

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

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

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

## Comparison with ABA Counterpart

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

## Primary Factors Considered

- Existing California Law

Rule

RPC 3-100

Statute

Bus. & Prof. Code § 6068(e); Evid. Code §§950 et seq.

Case law

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

- Other Primary Factor(s)

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

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## Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below)

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

Approved on Consent Calendar

Approved by Consensus

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## Commission Minority Position, Known Stakeholders and Level of Controversy

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

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

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

Moderately Controversial – Explanation:

Not Controversial

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 1.6\* Confidentiality of Information

March 2010

(Draft rule following consideration of public comment)

### *INTRODUCTION:*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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		<p><u>Minority.</u> A minority of the Commission objects to proposed Rule 1.14, and thus to the inclusion of subparagraph (b)(5) in the Rule.</p>
	<p><u>(c) Further obligations under paragraph (b)(1). Before revealing information protected by Business and Professions Code section 6068(e)(1) in order to prevent a criminal act as provided in paragraph (b)(1), a lawyer shall, if reasonable under the circumstances:</u></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b> Proposed Rule 1.6(c) carries forward current rule 3-100(C). In addition to the substitution of the term “information protected by Business and Professions Code section 6068(e)(1)” for “confidential information,” see Explanation of Changes to paragraphs (a) and (b), the only changes made conform the rule to California rule style and substitute “lawyer” for “member.”</p>
	<p><u>(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and</u></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b> See Explanation of changes for introductory clause to paragraph (c).</p>
	<p><u>(2) inform the client, at an appropriate time, of the lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068(e)(1) as provided in paragraph (b)(1).</u></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b> See Explanation of changes for introductory clause to paragraph (c).</p>

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	<p>(d) <a href="#">In revealing information protected by Business and Professions Code section 6068(e)(1) as permitted by paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, secure confidential legal advice, establish a claim or defense in a controversy between the lawyer and a client, protect the interests of the client, or to comply with a court order given the information known to the member at the time of the disclosure.</a></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>Proposed Rule 1.6(d) carries forward current rule 3-100(D). In addition to including within paragraph (d)'s scope the additional exceptions in the proposed Rule (i.e., subparagraphs (b)(2), (b)(3) and (b)(4)), the only changes made are the substitution of the defined term, "information protected by Business and Professions Code section 6068(e)(1)," changes to conform the rule to California rule style, and the substitution of "lawyer" for "member."</p>
	<p>(e) <a href="#">A lawyer who does not reveal information protected by Business and Professions Code section 6068(e)(1) as permitted by paragraph (b) does not violate this Rule.</a></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>See Explanation of changes for introductory clause to paragraph (c).</p>

<p align="center"><b><u>ABA Model Rule 1.6/Cal. Rule 3-100</u></b>  <b>Confidentiality of Information</b>  <b><u>Comment</u><sup>1</sup></b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b>  <b>Rule 1.6 Confidentiality of Information</b>  <b><u>Comment</u><sup>2</sup></b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.</p>	<p>[1] This Rule governs the disclosure by a lawyer of information <del>relating to the representation of a client protected by Business and Professions Code section 6068(e)(1)</del> during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and Rules <del>1.8(b)</del> <u>1.8.2</u> and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.</p>	<p><b><u>COMPARISON TO MODEL RULE 1.6</u></b></p> <p>Comment [1] is based on MR 1.6, cmt. [2]. As explained in the Introduction and the Explanation to paragraphs (a) and (b) of the Rule, the term "information protected by Business &amp; Professions Code section 6068(e)(1) has been substituted for "information relating to the representation of a client." The only other change is to substitute "1.8.2" for "1.8(b)," which conforms the cross-reference to the Commission's numbering convention for the 1.8 series of rules.</p>
<p>[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby</p>	<p><b><u>Policies Furthered by the Duty of Confidentiality</u></b></p> <p>[2] <del>A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0a</del> <u>Paragraph (a) relates to the lawyer's obligations</u></p>	<p><b><u>COMPARISON TO MODEL RULE 1.6</u></b></p> <p>Comment [2] is based on current California rule 3-100, Discussion ¶. 1, which in turn is based on Model Rule 1.6, cmt. [1]. The changes made during the original drafting of rule 3-100 were intended to emphasize California's strong policy of protecting client confidentiality.</p>

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

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

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

<p align="center"><b><u>ABA Model Rule 1.6/Cal. Rule 3-100</u></b>  <b>Confidentiality of Information</b>  <b><u>Comment</u><sup>1</sup></b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b>  <b>Rule 1.6 Confidentiality of Information</b>  <b><u>Comment</u><sup>2</sup></b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.</p>	<p><u>under Business and Professions Code section 6068(e) for the definition(1), which provides it is a duty of informed consent</u> a lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.<del>This</del>" <u>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</u> contributes to the trust that is the hallmark of the <del>client-lawyer-client</del> relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or <del>legally damaging subject matter</del><u>detrimental subjects</u>. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. <u>Paragraph (a) thus recognizes a fundamental principle in the lawyer-client relationship, that, in the absence of the client's informed consent, a lawyer must not reveal information protected by Business and Professions Code section 6068(e)(1). (See, e.g., Commercial Standard Title Co. v. Superior Court (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)</u></p>	<p>In addition, the Commission has substituted "lawyer-client" for "client-lawyer" throughout the proposed Rules to conform the term to the usage in the Business &amp; Professions and Evidence Codes.</p> <p>The substitution of "detrimental subjects" for "legally damaging subject matter" conforms the language in this Comment to the definition of "information protected by Business and Professions Code section 6068(e)(1)" that appears in Comment [3], which in turn is based on long-standing California authority concerning the scope of the terms "confidence" and "secrets" in Bus. &amp; Prof. Code § 6068(e).</p> <p>See also Explanation of Changes for paragraphs (a) and (b), which explain the Commission's recommended use of the defined term, "information protected by Business and Professions Code section 6068(e)(1)."</p>

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<p>[1] <i>Duty of confidentiality.</i> Paragraph (A) relates to a member’s obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a member: “To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” A member’s duty to preserve the confidentiality of client information involves public policies of paramount importance. (In Re Jordan (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (A) thus recognizes a fundamental principle in the client-lawyer relationship, that, in the absence of the client’s informed consent, a member must not reveal information relating to the representation. (See, e.g., Commercial Standard Title Co. v. Superior Court (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)</p>	<p>[42] <del><i>Duty of confidentiality.</i></del> Paragraph (Aa) relates to a <del>member’s</del><u>lawyer’s</u> obligations under Business and Professions Code section 6068, <del>subdivision</del> (e)(1), which provides it is a duty of a <del>member</del><u>lawyer</u>: “To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” A <del>member’s</del><u>lawyer’s</u> duty to preserve the confidentiality of client information involves public policies of paramount importance. (In <del>Re</del><u>Rere</u> Jordan (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the <del>client-lawyer-client</del> relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or <del>legally damaging subject matter</del><u>detrimental subjects</u>. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (Aa) thus recognizes a fundamental principle in the <del>client-lawyer-client</del> relationship, that, in the absence of the client’s informed consent, a <del>member</del><u>lawyer</u> must not reveal information <del>relating to the representation protected by Business and</del></p>	<p><b>COMPARISON TO CAL. RULE 3-100</b> See Explanation of Changes in previous row.</p>

