that paragraph (b)(1) permits the disclosure; in fact, it is section 6068(e)(2) that permits the disclosure.

<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>act.</p>	<p>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.¹⁷</p>	<p>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</p>

¹⁷ **Drafters' Note/Recommendation:** As was done by the AB 1101 Task Force, we've substituted rule 3-100, cmt. [3], for MR 1.6, cmt. [6].

¹⁸ In its entirety, section 3 of AB 1101 provided:

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

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

- (1) Whether an attorney must inform a client or a prospective client about the attorney's discretion to reveal the client's or prospective client's confidential information to the extent that the attorney reasonably believes that the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.
- (2) Whether an attorney must attempt to dissuade the client from committing the perceived criminal conduct prior to revealing the client's confidential information, and how those conflicts might be avoided or minimized.
- (3) Whether conflict-of-interest issues between the attorney and client arise once the attorney elects to disclose the client's confidential information, and how those conflicts might be avoided or minimized.
- (4) Other similar issues that are directly related to the disclosure of confidential information permitted by this act.

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

- (1) Civil and criminal law practitioners, including criminal defense practitioners.
- (2) Representatives from the judicial, executive, and legislative branches.
- (3) Representatives from the State Bar Commission for the Revision of the Rules of Professional Conduct and from the State Bar Committee on Professional Responsibility and Conduct.
- (4) Public members.

¹⁹ KEM Note: Much of this, if it is retained, should probably be placed in the Introduction.

<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>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 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.¹⁹</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</p>	<p>[7][C4]²⁰ <i>Member/Lawyer not subject to discipline for revealing confidential information as permitted under <u>this Rule paragraph (b)(1)</u>.</i> Rule 3-100, which restates Business and Professions Code section 6068, subdivision 1.6(e)(2),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</p>	<p><u>COMPARISON TO CAL. RULE 3-100</u></p> <p>See Explanation of Changes for proposed Comment [6].</p>

²⁰ **Drafters' Note:** We have inserted the remaining comments to rule 3-100, all of which address proposed Rule 1.6(b)(1), before comment [9] to MR 1.6. Although under strict application of our rule format protocol, we would discuss comments relating to rule paragraphs (d) and (e) after the comments relating to paragraph (c), for now, we have placed (d)-(e) comments with the comments related directly to paragraph (b)(1). We have substituted “lawyer” for “member” throughout, and have also revised the references to the rule paragraph numbers.

²¹ **Drafters' Note/Recommendation:** As suggested by Bob Kehr, we've deleted the cross-reference to section 6068(e)(2), which also appears in Comment [6]. See 7/19/09 Kehr E-mail #9.

<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>an individual. A member who reveals information as permitted under this rule is not subject to discipline.</p>	<p>in death or substantial bodily harm to an individual. A memberlawyer who reveals confidential information as permitted under this ruleparagraph (b)(1) is not subject to discipline.</p>	
<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>[8] [C5] <i>No duty to reveal confidential information.</i> Neither Business and Professions Code section 6068, subdivision(e)(2) nor this ruleparagraph (b)(1) imposes an affirmative obligation on a memberlawyer to reveal confidential information in order to prevent harm. (See rule 1-100(A).) A member lawyer may decide not to reveal confidential information. Whether a memberlawyer chooses to reveal confidential information as permitted under this rule is a matter for the individual memberlawyer to decide, based on all the facts and circumstances, such as those discussed in paragraphcomment [C6] of this discussionRule.</p>	<p>COMPARISON TO CAL. RULE 3-100 See Explanation of Changes for proposed Comment [6].</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 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</p>	<p>[9] [C6] <i>Deciding to reveal confidential information as permitted under paragraph (Bb)(1).</i> Disclosure permitted under paragraph (Bb)(1) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing confidential information as permitted under paragraph (Bb)(1), the memberlawyer 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</p>	<p>COMPARISON TO CAL. RULE 3-100 See Explanation of Changes for proposed Comment [6].</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>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>(6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.</p>	<p>considered in determining whether to disclose confidential 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>(6) the nature and extent of <u>confidential</u></p>	

