

**Rule 1.6 Confidential Information of a Client  
(Proposed Rule Adopted by the Board on November 17, 2016)**

- (a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code § 6068(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 § 6068(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 § 6068(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 § 6068(e)(1) as provided in paragraph (b).
- (d) In revealing information protected by Business and Professions Code § 6068(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 § 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 § 6068(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 § 6068(e)(1). Paragraph (b) is based on Business and Professions Code § 6068(e)(2), which narrowly permits a lawyer to disclose information protected by Business and Professions Code § 6068(e)(1) even without client consent. Evidence Code § 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 § 6068(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 § 6068(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 § 6068(e)(1) as permitted under this rule is not subject to discipline.

*No duty to reveal information protected by Business and Professions Code § 6068(e)(1).*

[5] Neither Business and Professions Code § 6068(e)(2) nor paragraph (b) imposes an affirmative obligation on a lawyer to reveal information protected by Business and Professions Code § 6068(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 § 6068(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 § 6068(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 § 6068(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 § 6068(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 § 6068(e)(1).

However, the imminence of the harm is not a prerequisite to disclosure and a lawyer may disclose the information protected by § 6068(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] Subparagraph (c)(1) provides that before a lawyer may reveal information protected by Business and Professions Code § 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 information protected by § 6068(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 § 6068(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 § 6068(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 § 6068(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 subparagraph (c)(2) of lawyer's ability or decision to reveal information protected by Business and Professions Code § 6068(e)(1).*

[9] A lawyer is required to keep a client reasonably\* informed about significant developments regarding the representation. Rule 1.4; Business and Professions Code § 6068(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 § 6068(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 § 6068(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 § 6068(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 § 6068(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 § 6068(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 § 6068(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 § 6068(e)(1) recognized under California law.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.6  
(Current 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 1871. 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 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.



## COMMISSION REPORT AND RECOMMENDATION: RULE 1.6 [3-100]

### Commission Drafting Team Information

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### I. CURRENT CALIFORNIA RULE

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

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

#### Discussion

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

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

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

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

[4] Member not subject to discipline for revealing confidential information as permitted under this Rule. Rule 3-100, which restates Business and Professions Code section 6068, subdivision (e)(2), reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a member reasonably believes

is likely to result in death or substantial bodily harm to an individual. A member who reveals information as permitted under this rule is not subject to discipline.

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

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

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

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

[7] Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm. Subparagraph (C)(1) provides that before a member may reveal confidential information, the member must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to

continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, or if necessary, do both. The interests protected by such counseling is the client's interest in limiting disclosure of confidential information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the member's counseling or otherwise, takes corrective action – such as by ceasing the criminal act before harm is caused – 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.

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

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

the appropriate time for the member to inform the client may vary depending upon the circumstances. (See paragraph [10] of this discussion.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

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

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

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

[12] Other consequences of the member's disclosure. Depending upon the circumstances of a member's disclosure of confidential information, there may be other

important issues that a member must address. For example, if a member will be called as a witness in the client's matter, then rule 5-210 should be considered. Similarly, the member should consider his or her duties of loyalty and competency (rule 3-110).

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

## **II. FINAL VOTES BY THE COMMISSION AND THE BOARD**

### **Commission:**

Date of Vote: January 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 1.6 [3-100]

Vote: 11 (yes) – 0 (no) – 0 (abstain)

### **Board:**

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 1.6 [3-100]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

## **III. COMMISSION'S PROPOSED RULE (CLEAN)**

### **Rule 1.6 [3-100] Confidential Information of a Client**

- (a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code § 6068(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 § 6068(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 § 6068(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 § 6068(e)(1) as provided in paragraph (b).

- (d) In revealing information protected by Business and Professions Code § 6068(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 § 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 § 6068(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 § 6068(e)(1). Paragraph (b) is based on Business and Professions Code § 6068(e)(2), which narrowly permits a lawyer to disclose information protected by Business and Professions Code § 6068(e)(1) even without client consent. Evidence Code § 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 § 6068(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 § 6068(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 § 6068(e)(1) as permitted under this rule is not subject to discipline.

*No duty to reveal information protected by Business and Professions Code § 6068(e)(1).*

[5] Neither Business and Professions Code § 6068(e)(2) nor paragraph (b) imposes an affirmative obligation on a lawyer to reveal information protected by Business and Professions Code § 6068(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 § 6068(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 § 6068(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 § 6068(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 § 6068(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 § 6068(e)(1). However, the imminence of the harm is not a prerequisite to disclosure and a lawyer may disclose the information protected by § 6068(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] Subparagraph (c)(1) provides that before a lawyer may reveal information protected by Business and Professions Code § 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 information protected by § 6068(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 § 6068(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 § 6068(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 § 6068(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 subparagraph (c)(2) of lawyer's ability or decision to reveal information protected by Business and Professions Code § 6068(e)(1).*

[9] A lawyer is required to keep a client reasonably\* informed about significant developments regarding the representation. rule 1.4; Business and Professions Code § 6068(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 § 6068(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 § 6068(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 § 6068(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 § 6068(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 § 6068(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 § 6068(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 § 6068(e)(1) recognized under California law.

#### **IV. COMMISSION'S PROPOSED RULE** **(REDLINE TO CURRENT CALIFORNIA RULE 3-100)**

##### **Rule 1.6 [3-100] Confidential Information of a Client**

- (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~~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 § 6068(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 § 6068(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 § 6068(e)(1) as provided in paragraph (Bb).
- (Dd) In revealing ~~confidential~~information protected by Business and Professions Code § 6068(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~~rule.

## Discussion Comment

### 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 § 6068(e)(1). (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

[2] ~~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~~rules, or other law.

~~[3] 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 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 § 6068(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 § 6068(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 protected by Business and Professions Code § 6068(e)(1) as permitted under this rule. rule 3-100, which restates Business and Professions Code section 6068, subdivision (e)(2);~~

~~[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 § 6068(e)(1) as permitted under this rule rule is not subject to discipline.~~

~~No duty to reveal information protected by Business and Professions Code § 6068(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 § 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 information protected by § 6068(e)(1) 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 [6] of this discussion rule.~~

~~Whether to reveal information protected by Business and Professions Code § 6068(e) as permitted under paragraph (b).~~

~~[6] Deciding to reveal confidential information as permitted under paragraph (B). Disclosure permitted under paragraph (B) is ordinarily a last resort, when no other~~

available action is reasonably\* likely to prevent the criminal act. Prior to revealing information protected by Business and Professions Code § 6068(e)(1) as permitted ~~under~~by paragraph (Bb), 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 § 6068(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 4I 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 § 6068(e)(1). However, the imminence of the harm is not a prerequisite to disclosure and a ~~member~~lawyer may disclose the information protected by § 6068(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]~~ Subparagraph (Cc)(1) provides that before a ~~member~~lawyer may reveal ~~confidential~~ information, ~~the member~~ protected by Business and Professions Code § 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, ~~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 § 6068(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 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 (Bb) does not permit the memberlawyer to reveal confidential-information, ~~the member~~ protected by § 6068(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 § 6068(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 § 6068(e) as permitted by paragraph (b), when made, must be no more extensive than ~~the member reasonably believesis~~ 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 subparagraph (c)(2) of lawyer's ability or decision to reveal information protected by Business and Professions Code § 6068(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. rule ~~3-5001.4; Business and Professions Code, section § 6068, subdivision (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 § 6068(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's~~client's family, or to the ~~member~~lawyer or the ~~member's~~lawyer's family or associates. Therefore, paragraph (C)(2) requires a ~~member~~lawyer to inform the client of the ~~member's~~lawyer's ability or decision to reveal ~~confidential~~ information ~~as provided~~protected by § 6068(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 ~~member~~lawyer to inform the client may vary depending upon the circumstances. (See ~~paragraph~~Comment [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 (B);
- (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 § 6068(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 § 6068(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 (B), 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.

~~[44]~~ -Informing client that disclosure has been made; termination of the lawyer-client relationship.

~~[11]~~ When a ~~member~~lawyer has revealed ~~confidential~~information ~~underprotected by Business and Professions Code § 6068(e) as permitted in~~ paragraph (B), 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 § 6068(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.~~This 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 ~~protected by Business and Professions Code § 6068(e)(1)~~ recognized under California law.

## V. RULE HISTORY

**Introduction.** There are three factors that should be considered in considering current rule 3-100. First, it is important to recognize that California's treatment of confidentiality is unique. In every other jurisdiction in the country, the statement of a lawyer's duty of confidentiality resides in a rule of professional conduct that has been adopted by the jurisdiction's highest court. In California, on the other hand, the confidentiality duty is found in a statutory provision passed by the California legislature and enacted in 1872.

