AGENDA MATERIALS FOR

III.D. Rule 3-100 [1.6] (Confidential Information of a Client)

- Drafting Team's Report & Recommendation on Rule 3-100 [1.6]
- Office of the Chief Trial Counsel's Comments re: 3-100 (July 31, 2015)
- Initial Public Comment Synopsis Table on Rule 1.6 (2015)
- Assignment Document

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-100 [1.6]

Lead Drafter: **Zipser**
Co-Drafters: **Brown, Harris, Stout, Tuft**
Meeting Date: **August 14, 2015**

I. CURRENT CALIFORNIA RULE

(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. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

III. PROPOSED RULE 3-100 [1.6] (CLEAN)

Rule 3-100 [1.6] Confidentiality of Information

(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 in 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.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-100 [1.6]

Lead Drafter: **Zipser**
Co-Drafters: **Brown, Harris, Stout, Tuft**
Meeting Date: **August 14, 2015**

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 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].)

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 any 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 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 section 956.5, which relates to the evidentiary lawyer-client privilege, sets forth a similar express exception. Although a lawyer is not permitted to reveal information protected by § 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 section § 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 1 of the Constitution of the State of California that may result from disclosure contemplated by the lawyer;

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

(6) the nature and extent of 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 of 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 the lawyer reasonably believes 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 employment or 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 (see Rule 1.16(b) [3-700(B)]), unless the 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 [3-700].)

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 [5-210]. Similarly, the lawyer must also consider his or her duties of loyalty and competence. (See Rules 1.7 [3-310] (Avoiding Representations of Adverse Interests) and 1.1 [3-110] (Failing To Act Competently).)

[13] *Other exceptions to confidentiality under California law*. 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.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-100 [1.6]

Lead Drafter: **Zipser**
Co-Drafters: **Brown, Harris, Stout, Tuft**
Meeting Date: **August 14, 2015**

IV. PROPOSED RULE 3-100 [1.6] (REDLINE TO CURRENT CALIFORNIA RULE 3-100)

Rule 3-100 [1.6] Confidentiality of Information ~~of a Client~~

~~(A)~~(a) A ~~member~~lawyer shall not reveal information protected from disclosure by Business and Professions Code ~~section~~ § 6068(e)(1)~~, subdivision (e)(1)~~ ~~without the~~ unless the client gives informed consent ~~of the client~~,~~ ~~or ~~as provided~~the disclosure is permitted in paragraph ~~(B)~~(b) of this ~~rule~~Rule.

~~(B)~~(b) A ~~member~~lawyer may, but is not required to, reveal ~~confidential~~ information ~~relating to the representation of a client~~ 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).

~~(C)~~(c) Before revealing ~~confidential~~ information protected by Business and Professions Code § 6068(e)(1) to prevent a criminal act as provided in paragraph ~~(B)~~(b), 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~~lawyer's ability or decision to reveal information protected by Business and Professions Code § 6068(e)(1) as provided in paragraph ~~(B)~~(b).

~~(D)~~(d) In revealing ~~confidential~~ information protected by Business and Professions Code § 6068(e)(1) as provided in paragraph ~~(B)~~(b), the ~~member~~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.

~~(E)~~(e) A ~~member~~lawyer who does not reveal information permitted by paragraph ~~(B)~~(b) does not violate this ~~rule~~Rule.

~~Discussion:~~**Comment**

Duty of confidentiality.

[1] ~~*Duty of confidentiality.*~~ Paragraph ~~(A)~~(a) relates to a ~~member~~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~~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 ~~(A)~~(a) thus recognizes a fundamental principle in the ~~client-lawyer~~lawyer-client relationship, that, in the absence of the client's informed consent, a ~~member~~lawyer 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].)

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

[2] ~~*Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine and ethical standards of confidentiality.*~~ The principle of ~~client-lawyer~~lawyer-client confidentiality applies to any 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~~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~~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~~ information even when not ~~confronted with~~subjected to such compulsion. Thus, a ~~member~~ lawyer may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these ~~rules~~Rules, or other law.

Narrow exception to duty of confidentiality under this Rule.

[3] ~~*Narrow exception to duty of confidentiality under this Rule.*~~ Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited ~~under~~ by Business ~~&~~ and Professions Code ~~section~~ § 6068(e)(1)~~, subdivision (1)~~. Paragraph ~~(B)~~(b)~~, which restates~~is based on Business and Professions Code ~~section~~ § 6068~~, subdivision~~ (e)(2), which narrowly permits ~~identifies a narrow confidentiality exception, absent the client's informed consent, when~~ a ~~member~~lawyer ~~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~~ 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~~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 past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

Lawyer not subject to discipline for revealing ~~confidential~~ information protected by Business and Professions Code § 6068(e)(1) as permitted under this Rule.

[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),~~ 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 ~~confidential~~ information protected by Business and Professions Code § 6068(e)(1).

[5] ~~*No duty to reveal confidential information.*~~ Neither Business and Professions Code section § 6068(e)(2)~~, 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.

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

[6] ~~*Deciding to reveal confidential information as permitted under paragraph (B).*~~ Disclosure permitted under paragraph ~~(B)~~(b) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing information protected by Business and Professions Code § 6068(e)(1) as permitted ~~under~~ by paragraph ~~(B)~~(b), the ~~member~~lawyer must, if reasonable under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose ~~confidential~~ information protected by § 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 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~~lawyer's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;

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

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

[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)(c)(1) provides that before a ~~member~~lawyer may reveal ~~confidential~~ information protected by Business and Professions Code § 6068(e)(1), the ~~member~~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. ~~or if~~ If necessary, the client may be persuaded to do both. The interests protected by such counseling ~~is~~ 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~~lawyer's counseling or otherwise, takes corrective action - such as by ceasing the client's own criminal act or by dissuading a third person from committing or continuing a criminal act before harm is caused - the option for permissive disclosure by the ~~member~~lawyer would cease ~~as~~ because the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the ~~member~~lawyer who contemplates making adverse disclosure of ~~confidential~~ protected information may reasonably conclude that the compelling interests of the ~~member~~lawyer or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient,

the ~~member~~lawyer should, if reasonable under the circumstances, first advise the client of the ~~member~~lawyer's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the ~~member~~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 ~~member~~lawyer has concluded that paragraph ~~(B)~~(b) does not permit the ~~member~~lawyer to reveal ~~confidential~~ information protected by § 6068(e)(1), the ~~member~~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 ~~confidential~~ information protected by Business and Professions Code § 6068(e)(1) must be no more than is reasonably necessary to prevent the criminal act.

