



The State Bar of California

Rule 1.6 Confidential Information of a Client (Rule Approved by the Supreme Court, Effective November 1, 2018)

- (a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent,* or the disclosure is permitted by paragraph (b) of this rule.
- (b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) to the extent that the lawyer reasonably believes* the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes* is likely to result in death of, or substantial* bodily harm to, an individual, as provided in paragraph (c).
- (c) Before revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) to prevent a criminal act as provided in paragraph (b), a lawyer shall, if reasonable* under the circumstances:
 - (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act; or (ii) to pursue a course of conduct that will prevent the threatened death or substantial* bodily harm; or do both (i) and (ii); and
 - (2) inform the client, at an appropriate time, of the lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b).
- (d) In revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, given the information known* to the lawyer at the time of the disclosure.
- (e) A lawyer who does not reveal information permitted by paragraph (b) does not violate this rule.

Comment

Duty of confidentiality

[1] Paragraph (a) relates to a lawyer's obligations under Business and Professions Code section 6068, subdivision (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, subdivision (e)(1). (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

Lawyer-client confidentiality encompasses the lawyer-client privilege, the work-product doctrine and ethical standards of confidentiality

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

Narrow exception to duty of confidentiality under this rule

[3] Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited by Business and Professions Code section 6068, subdivision (e)(1). Paragraph (b) is based on Business and Professions Code section 6068, subdivision (e)(2), which narrowly permits a lawyer to disclose information protected by Business and Professions Code section 6068, subdivision (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 information protected by section 6068, subdivision (e)(1) 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 information protected by Business and Professions Code section 6068, subdivision (e)(1) as permitted under this rule

[4] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a lawyer reasonably believes* is

likely to result in death or substantial* bodily harm to an individual. A lawyer who reveals information protected by Business and Professions Code section 6068, subdivision (e)(1) as permitted under this rule is not subject to discipline.

No duty to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1)

[5] Neither Business and Professions Code section 6068, subdivision (e)(2) nor paragraph (b) imposes an affirmative obligation on a lawyer to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) in order to prevent harm. A lawyer may decide not to reveal such information. Whether a lawyer chooses to reveal information protected by section 6068, subdivision (e)(1) as permitted under this rule is a matter for the individual lawyer to decide, based on all the facts and circumstances, such as those discussed in Comment [6] of this rule.

Whether to reveal information protected by Business and Professions Code section 6068, subdivision (e) as permitted under paragraph (b)

[6] 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 protected by Business and Professions Code section 6068, subdivision (e)(1) as permitted by paragraph (b), the lawyer must, if reasonable* under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose information protected by section 6068, subdivision (e)(1) 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 I of the Constitution of the State of California that may result from disclosure contemplated by the lawyer;
- (5) the extent of other adverse effects to the client that may result from disclosure contemplated by the lawyer; and
- (6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A lawyer may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the information protected by section 6068, subdivision (e)(1). However, the imminence of the harm is not a prerequisite to disclosure and a lawyer may disclose the information protected by section 6068, subdivision (e)(1) without waiting until immediately before the harm is likely to occur.

Whether to counsel client or third person not to commit a criminal act reasonably* likely to result in death or substantial* bodily harm*

[7] Paragraph (c)(1) provides that before a lawyer may reveal information protected by Business and Professions Code section 6068, subdivision (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 information protected by section 6068, subdivision (e) 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) does not permit the lawyer to reveal information protected by section 6068, subdivision (e)(1), the lawyer nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.

Disclosure of information protected by Business and Professions Code section 6068, subdivision (e)(1) must be no more than is reasonably necessary to prevent the criminal act*

[8] Paragraph (d) requires that disclosure of information protected by Business and Professions Code section 6068, subdivision (e) as permitted by paragraph (b), when made, must be no more extensive than is necessary to prevent the criminal act. Disclosure should allow access to the 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.