Second, the confidentiality rules adopted in the various jurisdictions reflect the greatest variation of any rule based on the Model Rules, ranging from some jurisdictions that *require* that a lawyer disclose confidential client information to prevent fraud, to

jurisdictions that *permit* such disclosures, to jurisdictions that prohibit such disclosures, e.g., California. In fact, California law has the strictest confidentiality duty in the United States, with only a single exception expressly recognized in both the statutory provision and the rule.

Third, it is helpful to consider the history behind current rule 3-100 and recognize that the rule was not intended solely as a disciplinary rule. As this history recounts, the rule is an outgrowth of a legislative amendment to the California statute that encompasses a California lawyer's duty of confidentiality, Business and Professions Code § 6068(e). The rule was drafted with the express intent of providing guidance to lawyers practicing in California on the application of the first express exception to confidentiality in California. Understanding this intent helps explain the large number of lengthy comments that the rule contains. The history will further suggest that any amendment to the confidentiality duty in California requires an amendment of § 6068(e).

***The History of Rule 3-100.*** Prior to 2004, the duty of confidentiality in California resided solely in Business and Professions Code § 6068(e).<sup>1</sup> Moreover, unlike ABA Model Rule 1.6 which, from its inception in 1983, recognized several exceptions to a lawyer's duty of confidentiality, § 6068(e) had no exceptions. The California statutory provision had remained substantively unchanged since its adoption by the California Legislature in 1871.<sup>2</sup>

The State Bar had made three attempts to propose a rule of professional conduct with a narrow exception that would permit a lawyer to disclose confidential information in order to prevent a crime reasonably likely to result in death or substantial bodily harm of a person. However, each of the three attempts failed. The reason for the Supreme Court rejecting the proposals appears to have been the Court's belief that a court could not amend a statutory provision, specifically § 6068(e). It was only when the legislature amended § 6068(e) in 2004 to recognize an exception to confidentiality to prevent life-threatening criminal activity and authorized the State Bar to draft a rule of professional conduct to clarify and provide guidance to lawyers concerning the application of this first express exception to confidentiality in California, that the way was opened for a confidentiality rule that included an exception.

#### **A. The State Bar's Three Attempts at Proposing a Rule Concerning Confidentiality Prior To 2004**

First, in 1987, the State Bar submitted a proposed rule with four exceptions to the duty, including an exception for life-threatening criminal activity.<sup>3</sup> The California Supreme

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<sup>1</sup> The 2004 amendment to section 6068(e), which added an exception to the duty of confidentiality for life-threatening criminal activity, carried forward the substance of 6068(e) verbatim, only changing the subdivision's designation from "(e)" to "(e)(1)." Section 6068(e)(1) provides that it is the duty of an attorney: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

<sup>2</sup> The language of the original statute has been made gender neutral.

<sup>3</sup> The proposal, if approved, also would have permitted disclosures: (i) with the client's consent; (ii) when ordered by a tribunal when certain conditions have been satisfied; and (iii) to

Court rejected that proposal. In a letter to the State Bar President, dated June 9, 1988, the Court questioned its authority to approve a rule that contravenes the language of a statute. The letter stated in relevant part:

4. Regarding proposed Rule 3-100(C)(3) (Duty to maintain Client Confidence and Secrets Inviolable), in what context does it allow for disclosure of otherwise privileged attorney-client information. To the extent it permits disclosure in a judicial proceeding *where no statutory exception to the privilege exists*, it may be inconsistent with, or contravene the Legislature's intent underlying *Evidence Code section 950 et seq.* (Cf. *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 539-540.) Where the Legislature has codified, and revised, or supplanted privileges previously available at common law, does the court have inherent authority to modify this statutory privilege?

(Letter from Laurence P. Gill, Clerk of the Supreme Court to Terry Anderlini, President of the State Bar of California (June 9, 1988) re Bar Misc. 5626 – Proposed Amendments to the Rules of Professional Conduct of the State Bar of California (on file with the State Bar of California).) (Emphasis added.)

Because the Supreme Court's inquiry raised uncertainty as to whether the Court could modify a statutory provision by approving a rule of professional conduct, the State Bar withdrew the rule from consideration.

Second, in 1992 the State Bar proposed a rule that was limited to two exceptions to the confidentiality duty: (i) when the client consents, or (ii) when life-threatening criminal activity by the client is present. Rather than carving out an exception to the statutory duty as the 1987 proposal had, the 1992 proposal was drafted to provide a safe harbor from discipline for the disclosing lawyer. The rule stated that a lawyer "is not subject to discipline who reveals a confidence or secret" to prevent a criminal act "that the member believes is imminently likely to result in death or substantial bodily harm." Rather than contravening statutory language, the rule identified narrow circumstances (consent, imminent life-threatening injury) under which disclosure would not subject a lawyer to discipline. Notwithstanding this different approach, the Supreme Court rejected the proposed rule without comment.

Third, in 1998, the State Bar abandoned the foregoing "safe harbor" approach and proposed a rule with an exception to confidentiality that would have permitted disclosure of confidential information to the extent that the lawyer reasonably believed it would be necessary "to prevent the client from committing a criminal act that the [lawyer] believes is likely to result in death or substantial bodily harm. The Supreme Court again rejected the proposed rule without comment.

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establish a claim or defense in a controversy with the client or in a disciplinary or other proceeding against the lawyer which is based upon conduct in which the client was involved.

The State Bar did not submit any further proposals until June 2004 when, as an outgrowth of the legislature's amendment of § 6068(e), it submitted a proposed rule that eventually would lead to the Supreme Court's approval of current rule 3-100.

## **B. The Process By Which Current Rule 3-100 Became Part Of The Rules Of Professional Conduct**

In 2003, then-Assemblyperson Darrell Steinberg introduced Assembly Bill 1101 ("AB 1101"),<sup>4</sup> which eventually was enacted by the Legislature and signed into law by Governor Davis (Stats. 2003, ch. 765). The enactment of the bill resulted in the process by which rule 3-100 became part of the Rules of Professional Conduct.

AB 1101 was comprised of four sections, two of which substantively amended statutory provisions in the Business & Professions Code (relating to the duty of confidentiality) and Evidence Code (relating to the lawyer-client privilege), respectively.

**Section (1) of AB1101** amended Bus. & Prof. Code § 6068(e) to add an exception, subdivision (e)(2), as indicated by the following legislative black-line version:

It is the duty of an attorney to do all of the following:

\* \* \*

(e) (1) \_\_\_ To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(2) \_\_\_ Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.<sup>5</sup>

**Section (2) of AB1101** amended Evidence Code § 956.5, an existing express exception to the lawyer-client privilege, as reflected in the following legislative black-line version of the section:

956.5 There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent ~~the client from committing~~ a criminal act that the

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<sup>4</sup> The full text of AB 1101 as introduced is available at: [http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_1101-1150/ab\\_1101\\_bill\\_20030220\\_introduced.pdf](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1101-1150/ab_1101_bill_20030220_introduced.pdf). (Last accessed on June 30, 2015.)

<sup>5</sup> See section (1) of AB 1101. The full text of AB 1101 as chaptered is available at: [http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_1101-150/ab\\_1101\\_bill\\_20031011\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1101-150/ab_1101_bill_20031011_chaptered.pdf). (Last accessed on June 30, 2015.)

lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

The phrase “confidential information relating to the representation of a client” in § 6068(e)(2) was apparently intended to conform to the phrase “confidential communication relating to the representation of a client” that already existed in Evidence Code § 956.5. The use of that latter phrase in § 6068(e)(2), which has no predicate in § 6068(e)(1), creates a disjunction between the two subdivisions that was also carried forward into current rule 3-100. This disjunction is a possible defect in the current rule that the first Commission attempted to remedy.

**Section (3) of AB 1101** stated the Legislature’s intent that the State Bar, in consultation with the Supreme Court, appoint a task force to study and make recommendations for a rule of professional conduct that would clarify the new statutory exception to the duty of confidentiality.<sup>6</sup> Section (3) provided:

- (a) It is the intent of the Legislature that the President of the State Bar shall, upon consultation with the Supreme Court, appoint an advisory task force to study and make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act.
- (b) The task force should consider the following issues:
  - (1) Whether an attorney must inform a client or a prospective client about the attorney’s discretion to reveal the client’s or prospective client’s confidential information to the extent that the attorney reasonably believes that the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.
  - (2) Whether an attorney must attempt to dissuade the client from committing the perceived criminal conduct prior to revealing the client’s confidential information, and how those conflicts might be avoided or minimized.
  - (3) Whether conflict-of-interest issues between the attorney and client arise once the attorney elects to disclose the client’s confidential information, and how those conflicts might be avoided or minimized.
  - (4) Other similar issues that are directly related to the disclosure of confidential information permitted by this act.<sup>7</sup>

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<sup>6</sup> Section (4) of AB 1101 provided that the amendments “shall become operative on July 1, 2004” to provide sufficient time for the task force to complete its work.

