

**February 3, 2010 KEM E-mail to Drafters (Julien, Lamport, Peck & Tuft), cc Chair & Staff:**

I've attached the following in relation to Agenda Item V.B. for the 2/26-27/10 meeting, all in PDF.

1. Rule, ALT 1, Draft 1.1 (1/31/10), redline, compared current Cal. Rule 3-100. All that I did with this version of the Rule was to implement the format and style changes that the RRC has adopted. Otherwise, it is substantively identical to current rule 3-100. This is all that the Commission voted to approve at the January meeting.
2. Rule, ALT 2, Draft 1 (1/31/10), redline, compared to ALT1, Draft 1.1 (1/31/10). In this version of the Rule, I've also included the other revisions related to current rule 3-100 that the Commission approved during its deliberations concerning proposed Rule 1.6. The comparison is to ALT 1 so you can easily review the added changes. I don't believe any of these changes are substantive.
3. Rule, ALT 3, Draft 11 (2/2/10), redline, compared to Draft 10 (12/30/10), the post-public comment draft of proposed Rule 1.6 that was the subject of the Commission's deliberations at its January 2010 meeting. This version of the Rule eliminates the second sentence of paragraph (a) that apparently precipitated the Commission's rejection of the Rule at the January meeting and substitutes the terms "information protected by Business and Professions Code section 6068(e)" and "protected information" for "confidential information relating to the representation of the client" and "confidential information," respectively, throughout the Rule. Of particular note, I've substituted the former phrase in paragraph (b).

**Notes:**

1. I've also copied Bob Kehr because of his abiding interest in this Rule and his many contributions to its drafting.
2. **ALT 3.** I will address item #3 (i.e., ALT3) first. I'm not flogging this option to the Commission at this time, so you might want to skip to paragraph 4, below. **First**, regardless of what I propose as a fix, those who voted against Rule 1.6 believe that there is an anomaly in 6068(e) between subdivisions (1) and (2) and that it has to be fixed before we can draft a comprehensive rule on confidentiality. I don't agree with that assessment and believe that we addressed the concerns in the previous draft.
  - a. Nevertheless, a **second** argument stated during the meeting is that our public comment draft (let's call it "ALT 4" for now) confused some very sophisticated lawyers with the insertion of the second sentence in ALT 4's paragraph (a). I don't read their objections as confusion but rather that using the phrase "relating to the representation" somehow was intended to narrow the protection afforded by 6068(e)(1). As indicated by Comments [3] through [6], nothing could be further from the truth. We could not have defined the term more broadly.
  - b. To address this latter concern, I simply deleted references to "relating to the representation" throughout the rule and inserted, where appropriate, "information protected by B&P Code section 6068(e)(1)" or "protected information" (I prefer the term "protected" to "confidential" because too many folks seem to think "confidential" is limited to privileged information or at a minimum, does not apply to information in the public record.

c. Nevertheless, it will be argued that ALT 3 does not address the anomaly, i.e., the legislature's use of "confidential information relating to the representation" in 6068(e)(2), which the AB 1101 Task Force transferred verbatim into current rule 3-100(B). Arguably, our experience with proposed rule 3-100 between 1987 and 1998 (three Supreme Court rejections) suggests that my recommended substitution of "information protected by B&P Code section 6068(e)(1)" for "information relating to the representation" in paragraph (b) would be rejected out of hand because it does not track the statutory language.

d. That brings us to a **third** criticism, this submitted by Michael Judge, LA Public Defender and member of the AB 1101 Task Force. He argues that the Legislature used the term "information relating to the representation" purposefully to limit the scope of information that a lawyer was authorized to disclose to prevent death or substantially bodily harm. The problem with this is that no record of such a legislative intent exists anywhere in the legislative history. On the contrary, the Assembly and Senate analyses indicate that the bill was intended to avoid the fact that the 1993 amendment to the Evidence Code, i.e., section 956.5, did not create the broad exception to 6068(e)'s then-absolute prohibition on disclosure that was intended. Substituting "information protected by B&P Code section 6068(e)(1)" captures that Legislative intent.