Informing client pursuant to paragraph (c)(2) of lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1)

[9] A lawyer is required to keep a client reasonably* informed about significant developments regarding the representation. (See rule 1.4; Bus. & Prof. Code, § 6068, subd. (m).) Paragraph (c)(2), however, recognizes that under certain circumstances, informing a client of the lawyer's ability or decision to reveal information protected by section 6068, subdivision (e)(1) as permitted in paragraph (b) would likely increase the risk of death or substantial* bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the lawyer or the lawyer's family or associates. Therefore, paragraph (c)(2) requires a lawyer to inform the client of the lawyer's ability or decision to reveal information protected by section 6068, subdivision (e)(1) as permitted in paragraph (b) only if it is reasonable* to do so under the circumstances. Paragraph (c)(2) further recognizes that the appropriate time for the lawyer to inform the client may vary depending upon the circumstances. (See Comment [10] of this rule.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

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

Avoiding a chilling effect on the lawyer-client relationship

[10] The foregoing flexible approach to the lawyer's informing a client of his or her ability or decision to reveal information protected by Business and Professions Code

section 6068, subdivision (e)(1) recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Comment [1].) To avoid that chilling effect, one lawyer may choose to inform the client of the lawyer's ability to reveal information protected by section 6068, subdivision (e)(1) 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), or even choose not to inform a client until such time as the lawyer attempts to counsel the client as contemplated in Comment [7]. 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

[11] When a lawyer has revealed information protected by Business and Professions Code section 6068, subdivision (e) as permitted in paragraph (b), in all but extraordinary cases the relationship between lawyer and client that is based on 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, unless the client has given 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 interest in 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

[12] Depending upon the circumstances of a lawyer's disclosure of information protected by Business and Professions Code section 6068, subdivision (e)(1) 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 as a witness in a matter involving a client must comply with rule 3.7. Similarly, the lawyer must also consider his or her duties of loyalty and competence. (See rules 1.7 and 1.1.)

Other exceptions to confidentiality under California law

[13] This rule is not intended to augment, diminish, or preclude any other exceptions to the duty to preserve information protected by Business and Professions Code section 6068, subdivision (e)(1) recognized under California law.

**NEW RULE OF PROFESSIONAL CONDUCT 1.6
(Former Rule 3-100)
Confidential Information of a Client**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 3-100 (Confidential Information of a Client) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 1.6 (Confidentiality of Information). The Commission also reviewed relevant California statutes, rules, case law, and ethics opinions relating to the issues addressed by the proposed rule. The result of this evaluation is proposed rule 1.6 (Confidential Information of a Client).

Rule As Issued For 90-day Public Comment

Proposed rule 1.6 is nearly identical to current rule 3-100 but has been renumbered to correspond to the ABA Model Rules. California’s treatment of lawyer-client confidentiality is unique. Unlike every other jurisdiction in the country, whose statement of a lawyer’s duty of confidentiality is contained in a rule of professional conduct that has been adopted by the jurisdiction’s highest court, California’s duty of confidentiality is contained in a statutory provision passed by the California legislature and enacted in 1872. The history of current rule 3-100 provides insight into proposed rule 1.6. First, because current rule 3-100 is an outgrowth of a legislative amendment to Business and Professions Code § 6068(e), the rule was never intended to function solely as a disciplinary rule, but was instead drafted with the intent of providing guidance to California lawyers on how to proceed when confronted with circumstances addressed in the sole statutory exception to the rule. Understanding this intent helps explain the relatively large number of lengthy comments that this proposed rule contains. Second, the history further suggests that any substantive amendment, including concepts contained in the ABA Model Rules, would require amendment of Business and Professions Code § 6068(e). This is especially true of any express exceptions to the duty of confidentiality and is one of the principal reasons why proposed rule 1.6 contains no major deviations from current rule 3-100.

Paragraph (a)(1) carries forward the language of current rule 3-100 and provides a duty to protect client confidential information to the extent mandated by Business and Professions Code § 6068(e)(1) unless the client gives informed consent or as provided by paragraph (b).