[8] ~~*Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act*. Under paragraph~~ Paragraph ~~(D)~~(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~~lawyer reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the ~~confidential~~ information to only those persons who the ~~member~~lawyer reasonably believes can act to prevent the harm. Under some circumstances, a ~~member~~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 ~~member~~lawyer. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the ~~member~~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 ~~member~~lawyer.

Informing client pursuant to subparagraph (c)(2) of ~~member's~~ lawyer's ability or decision to reveal ~~confidential~~ information protected by Business and Professions Code § 6068(e)(1)~~under subparagraph (C)(2)~~.

[9] ~~*Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2).*~~ A ~~member~~lawyer is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule ~~3-500~~1.4; Business and Professions Code~~, section~~ § 6068~~, subdivision~~ (m). Paragraph ~~(C)(2)~~(c)(2), however, recognizes that under certain circumstances, informing a client of the ~~member~~lawyer's ability or decision to reveal ~~confidential~~ information protected by § 6068(e)(1) ~~under~~ as permitted in paragraph ~~(B)~~(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~~lawyer or the ~~member~~lawyer's family or associates. Therefore, paragraph ~~(C)(2)~~(c)(2) requires a ~~member~~lawyer to inform the client of the ~~member~~lawyer's ability or decision to reveal ~~confidential~~ information protected by § 6068(e)(1) as ~~provided~~ permitted in paragraph ~~(B)~~(b) only if it is reasonable to do so under the circumstances. Paragraph ~~(C)(2)~~(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~~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~~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)~~(b);

(6) the ~~member~~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~~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~~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 paragraph~~Comment [1].) To avoid that chilling effect, one ~~member~~lawyer may choose to inform the client of the ~~member~~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)~~(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 paragraph~~ Comment [7]. In each situation, the ~~member~~lawyer will have ~~discharged properly~~ satisfied the ~~requirement~~ lawyer's obligation under ~~subparagraph~~ paragraph ~~(C)(2)~~(c)(2), and will not be subject to discipline.

Informing client that disclosure has been made; termination of the lawyer-client relationship.

[11] ~~*Informing client that disclosure has been made; termination of the lawyer-client relationship.*~~ When a ~~member~~lawyer has revealed ~~confidential~~ information protected by Business and Professions Code § 6068(e) ~~under~~ as permitted in paragraph ~~(B)~~(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~~lawyer's representation of the

client impossible. Therefore, when the relationship has deteriorated because of the lawyer's disclosure, the ~~member~~lawyer is required to seek to withdraw from the representation (see ~~rule~~Rule 1.16(b) [3-700(B)]), unless the ~~member is able to obtain the client's~~ the client has given informed consent to the ~~member~~lawyer's continued representation. The ~~member~~lawyer normally must inform the client of the fact of the ~~member~~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~~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 [3-700].)

Other consequences of the ~~member's~~ lawyer's disclosure.

[12] ~~*Other consequences of the member's disclosure*.~~ Depending upon the circumstances of a ~~member~~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~~lawyer ~~will be called as~~who is likely to testify as a witness in ~~the client's~~a matter involving a client must comply ~~, then rule~~ with Rule 3.7 [5-210] ~~should be considered~~. Similarly, the ~~member~~lawyer ~~should~~ must also consider his or her duties of loyalty and ~~competency~~competence. (See Rules 1.7 [3-310] (Avoiding Representations of Adverse Interests) and ~~rule~~ 1.1 [3-110] (Failing To Act Competently).)

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

V. PUBLIC COMMENTS SUMMARY

A. Glenn Alex, May 25, 2015 (2015-016d): California does not have an exception to confidentiality that permits government lawyers to blow the whistle.

B. Yvonne Ascher, Chair of Executive Committee, June 15, 2015 (2015-32): The Executive Committee of the Trusts & Estates Section ("TEXCOM") has urged the Commission to adopt proposed Rules 1.6 and 1.14 (Client With Diminished Capacity) as recommended by the first Commission.

C. Peter Stern, a former Chair and member of TEXCOM (2015-30), has also urged the Commission to adopt proposed Rules 1.6 and 1.14 as recommended by the first Commission.

D. Ashleigh E. Aitken, Pres., The Orange County Bar Association ("OCBA"), June 11, 2015 (2015-024c): identifies the following issues for consideration by the Commission in its study of rule 3-100.

- Is it time to bring California's confidentiality rules more in line with the rest of the country?

- Noisy withdrawal- should it be permitted in appropriate circumstances?
- Clarify the "other law" exception in Comment 2 to Rule 3-1 00;
- Should California permit an exception for preventing financial injury - as in MR 1.6(b)(3)?
- Whether to adopt an express exception for compliance with a court order -MR 1.6(b)(6); We believe there is a need to clarify whether lawyers are protected from discipline if they make disclosures in compliance with a court order. At present, Business and Professions Code section 6068 (e) generates uncertainty whether lawyers must violate a court order in order to preserve confidences and secrets;
- Clarity is needed in a rule as to what conduct regarding confidential information will or will not expose lawyers to disciplinary action.
- If the Legislative framework remains, the RRC should consider providing appropriate definitions for "confidence" and "secrets," and lawyers should not have to guess what is meant by "at every peril to himself or herself preserve the secrets of the client";
- The rule should address and resolve whether a lawyer may be disciplined for disclosing privileged information to the SEC or other government agency when they "encourage" you to provide the information (knowing that it's in your client's best interest to cooperate.)

E. Anonymous, [no date] (2015-023b): urges the Commission "NOT to recommend that the confidentiality obligations imposed under Rule 3-100 be watered down to correspond to the erosion of the confidentiality obligations that we have seen in the ABA Model Rules."

F. Gerald McNally, [no date] (2015-005a): has requested that California "conform to the ABA on disclosure of confidential information."

VI. OCTC / STATE BAR COURT COMMENTS

A. Jayne Kim, OCTC, 6/4/2015:

[The Commission is awaiting the submission of OCTC's 2015 comments.]

B. Russell Weiner, OCTC, 6/15/2010:

Please note: The comments submitted by OCTC in 2010 concerned a rule drafted by the first Commission that included several exceptions that are not included in the rule being proposed by the drafting team. OCTC comments that are not relevant to the proposed rule have been struck through.

Rule 1.6. Confidentiality of Information.

