THE STATE BAR OF CALIFORNIA

OFFICE OF PROFESSIONAL COMPETENCE, PLANNING & DEVELOPMENT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2167

M E M O R A N D U M

DATE: June 14, 2004

TO: Members, Commission for the Revision of the Rules of Professional Conduct

FROM: Randall Difuntorum, Staff Counsel

SUBJECT: Agenda Item II.B Staff's Report - State Bar Request to Approve Proposed New Rule 3-100 (Confidential Information of a Client)

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Attached please find an excerpt from the State Bar's memorandum requesting that the Supreme Court approve proposed new rule 3-100. The State Bar's memorandum was filed on June 7, 2004. The provided excerpt includes the following portions of the memorandum:

1) Recommendation
2) History of the Formulation of Proposed New Rule 3-100
3) Summary of Proposed new rule 3-100
4) Conclusion
5) Enclosure 1 - Text of proposed new rule 3-100
6) Written public comments received from members of the Commission acting in a personal capacity.

When available, a complete copy of the rule filing package will be sent to you to retain as a resource.

Please feel free to call me at (415) 538-2161 if you have any questions.

REQUEST THAT THE SUPREME COURT OF CALIFORNIA APPROVE PROPOSED RULE 3-100 OF THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA, AND MEMORANDUM AND SUPPORTING DOCUMENTS IN EXPLANATION

MEMORANDUM

PREPARED BY
THE OFFICE OF GENERAL COUNSEL AND THE PROFESSIONAL COMPETENCE UNIT OF
THE STATE BAR OF CALIFORNIA

180 Howard Street
San Francisco, California 94105-2399

June 2004

REQUEST THAT THE SUPREME COURT OF CALIFORNIA APPROVE PROPOSED RULE 3-100 OF THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA, AND MEMORANDUM AND SUPPORTING DOCUMENTS IN EXPLANATION

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SUPPORTING DOCUMENTS

The following enclosures are attached to this Memorandum for the Court's convenience:

ENCLOSURE 1: Proposed New Rule 3-100 of the Rules of Professional Conduct of the State Bar of California

ENCLOSURE 2: Resolution Adopted by the Board of Governors at its May 22, 2004 Meeting

ENCLOSURE 3: Chaptered Version of Assembly Bill No. 1101

ENCLOSURE 4: Member Roster for the State Bar of California AB 1101 Advisory Task Force

ENCLOSURE 5: State Bar of California Internet Web-Site Public Comment Notice of Proposed New Rule 3-100

ENCLOSURE 6: Synopsis Chart and Text of Written Public Comment Received on Proposed Amended Rule 3-100

ENCLOSURE 7: Text of Proposed New Rule 3-100, in Legislative Style, Showing Revisions Made Following Consideration of Public Comment

The following attachments are appended to this Memorandum for the Court's convenience:

ATTACHMENT A: State Bar of California AB 1101 Advisory Task Force Briefing Binder

ATTACHMENT B: "Request that the Supreme Court of California Approve Proposed Rule 3-100 of the Rules of Professional Conduct of the State Bar of California and Memorandum and Supporting Documents in Explanation" (May, 1998, S070520)

REQUEST THAT THE SUPREME COURT OF CALIFORNIA APPROVE PROPOSED RULE 3-100 OF THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA AND MEMORANDUM AND SUPPORTING DOCUMENTS IN EXPLANATION

I

RECOMMENDATION

The Board of Governors of the State Bar of California (hereinafter "Board") respectfully requests that this Court approve proposed new rule 3-100 (Confidential Information of a Client) of the Rules of Professional Conduct of the State Bar of California[1] in the form set forth in Enclosure 1.[2]

Proposed new rule 3-100 was adopted by the Board at its May 22, 2004 meeting. (The resolution adopted by the Board at its May 22, 2004 meeting is set forth in Enclosure 2.) Proposed new rule 3-100 was developed in response to Assembly Bill No. 1101 (hereinafter "AB 1101"). Operative July 1, 2004, AB 1101 amends the statutory duty of attorney-client confidentiality, Business and Professions Code section 6068, subdivision (e) (hereinafter "§6068(e)"), to permit, but not require, an attorney to reveal a client's confidential information to prevent a criminal act that is likely to result in the death of, or substantial bodily harm to, an individual. (The chaptered version of AB 1101 is provided in Enclosure 3.) In considering AB 1101, the Legislature recognized that a Rule of Professional Conduct could be adopted to address professional responsibility issues relating to the implementation of the new statutory exception. To this end, an uncodified section 3 of the bill was included stating the Legislature's intent that the State Bar develop a new Rule of Professional Conduct. Proposed new rule 3-100 responds to this legislative intent. A history and summary of the proposed new rule follow.

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[1] Unless otherwise indicated, all rule references are to the Rules of Professional Conduct of the State Bar of California.

[2] Business and Professions Code section 6076 provides: "With the approval of the Supreme Court, the Board of Governors may formulate and enforce rules of professional conduct for all members of the bar of this State."

Rules of Professional Conduct adopted by the Board are binding upon members of the State Bar only when approved by this Court. (See Business and Professions Code section 6077.)

II

HISTORY OF FORMULATION OF PROPOSED NEW RULE 3-100

A. AB 1101

Amendment to §6068(e). AB 1101 was introduced in the 2003-2004 legislative session by Assembly Member Darrell Steinberg to amend §6068(e), the statutory duty of attorney-client confidentiality.[3] Operative July 1, 2004, AB 1101 amends the statutory duty to include an express exception that permits, but does not require, an attorney's disclosure of certain confidential information. As amended, the statutory duty states:

> 6068. It is the duty of an attorney to do all of the following:
>
> . . . . .
>
> (e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.
>
> (2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual. (Bus. & Prof. Code §6068(e), as amended operative July 1, 2004.)

Amendment to Evidence Code section 956.5. AB 1101 also amends the evidentiary attorney-client privilege by expanding an existing statutory exception, Evidence Code section 956.5, applicable to confidential communications concerning a client's criminal act that is likely to result in death or substantial bodily harm. As amended, this exception to the evidentiary privilege deletes the

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[3] The Legislature's bill analyses of AB 1101 are found in Attachment A - the State Bar of California AB 1101 Advisory Task Force Briefing Binder, at Tab 2.

limitation that the criminal act be an act perpetrated by a client, thus making the evidentiary standard parallel to the amended statutory duty of confidentiality. As amended, Evidence Code section 956.5 states:

> 956.5. There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual. (Evid. Code §956.5, operative July 1, 2004.)