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<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>information that must be disclosed to prevent the criminal act or threatened harm.</p> <p>A memberlawyer 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 memberlawyer may disclose the <u>confidential</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 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</p>	<p>[10] [C7] <i>Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm.</i> SubparagraphParagraph (C)(1) provides that, before a memberlawyer may reveal confidential information, 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, <u>including persuading the client to take action to prevent a third person from committing or continuing a criminal act.</u> If necessary, <u>the client may be persuaded to</u> do both. The interests protected by such counseling isare the client's interestinterests in limiting disclosure of confidential information and in taking responsible action to deal with situations attributable to the client. If a client,</p>	<p>COMPARISON TO CAL. RULE 3-100</p> <p>See Explanation of Changes for proposed Comment [6].</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>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>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 confidential 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 confidential 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>	

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<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. 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> <p>(1) whether the client is an experienced user of legal services;</p> <p>(2) the frequency of the member's contact</p>	<p>[11][C9] <i>Informing client of member'slawyer's ability or decision to reveal confidential information under subparagraphparagraph (Cc)(2).</i> A memberlawyer 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 (Cc)(2), however, recognizes that under certain circumstances, informing a client of the member'slawyer's ability or decision to reveal confidential information under paragraph (Bb)(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 (Cc)(2) requires a memberlawyer to inform the client of the member'slawyer's ability or decision to reveal confidential information as provided in 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 memberlawyer to inform the client may vary depending upon the circumstances. (See paragraph comment [C10] of this discussion.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:</p> <p>(1) whether the client is an experienced user of legal services;</p>	<p>COMPARISON TO CAL. RULE 3-100</p> <p>See Explanation of Changes for proposed Comment [6].</p> <p>Note also that the Commission has reversed the order of current rule 3-100, Discussion ¶¶. 8 and 9 to better track the order of the Rule paragraphs.</p>

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<p>with the client;</p> <p>(3) the nature and length of the professional relationship with the client;</p> <p>(4) whether the member and client have discussed the member's duty of confidentiality or any exceptions to that duty;</p> <p>(5) the likelihood that the client's matter will involve information within paragraph (B);</p> <p>(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</p> <p>(7) the member's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.</p>	<p>(2) the frequency of the member'slawyer's contact with the client;</p> <p>(3) the nature and length of the professional relationship with the client;</p> <p>(4) whether the memberlawyer and client have discussed the member'slawyer's duty of confidentiality or any exceptions to that duty;</p> <p>(5) the likelihood that the client's matter will involve information within paragraph (B)(1);</p> <p>(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</p> <p>(7) the member'slawyer's belief, if 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</p>	<p>[12] [C8] <i>Disclosure of confidential information as permitted by paragraph (b)(1) must be no more than is reasonably necessary to prevent the criminal act.</i> Paragraph (d) requires that disclosure of confidential information as permitted by paragraph (b)(1), when made, must be no more extensive than the lawyer reasonably believes necessary to</p>	<p>COMPARISON TO CAL. RULE 3-100</p> <p>See Explanation of Changes for proposed Comments [6] and [11].</p>

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<p>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>prevent the criminal act. Disclosure should allow access to the confidential 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.</p>	
<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</p>	<p>[13] [C10] <i>Avoiding a chilling effect on the lawyer-client relationship.</i> The foregoing flexible approach to the member's a lawyer 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 comment [C1].) To avoid that chilling effect, one member lawyer may choose to inform the client of the member's lawyer's ability to reveal confidential information as early as the outset of the representation, while another member lawyer may choose²² to inform a client only at a point when</p>	<p><u>COMPARISON TO CAL. RULE 3-100</u> See Explanation of Changes for proposed Comment [6].</p>

²² **Drafters' Disagreement:** Mark Tuft would like to substitute the following construction for the second sentence in Comment [C10]:

<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>(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>that client has imparted information that may fall undercomes within paragraph (B)(1), or even choose not to inform a client until such time as²³the memberlawyer attempts to counsel the client as contemplated in Discussion paragraphunder Comment [C7]. In each situation, the memberlawyer will have discharged properlysatisfied the requirementlawyer's obligation under subparagraphparagraph (C)(2), and will not be subject to discipline.</p>	
<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</p>	<p>[14] [C11] <i>Informing client that disclosure has been made; termination of the lawyer-client relationship.</i> When a memberlawyer has revealed confidential 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 memberrelationship has deteriorated because of the lawyer's disclosure, the lawyer is required to seek to withdraw from the representation (see ruleRule 1.16</p>	<p>COMPARISON TO CAL. RULE 3-100 See Explanation of Changes for proposed Comment [6].</p>

To avoid that chilling effect, a lawyer may choose to inform the client of the lawyer's ability to reveal information as early as the outset of the representation, or may choose"

KEM disagrees. The construction the AB1101 Task Force used emphasizes that different lawyers will reach different resolutions of the issue depending upon the circumstances they confront. Mark's proposed construction lacks that contextual focus.