1. OCTC remains concerned that this proposed rule might create confusion and enforcement problems as Business & Professions Code section 6068(e) already addresses the issues raised in proposed rule 1.6. (We have already expressed in this letter our concern with the definition in rule 1.0 (e)(2).) If California is to have a rule to

cover this issue, OCTC suggests that paragraph (a) use the same terms as Business & Professions Code section 6068(e)(1) to ensure that the rule is not interpreted to change the duty of an attorney to preserve the confidences and secrets of a client as provided in Business & Professions Code section 6068(e). For the same reason, OCTC believes that paragraph (a) should refer to all of Business & Professions Code section 6068(e) including (e)(2)'s statement when an attorney may reveal the information ordinarily protected under section (e)(1).

2. OCTC is further concerned that subparagraph (b)(1) [**proposed paragraph (b)**] does not address what happens if any further changes are adopted to Business & Professions Code section 6068(e).

~~3. OCTC still agrees with the concerns of the Minority of the Commission that paragraph (b)(3) permits disclosure to establish a claim or defense on behalf of the lawyer without a court determination. We believe a court, not an attorney, should make this determination. This will also aid in the enforcement of violations of this paragraph.~~

~~4. OCTC continues to disagree with the removal from subparagraph (b)(4) of the term "other law" and agrees with the Model Rules that this term should be included in this paragraph. OCTC does not believe that the term "other law" is too vague or imprecise. It simply provides that if there is other law preventing or permitting disclosure, it will be complied with. It should be followed in California's rule. In fact, other proposed rules use similar terms. (See e.g. proposed rule 1.11(a) [Except as law may otherwise expressly permit].) There are statutes that require certain disclosures and the rules should not encourage disobedience of those statutes.~~

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

~~in and disrespect for the court and the law.~~

~~5. As to paragraph (b)(5), OCTC refers to its discussion of proposed rule 1.14(b).~~

~~6. OCTC has concerns about subparagraph (e). It appears subparagraph (e) is an attempt to carry forward the concept in Business & Professions Code section 6068(e)(2) that an attorney may but is not required to reveal some information. The problem is that proposed subparagraph (e) is too broad. It covers all of proposed subparagraph (b), but that would include that an attorney could not be disciplined for disobeying a law or court order to reveal the information. (See our discussion of paragraph (b)(4).) Although the Commission states this paragraph is just what current rule 3-100(E) states, proposed subparagraph (b)'s language is broader than current rule 3- 100(B). Proposed subparagraph (e), unlike current rule 3-100, includes allowing an attorney to refuse to reveal confidences required by a court order, apparently even after all the appeals and writs have been completed. This paragraph needs clarification and it should be a violation to disobey a court order or law.~~

~~7. The Comments are more appropriate for treatises, law review articles, and ethics opinions. We are particularly concerned that the first sentence of Comment 1 implies that OCTC can only discipline under this rule and not under Business & Professions Code section 6068(e). If that is what is meant, OCTC strongly disagrees. It should also be noted that by creating a rule that covers the subject of section 6068(e) the Commission may be eliminating the good faith defense that might exist to a violation of section 6068(e). As already discussed, the good faith defense generally applies to the Business & Professions Code and not to the Rules of Professional Conduct.~~

~~8. OCTC finds the first sentence of Comment 3 too narrow and may exclude information protected by section 6068(e). OCTC would strike that first sentence and only keep the second sentence.~~

9. OCTC finds Comment 9 [**proposed comment [3]**] confusing. It states that the overriding value of life permits disclosure otherwise protected by Business & Professions Code section 6068(e)(1), but Business & Professions Code section 6068 (e)(2) already provides for this. More importantly, OCTC does not think the rules should or can be adding Comments that are explaining a statute passed by the Legislature. OCTC recommends that this Comment be stricken.

10. Comment 15 [**proposed comment [8]**] is overly narrow and seems to imply that the rule of limited disclosure applies only to prevent criminal conduct. If that is what is meant, OCTC strongly disagrees and believes that such an interpretation is contrary to established law. OCTC would strike the Comment or significantly modify it. ~~Comment 19 could result in a claim that, in an investigation commenced under the State Bar's own authority and not the result of a client's complaint, the respondent does not have to provide certain information. It does not explain what it means by cooperation. What if OCTC subpoenas the client or the client consents?~~

~~11. OCTC is concerned that Comments 21 and 23 appear to allow a lawyer to disobey a court order to disclose information. As previously discussed, OCTC disagrees with that this position.~~

C. Commenter Name, State Bar Court: No comments received from State Bar Court.

VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

Included here are examples of rules 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 substantia l 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 involve d, 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 in formation 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):

  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":

  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.

A. The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.6: Confidentiality of Information," revised May 13, 2015, is available at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_6.pdf

Model rule 1.6 has arguably been subject to more variation among the jurisdictions that have adopted or adapted it than any other 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.[1] Thirty-nine jurisdictions have adopted a slightly modified version of Model

[1] The two jurisdictions are: Delaware and West Virginia.

Rule 1.6.[2] Ten jurisdictions have adopted a version of the rule that is substantially different to Model Rule 1.6.[3]

B. 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 states, like California, it is permissive, but 13 states 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 states, 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 states 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.

C. Other Model Rule exceptions to confidentiality that are recognized in California case law or statutes.[4]

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 states 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 VIII.C.5.a & note 9, 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

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[2] The thirty-nine states 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.

[3] The ten jurisdictions are: Alabama, California, District of Columbia, Florida, Massachusetts, Michigan, Minnesota, New Jersey, New York, and Texas.

[4] Although the first Commission recommended adoption of these exceptions, the drafting team does not recommend their addition to current rule 3-100. (See Section VIII.C.5 (Concepts Rejected), below.)

include a self-defense exception, it should be coextensive with Evidence Code § 958. (See Section VIII.C.5.b & note 10, below.)

3. Exception to comply with court order or other law. Nearly every state permits disclosures to comply with a court order or other law, or both. 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 VIII.C.5.c & note 11, below.)

D. Other Model Rule exceptions that have no counterparts in California law. Some jurisdictions have adopted some 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

- Forty-one jurisdictions permit disclosure to prevent crime (including criminal fraud). Five jurisdictions required disclosure to prevent crime (including criminal fraud). Five jurisdictions do not permit or require disclosure to prevent crime (including criminal fraud).
    - 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. Three jurisdictions require disclosure to prevent non-criminal fraud likely to result in substantial loss. Twenty-one jurisdictions do not allow disclosure to prevent non-criminal fraud likely to result in substantial loss.
- In nineteen jurisdictions disclosure is limited 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 includte 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.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-100 [1.6]

Lead Drafter: **Zipser**
Co-Drafters: **Brown, Harris, Stout, Tuft**
Meeting Date: **August 14, 2015**

VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Introduction

It is helpful to consider three points in reviewing the drafting team's recommendations concerning 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 originally passed by the California legislature and enacted in 1871.