3. I realize that my proposed revisions in ALT 3 will not satisfy those who objected to the second sentence of paragraph (a) of ALT 4 and believe there is a legislative anomaly that must be addressed. It also might not satisfy Bob and Stan, who with me, were the leading proponents of ALT 4, because I am "tinkering" with the Legislative language.

a. As to the latter, my substitution of "information protected by B&P Code section 6068(e)(1)" does no more damage to the legislative language than did the addition of the second sentence to ALT 4, paragraph (a). The purpose in both instances is to explain the legislative intent.

b. As to the former opponents who want the "anomaly" fixed in the legislation, my proposal will not help, and I concede that.

c. Accordingly, to move this along, I am not recommending consideration of ALT 3 by the Commission as a whole.

4. **Recommendation re ALT 1 & ALT 2 & Proposed Task Force/Commission.** As noted, I don't recommend that we pursue ALT 3 at this time. It can be a starting point for the Task Force that Mark has suggested we recommend that will convene interested parties from the three branches of government, similar to AB 1101, that can work to resolve the ambiguity between 6068(e)(1) and 6068(e)(2) [and probably Evid. Code 956.5]. My points made in paragraphs 2 and 3, above, are primarily an attempt to get off my chest the disappointment I feel with the Commission's vote at the January meeting and to provide a possible starting point for the Task Force. Let's face it; we won't be seeing 6068(e)(1) changing in our lifetimes. I think if indeed there is an anomaly, and if it is to be corrected, it will be by revision of the language in 6068(e)(2).

a. **Question.** For now, I simply need your direction on whether to proceed with ALT 1 (which is all the Commission approved at the January meeting) or ALT 2 (which incorporates the improvements we made to 3-100 during our deliberations over the last few years). I have a concern with some of the additions of "confidential" and so I think I'd prefer to go with ALT 1. That would be the simplest approach. What do other folks think?

5. **Deadline.** Agenda deadline is 2/10/10. I would your comments on this by Saturday, 2/6/10, 3:00 p.m., so I can complete the revisions of all the supporting documents (actually, they will more likely be creations of new documents, though there will be material I can use in the revised documents).

6. **Report.** Including in the foregoing documents I will have to update will be a report on the Commission's consideration of this Rule. I think this can be done in the Introduction for now, and we can refer RAC/BOG to the Introduction in the cover memo for the Batch 5 submission, as well as in the Dashboard. We will also probably want to make mention of the aforementioned intra-branch task force/committee/commission to address confidentiality in California comprehensively.

As usual, please let me know if you have any questions.

**February 5, 2010 Peck E-mail to Drafters, cc Chair & Staff:**

I know that draft ALT 3 does not resolve the problem that many of my fellow commissioners see as a flaw in the drafting of section 6068(e). I continue to believe that the Supreme Court will not fix it and that only the Legislature can fix this.

Therefore, I think ALT 3 does as much as can be done in this area and preserves the status quo. I beg all of you who voted against the rule to reconsider ALT 3.

As fine as ALT 1 is, it is a step backwards.

I prefer ALT 3 to ALT 1 but realize that it is what the Commission asked for. However, I ask that the Chair, in the interests of having rules that are evolved to lawyers' and the public's present and future needs, allow ALT 3 to be placed on the agenda to see if there is any preference of it to ALT 1.

**February 6, 2010 Sondheim E-mail to Peck, cc RRC:**

I was delighted to learn that you are on the road to a recovery from your cancer and look forward to hopefully seeing you at the meeting this month.

