

From: KEVINMOHR04@sprintpcs.com on behalf of [Kevin Mohr](#)
To: [McCurdy, Lauren](#); [Difuntorum, Randall](#)
Cc: [JoElla L. Julien](#); [Ellen Peck](#); [Ignazio J. Ruvolo](#); [Mark Tuft](#); [Harry Sondheim](#); [Kevin Mohr G](#)
Subject: RRC - 1.6 [3-100] - III.B. - Agenda Materials
Date: Monday, January 11, 2010 1:03:31 PM
Attachments: [RRC - 3-100 \[1-6\] - Public Comment Chart - By Commenter - DFT2 \(12-29-09\)KEM.doc](#)
[RRC - 3-100 \[1-6\] - Rule - DFT10 \(12-30-09\) - Cf. to DFT9.doc](#)
[RRC - 3-100 \[1-6\] - E-mails, etc. - REV \(01-19-10\) 85-87.pdf](#)

Greetings Lauren:

I've attached the following:

1. E-mail compilation of exchange amongst the drafters over the last week, in PDF.
2. Public comment Chart, Draft 2 (12/29/09)KEM, in Word.
3. Rule Draft 10 (12/30/09), redline, compared to Draft 9 (8/3009), in Word.

Please include the above in the order listed.

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

Kevin

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January 4, 2010 KEM E-mail to Drafters, cc Chair & Staff:

I've attached the following for your review, both in Word:

1. Public Comment Chart, with proposed responses.
2. Rule, Draft 10 (12/30/09), redline, compared to Draft 9 (8/30/09).

Comments & Questions:

1. I recommend only two changes: a sentence added to Comment [6] and some additional language in Comment [19] to emphasize the limits on disclosure under paragraph (b)(3). The former is in response to comments from COPRAC and Rob Sall, and the latter is in response to comments from OCBA and Rob Sall.
2. Where I've recommended changes, I have highlighted the response in the public comment chart in turquoise.
3. Please review the proposed response to OCTC's comment concerning paragraph (e). I have highlighted it in yellow. Do you agree with what I have written?
4. In the attached public comment chart, please review the other responses I propose to the public comment received. Do you agree with those?
5. Our deadline is **Monday, January 11, 2010**, at noon. Please provide me with any comments you might have by **Saturday at 5:00 p.m.** so I can make any changes to the introduction, comparison charts, etc. I will have limited time as the law school's new semester begins on that Monday.

Please let me know if you have any questions.

January 7, 2010 Tuft E-mail to Drafters, cc Chair & Staff re 1.8.2 & 1.6:

I do not have a problem with the proposed responses to the public comments received. The explanation for the broader scope of information protected in proposed rule 1.8.2 in contrast to 6068(e)(1) is analytically sound. However, the responses received from OCTC and OCBA to this rule and from COPRAC to proposed rule 1.6 on what is meant by "information relating to the representation" illustrates the confusion the Legislature created in enacting 6068(e)(2) and 956.5 and which is now being carried forward in the rules. Although we inherited this problem, thus far we have not been able to satisfactorily resolve it either for this rule or for proposed rules 1.6 and 1.9. At some point, we should bite the bullet and point out in a comment the anomaly in the statute and what the terms "confidential information" and "information relating to the representation of a client" mean for purposes of the rules. Otherwise, lawyers will be even more confused in trying to decipher these terms among these various rules.

January 9, 2010 KEM E-mail to Tuft, cc Drafters, Chair & Staff re 1.8.2 & 1.6:

I recognize that there is a potential problem of confusion in the different terms used in 6068(e)(1) and (e)(2). However, I continue to believe that we have satisfactorily addressed the

problem, short of petitioning the legislature to revise either (e)(1) or (e)(2) [or both?], by including the second sentence to Rule 1.6(e), drafting comments [3]-[6] to Rule 1.6, and including a "definition" of "confidential information relating to the representation" in proposed Rule 1.0.1, which refers readers to those 1.6 comments. In short, assuming the use of different terms did create an anomaly, we have removed it by the foregoing steps. We could also include a cross-reference to those comments (or to the section of 1.0.1 that refers to them) in each of the Rules that uses the term, "confidential information relating to the representation." (e.g., 1.8.2, 1.14, 1.18, etc.), but I don't think we need a comment that explains the "anomaly," a conclusion with which I disagree. We have already explained the meaning of the terms. I believe that Comments [3]-[6] to Rule 1.6 adequately explain the meaning of "confidential information relating to the representation."

I've attached the clean version of Rule 1.6 for the convenience of the recipients. Please review the last sentence of paragraph (a) and comments [3]-[6] and decide whether we have adequately addressed Mark's concerns. The comments create protection that is co-extensive with that presumably afforded by 6068(e)(1).

Attached:

RRC - 3-100 [1-6] - Rule - DFT10 (12-30-09) - CLEAN.doc

January 9, 2010 Peck E-mail to Drafters, cc Chair & Staff re 1.8.2 & 1.6:

I */*really*/* like this draft. I hope it meets Mark's concerns. Unless Mark wants to tweak the language or has other suggestions, I think it is good to go.

January 10, 2010 KEM E-mail to Drafters, cc Chair & Staff re 1.8.2 & 1.6:

I assume I won't hear anything further concerning this rule and, unless I hear differently by 5:00 p.m. this evening, I will package the materials for submission to staff for the agenda package.

January 10, 2010 Tuft E-mail to Drafters, cc Chair & Staff re 1.8.2 & 1.6:

I have limited Internet access from the UK and do not have sufficient access to the materials to make specific drafting recommendations. However, I continued to be concerned with the use of different terms dealing with the duty of confidentiality in rules 1.6, 1.8.2, 1.9 and 1.18, such as "confidential information relating to the representation," "information relating to the representation," and "confidential information." I am also concerned that we are telling lawyers they have separate obligations under 6068(e)(1) and 3-100 implying there is a difference between the two, although 3-100(a) prohibits lawyers from revealing information protected under section 6068(e) except as provided in paragraph (b). The only express exception to section 6068(e)(1) is 6068(e)(2). We may think we are bringing clarity to the confidentiality in California, but I am worried the average practitioner may agree.

For these reasons, I am not sanguine with the draft agenda materials and remain a reluctant dissenter.

January 10, 2010 Peck E-mail to Tuft, cc Drafters, Chair & Staff re 1.8.2 & 1.6:

I think the best thing to do is to authorize Kevin to go forward with the current draft and to note your reluctant dissent. I am assuming that that would be agreeable to you, given the need to get this onto the agenda. Therefore, I think Kevin can go forward along these lines.
All the best and travel safely----you are very important to us.

January 10, 2010 Tuft E-mail to Peck, cc Drafters, Chair & Staff re 1.8.2 & 1.6:

I concur.

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

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	California Attorneys for Criminal Justice ("CACJ")	M		1.6(b)(4)	Our proposed modification would be to paragraph (b)(4) to add the following language to say: to comply with a "valid" court order.	The Commission did not make the requested change. Whether a court order is valid will require resolution by an appellate court. Comment [21] has been added to provide guidance for proceeding under the circumstances. The Comment requires the lawyer to "assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the lawyer-client privilege or other applicable law," and includes a citation to <i>People v. Kor</i> (1954) 129 Cal. App. 2d 436, a seminal Supreme Court case on a lawyer's duty when ordered by a court to disclose confidential information. The comment also clarifies that in the event of an adverse ruling, the lawyer "must" consult the client concerning an appeal. Only after an appeal or if no appeal is taken, may a lawyer reveal confidential information to comply with a court order.
3	COPRAC	M		1.6(a)	COPRAC agrees with the minority position and believes the use of the phrase "relating to the representation" is too limited to conform to Business & Professions Code Section 6068(e)(1). This rule should extend the duty of confidentiality to the same extent delineated by Section 6068(e).	The Commission did not make the requested change. Contrary to COPRAC's position, the term "relating to the representation" does not limit the duty of confidentiality as stated in B&P Code § 6068(e)(1). First, the second sentence of paragraph (a) clarifies that the term "relating to the representation," which is found not only in the Model

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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

TOTAL = __ Agree = __
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				Cmt. [3]	Comment [3] to the proposed Rule should be revised to reference Section 6068(e).	Rule counterpart but also in Evid. Code § 956.5, encompasses all information that is protected by Bus. & Prof. Code § 6068(1). Second, Comments [3]-[6] reiterate what is stated in the second sentence of paragraph (a): the protection afforded a client's confidential information is extremely broad. See especially, Comment [5], sentences 3 through 5. Third, nothing in the legislative history of section 6068(e)(2) or the proceedings leading to rule 3-100 suggests that the use of that phrase in those provisions was intended by either the legislature or the Court "to restrict the ambit of information [that could be communicated] even in the face of a threat of death." See Submission of Michael Judge, below. The use of that language was simply an attempt to conform section 6068(e)(2)'s language to that in the similar provision in the Evidence Code. See Evid. Code § 956.5. The Commission did not make the requested change, which would be contingent on the deletion of the second sentence of paragraph (a) and striking the phrase "related to the representation," with both of which the Commission disagrees.
				Stricken 1.6(b)(2), (b)(3)	COPRAC does not favor adoption of the so-called Enron exceptions permitting disclosure in certain situations involving financial harm.	No response is necessary.
				1.6(b)(4)	We agree that compliance with a court order addressing disclosure of confidential information should be permitted by the	No response is necessary. See also response to CACJ, above.

**Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)].
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				1.6(b)(4)	<p>proposed rule, with the proviso set forth in the comment than an appeal should be considered.</p> <p>COPRAC members are divided on whether the compliance with “other law” should also be included as a scenario in which disclosure should be permitted. A majority of COPRAC members believe that this exception should not be included in the California rule.</p>	No response necessary. In any event, the Commission notes that including the “other law” exception would effectively permit disclosures under stricken MR 1.6(b)(2) and (3), at least for publicly-traded companies under the Sarbanes-Oxley Act.
1	Judge, Michael P. Los Angeles County Public Defender	M		1.6(a) 1.6(b)(4)	<p>We object to limiting “confidential information” to “relating to the representation” in 1.6(a). This protection should not be narrowed.</p> <p>Under <i>People v. Kor</i>, the lawyer is required to resist a court order to disclose confidential information, even upon pain of contempt. Thus, section (4) should be stricken, as should the part of section 1.6(d) allowing the lawyer to comply with a court order (to disclose confidential information).</p>	<p>Please see response to COPRAC comment re paragraph (a), above.</p> <p>Please see response to CACJ, above.</p>
8	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	M		Cmt. [5] Cmt. [6]	<p>We are concerned about the broad reference to the State Bar Act at the end of the Comment. That is overbroad, and makes the rule difficult to analyze. The Comment should refer directly to the specific provisions of the State Bar Act that are intended to be incorporated, such as Section 6068(e).</p> <p>Comment [6] should be clarified to distinguish between “generally known” information, which</p>	<p>The Commission did not make the requested change. A general reference is adequate in the event the legislature amends the State Bar Act to permit other exceptions.</p> <p>The Commission agrees and has added a sentence to Comment [6].</p>

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

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				<p>Cmt. [9]</p> <p>Cmts. [23] & [26]</p>	<p>is not protected under the rule, and information in the public record, which is protected.</p> <p>The first line of Comment [9] is an incomplete sentence. If this is intended as a title for the Comment, perhaps it should be italicized?</p> <p>We also believe that Comments [23] and [26] do not add anything to the interpretation of the rule and should be deleted. These are simply repetitive of what is stated elsewhere in the comments or rules. Even though Comment [26] is derived from ABA Comments, we believe it is unnecessary and duplicative.</p>	<p>LACBA correctly noted the first "sentence" is a heading and should have been italicized.</p> <p>The Commission has not made the requested changes. Comment [23] corresponds to Comment [11], currently found in rule 3-100. What Comment [11] states with respect to paragraph (b)(1), Comment [23] does with respect to paragraphs (b)(2) – (b)(5). Comment [26] and its heading points lawyers to Rule 1.9 concerning their duties with respect to former clients' confidential information.</p>
10	Office of Chief Trial Counsel ("OCTC"), State Bar of California	M		1.6(a)	<p>1. OCTC believes the proposed Rule might cause confusion because it does not use the same language in paragraph (a) as is found in Bus. & Prof. Code § 6068(e)(1) ("confidence" and "secrets").</p> <p>OCTC also believes that paragraph (a) should refer to all of § 6068(e) and not just 6068(e)(1).</p>	<p>1. The language used in paragraph (a) was compromise language approved by representatives of the Legislature during the drafting of current rule 3-100. The representatives did not want language that paralleled section 6068(e)(1) in paragraph (a).</p> <p>The Commission disagrees. Section 6068(e)(1) is the statement of the duty of confidentiality in California, just as Model Rule 1.6(a) is the statement of confidentiality in Model Rule states. Proposed Rule 1.6(a) attempts to parallel the substance of Model Rule 1.6(a) and 6068(e)(1). By contrast, section 6068(e)(2) is an exception to the duty; its counterpart is proposed Rule 1.6(b), as is true in Model Rule states.</p>

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

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				1.6(b)	2. OCTC suggests that paragraph (b) does not address what will happen if further changes are made to section 6068(e) that permit other exceptions. OCTC further suggests that to avoid conflicting rules, paragraph (b)(1) simply state that paragraph (b)(1) of proposed Rule 1.6 simply state that a lawyer may reveal confidential information as permitted under Business & Professions Code section 6068(e).	2. The Commission has not made the suggested change. First, there is no guarantee that the Legislature would place exceptions to § 6068(e)(1) in § 6068(e) or even in § 6068. In the past, proposed exceptions have appeared in different-numbered sections of the State Bar Act. Second, the experience of AB 1101, which resulted in the exception for death and substantial bodily harm that is in current rule 3-100 indicates that the Legislature is unlikely to enact any exceptions that would become operative before the Supreme Court has had an opportunity to approve a parallel rule.
				1.6(b)(3)	3. OCTC agrees with the minority that paragraph 1.6(b)(3) would permits disclosure to establish a claim or defense on behalf of the lawyer without a court determination.	3. Please see response to SDCBA, below. The provision is narrowly drafted and revisions to Comment [19] emphasize that a lawyer may reveal information only to the extent that it is necessary to establish a claim or defense. As the lawyer will be revealing such information only before a tribunal in which the lawyer-client controversy plays out, the necessary protections should be present.
				1.6(b)(4)	4. OCTC disagrees with the removal of the Model Rule’s phrase “other law” from subparagraph (b)(4). OCTC agrees with retaining “court order” exception in subparagraph (b)(4).	4. Please see response to COPRAC comment re 1.6(b)(4), above. No response necessary.
				1.6(b)(5)	5. OCTC has expressed concerns in relation to proposed Rule 1.14.	5. Please see discussion in Chart re proposed Rule 1.14.

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				1.6(e)	6. OCTC believes that paragraph (e) is too broad in extending current rule 3-100(E) to all subparagraphs of paragraph (b) and not limit it to subparagraph (b)(1) as in current rule 3-100. For example, OCTC believes paragraph (e) would permit a lawyer to escape discipline even if the lawyer refused a court order after an appeal determined the information sought must be disclosed.	The Commission does not believe any change need be made to paragraph (e), which provides only that "[a] lawyer who does not reveal confidential information as permitted by paragraph (b) does not violate this Rule." If, after an appeal, an appellate court has determined that the lawyer must disclose what the lawyer has argued is protected under Rule 1.6, the court in effect is stating that the information is not protected under the Rule, and so the lawyer cannot rely on the rule to oppose disclosure. Regardless, refusal to disclose should not subject a lawyer to discipline under a Rule that only permits disclosure. Further, the lawyer otherwise would be subject to discipline under other provisions of the State Bar Act.
				General	7. OCTC believes that there are too many comments and does not believe a rule comment should explain a statute.	7. The Commission has not made any changes. The specific comment to which OCTC refers, Cmt. [9], is in the Discussion to current rule 3-100 (¶. 3). The drafting of rule 3-100 was a cooperative venture among the Legislature, the Supreme Court, and the State Bar, as provided in AB 1101, which expressly provided for the appointment of a task force by the State Bar President in consultation with the Supreme Court "to make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act." In addition, the bill identified a number of issues that should be addressed in the rule, which are the subject of the Comments [9] to [18] of the proposed Rule.

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

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				Cmt. [15]	8. OCTC suggests that Comment [15] is too narrow and applies only to prevent criminal conduct and should be stricken.	8. The Commission has not made the suggested change. Comment [15] concerns only subparagraph (b)(1), which itself is limited to preventing criminal conduct.
				Cmt. [19]	OCTC also objects to Comment [19], arguing that it “could result in a claim that, in an investigation commenced under the State Bar’s own authority and not the result of a client’s complaint, the respondent does not have to provide certain information.”	The Commission notes that Comment [19] provides only that a lawyer may disclose information without the client’s permission in order to defend himself or herself against the client’s allegations. Neither paragraph (b)(3) nor Comment [19] is not intended to provide OCTC with the ability to force a lawyer to breach his or her duty of confidentiality without the client’s permission.
				Cmt. [21]	OCTC also suggests that Comment [21]’s last sentence “could be interpreted as implying that an attorney can disobey a court order or law, even if not appealing it.”	The Commission disagrees with this assessment. The last sentence of Comment [21] provides: “Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court’s order.” See response concerning paragraph (e), at RRC Response, ¶. 6, above.
				Cmt. [23]	OCTC also believes that Comment [23] would permit a lawyer to disobey a court order or law.	Please see response to paragraph (e), at RRC Response, ¶. 6, above.
2	Orange County Bar Association	M		1.6(b)(3)	The OCBA recommends one revision to the proposed Rule, and a corresponding change in one of the Comments, in order to emphasize the scope of a lawyer’s disclosure under certain circumstances. In paragraph (b)(3) of the proposed Rule, we suggest the following changes:	

**Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)].
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				Cmt. [19]	<p>“(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client relating to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship, but only to the extent necessary to establish a claim or defense; or . . .”</p> <p>In addition, we recommend the following changes to the first sentence in Comment [19]:</p> <p>“If a legal claim by a client or the client’s representative alleges a breach of duty by the lawyer . . . paragraph (b)(3) permits the lawyer to respond only to the extent the lawyer reasonably believes necessary to establish a defense.”</p>	<p>The Commission did not make the requested change as to paragraph (b)(3) as the requested limitation already appears in the introductory paragraph to (b) (“(b) A lawyer may, but is not required to, reveal confidential information relating to the representation of a client <i>to the extent that the lawyer reasonably believes the disclosure is necessary.</i>” [Emphasis added].)</p> <p>The Commission agrees with this clarifying change and will implement it.</p>
9	Sall, Robert K.	M		1.6(b) & Cmt. [22] 1.6(b)(3) & Cmt. [19]	<p>The “reasonable belief” standard is too subjective. It should be retained in subparagraph (b)(1) but should be removed from the introduction to paragraph (b). The same change should be made to Comment [22].</p> <p>There is a concern that a lawyer might use paragraph (b)(3) to justify disclosure of information not necessary to establish a claim or defense. Recommends revising Comment [19] to avoid any implication that a lawyer may</p>	<p>The Commission did not make the requested change. The “reasonable belief” standard is an objective standard; it appears in both B & P Code § 6068(e)(2) and in current rule 3-100(B).</p> <p>Please see response to OCBA re Comment [19], above.</p>

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				1.6(c)(1)	do so. Paragraph (c)(1) should be revised to require that the lawyer do both (i) and (ii). The commenter suggests the following: (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) <u>and counsel the client</u> to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii) ;	The Commission has not made the suggested change. The two courses of conduct in paragraph (c)(1) appear in current rule 3-100. They were written in the alternative because (1) addresses the situation where the client is the actor and (2) addresses the situation where a third person is the actor. In some instances where the client is acting with another person, the lawyer might want to do both. Comment [13] to proposed Rule 1.6 [which is taken nearly verbatim from paragraph 7 of current rule 3-100], clarifies this distinction.
				Cmt. [6]	There is a possibility that a person who reads Comment [6] will not understand the distinction between information that is “generally known” and information that is in the public record.	<u>Please see response to LACBA, above.</u>
4	San Diego County Bar Association (“SDCBA”) Legal Ethics Committee	M		1.6(a)	The Commission’s proposal to define information protected from disclosure by Section 6068(e)(1) as “confidential information relating to the representation” could be read to weaken California’s traditional protection of client confidences. The wording proposed by the minority is preferable and clearer: The information protected from disclosure	Please see response to COPRAC re paragraph (a).

**Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)].
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				1.6(b)(3)	<p>by section 6068(e)(1) is referred to as “confidential information relating to the representation” in this Rule.</p> <p>This paragraph, although intended by the Commission to track Cal. Evid. Code Section 958, in fact goes far beyond the statutory exception. The exception set forth in 958 applies only when a court determines that the exception applies. By contrast, proposed Rule 1.6(b)(3) would allow each individual attorney to make that determination. This determination is better left to an impartial court. Nonetheless, in the interest of uniformity, our recommendation is to replace proposed Rule 1.6(b)(3) with the provision of the ABA Model Rules, set forth in 1.6(b)(5).</p>	<p>The Commission did not make the suggested change. The Model Rule permits a lawyer to disclose confidential information not only in disputes with the client, but also in actions filed against the lawyer by third parties. The Commission does not understand how the Model Rule is narrower than proposed Rule 1.6(b)(3), which permits a lawyer to disclose confidential information only in controversies with the client. Further, the Model Rule does not provide for the intervention of “an impartial court,” which appears to be the fault SDCBA finds with the Commission’s proposal.</p>
7	Santa Clara County Bar Association			MR 1.6(b)(2), (3)	<p>We oppose the revisions proposes by the RRC in completely deleting subsection (b)(2) and (3) regarding a crime or fraud involving a substantial financial/economic injury to another. The SCCBA recognizes that adopting the ABA Model Rule including subsection (b)(2) and (3) would create another exception to the attorney-client confidentiality. However, the SCCBA believes that the crime/fraud exception is a vital one, constrained in its scope and permissive in its application.</p>	<p>The Commission did not make the suggested change. As noted in the Introduction to the Rule, MR 1.6(b)(2) and (3) are inimical to California’s settled policy favoring strong confidentiality to better enable a lawyer to provide competent representation and compliance with the law:</p> <p>These provisions run counter to California’s policy of providing assurance to clients that their secrets are safe, which encourages client candor in communicating with the lawyer and provides the lawyer with the information necessary to</p>

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						promote client compliance with the law.
6	Trusts and Estates Section of the State Bar of California, Executive Committee	M		1.6(b)(4) 1.6(a)	We urge (1) retaining subparagraph (b)(4) of the Proposed Rule which would allow disclosure of confidential client-information when necessary to comply with a court order; and (2) including in subparagraph (a) the Model Rule exception that allows for disclosure of confidential client information when “disclosure is impliedly authorized in order to carry out the representation.” Otherwise, the only general exception to the Business & Professions Code Section 6068 prohibition on disclosure would be for when the client gives informed consent.	No response necessary to position (1). As to position (2), the Commission has already noted that the concept of “implied authority,” which has been incorporated into the Model Rule, is a dangerous catchall that threatens to swallow the duty of confidentiality. Rather than incorporate a term the Model Rules do not define, the Commission in Comment [3] has defined “confidential information relating to the representation” (another term the Model Rules do not define). As provided in Comment [3], that term means “information gained by virtue of the representation of a client, whatever its source, that (a) is protected by the lawyer-client privilege, (b) is likely to be embarrassing or detrimental to the client if disclosed, or (c) the client has requested be kept confidential.” The lawyer thus would be impliedly authorized to reveal information that does not fall within (a), (b) or (c) – that is, so long as it is not privileged, embarrassing or detrimental to the client, or which the client has expressly requested that the lawyer not divulge. The Commission has determined that this approach provides more of a bright-line standard and thus provides better

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

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						guidance and predictability to lawyers in representing their clients.

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 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 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 as provided in paragraph (b)(1).

- (d) 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, 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 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 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.

- [3] As used in this Rule, "confidential information relating to the representation" 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 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 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 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 except with the consent of the client or an authorized representative of the client, or as authorized by these Rules or the State Bar Act.

Relationship of Confidentiality to Lawyer Work Product

- [6] Confidential information relating to the representation and contained in lawyer work product is protected under this Rule. 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 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 outside the scope of this Rule. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)¹

¹ [KEM Note: I've added this sentence in response to comments submitted by LACBA and Rob Sall.](#)

- [7] 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.

Authorized Disclosure

- [8] 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 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 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.

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

- [10] Rule 1.6(b)(1) reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a lawyer reasonably believes is likely to result in death or substantial bodily harm to an individual. A lawyer who reveals confidential information as permitted under paragraph (b)(1) is not subject to discipline.

No Duty to Reveal Confidential Information

- [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 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

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this rule is a matter for the individual lawyer to decide, based on all the facts and circumstances, such as those discussed in comment [12] of this Rule.

Deciding to Reveal Confidential 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 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 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 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.

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, 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 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 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 information, the lawyer nevertheless is permitted to counsel the client as to why it might be in the client's best interest to consent to the lawyer's disclosure of that information.

Informing Client of Lawyer's Ability or Decision to Reveal Confidential 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 information under paragraph (b)(1) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the lawyer or the lawyer's family or associates. Therefore, paragraph (c)(2) requires a lawyer to inform the client of the lawyer's ability or decision to reveal confidential 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 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 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 information to only those persons who the lawyer reasonably believes can act to prevent the harm. Under some circumstances, a lawyer may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable depends on the circumstances known to the lawyer. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the lawyer's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the lawyer.

Avoiding a Chilling Effect on the Lawyer-Client Relationship

[16] The foregoing flexible approach to a lawyer informing a client of his or her ability or decision to reveal confidential 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 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 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 information, there may be other important issues that a lawyer must address. For example, a lawyer who is likely to testify in a matter involving the client must comply with Rule [3.7]. Similarly, the lawyer must also consider the lawyer's duty of competence (Rule 1.1) and whether the lawyer has a conflict of interest in continuing to represent the client (Rule 1.7(d)).

Disclosure as Permitted by Paragraphs (b)(2) Through (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.² The same is true with respect to a claim involving conduct or representation of a former client.