Second, confidentiality rules adopted in the various jurisdictions throughout the country reflect the greatest variation of any rule derived from the Model Rules. For example, the rules range from some jurisdictions that *require* that a lawyer disclose confidential client information to prevent fraud, through jurisdictions that *permit* such disclosures, and on to jurisdictions that prohibit such disclosures, e.g., California. In fact, California 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, and perhaps most important, it is helpful to consider the history underlying current rule 3-100 and recognize that the rule, adopted by the Board of Governors and approved by the Supreme Court in 2004, was never intended to function solely as a disciplinary rule. As the history of rule 3-100 in the accompanying Rule Assignment Memo briefly 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). As directed by the California legislature,[5] the rule was drafted with the intent of providing guidance to lawyers

[5] AB1101, the bill that was signed into law by Governor Davis, contained non-codified section (3), which 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.

practicing in California about the application of the first express exception to confidentiality in California in 133 years. Understanding this intent helps explain the large number of lengthy comments that the rule contains. The history further suggests that any substantive amendment to the confidentiality duty in California requires an amendment of § 6068(e). This is especially true of any express exceptions to the duty and is one of the principal reasons why the drafting team hesitates to recommend any major changes to current rule 3-100.

B. Concepts Accepted (Pros and Cons):

1. Title: Change the title of the rule to "Confidentiality of Information." Drafting Team consensus
   - 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," would be confusing because the drafting team 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 below, (see Section _____), the drafting team is recommending these substitutions to remedy a disjunction between paragraph (a) and paragraph (b) of the current rule.
   - Cons: None identified so long as the Commission agrees with the proposed substitution.

2. Change the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)
   - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California, (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there

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(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.

has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

3. Substitute the term "lawyer" for "member".
   - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice *pro hac vice* or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
   - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

4. Paragraph (a): Change syntax to more closely approximate the syntax of Model Rule 1.6 and most jurisdictions. Drafting Team consensus.
   - Pros: The changed syntax includes the preferred active voice ("the client gives informed consent"). No substantive change is intended.
   - Cons: None identified.

5. Paragraph (a): Substitute "the disclosure is permitted" for "as provided". Drafting Team consensus.
   - Pros: The use of the word "permitted" emphasizes that rule 3-100 [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.

6. 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." Drafting Team consensus.
   - Pros: The substitution will remedy the current disjunction that exists between paragraphs (a) and (b) in current rule 3-100 (which also exists between B&P 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). 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 (1), 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 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.

7. Paragraph (b): Add phrase, "as provided in paragraph (c)" at the end of the paragraph. Drafting Team consensus.
   - 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.

8. 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. Drafting Team consensus.
   - Pros: There is no evidence that paragraph (c), which was drafted in response to specific inquiries from the Legislature, (see note 5, above), has caused confusion or other problems.
   - Cons: None identified.

9. 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. Drafting Team consensus.
   - Pros: Paragraph (d) is an important limitation on the ability 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 least amount of disclosed 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.

10. Paragraph (e): Retain paragraph (e), the only changes being substitution of the term "lawyer" and the formatting changes as described above. Drafting Team consensus.
    - 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 easily be condemned in retrospect should a fatality or serious injury occur that 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." As discussed, (paragraph A., above), proposed Rule 1.6 was not intended as a disciplinary rule. In considering the proposed comments, the Commission members should keep in mind the primary purpose of current rule 3-100 to provide guidance to lawyers admitted to practice or otherwise authorized to practice in California concerning how to comply with the rule's permissive exception for disclosing a life-threatening criminal act. Further, the members should consider that 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. Finally, the reader should also recognize that (i) no substantive changes to the comments are intended, the only changes being substituted terms and formatting, and (ii) 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."

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-100 [1.6]

Lead Drafter: **Zipser**
Co-Drafters: **Brown, Harris, Stout, Tuft**
Meeting Date: **August 14, 2015**

11. Retain current rule 3-100 comment headings with minor revision. Drafting Team consensus.
    - 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 is favored. Although not always the case, when a lawyer confronted with a life-threatening situation the harm is often imminent. Providing headings helps a lawyer to quickly find a comment that explains how the lawyer might disclose protected information as permitted by the rule.
      In addition, there was drafting team consensus to move each heading out of the comment itself and place it above each comment to make it more prominent.
    - Cons: None identified.

12. Retain current rule 3-100, Discussion ¶. 1 as comment [1]. Drafting Team consensus.
    - 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.

13. Retain current rule 3-100, Discussion ¶. 2 as comment [2]. Drafting Team consensus.
    - 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 and information protected under the work-product doctrine.
    - Cons: None identified.

14. Retain current rule 3-100, Discussion ¶. 3 as comment [3]. Drafting Team consensus.
    - Pros: Comment [3] clarifies that the rule provides for a narrow exception to the duty of confidentiality. The drafting team recommends replacing a nearly verbatim recitation of § 6068(e)(2) with a much 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 can disclose information protected by their duty of confidentiality.

- Cons: None identified.

15. Retain current rule 3-100, Discussion ¶. 4 as comment [4]. Drafting Team consensus.
    - Pros: Comment [4] is the opposite of 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 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: If comment [4], which provides immunity from discipline similar to paragraph (e), should also be in the black letter of the rule.

16. Retain current rule 3-100, Discussion ¶. 5 as comment [5]. Drafting Team consensus.
    - 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 drafting team 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 section 6068(e)(1); and (ii) paragraph (b) is permissive. The first Commission also deleted the reference.
    - 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].

17. Retain current rule 3-100, Discussion ¶. 6 as comment [6] and change the heading so it provides "Whether to reveal information …". Drafting Team consensus.
    - Pros: Comment [6] is one of the critical guidance provisions in the rule by providing 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 the 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.

18. Retain current rule 3-100, Discussion ¶. 7 as comment [7] and change the heading so it provides "Whether to counsel client …". Drafting Team consensus.
    - 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) requires "if reasonable under the circumstances." The comment was originally drafted as a direct response to the Legislature's inquiry to the State Bar. (See note 5, 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.