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

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<p>principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See <i>In the Matter of Johnson</i> (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; <i>Goldstein v. Lees</i> (1975) 46 Cal.3d 614, 621 [120 Cal. Rptr. 253].) The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member’s ethical duty of confidentiality is not so limited in its scope of protection for the client-lawyer relationship of trust and prevents a member from revealing the client’s confidential information even when not confronted with such compulsion. Thus, a member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law.</p>	<p><del>confidentiality. The principle of client-lawyer confidentiality applies to</del>“information relating to protected by Business and Professions Code section 6068(e)(1)” consists of information gained by virtue of the representation of a client, whatever its source, and encompasses matters communicated in confidence by the client, and therefore that (a) is protected by the attorney-lawyer-client privilege, matters protected by (b) is likely to be embarrassing or detrimental to the work-product doctrine client if disclosed, and matters protected under ethical standards or (c) the client has requested be kept confidential. Therefore, the lawyer’s duty of confidentiality, all as established defined in law, rule Business and Professions Code section 6068(e) is broader than lawyer-client privilege. (See <i>In the Matter of Johnson</i> (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; <i>Goldstein v. Lees</i> (1975) 46 Cal. App.3d 614, 621 [120 Cal. Rptr. 253].) <del>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.</del></p>	<p>loosely on Model Rule 1.6, cmt. [3].</p> <p>The purpose of Comments [3] to [6] is to delimit the scope of a lawyer’s duty of confidentiality, as well as provide a definition for “information protected by Business and Professions Code section 6068(e)(1)”. Because of California’s strong policy of protecting client confidentiality and the apparent disjunction in language between subdivisions (1) and (2) of Bus. &amp; Prof. Code § 6068(e), (see Explanation of Changes for proposed paragraphs (a) and (b)), the Commission views the expansion of rule 3-100, Discussion ¶. 2, as critical to providing guidance to lawyers in this important area and protection to clients.</p>

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	<p><b><u>Scope of the Lawyer-Client Privilege</u></b></p> <p>[4] <u>The protection against compelled disclosure or compelled production that is afforded lawyer-client communications under the privilege is typically asserted in judicial and other proceedings in which a lawyer or client might be called as a witness or otherwise compelled to produce evidence. Because the lawyer-client privilege functions to limit the amount of evidence available to a tribunal, its protection is somewhat limited in scope.</u></p>	<p><b>COMPARISON TO CAL. RULE 3-100</b></p> <p>See Explanation of Changes for proposed Comment [3].</p>
	<p><b><u>Scope of the Duty of Confidentiality</u></b></p> <p>[5] <u>A lawyer's duty of confidentiality, on the other hand, is not so limited as the lawyer-client privilege. The duty protects the relationship of trust between a lawyer and client by preventing the lawyer from revealing the client's protected information, regardless of its source and even when not confronted with compulsion. As a result, any information the lawyer has learned during the representation, even if not relevant to the matter for which the lawyer was retained, is protected under the duty so long as the lawyer acquires the information by virtue of being in the lawyer-client relationship. Information protected by Business and Professions Code section 6068(e)(1) is not concerned only with information that a lawyer might learn after a lawyer-client relationship has been</u></p>	<p><b>COMPARISON TO CAL. RULE 3-100</b></p> <p>See Explanation of Changes for proposed Comment [3].</p>

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	<p><u>established. Information that a lawyer acquires about a client before the relationship is established, but which is relevant to the matter for which the lawyer is retained, is protected under the duty regardless of its source. The duty also applies to information a lawyer acquires during a lawyer-client consultation, whether from the client or the client’s representative, even if a lawyer-client relationship does not result from the consultation. See Rule 1.18. Thus, a lawyer may not reveal information protected by Business and Professions Code section 6068(e)(1) except with the consent of the client or an authorized representative of the client, or as authorized by these Rules or the State Bar Act.</u></p>	
	<p><b><u>Relationship of Confidentiality to Lawyer Work Product</u></b></p> <p><u>[6] “Information protected by Business and Professions Code section 6068(e)(1)” does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates. However, the fact that information can be discovered in a public record does not, by itself, render that information “generally known” and therefore outside the scope of this Rule. (See <i>In the Matter of Johnson</i> (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)</u></p>	<p><b><u>COMPARISON TO CAL. RULE 3-100</u></b></p> <p>See Explanation of Changes for proposed Comment [3].</p>

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<p>[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer’s use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.</p>	<p>[47] Paragraph (a) prohibits a lawyer from revealing information <del>relating to the representation of a client</del> <u>protected by Business and Professions Code section 6068(e)(1)</u>. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer’s use of a hypothetical to discuss issues relating to the <u>client’s</u> representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.</p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>Comment [4] is identical to Model Rule 1.6, cmt. [4], except for the substitution of “information protected by Business and Professions Code section 6068(e)(1),” a defined term, for the Model Rule’s “information relating to the representation,” and the addition of “client’s” to modify “representation” for clarification.</p>
<p><b>Authorized Disclosure</b></p> <p>[5] Except to the extent that the client’s instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm’s practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.</p>	<p><b>Authorized Disclosure</b></p> <p><del>[58] Except to the extent that the client’s instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.</del> Lawyers in a firm may, in the course of the firm’s practice, disclose to each other information <u>relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.</u></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>Comment [8] is based on Model Rule 1.6, cmt. [5]. The first two sentences of the Model Rule comment have been deleted because the Commission has rejected the ABA’s theory of implied authority with respect to confidentiality because it is an exclusion from the general rule of confidentiality that would threaten to become a catchall exemption that swallows the rule of confidentiality. See Explanation of Changes for paragraph (a).</p>

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

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<p>Business &amp; Professions Code section 6068(e), subdivision (1). Paragraph (B), which restates Business and Professions Code section 6068, subdivision (e)(2), identifies a narrow confidentiality exception, absent the client's informed consent, when a member reasonably believes that disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in the death of, or substantial bodily harm to an individual. Evidence Code section 956.5, which relates to the evidentiary attorney-client privilege, sets forth a similar express exception. Although a member is not permitted to reveal confidential information concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.</p>	<p>under Business &amp; Professions Code section 6068(e), <del>subdivision</del>(1). Paragraph <del>(B)</del><del>(1)</del>, <del>which restates is based on</del> Business and Professions Code section 6068, <del>subdivision</del>(e)(2), <del>identifies which narrowly permits a narrow confidentiality exception, absent the client's informed consent, when a member reasonably believes that disclosure is necessary</del><del>lawyer to prevent a criminal act that the member reasonably believes is likely to result in the death of, or substantial bodily harm to an individual</del><del>disclose information protected by Business and Professions Code section 6068(e)(1) even without client consent.</del> Evidence Code section 956.5, which relates to the evidentiary <del>attorney</del><del>lawyer</del>-client privilege, sets forth a similar express exception. Although a <del>member</del><del>lawyer</del> is not permitted to reveal <del>confidential</del><del>protected</del> information concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.</p>	<p>to provide for an exception that would permit a lawyer to reveal confidential information to prevent a criminal act likely to result in death or substantial bodily harm, also provided in Section 3 of the Bill for the appointment of a task force "to make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act."</p> <p>The legislature also identified in Section 3 a series of issues for the Task Force to address:</p> <p>"(1) Whether an attorney must inform a client or a prospective client about the attorney's discretion to reveal the client's or prospective client's confidential information to the extent that the attorney reasonably believes that the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.</p> <p>(2) Whether an attorney must attempt to dissuade the client from committing the perceived criminal conduct prior to revealing the client's confidential information, and how those conflicts might be avoided or minimized.</p> <p>(3) Whether conflict-of-interest issues between the attorney and client arise once the attorney elects to disclose the client's confidential information, and how those conflicts might be avoided or minimized.</p> <p>(4) Other similar issues that are directly related to the disclosure of confidential information permitted by this act."</p> <p>After reviewing rule 3-100, Discussion ¶¶. 3-12, the Commission determined first, that the Model Rule comment inadequately</p>