Paragraph (b) carries forward the language of current rule 3-100 and provides that a lawyer may reveal confidential information to the extent necessary to prevent a criminal act resulting in serious bodily injury or death.

Paragraph (c) carries forward the language of current rule 3-100 and provides the steps that a lawyer must take, if reasonable, before disclosing client confidential information.

Paragraph (d) carries forward the language of current rule 3-100 and provides that a lawyer may not disclose any more confidential information than is necessary to prevent a criminal act resulting in serious bodily injury or death.

Paragraph (e) carries forward the language of current rule 3-100 and provides that a lawyer does not violate the rule by declining to reveal confidential information permitted by paragraph (b).

Comment [1] provides context for the rule and explains the policy underlying the duty of confidentiality. The term “detrimental subjects” has been substituted for the phrase “legally damaging subject matter” in current rule 3-100. The language is derived from California ethics opinions that have traditionally understood the term “secrets” in Business and Professions Code § 6068(e)(1) to mean information that the client has requested be kept confidential or which would be embarrassing or detrimental to the client.

Comment [2] provides the scope of the information protected under Business and Professions Code § 6068(e)(1). It clarifies that the duty of confidentiality is broader than the lawyer-client privilege and also includes information acquired by virtue of the representation, regardless of the source, and information protected under the work product doctrine.

Comment [3] explains that the rule provides a narrow exception to the duty of confidentiality derived from Business and Professions Code § 6068(e)(2). Moreover, by distinguishing between “past, completed” and “future or ongoing” criminal acts, the comment provides important guidance to lawyers regarding the scope of the exception.

Comment [4] is a counterpoint to paragraph (e) and provides that a lawyer is not subject to discipline if the lawyer discloses confidential information in compliance with the provisions provided in paragraph (c). The comment also provides the rationale for the provision, i.e., the balance between protecting client confidential information and the prevention of a criminal act resulting in serious bodily injury or death.

Comment [5] provides that there is no duty to disclose confidential information and that the decision to disclose rests solely with the lawyer.

Comment [6] provides critical guidance to lawyers in the form of a list of non-exclusive factors a lawyer should balance in deciding whether to disclose confidential information in order to prevent a criminal act resulting in serious bodily injury or death. The comment further clarifies that the threatened harm need not be imminent for the exception to apply.

Comment [7] provides critical guidance to a lawyer deciding whether and when to counsel either a client or a third person not to commit or continue a criminal act resulting in serious bodily injury or death as required under paragraph (c)(1).

Comment [8] clarifies what is meant by the limiting clause in paragraph (a), “to the extent that the lawyer reasonably believes the disclosure is necessary.” Because of the numerous ways in which a lawyer may disclose confidential information, the comment provides guidance, including examples of relevant circumstances that a lawyer might consider in determining the extent of the permitted disclosure under the circumstances.

Comment [9] requires a lawyer, if reasonable under the circumstances, to inform the client of the lawyer’s ability or decision to disclose confidential information to prevent a criminal act resulting in serious bodily injury or death. The comment provides critical guidance by setting forth seven non-exclusive factors to assist a lawyer in determining when such a disclosure should be made.

Comment [10] further elaborates upon paragraph (c)(2)'s requirement of informing a client of the ability or decision to disclose. The comment explains that there is no specific time when the disclosure must be made and provides a range of possibilities.

Comment [11] provides that disclosure of confidential information permitted by paragraph (b) will likely result in a deterioration of the lawyer-client relationship such that withdrawal may be necessary.

Comment [12] provides that other consequences may arise from disclosure permitted by paragraph (b) and identifies other rules a lawyer should consult in determining the lawyer's course of action.

Comment [13] addresses the fact that the rule does not comprehensively address a lawyer's duty of confidentiality and puts the lawyer on notice that there may be other obligations or exceptions not addressed in the rule, none of which the rule is designed to supersede.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission added "informed" consent in Comment [2] for consistency to paragraph (a) and deleted the term "employment or" in Comment [9] as redundant to the concept of "representation." The Commission voted to recommend that the Board adopt the proposed rule.