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

[21] A lawyer may be ordered to reveal confidential information relating to the representation of a client 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

² [KEM Note: Changes made to Comment \[19\] as requested by OCBA.](#)

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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 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 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 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 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, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

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

Rule 1.6 – Public Comment – File List

E-2009-291b LA Public Defender[1.6]

E-2009-292b OCBA [1.6]

E-2009-293b State Bar OCTC [1.6]

E-2009-310f COPRAC [1.6]

E-2009-311 Sall Law Firm [1.6]

E-2009-351b SDCBA [1.6]

E-2009-358b Santa Clara County Bar [1.6]

E-2009-361 State Bar Trust & Estates Section [1.6]

E-2009-368b CACJ [1.6]

E-2009-370b LACBA [1.6]



MICHAEL P. JUDGE
PUBLIC DEFENDER

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EXECUTIVE OFFICE

November 3, 2009

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

Re: Proposed Ethical Rules (Rule 1.2 and 1.6)

Dear Ms. Hollins,

We write to express our position to the proposed Rules:

Rule 1.2

~~Rule 1.2 governs the "Scope Of Representation And Allocation Of Authority Between Client And Lawyer." The rule requires that a lawyer abide by a client's decisions concerning the "objective" of the representation, and consult with the client about the "means" by which the objectives are to be pursued.~~

~~The proposed rule is opposed, according to the Discussion Draft provided by the Commission, by a minority of the Commission. We agree with the concern of the minority regarding the intersection of the proposed rule and the provisions of Penal Code section 1018. That concern is set forth in the Discussion Draft and reprinted below:~~

~~[T]he minority observes that, in some cases, a lawyer must be able to disagree with a client's decisions concerning the objectives of the representation and to refuse to "abide by" the client's decision as to a plea in a criminal case. The minority notes that if a lawyer believes there is a valid defense in a death penalty case, the lawyer is required to exercise independent judgment about whether to oppose the client's plea and to advocate against conviction or the death penalty. Penal Code section 1018, states in part: "No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received~~

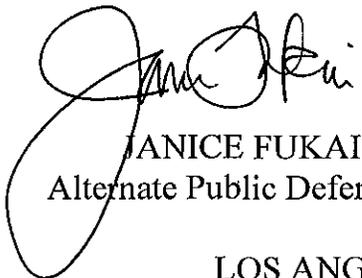
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State Bar of California
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~~without the consent of the defendant's counsel.” (See, e.g., *People v. Massie* (1985) 40 Cal.3d 620; *People v. Alfaro* (2007) 41 Cal.4th 1277, cert. denied 128 S.Ct. 1476, 170 L.Ed.2d 300.) The minority concludes that, if the Supreme Court approves Rule 1.2, so a lawyer who does not comply with a client’s decision regarding a plea in a criminal case faces discipline, then the validity of Penal Code section 1018 is jeopardized.~~

Rules 1.6

Rule 1.6 is mostly in accord with the protection afforded in present rule 3-100. However, we object to limiting “confidential information” to “relating to the representation” in 1.6(a). The present protection afforded in Business and Professions Code section 6068(e)(1) is “to maintain inviolate the confidence, and at every peril to himself or herself to preserve, the secrets of his or her client.” This protection should not be narrowed simply because the exception, which allows but does not require disclosure to prevent a criminal act likely to result in death or substantial bodily harm, in 6068(e)(1) contains the narrower definition of “relating to the representation.” The narrower definition in the exception permitting disclosure obviously is an effort to restrict the ambit of information communicated even in the face of a threat of death.

A second objection is to proposed rule 1.6(b) (4), which would allow a lawyer to reveal confidential information “to comply with a court order.” Under *People v. Kor* (1954) 129 Cal.App.2d 436, the lawyer is required to resist the court order to disclose, even upon pain of contempt. Thus section (4) should be stricken, as should the part of section 1.6(d) allowing the lawyer to comply with a court order (to disclose confidential information).


JANICE FUKAI
Alternate Public Defender

Sincerely,


MICHAEL P. JUDGE
Public Defender

LOS ANGELES COUNTY, CALIFORNIA

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, November 06, 2009 2:53 PM
To: Hollins, Audrey
Cc: 'Garner, Scott'; 'Shawn M Harpen'
Subject: Orange County Bar Comments Re Proposed Rules of Professional Conduct
Attachments: OCBA Comments to Commission Nov 2009.pdf

Dear Ms. Hollins:

Attached are comments being sent on behalf of the Orange County Bar Association regarding ten (10) of the eleven (11) proposed new or amended Rules of Professional Conduct of the State Bar of California as developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We appreciate the work of the Commission and the opportunity to provide these comments, which are attached in PDF format.

- Proposed Rule 1.2 - Scope of Representation and Allocation of Authority between Client and Lawyer
- Proposed Rule 1.6 – Confidentiality of Information
- Proposed Rule 1.8.2 – Use of Current Client's Information Relating to the Representation
- Proposed Rule 1.8.13 – Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9, and 1.8.12
- Proposed Rule 1.9 – Duties to Former Clients
- Proposed Rule 1.10 – Imputation of Conflicts – General Rule
- Proposed Rule 1.14 – Client with Diminished Capacity
- Proposed Rule 2.1 – Advisor
- Proposed Rule 3.8 – Special Responsibilities of a Prosecutor
- Proposed Rule 8.5 – Disciplinary Authority; Choice of Law

Please let me know if you require any additional information or if you prefer that these comments are provided in a different format.

Trudy C. Levindofske, CAE
Executive Director
Orange County Bar Association
Orange County Bar Association Charitable Fund
(949)440-6700, ext. 213

MEMORANDUM

Date: October 16, 2009

To: Commission for the Revision of the Rules of Professional Conduct of the State Bar of California

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 1.6 – Confidentiality of Information**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism & Ethics Committee.

The OCBA respectfully submits the following comments concerning the subject proposed Rule:

The OCBA generally supports the proposed Rule as drafted. The OCBA agrees with the Commission that adoption of the Enron exceptions would be inconsistent with California's policies regarding confidentiality.

The OCBA recommends one revision to the proposed Rule, and a corresponding change in one of the Comments, in order to emphasize the scope of a lawyer's disclosure under certain circumstances. In paragraph (b)(3) of the proposed Rule, we suggest the following changes:

- (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client relating to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship, *but only to the extent necessary to establish a claim or defense*; or

In addition, we recommend the following changes to the first sentence in Comment [19]:

If a legal claim by a client or the client's representative alleges a breach *of duty* by the lawyer ... paragraph (b)(3) permits the lawyer to respond *only* to the extent the lawyer reasonably believes necessary to establish a defense.

We agree that an "implied authority" exception is not appropriate. We agree with the majority regarding paragraph (b)(3) incorporating Evidence Code section 958. Further, we agree with the majority as to paragraph (b)(4), permitting a lawyer to make disclosures to comply with a court order. Finally, we agree with the majority that it is helpful in Comment [3] to include a definition of the term "confidential information relating to the representation."



**THE STATE BAR OF
CALIFORNIA**

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November 4, 2009

Randall Difuntorum, Director
Office of Professional Competence & Planning
State Bar of California
180 Howard Street
San Francisco, California 94105

re: Comments of the Office of the Chief Trial Counsel to Proposed
Amendments to the Rules of Professional Conduct

Dear Mr. Difuntorum:

Thank you for the opportunity to submit the comments of the Office of the Chief Trial Counsel (OCTC) to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in September 2009. Here are OCTC's comments:

Rule 1.2 Scope of Representation and Allocation of Authority.

1. The Office of the Chief Trial Counsel (OCTC) is concerned that paragraphs (a) and (b) of proposed Rule 1.2, although in the Model Rules version, are not really rules subject to discipline and, thus, do not belong in the Rules of Professional Conduct. OCTC believes that the Rules of Professional Conduct should only address rules that are disciplinable. Otherwise, it can create confusion among the state's lawyers and make enforcement of the rules more difficult. Further, OCTC believes that the concepts in paragraphs (a) and (b) are already implicitly included in the rules regarding competence and the duty to communicate.
2. OCTC is concerned that, while paragraph (c) permits limited scope representations if the limitation is reasonable under the circumstances, it does not specifically prohibit limited scope representations when they are not permitted by law. In *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520-521, an attorney raised the issue of limited scope representation as a defense to charges of incompetence and failing to perform. The court rejected that defense because it found that federal law did not permit limited scope representations in immigration cases and, therefore, the attorney could not defend the charges by asserting a limited scope representation. The court concluded that because the law prohibited limited scope representations the duty to fully and competently represent the client may not be modified by an agreement between the attorney and the client even if the parties expressly noted the limited scope of the representation. That may be what Comment 8 is trying to explain, but, it should be specifically in the rule, not just a comment.