²³ **Drafters' Note:** Deleted per 7/19/09 Kehr E-mail #11.

<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>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>[3-700(B)], unless the member is able to obtain the client's <u>client has given his or her</u> informed consent to the member's <u>lawyer's</u> continued representation. The member <u>lawyer normally</u> must inform the client of the fact of the member's <u>lawyer's</u> disclosure unless <u>if</u> the member <u>lawyer</u> has a compelling interest in <u>reason for</u> not informing the client, such as to protect the member <u>lawyer</u>, the member's <u>lawyer's</u> family or a third person from the risk of death or substantial bodily harm, <u>the lawyer must withdraw from the representation.</u> [See Rule 1.16].</p>	
<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>[15] [C12] <i>Other consequences of the member's lawyer's disclosure.</i> Depending upon <u>on</u> the circumstances of a member's <u>lawyer's</u> disclosure of confidential information, 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 in the client's</u> a 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 (Rule 1.1)</u> 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(d)</u>).</p>	<p>COMPARISON TO CAL. RULE 3-100 See Explanation of Changes for proposed Comment [6].</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>[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 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>[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 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>COMPARISON TO MODEL RULE 1.6</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>[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</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</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</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>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>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>recommends deletion of Model Rule 1.6, cmt. [8]. See Explanation of Changes for Model Rule 1.6(b)(2).</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>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] 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 proposed 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</p>	<p><u>[16] [M10] Where</u>²⁴ a legal claim <u>by a client</u> or <u>disciplinary charge</u> <u>the client's representative</u> alleges <u>complicity of a breach by</u> the lawyer <u>in a client's</u></p>	<p><u>COMPARISON TO MODEL RULE 1.6</u></p> <p>Comment [16] is based on Model Rule 1.6, cmt. [10]. The Model Rule comment has been revised to conform the comment to the</p>

²⁴ **Drafters' Note:** We've substituted "if" for "where" as suggested by Jerry Sapiro. See 7/20/09 Sapiro E-mail #14.

<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>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 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>conduct involving representation of the client or other 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, <u>paragraph (b)(3) permits</u> the lawyer mayto 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 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>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>[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</p>	<p><u>[17]</u> [M11] 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</p>	<p>COMPARISON TO MODEL RULE 1.6 Comment [17] 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</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>fiduciary relationship may not exploit it to the detriment of the fiduciary.</p>	<p>fiduciary relationship may not exploit it to the detriment of the fiduciary.²⁵</p>	<p>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>COMPARISON TO MODEL RULE 1.6 Because the Commission has recommended striking Model Rule 1.6(b)(6), it recommends the deletion of MR 1.6, cmt. [12].</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</p>	<p>[18] [M13] A lawyer may be ordered to reveal <u>confidential</u> 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<u>must act reasonably to</u> 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<u>lawyer</u>-client privilege or other applicable law. In the event of an adverse</p>	<p>COMPARISON TO MODEL RULE 1.6 Comment [18] is based on Model Rule 1.6, cmt. [13]. The phrase “must act reasonably to” has been substituted for “should” to emphasize the lawyer’s duty under this Rule to protect the client’s confidential information. The last sentence of the comment has been deleted because</p>

²⁵ **Drafters’ Recommendation:** We do not believe a comment is required for paragraph (b)(4). The territory is adequately covered in Rule 1.14.

<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>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>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>[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 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>[19] [M14] Paragraph (b) permits disclosure <u>as permitted by paragraphs (b)(2) through (b)(4)</u> 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 <u>confidential</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>COMPARISON TO MODEL RULE 1.6 Comment [19] is based on Model Rule 1.6, cmt. [14]. The clause, “as permitted by paragraphs (b)(2) through (b)(4)” has been added to emphasize that this Comment applies to the exceptions stated in those subparagraphs only. Proposed Comment [12], which provides guidance specific to the confidentiality exception in subparagraph (b)(1), is applicable to that paragraph.</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</p>	<p>[20] [M15] Paragraph (b) permits but does not require the disclosure of <u>confidential</u> information relating to a client’s representation to accomplish the purposes specified in paragraphs (b)(4<u>2</u>) through (b)(6<u>4</u>). In exercising the discretion</p>	<p>COMPARISON TO MODEL RULE 1.6 Comment [20] is based on Model Rule 1.6, cmt. [15]. The phrase, “(b)(2) through (b)(4)” has been substituted for “(b)(1) through (b)(6)” to conform to the structure of the proposed Rule</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>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>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>and to emphasize that this Comment applies to the exceptions stated in those subparagraphs only. Proposed Comment [8], which provides guidance specific to the confidentiality exception in subparagraph (b)(1), is applicable to that paragraph.</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] 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 5.3.²⁶</p>	<p><u>COMPARISON TO MODEL RULE 1.6</u></p>