Section 3 of AB 1101 – Issues Raised by the Implementation of the Statutory Changes. In developing the foregoing changes to California statutory law concerning an attorney's professional obligation to keep secret the confidential information of a client, the Legislature determined that there are issues raised in implementing the statutory changes that could be addressed by an amendment to the Rules of Professional Conduct. This is found in section 3 of AB 1101, an uncodified portion of the bill, which states:

> SEC. 3. (a) It is the intent of the Legislature that the President of the State Bar shall, upon consultation with the Supreme Court, appoint an advisory task force to study and make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act.
>
> (b) The task force should consider the following issues:
>
> (1) Whether an attorney must inform a client or a prospective client about the attorney's discretion to reveal the client's or prospective client's confidential information to the extent that the attorney reasonably believes that the disclosure is necessary to

prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.

(2) Whether an attorney must attempt to dissuade the client from committing the perceived criminal conduct prior to revealing the client's confidential information, and how those conflicts might be avoided or minimized.

(3) Whether conflict-of-interest issues between the attorney and client arise once the attorney elects to disclose the client's confidential information, and how those conflicts might be avoided or minimized.

(4) Other similar issues that are directly related to the disclosure of confidential information permitted by this act.

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

(1) Civil and criminal law practitioners, including criminal defense practitioners.

(2) Representatives from the judicial, executive, and legislative branches.

(3) Representatives from the State Bar Commission for the Revision of the Rules of Professional Conduct and from the State Bar Committee on Professional Responsibility and Conduct.

In accordance with this legislative intent, the State Bar President, in consultation with this Court, appointed an advisory task force.

B. <u>The State Bar of California AB 1101 Advisory Task Force</u>

The State Bar of California AB 1101 Advisory Task Force (hereinafter "Task Force") consisted of twenty-one members, including eighteen attorney members and three non-lawyer, public members. (A member roster for the Task Force is provided in Enclosure 4.) Each of the stakeholder groups identified in section 3(c) of AB 1101 was represented on the Task Force. Professor Kevin Mohr, representative of the State Bar Committee on Professional Responsibility and Conduct, served as the Task Force Chair. (A briefing binder prepared for the Task Force is provided as Attachment A to this memorandum.)

The Task Force was given a narrow charge. It was assigned to develop a recommendation for an amendment to the Rules of Professional Conduct after consideration of the issues posed by the Legislature in section 3 of AB 1101. It was understood that the Task Force's recommendation would be made to the State Bar, and that the State Bar would use its normal procedures in adopting the rule and submitting the rule to this Court for approval.

The Task Force conducted an initial half-day meeting followed by three day-long meetings to study the issues presented and to draft a proposed new rule.[4] Meetings were held in Sacramento, Los Angeles, and San Francisco. The meetings were conducted in open session. The Task Force's development of a proposed rule included consideration of the following resources: prior versions of rule 3-100 adopted by the State Bar; American Bar Association Model Rule of Professional Conduct 1.6; and section 66 of the American Law Institute's Restatement of the Law, the Law Governing Lawyers, Third Edition.[5] The Task Force sought to draft a rule that would effectuate the public policies favoring the preservation of life and protection of the public, while at the same time

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[4] The Task Force meetings were held on: January 23, 2004 (Sacramento); February 11, 2004 (San Francisco); February 27, 2004 (Los Angeles); and March 12, 2004 (San Francisco).

[5] These references are found in Attachment A - the State Bar of California AB 1101 Advisory Task Force Briefing Binder, at: Tab 4 (prior versions of rule 3-100 adopted by the State Bar); Tab 8 (American Bar Association Model Rule of Professional Conduct 1.6); Tab 9 (section 66 of the American Law Institute's Restatement of the Law, the Law Governing Lawyers, Third Edition).

provide guidance to lawyers about how, where feasible, to achieve those goals within the confines of the attorney-client relationship. At its meeting on March 12, 2004, the Task Force met to consider the proposed language of a draft rule 3-100. The Task Force considered each paragraph of the draft rule and the rule discussion section and voted to submit the draft rule to the State Bar as its completed work product.

C. Request for Public Comment on Proposed New Rule 3-100

At its meeting on March 19, 2004, the State Bar of California's Board Committee on Regulation, Admissions and Discipline Oversight (hereinafter "Board Committee") considered a State Bar staff request that the rule developed by the Task Force be authorized for a public comment distribution. The Board Committee authorized proposed new rule 3-100 for a 60-day public comment period with a deadline of May 17, 2004.

Notice of the request for public comment was posted on the State Bar of California's internet website and sent via e-mail to two distribution lists of persons interested in State Bar proposals. (A print-out of the State Bar of California internet website notice of request for public comment on proposed new rule 3-100 is provided in Enclosure 5. This enclosure includes the text of proposed new rule 3-100 as distributed for public comment.) A summary of proposed new rule 3-100, as released for public comment follows.

Summary of Proposed New Rule 3-100 as Released for Public Comment. Paragraph (A) of the rule incorporates by reference the statutory duty of confidentiality found in the Business and Professions Code. Paragraph (A) also identifies two exceptions to the duty of confidentiality: informed consent of the client to reveal confidential information; and disclosure of confidential information under

paragraph (B) of the rule. The first five paragraphs of the rule Discussion Section[6] clarify the scope of the duty of confidentiality and the balanced policy of allowing a limited exception to prevent a criminal act likely to result in death or substantial bodily harm. In particular, paragraph [4] of the discussion states that an attorney is not subject to discipline for revealing confidential information in accordance with the terms of the rule and §6068(e)(2).

Paragraph (B) of the rule restates the statutory language of the new exception §6068(e)(2) that permits, but does not require, disclosure of confidential information to prevent a criminal act likely to result in death or substantial bodily harm. The language used in paragraph (B) is identical to the exception language used in §6068(e)(2), as operative on July 1, 2004. The factors to be considered by an attorney in deciding whether to disclose are set forth in paragraph [6] of the discussion.

Paragraph (C) of the rule identifies two steps that an attorney must consider before exercising discretion to reveal confidential information to prevent a criminal act of death/substantial bodily harm. Subparagraph (C)(1) states that an attorney must, if reasonable under the circumstances, attempt to persuade the client (i) not to commit or to continue the criminal act, (ii) to otherwise pursue a course of conduct that will prevent the threatened death/substantial bodily harm, or, if necessary, do both. Paragraph [7] of the discussion clarifies that if this remonstration with the client is successful in preventing the threatened harm, then the option to make a permissive disclosure

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[6] Proposed new rule 3-100 includes a proposed new format style for the rule Discussion Section. The new format is the addition of discussion paragraph numbering and title headings. The Task Force noted that the American Bar Association Model Rules of Professional Conduct utilize comment numbering and titles. Also, it was reported to the Task Force that the State Bar's Special Commission for the Revision of the Rules of Professional Conduct is utilizing this format in its working drafts of proposed rule amendments and likely will recommend that the Board adopt the new format for all of the rules. (The Charter for the State Bar's Special Commission for the Revision of the Rules of Professional Conduct is found in Attachment A - the State Bar of California AB 1101 Advisory Task Force Briefing Binder, at Tab 13.)

would no longer be open to the member as the threat of harm posed by the criminal act would no longer be present. Subparagraph (C)(2) states that an attorney must, if reasonable under the circumstances, inform the client, at an appropriate time, of the attorney's ability (or if reached, the attorney's decision) to reveal information to prevent a criminal act likely to result in death or substantial bodily harm. Paragraph [9] of the discussion sets forth factors to be considered in determining an appropriate time, if any, to inform a client, and paragraph [10] of the discussion explains that this flexible "factor analysis" approach is intended to avoid, where possible, chilling the relationship of trust between client and attorney that is essential to effective legal representation.