With regard to ALT 1, 2 AND 3, here are my thoughts. As you know, we need to finish our work and I do not want to unnecessarily delay that process. That is why, in the agenda materials, it was indicated that we would not reconsider 1.6 in its entirety. I have concerns that, if we do so, we will end up spending a lot of meeting time with the same result as last time. Similarly, there are those who would probably like to reconsider the Commission's rejection of the draft of 1.7 that was before the Commission at the last meeting and was quickly rejected. As is true of 1.6, I prefer not to reconsider 1.7 since we customarily do not revote on a matter that has been resolved by a prior vote.

However, in light of your request and the fact that there are now additional drafts to be considered for both rules, as well as out of fairness to the minority views on both rules, I want to give the Commission an opportunity to reverse itself on either rule if at least 7 members indicate by noon on Feb 22 that they favor consideration of ALT 3 or that they want to revisit the last

draft of 1.7, in light of the new draft which will be submitted for this meeting. If there are 7 members for either or both rules, based on past experience, it would not be the first time that we might reverse our direction.

Accordingly, I am sending this message, together with your message, as well as Kevin's, to the entire Commission and will also forward Kevin's 3 ALTS to the entire Commission. Absent 7 votes for consideration of ALT 3, we will only consider ALTS 1 and 2 at the Feb. meeting.

**February 6, 2010 Sondheim E-mail to RRC:**

As a follow-up to the message I sent a few minutes ago, attached are Kevin's 3 ALTS.

**See February 3, 2010 KEM E-mail to Drafters (Julien, Lampport, Peck & Tuft), cc Chair & Staff:** and Attachments.

**February 8, 2010 Peck E-mail to Sondheim, cc RRC:**

Thanks so much for your kind words about my health. As I continue to improve, I think it is probable that I will be in LA in person (subject of course to a relapse, in which case, I will appear by telephone).

Your proposal for handling all versions of this rule is very fair and reasoned. I agree.

### Rule 1.6 Confidential Information of a Client

- (Aa) A memberlawyer 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)(b)~~ of this ruleRule.
- (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 to prevent a criminal act that the memberlawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.
- (Cc) Before revealing confidential information to prevent a criminal act as provided in paragraph ~~(B)(b)~~, a memberlawyer shall, if reasonable under the circumstances:
- (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and
  - (2) inform the client, at an appropriate time, of the memberlawyer's ability or decision to reveal information as provided in paragraph ~~(B)(b)~~.
- (Dd) In revealing confidential information as provided in paragraph ~~(B)(b)~~, the memberlawyer's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the memberlawyer at the time of the disclosure.
- (Ee) A memberlawyer who does not reveal information permitted by paragraph ~~(B)(b)~~ does not violate this ruleRule.

### DiscussionComment

[1] *Duty of confidentiality.* Paragraph ~~(A)(a)~~ relates to a memberlawyer's obligations under Business and Professions Code section 6068, ~~subdivision~~(e)(1), which provides it is a duty of a memberlawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A memberlawyer'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-lawyerlawyer-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. 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)(a)~~ thus recognizes a fundamental principle in the ~~client-lawyer~~lawyer-client relationship, that, in the absence of the client's informed consent, a ~~member~~lawyer must not reveal information relating to the representation. (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

[2] ~~Client-lawyer~~Lawyer-client confidentiality encompasses the ~~attorney~~lawyer-client privilege, the work-product doctrine and ethical standards of confidentiality. The principle of ~~client-lawyer~~lawyer-client 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~~lawyer-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.App.3d 614, 621 [120 Cal. Rptr. 253].) The ~~attorney~~lawyer-client privilege and work-product doctrine apply in judicial and other proceedings in which a ~~member~~lawyer may be called as a witness or be otherwise compelled to produce evidence concerning a client. A ~~member~~lawyer's ethical duty of confidentiality is not so limited in its scope of protection for the ~~client-lawyer~~lawyer-client relationship of trust and prevents a ~~member~~lawyer from revealing the client's confidential information even when not confronted with such compulsion. Thus, a ~~member~~lawyer may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these ~~rule~~Rules, or other law.