²⁶ **RRC Action:** At the 4/25/08 meeting, the RRC voted 6-5-1 to delete comment [M16]. See 4/25/08 KEM Meeting Notes, III.A., at ¶. 45. Notwithstanding the foregoing vote, Mark Tuft argues that MR 1.6, cmt. [16] should be retained. See 3/15/09 Tuft E-mail, #18.

<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>[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 prohibited by this Rule.</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 prohibited by this Rule.²⁷</p>	<p align="center"><u>COMPARISON TO MODEL RULE 1.6</u></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</p>	<p><u>[21][C]</u>13] <i>Other exceptions to confidentiality under California law.</i> <u>This</u> Rule 3-100 is not intended to augment, diminish, or preclude reliance upon<u>on</u>, any other exceptions to the duty to preserve the confidentiality of client information recognized under</p>	<p align="center"><u>COMPARISON TO CAL. RULE 3-100</u></p> <p>Comment [21] is based on current rule 3-100, Discussion ¶. 13.</p>

²⁷ **RRC Action:** At the 4/25/08 meeting, the RRC voted 8-4-0 to delete comment [M17]. See 4/25/08 KEM Meeting Notes, III.A., at ¶. 46. Notwithstanding the foregoing vote, Mark Tuft argues that MR 1.6, cmt. [17] should be retained. See 3/15/09 Tuft E-mail, #18.

<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>California law. (Added by order of the Supreme Court, operative July 1, 2004.)</p>	<p>California law. (Added by order of the Supreme Court See, operative July 1, 2004e.) g., Rule 1.7, comment [13].</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>[22] [M18] 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</p> <p>Comment [22] 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>

**RRC –Rule 1.6 [3-100]
E-mails, etc. – Revised (8/24/2009)**

August 2, 2009 KEM E-mail to Drafters (Julien, Peck, Tuft), cc Chair, Difuntorum & McCurdy:..... 76

August 6, 2009 KEM E-mail to Drafters, cc Chair, Difuntorum & McCurdy (w/ 8/2/09 e-mail & attachments): 77

August 7, 2009 Peck E-mail to KEM, cc Drafters, Chair, Difuntorum & McCurdy: 77

August 9, 2009 KEM E-mail to Drafters, cc Chair & Staff:..... 77

August 10, 2009 Peck E-mail to KEM, cc Drafters, Chair & Staff:..... 78

August 10, 2009 Difuntorum E-mail to KEM, cc Drafters, Chair & Staff: 78

August 10, 2009 Peck E-mail to Difuntorum, cc Drafters, Chair & Staff:..... 78

**RRC –Rule 1.6 [3-100]
E-mails, etc. – Revised (8/24/2009)**

August 10, 2009 KEM E-mail to Difuntorum, cc Drafters, Chair & Staff: 79
August 12, 2009 KEM E-mail to Difuntorum, cc Drafters, Chair & Staff: 79
August 23, 2009 Kehr E-mail to RRC: 80
August 23, 2009 KEM E-mail to RRC (reply to 8/23/09 Kehr E-mail):..... 80
August 24, 2009 Sapiro E-mail to RRC List:..... 80

14. At line 331, I would *change the* phrase “Where a legal claim by . . .” to the word “If” I would insert after the word “representative” and before the word “alleges” the phrase “asserts a claim that.” In line 332, I would insert after the word “client” the phrase “. . . , or if”
15. At Comment [18], in line 347, I would delete the phrase “reasonably to.” I think that phrase is redundant with the rest of the sentence and is inconsistent with *People v. Kor*.
16. At line 363, I would insert a comma after the word “it” and before the word “and.”

August 2, 2009 KEM E-mail to Drafters (Julien, Peck, Tuft), cc Chair, Difuntorum & McCurdy:

I've attached the following:

1. Rule 1.6 [3-100], draft 8 (8/2/09), redline, compared to Draft 7.1 (6/26/09), the draft on the agenda for the July 2009 meeting. In Word & PDF.