19. Retain current rule 3-100, Discussion ¶. 8 as comment [8]. Drafting Team consensus.
    - 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.
    - Cons: None identified.

20. Retain current rule 3-100, Discussion ¶. 9 as comment [9]. Drafting Team consensus.
    - 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 20, below, concerning related comment [10].
      The comment was originally drafted as a direct response to the Legislature's inquiry to the State Bar. (See note 5, above.) No substantive changes have been made to current Discussion ¶.9. Given that background and the Supreme Court's prior approval of this comment, there is no apparent reason to delete it from the proposed rule.
    - Cons: None identified.

21. Retain current rule 3-100, Discussion ¶. 10 as comment [10]. Drafting Team consensus.
    - 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.
      The comment was originally drafted as a direct response to the Legislature's inquiry to the State Bar. (See note 5, above.) No substantive changes have been made to current Discussion ¶.10. Given that background and the Supreme Court's prior approval of this comment, there is no apparent reason to delete it from the proposed rule.
    - Cons: None identified.

22. Retain current rule 3-100, Discussion ¶. 11 as comment [11]. Drafting Team consensus.
    - 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 note 5, above.) No substantive changes have been made to either of the current Discussion paragraphs. Given that background and the Supreme Court's prior approval of these comments, there is no apparent reason to delete them from the proposed rule.
    - Cons: None identified.

23. Retain current rule 3-100, Discussion ¶. 12 as comment [12]. Drafting Team consensus.
    - Pros: See paragraph 22.
    - Cons: See paragraph 22.

24. Retain current rule 3-100, Discussion ¶. 13 as comment [13] and delete the phrase "reliance upon." Drafting Team consensus.
    - 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 drafting team recommend deleting the phrase "reliance upon" as surplusage. No change in meaning is intended.
    - Cons: None identified.

C. Concepts Rejected (Pros and Cons):

1. Include in the blackletter rule a **definition** of "information protected by Business and Professions Code § 6068(e)(1)". Drafting Team consensus not to recommend including a definition. The definition considered would have 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, which 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). Note that the term used is "generally known," not "public record" information. A State Bar court case held that "public record" information that is "not easily discoverable" is protected by 6068(e)(1). See In the Matter of Johnson, 4 Cal. State Bar Ct. Rptr. 179, 2000 WL 1682427 (Rev.Dept. 2000).

- 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 Bus. & Prof. Code § 6068(e) (and paragraphs (a) and (b)), (see paragraph B.6, 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.[6] Second, it is

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[6] 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 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

questionable whether the Supreme Court should define in a Rule of Professional Conduct a term that is used in a statute. In fact, in a 2014 Supreme Court letter to the Bar concerning proposed rule 1.0, the Supreme Court directed that a cross-reference in that rule 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. It is not clear what that direction meant. Among other things, it could mean: (i) there should be no definition of a statutory term in the Rules; (ii) if there is such a definition, it must be in the black letter of the rule and not in the comments; or (iii) there should not be a cross-reference from the black letter of a rule to a comment in another rule.

2. Require that the client's **"informed consent"** as described in paragraph (a) must be **in writing**. Drafting Team consensus not to recommend including 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.
   - 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

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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.

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.

3. 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."[7] Drafting Team consensus 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.
   - Cons: Such a provision has the potential for this exception to swallow the rule. The first Commission similarly rejected the provision.

4. In paragraph (b), remove the "**criminal act" limitation** as suggested in a public comment received. Drafting Team consensus 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 failure to recall the product or warn 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.[8]

5. Add **other exceptions** to paragraph (b) that correspond to Model Rule exceptions and are **recognized in California** case law or other statutory sections. Drafting Team consensus not to recommend including these exceptions.
   The exceptions would have included provisions corresponding to:
   a. **MR 1.6(b)(4)**. Exception to seek legal advice about the lawyer's compliance with the Rules.[9]

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[7] The drafting team 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."

[8] In fairness to the public commenter, Prof. Stephen Gillers, he is aware that such a change requires legislative action and urges the Commission through the State Bar to seek the change.

[9] The specific exception considered by the drafting team, which had been proposed by the first Commisson, 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).

b. **MR 1.6(b)(5)**. A "self-defense" exception, i.e., would permit a lawyer to disclose protected information to establish a claim or defense.[10]
c. **MR 1.6(b)(6)**. An exception to comply with a court order or other law.[11]

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 Seachlight 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).

[10] 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.

That a lawyer can reveal protected information to establish a claim or defense appears to be well-settled in California law. See Evidence 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.

[11] 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. Issue: Include? This is similar to 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 claimed 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

- 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 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. It would not be an efficient use of the Commission's limited time to pursue these legislative objectives.

6. Add **other exceptions** to paragraph (b) that correspond to Model Rule exceptions but are ***not*** **recognized in California** case law or other statutory sections. Drafting Team consensus 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 Substantia 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

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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 lawyer's calculus 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).

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. It would not be an efficient use of the Commission's limited time to pursue these legislative objectives.

7. 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. Drafting Team consensus not to recommend including such a 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 MR 1.6(c).

8. Add exception that would permit **government lawyer whistle blowing**. Drafting Team consensus not to recommend such an exception. The concept was raised by a public comment submitted by lawyer Glenn Alex. (See Section V.A., above.)
   - 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.
   - 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. Moreover, an attempt to carve out an exception to confidentiality for government lawyers has failed three times in the last 15 years.[12]

[12] 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."

consultation by a prospective client.[13] California does not have a similar rule but Evidence Code § 951 defines client to mean "a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity." Section 951 does not require that a lawyer-client relationship ensue. See also Cal. State Bar Ethics Op. 2003-161.

2. **Use of a Current Client's Information**. Current rule 3-100 appears to address only the duty not to reveal 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

[13] A "prospective client" is defined as "[a] A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter." Model Rule 1.18(a).

In its entirety, the black letter of Model Rule 1.18 provides:

Rule 1.18 Duties To Prospective Client

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

client." (Model Rule 1.8(b). Should California have a rule that similarly prohibits the "use" of a client's confidential information to the client's disadvantage?[14]
The drafting team's consideration of a rule similar to Model Rule 1.8(b) is the subject of a separate Report & Recommendation circulated concurrently with this Report.

3. 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 drafting team's consideration of a rule similar to Model Rule 1.14 is the subject of a separate memo outline circulated concurrently with this Report.