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

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

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<p>circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose confidential information are the following:</p> <p>(1) the amount of time that the member has to make a decision about disclosure;</p> <p>(2) whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;</p> <p>(3) whether the member believes the member's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;</p> <p>(4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the member;</p> <p>(5) the extent of other adverse effects to the client that may result from disclosure contemplated by the member; and</p>	<p>under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose <del>confidential</del><u>such</u> information are the following:</p> <p>(1) the amount of time that the <del>member</del><u>lawyer</u> has to make a decision about disclosure;</p> <p>(2) whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;</p> <p>(3) whether the <del>member</del><u>lawyer</u> believes the <del>member's</del><u>lawyer's</u> efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;</p> <p>(4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the <del>member</del><u>lawyer</u>;</p> <p>(5) the extent of other adverse effects to the client that may result from disclosure contemplated by the <del>member</del><u>lawyer</u>; and</p>	

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<p>(6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.</p> <p>A member may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure and a member may disclose the information without waiting until immediately before the harm is likely to occur.</p>	<p>(6) the nature and extent of <u>protected</u> information that must be disclosed to prevent the criminal act or threatened harm.</p> <p>A <del>member</del><u>lawyer</u> may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the <del>confidential</del><u>protected</u> information. However, the imminence of the harm is not a prerequisite to disclosure, and a <del>member</del><u>lawyer</u> may disclose the <u>protected</u> information without waiting until immediately before the harm is likely to occur.</p>	
<p>[7] <i>Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm.</i> Subparagraph (C)(1) provides that before a member may reveal confidential information, the member must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, or if necessary, do both. The interests protected by such counseling is the client’s interest in limiting disclosure of confidential information and</p>	<p><b><u>Counseling Client or Third Person Not to Commit a Criminal Act Reasonably Likely to Result in Death of Substantial Bodily Harm</u></b></p> <p><del>[7]</del><u>13</u> <del><i>Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm.</i></del> Subparagraph <del>(C)</del><u>Paragraph</u> <del>(C)</del><u>(1)</u> provides that, before a <del>member</del><u>lawyer</u> may reveal <del>confidential</del><u>protected by Business and Professions Code section 6068(e)(1)</u>, the <del>member</del><u>lawyer</u> must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, <u>including persuading the client to take action to prevent a</u></p>	<p><b><u>COMPARISON TO CAL. RULE 3-100</u></b></p> <p>See Explanation of Changes for proposed Comment [9].</p>

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<p>in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the member's counseling or otherwise, takes corrective action - such as by ceasing the criminal act before harm is caused - the option for permissive disclosure by the member would cease as the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the member who contemplates making adverse disclosure of confidential information may reasonably conclude that the compelling interests of the member or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the member should, if reasonable under the circumstances, first advise the client of the member's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the member should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent the harm. Even when the member has concluded that paragraph (B) does not permit the member to reveal confidential information, the member nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.</p>	<p><u>third person from committing</u> or <del>if</del><u>continuing a criminal act.</u> If necessary, <u>the client may be persuaded to</u> do both. The interests protected by such counseling <del>is</del><u>are</u> the client's <del>interest</del><u>interests</u> in limiting disclosure of <del>confidential</del><u>protected</u> information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the <del>member's</del><u>lawyer's</u> counseling or otherwise, takes corrective action - such as by ceasing the <u>client's own criminal act or by dissuading a third person from committing or continuing a</u> criminal act before harm is caused - the option for permissive disclosure by the <del>member</del><u>lawyer</u> would cease <del>as</del><u>because</u> the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the <del>member</del><u>lawyer</u> who contemplates making adverse disclosure of <del>confidential</del><u>protected</u> information may reasonably conclude that the compelling interests of the <del>member</del><u>lawyer</u> or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the <del>member</del><u>lawyer</u> should, if reasonable under the circumstances, first advise the client of the <del>member's</del><u>lawyer's</u> intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the <del>member</del><u>lawyer</u> should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent the harm. Even when</p>	

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	<p>the <del>member</del>lawyer has concluded that paragraph (B)(1) does not permit the <del>member</del>lawyer to reveal confidentialprotected information, the <del>member</del>lawyer nevertheless is permitted to counsel the client as to why it <del>may</del>might be in the client's best interest to consent to the <del>attorney's</del>lawyer's disclosure of that information.</p>	
<p>[9] <i>Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2).</i> A member is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 3-500; Business and Professions Code, section 6068, subdivision (m). Paragraph (C)(2), however, recognizes that under certain circumstances, informing a client of the member's ability or decision to reveal confidential information under paragraph (B) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the member or the member's family or associates. Therefore, paragraph (C)(2) requires a member to inform the client of the member's ability or decision to reveal confidential information as provided in paragraph (B) only if it is reasonable to do so under the circumstances.</p>	<p><b><u>Requirement under Paragraph (c)(2) to Inform Client of Lawyer's Ability or Decision to Reveal Protected Information</u></b></p> <p><del>[9]14</del> <i>Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2).</i> A <del>member</del>lawyer is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule <del>3-500</del>1.4; Business and Professions Code, section 6068, <del>subdivision</del>(m). Paragraph (C)(2), however, recognizes that under certain circumstances, informing a client of the <del>member's</del>lawyer's ability or decision to reveal confidentialprotected information under paragraph (B)(1) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the <del>member</del>lawyer or the <del>member's</del>lawyer's family or associates. Therefore, paragraph (C)(2) requires a <del>member</del>lawyer to inform the client of the <del>member's</del>lawyer's ability or decision to reveal confidentialprotected information as provided in</p>	<p><b>COMPARISON TO CAL. RULE 3-100</b></p> <p>See Explanation of Changes for proposed Comment [9].</p> <p>Note also that the Commission has recommended reversing the order of current rule 3-100, Discussion ¶¶. 8 and 9, to better track the order of the Rule paragraphs.</p>

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<p>Paragraph (C)(2) further recognizes that the appropriate time for the member to inform the client may vary depending upon the circumstances. (See paragraph [10] of this discussion.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:</p> <ul style="list-style-type: none"> <li>(1) whether the client is an experienced user of legal services;</li> <li>(2) the frequency of the member's contact with the client;</li> <li>(3) the nature and length of the professional relationship with the client;</li> <li>(4) whether the member and client have discussed the member's duty of confidentiality or any exceptions to that duty;</li> <li>(5) the likelihood that the client's matter will involve information within paragraph (B);</li> <li>(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</li> <li>(7) the member's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.</li> </ul>	<p>paragraph (Bb)(1) only if it is reasonable to do so under the circumstances. Paragraph (Cc)(2) further recognizes that the appropriate time for the <u>memberlawyer</u> to inform the client may vary depending upon the circumstances. <del>(See paragraphcomment [1016] of this discussion.)</del> Among the factors to be considered in determining an appropriate time, if any, to inform a client are:</p> <ul style="list-style-type: none"> <li>(1) whether the client is an experienced user of legal services;</li> <li>(2) the frequency of the <u>member'slawyer's</u> contact with the client;</li> <li>(3) the nature and length of the professional relationship with the client;</li> <li>(4) whether the <u>memberlawyer</u> and client have discussed the <u>member'slawyer's</u> duty of confidentiality or any exceptions to that duty;</li> <li>(5) the likelihood that the client's matter will involve information within paragraph (Bb)(1);</li> <li>(6) the <u>member'slawyer's</u> belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and</li> <li>(7) the <u>member'slawyer's</u> belief, if</li> </ul>	