Paragraph (D) of the rule states that disclosure of confidential information under the rule must be no more than is necessary to prevent the criminal act, given the information known to the attorney at the time of the disclosure. Paragraph [8] of the discussion elaborates on this requirement and also clarifies that in some circumstances, an attorney may decide that the best course to pursue is to make an anonymous tip to law enforcement agencies or potential victims.

Paragraph (E) of the rule states that an attorney who does not reveal confidential information permitted under the limited exception does not violate the rule. Paragraph [5] of the discussion explains that revealing confidential information to prevent a criminal act likely to result in death or substantial bodily harm is a matter for the individual attorney to decide, based on all the facts and circumstances.

Other matters addressed in the rule Discussion Section include: an attorney's consideration of the "imminence" of harm as a factor to consider in deciding to reveal confidential information, but not a prerequisite to disclosure (paragraph [6] of the discussion); clarification that the scope of the limited exception applies to future or ongoing crimes (paragraph [3] of the discussion); and

identification of other consequences to the attorney-client relationship once an attorney discloses confidential information under the limited exception (paragraphs [11] and [12] of the discussion).

Regarding other consequences to the attorney-client relationship once an attorney discloses confidential information, the discussion identifies the following issues of concern and relevant Rules of Professional Conduct: mandatory withdrawal under rule 3-700; attorney acting as witness in the client's case under rule 5-210; the obligation to perform legal services with competence under rule 3-110; and the common law duty of loyalty.

D. Public Comments Received on Proposed New Rule 3-100

Twelve written comments were received on proposed new rule 3-100 (ten received timely and two received after the public comment deadline). (A synopsis chart and the full text of the written public comments received are provided in Enclosure 6.) Of these twelve written comments, two support the proposed rule, one opposes the proposed rule, and nine generally recommend amendments to the proposed rule without expressly supporting or opposing the proposal.[7]

State Bar staff reviewed all of the public comments received in consultation with Professor Mohr. In addition, the full text and synopsis of the comments that were timely submitted were provided to the members of the Task Force with an invitation for individual informal input. This informal input also was considered by State Bar staff in consultation with Professor Mohr. In presenting the public

[7] The two comments supporting the proposed rule are from: Assemblymember Darrell Steinberg; and Robert Kehr. The one comment opposing the proposed rule is from Phillip Feldman. The nine comments recommending amendments are from: Cristina Arguedas (also signed by Taylor Carey, Michael Judge, David LaBahn, Gene Wong, and Richard Zitrin); the Executive Committee of the Trust & Estates Section of the State Bar; JoElla Julien (also signed by Diane Karpman, Kurt Melchior, and Jerome Sapiro, Jr.); Stanley Lamport; Orange County Bar Association; San Diego County Bar Association; Harry Sondheim; Anthonie Voogd; and an anonymous comment.

comments to the Board Committee, staff reported its conclusion that: (1) the various points raised in the comments were issues that were discussed thoroughly by the Task Force and resolved by consensus or vote on the language of proposed new rule 3-100; and (2) several comments concerning significant material amendments to the rule language warranted a State Bar response. These specific comments, together with the State Bar's response, are set forth below.

(1) *Comment*: The toxic waste illustration found in paragraph [6] of the discussion exceeds the limited scope of the statutory exception. As worded, the illustration and the accompanying discussion inappropriately suggests that the confidentiality exception allows disclosure of future harm that may follow from a criminal act even where the criminal act, itself, is completed and not capable of being "prevented" by a lawyer's disclosure of confidential information. Consistent with the language used in paragraph (B) of proposed new rule 3-100 and §6068(e)(2), the exception should be limited to future criminal acts and not extended to reach ongoing criminal acts.

Response: The State Bar agreed that the illustration could be clarified and modified the illustration to convey the important point that the statutory exception applies in situations where the harm resulting from a criminal act may not be "imminent" while at the same time avoiding a confusing inference that the exception extends to past, completed criminal acts. The issue of ongoing criminal acts was discussed by the Task Force which determined to include the illustration.

(2) *Comment*: The portions of proposed new rule 3-100 that seek to control or direct a lawyer with regard to the conduct of a non-client third party should be deleted. While it makes sense to impose a burden on a lawyer to predict the future conduct of a client and to interact with that client accordingly, it is inappropriate to impose a similar burden with regard to a non-client third party.

Response: No change was made in response to this comment. This issue was discussed by the Task Force. Proposed new rule 3-100 is not confined to client conduct because the statutory policy, itself, extends beyond client conduct and covers any criminal act, including acts threatened by non-client third parties. Accordingly, paragraph [7] of the discussion provides guidance to lawyers concerning situations where the actor is a non-client. The guidance provided grants an attorney great discretion on how to proceed. For example, although paragraph [7] of the discussion suggests that an attorney consider counseling a non-client against an anticipated criminal act, it also notes that an attorney's interest in safety likely will preclude any contact with the non-client.

(3) *Comment*: The concept of "informed consent" referenced in paragraph (A) of proposed new rule 3-100 should be defined.

Response: No change was been made in response to this comment. The issue of including the concept of "informed consent" was discussed by the Task Force. Proposed new rule 3-100 does not include a definition of "informed consent" because the concept arises from common law. Thus, there is guidance available to attorneys who seek to reveal confidential information based upon a client's informed consent. Both case law and advisory ethics opinions[8] address the concept of a client's informed decision to authorize an attorney's disclosure confidential information (see, for example, *Maxwell v. Superior Court* (1982) 30 Cal.3d 606 [re criminal defendant's consent to grant defense counsel media rights in the defendant's life story, including the capital crime defended by counsel] and State Bar Formal Opinion No. 1989-115 [re ethical considerations involved when a lawyer seeks an

[8] Rule 1-100(A) (Purpose and Function), in part, states: "Members [of the State Bar] are also bound by . . .opinions of California courts. Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct."

advanced "blanket waiver" of confidential information]). The precise term "informed consent" already appears in the Rules of Professional Conduct (see rule 4-200(B) enumerating the "informed consent" of the client as a factor to consider in determining the existence of an unconscionable fee).

(4) *Comment*: The text of proposed new rule 3-100 should state that members are not subject to discipline for revealing information pursuant to the exception in the rule and in §6068(e)(2).