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

1. Whether to transfer to another drafting team, e.g., the team charged w/ considering a rule similar to Model Rule 1.9 (Duties To Former Client) consideration of a rule addressing duties owed to a prospective client (e.g., Model Rule 1.18). (See Section VIII.F.1, above.)

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[14] Note that rule 3-100 may impliedly prohibit the use of confidential information by cross-referencing "information protected from disclosure by Business and Professions Code section 6068(e)(1)" in paragraph (A). Subdivision (e)(1) is not limited by its terms to prohibiting a lawyer from "revealing" confidential information. It provides simply that it is a lawyer's duty to "maintain inviolate the confidence, and at every peril to himself or herself to protect the secrets, of his or her client." That language, which is not limited to "revealing" or "disclosing," can be interpreted to prohibit not just the disclosure but also the use of a client's information to the client's disadvantage.

Moreover, paragraph (E) of the general California rule that addresses conflicts of interest, 3-310, provides:

> (E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

Because paragraph (E) applies to both former and current clients in the context of a conflict, it might also be interpreted to apply to the use of a current client's confidential information. However, paragraph (E) is limited to situations where the lawyer has accepted "employment adverse to the client," and thus does not sweep as broadly as Model Rule 1.8(b).

2. Whether to recommend to the Supreme Court and the State Bar that a collaborative process with the Legislature be initiated to explore the possibility of adding further exceptions already recognized in California case law of statutes to the duty of confidentiality in Business & Professions Code § 6068(e)(1), including an exception to seek legal advice about compliance with professional obligations, a self-defense exception coextensive with Evid. Code § 958, and an exception to comply with a court order. (See Section VIII.C.5, above.)

3. Whether to recommend to the Supreme Court and the State Bar that a collaborative process with the Legislature be initiated to explore the possibility of adding an exception to the duty of confidentiality in Business & Professions Code § 6068(e)(1) that would permit limited disclosures to protect a client with significantly diminished capacity. (See Section VIII.F.3, above.)

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Zipser
- [Date]: Email Comment

Brown

[Date]: Email Comment

Harris
- [Date]: Email Comment

Stout

[Date]: Email Comment

Tuft
- [Date]: Email Comment

XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed rule 1.6, derived from current rule 3-100 as amended, in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 1.6, derived from current rule 3-100 as amended, in the form attached to this Report and Recommendation.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-100 [1.6]

Lead Drafter: **Zipser**
Co-Drafters: **Brown, Harris, Stout, Tuft**
Meeting Date: **August 14, 2015**

XII. DISSENTING POSITION(S)

None.

XIII. FINAL COMMISSION VOTE/ACTION

[Date of Vote]

[Action: Proposed amended rule adopted or not adopted]

[Record of Roll Call Vote]

THE STATE BAR
OF CALIFORNIA

Date: July 31, 2015

To: Justice Lee Edmon, Chair, and the Members of the Commission for the Revision of the Rules of Professional Conduct

From: Jayne Kim, Chief Trial Counsel, Office of the Chief Trial Counsel

Subject: OCTC's comment on the Rules of Professional Conduct for August 2015 meeting

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CONTENTS

I.

OPENING COMMENT

The following comments address rule 3-100 to be considered at the Commission's August 2015 meeting. OCTC previously commented on the remaining rules to be discussed at the August 2015 meeting and refers the Commission to those comments. As requested by the Commission, OCTC will submit additional comments on the rules as the revision process progresses.

II.

POINTS FOR CONSIDERATION

A. Rule 3-100: Confidentiality of Information

1. Rule 3-100 should prohibit an attorney from threatening to disclose confidential information.

2. The rule should be revised to clarify its consistency with Business and Professions Code section 6068(e) which also addresses client confidences and secrets. Rule 3-100(A) articulates the fundamental rule regarding protection of client information. That section of the rule relates to and makes reference to code section 6068(e)(1). The balance of rule

3-100, sections (B) through (E), address the exception to section (A) where disclosure is permitted for the purpose of preventing a criminal act. These sections of the rule relate, but make no reference, to code section 6068(e)(2). Reference to code section 6068(e)(2) is relegated to the discussion following the rule. A reference to code section 6068(e)(2) in the rule itself would make clear that the rule is to be interpreted and enforced consistently with the code.

3. The rule should also discuss an exception to section (A) where a member is ordered by a court to disclose client information. Members must obey court orders unless a stay is obtained. (Bus. & Prof. Code, § 6103.)

III.

CLOSING COMMENT

OCTC appreciates the opportunity to participate in the Commission's evaluation of the Rules of Professional Conduct and remains available to assist as requested.

Initial Public Comments
[Rule 3-100 (1.6) – Confidential Information of a Client]

No.	Commenter	Comment on Behalf of Group?	Rule	Comment	RRC Response
2015-024b	OCBA	Yes	3-100	Suggest consideration of topics surrounding the confidentiality rule, and the need for clarification of the rule to address the ambiguities in existing statutes and case law.	
2015-016c	Alex, Glenn C.	No	3-100	Concerned that current rules do not address concurrent conflicts of public attorneys.	
2015-023b	Anonymous	No	3-100	Recommends retaining current confidentiality rule as necessary to maintain attorney-client relationships. Conforming to the ABA rule allowing disclosures would erode client trust.	
2015-005a	McNally, Gerald	No	3-100	Existing rules prohibit attorney from reporting SEC violations. Concerned that this will chill investments with companies that use California law firms that would "cover up" violations. Suggest rule and statute conform to ABA and permit such disclosures.	
2015-048n	Law Professors	Yes	3-100 (1.6)	Caution that care must be taken to ensure the Commission does not overstep the narrow bounds created by the legislature in the confidentiality statute and exceptions.	
2015-022	Gillers, Stephen	No	3-100(B)	Suggests removing "criminal" from the rule to allow attorneys to warn the public of non-criminal conduct that poses a risk of death.	

CURRENT CALIFORNIA RULE 3-100
"Confidential Information of a Client"

I. Text of Current Rule:

(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. Background/Purpose:

Introduction. There are three things that should be considered in approaching consideration of 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 1871.

Second, confidentiality rules adopted in the various jurisdictions reflect the greatest variation of any rule derived from the Model Rules. For example, the rules range from some jurisdictions that *require* that a lawyer disclose confidential client information to prevent fraud, through jurisdictions that *permit* such disclosures, and on 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 will briefly attempt to recount, 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 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 substantive amendment to the confidentiality duty in California requires an amendment of section 6068(e). This is especially true of exceptions to the duty.