3. OCTC also believes that the consent in paragraph (c) should be in writing. There already are rules requiring that fee agreements and consent to certain fee agreements be in writing. (E.g. Business & Professions Code sections 6147 and 6148 and current Rule 2-200 of the Rules of Professional Conduct.) OCTC recognizes that Business & Professions Code sections 6147 and 6148 are not considered by themselves a basis for discipline (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 279-280), but unless the fee agreements are in writing they are voidable and under current rule 4-200 (proposed rule 1.5) a client must be fully informed of the terms of a fee agreement. Moreover, although California has not made Business & Professions Code sections 6147 and 6148 disciplinable offenses on their own, the Model rules and many other jurisdictions have made the lack of a written agreement disciplinable for contingent fees. (See e.g. Model Rule 1.5 (c); *Statewide Grievance Comm. v. Timbers* (Conn App. Ct. 2002) 796 A.2d 565.) Likewise, current rule 2-200 of the Rules of Professional Conduct has made it a disciplinable violation when the attorney does not obtain the client's written consent to the attorney sharing fees with another attorney. Further, making it in writing prevents future arguments between the attorney and client about the scope of the representation and impresses upon the client the importance of the limitation. A similar purpose was among the purposes noted by the Supreme Court in refusing to honor a fee agreement between attorneys without the informed written consent of the client, in violation of current rule 2-200. (See *Chambers v. Kay* (2002) 29 Cal. 4th 142.) Given that limited scope representation is the exception, it would be better policy and more enforceable to require that it be in writing.
4. OCTC agrees with paragraph (d)'s broadening of current rule 3-210 to include criminal and fraudulent conduct as well as any law, rule, or ruling. However, paragraph (d), unlike current rule 3-210, does not specifically provide for the defense of good faith or appropriate steps. While the Commission's Comments make clear that it intends to keep that defense, OCTC believes that it should be in the rule and not in a comment.
5. OCTC is also concerned with Comments 1 and 2's statement that an attorney is required to consult with the client regarding the means by which the attorney handles the client's matter. These Comments appear to be overbroad and could be interpreted to change current law. The current law is that a lawyer must advise the client of significant developments and that the client has the authority over significant matters, such as settling a case. However, it has never been that the attorney must consult (or advise) on every step and action, just the significant ones. In fact, it is well established that as a general rule an attorney, not a client, controls the presentation of a case. (See e.g. *People v. Hamilton* (1989) 48 Cal.3d 1142, 1163; *People v. Mattison* (1959) 51 Cal.2d 777, 788.) Proposed rule 1.4 requires reasonable consultation, but the Comments to proposed rule 1.2 could be interpreted to change the law and suggest that every means or action by the lawyers requires this consultation. OCTC thinks these Comments need clarification so that only significant means should require consultation and specific communication; and that nothing is intended to change current law about who controls the presentation of cases.
6. OCTC believes that Comment 8 needs clarification to make clear that limited scope representations are not permitted unless allowed by law. OCTC suggests that the Comment reference *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct.

Rptr. 498, 520-521 for this proposition. OCTC is also concerned that nowhere in the Comments are attorneys advised that the courts have found that even where the scope of the representation is expressly limited, the attorney may still have a duty to alert the client to reasonable apparent legal problems outside the scope of the representation. (See *Janik v. Rudy, Exelrod, & Zieff* (2004) 119 Cal.App.4th 930, 940.)

Rule 1.6 Confidentiality of Information.

1. OCTC is concerned that this proposed rule might create confusion and enforcement problems since Business & Professions Code section 6068(e) already addresses the issues raised in proposed rule 1.6. For example, OCTC is concerned that paragraph (a) of proposed Rule 1.6 uses the term information but not the term confidences or secrets, which is used in Business & Professions Code section 6068(e)(1). If California is to have a rule to cover this issue, OCTC suggests that paragraph (a) use the same terms as Business & Professions Code section 6068(e)(1) to ensure that the rule is not interpreted to change the duty of an attorney to preserve the confidences and secrets of a client as provided in Business & Professions Code section 6068(e). For the same reason, OCTC believes that paragraph (a) should refer to all of Business & Professions Code section 6068(e) including (e)(2)'s statement when an attorney may reveal the information ordinarily protected under section (e)(1).
2. OCTC is further concerned that paragraph (b)(1) does not address what happens if any further changes occur to Business & Professions Code section 6068(e). Even if the Supreme Court later changed paragraph (b)(1) to be consistent with any changes in section (e) the delay would be substantial before that occurred. Paragraph (b)(1) currently mirrors the language of Business & Professions Code section 6068(e)(2), but does not specifically refer to Business & Professions Code section 6068(e)(2). To prevent the problems that would occur if the Legislature changed Business & Professions Code section 6068(e)(2) OCTC suggests that, if California is to have a Rule of Professional Conduct to cover the same concerns as already addressed in Business & Professions Code section 6068(e), paragraph (b)(1) of proposed Rule 1.6 simply state that a lawyer may reveal confidential information as permitted under Business & Professions Code section 6068(e). This would prevent conflicting rules, avoid any confusion, and allow for enforcement of this important provision.
3. OCTC agrees with the concerns of the Minority of the Commission that paragraph (b)(3) permits disclosure to establish a claim or defense on behalf of the lawyer without a court determination. We believe a court, not an attorney, should make this determination. This will also aid in the enforcement of violations of this paragraph.
4. OCTC disagrees with the removal from paragraph (b)(4) of the term "other law" and agrees with the Model Rule drafters that this term should be included in this paragraph. OCTC does not believe that the term "other law" is too vague or imprecise. It simply provides that if there is other law preventing or permitting disclosure, it will be complied with. It should be followed in California's rule. There are statutes that require certain disclosures and the rules should not encourage disobedience of those statutes. OCTC also believes that the term court order should be in this paragraph. Thus, OCTC agrees with the majority view regarding proposed paragraph (b)(4)'s use of the term court order because an attorney should not be disobeying a court order. Such disobedience violates

Business & Professions Code section 6103, brings disrespect to the court, and demeans the profession. It also mocks the court's authority and sends a message that juries may also disobey the judge's directives and ignore the law. (See *People v. Chong* (1999) 76 Cal.App.4th 232, 244.) The Supreme Court has stated that an attorney's disobedience of a court order is one of the most serious violations of professional duties. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 112.) Thus, no rule should permit or encourage disobedience of a court order. There should not be an exception to obeying court orders for an attorney's claim of attorney-client confidences. The court, not the lawyer, should be the final decider of what must be disclosed. Further, this type of behavior is subject to serious abuse by attorneys who simply use this as an excuse to violate court orders and frustrate the proper administration of justice, no matter how frivolous their assertions. A court, not an attorney, should be the final arbiter of when an attorney can refuse to disclose matters. In fact, OCTC has recently experienced cases in the State Bar Court where attorneys attempted to disrupt, delay, and frustrate our proceedings by refusing to obey court orders to answer questions by making frivolous claims of attorney-client confidences. Thus, unless an attorney obtains an immediate stay or a writ is granted, he or she should not be allowed to disobey a court order. The minority view would in our opinion result in chaos in and disrespect to the court and the law.

5. As to paragraph (b)(5), OCTC refers to its discussion of proposed rule 1.14(b).
6. OCTC has some concerns about paragraph (e). It appears paragraph (e) is an attempt to carry forward the concept in Business & Professions Code section 6068(e)(2) that an attorney may but is not required to reveal some information. The problem is that proposed paragraph (e) is too broad. It covers all of proposed paragraph (b), but that would include that an attorney could not be disciplined for disobeying a law or court order to reveal the information. (See our discussion of paragraph (b)(4).) Although the Commission states this paragraph is just what current rule 3-100(E) states, proposed paragraph (b)'s language is much broader than current rule 3-100(B). Proposed paragraph (e), as written, unlike current rule 3-100, includes allowing an attorney to refuse to reveal confidences required by a court order, apparently even after all the appeals have been completed. It seems to OCTC that this paragraph needs clarification and that it should be a violation to disobey a court order or law.
7. OCTC also has some concerns about the Comments. In general, OCTC thinks there are too many and that some are not necessary. Further, OCTC finds Comment 9 confusing. It states that the overriding value of life permits disclosure otherwise protected by Business & Professions Code section 6068(e)(1), but Business & Professions Code section 6068 (e)(2) already provides for this. More importantly, OCTC does not think the rules should be adding Comments that are explaining a statute passed by the Legislature. OCTC recommends that this Comment be stricken.
8. Comment 15 is overly narrow and seems to imply that the rule of limited disclosure when disclosing information applies only to prevent criminal conduct. If that is what is meant, OCTC strongly disagrees and believes that is contrary to established law. OCTC would strike the Comment or significantly modify it. Comment 19 could result in a claim that, in an investigation commenced under the State Bar's own authority and not the result of a client's complaint, the respondent does not have to provide certain information. It does

not explain what it means by cooperation. What if OCTC subpoenas the client? Comment 21's last sentence could be interpreted as implying that an attorney can disobey a court order or law, even if not appealing it. As previously discussed, OCTC has concerns with that. Likewise, Comment 23 has the problem that it appears to allow a lawyer to disobey a court order or a law.

Rule 1.8.2 Use of Current Client's Information Relating to the Representation.