<sup>7</sup> Paragraph (c) of section (3) specifies the composition of the task force which includes, but is not limited to: (1) Civil and criminal law practitioners; (2) judicial, executive, and legislative representatives; (3) State Bar committee representatives; and (4) public members. A copy of the task force roster is on file with the State Bar. The current Commission consultant, Professor Kevin

Pursuant to section (3) of AB 1101, a State Bar Advisory Task Force (“Task Force”) was appointed. (See, page 4 of the “Request That The Supreme Court Of California Approve Proposed Rule 3-100 Of The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” June 2004 (“2004 Request”).) The Task Force was charged with developing a rule of professional conduct related to the issues posed in section (3) of AB 1101 concerning the single confidentiality exception added as § 6068(e)(2). The Task Force used the State Bar’s procedures for adopting and submitting a rule to this Court for approval. (See, 2004 Request, at page 4.)

The Task Force sought to draft a rule that would effectuate the public policies favoring the preservation of life and protection of the public and also provide guidance to lawyers about how to achieve those goals within the confines of the attorney-client relationship.<sup>8</sup> The Task Force met several times to discuss the issues identified in section (3) of AB 1101 and consider several preliminary rule drafts to address the issues, and then prepared a proposed rule to submit to the Board for public comment authorization. (See, 2004 Request, at pp. 18-20.) In response to public comment, a number of revisions were made. (See, 2004 Request, at pp. 15-17.) A revised proposed rule was then submitted to the Board, which was adopted unanimously for transmission to this Court. This Court modified Discussion paragraphs [6] and [7] to bring the comment closer to the language of the proposed rule and then approved current rule 3-100, operative on July 1, 2004, Supreme Court case number S125414.

The changes the Supreme Court effectuated appear to reflect its concern that the comments, intended to clarify the rule, conform more closely to that purpose and the black letter language in the rule. In Discussion paragraph [6], the proposed last sentence was deleted: “Thus, a member who knows that a client is discharging or intends to discharge toxic waste into a town’s water supply in violation of the criminal law may reveal this information to the authorities if there is a substantial risk that a person who drinks the water will contract a life threatening or debilitating disease and the member’s disclosure is necessary to eliminate the threat or reduce the number of victims.”

In Discussion paragraph [7], two sentences were modified as shown below.

If a client, whether in response to the member’s counseling or otherwise, takes corrective action – such as by ceasing the criminal act before harm is caused – ~~or by expressing a genuine commitment not to proceed with a threatened criminal act,~~ then the option for permissive disclosure by the member would cease as the threat posed by the criminal act would no longer be present.

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Mohr, was the chair of the Task Force. Also, current Commission member Mark Tuft was a member of the Task Force.

<sup>8</sup> The Task Force’s rule development process included consideration of the prior State Bar proposals of rule 3-100; American Bar Association Model Rule of Professional Conduct 1.6; and section 66 of the American Law Institute’s *Restatement of the Law Governing Lawyers*. (See, 2004 Request, at page 4.)

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If a client or another person has already acted but the intended harm has not yet occurred, the member should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent ~~the criminal act~~ harm.

## VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**  
**(In response to 90-day public comment circulation):**

1. OCTC supports this rule, but has concerns about many of the Comments.

Commission Response: No response required.

2. Comments [1], [2], [3], [4], [5], [7], [9], and [10] appear unnecessary and just a reiteration of the rule and a philosophical discussion of the reasons for the rule.

Commission Response: The Commission declines to make the requested change. In 2003, as part of the legislative enactment that effectuated the exception to § 6068(e) to permit disclosure of confidential information to prevent a life-threatening criminal act, the State Bar, in consultation with the Supreme Court, was directed to promulgate a rule of professional conduct “regarding professional responsibility issues related to the implementation of this act.”<sup>9</sup> The bill also identified several issues that the rule drafters should consider in drafting

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<sup>9</sup> Section (3) provided of AB 1101, the bill that amended § 6068(e) provided:

SEC. 3. (a) It is the intent of the Legislature that the President of the State Bar shall, upon consultation with the Supreme Court, appoint an advisory task force to study and make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act.

(b) The task force should consider the following issues:

(1) Whether an attorney must inform a client or a prospective client about the attorney’s discretion to reveal the client’s or prospective client’s confidential information to the extent that the attorney reasonably believes that the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.

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

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

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

the rule.<sup>10</sup> The Comments for Rule 1.6 identified by the commenter as “superfluous and unnecessary” are essential to the State Bar’s reasoned and balanced response to the legislative directive to provide guidance to California lawyers regarding the application of the first express exception to the duty of California since § 6068(e) was first adopted in 1872.

3. OCTC supports Comment [6], [8], [11], [12], and [13].

Commission Response: No response required.

- **State Bar Court**: No comments received from State Bar Court.

## **VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY**

During the 90-day public comment period, six public comments were received. All six comments agreed with the proposed Rule only if modified. A public comment synopsis table, with the Commission’s responses to each public comment, is provided at the end of this report.

## **VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS**

### **A. Related California Law**

As noted in rule 3-100, Discussion paragraph [2], the duty of confidentiality encompasses the lawyer-client privilege, the work product doctrine, and ethical standards of confidentiality.

1. Lawyer-Client Privilege. Unlike most jurisdictions in which the attorney-client privilege is created by common law, the lawyer-client privilege in California is a creation of statutory law. (See Evidence Code §§ 951-962.) It applies only to lawyer-client communications where the client has consulted the lawyer in the latter’s professional capacity to secure legal service or advice. (Evid. Code §§ 951, 952). The lawyer-client privilege is a narrow evidentiary privilege that protects a client (and the client’s lawyer) from being compelled to disclose privileged communications. (Evid. Code §§ 954, 955). The privilege can be waived. (Evid. Code § 912.) There are statutorily-created exceptions to the lawyer-client privilege. (Evid. Code §§ 956-962). A court cannot create, limit or expand a privilege in California. (See, e.g., *Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal.4th 725, 739; *HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal.4th 54, 67.)
2. Duty of Confidentiality. As noted above, the duty of confidentiality is set forth in Business and Professions Code § 6068(e)(1). It is much broader than the lawyer-client privilege, which is limited to communications between client and

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<sup>10</sup> See footnote 9, section 3(b).

lawyer for the purpose of obtaining legal services or advice from a lawyer in the latter's professional capacity. The duty applies to information acquired by virtue of the representation of a client, regardless of its source. It includes not only privileged information but also information that is likely to be embarrassing or detrimental to the client, or that the client has requested be kept confidential. (E.g., *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621; *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.) Even information in the public record that is not easily discoverable is protected by the duty. (*In the Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. 179).

- a. *Duty of Confidentiality and Lawyer-Client Privilege Compared.* The duty of confidentiality overlaps with the evidentiary lawyer-client privilege. The scope of the duty is broader than the privilege in three key respects. *First*, the duty encompasses more information than privilege because the latter is confined to the statutorily-defined concept of a "confidential communication." (See Evid. Code § 952 for the definition of a "confidential communication" between a "lawyer"; Evid. Code § 950 for the definition of "lawyer"; Evid. Code § 951 for the definition of "client.") For example, the duty encompasses information acquired by virtue of the lawyer–client relationship regardless of the source of that information. *Second*, the duty applies beyond the limited context of an evidentiary setting where a judicial officer is making a decision on whether information may be admitted into evidence. For example, a lawyer who is preparing advertising material may not use information protected by the duty without the client's consent. *Third*, exceptions to the privilege do not function as an exception to the duty (but see Evid. Code § 956.5 that provides for an exception that is coextensive with the exception in Bus. & Prof. Code § 6068(e)(2)).
- b. *Other Points About the Duty.* The duty of confidentiality is a disciplinary standard and lawyers have been subject to discipline for violating the duty. (See, e.g., *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179 and *Dixon v. State Bar* (1982) 32 Cal.3d 728.) A violation of the duty may also give rise to non-disciplinary consequences. (See e.g., *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256].)

Other laws in California relate, and refer, to the duty. For example, the State Bar Act expressly states that a written fee contract shall be deemed to be confidential under the duty (see Bus. & Prof. Code § 6149) and also provides that a paralegal is subject to the same duty of confidentiality as an attorney (see Bus. & Prof. Code § 6453).

3. Attorney Work-Product. In California, attorney-work product is governed by statute. (Code Civ. Proc. §§ 2018.010-2018.080). "A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." (§ 2018.030(a).) Any other work product of an attorney "is not discoverable unless the court determines that denial of

discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.” (§ 2018.030(b).)

- a. *Duty of Confidentiality and Work-Product Compared.* There is also overlap between the protection afforded by the duty of confidentiality and the attorney work-product protection. The duty is broader in both scope and function. For example, the duty is not limited to the discovery of a writing that reflects an attorney's impressions, conclusions, opinions, research or theories (see Code of Code of Civ. Proc. § 2018.030). Also, the exceptions to the work-product doctrine do not function as exceptions to the duty (but see, Code of Civ. Proc. § 2018.050 providing for a crime or fraud exception that might in some circumstances be coextensive with the exception in Bus. & Prof. Code § 6068(e)(2).)