The Board adopted proposed rule 1.6 at its November 17, 2016 meeting.

Supreme Court Action (May 10, 2018)

The Supreme Court approved the rule as submitted by the State Bar to be effective November 1, 2018. But see, stylistic changes made by the Court in Comments [8] and [9] and, in Comment [12], the addition of a period after the word "rule" and before the "3.7." The addition of the period in Comment [12] appears to be an inadvertent copyediting error.

Supreme Court Action (September 26, 2018)

Subsequently, the Board adopted staff recommended "clean-up" revisions to various rules, including this rule. All of these changes were non-substantive and, for example, implemented copy editing corrections to style and punctuation. The Supreme Court approved the "clean-up" revisions operative November 1, 2018 by order dated September 26, 2018.

Rule 1.6 ~~[3-100]~~ Confidential Information of a Client
(Redline Comparison to the California Rule Operative Until October 31, 2018)

- (Aa) A ~~member~~lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) ~~without~~unless the client gives informed consent ~~of the client,*~~ or ~~as provided in~~the disclosure is permitted by paragraph (Bb) of this rule.
- (Bb) A ~~member~~lawyer may, but is not required to, reveal ~~confidential~~information ~~relating to the representation of a client to the~~protected by Business and Professions Code section 6068, subdivision (e)(1) to the extent that the ~~member~~lawyer 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).
- (Cc) Before revealing ~~confidential~~information protected by Business and Professions Code section 6068, subdivision (e)(1) to prevent a criminal act as provided in paragraph (Bb), 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, subdivision (e)(1) as provided in paragraph (Bb).
- (Dd) In revealing ~~confidential~~information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (Bb), the ~~member's~~lawyer's disclosure must be no more than is necessary to prevent the criminal act, given the information known* to the ~~member~~lawyer at the time of the disclosure.
- (Ee) A ~~member~~lawyer who does not reveal information permitted by paragraph (Bb) does not violate this rule.

DiscussionComment

Duty of confidentiality

[1] ~~Duty of confidentiality.~~ Paragraph (Aa) relates to a ~~member's~~lawyer's obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a ~~member~~lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A ~~member's~~lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].)

Preserving the confidentiality of client information contributes to the trust that is the hallmark of the ~~client-lawyer~~lawyer-client relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or ~~legally damaging subject matter~~detrimental subjects. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (Aa) thus recognizes a fundamental principle in the ~~client-lawyer~~lawyer-client relationship, that, in the absence of the ~~client's~~client's informed consent,* a ~~member~~lawyer must not reveal information ~~relating to the representation~~protected by Business and Professions Code section 6068, subdivision (e)(1). (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

[2] ~~Client-lawyer~~Lawyer-client confidentiality encompasses the ~~attorney-client~~lawyer-client privilege, the work-product doctrine and ethical standards of confidentiality

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

Narrow exception to duty of confidentiality under this rule

[3] ~~Narrow exception to duty of confidentiality under this Rule.~~ Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited ~~under by~~ Business ~~&and~~ Professions Code section 6068, subdivision (e)(1). Paragraph ~~(B), which restates b)~~ is based on 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~~which narrowly permits a lawyer to disclose information protected by Business and Professions Code section 6068,

subdivision (e)(1) even without client consent. Evidence Code section 956.5, which relates to the evidentiary ~~attorney-client~~lawyer-client privilege, sets forth a similar express exception. Although a ~~member~~lawyer is not permitted to reveal ~~confidential~~ information protected by section 6068, subdivision (e)(1) concerning a ~~client's~~client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

~~[4] Member~~Lawyer ~~not subject to discipline for revealing confidential information as permitted under this Rule. Rule 3-100, which restates~~ protected by Business and Professions Code section 6068, subdivision (e)(2); as permitted under this rule

[4] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a ~~member~~lawyer reasonably believes* is likely to result in death or substantial* bodily harm to an individual. A ~~member~~lawyer who reveals information protected by Business and Professions Code section 6068, subdivision (e)(1) as permitted under this rule is not subject to discipline.