1. The Commission has asked for comments as to whether it should exclude the term relating to the representation and whether it should require written consent. As to relating to representation, OCTC would suggest that the rule not use that term because the lawyer may learn client secrets not related to the representation but as a result of the representation or otherwise and the lawyer's duty of loyalty would still suggest that the lawyer should not be able to use it. Further, it would undermine the relationships of attorneys and clients and inhibit candid communications between the client and the lawyer. OCTC also supports the idea of written consent as it prevents future disagreement and, as the Supreme Court noted on a difference subject in *Chambers v. Kay* (2002) 29 Cal.4th 142, it impresses upon the client the importance of the decision. Moreover, the State Bar believes that it assists in the enforcement of the rule.

Rule 1.9. Duties to Former Clients.

1. OCTC is concerned with paragraphs (a) and (b) of proposed Rule 1.9 because the Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. Thus, it would appear to be a significant change in the law. Moreover, while the term "materially adverse" is in the Model Rules version, the proposed paragraph does not state what that means and why the lawyer, not the client, should decide whether it is material. That should be left to the clients to decide, not the lawyers. Further, it creates uncertainty for the lawyers and makes it more difficult to prosecute for a violation. OCTC also agrees with the Minority of the Commission that paragraph (b) might narrow the duty of confidentiality because it refers to the confidentiality rules in the Rules of Professional Conduct but not Business & Professions Code section 6068(e). OCTC believes that the rule should reference Business & Professions Code section 6068(e) as well.
2. OCTC is concerned about the phrase "except as these Rules or the State Bar Act would permit . . . or when the information has become generally known" in paragraph (c)(1). This concern goes back to our concern whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Further, it is unclear what is meant by "information generally known." Business & Professions Code section 6068(e) has traditionally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) Is California now going to allow lawyers to use that information against the former client even though they learned of it during or because of the representation? OCTC does not think California should. It opposes any change in the law that allows lawyers to use information obtained from the client as a result of a representation, even if it is already in the public record. Further, the paragraph would make the disclosures prohibited by the rule more difficult to prosecute as OCTC would have to prove the information was not

“generally known.”

3. Further, paragraph (c)(2) references the exception to current clients. Like paragraph (c)(1), paragraph (c)(2) has the issue of whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Unlike paragraph (c)(1), paragraph (c)(2) does not include the language “or when the information is generally known.” Although this proposed language is also in the Model Rules version, OCTC is not sure when paragraph (c)(1) applies or when paragraph(c)(2) applies. This needs more clarity.
4. OCTC has problems with some of the Comments to this proposed rule, particularly Comment 5. Comment 5 states or implies that the substantial relationship test applies in disqualification cases, but “might not be necessary” in disciplinary proceedings or civil litigation. (The substantial relationship test states that when an attorney’s former representation is substantially related to a current representation it is conclusively presumed that the attorney received and knows of confidential information from the first client.) However, the statement in Comment 5 that the presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to State Bar decisional law. In *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: “Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.)” (Id at 747.)

If there is to be a change in the law, it should be in the rule, not a comment. Further, OCTC disagrees with the analysis in Comment 5. Comment 5 states that the reason for this suggested difference is that in a disciplinary proceeding or in civil litigation the new client may not be present and so the attorney can provide the evidence concerning information actually received. However, these are public proceedings; and so the new client can learn of them even if not present. Further, nothing prevents the new client from being present or reading the pleadings or a transcript. The new client may also be a witness.

Moreover, the courts have held that this conclusive presumption is a “rule of necessity.” Thus, the presumption exists because it is not within the power of the client (or anybody else) to prove what is in the mind of the attorney. Nor should the attorney have to engage in a subtle evaluation of the extent to which the lawyer acquired relevant information and the actual use of that knowledge and information. (See e.g. *Global Van Lines Inc v. Superior Court* (1983) 144 Cal.App.3d 483, 489; *Western Continental Operating Co v. Natural Gas Co.* (1989) 212 Cal.App.3d 752, 759.) The Commission’s Comment excluding the presumption in disciplinary and civil cases would force OCTC and the other party to try to prove what was provided to the attorney and what is in the attorney’s mind. It would create numerous disputes as to what the client really told the lawyer. In fact, OCTC’s experience is that the lawyers often claim that no confidences were disclosed, no matter how absurd that claim is. In fact, that is exactly what attorney Lane claimed in his State Bar matter. (See *In the Matter of Lane*, supra, 2 Cal. State Bar Ct. Rptr at 747.)

Further, the conflicts rule is intended to prevent the use of confidential information, not just its disclosure, and it is also intended to prevent the attorney from being put in the position of having to resolve conflicting obligations. Thus, the presumption is just as necessary in State Bar and civil cases as in disqualification motions.

Moreover, the presumption springs from the fact that all attorney-client communications are presumptively confidential and any communication between the lawyer and the client in the first representation must necessarily have been material to the ongoing matter in which the lawyer has switched sides. (*City National Bank v. Adams* (2002) 96 Cal.App.4th 315, 328.) That is, it springs from the common sense notion that clients necessarily provide confidential information material to the lawyer's representation of the client. Thus, the duty of confidentiality complements the evidentiary presumption that communications from client to attorney during their professional relationship are confidential and involves public policy of paramount importance which is reflected in various statutes as well as the Rules of Professional Conduct. (See *In the Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. at 189-190; *In re Jordan* (1972) 7 Cal.3d 930, 940-941.)

In addition, while the primary purpose of the presumption is to protect client confidences, the presumption also exists to preserve the attorney's duty of loyalty to the client. (See *City National Bank v. Adam, supra*, Cal.App.4th at 328; *In re I Successor Corp* (Bkrcty S.D.N.Y. 2005) 312 B.R. 640, 656.) Any concern about tangential matters being covered by this presumption is already addressed in the presumption. In recent years, there has arisen a limited exception to the presumption in those rare instances where the lawyer can show that there was no opportunity for confidential information to be divulged. However, the limited exception is not available when the lawyer's former and current representation is on the opposite sides of the very same matter or the current matter involves the work the lawyer performed for the former client. (*City National Bank v. Adams, supra*, 96 Cal.App.4th at 327-328.) There is no reason to exclude the presumption in disciplinary cases since the basis for the disqualification is the same as the basis for attorney discipline: the need to maintain ethical standards of professional responsibility. (See *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135, 1145.)

Most importantly, without the conclusive presumption, OCTC would be forced to require from the client or the attorney in a public forum the very disclosure the rule is intended to protect. The courts have held that it is the possibility of the breach of confidence, not the fact of the breach, which triggers the rule. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934.) While *Woods* addresses a disqualification motion, its point is equally applicable in discipline and civil cases. Without the conclusive presumption, OCTC would be forced to require the disclosure of the very information the rule was intended to protect.

5. Comment 6 also presents some concerns for OCTC. The Comment's statement is too narrow in defining "substantially related." It, again, does not reference Business & Professions Code section 6068(e). Yet, Comment 7, unlike Comment 6, references Business & Professions Code section 6068(e). The difference in these Comments could create some confusion and uncertainty. Comment 11 refers to paragraph (c). OCTC is

concerned that, like in the proposed paragraph (c) itself, what is meant by “generally known information” and this Comment appears not consistent with the established law that Business & Professions Code section 6068(e) is broader than the attorney-client privilege. Business & Professions Code section 6068(e) has generally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) This needs to be clarified and OCTC opposes any change to the requirement that Business & Professions Code section 6068(e) precludes an attorney from disclosing or using information provided by a client to the attorney that might be in the public record.

Rule 1.10 Imputation of Conflicts.

1. OCTC is concerned that paragraph (b) leaves out a reference to Business & Professions Code section 6068(e). Further, Comment 1 simply states that whether two or more lawyers constitute a firm depends on specific facts. OCTC is concerned that the proposed rule is not a rule subject to discipline and, further, that neither the rule nor Comment 1 provides guidance as to what constitutes a law firm. OCTC believes that either California follow the Model rules version or come up with a more definitive definition, or the Commission should strike the Comment completely. Current rule 1-110 defines a “ [l]aw [f]irm ’ ” as “two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities.” The Supreme Court discussed the definition of law firm, partnership, etc in *Chambers v. Kay* (2002) 29 Cal.4th 142, although not in a conflict context, and if there is a comment on the definition of law firm the Comment might reference that case and the Supreme Court’s discussion of the meaning of the term “of counsel” in *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135.)
2. OCTC is not sure what the purpose of Comment 3 is. OCTC suggests either it be clarified or stricken. Comment 4 discusses non-lawyer situations: secretaries, paralegals, law clerks and provides for screening of them. It is not clear why this Comment is provided given that the rules do not regulate these people. Comment 9 seems unnecessary and is confusing to OCTC. It needs more clarification or should be stricken.

Rule 1.14 Client with Diminished Capacity.