Comments:

1. The agenda deadline is Wednesday, 8/12/09. I need to work on this rule by the end of this week, so I need you to please give me your input, if any, by this Thursday, August 6, 2009. Harry wants a comparison chart and I need to use a clean version of the attached rule to generate the redline. I need to make sure you agree with the changes so I can accept them to create a clean version of the rule.
2. I took the previous draft, #7.1, and removed all the footnotes that had stated "Drafters' Recommendation" unless there had been at least one objection to the recommendation. In effect, except for the items I've identified in #3 & 4, below, the Rule and comment are deemed approved.
3. I've tried to respond to Bob's and Jerry's comments in the following footnotes. Please let me know by Thursday if you disagree w/ my recommendations:

Note 7

Note 18

Note 20

Note 23

Note 27

Note 29

Note 32

Note 37

4. Also, Mark and I have a disagreement at footnote 34. Mark, are you OK w/ leaving the comment as is?

August 6, 2009 KEM E-mail to Drafters, cc Chair, Difuntorum & McCurdy (w/ 8/2/09 e-mail & attachments):

Do any of the drafters intend to comment on the Rule today before I start putting together the comparison charts? Please see my e-mail, below. I have again attached the draft for your convenience.

August 7, 2009 Peck E-mail to KEM, cc Drafters, Chair, Difuntorum & McCurdy:

As always, a fabulous job. I agree with all of the drafter's recommendations that you have called out. I hope that Mark likes the resolution of fn. 34 because I really like the emphasis on flexibility as it now reads.

Sorry for the delay. I hope that you are preparing the charts.

August 9, 2009 KEM E-mail to Drafters, cc Chair & Staff:

NOTE: Please see the question I've asked in Comment #3.b., below.

I've attached the following:

1. Rule 1.6 [3-100], draft 8 (8/2/09), redline, compared to Draft 7.1 (6/26/09), the draft on the agenda for the July 2009 meeting. In Word & PDF.
2. Rule 1.6 [3-100], Rule Comparison Chart. In scaled PDF. See Comment below.
3. Rule 1.6 [3-100], Comment Comparison Chart. In scaled PDF. See Comment below.

Comments:

1. Item #1. I've already provided you with the above rule and it already incorporated the revisions I had recommended. Ellen got back to me and agreed on them so I went ahead and created comparison charts based on draft 8.
2. Item #2. Rule Comparison Chart. The comparison chart is a rough draft. It also includes not only a comparison to the Model Rule (pages 1-6), but also a comparison to current rule 3-100 (pages 7-10). I thought it would be helpful for the Commission to see the changes that we've made to current rule 3-100. I don't recommend providing it to the BOG.
3. Item #3. Comment Comparison Chart. As I've noted in my earlier e-mails, I anticipated this task would be a bit complicated because some of the comments are derived from the Model Rule comment and some from the rule 3-100 Discussion. If we just compared the comments to the Model Rule comment, the 13 Discussion paragraphs from current rule 3-100 that we've

largely retained would simply appear in the comparison as additional comments. I thought it would make more sense to show the changes to each. Therefore, 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. Put another way, 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.

- a. 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.
- b. I am leaning toward taking this same approach for the public comment and BOG submissions. Do you agree? Harry & Randy, what do you think?
- c. Finally, you will see that I haven't tried to draft explanations for the comments yet. I will do that before Wednesday. However, I wanted your input on whether to proceed as in the attached or simply draft a comparison chart in which the comparison is to the Model Rule.

Please let me know if you have any questions.

August 10, 2009 Peck E-mail to KEM, cc Drafters, Chair & Staff:

I like the samples which you have enclosed Kevin. I think that your proposal in (b) works nicely for this rule. I could see the derivation of the comments easily in the manner that you have them displayed.

Unless Harry and Randy object, I would go forward with your proposed plan in the interests of time and getting the agenda out.

August 10, 2009 Difuntorum E-mail to KEM, cc Drafters, Chair & Staff:

Great work, as usual. Regarding your approach to the comment comparison chart, I like the idea but I do think that ultimately it will be the information in the explanation column that will allow the reader to understand that a specific redlined passage is a MR comparison or CA comparison, whichever the case may be. Accordingly, as a place holder, I have added a prominent text box at the start of the explanation cell for each comment identifying whether the comparison is a MR comparison or CA comparison. Hopefully, these signposts will keep folks from getting lost.