[3] *Narrow exception to duty of confidentiality under this Rule.* Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited under Business & Professions Code section 6068(e), ~~subdivision~~ (1). Paragraph ~~(B)(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~~lawyer reasonably believes that disclosure is necessary to prevent a criminal act that the ~~member~~lawyer 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~~lawyer-client privilege, sets forth a similar express exception. Although a ~~member~~lawyer is not permitted to reveal confidential information concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

[4] *Member*Lawyer not subject to discipline for revealing confidential information as permitted under this Rule. ~~Rule 3-100, Paragraph (b)~~, 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~~lawyer reasonably believes is likely to result in death or substantial bodily harm to an individual. A ~~member~~lawyer who reveals information as permitted under this ~~rule~~Rule is not subject to discipline.

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

[6] *Deciding to reveal confidential information as permitted under paragraph (B)(b).* Disclosure permitted under paragraph (B)(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)(b), 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 considered in determining whether to disclose confidential information are the following:

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

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

[7] *Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm.* ~~Subp~~Paragraph ~~(C)(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, or if necessary, do both. ~~The~~ interests protected by such counseling ~~is~~are the client's interests 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 memberlawyer'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 memberlawyer would cease as the threat posed by the criminal act would no longer be present. ~~When~~ the actor is a nonclient or when the act is deliberate or malicious, the 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 memberlawyer'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)(b)~~ does not permit the memberlawyer to reveal confidential information, the memberlawyer 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-lawyer's disclosure of that information.

[8] *Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act.* Under paragraph ~~(D)(d)~~, disclosure of confidential information, when made, must be no more extensive than the memberlawyer reasonably believes necessary to prevent the criminal act. ~~Disclosure~~ should allow access to the confidential information to only those persons who the memberlawyer reasonably believes can act to prevent the harm. ~~Under~~ some circumstances, a memberlawyer 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 memberlawyer. ~~Relevant~~ circumstances include the time available, whether the victim might be unaware of the threat, the memberlawyer'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 memberlawyer.

[9] *Informing client of memberlawyer's ability or decision to reveal confidential information under ~~sub~~paragraph ~~(C)(c)~~(2).* A memberlawyer is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 3-5001.4; Business and Professions Code, section 6068; ~~subdivision~~(m). ~~Paragraph~~ ~~(C)(c)~~(2), however, recognizes that under certain

circumstances, informing a client of the memberlawyer's ability or decision to reveal confidential information under paragraph ~~(B)(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 memberlawyer or the memberlawyer's family or associates. Therefore, paragraph ~~(C)(c)~~(2) requires a memberlawyer to inform the client of the memberlawyer's ability or decision to reveal confidential information as provided in paragraph ~~(B)(b)~~ only if it is reasonable to do so under the circumstances. Paragraph ~~(C)(c)~~(2) further recognizes that the appropriate time for the memberlawyer to inform the client may vary depending upon the circumstances. ~~(See paragraph [10] of this discussion.) See Comment [10].~~ Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

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

[10] *Avoiding a chilling effect on the lawyer-client relationship.* The foregoing flexible approach to the memberlawyer'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].) See Comment [1].~~ To avoid that chilling effect, one memberlawyer may choose to inform the client of the memberlawyer's ability to reveal information as early as the outset of the representation, while another memberlawyer may choose to inform a client only at a point when that client has imparted information that may fall under paragraph ~~(B)(b)~~, or even choose not to inform a client until such time as the memberlawyer attempts to counsel the client as contemplated in ~~Discussion paragraph Comment [7].~~ In each situation, the memberlawyer will have discharged properly the requirement under ~~subparagraph (C)(c)~~(2), and will not be subject to discipline.