1. OCTC is concerned that, while this rule attempts to address some important issues, it does not appear to be an enforceable rule as written and appears to undermine the other confidentiality rules. OCTC is concerned that paragraph (b) leaves too much discretion to an attorney’s unqualified personal assessment of a client’s abilities and using that unqualified assessment to permit the attorney to reveal a client’s confidences. Further, it appears to be broadening what Business & Professions Code section 6068(e) allows.
2. Comment 1 is problematic as to when and how to utilize the rule. The problem here is when and who decides when a client is not capable of making decisions - - and how and to whom does the attorney reveal this. If the client is not capable of making the decisions, is the lawyer able to give advice, take direction, or do anything on the client’s behalf as to the matter? Comment 3 attempts to address this, but in such broad terms that it is vague and leaves too much discretion to the attorney. It also states that the attorney

may in appropriate situations seek the advice of a diagnostician. While this may be appealing, the Comment creates its own exception to confidentiality not specifically in the rule. OCTC believes this is not appropriate for a Comment. It either should be stated specifically in the rule or not at all. Moreover, the Comment does not define diagnostician. Is it a psychiatrist, a psychologist, a marriage counsel, a priest, or some other person? If this exception is to be permitted, it should be in the rule and more specific.

3. Comment 4 states that before taking any action on this rule the lawyer should take all reasonable steps to preserve the client's confidence and decision-making authority, including explaining to the client the need to take such action and requesting the client's permission to do so. However, the Comment states that, if the client refuses or is unable to give this permission, the lawyer may still proceed under paragraph (b). The Comment then lists a number of considerations for the lawyer in making the decision to reveal the client's confidences. There is, however, nothing in the rule that specifically provides for these considerations. OCTC is concerned that this Comment may make enforcement of the confidentiality rules much more difficult.
4. Comments 5 and 6 states the lawyer may discuss these matters with the client's family members, although the lawyer must keep the client's interests foremost. Again, the question is to what extent is this consistent with Business & Professions Code section 6068(e) and this Comment may make enforcement of the confidentiality rules much more difficult. Comment 7, which is different than the Model Rules Comment 7, explains that section (b) is a balancing between the interest of preserving client confidences and of protecting a client with significantly diminished capacity. It also states that a lawyer who reveals such information is not subject to discipline. This would prevent discipline from almost any attorney who claims that he or she revealed the confidences because they believed it was appropriate under this rule. Thus, what safeguards exist for the client?
5. Comment 8 states that the lawyer may not file guardianship or conservatorship or similar action or take actions that would violate proposed rule 1.7 (current rule 3-310.) Thus, according to this comment, an attorney may reveal confidences to others that may take this action, but not do it themselves. The reason for this is not explained. Is it better to disclose the confidences than to file under seal a motion to the court disclosing the confidences?

Rule 2.1 Advisor.

1. OCTC is concerned that this is not an enforceable rule. OCTC does not believe the rules should have rules that are not enforceable.

Rule 3.8 Special Responsibilities of a Prosecutor.

1. OCTC is concerned that paragraph (a) of proposed Rule 3.8 does not explain what it means by recommending for prosecution. Does a prosecutor's advice to his or her supervisor to prosecute constitute a disciplinable offense? Does this apply when the investigation is not finished? Are we going to prosecute differences in opinion? What if the opinion is based on differences about what is admissible evidence?
2. OCTC is also concerned about paragraph (b)'s requirement that a prosecutor make reasonable efforts to assure that the accused has been advised of the right to and the

procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel. This section fails to address that in most situations the police, not the prosecutor is involved in this. The police, at least in California, are usually independent of the criminal prosecutor. Further, to what extent is this impinging on certain investigative tools and the role of the prosecutor in them? The same concern seems to apply to section (c) which prohibits a prosecutor from obtaining from an unrepresented accused a waiver of important pretrial rights, such as a preliminary hearing, unless the tribunal has approved of the appearance of the accused in propria persona.

3. Likewise, OCTC is concerned with paragraph (f)'s requirement that the prosecutor use reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under proposed rule 3.6. While in principle laudable, this Comment seems to have the same problem of not addressing the thorny issue of when law enforcement, such as the police, is independent of the prosecutor. This is particularly difficult when the Chief Law Enforcement officer is an elected position.
4. OCTC is concerned that paragraph (e) does not discuss how the prosecutor is to deal with a waiver of the privilege or the work product doctrine.
5. OCTC agrees with the majority of the Commission regarding paragraph (g) and supports this paragraph.
6. OCTC believes that if there are Comments to this rule, the Commission might consider having a Comment to advise prosecutors and former prosecutors and their partners of their duties under Business & Professions Code section 6131. This is an important but often forgotten provision affecting prosecutors and former prosecutors and their partners.

Rule 8.5 Disciplinary Authority: Choice of Law.

1. OCTC agrees with the policy behind this rule, but has concerns that the rule as written is in conflict with Business & Professions Code section 6049.1. Business & Professions Code section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Thus, how can we now enforce a rule that permits discipline based on another jurisdiction's rules if those rules are in conflict with California's rules? Is rule 8.5 changing Business & Professions Code section 6049.1 and its intent? While this concern would not be true in all cases where the choice of law was the other jurisdiction's law, it would occur in those cases where the other jurisdiction's rules are in conflict with California's rules. This needs to be discussed and addressed in this rule and its Comments.

Letter to Randall Difuntorum @ Office of Professional Competence & Planning
November 4, 2009
Page Number 11

Again, we thank you for the opportunity to present our views. If you have any questions, please feel free to contact us.

Very truly yours,

A handwritten signature in black ink that reads "Russell G. Weiner". The signature is written in a cursive style with a large, sweeping initial "R".

Russell G. Weiner
Interim Chief Trial Counsel



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

November 9, 2009

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

RE: Proposed Rule 1.6

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 1.6 and offers the following comments.

COPRAC agrees with the substantial minority position and believes the use of the phrase “relating to the representation” is too limited to conform to Business & Professions Code Section 6068(e)(1). This rule should extend the duty of confidentiality to the same extent delineated by Section 6068(e). Comment [3] to the proposed Rule should be revised to reference Section 6068(e).

COPRAC does not favor adoption of the so-called Enron exceptions permitting disclosure in certain situations involving financial harm.

COPRAC also agrees with the Commission that an exception for implied authority to disclose information is too broad, given the importance of protecting confidential information.

We further agree that compliance with a court order addressing disclosure of confidential information should be permitted by the proposed rule, with the proviso set forth in the comment that an appeal should be considered.

COPRAC members are divided on whether the compliance with “other law” should also be included as a scenario in which disclosure should be permitted. A majority of COPRAC members believe that this exception should not be included in the California rule.

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,

Carole J. Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

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November 13, 2009

Audrey Hollins
Office of Professional Competence,
Planning & Development
State Bar of California
180 Howard Street
San Francisco, Calif 94105

RE: Rule 1.6 – Confidentiality of Information

Dear Ms. Hollins:

I am writing as an individual, to express my concerns and comments regarding Proposed Rule 1.6 regarding the Confidentiality of Information:

I am concerned that there is ambiguity in the use of the words “the lawyer reasonably believes” in subsection (b) of the proposed rule. The lawyer’s reasonable belief standard is already incorporated into subsection (b)(1). It is not necessary, and perhaps confusing, to introduce the reasonable belief standard multiple times.

Further, in instances other than prevention of a criminal act, either the disclosure is necessary or it is not. The reasonable belief standard would only make the analysis too subjective. The lawyer should not be making unnecessary disclosures, even if the lawyer might subjectively believe they are reasonable. Thus, we would recommend leaving the subjective belief standard in subsection (b)(1), but removing the words “the lawyer reasonably believes” from subsection (b).

Likewise, in Comment 22, the Commission should consider removing “the lawyer reasonably believes” which appears twice in that comment.

I am also concerned that the permissive disclosure in subsection (b)(3) of the rule may be abused in instances where the client accuses the lawyer of wrongdoing. Information is sometimes publicly revealed in circumstances where the disclosure is not necessary to establish a claim or defense. Although the limitation is further addressed in subparagraph (d) of the proposed rule, I believe that Comment 19 should be revised to make a stronger statement that such disclosure must be limited to be only to the extent necessary to establish such claim or defense, and within the context of a proceeding that exists for such purpose. Potential language might be:

Audrey Hollins
Office of Professional Competence, Planning & Development
State Bar of California
November 13, 2009
Page 2

“Public disclosures of information relating to the representation of a client are ordinarily not necessary to defend against a claim asserted against a lawyer. Therefore, disclosures should be limited to the context of the proceeding in which such claim or defense is being made.”

Regarding subsection (c)(1) of the proposed rule, I believe it is confusing to have the two subsections, (i) and (ii) and the suggestion that the lawyer may “do both”. If the lawyer is going to do this at all, the lawyer *should* do both. The entire disclosure is permissive, not mandatory, so it adds confusion to say that the lawyer shall do this if reasonable under the circumstances and then say that the lawyer “may do both”. This subsection would more readable and understandable if (c)(1) was rephrased as follows:

“(1) make a good faith effort to persuade the client not to commit or to continue the criminal act, *and counsel the client* to pursue a course of conduct that will prevent the threatened death or substantial bodily harm.”