## **B. ABA Model Rule Adoptions**

Included here are examples of the rule text from three jurisdictions that demonstrate the variation that exists in the confidentiality rule throughout the country: Delaware Rule 1.6, which is identical to Model Rule 1.6, and Alabama Rule 1.6 and New York Rule 1.6, both of which substantially diverge from the Model Rule in different ways.

- **Delaware Rule 1.6** is identical to Model Rule 1.6:

### **Delaware Rule 1.6 Confidentiality of Information**

(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).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

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

(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;

(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;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(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

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

- **Alabama Rule 1.6** diverges markedly from Model Rule 1.6 in not adopting most of the exceptions in the Model Rule's paragraph (b), nor adopting paragraph (c):<sup>11</sup>

#### **Alabama Confidentiality of Information.**

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) 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.

- **New York Rule 1.6** also diverges markedly from Model Rule 1.6 in its structure and terminology, and in including a definition of "confidential information":

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<sup>11</sup> It should be noted that Alabama engaged in a piecemeal revision of its Rules of Professional Conduct after the ABA Ethics 2000 Commission issued its revised Model Rules by the end of 2002. Most of its rules remain based on the original Model Rules, which the ABA adopted in 1983.

## **New York Rule 1.6: Confidentiality of Information**

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

- (1) the client gives informed consent, as defined in Rule 1.0(j);
- (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
- (3) the disclosure is permitted by paragraph (b).

“Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. “Confidential information” 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.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime;
- (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably 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;
- (4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer’s firm or the law firm;
- (5) (i) to defend the lawyer or the lawyer’s employees and associates against an accusation of wrongful conduct; or  
(ii) to establish or collect a fee; or
- (6) when permitted or required under these Rules or to comply with other law or court order.

The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 1.6: Confidentiality of Information,” revised December 9, 2016, is available at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_6.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_6.pdf) [Last visited 2/7/2017]
- Model Rule 1.6 has been subject to more variation among the jurisdictions that have adopted or adapted it than any other ABA model rule. These variations range 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, and even to some states that *mandate* disclosure to prevent death or substantial bodily harm or to prevent a criminal act likely to result in substantial financial injury. Two jurisdictions have adopted Model Rule 1.6 verbatim.<sup>12</sup> Thirty-nine jurisdictions have adopted a slightly modified version of Model Rule 1.6.<sup>13</sup> Ten jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.6.<sup>14</sup>
- Exception to Prevent Life-threatening Act. Concerning paragraph (b) of the proposed rule, all states provide an exception for revealing confidential information to prevent reasonably certain death or substantial bodily injury. In most jurisdictions, like California, it is permissive, but 13 jurisdictions require such disclosures (Arizona, Connecticut, Florida, Illinois, Iowa, Nevada, New Jersey, North Dakota, Tennessee, Texas, Vermont, Washington, and Wisconsin). A number of jurisdictions, like California, limit disclosures to preventing a life-threatening *criminal act* (e.g., Alabama, District of Columbia, Michigan, Rhode Island, South Dakota and West Virginia). Some jurisdictions, unlike California, require that the criminal act be likely to cause *imminent* death or bodily harm (e.g., Alabama, Rhode Island, and South Dakota). Other jurisdictions simply provide an exception that would permit a lawyer to prevent a crime, which would include a life-threatening crime (e.g., Kansas, Virginia). Given the range of permitted or mandated disclosures, California’s variation does not stray from a national standard.

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<sup>12</sup> The two jurisdictions are: Delaware and West Virginia.

<sup>13</sup> The thirty-nine jurisdictions are: Alaska, Arkansas, Arizona, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Kansas, Kentucky, Maine, Maryland, Missouri, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming.

<sup>14</sup> The ten jurisdictions are: Alabama, California, District of Columbia, Florida, Massachusetts, Michigan, Minnesota, New Jersey, New York, and Texas.

- **Other Model Rule exceptions to confidentiality that are recognized in California case law or statutes.**<sup>15</sup>

1. Exception to seek legal advice about compliance with professional obligations. Nearly every jurisdiction permits a lawyer to seek advice about compliance with the rules of professional conduct or other law, or both. Several jurisdictions provide a Comment to recognize that such disclosures are permitted (e.g., Kansas, Massachusetts, Michigan, and Virginia). Only New Jersey, Texas and West Virginia do not provide for such disclosures either in the Rule or a Comment. Texas permits a lawyer to reveal unprivileged information, i.e., information relating to the representation that is not subject to the lawyer-client privilege, to “carry out the representation effectively . . . .” (Texas Rule 1.05(d)(2)(i)), and New Jersey and West Virginia provide that the duty is qualified by “disclosures that are impliedly authorized in order to carry out the representation.”) (N.J. Rule 1.6(a); W.V. Rule 1.6(a).) (See Section IX.C.6.a & note 26, below.)
2. Self-defense exception. Every other jurisdiction’s provision is as broad as Model Rule 1.6(b)(5) in permitting disclosures even against third-party claims. If California were to include a self-defense exception, it would have to be coextensive with Evidence Code § 958, i.e., available only to assert a claim against, or defend a claim brought by, a client. (See Section IX.C.6.b & note 27, below.)
3. Exception to comply with court order or other law. Nearly every jurisdiction permits disclosures to comply with a court order or other law, or both. Besides California, only Alabama does not have an express exception for such disclosures, and an unnumbered Alabama Comment titled “Disclosures Otherwise Authorized or Required,” provides: “The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.” (See, Alabama Rule 1.6, Comment.) Florida, Georgia, and Washington do not permit disclosures to “comply with other law.” (See Section IX.C.6.c & note 28, below.)

- **Other Model Rule exceptions that have no counterparts in California law.** Some jurisdictions have adopted a version of ABA Model Rule 1.6(b)(2) and (3) (revealing confidential information in cases of financial harm). The ABA Comparison Chart, entitled "Comparison of State Confidentiality Rules, ABA Model Rule 1.6(b)(2) and (3): Revealing Confidential Information in Cases of Financial Harm," revised May 13, 2015, is available at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_6b2\\_3.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_6b2_3.pdf) [last visited 2/7/17].

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<sup>15</sup> Although the first Commission recommended adoption of these exceptions, the Commission does not recommend their addition to current rule 3-100. (See Section IX.C.6 (Concepts Rejected), below.)

- Forty-one jurisdictions permit disclosure to prevent crime, including criminal fraud.<sup>16</sup> Five jurisdictions required disclosure to prevent crime, including criminal fraud.<sup>17</sup> Six jurisdictions do not permit or require disclosure to prevent crime (including criminal fraud).<sup>18</sup>
  - Of the jurisdictions that permit or require disclosure, thirty jurisdictions require the amount of loss to be “substantial” in order to disclose. Sixteen jurisdictions do not have a requirement in the amount of loss in order to disclose.
- Twenty-seven jurisdictions permit disclosure to prevent non-criminal fraud likely to result in substantial loss.<sup>19</sup> Three jurisdictions require disclosure to prevent non-criminal fraud likely to result in substantial loss.<sup>20</sup> Twenty-one jurisdictions do not allow disclosure to prevent non-criminal fraud likely to result in substantial loss.<sup>21</sup>
- In nineteen jurisdictions disclosure is limited to situations where the lawyer’s services were used perpetrate a crime or fraud. Thirteen jurisdictions do not limit it to situations where the lawyer’s services were used. Seventeen jurisdictions include no provision. Two states limit it to situations where the lawyer’s services were used to perpetrate a fraud but not a crime.
- Thirty-three jurisdictions permit disclosure to prevent or rectify substantial financial loss resulting from crime or fraud. Seventeen jurisdictions do not require disclosure to rectify substantial financial loss resulting from crime or fraud. One jurisdictions permits disclosure to rectify financial loss unless the loss is substantial, in which case disclosure is required.

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<sup>16</sup> The jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Washington, West Virginia, and Wyoming.

<sup>17</sup> The jurisdictions are: Florida, New Jersey, Vermont, Virginia and Wisconsin.

<sup>18</sup> The jurisdictions are: California, Kentucky, Missouri, Montana, Rhode Island and South Dakota.

<sup>19</sup> The jurisdictions are: Alaska, Arizona, Arkansas, Colorado, Connecticut, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nevada, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, and West Virginia,.

<sup>20</sup> The jurisdictions are: New Jersey, Vermont and Wisconsin.

<sup>21</sup> The jurisdictions are: Alabama, California, Delaware, Florida, Georgia, Idaho, Kansas, Kentucky, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, Ohio, Oregon, Rhode Island, South Dakota, Washington, and Wyoming.

## **IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED**

### **A. Introduction**

The same three factors identified in the Introduction to the History Section should be considered in reviewing the Commission's recommendations concerning current rule 3-100: (i) the uniqueness of California's duty of confidentiality residing in a statute rather than a rule; (ii) the broad variation in rules adopted in jurisdictions throughout the country; and (iii) the lengthy gestation of current rule 3-100 and how it was eventually adopted.