No duty to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1)

~~[5] No duty to reveal confidential information.~~ Neither Business and Professions Code section 6068, subdivision (e)(2) nor ~~this rule~~paragraph (b) imposes an affirmative obligation on a ~~member~~lawyer to reveal information protected by Business and Professions Code section 6068, subdivision (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~~ information protected by section 6068, subdivision (e)(1) as permitted under this 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 [6] of this discussion rule.

Whether to reveal information protected by Business and Professions Code section 6068, subdivision (e) as permitted under paragraph (b)

~~[6] Deciding to reveal confidential information as permitted under paragraph (B).~~ Disclosure permitted under paragraph (~~B~~b) is ordinarily a last resort, when no other available action is reasonably* likely to prevent the criminal act. Prior to revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) as permitted ~~under~~by paragraph (~~B~~b), 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~~ information protected by section 6068, subdivision (e)(1) are the following:

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

- (2) whether the client or a ~~third party~~third-party has made similar threats before and whether they have ever acted or attempted to act upon them;
- (3) whether the ~~member~~lawyer believes* the ~~member's~~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~~client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 4~~l~~ of the Constitution of the State of California that may result from disclosure contemplated by the ~~member~~lawyer;
- (5) the extent of other adverse effects to the client that may result from disclosure contemplated by the ~~member~~lawyer; and
- (6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A ~~member~~lawyer may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the ~~confidential~~ information protected by section 6068, subdivision (e)(1). However, the imminence of the harm is not a prerequisite to disclosure and a ~~member~~lawyer may disclose the information protected by section 6068, subdivision (e)(1) without waiting until immediately before the harm is likely to occur.

~~[7]~~ Counseling *Whether to counsel client or third person* not to commit a criminal act reasonably* likely to result in death ~~of~~or substantial* bodily harm*

~~[7]~~ Paragraph (c)–Subparagraph(C)(1) provides that before a ~~member~~lawyer may reveal ~~confidential~~ information, ~~the member~~ protected by Business and Professions Code section 6068, subdivision (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, ~~or if 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 ~~is the client's interest~~ are the client's interests in limiting disclosure of ~~confidential~~ information protected by section 6068, subdivision (e) and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the ~~member's~~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 ~~member~~lawyer would cease ~~as~~because the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the ~~member~~lawyer who contemplates making adverse disclosure of ~~confidential~~protected 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 (Bb) does not permit the [memberlawyer](#) to reveal [confidential](#) information, ~~the member~~ [protected by section 6068, subdivision \(e\)\(1\), the lawyer](#) nevertheless is permitted to counsel the client as to why it may be in the [client'sclient's](#) best interest to consent to the [attorney'sattorney's](#) disclosure of that information.

[8] *Disclosure of [confidential](#) information [protected by Business and Professions Code section 6068, subdivision \(e\)\(1\)](#) must be no more than is reasonably* necessary to prevent the criminal act* ~~Under paragraph (D),~~

[8] [Paragraph \(d\) requires that](#) disclosure of [confidential](#) information [protected by Business and Professions Code section 6068, subdivision \(e\) as permitted by paragraph \(b\)](#), when made, must be no more extensive than ~~the member~~ [reasonably believes](#) is necessary to prevent the criminal act. Disclosure should allow access to the [confidential](#) information to only those persons* who the [memberlawyer](#) reasonably believes* can act to prevent the harm. Under some circumstances, a [memberlawyer](#) may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable* depends on the circumstances known* to the [memberlawyer](#). Relevant circumstances include the time available, whether the victim might be unaware of the threat, the [member'slawyer's](#) prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the [memberlawyer](#).