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	<p>applicable, that good faith efforts to persuade a client not to act on a threat have failed.</p>	
<p>[8] <i>Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act.</i> Under paragraph (D), disclosure of confidential information, when made, must be no more extensive than the member reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the confidential information to only those persons who the member reasonably believes can act to prevent the harm. Under some circumstances, a member may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable depends on the circumstances known to the member. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the member’s prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the member.</p>	<p><b><u>Disclosure of Protected Information as Permitted by Paragraph (b)(1) Must Be No More Than is Reasonably Necessary to Prevent the Criminal Act</u></b></p> <p><del>[815] Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act.</del> Under Paragraph (d) requires that disclosure of <del>confidential</del> <u>protected</u> information <u>as permitted by paragraph (b)(1)</u>, when made, must be no more extensive than the lawyer reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the <del>confidential</del> <u>protected</u> information to only those persons who the <del>member-lawyer</del> reasonably believes can act to prevent the harm. Under some circumstances, a <del>member-lawyer</del> 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 <del>member-lawyer</del>. 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 <del>member-lawyer</del>.</p>	<p><b>COMPARISON TO CAL. RULE 3-100</b></p> <p>See Explanation of Changes for proposed Comments [9] and [14].</p>

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

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<p>[11] <i>Informing client that disclosure has been made; termination of the lawyer-client relationship.</i> When a member has revealed confidential information under paragraph (B), in all but extraordinary cases the relationship between member and client will have deteriorated so as to make the member’s representation of the client impossible. Therefore, the member is required to seek to withdraw from the representation (see rule 3-700(B)), unless the member is able to obtain the client’s informed consent to the member’s continued representation. The member must inform the client of the fact of the member’s disclosure unless the member has a compelling interest in not informing the client, such as to protect the member, the member’s family or a third person from the risk of death or substantial bodily harm.</p>	<p><b><u>Informing Client that Disclosure Has Been Made: Termination of the Lawyer-Client Relationship</u></b></p> <p>[4117] <del><i>Informing client that disclosure has been made; termination of the lawyer-client relationship.</i></del> When a <del>member</del>lawyer has revealed <del>confidential</del>protected information under paragraph (B)(1), in all but extraordinary cases the relationship between <del>member</del>lawyer and client <del>that is based in mutual trust and confidence</del> will have deteriorated so as to make the <del>member’s</del>lawyer’s representation of the client impossible. Therefore, <del>when the member relationship has deteriorated because of the lawyer’s disclosure, the lawyer is</del> required to seek to withdraw from the representation (see <del>rule 3-700(B)</del>Rule 1.16, unless the <del>member is able to obtain the client’s</del>client has given his or her informed consent to the <del>member’s</del>lawyer’s continued representation. The <del>member</del>lawyer normally must inform the client of the fact of the <del>member’s</del>lawyer’s disclosure—unless. If the <del>member</del>lawyer has a compelling interest in reason for not informing the client, such as to protect the <del>member</del>lawyer, the <del>member’s</del>lawyer’s family or a third person from the risk of death or substantial bodily harm, <del>the lawyer must withdraw from the representation.</del> See Rule 1.16.</p>	<p><b><u>COMPARISON TO CAL. RULE 3-100</u></b></p> <p>See Explanation of Changes for proposed Comment [9].</p>

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

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

<p align="center"><b>ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment<sup>1</sup></b></p>	<p align="center"><b>Commission's Proposed Rule Rule 1.6 Confidentiality of Information Comment<sup>2</sup></b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p>[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.</p>	<p><u><a href="#">Disclosure as Permitted by Paragraphs (b)(2) through (b)(4).</a></u></p> <p><del>[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.</del></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>The Commission recommends that Model Rule 1.6, cmt. [9], concerning implied authorization, be stricken for the same reasons it has recommended the deletion of the first two sentences of Model Rule 1.6, cmt. [5]. See Explanation of Changes for deleted Model Rule 1.6, Comment [5].</p>
<p>[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does</p>	<p><del>[10]</del> <u><a href="#">Where</a></u> if a legal claim <u><a href="#">by a client</a></u> or <u><a href="#">disciplinary charge</a></u> <u><a href="#">the client's representative</a></u> alleges <u><a href="#">complicity</a></u> <u><a href="#">a breach of duty by</a></u> the lawyer <u><a href="#">in a client's conduct</a></u> <u><a href="#">involving representation of the client</a></u> or <u><a href="#">other</a></u> <u><a href="#">a disciplinary charge filed by or with the cooperation of the client or the client's representative</a></u> <u><a href="#">alleges</a></u> misconduct of the lawyer involving representation of the client, <u><a href="#">paragraph (b)(3) permits</a></u> the lawyer <u><a href="#">may to</a></u> respond <u><a href="#">only</a></u> to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving <del>the</del> conduct or representation of a former client. <del>Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a</del></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>Comment [19] is based on Model Rule 1.6, cmt. [10]. The Model Rule comment has been revised to conform the comment to the more limited scope of proposed paragraph (b)(3), which is based on the limited exception in Evidence Code § 958. See Explanation of Changes for proposed paragraph (b)(3).</p>

<p align="center"><b><u>ABA Model Rule 1.6/Cal. Rule 3-100</u></b>  <b>Confidentiality of Information</b>  <b><u>Comment</u><sup>1</sup></b></p>	<p align="center"><b><u>Commission’s Proposed Rule</u></b>  <b>Rule 1.6 Confidentiality of Information</b>  <b><u>Comment</u><sup>2</sup></b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.</p>	<p><del>third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer’s right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.</del></p>	
<p>[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.</p>	<p>[<del>14</del>20] A lawyer entitled to a fee is permitted by paragraph (b)(<del>5</del>3) to prove the services rendered in an action to collect it. This aspect of the <del>rule</del>Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.</p>	<p><b>COMPARISON TO MODEL RULE 1.6</b>  Comment [20] is identical to Model Rule 1.6, cmt. [11], except that “(b)(3)” has been substituted for the cross reference to “(b)(5),” and “Rule” substituted for “rule” to conform to California rule style.</p>
<p>[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.</p>	<p>[<del>12</del>] <del>Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.</del></p>	<p><b>COMPARISON TO MODEL RULE 1.6</b>  Because the Commission has recommended striking that part of Model Rule 1.6(b)(6) that permits disclosure if permitted by other law, see Explanation of Changes for paragraph (b)(6), it recommends the deletion of MR 1.6, cmt. [12].</p>