### **B. Concepts Accepted (Pros and Cons):**

1. Paragraph (a): Change syntax to more closely approximate the syntax of Model Rule 1.6 and most jurisdictions.
  - Pros: The changed syntax includes the preferred active voice ("the client gives informed consent"). No substantive change is intended.
  - Cons: None identified.
2. Paragraph (a): Substitute "the disclosure is permitted" for "as provided".
  - Pros: The use of the word "permitted" emphasizes that Rule 1.6 does not impose a disclosure duty on the lawyer. Whether the lawyer discloses information protected by § 6068(e)(1) is discretionary.
  - Cons: None identified.
3. Paragraph (b), substitute the clause "information protected by Business and Professions Code § 6068(e)(1)" for the clause "confidential information relating to the representation of a client."
  - Pros: The substitution will remedy the current disjunction that exists between paragraphs (a) and (b) in current rule 3-100 (which also exists between Business and Professions Code §§ 6068(e)(1) and (e)(2).)

The disjunction arises because under current rule 3-100(B) (and subdivision (e)(2)), a member/attorney may reveal "confidential information relating to the representation of a client" to prevent a life-threatening criminal act. However, there is no predicate for the phrase "confidential information relating to the representation of a client" in subdivision (e)(1), which is incorporated by reference in paragraph (A). Moreover, there is nothing in the legislative history to explain the disjunction. It would appear there are two possibilities: First, the Legislature might have simply attempted to conform the language in 6068(e)(2) to the language in the parallel exception to the lawyer-client privilege, Evidence Code § 956.5 ("There is no privilege under this article if

the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.”) However, even with that attempt to conform the language, the language in § 6068(e)(2) is different from that in § 956.5, the former referring to “confidential *information*” and the latter referring to “confidential *communication*,” which are different concepts. Only communications between lawyer and client are protected by the privilege while any information the lawyer acquires by virtue of the representation, regardless of its source, is protected under the duty of confidentiality. Second, the language used might represent a borrowing of the term used in Model Rule 1.6 to denote the information protected in subdivision (1) of § 6068(e), i.e., “information relating to the representation of a client.”

However, regardless of why the clause “confidential information relating to the representation of a client” was used in subdivision (2) of § 6068(e), the disjunction remains. Substituting the more accurate “information protected by Business and Professions Code § 6068(e)(1)” removes it.

The first Commission recommended a similar substitution, but more generally referred to “§ 6068(e)” rather than “§ 6068(e)(1).” The latter term is more precise because the confidentiality duty is stated in subdivision (e)(1), and the exception for life-threatening criminal conduct in subdivision (e)(2).

- Cons: There is no evidence that the “disjunction” has created confusion or diminished compliance with the statute or the rule. Moreover, it might be questioned whether the Supreme Court should change the language in paragraph (b), which is a verbatim recitation of a legislative enactment.
4. Paragraph (b): Add phrase, “as provided in paragraph (c)” at the end of the paragraph.
- Pros: This phrase is an important clarification. It emphasizes that the disclosure as permitted by paragraph (b) is limited not only “to the extent . . . necessary to prevent” the criminal act, but also by the provisions of paragraph (c). The first Commission also added this clause.
  - Cons: None identified.
5. Paragraph (c): Retain paragraph (c), the only changes being substitution of the terms “lawyer” and “information protected by Business and Professions Code § 6068(e)(1)” and the formatting changes as described above.
- Pros: There is no evidence that paragraph (c), which was drafted in response to specific inquiries from the Legislature, (see above), has caused confusion or other problems.
  - Cons: None identified.

6. Paragraph (d): Retain paragraph (d), the only changes being substitution of the terms “lawyer” and “information protected by Business and Professions Code § 6068(e)(1)” and the formatting changes as described above.
  - Pros: Paragraph (d) is an important limitation on the extent to which a lawyer is permitted to disclose information protected by § 6068(e)(1) to prevent a life-threatening criminal act. In effect, the provision provides that in attempting to prevent such an act, a lawyer must take care to pursue the path that will result in the lawyer disclosing the least amount of protected information, thus avoiding concomitant injury to the lawyer-client relationship. (See Comments [10] and [11].) Moreover, aside from the fact that the Supreme Court has already approved this provision, there is no evidence that paragraph (d) has caused confusion or other problems of compliance or enforcement.
  - Cons: None identified.
7. Paragraph (e): Retain paragraph (e), the only changes being substitution of the term “lawyer” and the formatting changes as described above.
  - Pros: Paragraph (b)’s use of permissive language and the disjunctive (“may, but is not required to”) emphasizes that disclosure is discretionary with the lawyer and no duty is imposed. Paragraph (e) fosters a lawyer’s careful consideration of the circumstances in making a decision to disclose protected information by providing that a lawyer’s exercise of that discretion and decision not to disclose will not subject the lawyer to discipline. Given the subject matter of the paragraph (b) exception and the overriding value that is placed on life, a lawyer’s carefully-reasoned decision not to disclose information as permitted could be condemned in retrospect should a fatality or serious injury occur that a disclosure might have been prevented. This provision provides an important balance to those considerations.
  - Cons: None identified.

## **COMMENTS**

Note on Comments To Proposed Rule 1.6: Principle 2 of the Commission’s Charter provides the Commission “should consider the historical purpose of the Rules of Professional Conduct in California, and ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards.” Principle 5 provides that Comments “should not conflict with the language of the rules, and should be used sparingly to elucidate, and not to expand upon, the rules themselves.” Despite these principles, each of the recommended Comments are justified. As discussed, (see paragraph A., above), proposed Rule 1.6 was not intended solely as a disciplinary rule. The primary objective of current rule 3-100 is to provide guidance to California lawyers concerning how to comply with the rule’s permissive exception for disclosing protected information to prevent a life-threatening criminal act. Further, the rule was drafted at the direction of the Legislature when it amended § 6068(e) to permit the first exception to the California duty of

confidentiality since the section was adopted in 1871. In addition, no substantive changes to the Comments are intended, the only changes being substituted terms and formatting changes. Finally, the Supreme Court has already approved all of the Comments. In summary, the Comments are an attempt to clarify how the rule should be applied, do not conflict with Principle 5, and conform with Principle 4 by facilitating “compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties.”

8. Retain current rule 3-100 Comment headings with minor revisions.

- Pros: The Rule 3-100 Task Force inserted headings into each Discussion paragraph to provide lawyers with a quick reference point for the subject matter of the paragraph. Notwithstanding the current Commission’s Charter regarding Comments, given that rule 3-100 was intended as, and is, a rule of guidance, retaining the Comment headings should be favored. When a lawyer is confronted with a life-threatening situation the harm is often imminent. Providing headings helps a lawyer to quickly find a Comment that will explain how the lawyer might disclose protected information as permitted by the Rule. In addition, there was consensus among the Commission members to move each heading out of the Comment itself and place it above each Comment to make it more prominent.
- Cons: None identified.

9. Retain current rule 3-100, Discussion ¶. 1 as Comment [1].

- Pros: Comment [1] provides context for the Rule, explaining the policy underlying the duty of confidentiality, i.e., to promote “the trust that is the hallmark of the lawyer-client relationship,” which in turn promotes candor by the client and enhances the lawyer’s ability to represent the client effectively.

The term “detrimental subjects” has been substituted for the phrase, “legally damaging subject matter.” No change of meaning is intended. The latter phrase comes from Model Rule 1.6, Cmt. [2], and has no historical meaning in California law. The substituted term, “detrimental subjects” is derived from State Bar and local California bar association ethics opinions that have traditionally understood the term “secrets” in § 6068(e)(1) to mean information that the client has requested be kept confidential or which would be embarrassing or *detrimental* to the client.

- Cons: The Comment, while accurate, does not explain or clarify the rule.

10. Retain current rule 3-100, Discussion ¶. 2 as Comment [2], with non-substantive several revisions, including adding the term “informed” to modify “consent” in the last sentence, to conform the Comment to paragraph (a).

- Pros: Comment [2] describes the scope of information protected under Business and Professions Code § 6068(e)(1). It clarifies that the duty of confidentiality is much broader than the lawyer-client privilege and also

includes information acquired by virtue of the representation, regardless of source, and information protected under the work-product doctrine.

- Cons: None identified.

11. Retain current rule 3-100, Discussion ¶. 3 as Comment [3].

- Pros: Comment [3] clarifies that the rule provides for a narrow exception to the duty of confidentiality. The Commission recommends replacing a nearly verbatim recitation of § 6068(e)(2) with a shorter description of that provision. The first Commission made a similar recommendation. By distinguishing in the last two sentences “past, completed criminal acts” of a client and “future or ongoing criminal acts,” the Comment provides important guidance to lawyers regarding the extent to which they are authorized under § 6068(e)(2) to disclose information protected by their duty of confidentiality.
- Cons: None identified.