[11] *Informing client that disclosure has been made; termination of the lawyer-client relationship.* When a memberlawyer has revealed confidential information under paragraph (B)(b), in all but extraordinary cases the relationship between memberlawyer and client will have deteriorated so as to make the memberlawyer's representation of the client impossible. Therefore, the memberlawyer is required to seek to withdraw from the representation. (see rule 3-700(B)Rule 1.16(a)), unless the memberlawyer is able to obtain the client's informed consent to the memberlawyer's continued representation. The memberlawyer must inform the client of the fact of the memberlawyer's disclosure unless the memberlawyer has a compelling interest in not informing the client, such as to protect the memberlawyer, the memberlawyer's family or a third person from the risk of death or substantial bodily harm.

[12] *Other consequences of the memberlawyer's disclosure.* Depending upon the circumstances of a memberlawyer's disclosure of confidential information, there may be other important issues that a memberlawyer must address. For example, if a memberlawyer will be called as a witness in the client's matter, then Rule 5-2103.7 should be considered. Similarly, the memberlawyer should consider his or her duties of loyalty and competency (rule 3-110Rule 1.1).

[13] *Other exceptions to confidentiality under California law.* Rule 3-100This Rule is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law. (~~Added by order of the Supreme Court, operative July 1, 2004.~~)

### Rule 1.6 Confidential Information of a Client

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

### Comment

[1] Policies furthered by the Duty-duty of confidentiality. Paragraph (a) relates to a lawyer's obligations under Business and Professions Code section 6068(e)(1), which provides it is a duty of a lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the lawyer-client relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or 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 lawyer-client relationship, that, in the absence of the client's informed consent, a lawyer must not reveal confidential information relating to the representation protected by Business and Professions Code section 6068(e)(1). (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

[2] *Lawyer-client confidentiality encompasses the lawyer-client privilege, the work-product doctrine and ethical standards of confidentiality.* The principle of lawyer-client 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 lawyer-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.App.3d 614, 621 [120 Cal. Rptr. 253].) The lawyer-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or be otherwise compelled to produce evidence concerning a client. A lawyer's ethical duty of confidentiality is not so limited in its scope of protection for the lawyer-client relationship of trust and prevents a lawyer from revealing the client's confidential information even when not confronted with such compulsion. Thus, a lawyer may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these Rules, or other law.

[3] *Narrow exception to duty of confidentiality under this Rule.* Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits certain disclosures otherwise prohibited under Business & Professions Code section 6068(e)(1). Paragraph (b), ~~which restates Business and Professions Code section 6068(e)(2), identifies a narrow confidentiality exception, absent the client's informed consent, when a lawyer reasonably believes that disclosure is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to an individual~~ which narrowly permits a lawyer to disclose confidential information relating to the representation even without client consent. Evidence Code section 956.5, which relates to the evidentiary lawyer-client privilege, sets forth a similar express exception. Although a lawyer is not permitted to reveal confidential information concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

[4] *Lawyer not subject to discipline for revealing confidential information as permitted under this Rule.* Paragraph (b), ~~which restates Business and Professions Code section 6068(e)(2)~~, reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a lawyer reasonably believes is likely to result in

death or substantial bodily harm to an individual. A lawyer who reveals information as permitted under this Rule is not subject to discipline.

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

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

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

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

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

[8] *Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act.* Under paragraph (d), disclosure of confidential information, when made, must be no more extensive than the lawyer reasonably believes necessary to 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 depend 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.

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

decision to reveal confidential 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 lawyer or the lawyer's family or associates. Therefore, paragraph (c)(2) requires a lawyer to inform the client of the lawyer's ability or decision to reveal confidential 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 lawyer to inform the client may vary depending upon the circumstances. See Comment [10]. Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

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

[10] *Avoiding a chilling effect on the lawyer-client relationship.* The foregoing flexible approach to the lawyer'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 Comment [1]. To avoid that chilling effect, one lawyer may choose to inform the client of the lawyer's ability to reveal confidential information as early as the outset of the representation, while another lawyer may choose to inform a client only at a point when that client has imparted information that may fall under comes within paragraph (b), or even choose not to inform a client until such time as the lawyer attempts to counsel the client as contemplated in under Comment [7]. In each situation, the lawyer will have discharged properly the requirements satisfied the lawyer's obligation under paragraph (c)(2), and will not be subject to discipline.