<p align="center"><b>ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment<sup>1</sup></b></p>	<p align="center"><b>Commission’s Proposed Rule Rule 1.6 Confidentiality of Information Comment<sup>2</sup></b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p>[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court’s order.</p>	<p>[13<del>21</del>] A lawyer may be ordered to reveal information <del>relating to the representation of a client</del><a href="#">protected by Business and Professions Code section 6068(e)(1)</a> 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 <del>should</del><a href="#">must</a> 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 <del>attorney</del><a href="#">lawyer</a>-client privilege or other applicable law. <a href="#">See, e.g., People v. Kor (1954) 129 Cal. App. 2d 436.</a> In the event of an adverse ruling, the lawyer must consult with the client <del>about the possibility of appeal</del> to the extent required by Rule 1.4 <a href="#">about the possibility of appeal</a>. Unless review is sought, however, paragraph (b)(<del>6</del><a href="#">4</a>) permits the lawyer to comply with the court’s order.</p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>Comment [21] is based on Model Rule 1.6, cmt. [13]. The phrase “must” has been substituted for “should” to emphasize the lawyer’s duty under this Rule to protect the client’s confidential information.</p> <p>The citation to <i>People v. Kor</i>, a seminal California Court of Appeal case on the lawyer’s duty of confidentiality to the client, has been added to provided guidance.</p>
<p>[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client’s interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial</p>	<p>[14<del>22</del>] Paragraph (<del>b</del><a href="#">d</a>) permits disclosure <a href="#">as permitted by paragraphs (b)(2) through (b)(5)</a> only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client’s interest should be no greater than the lawyer reasonably believes necessary to accomplish the</p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>Comment [22] is based on Model Rule 1.6, cmt. [14]. The clause, “as permitted by paragraphs (b)(2) through (b)(5)” has been added to emphasize that this Comment applies to the exceptions stated in those subparagraphs only. Proposed Comment [15], which provides guidance specific to the confidentiality exception in subparagraph (b)(1), is applicable to that paragraph.</p>

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

<p align="center"><b>ABA Model Rule 1.6/Cal. Rule 3-100 Confidentiality of Information Comment<sup>1</sup></b></p>	<p align="center"><b>Commission’s Proposed Rule Rule 1.6 Confidentiality of Information Comment<sup>2</sup></b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p><b>Acting Competently to Preserve Confidentiality</b></p> <p>[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision. See Rules 1.1, 5.1 and 5.3.</p>	<p><b>Acting Competently to Preserve Confidentiality</b></p> <p><del>[16]</del><sup>[24]</sup> A lawyer must act competently to safeguard information <del>relating to the representation of a client protected by Business and Professions Code section 6068(e)(1)</del> against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision. See Rules 1.1, 5.1 and 5.3.</p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>Comment [24] is identical to Model Rule 1.6, cmt. [16], except for the substitution of the defined term, “information protected by Business and Professions Code section 6068(e)(1)”. See Introduction and Explanation of Changes for paragraphs (a) and (b).</p>
<p>[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer’s expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be</p>	<p><del>[17]</del><sup>[25]</sup> When transmitting a communication that includes information <del>relating to the representation of a client protected by Business and Professions Code section 6068(e)(1)</del>, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer’s expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this</p>	<p><b>COMPARISON TO MODEL RULE 1.6</b></p> <p>Comment [25] is identical to Model Rule 1.6, cmt. [17], except for the substitution of the defined term, “information protected by Business and Professions Code section 6068(e)(1)”. See Introduction and Explanation of Changes for paragraphs (a) and (b).</p>

<p align="center"><b><u>ABA Model Rule 1.6/Cal. Rule 3-100</u></b>  <b>Confidentiality of Information</b>  <b><u>Comment</u><sup>1</sup></b></p>	<p align="center"><b><u>Commission’s Proposed Rule</u></b>  <b>Rule 1.6 Confidentiality of Information</b>  <b><u>Comment</u><sup>2</sup></b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>prohibited by this Rule.</p>	<p>Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.</p>	
<p>[13] <i>Other exceptions to confidentiality under California law.</i> Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law. (Added by order of the Supreme Court, operative July 1, 2004.)</p>	<p><del>[13] <i>Other exceptions to confidentiality under California law.</i> Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law. (Added by order of the Supreme Court, operative July 1, 2004.)</del></p>	<p><b>COMPARISON TO CAL. RULE 3-100</b>  Discussion ¶. [13] to current rule 3-100 has been deleted as superfluous, as proposed Rule 1.6 is a comprehensive statement of the exceptions to confidentiality in California.</p>
<p><b>Former Client</b></p> <p>[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.</p>	<p><b>Former Client</b></p> <p>[18] The duty of confidentiality continues after the <del>client-lawyer-client</del> relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.</p>	<p><b>COMPARISON TO MODEL RULE 1.6</b>  Comment [26] is nearly identical to Model Rule 1.6, cmt. [18], the only change being to change “client-lawyer” to “lawyer-client” to conform with the convention used in the Bus. &amp; Prof. and Evid. Codes.</p>

## Rule 1.6 Confidentiality of Information

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

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

## Comment

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

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

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

~~confidential~~ information protected by Business ~~&~~ Professions Code section 6068(e)(1). (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

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

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

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

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

### *Scope of the Duty of Confidentiality*

- [5] A lawyer's duty of confidentiality, on the other hand, is not so limited as the lawyer-client privilege. The duty protects the relationship of trust

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

*Relationship of Confidentiality to Lawyer Work Product*

[6] ~~Confidential information relating to the representation and contained in lawyer work product is~~Information protected under this Rule. However, "confidential information relating to the representation by Business and Professions Code section 6068(e)(1)" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates. However, the fact that information can be discovered in a public record does not,

by itself, render that information "generally known" and therefore outside the scope of this Rule. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)

[7] Paragraph (a) prohibits a lawyer from revealing ~~confidential~~information ~~relating to the representation of a client~~protected by Business and Professions Code section 6068(e)(1). This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the client's representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved. [8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6. See also California Rules of Court, ~~Rules~~ 3.35-3.37 (limited scope rules applicable in civil matters generally), and 5.70-5.71 (limited scope rules applicable in family law matters).

*Authorized Disclosure*

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

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

[9] ~~Narrow exception to duty of confidentiality under paragraph (b)(1).~~Notwithstanding the important public policies promoted by the duty of confidentiality, the overriding value of life permits certain

disclosures otherwise prohibited under Business ~~&~~ Professions Code section 6068(e)(1). Paragraph (b)(1) ~~restates~~ is based on Business and Professions Code section 6068(e)(2), which narrowly permits a lawyer to disclose ~~confidential~~ information ~~relating to the representation~~ protected by Business and Professions Code section 6068(e)(1) even without client consent. Evidence Code section 956.5, which relates to the evidentiary lawyer-client privilege, sets forth a similar express exception. Although a lawyer is not permitted to reveal ~~confidential~~ protected information concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act. [11] Paragraph (d)(2) authorizes a lawyer to counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law, rule or ruling of a tribunal. Determining the validity, scope, meaning or application of a law, rule, or ruling of a tribunal in good faith may require a course of action involving disobedience of the law, rule, or ruling of a tribunal, or of the meaning placed upon it by governmental authorities. Paragraph (d)(2) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes to be unjust.