Response: No change was made in response to this comment. This issue was discussed by the Task Force. Paragraph (E) was added to the rule to make clear that a lawyer who does not reveal information under the permissive exception does not violate the rule. Paragraph (E) thus reinforces the exception's language, which states, "A lawyer may, but is *not required to*, reveal confidential information. . . ." (Emphasis added). When a lawyer chooses to reveal confidential information, however, issues arise that are very fact dependent, making it inappropriate to include an absolute 'safe harbor' statement in the rule. Instead, paragraph [4] of the discussion, which provides that a member who reveals information *as permitted* under rule 3-100 is not subject to discipline, addresses this issue in the context of the overall Discussion Section that covers more thoroughly relevant issues of concern that could, in fact, lead to discipline. Paragraph [4] of the discussion is preceded by three paragraphs that acknowledge the balancing of important competing policies, and is followed by several paragraphs that are intended to guide the lawyer on the factors to consider in deciding when and how to the make a disclosure, including steps the lawyer might pursue to prevent the criminal act without having to disclose the client's confidential information.

(5) *Comment*: Proposed new rule 3-100 should state the rule is not a basis for civil liability.

Response: No change was made in response to this comment. This issue was discussed by the Task Force. In considering this point, it was noted that rule 1-100(A) (re the purpose and function of the rules) states expressly that the rules: "are intended to regulate professional conduct of members of the State Bar through discipline. . . . ¶These rules are not intended to create new civil causes of action." This global principle applies to the entirety of the Rules of Professional Conduct and would apply to proposed new rule 3-100 upon its approval by this Court. Going beyond this global principle to add the requested change would be tantamount to suggesting affirmative civil immunity which is a substantive law area beyond the scope of the Rules of Professional Conduct.

(6) *Comment*: Paragraph [13] of the discussion should be deleted as unnecessary and potentially confusing.

Response: No change was made in response to this comment. The language found in paragraph [13] of the discussion is intended to assure that action by this Court to approve a confidentiality rule, like the proposed new rule 3-100, would not be misinterpreted as undermining existing common law limitations on the statutory duty of confidentiality. Examples include this Court's decision in *General Dynamics v. Sup. Ct. (Rose)* (1994) 7 Cal.4th 1164, 1190 [§6068(e) does not prohibit a former in-house counsel from bringing a wrongful termination action against their former client/employer].

At the Board's May 21-22, 2004 meetings, the Board received a presentation from State Bar staff and Professor Mohr on proposed new rule 3-100 and the public comments received, including the informal input of members of the Task Force. Following discussion, the Board unanimously adopted proposed new rule 3-100 for transmission to this Court with a recommendation that the

proposed new rule be approved. The next portion of this memorandum provides a summary of proposed new rule 3-100 as adopted by the Board and recommended for approval by this Court.

III

SUMMARY OF PROPOSED NEW RULE 3-100

A. The Concept of Proposed New Rule 3-100

Consistent with the legislative intent in section 3 of AB 1101, the concept of proposed new rule 3-100 is to facilitate an attorney's consideration and exercise of the AB 1101 permissive exception to confidentiality in a professionally responsible manner.[9] The proposed rule is intended to guide a lawyer in understanding how the confidentiality exception works within the framework of other existing duties to clients.

The proposed rule conveys the important balancing of competing public interests: preserving confidentiality to encourage client candor and ensure the effective administration of justice vs. disclosure of confidential information to prevent the harm threatened by a criminal act. Under the terms of the proposed rule, an attorney is granted wide discretion as to how best to achieve

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[9] This Court previously considered a proposed new rule 3-100 submitted by the State Bar in May of 1998. (As background, and for this Court's convenient reference, a copy of the May, 1998 "Request that the Supreme Court of California Approve Proposed Rule 3-100 of the Rules of Professional Conduct of the State Bar of California and Memorandum and Supporting Documents in Explanation" is provided as Attachment B.) In an order dated September 2, 1998, this Court denied the request to approve that proposed rule (S070520). The 1998 proposal differs materially from the current proposed new rule primarily because the statutory regulation of attorney-client confidentiality in 1998 only included an evidentiary exception to the attorney-client privilege with no corresponding exception to §6068(e). In contrast, as a result of AB 1101, operative July 1, 2004, both §6068(e) and the codified attorney-client privilege will include corresponding exceptions that are intended to be facilitated by the State Bar's present proposal for a new rule 3-100.

the goal of preventing criminal acts of death or substantial bodily harm. The proposed rule recognizes that a client's informed consent to disclose confidential information is an existing approach that is available to an attorney who is considering options for preventing a criminal act of death or substantial bodily harm.

When client consent is not an option, the proposed rule stresses the role of an attorney as a counselor who must, when reasonable, attempt to persuade a client not to commit a criminal act. It is important to note an attorney's role as counselor is not limited to the circumstances that would permit disclosure under the statute and rule. Thus, the proposed rule also addresses an attorney's role in counseling a client to take action to prevent anticipated harm even where a criminal act may be completed and not capable of prevention.

A final important component in the concept of the proposed new rule is an educational function. The approach taken on the underlying duty of confidentiality in the proposed new rule informs attorneys that the duty of confidentiality resides in statute while at the same time giving lawyers ready access to the relevant statutory language in the rule Discussion section. This is significant because a different formulation of the rule could lead an unwary attorney into erroneously believing that California's duty of confidentiality, like those jurisdictions that follow the American Bar Association's Model Rules of Professional Conduct or Model Code of Professional Responsibility, is completely and exclusively addressed within the rules. To avoid this consequence, the format of proposed new rule 3-100 incorporates by reference the duty of confidentiality in §6068(e) and promotes an attorney's careful consultation of both the statute and the rule.

B. Summary of Proposed New Rule 3-100 as Amended Following Public Comment

Revisions to the public comment version of proposed new rule 3-100 were implemented in response to points made in the comments received and in response to informal input from the

members of the Task Force who were afforded an opportunity to review the written comments and to contribute to the State Bar staff analysis. All of these revisions are summarized below.[10]

1. In paragraph [3] of the discussion, a new last sentence has been added clarifying that the policy underlying the statutory confidentiality exceptions permit disclosures to prevent a future or ongoing criminal act but that disclosure of a past, completed criminal act is prohibited. In addition, the second sentence of paragraph [3] of the discussion has been changed to track the exact language of the §6068(e)(2). In the public comment version, the language used in this sentence was a paraphrase.
2. The first sentence of paragraph [4] of the discussion also has been changed to track the exact language of §6068(e)(2) (i.e., the word "another" has been changed to "an individual.")
3. The clause "based on all the facts and circumstances, such as those discussed in Discussion paragraph [6]," has been added to the last sentence of paragraph [5] of the discussion to emphasize that a member's decision to reveal confidential information is subject to a fact-based consideration of the particular situation with which the member is confronted.
4. In paragraph [6] of the discussion, the criminal discharge of toxic waste illustration has been modified. The phrase "has discharged" has been changed to "is discharging or intends to discharge." Also, in the phrase "present and substantial risk," the words "present and" have been deleted. These changes clarify the illustration to convey the important point that the AB 1101 confidentiality exception applies in situations where the harm resulting from a criminal act may not be "imminent" while at the same time avoiding a confusing inference that the exception extends to past, completed criminal acts. The deletion of the description of the harm as posing a "present" risk is consistent with this clarification of the illustration. The illustration, as revised, continues to reflect the