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

The State Bar 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. As described in the following section II.A., the reason for the Supreme Court rejecting the proposals appears to have been the Supreme Court's belief that a court could not amend a statutory provision, specifically section 6068(e). It was only when the legislature amended section 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. See Section II.B.

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.[3] The California Supreme 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 Inviolate), in what context does it allow for disclosure of otherwise privileged attorney-client information. To the

[1] 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."

[2] The language of the original statute has been made gender neutral.

[3] 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 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.

> 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 should 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 "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.

The State Bar did not submit any further proposals until June 2004 when, as an outgrowth of the legislature's amendment of section 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"),[4] 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.[5]

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 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 section 6068(e)(2) was apparently intended to conform to the phrase "confidential communication relating to the representation of a client" that already existed in

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[4] 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. (Last accessed on June 30, 2015.)

[5] See section (1) of AB 1101. The full text of AB 1101 as chaptered is available athttp://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1101-1150/ab_1101_bill_20031011_chaptered.pdf . (Last accessed on June 30, 2015.)

Evidence Code section 956.5. The use of that latter phrase in section 6068(e)(2), which has no predicate in section 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. See Section IV.C.1, below.

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.[6] Section (3) 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.[7]

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[6] 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.

[7] 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 section 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.[8] 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

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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.

[8] 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.)

member would cease as the threat posed by the criminal act would no longer be present.

* * * * *

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.

III. Input from the State Bar Office of the Chief Trial Counsel (OCTC):

A. In a September 27, 2001 memorandum to the first Commission, OCTC did not offer any comments on a rule concerning confidentiality because at that time there was no confidentiality rule, the sole statement of a lawyer's confidentiality duty appearing in Bus. & Prof. Code § 6068(e). OCTC did propose a new rule 3-100, but its topic was not related to the duty of confidentiality.[9]

B. In a June 15, 2010 letter to the first Commission, OCTC made the following comments concerning the first Commission's proposed rule 1.6 [3-100] (a copy of the Commission's proposed rule, together with public comment received concerning the rule, is provided with this rule assignment memo):

Rule 1.6. Confidentiality of Information.

1. OCTC remains concerned that this proposed rule might create confusion and enforcement problems as Business & Professions Code section 6068(e) already addresses the issues raised in proposed rule 1.6. (We have already expressed in this letter our concern with the definition in rule 1.0 (e)(2).) If California is to have a rule to cover this issue, OCTC suggests that paragraph (a) use the same terms as Business & Professions Code section 6068(e)(1) to ensure that the rule is not interpreted to change the duty of an attorney to preserve the confidences and secrets of a client as provided in Business & Professions Code section 6068(e). For the same reason, OCTC believes that paragraph (a) should refer to all of Business & Professions Code section 6068(e) including (e)(2)'s statement when an attorney may reveal the information ordinarily protected under section (e)(1).

[9] OCTC's proposed rule 3-100 was intended to clarify "the authority of a lawyer to act on behalf of a client." It was based at least in part on Model Rule 1.2 (Scope Of Representation And Allocation Of Authority Between Client And Lawyer). (See September 27, 2001 Nisperos Memo to First Rules Revision Commission, at pages 18-21.

2. OCTC is further concerned that subparagraph (b)(1) does not address what happens if any further changes are adopted to Business & Professions Code section 6068(e).

3. OCTC still agrees with the concerns of the Minority of the Commission that paragraph (b)(3) permits disclosure to establish a claim or defense on behalf of the lawyer without a court determination. We believe a court, not an attorney, should make this determination. This will also aid in the enforcement of violations of this paragraph.

4. OCTC continues to disagree with the removal from subparagraph (b)(4) of the term "other law" and agrees with the Model Rules that this term should be included in this paragraph. OCTC does not believe that the term "other law" is too vague or imprecise. It simply provides that if there is other law preventing or permitting disclosure, it will be complied with. It should be followed in California's rule. In fact, other proposed rules use similar terms. (See e.g. proposed rule 1.11(a) [Except as law may otherwise expressly permit].) There are statutes that require certain disclosures and the rules should not encourage disobedience of those statutes.

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

5. As to paragraph (b)(5), OCTC refers to its discussion of proposed rule 1.14(b).

6. OCTC has concerns about subparagraph (e). It appears subparagraph (e) is an attempt to carry forward the concept in Business & Professions Code section 6068(e)(2) that an attorney may but is not required to reveal some information. The problem is that proposed subparagraph (e) is too broad. It covers all of proposed subparagraph (b), but that would include that an attorney could not be disciplined for disobeying a law or court order to reveal the information. (See our discussion of paragraph (b)(4).) Although the Commission states this paragraph is just what current rule 3-100(E) states, proposed subparagraph (b)'s language is broader than current rule 3-100(B). Proposed subparagraph (e), unlike current rule 3-100, includes allowing an attorney to refuse to reveal confidences required by a court order, apparently even after all the appeals and writs have been completed. This paragraph needs clarification and it should be a violation to disobey a court order or law.

7. The Comments are more appropriate for treatises, law review articles, and ethics opinions. We are particularly concerned that the first sentence of Comment 1 implies that OCTC can only discipline under this rule and not under Business & Professions Code section 6068(e). If that is what is meant, OCTC strongly disagrees. It should also be noted that by creating a rule that covers the subject of section 6068(e) the Commission may be eliminating the good faith defense that might exist to a violation of section 6068(e). As already discussed, the good faith defense generally applies to the Business & Professions Code and not to the Rules of Professional Conduct.

8. OCTC finds the first sentence of Comment 3 too narrow and may exclude information protected by section 6068(e). OCTC would strike that first sentence and only keep the second sentence.

9. OCTC finds Comment 9 confusing. It states that the overriding value of life permits disclosure otherwise protected by Business & Professions Code section 6068(e)(1), but Business & Professions Code section 6068 (e)(2) already provides for this. More importantly, OCTC does not think the rules should or can be adding Comments that are explaining a statute passed by the Legislature. OCTC recommends that this Comment be stricken.

10. Comment 15 is overly narrow and seems to imply that the rule of limited disclosure applies only to prevent criminal conduct. If that is what is meant, OCTC strongly disagrees and believes that such an

interpretation is contrary to established law. OCTC would strike the Comment or significantly modify it. Comment 19 could result in a claim that, in an investigation commenced under the State Bar's own authority and not the result of a client's complaint, the respondent does not have to provide certain information. It does not explain what it means by cooperation. What if OCTC subpoenas the client or the client consents?