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

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

harm to an individual. A lawyer who reveals ~~confidential~~ protected information as permitted under paragraph (b)(1) is not subject to discipline

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

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

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

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

(1) the amount of time that the lawyer has to make a decision about disclosure;

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

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

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

- [13] Paragraph (c)(1) provides that, before a lawyer may reveal ~~confidential~~ information protected by Business and Professions Code section

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

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

[14] A lawyer is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 1.4; and Business and Professions Code, section 6068(m). Paragraph (c)(2), however, recognizes that under certain circumstances, informing a client of the lawyer's ability or decision to reveal ~~confidential~~protected information under paragraph (b)(1) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the lawyer or the lawyer's family or associates. Therefore, paragraph (c)(2) requires a lawyer to inform the client of the lawyer's ability or decision to reveal ~~confidential~~protected information as provided in paragraph (b)(1) only if it is reasonable to do so under the circumstances. Paragraph (c)(2) further recognizes that the appropriate time for the lawyer to inform the client may vary depending upon the circumstances. (See ~~comment~~Comment [16].) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

- (1) whether the client is an experienced user of legal services;
- (2) the frequency of the lawyer's contact with the client;
- (3) the nature and length of the professional relationship with the client;
- (4) whether the lawyer and client have discussed the lawyer's duty of confidentiality or any exceptions to that duty;

- (5) the likelihood that the client's matter will involve information within paragraph (b)(1);
- (6) the lawyer's belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and
- (7) the lawyer's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

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

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

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

[16] The foregoing flexible approach to a lawyer informing a client of his or her ability or decision to reveal ~~confidential~~protected information

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

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

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

#### *Other Consequences of the Lawyer's Disclosure*

[18] Depending on the circumstances of a lawyer's disclosure of ~~confidential~~[protected](#) information [as permitted by this Rule](#), there may

be other important issues that a lawyer must address. For example, a lawyer who is likely to testify in a matter involving the client must comply with [Rule \[3.7\]](#). Similarly, the lawyer must also consider the lawyer's duty of competence (Rule 1.1) and whether the lawyer has a conflict of interest in continuing to represent the client ([Rule 1.7](#)~~(d)~~).

#### *Disclosure as Permitted by Paragraphs (b)(2) ~~Through~~[through](#) (b)~~(4)~~[\(5\)](#)*

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

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

[21] A lawyer may be ordered to reveal ~~confidential~~ information ~~relating to the representation of a client~~[protected by Business and Professions Code section 6068\(e\)\(1\)](#) by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer must assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the lawyer-client privilege or other applicable law. See, e.g., *People v. Kor* (1954) 129 Cal. App. 2d 436 [\[277 P.2d 94\]](#). In the event of an adverse ruling, the lawyer must consult with the client ~~about the~~

~~possibility of appeal~~ to the extent required by Rule 1.4 about the possibility of appeal. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order.

- [22] Paragraph (d) permits disclosure as permitted by paragraphs (b)(2) through (b)(5) only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the ~~confidential~~protected information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.
- [23] Paragraph (b) permits but does not require the disclosure of ~~confidential~~ information ~~relating to a client's representation~~protected by Business and Professions Code section 6068(e)(1) to accomplish the purposes specified in paragraphs (b)(2) through (b)(5).

#### Acting Competently to Preserve Confidentiality

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

- [25] When transmitting a communication that includes information ~~relating to the representation of a client~~protected by Business and Professions Code section 6068(e)(1), the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

#### *Former Client*

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

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

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

- ~~(A)~~(a) A ~~member~~lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, ~~subdivision~~(e)(1) ~~without the informed consent of~~unless the client, ~~gives informed consent or as provided in~~the disclosure is permitted by paragraph ~~(Bb)~~ of this rule.
- (b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068(e)(1) to the extent that the lawyer reasonably believes the disclosure is necessary:
- ~~(B)(1)~~ ~~A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary~~to prevent a criminal act that the ~~member~~lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, ~~as provided in paragraph (C)~~:
- ~~(2)~~ to secure legal advice about the lawyer's compliance with the lawyer's professional obligations;
  - ~~(3)~~ to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client relating to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship;
  - ~~(4)~~ to comply with a court order; or
  - ~~(5)~~ to protect the interests of a client under the limited circumstances identified in Rule 1.14(b).
- ~~(C)~~(c) Further obligations under paragraph (b)(1). Before revealing ~~confidential~~information protected by Business and Professions Code section 6068(e)(1) in order to prevent a criminal act as provided in paragraph ~~(Bb)(1)~~, a ~~member~~lawyer shall, if reasonable under the circumstances:
- (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and
  - (2) inform the client, at an appropriate time, of the ~~member's~~lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068(e)(1) as provided in paragraph ~~(Bb)(1)~~.
- ~~(D)~~(d) In revealing ~~confidential~~information protected by Business and Professions Code section 6068(e)(1) as ~~provided in~~permitted by paragraph ~~(Bb)~~, the ~~member's~~lawyer's disclosure must be no more than is necessary to prevent the criminal act, secure confidential legal advice, establish a claim or defense in a controversy between the lawyer and a client, protect the interests of the client, or to comply with a court order given the information known to the ~~member~~lawyer at the time of the disclosure.
- ~~(E)~~(e) A ~~member~~lawyer who does not reveal information protected by Business and Professions Code section 6068(e)(1) as permitted by paragraph ~~(Bb)~~ does not violate this ~~rule~~Rule.

**Discussion:**  
**Comment**

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

Policies Furthered by the Duty of Confidentiality

~~[1]~~<sup>[2]</sup> Duty of confidentiality. Paragraph (Aa) relates to a ~~member's~~<sup>lawyer's</sup> obligations under Business and Professions Code section 6068, ~~subdivision~~ (e)(1), which provides it is a duty of a ~~member~~<sup>lawyer</sup>: "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~~<sup>lawyer's</sup> duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Rere Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the ~~client~~-lawyer-client relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or ~~legally damaging~~<sup>subject matter</sup>~~deleterious~~ subjects. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the

advice given, and the law is upheld. Paragraph (Aa) thus recognizes a fundamental principle in the ~~client~~-lawyer-client relationship, that, in the absence of the client's informed consent, a ~~member~~<sup>lawyer</sup> must not reveal information ~~relating to the representation~~<sup>protected by Business and Professions Code section 6068(e)(1)</sup>. (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

Information protected by Business and Professions Code section 6068(e)(1.)

~~[2]~~<sup>[3]</sup> ~~Client-lawyer confidentiality encompasses the attorney-client privilege. As used in this Rule, the work-product doctrine and ethical standards of confidentiality. The principle of client-lawyer confidentiality applies to~~ "information ~~relating to~~<sup>protected by Business and Professions Code section 6068(e)(1)</sup>" consists of information ~~gained by virtue of~~ the representation of a client, whatever its source, ~~and encompasses matters communicated in confidence by the client, and therefore that (a) is protected by the attorney-lawyer-client privilege, matters protected by (b) is likely to be embarrassing or detrimental to the work-product doctrine client if disclosed, and matters protected under ethical standards or (c) the client has requested be kept confidential. Therefore, the lawyer's duty of confidentiality, all as established defined in law, rule Business and policy Professions Code section 6068(e) is broader than lawyer-client privilege.~~ (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal. Rptr. 253].) ~~The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member's ethical duty of confidentiality is not so limited in its scope of protection for the client-lawyer relationship of trust and prevents a member from revealing the client's confidential information even when not confronted with such compulsion. Thus, a member may not reveal~~

~~such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law.~~

#### Scope of the Lawyer-Client Privilege

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

#### Scope of the Duty of Confidentiality

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

information protected by Business and Professions Code section 6068(e)(1) except with the consent of the client or an authorized representative of the client, or as authorized by these Rules or the State Bar Act.