[10] A general summary of proposed new rule 3-100, as issued for public comment, appears at pages 6 through 9 of this memorandum.

concept that future criminal acts, as a category, may be construed to include ongoing criminal acts.[11]

5. The third sentence of paragraph [7] of the discussion has been changed to add the point that remonstration may result in a client "expressing a genuine commitment not to proceed" with a threatened criminal act.
6. The fourth sentence of paragraph [7] of the discussion has been modified, including deletion of the word "necessary," to avoid a possible misleading inference that permissive disclosure might be mandatory.
7. The fourth item enumerated in paragraph [9] of the discussion has been changed to use more direct and concise language.
8. The sixth and seventh items enumerated in paragraph [9] of the discussion have been modified to recognize the fact dependent nature of these particular factors to consider.

(The text of proposed new rule 3-100, in legislative style, showing the revisions made following public comment, is provided as Enclosure 7.)

C. <u>How Proposed New Rule 3-100 Responds to the Issues in Section 3 of AB 1101</u>

AB 1101 identified the following issues for consideration in developing an amendment to the Rules of Professional Conduct.

> (1) Whether an attorney must inform a client or prospective client about the attorney's discretion to reveal the client's or prospective client's confidential information to the extent the attorney reasonably believes that the disclosure is

[11] In jurisdictions that have a professional conduct rule on disclosure of confidential information "*to prevent*" a criminal act, at least one court has indicated that such language can be interpreted to cover an ongoing act. See *Prudential Ins. Co. of America v. Massaro* (D.N.J., 2000) 2000 WL 1176541.

necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.

(2) Whether an attorney must attempt to dissuade the client from committing the perceived criminal conduct prior to revealing the client's confidential information, and how those conflicts might be avoided or minimized.

(3) Whether conflict-of-interest issues between the attorney and client arise once the attorney elects to disclose the client's confidential information, and how those conflicts might be avoided or minimized.

Issue 1: Whether an attorney must inform the client of the attorney's discretion to reveal confidential information. Paragraph (C)(2) of proposed new rule 3-100 represents a policy decision to grant an attorney great flexibility in determining whether and when to inform a client or prospective client about the attorney's ability to reveal confidential information to prevent a criminal act of death or substantial bodily harm. Proposed new rule 3-100 rejects the argument that enactment of the AB 1101 confidentiality exception demands promulgation of a corresponding "Miranda-type" duty imposing an absolute obligation that all attorneys caution every client, at the outset of representation, that confidentiality does not extend to information that the attorney is permitted to reveal to prevent a criminal act of death or substantial bodily harm. Accordingly, paragraphs [9] and [10] of the discussion are intended to clarify that although proposed new rule 3-100 states that an attorney "shall" inform a client of the attorney's ability or decision to reveal confidential information, this requirement is imposed only if "reasonable under the circumstances."

Paragraph [9] of the discussion conveys two important points: (1) that in some situations informing a client should be regarded as unreasonable if such conduct would increase the risk of death or substantial bodily harm; and (2) where informing the client is reasonable, there are factors that an attorney may consider in determining an appropriate time, if any, to inform the client. Paragraph [10] of the discussion is intended to recognize a continuum of possible

approaches to satisfying the requirement to inform a client while maintaining, as best as possible, the trust relationship between attorney and client.

Issue 2: Whether an attorney must attempt to dissuade the client from committing the criminal act before disclosure is permitted. Proposed new rule 3-100 includes a requirement, in subparagraph (C)(1), that an attorney 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. As in the above approach used to address the issue of informing a client, subparagraph (C)(1) does not create an absolute duty. Instead, paragraph [7] of the discussion notes the important role of an attorney as a counselor, and that "conflicts" between the attorney and client concerning disclosure of confidential information can be minimized by ending the threat through counseling. Further, with the added leverage conferred by permissive disclosure, efforts to dissuade a client against a threatened criminal act may find greater success. As indicated in paragraph [7] of the discussion, however, the requirement to counsel a client is not absolute due to concerns for personal safety that may arise.

Issue 3: Conflicts of Interest. Paragraphs [11] and [12] of the discussion informs attorneys that permitted disclosure of confidential information, when accomplished without the informed consent of the client, likely reflects a deterioration of the client-lawyer trust relationship rendering continued representation impossible. Paragraph [11] of the discussion directs attorneys to rule 3-700 (Termination of Employment) and paragraph (b) of rule 3-700 identifies the mandatory causes for withdrawal from employment, including subparagraph (B)(2) stating that an attorney shall "withdraw from employment if: . . .(2) The member knows or should know that continued employment will result in a violation of these rules or of the State Bar Act. . . ."

Notwithstanding the likelihood of a breakdown in the client-lawyer relationship, in circumstances where there is no such breakdown, the client's informed consent may allow that representation to continue. For example, as indicated in paragraph [12] of the discussion, if the attorney is called as a witness in the client's matter, then rule 5-210 (Member as Witness) would allow an

attorney to act as both advocate and witness before a jury, provided the attorney has the informed written consent of the client. Paragraph [12] of the discussion also guides attorneys to consider their duty of loyalty and rule 3-110 (Failing to Act Competently). Depending upon the specific circumstances, both loyalty and competency may be implicated following disclosure of confidential information and an attorney must be cognizant of these concerns when seeking to continue in the representation of the client.

Finally, regarding the issues posed in section 3 of AB 1101, it bears noting that Assemblymember Darrell Steinberg, the author of AB 1101, submitted a written comment stating, in part, that "[t]he rule thoroughly addresses all three issues identified by the legislature. . . . ¶Proposed new rule 3-100 provides an excellent road map for attorneys considering action under AB 1101." (May 17, 2004 letter from Assemblymember Darrell Steinberg to Audrey Hollins, State Bar of California, at p. 2. See Enclosure 6.)

IV

CONCLUSION

The Board of Governors of the State Bar of California respectfully requests that this Court approve proposed new rule 3-100 of the Rules of Professional Conduct of the State Bar of California in the form set forth in Enclosure 1.

ENCLOSURE 1:

Proposed New Rule 3-100 of the Rules of Professional Conduct of the State Bar of California

Rule 3-100. Confidential Information of a Client

(A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.