12. Retain current rule 3-100, Discussion ¶. 4 as Comment [4].

- Pros: Comment [4] is a counterpoint to paragraph (e), which provides a lawyer is not subject to discipline for not disclosing information. Comment [4], on the other hand, provides that a lawyer is not subject to discipline if the lawyer *does disclose* protected information as permitted by the rule, i.e., complies with the various provisions limiting the disclosure, e.g., paragraph (c). It provides assurance to a lawyer contemplating disclosure that if the lawyer complies with the rules provisions, he or she will not be subject to discipline. Comment [4] also provides the rationale for the provision, i.e., whether a lawyer should disclose protected information requires a careful balancing between the interests in preserving confidentiality (and the trust relationship between lawyer and client) and preventing a life-threatening criminal act.
- Cons: Comment [4], which provides immunity from discipline similar to paragraph (e), should also be in the black letter of the rule.

13. Retain current rule 3-100, Discussion ¶. 5 as Comment [5].

- Pros: Comment [5] is included to emphasize that there is no duty to disclose and that the decision whether to disclose or not rests with the lawyer. To further emphasize the lawyer’s discretion, the Commission recommends deleting the reference to rule 1-100(A) [proposed Rule 1.0(a) and (b)], which notes that the rules are “binding” on lawyers, as unnecessary given that (i) the binding confidentiality duty resides in § 6068(e)(1); and (ii) paragraph (b) is permissive. The first Commission also deleted the reference for the same reason.
- Cons: The use of permissive language and the disjunction in paragraph (b) (“may but is not required”) sufficiently makes the intended point of Comment [5].

14. Retain current rule 3-100, Discussion ¶. 6 as Comment [6] and change the heading so it provides “Whether to reveal information ...”.

- Pros: Comment [6] is one of the critical guidance provisions in the rule. It provides a list of non-exclusive factors a lawyer should balance in deciding whether to disclose protected information to prevent a life-threatening criminal act.

Further, the Comment clarifies that the threatened harm need not be imminent for the paragraph (b) exception to apply. This is important because most jurisdictions formerly had required that the harm be imminent before a lawyer could rely on the exception and all three previous proposals by the State Bar had included an “imminence” limitation.

The heading has also been changed to emphasize that disclosure is a choice, not a foregone conclusion.

- Cons: None identified.

15. Retain current rule 3-100, Discussion ¶. 7 as Comment [7] and change the heading so it provides “Whether to counsel client ...”.

- Pros: Comment [7] is another provision that provides critical guidance to a lawyer in deciding whether and when to counsel either a client or a third person not to commit or continue a criminal act, as required under paragraph (c)(1) “if reasonable under the circumstances.” The Comment was originally drafted as a direct response to the Legislature’s inquiry to the State Bar. (See above.) No substantive changes have been made to current Discussion ¶.7.

Similar to Comment [6], the heading has been revised to emphasize that under appropriate circumstances as describe in the Comment, counseling the client or third person is within the lawyer’s discretion.

- Cons: None identified.

16. Retain current rule 3-100, Discussion ¶. 8 as Comment [8].

- Pros: Comment [8] clarifies what is meant by the limited clause, “to the extent that the lawyer reasonably believes the disclosure is necessary.” Because of the numerous ways in which a lawyer might disclose protected information (anonymous message, to authorities, to a family member of the criminal actor, etc.), 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.

- Cons: None identified.

17. Retain current rule 3-100, Discussion ¶. 9 as Comment [9].

- Pros: Paragraph (c)(2) requires that a lawyer, if reasonable under the circumstances, inform the client of the lawyer's ability or decision to disclose protected information to prevent a life-threatening criminal act. Comment [9] sets forth seven non-exclusive factors to assist a lawyer in determining when such a disclosure should be made. (See also paragraph 17, below, concerning related Comment [10].

The Comment was originally drafted as a direct response to the Legislature's inquiry to the State Bar. (See above.) No substantive changes have been made to current Discussion ¶.9.

- Cons: None identified.

18. Retain current rule 3-100, Discussion ¶. 10 as Comment [10].

- Pros: Comment [10] further elaborates upon paragraph (c)(2)'s requirement of informing the client of the ability or decision to disclose. It explains that there is no specific time when the disclosure must be made and provides a range of possibilities, at the outset of the representation to shortly before the contemplated disclosure is made.

The Comment was originally drafted as a direct response to the Legislature's inquiry to the State Bar. (See above.) No substantive changes have been made to current Discussion ¶.10.

- Cons: None identified.

19. Retain current rule 3-100, Discussion ¶. 11 as Comment [11].

- Pros: Comments [9] and [10] provide guidance as to *when* a lawyer should inform the client of the lawyer's ability or decision to disclose. Comments [11] and [12] provide guidance on what a lawyer should expect will likely result when the lawyer has so informed the client, particularly when the lawyer has already made the disclosure.

Comment [11] focuses on the potential breakdown of the trust relationship between and lawyer and client and the real possibility that the lawyer will be obligated to withdraw from the representation as a result of the lawyer informing the client.

Comment [12] focuses on other consequences that might result from the lawyer making a disclosure and identifies other rules the lawyer should consult in determining the lawyer's course of action.

These Comments were originally drafted as a direct response to the Legislature's inquiry to the State Bar. (See above.) No substantive changes have been made to either of the current Discussion paragraphs.

- Cons: None identified.

20. Retain current rule 3-100, Discussion ¶. 12 as Comment [12].

- Pros: See paragraph 19.
- Cons: See paragraph 19.

21. Retain current rule 3-100, Discussion ¶. 13 as Comment [13] and delete the phrase "reliance upon."

- Pros: Because current rule 3-100 is not a rule that comprehensively addresses the duty of confidentiality, the Task Force that drafted rule 3-100 included Discussion ¶. 13 to put lawyers on notice that the rule is not an exhaustive treatment of confidentiality in California and that there may be other obligations or exceptions recognized in the law, none of which the rule is intended to supersede.

The Commission recommends deleting the phrase "reliance upon" as surplusage. No change in meaning is intended.

- Cons: None identified.

### **C. Concepts Rejected (Pros and Cons):**

1. Title: Change the title of the rule to "Confidentiality of Information."

- Pros: First, that title is used in nearly every jurisdiction's confidentiality rule. Second, and more important, continued use of the current title, "Confidential Information of a Client," could be confusing because the Commission has recommended that all references to "confidential information" in current rule 3-100 be replaced by either "information protected by Business and Professions Code § 6068(e)(1)" or "information protected by § 6068(e)(1)". As discussed above, (see Section IX.B.3), the Commission is recommending these substitutions to remedy a disjunction between paragraph (a) and paragraph (b) of the current rule.
- Cons: The Rule concerns only confidential client information, not information that a lawyer is obligated to keep confidential pursuant to a contract with non-clients or under a court order. Moreover, the Commission has recommended that the current term, "confidential information relating to the representation," be replaced with "information protected by Business and Professions Code § 6068(e)(1)." Retaining the current reference to "client" in the title will help to

explain what follows, which does not include consideration of any other duty of confidentiality a lawyer might owe.

2. Include in the blackletter rule a definition of “information protected by Business and Professions Code § 6068(e)(1)”. There was consensus among Commission members not to recommend including a definition in the rule. The definition the Commission considered provided:

(f) “Information protected by Business and Professions Code § 6068(b)(1)” or “protected information” 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. Protected information 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.

The first sentence is drawn from California ethics opinions that in turn adopted the definition of “confidence” and “secrets” in ABA Code of Professional Responsibility, DR 4-101(A). The second sentence of the definition is taken from New York Rule 1.6(a). It is significant that the term used in the New York definition is “generally known,” not “public record” information. A State Bar Court case has held that “public record” information that is “not easily discoverable” is protected by 6068(e)(1). (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)

- Pros: The proposed provision would delimit the scope of a lawyer’s duty of confidentiality. Because of California’s strong policy of protecting client confidentiality and the apparent disjunction in language between subdivisions (1) and (2) of Business and Professions Code § 6068(e) (and paragraphs (a) and (b)), (see paragraph B.3, above), expanding current rule 3-100, Discussion ¶. 2, would be critical in providing guidance to lawyers in this important area and advancing protection to clients. Few jurisdictions define in their rules what information comes within the scope of the duty of confidentiality, and that is a deficiency.
- Cons: First, it is not practicable to define confidentiality in a black letter profession without including several clarifying Comments. For example, the first Commission attempted to do so in four Comments in its proposed Rule 1.6.<sup>22</sup> Second, it is questionable whether the Supreme Court should attempt

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<sup>22</sup> The first Commission’s description of confidentiality provided:

[3] As used in these Rules, “information protected by Business and Professions Code § 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

to define in a Rule of Professional Conduct a statutory term. In fact, in a 2014 Supreme Court letter to the Bar concerning proposed Rule 1.0, the Supreme Court directed that a cross-reference to the definition of “information protected by Business and Professions Code § 6068(e)” in Comments [3] to [6] of proposed Rule 1.6 should be deleted.<sup>23</sup> There is some uncertainty about the

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confidential. Therefore, the lawyer’s duty of confidentiality as defined in Business and Professions Code § 6068(e)(1) is broader than the 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) 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) 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)” 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* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

<sup>23</sup> The letter provided:

The court has asked that I refer the Proposed Revision to the Rules of Professional Conduct, rule 1.0.1(e-2), submitted August 21, 2013, with its request that the State Bar redraft this provision without reference to any proposed Comments. The language of the

reason for the Court's direction. Among other things, it could mean: (i) rules of professional conduct, which are promulgated by the court, should not attempt to define a statutory term; (ii) if there is such a definition, the definition should be in the black letter of the rule and not in its Comments; (iii) there should not be a cross-reference from the black letter of a rule to a Comment in another rule.