August 10, 2009 Peck E-mail to Difuntorum, cc Drafters, Chair & Staff:

I am good with this approach too. Thanks, Randy.

August 10, 2009 KEM E-mail to Difuntorum, cc Drafters, Chair & Staff:

Excellent idea. That will be most helpful to the reader (not to mention me!)

August 12, 2009 KEM E-mail to Difuntorum, cc Drafters, Chair & Staff:

I've attached the following for inclusion in the agenda materials for the August 2009 meeting:

1. Rule 1.6 [3-100], Rule Comparison Chart, Draft 1.1 (8/11/09), compared to MR 1.6, in Scaled PDF.
2. Rule 1.6 [3-100], Comment Comparison Chart, Draft 1.1 (8/11/09), compared to MR 1.6, in Scaled PDF.

Comments:

1. Item #1. Rule Comparison Chart. It includes not only a comparison to the Model Rule (pages 1-6), but also a comparison to current rule 3-100 (pages 7-10). We thought it would be helpful for the Commission to see the changes that we've made to current rule 3-100 but do not recommend providing it to the BOG. Therefore, there are no explanations for the changes to rule 3-100.

- a. Please note that the other drafters have not yet weighed in on the Explanation column.
- b. In addition, please review my inquiries at notes 4 and 6.

3. Item #3. Comment Comparison Chart. This chart is a bit complicated because some of the comments are derived from the Model Rule comment and some from the rule 3-100 Discussion. If we just compared the comments to the Model Rule comment, the 13 Discussion paragraphs from current rule 3-100 that we've largely retained would simply appear in the comparison as additional comments. We thought it would make more sense to show the changes to each. Therefore, 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. Put another way, 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.

- a. 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.
- b. We are leaning toward taking this same approach for the public comment and BOG submissions.
- c. The Explanation for proposed comment [6] on page 11 of 30 will probably be inserted in the Introduction.

- d. We might want to revisit the deletion of Model Rule Comments [16] & [17] at pages 28 & 29 of the chart. That decision was made in April 2008, well before we received guidance from BOG.
- e. Again, please note that the other drafters have not yet weighed in on the Explanation column.

Please let me know if you have any questions.

August 23, 2009 Kehr E-mail to RRC:

At this point I have only one comment on these materials. I suggest that, because of the many references to current rule 3-100 in the comparison chart, we remind the Board of the statutory requirement that led to the drafting of that rule and its recent issuance by the Supreme Court. Without this, some on the Board might think we merely are citing California tradition as a reason for varying the MR.

August 23, 2009 KEM E-mail to RRC (reply to 8/23/09 Kehr E-mail):

Please review the Explanation of Changes for Comment [6] at pages 11-13 of the Comment Comparison Chart. We intend to move some of that explanation of AB 1101 or something similar into the Introduction. See footnote 19.

August 24, 2009 Sapiro E-mail to RRC List:

1. The explanation of changes reinforces my dissent from the second sentence of paragraph (a) and prompts me to dissent from the introductory paragraph (b) of this rule. Please bear with me while I explain why.
 - a. The explanation of changes makes clear that the addition of the second sentence of paragraph (a) is bad drafting and results in an improper narrowing of client protections under Business and Professions Code section 6068(e)(1).
 - b. Business and Professions Code section 6068(e)(1) does not contain the phrase “confidential information related to the representation.” It is far broader. If a client hires a lawyer for a particular matter and, in a confidential communication, discloses something extraneous to that matter, that communication is still confidential and is still protected by Section 6068(e)(1). Thus, the proposed second sentence is wrong in its characterization of the scope of information protected from disclosure by Section 6068(e)(1) as merely being information that relates to the representation.
 - c. The phrase “confidential information relating to the representation” only appears in paragraph (2) of Section 6068(e). The Legislature amended Section 6068(e) to permit disclosure of “confidential information relating to the representation” under the limited circumstance described in subparagraph (2). It did not limit the information protected by Section 6068(e)(1) to information “relating to the representation.” That phrase does not appear in subparagraph (1). Subparagraph (2) only allows disclosure of confidential information relating to the representation for the purpose of preventing death or bodily

harm. It does not say that all information that is confidential under subparagraph (1) may be disclosed. Conversely, in AB 1101 the Legislature did not add the phrase “confidential information relating to the representation” to subparagraph (1) and therefore did not limit the information protected by Section 6068(e)(1) to information “relating to the representation.”