(B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:

(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and

(2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).

(D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.

(E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.

Discussion:

[1] *Duty of confidentiality*. Paragraph (A) relates to a member's obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a member: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A member's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow

the advice given, and the law is upheld. Paragraph (A) thus recognizes a fundamental principle in the client-lawyer relationship, that, in the absence of the client's informed consent, a member must not reveal information relating to the representation. (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

[2] *Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine and ethical standards of confidentiality*. The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (*See In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.3d 614, 621 [120 Cal. Rptr. 253].) The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member's ethical duty of confidentiality is not so limited in its scope of protection for the client-lawyer relationship of trust and prevents a member from revealing the client's confidential information even when not confronted with such compulsion. Thus, a member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law.

[3] *Narrow exception to duty of confidentiality under this Rule*. Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited under Business & Professions Code section 6068(e), subdivision (1). Paragraph (B), which restates Business and Professions Code section 6068, subdivision (e)(2), identifies a narrow confidentiality exception, absent the client's informed consent, when a member reasonably believes that disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in the death of, or substantial bodily harm to an individual. Evidence Code section 956.5, which relates to the evidentiary attorney-client privilege, sets forth a similar express exception. Although a member is not permitted to reveal confidential information concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

[4] *Member not subject to discipline for revealing confidential information as permitted under this Rule*. Rule 3-100, which restates Business and Professions Code section 6068, subdivision (e)(2), reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a member reasonably believes is likely to result in death or substantial bodily harm to an individual. A member who reveals information as permitted under this rule is not subject to discipline.

[5] *No duty to reveal confidential information*. Neither Business and Professions Code section 6068, subdivision (e)(2) nor this rule imposes an affirmative obligation on a member to reveal information in order to prevent harm. (See rule 1-100(A).) A member may decide not to reveal confidential

information. Whether a member chooses to reveal confidential information as permitted under this rule is a matter for the individual member to decide, based on all the facts and circumstances, such as those discussed in paragraph [6] of this discussion.

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

(1) the amount of time that the member 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 member believes the member's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;

(4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the member;

(5) the extent of other adverse effects to the client that may result from disclosure contemplated by the member; and

(6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A member may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure and a member may disclose the information without waiting until immediately before the harm is likely to occur. Thus, a member who knows that a client is discharging or intends to discharge toxic waste into a town's water supply in violation of the criminal law may reveal this information to the authorities if there is a substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the member's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] *Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm*. Subparagraph (C)(1) provides that before a member may reveal confidential information, the member must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, or if necessary, do both. The interests protected by such counseling is the client's interest in limiting disclosure of confidential information and in taking responsible action to deal with

situations attributable to the client. If a client, whether in response to the member's counseling or otherwise, takes corrective action – such as by ceasing the criminal act before harm is caused – or by expressing a genuine commitment not to proceed with a threatened criminal act, then the option for permissive disclosure by the member would cease as the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the member who contemplates making adverse disclosure of confidential information may reasonably conclude that the compelling interests of the member or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the member should, if reasonable under the circumstances, first advise the client of the member's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the member should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent the criminal act. Even when the member has concluded that paragraph (B) does not permit the member to reveal confidential information, the member nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.

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

[9] *Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2)*. A member is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 3-500; Business and Professions Code, section 6068, subdivision (m). Paragraph (C)(2), however, recognizes that under certain circumstances, informing a client of the member's ability or decision to reveal confidential information under paragraph (B) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the member or the member's family or associates. Therefore, paragraph (C)(2) requires a member to inform the client of the member's ability or decision to reveal confidential information as provided in paragraph (B) only if it is reasonable to do so under the circumstances. Paragraph (C)(2) further recognizes that the appropriate time for the member to inform the client may vary depending upon the circumstances. (See paragraph [10] of this discussion.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

(1) whether the client is an experienced user of legal services;

(2) the frequency of the member's contact with the client;

(3) the nature and length of the professional relationship with the client;

(4) whether the member and client have discussed the member's duty of confidentiality or any exceptions to that duty;

(5) the likelihood that the client's matter will involve information within paragraph (B);

(6) the member's belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and

(7) the member's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

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

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

[12] *Other consequences of the member's disclosure*. Depending upon the circumstances of a member's disclosure of confidential information, there may be other important issues that a member must address. For example, if a member will be called as a witness in the client's matter, then rule 5-210 should be considered. Similarly, the member should consider his or her duties of loyalty and competency (rule 3-110).

[13] *Other exceptions to confidentiality under California law*. Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law.

To: STATE BAR OF CALIFORNIA

Date: May 13, 2004

Subject: Comment on Proposed Rule 3-100

The undersigned are members of or liaisons to the Commission on Revision of the Rules of Professional Conduct. At its meeting last weekend, the Commission discussed proposed Rule 3-100 but did not take a position on the draft due to procedural constraints. Instead, individual members of the Commission and liaisons were invited to make their thoughts known to the State Bar before the comment deadline of May 17, 2004. Thus, these comments represent only the thoughts of the undersigned.

1. In Items 6(2), 6(3) and 7 of the Discussion, there suddenly appears an intrusion of the lawyer's possible disclosure of threatened third party conduct. Neither AB 1101 which caused Rule 3-100 to be drafted nor the Rule itself deals with any such relationships; and after reflection we have extreme doubt that such material should be included in the discussion—particularly since it is not addressed in the Rule as drafted. Obviously, the subject matter of AB 1101 and Rule 3-100 is delicate and controversial. **Nothing** of which we are aware—there or elsewhere—seeks to control or direct a lawyer in respect to disclosing prospective conduct by someone other than a client. It seems to us that the lawyer is on his or her own in making such difficult decisions. We think that the Rules of Professional Conduct should stay very far away from this unnecessary expansion into dealing with non-client third parties.

2. Another factor to be considered in making disclosure is **to whom** such disclosure should be made it **if** it is made. After the *Tarasoff* case, the psychiatric profession faced considerable difficulty in identifying disclosure in parallel situations, and finally caused the Legislature to adopt Civil Code section 43.92, which states that the duty to make *Tarasoff* disclosures is met by advising the prospective victim and a law enforcement agency. The proposed Rule might well at least identify that option, although of course AB 1101 creates only a right, not a duty.

3. This Rule is preeminently a "guidance rule," as emphasized by Proposed Rule 3-100(E). We are gratified to see this development.

4. We suggest that the penultimate sentence of discussion Item 3, concerning non-disclosure of past criminal acts, should be elevated into the Rule itself. It is a key element of guidance and instruction.