#### Relationship of Confidentiality to Lawyer Work Product

- [6] "Information protected by Business and Professions Code section 6068(e)(1)" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates. However, the fact that information can be discovered in a public record does not, by itself, render that information "generally known" and therefore outside the scope of this Rule. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)
- [7] Paragraph (a) prohibits a lawyer from revealing information protected by Business and Professions Code section 6068(e)(1). This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the client's representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

#### Authorized Disclosure

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

[Disclosure Adverse to Client as Permitted by Paragraph \(b\)\(1\)](#)

~~[3][9] Narrow exception to duty of confidentiality under this Rule.~~ Notwithstanding the important public policies promoted by ~~lawyers~~ ~~adhering to the core~~ duty of confidentiality, the overriding value of life permits certain disclosures otherwise prohibited under ~~Business & Professions Code section 6068(e), subdivision (1).~~ Paragraph (B), ~~which restates Business and Professions Code section 6068, subdivision (e)(1).~~ Paragraph (b)(1) is based on Business and Professions Code section 6068(e)(2), identifies which narrowly permits a narrow confidentiality exception, absent the client's informed consent, when a member reasonably believes that disclosure is necessary lawyer to prevent a criminal act that the member reasonably believes is likely to result in the death of, or substantial bodily harm to an individual disclose information protected by Business and Professions Code section 6068(e)(1) even without client consent. Evidence Code section 956.5, which relates to the evidentiary ~~attorney~~ lawyer-client privilege, sets forth a similar express exception. Although a member lawyer is not permitted to reveal ~~confidential~~ protected information concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

[Lawyer Not Subject to Discipline for Revealing Protected Information as Permitted Under Paragraph \(b\)\(1\)](#)

~~[10][4] Member not subject to discipline for revealing confidential information as permitted under this Rule.~~ Rule 3-100, which restates ~~Business and Professions Code section 6068, subdivision 1.6(eb)(21),~~ reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a member lawyer reasonably believes

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

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

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

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

~~[6][12] Deciding to reveal confidential information as permitted under paragraph (B).~~ Disclosure permitted under paragraph ~~(B)~~ (b)(1) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing protected information as permitted under paragraph ~~(B)~~ (b)(1), the member lawyer must, if reasonable under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose ~~confidential~~ such information are the following:

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

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

[Counseling Client or Third Person Not to Commit a Criminal Act Reasonably Likely to Result in Death of Substantial Bodily Harm](#)

~~[7]13] Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm.~~ Subparagraph Paragraph (C)(1) provides that, before a memberlawyer may reveal confidential information protected by Business and Professions Code section 6068(e)(1), the memberlawyer must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, including persuading the client to take action to prevent a third person from committing or continuing a criminal act. If necessary, the client may be persuaded to do both. The interests protected by such counseling isare the client's interestinterests in limiting disclosure of confidentialprotected information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the member'slawyer's counseling or otherwise, takes corrective action - such as by ceasing the client's own criminal act or by dissuading a third person from committing or continuing a criminal act before harm is caused - the option for permissive disclosure by the memberlawyer would cease asbecause the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the memberlawyer who contemplates making adverse disclosure of confidentialprotected information may reasonably conclude that the compelling interests of the memberlawyer or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the memberlawyer should, if reasonable under the circumstances, first advise the client of the member'slawyer's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the memberlawyer should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent the harm. Even when the memberlawyer has concluded that paragraph (B)(1)

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

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

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

~~[9][14]—Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2). A [memberlawyer](#) is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule [3-500;1.4 and](#) Business and Professions Code, section 6068, ~~subdivision (m)~~. Paragraph (C)(2), however, recognizes that under certain circumstances, informing a client of the [member'slawyer's](#) ability or decision to reveal [confidentialprotected](#) information under paragraph (B)(1) would likely increase the risk of death or substantial bodily~~

harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the [memberlawyer](#) or the [member'slawyer's](#) family or associates. Therefore, paragraph (C)(2) requires a [memberlawyer](#) to inform the client of the [member'slawyer's](#) ability or decision to reveal [confidentialprotected](#) information as provided in paragraph (B)(1) only if it is reasonable to do so under the circumstances. Paragraph (C)(2) further recognizes that the appropriate time for the [memberlawyer](#) to inform the client may vary depending upon the circumstances. (See [paragraphComment \[1016\] of this discussion.](#)) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

- (1) whether the client is an experienced user of legal services;
- (2) the frequency of the [member'slawyer's](#) contact with the client;
- (3) the nature and length of the professional relationship with the client;
- (4) whether the [memberlawyer](#) and client have discussed the [member'slawyer's](#) duty of confidentiality or any exceptions to that duty;
- (5) the likelihood that the client's matter will involve information within paragraph (B)(1);
- (6) the [member'slawyer's](#) belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and

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

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

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

Avoiding a Chilling Effect on the Lawyer-Client Relationship

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

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

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

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

Other Consequences of the Lawyer's Disclosure

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

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

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

Disclosure as Permitted by Paragraphs (b)(2) through (b)(5)

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

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

[21] A lawyer may be ordered to reveal information protected by Business and Professions Code section 6068(e)(1) by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer must assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the lawyer-client privilege or other applicable law. See, e.g., *People v. Kor* (1954) 129 Cal. App. 2d 436 [277 P.2d 94]. In the event of an adverse ruling, the lawyer must consult with the client to the extent required by Rule 1.4 about the possibility of appeal. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order.

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

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

Acting Competently to Preserve Confidentiality

- [24] A lawyer must act competently to safeguard information protected by Business and Professions Code section 6068(e)(1) against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.
- [25] When transmitting a communication that includes information protected by Business and Professions Code section 6068(e)(1), the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

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

## Rule 1.6 Confidentiality of Information

(Commission's Proposed Rule – Clean Version)

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

### Comment

- [1] This Rule governs the disclosure by a lawyer of information protected by Business and Professions Code section 6068(e)(1) during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a

prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and Rules 1.8.2 and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

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

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

#### *Information protected by Business and Professions Code section 6068(e)(1).*

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

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

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

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

- [5] A lawyer's duty of confidentiality, on the other hand, is not so limited as the lawyer-client privilege. The duty protects the relationship of trust between a lawyer and client by preventing the lawyer from revealing the client's protected information, regardless of its source and even when not confronted with compulsion. As a result, any information the lawyer has learned during the representation, even if not relevant to the matter for which the lawyer was retained, is protected under the duty so long as the lawyer acquires the information by virtue of being in

the lawyer-client relationship. Information protected by Business and Professions Code section 6068(e)(1) is not concerned only with information that a lawyer might learn after a lawyer-client relationship has been established. Information that a lawyer acquires about a client before the relationship is established, but which is relevant to the matter for which the lawyer is retained, is protected under the duty regardless of its source. The duty also applies to information a lawyer acquires during a lawyer-client consultation, whether from the client or the client's representative, even if a lawyer-client relationship does not result from the consultation. See Rule 1.18. Thus, a lawyer may not reveal information protected by Business and Professions Code section 6068(e)(1) except with the consent of the client or an authorized representative of the client, or as authorized by these Rules or the State Bar Act.

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

- [6] "Information protected by Business and Professions Code section 6068(e)(1)" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates. However, the fact that information can be discovered in a public record does not, by itself, render that information "generally known" and therefore outside the scope of this Rule. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)
- [7] Paragraph (a) prohibits a lawyer from revealing information protected by Business and Professions Code section 6068(e)(1). This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the client's representation is permissible so

long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

#### *Authorized Disclosure*

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

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

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

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

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

harm to an individual. A lawyer who reveals protected information as permitted under paragraph (b)(1) is not subject to discipline.