3. Require that the client's "informed consent" as described in paragraph (a) must be in writing. There was consensus among Commission members not to recommend that requirement.
  - Pros: Given California's strong policy of protecting client confidentiality, any informed consent that is obtained from a client to disclose protected information should be "informed *written* consent" as is required in the conflict of interest rules. Such a writing requirement would better alert the client to the significance of the consent being sought.
  - Cons: Requiring written consent would be impracticable in many practice scenarios, e.g., negotiations and mediations, which often require prompt responses to proposals and counter-proposals. In addition, the consequences from other kinds of disclosures that would be detrimental or embarrassing to a client would be obvious and should not require the kind of detailed written disclosures that are required in conflict situations where the adverse consequences might not be so apparent.
  
4. Include in paragraph (a), similar to the Model Rule, language that recognizes that in addition to informed client consent and the paragraph (b) exception, disclosures may also be "impliedly authorized in order to carry out the representation."<sup>24</sup> There was consensus among Commission members not to recommend including such a provision.
  - Pros: Including the exception will bring California in line with every other jurisdiction in the country, which recognize that in order to advance the client's interests in the representation, a lawyer must have implied authority, for example, during negotiations on behalf of the client when the client is not available to provide consent.

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redrafted submission should be consistent with the terms of Business and Professions Code section 6068, subdivision (e), as well as the compliance and disciplinary purpose and function of the California Rules of Professional Conduct.

(See April 15, 2015 Letter from Frank McGuire, Court Administrator, to Starr Babcock and Mary Yen, State Bar General Counsel's Office, concerning 8206125 – Proposed Rule 1.0.1 (Terminology).)

<sup>24</sup> The Commission also considered "implied authority" language from other jurisdictions, including New York's more detailed language, which provides: "the disclosure is impliedly authorized in order to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community."

- Cons: Such a provision has the potential to swallow the rule. The first Commission similarly rejected the provision.
5. In paragraph (b), remove the “criminal act” limitation as suggested in a public comment received. There was consensus among Commission members not to recommend the change.
- Pros: The change is necessary because a lawyer who learns that a client or another person has put the public in danger – as through a dangerous consumer product – could not ethically warn anyone unless the manufacturer’s failure to recall the product or warn the public was also a crime.
  - Cons: The “criminal act” limitation is included to emphasize that the conduct that would release a lawyer from the lawyer’s duty of confidentiality must at least rise to the level of being “criminal.” It should remain. In any event, because the language is part of § 6068(e)(1), it cannot be changed without legislative action.<sup>25</sup>
6. Add other exceptions to paragraph (b) that correspond to Model Rule exceptions and are recognized in California case law or other statutory sections. The exceptions would have included provisions corresponding to:
- a. Model Rule 1.6(b)(4). Exception to seek legal advice about the lawyer’s compliance with the Rules.<sup>26</sup>
  - b. Model Rule 1.6(b)(5). A “self-defense” exception, i.e., would permit a lawyer to disclose protected information to establish a claim or defense.<sup>27</sup>

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<sup>25</sup> The public commenter, Prof. Stephen Gillers, is aware that such a change requires legislative action and urges the Commission through the State Bar to seek such legislative action.

<sup>26</sup> The specific exception considered by this Commission, which had been proposed by the first Commission, provided that a lawyer may reveal confidential information to the extent necessary:

(2) to secure legal advice about the lawyer’s compliance with the *lawyer’s professional obligations*. (Emphasis added).

The provision considered would have broadened the topics for consultation to include all of a lawyer’s “professional obligations” in recognition that lawyer conduct is regulated in California not only by the RPC’s but also by the State Bar Act, other statutes (e.g., Evidence Code), and case law. (See, e.g., *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308-309 [106 Cal.Rptr.2d 906], which is in accord with MR 1.6(b)(4).)

<sup>27</sup> The specific exception considered, proposed by the first Commission, would have permitted disclosures:

(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.

- c. Model Rule 1.6(b)(6). An exception to comply with a court order or other law.<sup>28</sup>
  - o Pros: The three exceptions described above are already recognized in current California case law or other statutory sections, (e.g., Evid. Code § 958), and should be included in the confidentiality rule to alert lawyers to

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That a lawyer can reveal protected information to establish a claim or defense appears to be well-settled in California law. (See Evid. Code § 958; *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164.) Nevertheless, the first Commission used language from the more narrowly-constructed exception in § 958, viewing the Model Rule exception as being too broad in permitted a lawyer to disclose protected information in third party actions and thus contrary to California law. (Compare *Solin v. O'Melveny & Myers, LLP* (2001) 89 Cal.App.4th 451 [107 Cal.Rptr.2d 456] [action dismissed where law firm could not defend itself against malpractice claim filed by lawyer it had advised with respect to plaintiff lawyer's client, and client had refused to waive privilege as to communications necessary to law firm's defense]; *McDermott Will & Emery v. Superior Court* (2000) 83 Cal.App.4th 378 [99 Cal.Rptr.2d 622] [action dismissed in shareholder derivative action against corporation's outside counsel where only corporation, not shareholders, could waive the privilege, corporation had not waived the privilege, and corporation's privileged communications were necessary to the law firm's defense].)

Still, a Commission dissent argued that such an exception would permit disclosure without a court determination, as would be the case with Evidence Code § 958.

<sup>28</sup> The specific exception, proposed by the first Commission, permitted disclosure:

(4) to comply with a court order.

Model Rule 1.6(b)(6) provides a lawyer may reveal information relating to the representation:

(6) to comply with other law or a court order;

Comply With Court Order Exception. This exception is similar to the second half of Model Rule 1.6(b)(6). (Compare *People v. Kor* (1954) 129 Cal.App.2d 436.) Note that a first Commission dissent took issue with this provision, arguing that it contradicted settled California law, i.e., *People v. Kor*, which the dissent argued prohibited a lawyer from disclosing confidential information to comply with a court order. *Kor*, however, should probably be limited to its facts. There, where the lawyer had testified against his client under threat of punishment for contempt, the Court stated the lawyer ““should have chosen to go to jail and take his chances of release by a higher court.” (*Id.* at 447 [concurring opinion of J. Shinn, joined by J. Vallee].) However, the factual situation in *Kor* was extraordinary. Rarely will a lawyer be ordered, as was the case in *Kor*, to take the stand and testify as to the substance of a client's communication, when the lawyer's testimony would directly contradict the client's testimony, which in *Kor* was the basis for the client's defense to the charges against him. In such a case, the lawyer's testimony would be highly prejudicial or injurious to the client, which would be a critical factor in a lawyer's calculus in deciding whether risking contempt is an appropriate course to take. In addition, there are steps a lawyer can take to protect against such a situation. (See *Mohawk Indus., Inc. v. Carpenter* (2009) 558 U.S. 100 [130 S.Ct. 599].)

“Other Law” Exception. The first Commission declined to include the reference to “other law” in part out of concern that the exception might be used to import provisions of the Sarbanes-Oxley Act into rule 3-100, thus circumventing the first Commission's rejection of Model Rules 1.6(b)(2) and (b)(3).

their existence and their duties to utilize the exceptions only to the extent necessary to achieve the objective permitted by the exception.

- Cons: All of the foregoing exceptions would likely still require a legislative enactment.

7. Add other exceptions to paragraph (b) that correspond to Model Rule exceptions but are *not* recognized in California case law or other statutory sections. There was consensus among Commission members not to recommend including these exceptions. The exceptions include:

- a. Crime or Fraud Resulting in Substantial Financial or Property Injury. Model Rule 1.6(b)(2), which permits disclosure “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.”
- b. Prevent, Mitigate or Rectify Substantial Financial Injury. Model Rule 1.6(b)(3), which permits disclosure “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.”

Both paragraph (b)(2) and (b)(3) were adopted by the ABA in 2003 in response to the financial debacles earlier in the Millennium, e.g., Enron.

- c. Conduct Conflicts Check. Model Rule 1.6(b)(7), which permits disclosure “to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.” This provision was adopted by the ABA in 2012, after the first Commission’s deliberations.