[Informing client pursuant to paragraph \(c\)\(2\) of lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068, subdivision \(e\)\(1\)](#)

[9] ~~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. ~~(See rule Rule 3-500; Business and Professions 1.4; Bus. & Prof. Code, section § 6068, subdivisions subd. (m).)~~ Paragraph (Cc)(2), however, recognizes that under certain circumstances, informing a client of the [member'slawyer's](#) ability or decision to reveal [confidential](#) information [underprotected by section 6068, subdivision \(e\)\(1\) as permitted in](#) paragraph (Bb) 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'sclient's](#) family, or to the [memberlawyer](#) or the [member'slawyer's](#) family or associates. Therefore, paragraph (Cc)(2) requires a [memberlawyer](#) to inform the client of the [member'slawyer's](#) ability or decision to reveal [confidential](#) information as

~~provided~~ protected by Business and Professions Code section 6068, subdivision (e)(1) as permitted in paragraph (Bb) only if it is reasonable* to do so under the circumstances. Paragraph (Cc)(2) further recognizes that the appropriate time for the ~~member~~lawyer to inform the client may vary depending upon the circumstances. (See paragraphComment [10] of this ~~discussion~~rule.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

- (1) whether the client is an experienced user of legal services;
- (2) the frequency of the ~~member's~~lawyer's contact with the client;
- (3) the nature and length of the professional relationship with the client;
- (4) whether the ~~—member~~lawyer and client have discussed the ~~member's~~lawyer's duty of confidentiality or any exceptions to that duty;
- (5) the likelihood that the ~~—client's~~client's matter will involve information within paragraph (Bb);
- (6) the ~~—member's~~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 ~~member's~~lawyer's belief,* if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

Avoiding a chilling effect on the lawyer-client relationship

[10] ~~-Avoiding a chilling effect on the lawyer-client relationship.~~—The foregoing flexible approach to the ~~member's~~lawyer's informing a client of his or her ability or decision to reveal ~~confidential~~ information protected by Business and Professions Code section 6068, subdivision (e)(1) recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Discussion paragraphComment [1].) To avoid that chilling effect, one ~~member~~lawyer may choose to inform the client of the ~~member's~~lawyer's ability to reveal information protected by section 6068, subdivision (e)(1) 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), or even choose not to inform a client until such time as the ~~member~~lawyer attempts to counsel the client as contemplated in Discussion paragraphComment [7]. In each situation, the ~~member will have discharged properly the requirement under subparagraph (C)~~lawyer will have satisfied the lawyer's obligation under paragraph (c)(2), and will not be subject to discipline.

[14] ~~-Informing client that disclosure has been made; termination of the lawyer-client relationship~~

[11] When a ~~member~~lawyer has revealed ~~confidential~~ information ~~under~~protected by Business and Professions Code section 6068, subdivision (e) as permitted in paragraph (Bb), in all but extraordinary cases the relationship between ~~member~~lawyer and client ~~that is based on 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))~~, unless the ~~member is able to obtain the client's~~client has given 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 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] ~~Other consequences of the member's disclosure.~~ Depending upon the circumstances of a ~~member's~~lawyer's disclosure of ~~confidential~~ information ~~protected by Business and Professions Code section 6068, subdivision (e)(1) 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~~lawyer who is likely to testify as a witness in ~~the client's matter, then rule 5-210 should be considered~~a matter involving a client must comply with rule 3.7. Similarly, the ~~member should~~lawyer must also consider his or her duties of loyalty and ~~competency (rule 3-110)~~competence. (See rules 1.7 and 1.1.)

Other exceptions to confidentiality under California law

[13] ~~Other exceptions to confidentiality under California law. Rule 3-100~~This rule is not intended to augment, diminish, or preclude ~~reliance upon~~, any other exceptions to the duty to preserve ~~the confidentiality of client~~ information ~~protected by Business and Professions Code section 6068, subdivision (e)(1)~~ recognized under California law.