- d. The language in the second sentence of proposed paragraph (a) of Rule 1.6 is wrong because it grafts a phrase from subparagraph (2) of Section 6068(e) into subparagraph (1) of Section 6068(e). This changes the meaning of subparagraph (1) of Section 6068(e) in a way not contemplated by the Legislature and not justified by the express statutory language. Where the Legislature uses words or phrases in one paragraph but not in another, it intends a distinction between the two paragraphs.

“Where the Legislature makes express statutory distinctions, we must presume it did so deliberately, giving effect to the distinctions, unless the whole scheme reveals the distinction is unintended. This concept merely restates another statutory construction canon: *we presume the Legislature intended everything in a statutory scheme, and we should not read statutes to omit expressed language or include omitted language.* As our Supreme Court stated, ‘we are aware of no authority that supports the notion of legislation by accident.’ [Citation.]” ([Jurcoane v. Superior Court \(2001\) 93 Cal.App.4th 886, 894 \[113 Cal.Rptr.2d 483\]](#), italics added.)

Yao v. Superior Court, 104 Cal.App.4th 327, 333 (2002). Muddling the differences between subparagraph (1) and subparagraph (2) of Section 6068(e) is a legal and a drafting error.

- e. This drafting error becomes explicit in the explanation of changes to Comment [1]. The explanation incorrectly states that the phrase “confidential information relating to the representation” appears in Section 6068(e)(1). It does not! That phrase only appears in the exception that is paragraph (2) of Section 6068(e). Surely, we should not mislead the Board of Governors and the Supreme Court by using an incorrect rationale for changing Section 6068(e) in a Rule of Professional Conduct.
- f. Importing into the second sentence of paragraph (a) of Rule 1.6 the phrase “confidential information relating to the representation” does not just distort the intent of the Legislature when it amended Section 6068(e) by adding subparagraph (2). It also will cause adverse consequences for paragraph (b) of proposed Rule 1.6. I suspect the adverse consequences are not intended. The phrase “confidential information relating to the representation of a client” is the introduction to in paragraph (b). This makes that phrase applicable to all of the subparagraphs of paragraph (b). That phrase is appropriate for subparagraph (1) of proposed Rule 1.6(b) because it tracks Section 6068(e)(2). However, it is wrong when applied to the other subparagraphs of Rule 1.6(b).
- g. For example, if a lawyer needs to obtain confidential legal advice about the lawyer’s compliance with the lawyer’s professional obligations, but part of the reason the lawyer needs such advice is confidential information disclosed by the client to the lawyer that is not germane to the scope of the representation, the lawyer, under the literal wording of

subparagraph (b)(2) could not disclose the very information necessary to obtain the legal advice. This will nullify paragraph (b)(2) in that situation.

- h. Similarly, if a lawyer needs to use confidential client information that was not related to the scope of the representation in order to defend a claim asserted by the client, we would defeat the purpose of subparagraph (b)(3) by narrowing the definition of confidential information so the lawyer could only use his or her own defense the information “related to the representation.”
 - i. And those who support proposed Rule 1.14(b) should be outraged that the phrase “relating to the representation of a client” is used to narrow the information that may be disclosed if necessary to protect the interests of the impaired client under that rule. For example, if I were representing a client in litigation, and the client told me something extraneous to the scope of the representation – such as the fact that the client’s son beats her – I could not disclose that information even if necessary to protect the interests of my client because that information is not related to the scope of my representation.
 - j. In short, by adopting in Rule 1.6(a) a phrase that appears only in subparagraph (2) of Section 6068(e), we have applied a phrase from subparagraph (2) to define a phrase to which it does not apply, namely confidential information under subparagraph (1) of Section 6068(e). Then, we repeat that incorrect phrase in the introduction to Rule 1.6(b). By doing that, we have left the scope of permissible disclosure as it should be for proposed Rule 1.6(b)(1), for that is where the Legislature intended it to apply. However, we have thereby narrowed the scope of permissible disclosures unnecessarily and defeated the purposes of proposed subparagraphs (2) through (4) without cause.
 - k. Misapplying the phrase from subparagraph (2) of Section 6068(e) also makes proposed Comment [1] of Rule 1.6 inconsistent with proposed Comment [2]. Section 6068(e)(1) does not limit the duty to maintain inviolate the confidence or to preserve the secrets of a client only to those matters that relate to the representation of the client.
 - l. In short, in this rule we ought to say what we mean. If we mean what we say in the first sentence of proposed paragraph (a), then the second sentence of that paragraph is wrong because it narrows the scope of our duty of confidentiality. If we mean that a lawyer may disclose confidential information relating to the representation of the client as permitted by subparagraph (2) of Section 6068(e), then we should limit the wording of paragraph (b) by deleting the phrase “relating to the representation of a client” from that introductory paragraph and have it appear only in subparagraph (1), and not in the introductory paragraph and not in any of the other subparagraphs of paragraph (b).
 - m. If the foregoing analysis does not result in reconsideration of the use of the phrase “related to the representation” in the second sentence of paragraph (a) and the introduction of paragraph (b) of Rule 1.6, I request that it appear as the statement of explanation of my dissent.
2. Regarding the deletion of Model Rule paragraph (b)(6), in the explanation of changes column I think the explanation is insufficient. *People v. Kor* makes clear that the Model Rule exception is not consistent with California law.
 3. Although I agree with paragraph (e) of the proposed rule, I do want to raise a caution. Having this exception in Rule 1.6 implies that, if other rules permit but do not require