[11] *Informing client that disclosure has been made; termination of the lawyer-client relationship.* When a lawyer has revealed confidential information under paragraph (b), in all but extraordinary cases the relationship between lawyer and client that is based in mutual trust and confidence will have deteriorated so as to make the lawyer's

representation of the client impossible. Therefore, when the relationship has deteriorated because of the lawyer's disclosure, the lawyer is required to seek to withdraw from the representation, (see Rule 1.16(a)), unless the ~~lawyer is able to obtain the client's~~ client has given his or her informed consent to the lawyer's continued representation. The lawyer normally must inform the client of the fact of the lawyer's disclosure. unless if the lawyer has a compelling interest in reason for not informing the client, such as to protect the lawyer, the lawyer's family or a third person from the risk of death or substantial bodily harm, the lawyer must withdraw from the representation. See Rule 1.16.

[12] *Other consequences of the lawyer's disclosure.* Depending upon the circumstances of a lawyer's disclosure of confidential information, there may be other important issues that a lawyer must address. For example, if a lawyer ~~will be called as is likely to be~~ a necessary witness in the client's matter, then the lawyer must comply with Rule 3.7 ~~should be considered~~. Similarly, the lawyer ~~should~~ must also consider ~~his or her duties of loyalty and~~ and the lawyer's duty of competency ~~competence~~ (Rule 1.1) and whether the lawyer has a conflict of interest in continuing to represent the client (Rule 1.7).

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

### Rule 1.6 Confidentiality of Information

- (a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068(e)(1) unless the client gives informed consent or the disclosure is permitted by paragraph (b). ~~The information protected from disclosure by section 6068(e)(1) is referred to as “confidential information relating to the representation” in this Rule.~~
- (b) A lawyer may, but is not required to, reveal ~~confidential information relating to the representation of a client~~information protected by Business & Professions Code section 6068(e)(1) to the extent that the lawyer reasonably believes the disclosure is necessary:
- (1) to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, as provided in paragraph (c);
  - (2) to secure legal advice about the lawyer’s compliance with the lawyer’s professional obligations;
  - (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client relating to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship;
  - (4) to comply with a court order; or
  - (5) to protect the interests of a client under the limited circumstances identified in Rule 1.14(b).
- (c) *Further obligations under paragraph (b)(1).* Before revealing ~~confidential information relating to the representation~~information protected by Business and Professions Code section 6068(e)(1) in order to prevent a criminal act as provided in paragraph (b)(1), a lawyer shall, if reasonable under the circumstances:
- (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and
  - (2) inform the client, at an appropriate time, of the lawyer’s ability or decision to reveal ~~confidential information relating to the representation~~information protected by Business and Professions Code section 6068(e)(1) as provided in paragraph (b)(1).
- (d) In revealing ~~confidential information relating to the representation~~information protected by Business and Professions Code section 6068(e)(1) as permitted by paragraph (b), the lawyer’s disclosure must be no more than is necessary to

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prevent the criminal act, secure confidential legal advice, establish a claim or defense in a controversy between the lawyer and a client, protect the interests of the client, or to comply with a court order given the information known to the member at the time of the disclosure.

- (e) A lawyer who does not reveal ~~confidential~~ information protected by Business and Professions Code section 6068(e)(1) as permitted by paragraph (b) does not violate this Rule.