- Pros: Including the exception will bring California in line with a majority of jurisdictions, at least as to paragraphs (b)(2) and (b)(3). Adding the conflicts check exception would recognize the modern reality of law firm mergers and the increased lateral movement of lawyers between law firms.

- Cons: All of the foregoing exceptions would require a legislative enactment.

8. Add a provision similar to Model Rule 1.6(c) that would impose a duty on lawyers to prevent inadvertent or unauthorized disclosure or unauthorized access to protected information. There was consensus among Commission members not to recommend including the duty.

- Pros: Including the duty would recognize today’s reality, particularly in light of the expanded use of technology in modern law practice, of the risk of inadvertent or unauthorized disclosure of protected information, or

unauthorized access to it. The provision would put lawyers on alert that they have a duty to implement policies and procedures to prevent such eventualities.

- Cons: A lawyer's duty to maintain inviolate the confidence and to protect the secrets of clients already encompasses the more specific duty contained in Model Rule 1.6(c).

9. OCTC's suggestion that Rule 3-100 should prohibit an attorney from threatening to disclose confidential information.

- Pros: Such a prohibition would clarify that a lawyer must not take advantage of the lawyer's knowledge of the client's secrets, confided to the lawyer in confidence, to gain an advantage or achieve a result that the lawyer wants. Such secrets can be and often are embarrassing or detrimental to the client. Even a threat of disclosure can undermine the lawyer-client relationship.
- Cons: First, current rule 3-100 is not a general rule of confidentiality and, in fact, does not state any prohibitions on disclosing confidential information but simply references the statutory provision, § 6068(e)(1), which contains the statement of the lawyer's duty. The provisions in paragraphs (c) through (e) were drafted in direct response to a legislative inquiry. (See Section IX.A.5-7, above.)

Second, a duty not to threaten disclosure of confidential information can be inferred from § 6068(e)(1)'s statement of the lawyer's duty to "maintain inviolate the confidence and at every peril to himself or herself to preserve the secrets of his or her client." Threatening disclosure of information that is embarrassing or detrimental to the client cannot be viewed as compatible with maintaining the confidence or trust of a client, or preserving that information.

Third, an express prohibition on threatening disclosure could place a lawyer in an untenable position under a Rule that is directed to a specific situation: a life-threatening criminal act that a lawyer is permitted to prevent through disclosure of confidential information. In addition, the paragraph (c) of the Rule requires that the lawyer, when reasonable under the circumstances, (i) inform the client of the lawyer's ability or decision to disclose confidential information to prevent such an act and (ii) attempt to persuade the client not to commit the act. In many if not most instances the client could feel threatened by these disclosures. That possibility might act to prevent a lawyer from exercising discretion under the rule for fear of violating the Rule.

Finally, paragraph (b) of the Rule (as well as § 6068(e)(2)) permit disclosures only "to the extent that the lawyer reasonably believes the disclosure is necessary to prevent" the criminal act.

10. OCTC's suggestion to include reference to Bus. & Prof. Code § 6068(e)(2) in the rule itself.

- Pros: Including the reference would clarify that the Rule is to be interpreted and enforced consistently with the code.
- Cons: There is no need for such clarification. First, paragraph (b) is a nearly verbatim recitation of § 6068(e)(2). Second, given that there are already references to paragraph (b) in paragraphs (c), (d) and (e), that the Rule is to be interpreted and enforced consistently with § 6068(e)(2) is apparent. Further, current Discussion ¶. 3, carried forward as Comment [3], expressly states that paragraph (b) “is based on” § 6068(e)(2).

11. OCTC's suggestion that the rule should also discuss an exception to section (A) where a member is ordered by a court to disclose client information.

- Pros: Members must obey court orders unless a stay is obtained. (Bus. & Prof. Code, § 6103.)
- Cons: Assuming that OCTC is suggesting that the Rule should include an exception to the duty of confidentiality that would permit a lawyer to disclose a client's confidential information to comply with a court order, the Commission believes that such an exception would require legislative action similar to that action which resulted in the enactment of § 6068(e)(2). (See paragraph IX.C.6 & footnote 28, above.) Although § 6103 provides that a “willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession . . . are causes for disbarment,”<sup>29</sup> the provision does not address whether compliance with a court order preempts the lawyer's duty under § 6068(e)(1).

12. Add exception that would permit government lawyer whistle blowing. There was consensus among Commission members not to recommend the exception. The concept was raised by a public comment submitted by lawyer Glenn Alex.

- Pros: Government lawyers should be permitted to blow the whistle even if it requires them to disclose protected information acquired by virtue of the representation because such lawyers should be viewed as owing duties not only to the government entity they represent but also to the public. Where actions by government officials will injure the public interest, a government lawyer should not be restrained by his or her duty of confidentiality and should be permitted to take action to prevent the harm.

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<sup>29</sup> Section 6103 provides in full:

A willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension.

- Cons: Government lawyers cannot function effectively in representing their client government entities if there were an exception that permitted them to blow the whistle. They would be unable to establish the trust relationship required for effective counseling and advocacy of their government clients. Moreover, an attempt to carve out an exception to confidentiality for government lawyers has failed three times in the last 15 years.<sup>30</sup>

This section identifies concepts the Commission considered before the Rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the Rule, can be found in the Public Comment Synopsis Tables.

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<sup>30</sup> First, an attempt was made to create an exception to rule 3-600 (Organization As Client). The Supreme Court rejected the State Bar's proposed rule:

"The State Bar Board of Governors' request to adopt amendments to the Rules of Professional Conduct, rule 3-600, is denied because the proposed modifications conflict with B & P Code section 6068, (e)."

Second, the legislature passed a bill, AB363, that would have permitted government lawyers to whistle blow. Then Governor Davis vetoed the bill with the following message:

"I am returning Assembly Bill 363 without my signature.

While this bill is well intended, it chips away at the attorney-client relationship which is intended to foster candor between an attorney and client. It is critical that clients know they can disclose in confidence so they can receive appropriate advice from counsel.

The effective operation of our legal system depends on the fundamental duty of confidentiality owed by lawyers to their clients. For these reasons, I must return this bill without my signature."

Third, the legislature subsequently passed a similar bill, AB2713. Then Governor Schwarzenegger vetoed that bill as well. His veto message stated:

"I am returning Assembly Bill 2713 without my signature.

This is a well-intended bill and I applaud the efforts to expose wrongdoing within government. However, this bill would condone violations of the attorney-client privilege, which is the cornerstone of our legal system. This bill will have a chilling effect on when government officials would have an attorney present when making decisions. It is an attorneys duty to advise the governmental officials when they are about to engage in illegal activity. This bill will ensure that advice is not conveyed in every situation and therefore it is too broad to affect the intended purposes.

Existing law already addresses the most egregious situations, which is the only time the attorney-client relationship should be breached. It is critical to evaluate the recent changes to the law as it relates to the attorney-client privilege prior to further eroding this important legal principle.

For the reasons stated I am unable to support this measure."

**D. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:**

1. None of the proposed changes to current rule 3-100, including the substitution of the clause “information protected by Business and Professions Code § 6068(e)(1),” are intended as substantive changes.

**E. Non-Substantive Changes to the Current Rule:**

1. All of the proposed changes to current rule 3-100, including the substitution of the clause “information protected by Business and Professions Code § 6068(e)(1),” are intended as non-substantive changes.

**F. Alternatives Considered:**

1. Use of a Current Client’s Information. Current rule 3-100 appears to address only the duty not to *reveal* or *disclose* confidential information given that the exception in paragraph (B) only permits a lawyer to “reveal confidential information . . . .” The Model Rules have a specific rule that prohibits a lawyer’s *use* of confidential information “to the disadvantage of the client.” (Model Rule 1.8(b).) The Commission concluded that California should have a rule that similarly prohibits the “use” of a client’s confidential information to the client’s disadvantage?

The Commission’s consideration of a rule similar to Model Rule 1.8(b) is the subject of a separate Report & Recommendation. (Proposed Rule 1.8.2).

2. Disclosure to Protect Client With Diminished Capacity. There is no provision in rule 3-100 that would permit a lawyer to disclose confidential information or take other “reasonably necessary protective action” to protect a client with diminished capacity when “the lawyer reasonably believes the client is at risk of substantial physical, financial or other harm unless action is taken.” (Compare Model Rule 1.14.) The first Commission recommended, and the Board adopted a more narrowly drawn rule that would have permitted a lawyer to take such action.

The Commission’s consideration of a rule similar to Model Rule 1.14 is the subject of a separate Report & Recommendation.

**X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION**

**Recommendation:**

The Commission recommends adoption of proposed Rule 1.6 [3-100] in the form attached to this Report and Recommendation.

**Proposed Resolution:**

RESOLVED: That the Board of Trustees adopts proposed amended Rule 1.6 [3-100] in the form attached to this Report and Recommendation.