5. The reference in proposed 3-100 (A) to "informed consent" as a basis for releasing protected information is unclear, since "informed consent," though used in various

places in the ABA Model Rules, is not defined in our Rules except in the similar but extensively explained phrase "informed **written** consent" in Rule 3-310(a)(2). We believe that this is a well intentioned effort to clarify something which has always been implicit in B&P Code sec. 6068(e), even before its recent amendment, i.e., that if a client authorizes or instructs the lawyer to release information, that information thus ceases to be a "confidence" or a "secret."

It seems that this problem can be solved in one of two ways: either the entire concept of "informed consent" should be deleted and the law left where it has been since 1872 without much difficulty. Or a full set of definitions must be provided about what constitutes "informed consent." For simplicity and ease of use (as more fully explained in the following item), we recommend the former.

6. The Discussion is excellent, but nonetheless it begins to approach complexity beyond ready comprehension. We believe that a Discussion section which goes on at this length will not assist practitioners in real life. It is very definitely our experience that highly trained, very sophisticated lawyers who are not specialists in legal ethics are, either or both, relatively ignorant about the rules as a whole or at least not knowledgeable about their sophisticated details, such as (to cite one example) failure to provide a full written explanation of the possible consequences in case of conflict waivers. Our profession should do whatever it can—not just with respect to the discussion in Rule 3-100—to keep the rules simple and accessible. They are only secondarily (to the undersigned) a disciplinary code. Rather, they provide the framework and guidance under which lawyers serve the public interest within their licensure. The State Bar ought to make it possible for lawyers to find their way through these rules as straight forwardly as possible.

7. The Rule and the Discussion hint at possible Miranda warnings at the beginning of the attorney-client relationship. Is the profession really going to give lawyers a heads up to go in the direction of having lawyers discourage clients from full disclosure to their lawyer and from developing confidence and trust in their lawyer at the very beginning of their relationship? We believe that actual Rule 3-100 situations will be rare as hens teeth, and view with great concern any warnings which establish some wall or communications difficulty between lawyer and client.

We appreciate the difficulty: if a warning of this nature is to be given, it should be given at the outset, not after the situation has become acute. But it is the heart of the service lawyers render to the community that they offer a place where troubled persons can confide their troubles in total confidence. A routinely required warning about a possible future need to disclose certain things (in rare situations, to be sure) will discourage confidence and full disclosure, which are necessary to the performance of the lawyer's services.

8. Finally, we suggest some edits, as follows:

A. In the third sentence of Discussion Part 7, where the example of ceasing the criminal act before harm is caused is given, we suggest that the following example be added: "or expressing a genuine commitment not to proceed with the threatened conduct."

B. We don't understand the idea that "the frequency of the member's contact with the client" is a consideration under Discussion Part 8.

C. Part 4 of Discussion Part 8 is unclear to us.

D. In Part 6 of Discussion Part 8, we would say "the member's belief, <u>if applicable</u>, under, . . ."

E. At the end of the penultimate sentence in Discussion Part 10, we would add the words ", or possibly not at all."

There are other concerns with the draft which we believe will be addressed by others. We have not had enough time to resolve all of them to a point where they can be effectively presented here.

Thank you for your consideration.

JoElla Julien

Diane Karpman

Kurt Melchior

Jerome Sapiro, Jr.

May 18, 2004

Office of Professional Competence, Planning, And Development
State Bar of California
180 Howard Street
San Francisco, California 94105

Attn: Audrey Hollings

Re: Proposed Rule 3-100 of the California Rules of Professional Conduct

Dear Audrey:

I am writing to request that the State Bar's Board Committee on Regulation, Admissions and Discipline modify Discussion paragraphs 3 and 6 in proposed rule 3-100. Specifically, I request that the Board Committee delete the words "or ongoing" in the second sentence in Discussion paragraph 3 and that the Board Committee delete the sentence in paragraph 6 that states "Thus, a member who knows that a client has discharged toxic waste into a town's water supply in violation of the criminal law may reveal this information to authorities if there is a present or substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the member's disclosure is necessary to eliminate the threat or reduce the number of victims."

The language in question in Discussion paragraphs 3 and 6 is inconsistent with the rule and produces a result that would undermine the extremely important reasons why we have a duty of confidentiality in California.

The basic issue is whether proposed rule 3-100(B) reaches ongoing criminal activity. As the Discussion correctly states, the rule does not permit revelation of past, completed criminal acts. The Discussion also correctly states that the rule applies to future criminal acts that are likely to result in death or substantial bodily harm. The question is whether rule 3-100(B) covers past criminal conduct that is ongoing.

The rule itself does not dictate such a result. It states that the member may reveal confidential information to the extent necessary to prevent a criminal act. The verb "prevent" means "to keep from happening." In the context of the rule, the focus is on keeping the criminal act from happening rather than keeping bodily injury or death from happening. That is why there is a distinction between past, completed criminal acts and future criminal acts even though both could result in death or substantial bodily harm.

The focus of "prevent" is on what will happen in the future, not what has happened or what is already happening. One does not prevent an ongoing act. One stops an ongoing act. Stopping what is happening and preventing what will happen are different concepts. The former is not encompassed in rule 3-100(B). The latter is.

As a result, the reference to ongoing criminal activity in Discussion paragraph 3 is inconsistent with the rule 3-100(B). It will mislead the membership about the scope of rule 3-100(B) and create unnecessary controversy about the scope of the rule, which the State Bar should avoid.

The sentence in Discussion paragraph 6, which refers to a situation where a client "has discharged" toxic waste, also is inconsistent with the rule and also will mislead the membership. The sentence in paragraph 6 is drawn from the comment to ABA Model Rule 1.6(b)(1), which differs substantially from rule 3-100(B) . Model Rule 1.6(b)(1) is not tied to preventing criminal activity, but to preventing reasonably certain death or substantial bodily harm. The sentence does not incorporate the concept of a future criminal act (or an ongoing criminal act for that matter). Indeed, the toxic discharge example could involve a completed criminal act, a situation Discussion paragraph 3 says is beyond the scope of the rule.

As written the toxic discharge example in Discussion paragraph 6 is misleading and misapplies the rule. The Board Committee should remove the sentence or, at the very least revise it to state a situation where a client "will discharge toxic waste." The sentence should also be revised to state that a member "may reveal this information to the authorities <u>to the extent permitted by rule 3-100</u>…" to make it clear that the member still must follow the protocols in rule 3-100(C).

There are extremely important reasons why these changes are necessary. It is one thing for a client to consult a lawyer about engaging in future criminal activity. No one has the right to consult a lawyer for the purpose of planning or carrying out a crime. The crime/fraud exception to the lawyer-client privilege exists for that reason.