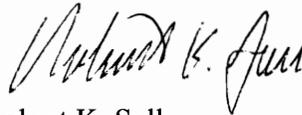
If this suggested revision is adopted, then in Comment 13 it would be necessary to delete the words “or to persuade” and insert the words “and to counsel”.

In Comment 6, I am concerned about the confusion that some lawyers will have about disclosure of information that is in the public record versus information that is generally known in the local community. There should be a better explanation of the “generally known” standard, so that it is not confused with public record.

Thank you for considering these comments.

Very truly yours,

THE SALL LAW FIRM
A Professional Corporation



Robert K. Sall

RKS/jvb



**SAN DIEGO COUNTY
BAR ASSOCIATION**

November 11, 2009

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

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

Dear Ms. Hollins:

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

Sincerely,

Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

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

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James W. Talley

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

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

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

LEC Rule Volunteer Name(s): [sic]

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

Proposed New Rule No./ Title: 1.6

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

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

Yes [– in part] No [– in part]

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

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

Rule 1.6(a)

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

A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068(e)(1) unless the client gives informed consent or the disclosure is permitted by paragraph (b). **The information protected from disclosure by section 6068(e)(1) is referred to as “confidential information relating to the representation” in this Rule.**

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

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

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

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

- (a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068(e)(1) unless the client gives informed consent or the disclosure is permitted by paragraph (b). **The information protected from disclosure by section 6068(e)(1) is referred to as “confidential information” in this Rule.**

- (b) A lawyer may, but is not required to, reveal confidential information of a client to the extent that the lawyer reasonably believes the disclosure is necessary:
 - (1) **when the information relates to the representation of a client,** to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, as provided in paragraph (c);

Rule 1.6(b)(3)

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

to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client relating to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship;

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

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

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

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

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

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

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

CONCLUSIONS (pick one):

[] We approve the new rule in its entirety.

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

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

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

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

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



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on *one* Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

The Santa Clara County Bar Association (SCCBA) opposes the revisions proposed by the RRC in completely deleting subsections (b)(2) and (3) regarding a crime or fraud involving a substantial financial/economic injury to another. The SCCBA recognizes that adopting the ABA Model Rule including subsection (b)(2) and (3) would create another exception to the attorney-client confidentiality. However, the SCCBA believes that the crime/fraud exception is a vital one, constrained in its scope and permissive in its application. The exception will allow attorneys in certain limited circumstances to meet the profession's obligation to protect interests greater than that of an individual client, particularly where that client is one who wishes to engage in criminal activity or commit fraud which has the potential of inflicting a substantial injury. Other jurisdictions' experience with the Model Rule shows that the exception does not unduly undermine the attorney-client relationship. Indeed, California's own experience since 2004 with the exception relating to criminal conduct that may result in substantial bodily harm or death demonstrates that these limited exceptions do not erode the important policy of

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

The Santa Clara County Bar Association (SCCBA) opposes the revisions proposed by the RRC in completely deleting subsections (b)(2) and (3) regarding a crime or fraud involving a substantial financial/economic injury to another. The SCCBA recognizes that adopting the ABA Model Rule including subsection (b)(2) and (3) would create another exception to the attorney-client confidentiality. However, the SCCBA believes that the crime/fraud exception is a vital one, constrained in its scope and permissive in its application. The exception will allow attorneys in certain limited circumstances to meet the profession's obligation to protect interests greater than that of an individual client, particularly where that client is one who wishes to engage in criminal activity or commit fraud which has the potential of inflicting a substantial injury. Other jurisdictions' experience with the Model Rule shows that the exception does not unduly undermine the attorney-client relationship. Indeed, California's own experience since 2004 with the exception relating to criminal conduct that may result in substantial bodily harm or death demonstrates that these limited exceptions do not erode the important policy of protecting the communication between a client and attorney. Having an attorney-client confidentiality rule that allows a client to use an attorney to commit a future crime or fraud really only serves to shield the attorney from making the difficult decision to divulge client confidences. Attorneys' role in society and in the administration of justice is greater than providing services to an individual client who wishes to engage in a future crime or fraud. In these rare situations, attorneys should be free to make a judgment to take action that could prevent substantial harm by a client. To continue to prevent an attorney from making that judgment actually serves to undermine the profession as a whole and impair attorneys' ability to maintain a reputation that ensures the respect for the judicial system. No valid argument has been posited to distinguish California lawyers and the practice of law in California from attorneys in the remainder of the country such that would justify California maintaining its parochial inviolate rule of attorney-client confidentiality. Not one example has been cited from any other jurisdiction to suggest that the exceptions included in the ABA Model Rule erodes the attorney-client relationship to the detriment of clients, the legal profession, society or the judicial system. Simply because California has always had an inviolate rule is not reason enough to continue it.



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

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Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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[Rule 1.9 \[3-310\]](#)

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[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

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See attachment.

Proposed comment re Proposed Rule 1.6:

The Executive Committee of the Trusts and Estates Section of the State Bar urges (1) retaining subparagraph (b)(4) of the Proposed Rule which would allow disclosure of confidential client-information when necessary to comply with a court order; and (2) including in subparagraph (a) the Model Rule exception that allows for disclosure of confidential client information when "disclosure is impliedly authorized in order to carry out the representation." Otherwise, the only general exception to the Business & Professions Section 6068 prohibition on disclosure would be for when the client gives informed consent.

Because there is no attorney-client privilege after the client's death for attorney-client communications relevant to a will or other writing executed by the client (Evidence Code sections 959-961), an estate planner who becomes a witness in a will contest or other estate dispute, without the benefit of exceptions for implied authority and a court order, would likely be faced with choosing between risking contempt of court by refusing to disclose non-privileged but confidential communications, or violating a rule of professional conduct by disclosing the communications. The specific policy behind these Evidence Code sections, to enable the use of confidential client communications as evidence respecting the validity of a deceased client's writings, should trump the general ethical policy requiring attorneys to maintain confidential client information free from disclosure even after the client has died. This rule also could have elder abuse implications. Without the attorney's ability to disclose based on implied authority or a court order, an executor who has benefitted from estate planning documents obtained by fraud, undue influence, or manipulation of an elder, likely would not consent to the attorney's disclosure and thereby would prevent the attorney from testifying about the circumstances of the documents' execution.



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

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All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

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[Rule 1.6 \[3-100\]](#)

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[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Proposed Rule 1.6 Confidentiality of Information:

Our proposed modification would be to paragraph (b)(4) to add the following language to say: to comply with a "valid" court order.



LACBA

**LOS ANGELES COUNTY
BAR ASSOCIATION**

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November 12, 2009

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

Re: Comment Regarding Proposed Rule of Professional Conduct 1.6 –
Confidentiality of Information

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA) has the following comments on Proposed Rule 1.6 regarding the Confidentiality of Information:

PREC supports the Commission's decision to focus on confidentiality, and therefore supports the general deviations of this proposed rule from the text of Model Rule 1.6.

Regarding Comment 5, PREC is concerned about the broad reference to the State Bar Act at the end of the comment. That is overbroad, and makes the rules difficult to analyze. The comment should refer directly to the specific provisions of the State Bar Act that are intended to be incorporated, such as Section 6068(e).

In Comment 6, PREC is concerned about the confusion that some lawyers will have about disclosure of information that is in the public record versus information that is "generally known" in the local community. There should be a better explanation of the difference. There is sometimes information that is in the public record that should not be disclosed. The "generally known" standard is not sufficiently defined.

In Comment 9, the first line is an incomplete sentence. If this is intended as a title for the comment, perhaps it should be italicized?

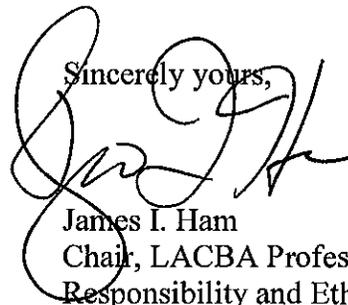
PREC also believes that Comments 23 and 26 do not add anything to interpretation of the rule, and should be deleted in the spirit of removing unnecessary comments. These are simply repetitive of what is stated elsewhere in the comments or the rules. Even though Comment 26 is derived from the ABA Comments, we believe it is unnecessary and duplicative.

In general, PREC believes that the proposed rules have too many comments, and the comments are too lengthy. There may be questions as to whether the comments are controlling. Such lengthy rules create impracticality for purposes of State Bar proceedings and difficulty in counseling clients.

Finally, PREC expresses concern about the characterization being given by the Commission to "California's traditional emphasis on client protection" in connection with this rule. The underlying purpose of this rule is to protect the confidentiality of client information. As such, it serves the important public purpose of maintaining confidence in the integrity of the attorney-client relationship, and encourages clients to provide information to their lawyers. This does not always equate with client protection, and should not be so limited.

Thank you for the opportunity to comment on this batch of proposed new and amended Rules of Professional Conduct.

Sincerely yours,

A handwritten signature in black ink, appearing to read "James I. Ham", written over the typed name and title.

James I. Ham
Chair, LACBA Professional
Responsibility and Ethics Committee