### Comment

[1] This Rule governs the disclosure by a lawyer of ~~confidential information relating to the representation of a client~~ information protected by Business and Professions Code section 6068(e)(1) during the lawyer's representation of the client. See [Rule 1.18] for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule [1.9(c)(2)] for the lawyer's duty not to reveal [confidential information relating to the lawyer's prior representation of a former client], and [Rules 1.8.2 and 1.9(c)(1)] for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

#### *Policies Furthered by the Duty of Confidentiality*

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

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

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

#### *Scope of the Lawyer-Client Privilege*

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

#### *Scope of the Duty of Confidentiality*

[5] A lawyer’s duty of confidentiality, on the other hand, is not so limited as the lawyer-client privilege. The duty protects the relationship of trust between a lawyer and client by preventing the lawyer from revealing the client’s ~~confidential~~protected information, regardless of its source and even when not confronted with compulsion. As a result, any information the lawyer has learned during the representation, even if not relevant to the matter for which the lawyer was retained, is protected under the duty so long as the lawyer acquires the information by virtue of being in the lawyer-client relationship. ~~Confidential information relating to the representation~~Information protected by Business and Professions Code section 6068(e)(1) is not concerned only with information that a lawyer might learn after a lawyer-client relationship has been established. Information that a lawyer acquires about a client before the relationship is established, but which is relevant to the matter for which the lawyer is retained, is protected under the duty regardless of its source. The duty also applies to information a lawyer acquires during a lawyer-client consultation, whether from the client or the client’s representative, even if a lawyer-client relationship does not result from the consultation. (See Rule 1.18.) Thus, a lawyer may not reveal ~~confidential information relating to the representation~~information protected by Business and Professions Code section 6068(e)(1) except with the consent of the client or an authorized representative of the client, or as authorized by these Rules or the State Bar Act.

#### *Relationship of Confidentiality to Lawyer Work Product*

[6] ~~Confidential information relating to the representation~~Information protected by Business and Professions Code section 6068(e)(1) and contained in lawyer work product is protected under this Rule. However, “~~confidential information relating to the~~

~~representation~~ information protected by Business and Professions Code section 6068(e)(1)” does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates. However, the fact that information can be discovered in a public record does not, by itself, render that information “generally known” and therefore outside the scope of this Rule. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)

[7] Paragraph (a) prohibits a lawyer from revealing ~~confidential information relating to the representation of a client~~ information protected by Business and Professions Code section 6068(e)(1). This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer’s use of a hypothetical to discuss issues relating to the client’s representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

*Authorized Disclosure*

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

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

[9] *Narrow exception to duty of confidentiality under paragraph (b)(1)*. Notwithstanding the important public policies promoted by the duty of confidentiality, the overriding value of life permits certain disclosures otherwise prohibited under Business & Professions Code section 6068(e)(1). Paragraph (b)(1) restates Business and Professions Code section 6068(e)(2), which narrowly permits a lawyer to disclose ~~confidential information relating to the representation~~ information protected by Business and Professions Code section 6068(e)(1) even without client consent. Evidence Code section 956.5, which relates to the evidentiary lawyer-client privilege, sets forth a similar express exception. Although a lawyer is not permitted to reveal ~~confidential-protected~~ information concerning a client’s past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

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

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

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~~confidential-protected~~ information as permitted under paragraph (b)(1) is not subject to discipline.

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

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

*Deciding to Reveal ~~Confidential-Protected~~ Information as Permitted Under Paragraph (b)(1)*

[12] Disclosure permitted under paragraph (b)(1) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing ~~confidential-protected~~ information as permitted under paragraph (b)(1), the lawyer must, if reasonable under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose ~~confidential-such~~ information are the following:

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

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

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

[13] Paragraph (c)(1) provides that, before a lawyer may reveal ~~confidential~~ information protected by Business and Professions Code section 6068(e)(1), the lawyer must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, including persuading the client to take action to prevent a third person from committing or continuing a criminal act. If necessary, the client may be persuaded to do both. The interests protected by such counseling are the client's interests in limiting disclosure of ~~confidential~~-protected information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the lawyer's counseling or otherwise, takes corrective action – such as by ceasing the client's own criminal act or by dissuading a third person from committing or continuing a criminal act before harm is caused – the option for permissive disclosure by the lawyer would cease because the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the lawyer who contemplates making adverse disclosure of ~~confidential~~-protected information may reasonably conclude that the compelling interests of the lawyer or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the lawyer should, if reasonable under the circumstances, first advise the client of the lawyer's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the lawyer should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent the harm. Even when the lawyer has concluded that paragraph (b)(1) does not permit the lawyer to reveal ~~confidential~~-protected information, the lawyer nevertheless is permitted to counsel the client as to why it might be in the client's best interest to consent to the lawyer's disclosure of that information.