conduct [see, e.g., Rule 2.1], a lawyer who does not engage in the permissible conduct violates the rule. Otherwise, we would not need this explicit statement in Rule 1.6(e). We create the risk that other permissive statements in rules will be interpreted as directory because we do not say in them that they are not mandatory.

4. I also dissent from the last sentence of proposed Comment [2]. The duty not to reveal confidential information is not limited to “information relating to the representation.” Commercial Standard Title Co., 92 Cal. App. 3d 934 (1979), does not limit it in that respect. To the contrary, that opinion unequivocally says: “The attorney is under an obligation to preserve the secrets of his client “at every peril to himself.” (Bus. & Prof. Code, § 6068, subd. (e).)” Id., 92 Cal App 3d at 945. It does not say or imply that “The attorney is under an obligation to preserve the secrets of his client “at every peril to himself if those secrets relate to the representation.”
5. I request that the reason for my dissent to Comment [3A] be added. The last sentence of the comment is misleading. The attorney client privilege is more limited than the duty of confidentiality, but it is not interpreted narrowly. For example, Evidence Code section 950 defines “lawyer” to give a client “broad protection for his or her communications.” Jefferson’s California Benchbook (2009), section 42.10, p. 967. There are exceptions to the privilege, but a comment to our rule should not mislead those who read it.
6. At page 9 of the spreadsheet, in the explanation of changes for Comment [5], there is a typographical error. We have not “recommended” the ABA’s theory of implied authority. Instead, we rejected it. I recommend that we substitute the word “rejected” for the word “recommended.”
7. In proposed Comment [6], at page 11 of the spreadsheet, I think something got scrambled in the transcription of the second sentence. It is difficult to read because of the redlining, but if I interpret it correctly it now states that the lawyer may “disclose confidential information relating to information even without client consent.” I think the second word “information” is wrong. I would substitute for it the phrase “the representation.” Then, it would read “. . . disclose confidential information relating to the representation” I would also add in the explanation of changes for that paragraph, at the fifth line of the first paragraph on page 11 of the spreadsheet, after the phrase “confidential information” the phrase “related to the representation.” Assembly Bill 1101 did not permit disclosure of all confidential information. It only permitted disclosure of confidential information related to the representation.
8. In Comment [11], at page 18 of the spreadsheet, we might want to put the reference to Rule 3-500 in brackets. If the new rules are adopted, that rule number will change.
9. Also in Comment [11], I think we should go ahead and change the cross-reference to Comment [C10] at this stage. If I am reading it correctly, we should just go ahead and cross-reference Comment [13].
10. At page 21 of the spreadsheet, in Comment [13], I would go ahead at this time and change the cross-reference from Comment [C7] to Comment [10].

McCurdy, Lauren

From: McCurdy, Lauren
Sent: Tuesday, August 25, 2009 9:48 AM
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Subject: Message from the Chair Concerning Agenda item IIID -- 1.6

Commission Members:

Page 217: In the explanation column, should the reference to 6068(e)(1) be 6068(e)(2)?

Page 225: in the explanation column regarding comment 5, third line, should "recommended" be "rejected"?

Page 242, explanation column regarding comment 18: "must act reasonably" seems to me to afford less client protection than "should" (perhaps should be "must"). Also the last line of this explanation is incomplete.

Page 244: No explanation is given as to why the rest of ABA comment 15 is stricken.

Cheers,
Harry