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

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

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

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

- (1) the amount of time that the lawyer has to make a decision about disclosure;
- (2) whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;

- (3) whether the lawyer believes the lawyer's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;
- (4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the lawyer;
- (5) the extent of other adverse effects to the client that may result from disclosure contemplated by the lawyer; and
- (6) the nature and extent of protected information that must be disclosed to prevent the criminal act or threatened harm.

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

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

[13] Paragraph (c)(1) provides that, before a lawyer may reveal information protected by Business and Professions Code section 6068(e)(1), the lawyer must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, including persuading the client to take action to prevent a third person from committing or continuing a criminal act. If necessary, the client

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

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

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

reveal protected information under paragraph (b)(1) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the lawyer or the lawyer's family or associates. Therefore, paragraph (c)(2) requires a lawyer to inform the client of the lawyer's ability or decision to reveal protected information as provided in paragraph (b)(1) only if it is reasonable to do so under the circumstances. Paragraph (c)(2) further recognizes that the appropriate time for the lawyer to inform the client may vary depending upon the circumstances. See Comment [16]. Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

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

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

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

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

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

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

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

*Other Consequences of the Lawyer's Disclosure*

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

*Disclosure as Permitted by Paragraphs (b)(2) through (b)(5)*

[19] If a legal claim by a client or the client's representative alleges a breach of duty by the lawyer involving representation of the client or a disciplinary charge filed by or with the cooperation of the client or the client's representative alleges misconduct of the lawyer involving

representation of the client, paragraph (b)(3) permits the lawyer to respond only to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving conduct or representation of a former client.

- [20] A lawyer entitled to a fee is permitted by paragraph (b)(3) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.
- [21] A lawyer may be ordered to reveal information protected by Business and Professions Code section 6068(e)(1) by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer must assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the lawyer-client privilege or other applicable law. See, e.g., *People v. Kor* (1954) 129 Cal. App. 2d 436 [277 P.2d 94]. In the event of an adverse ruling, the lawyer must consult with the client to the extent required by Rule 1.4 about the possibility of appeal. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order.
- [22] Paragraph (d) permits disclosure as permitted by paragraphs (b)(2) through (b)(5) only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that

limits access to the protected information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

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

*Acting Competently to Preserve Confidentiality*

- [24] A lawyer must act competently to safeguard information protected by Business and Professions Code section 6068(e)(1) against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.
- [25] When transmitting a communication that includes information protected by Business and Professions Code section 6068(e)(1), the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

*Former Client*

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

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

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

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

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

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

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

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

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

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

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					disclose confidential information).	
4	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	M		Cmt. [5]  Cmt. [6]  Cmt. [9]  Cmts. [23] & [26]	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).  Comment [6] should be clarified to distinguish between “generally known” information, which is not protected under the rule, and information in the public record, which is protected.  The first line of Comment [9] is an incomplete sentence. If this is intended as a title for the Comment, perhaps it should be italicized?  We also believe that Comments [23] and [26] do not add anything to the interpretation of the rule and should be deleted. These are simply repetitive of what is stated elsewhere in the comments or rules. Even though Comment [26] is derived from ABA Comments, we believe it is unnecessary and duplicative.	The Commission 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.  The Commission agrees and has added a sentence to Comment [6].  LACBA correctly noted the first “sentence” is a heading and it has been revised as a heading in conformance with the Rules format.  The Commission has not made the requested changes. Comment [23] corresponds to Comment [11], currently found in rule 3-100. What Comment [11] states with respect to paragraph (b)(1), Comment [23] does with respect to paragraphs (b)(2) – (b)(5). Comment [26] and its heading points lawyers to Rule 1.9 concerning their duties with respect to former clients’ confidential information.



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

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

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.6(b)(4)	to establish a claim or defense on behalf of the lawyer without a court determination.  4. OCTC disagrees with the removal of the Model Rule's phrase "other law" from subparagraph (b)(4).	Comment [19] emphasize that a lawyer may reveal information only to the extent that it is necessary to establish a claim or defense. As the lawyer will be revealing such information only before a tribunal in which the lawyer-client controversy plays out, the necessary protections should be present.  4. Please see response to COPRAC comment re 1.6(b)(4), above.
				1.6(b)(5)	OCTC agrees with retaining "court order" exception in subparagraph (b)(4).  5. OCTC has expressed concerns in relation to proposed Rule 1.14.	No response necessary.  5. Please see discussion in Chart re proposed Rule 1.14.
				1.6(e)	6. OCTC believes that paragraph (e) is too broad in extending current rule 3-100(E) to all subparagraphs of paragraph (b) and not limit it to subparagraph (b)(1) as in current rule 3-100. For example, OCTC believes paragraph (e) would permit a lawyer to escape discipline even if the lawyer refused a court order after an appeal determined the information sought must be disclosed.	The Commission does not believe any change need be made to paragraph (e), which provides only that "[a] lawyer who does not reveal confidential information as permitted by paragraph (b) does not violate this Rule." If, after an appeal, an appellate court has determined that the lawyer must disclose what the lawyer has argued is protected under Rule 1.6, the court in effect is stating that the information is not protected under the Rule, and so the lawyer cannot rely on the rule to oppose disclosure. Regardless, refusal to disclose should not subject a lawyer to discipline under a Rule that only permits disclosure. Further, the lawyer otherwise would be subject to discipline under other provisions of the

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

**TOTAL = 10**    **Agree = 0**  
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**NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				General	7. OCTC believes that there are too many comments and does not believe a rule comment should explain a statute.	State Bar Act. 7. The Commission has not made any changes. The specific comment to which OCTC refers, Cmt. [9], is in the Discussion to current rule 3-100 (¶. 3). The drafting of rule 3-100 was a cooperative venture among the Legislature, the Supreme Court, and the State Bar, as provided in AB 1101, which expressly provided for the appointment of a task force by the State Bar President in consultation with the Supreme Court "to make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act." In addition, the bill identified a number of issues that should be addressed in the rule, which are the subject of the Comments [9] to [18] of the proposed Rule.
				Cmt. [15]	8. OCTC suggests that Comment [15] is too narrow and applies only to prevent criminal conduct and should be stricken.	8. The Commission has not made the suggested change. Comment [15] concerns only subparagraph (b)(1), which itself is limited to preventing criminal conduct.
				Cmt. [19]	OCTC also objects to Comment [19], arguing that it "could result in a claim that, in an investigation commenced under the State Bar's own authority and not the result of a client's complaint, the respondent does not have to provide certain information."	The Commission notes that Comment [19] provides only that a lawyer may disclose information without the client's permission in order to defend himself or herself against the client's allegations. Neither paragraph (b)(3) nor Comment [19] is not intended to provide OCTC with the ability to force a lawyer to breach his or her duty of confidentiality without the client's permission.

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

## Rule 1.6: Confidentiality of Information

### STATE VARIATIONS

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

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

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

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

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

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

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

**California:** California Business & Professions Code § 6068 (e)(1) provides that it is the duty of an attorney “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” However, §6068(e)(2) provides that an attorney “may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.” In addition, Rule 3-100 of the California Rules of Professional Conduct provides as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Massachusetts:** Rule 1.6(b) provides as follows:

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

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

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

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

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

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

(1) the client gives informed consent;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

client ultimately consents to representation by the purchasing lawyer.”

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

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

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

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

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

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

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

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

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

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

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