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

[14] A lawyer is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 1.4; Business and Professions Code, section 6068(m). Paragraph (c)(2), however, recognizes that under certain circumstances, informing a client of the lawyer's ability or decision to reveal ~~confidential~~-protected information under paragraph (b)(1) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the

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criminal act, but also to the client or members of the client's family, or to the lawyer or the lawyer's family or associates. Therefore, paragraph (c)(2) requires a lawyer to inform the client of the lawyer's ability or decision to reveal ~~confidential-protected~~ information as provided in paragraph (b)(1) only if it is reasonable to do so under the circumstances. Paragraph (c)(2) further recognizes that the appropriate time for the lawyer to inform the client may vary depending upon the circumstances. (See comment [16].) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

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

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

[15] Paragraph (d) requires that disclosure of ~~confidential-protected~~ information as permitted by paragraph (b)(1), when made, must be no more extensive than the lawyer reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the ~~confidential-protected~~ information to only those persons who the lawyer reasonably believes can act to prevent the harm. Under some circumstances, a lawyer may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable depends on the circumstances known to the lawyer. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the lawyer's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the lawyer.

*Avoiding a Chilling Effect on the Lawyer-Client Relationship*

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

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

[17] When a lawyer has revealed ~~confidential-protected~~ information under paragraph (b)(1), in all but extraordinary cases the relationship between lawyer and client that is based in mutual trust and confidence will have deteriorated so as to make the lawyer's representation of the client impossible. Therefore, when the relationship has deteriorated because of the lawyer's disclosure, the lawyer is required to seek to withdraw from the representation, (see Rule 1.16-~~[3-700]~~), unless the client has given his or her informed consent to the lawyer's continued representation. The lawyer normally must inform the client of the fact of the lawyer's disclosure. If the lawyer has a compelling reason for not informing the client, such as to protect the lawyer, the lawyer's family or a third person from the risk of death or substantial bodily harm, the lawyer must withdraw from the representation. [See Rule 1.16].

*Other Consequences of the Lawyer's Disclosure*

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

*Disclosure as Permitted by Paragraphs (b)(2) ~~Through-through~~ (b)(4)*

[19] If a legal claim by a client or the client's representative alleges a breach of duty by the lawyer involving representation of the client or a disciplinary charge filed by or with the cooperation of the client or the client's representative alleges misconduct of the lawyer involving representation of the client, paragraph (b)(3) permits the lawyer to respond only to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving conduct or representation of a former client.

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[20] A lawyer entitled to a fee is permitted by paragraph (b)(3) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[21] A lawyer may be ordered to reveal ~~confidential information relating to the representation of a client~~ information protected by Business and Professions Code section 6068(e)(1) by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer must assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the lawyer-client privilege or other applicable law. See, e.g., *People v. Kor* (1954) 129 Cal. App. 2d 436. In the event of an adverse ruling, the lawyer must consult with the client to the extent required by Rule 1.4 about the possibility of appeal ~~to the extent required by Rule 1.4~~. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order.

[22] Paragraph (d) permits disclosure as permitted by paragraphs (b)(2) through (b)(5) only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the ~~confidential~~ protected information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

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

[24] A lawyer must act competently to safeguard ~~information relating to the representation of a client~~ information protected by Business and Professions Code section 6068(e)(1) against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[25] When transmitting a communication that includes ~~information relating to the representation of a client~~ information protected by Business and Professions Code section 6068(e)(1), the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances,

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however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

*Former Client*

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