However, there is no such exception when the client consults a lawyer about activity that has already occurred even if the activity is ongoing, provided the lawyer does not advise or assist the client in furthering the ongoing criminal activity. The legal profession exists to advise clients who are in that very situation. People come to lawyers with their problems, sometimes very serious problems. Our role as lawyers is to be the one safe harbor where a client can receive counseling and advice about the law and its effect on their lives, without fear of consequence. We serve in that capacity for both sinner and saint. We cannot fulfill that role unless a client can fully and frankly communicate with us. We cannot advise a client on those matters the client is afraid to tell us about . As the California Supreme Court observed long ago, "Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his attorney. Unless he makes known to the lawyer all the facts, the advice that follows will be useless, if not misleading." (*City & County of S.F. v. Superior Court* (1951) 37 Cal.2d 227, 235.)

For that reason that we promote candor in the lawyer-client relationship. We invite that candor by promising the highest level of confidentiality found in a lay profession. Our ethics rules embody the promise that we will hold what we learn from our clients in confidence and that we will not reveal that information to anyone unless compelled by law to do

so and then only after exhausting reasonable measures to protect that information from disclosure.

When clients reveal the most embarrassing and legally damaging aspects of their lives in reliance on that promise, we as lawyers and as a profession must accept the consequences of that promise. For better or for worse. We cannot expect to receive the trust we invite the public to repose in our profession if we create exceptions that allow us to break that promise or create doubt about whether we will keep that promise. When we lose that trust, we lose candor and with it the ability to fulfill our role in our system of laws.

The Discussion to rule 3-100 unnecessarily creates a risk for the client who consults a lawyer regarding an ongoing criminal violation that may have ongoing consequences. That client now has to fear the consequence of merely speaking to a lawyer about his or her problem. In the context of environmental law, Discussion paragraph 6 is a warning that a client who has experienced a discharge of toxic materials must worry about the consequence of seeking legal advice.

This is the wrong result. The unnecessary language in Discussion paragraphs 3 and 6 forecloses the availability of legal services to a segment of the client population who would have to add talking to a lawyer to the list of things to fear about their ongoing criminal problem. Rule 3-100(B) does not mandate that result.

For these reasons, I respectfully request that the Board Committee revise the Discussion to delete the reference to ongoing criminal activity in Discussion paragraph 3 and delete the toxic discharge example in Discussion paragraph 6.

Sincerely,

Stanley W. Lamport

SWL/rl

E-mail message dated May 3, 2004
To: Randall Difuntorum
From: Harry Sondheim

As I indicated at the Symposium, I have the following concerns regarding portions of the Discussion:

2. 1. The second sentence of paragraph [3] of the Discussion, instead of discussing the "narrow exception" referred to in its heading, appears to have broadened the scope of proposed Rule 3-100(B) because it does not track the language of either 3-100(B) or A.B. 1011. I quote below the language of this sentence and indicate by brackets what it leaves out and what it adds:

"Paragraph (B), which restates Business & Professions Code section 6068(e), subdivision (e) (2), identifies a narrow exception, absent the client's informed consent, to the member's duty not to reveal confidential information when a member reasonably believes that [disclosure is necessary to prevent] a [future or ongoing] criminal act [that the member reasonably believes] is likely to result in the death of, or substantial bodily harm to an individual."

Thus this discussion sentence fails to follow the rule and its underlying legislation in three respects:

a. It eliminates the concept of necessity.

b. It eliminates the concept of reasonable belief in the result.

c. It broadens the criminal act to include not only future acts, but ongoing criminal acts, a concept which is further spelled out by the example given in paragraph [6] regarding prior discharge of toxic waste in a water supply.

2. Turning now to paragraph [6], it appears that the discharge which is deemed by that paragraph to be the "violation of the criminal law" and which obviously has occurred in the past can be disclosed because of the risk of future harm. Yet, as enacted by the legislature and as set forth in 3-100(B) the disclosure is to "prevent a criminal act," not to prevent future harm *per se*, although the disclosure of the former may prevent the latter.

3. At the Symposium some indication was given that the intent of the sponsor of A.B. 1101 was to encompass the toxic waste example. I do not know what is the basis for this view. Even assuming that it is correct, the issue for a court to decide, in interpreting the language enacted by the legislature, is not to determine what an individual member of the legislature intended, but rather what is a reasonable interpretation of the language enacted by the entire legislature in the bill which was signed by the governor. I believe the interpretation I am suggesting as being appropriate for the phrase "prevent a criminal act" is arguably reasonable and should not be nullified by the discussion for this rule. Let a court decide this issue if and when it becomes relevant to litigation or discipline.

In addition to the concerns set forth above which I raised at the Symposium, there is a policy issue which I would hope will be further considered by the A.B. 1101 Task Force:

Paragraph (C) of proposed rule 3-100 mandates, "if reasonable under the circumstances," that a member inform a client that he or she intends to reveal confidential information. The phrase "if reasonable under the circumstances" allows for second guessing by persons who may disagree with the attorney's belief that it was not reasonable to do so. Since the purpose of this rule and the statute is to give an attorney total discretion with regard to revealing confidential information, why not permit the attorney to have total discretion as to whether he or she will inform a client about the contemplated disclosure?

Knowing the difficulties faced by the Commission as it reviews the current rules of professional conduct, I can only empathize with the members of the Advisory Task Force as they face their own difficult task and hope that this e-mail may be of some assistance in that endeavor.

ANTHONIE M. VOOGD

918 Palomar Road, Ojai, California 93023, (805) 646-1512, email avoogd@ojai.net

INTER-OFFICE MEMORANDUM

TO: TASK FORCE

FROM: A.M. VOOGD

RE: PROPOSED RULE 1-300

DATE: 5/17/2004

Discussion item [13] of the proposed rule provides: "*Other exceptions to confidentiality under California law.* Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law."

The item should be stricken. I am advised by Randall Difuntorum of the State Bar that:

> "Comment [13] is taken from prior versions of proposed rule 3-100 that were adopted by the Board and sent to the Supreme Court. The comment is intended to assure that Supreme Court action to approve a confidentiality rule, like the current proposed rule 3-100, would not be misinterpreted as undermining existing common law limitations on the statutory duty. Examples include the Supreme Court's decision in General Dynamics v. Sup. Ct. (Rose) (1994) 7 Cal.4th 1164, 1190 [sec. 6068(e) does not prohibit a former in-house counsel from bringing a wrongful termination action against their former client/employer].

There is little or no risk of the paragraph (A) of the proposed rule being misinterpreted as undermining existing common law limitations on 6068(e) since that paragraph expressly refers to the statute. That reference means that the statute should be read as interpreted by the Supreme Court. With regard to subpart (B) of the rule, discussion item [13] serves to diminish its provisions relating to death or bodily harm and the associated discussion items by leaving open the existence of other, less rigorous, common law exceptions relating to death or bodily harm. For instance, General Dynamics, supra, can be read as suggesting that any breach of confidentiality in the commonweal is permissible if the attorney is willing to accept the risk of discipline.

Accordingly, I recommend that discussion item [13] be removed from the proposed rule as likely to cause more confusion than elucidation.

Anthonie M. Voogd