11. OCTC is concerned that Comments 21 and 23 appear to allow a lawyer to disobey a court order to disclose information. As previously discussed, OCTC disagrees with that this position.

C. In a _____, 2015 memorandum to the Commission, OCTC provided the following comment regarding rule 3-100:

(These comments will be distributed to the drafting team when they are received from OCTC.)

IV. Potential Deficiencies in the Current Rule:

A. June 15, 2010 OCTC Input. See above June 15, 2010 input from OCTC. Many of OCTC's concerns with the first Commission's proposed rule were directed at provisions that were carried forward nearly verbatim from current rule 3-100 which, as described in Section II.B., is the product of a cooperative venture involving a task force with representatives from the three branches of government. It had already been adopted by the State Bar Board and approved by the Supreme Court in 2004. Further, many of OCTC's comments were directed at provision that are not found in the current rule. Therefore, only OCTC's comments relating to current rule provisions or comments are addressed here:

1. Paragraph (a)'s language should track the language of Bus. & Prof. Code § 6068(e)(1). Representatives of the legislature on the Task Force vigorously opposed the inclusion of the statutory language in the rule, taking the position that the duty of confidentiality resides in section 6068(e)(1) and that the rule was intended to provide guidance on the application of the exception in section 6068(e)(2).

2. Concern that paragraph (b)(1) [exception for life-threatening injury] does not address what would happen if there were any further changes to section 6068(e). Similar to what the legislature did with respect to the change that resulted in subdivision (e)(1), the legislature would likely provide the Supreme Court and the State Bar with an opportunity to address such changes in a revised rule.

6. Concern about paragraph (e), which provided "A lawyer who does not reveal confidential information as permitted by paragraph (b) does not violated this Rule". This provision appears in current rule 3-100, which was approved by the Supreme Court, operative July 1, 2004. See rule 3-100(E).

9. Concern that Comment [9] is confusing and that comments should not be used to explain a statute. First, proposed Comment [9] is current rule 3-100, Discussion ¶. 9, carried forward without substantive change. It has been approved by the Supreme Court. Second, the legislature expressly authorized the State Bar and the Supreme Court to draft a rule of professional conduct that would explain the application of the confidentiality exception in § 6068(e)(2). (See Section II.B., above.)

10. Concern that Comment [15] Is overly narrow and that the rule of limited disclosure applies only to prevent criminal conduct. First, proposed Comment [15] merely carried forward current rule 3-100, Discussion ¶. [8], with only minor changes. Second, the concern expressed about "criminal conduct" is confusing as section 6068(e) expressly applies only when reasonably necessary "to prevent a *criminal act* the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." (Emphasis added.)

B. July __, 2015 OCTC Input.

[Awaiting OCTC Input]

C. Other Possible Deficiencies.

1. Disjunction between paragraphs (A) and (B). As noted above, there is an apparent disjunction in the language between paragraph (A) and paragraph (B) of the rule, which carries forward a similar disjunction between subdivisions (e)(1) and (e)(2) of section 6068. Paragraph (A) provides:

> (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.

Paragraph (B) is a near verbatim quote of subdivision (e)(2) and provides:

> (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.

Under paragraph (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),[10] which is incorporated by reference in paragraph (A). The first Commission attempted to resolve this disjunction by substituting the phrase, "information protected by Business and Professions Code section 6068(e)" for the disjunctive phrase in paragraph (B). The first Commission's proposed rule, while adopted by the Board, was never submitted to the Supreme Court for its review.

2. Implied Authority Exception. The corresponding Model Rule 1.6 expressly refers to a catchall exception to confidentiality, i.e., where the lawyer is "impliedly authorized" to disclose information "in order to carry out the representation." Question whether the California rule should include a similar exception. The first Commission declined to recommend such an broad exception.

3. Confidentiality Exceptions Recognized in California Statutory & Case Law. The current rule contains a single express exception to the duty of confidentiality (disclosure permitted to prevent life-threatening criminal action) as compared to seven specific express exceptions in corresponding Model Rule 1.6. Despite this discrepancy, some of the exceptions appear to be recognized in case law or have counterparts in the Evidence Code. The first Commission recommended their adoption and the Board agreed. Whether similar express exceptions should be included in rule 3-100 is a matter for discussion.

a. Exception to secure legal advice about the lawyer's compliance with the lawyer's professional obligations, similar to Model Rule 1.6(b)(4). (See, e.g., *Fox Seachlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308-309 [106 Cal.Rptr.2d 906].)

b. Exception to establish a claim or defense in a controversy between lawyer and client, which is much narrower than Model Rule 1.6(b)(5), which permits a lawyer to disclose client confidential information in third party actions. (See Evidence Code § 958; *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164.[11]) A Commission dissent argued that such an exception

[10] As noted in Section II.B., it appears that the Legislature attempted to conform the language in (e)(2) to the language in the parallel exception to the California lawyer-client privilege, Evidence Code § 956.5.

[11] 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

would permit disclosure without a court determination. However, case law recognizes limitations on such claims and defenses. See, e.g, *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1190 ("Similarly, the in-house attorney who publicly exposes the client's secrets will usually find no sanctuary in the courts. Except in those rare instances when disclosure is explicitly permitted or mandated by an ethics code provision or statute, it is never the business of the lawyer to disclose publicly the secrets of the client.")

c. Exception to permit a lawyer to comply with a court order, similar to Model Rule 1.6(b)(6). (Compare *People v. Kor* (1954) 129 Cal.App.2d 436.)

4. Other Exceptions in Model Rule 1.6. There are also several other exceptions to the Model Rule that the first Commission rejected and did not recommend to the Board, or which the ABA adopted after the first Commission's deliberations had been completed. Unlike the provisions described in paragraph 3, above, these provisions do not have counterparts in California statutes or case law.

a. Crime or Fraud. 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 Substantia 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. Comply with Other Law. Model Rule 1.6(b)(6), which in addition to permitting disclosure to comply with a court order, also permits disclosure to comply "with other law." The first Commission rejected this provision in part out of concern that it might be used to

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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].)

import provisions of the Sarbannes-Oxley Act into rule 3-100, thus circumventing the rejection of Model Rules 1.6(b)(2) and (b)(3). However, note that Discussion paragraph [13] in the current rule states, in part, that: "Rule 3-100 is not intended to . . . preclude reliance upon, any other exceptions to the duty . . . recognized under California law."

d. 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.

5. Model Rule 1.6(c) Duty to Prevent Inadvertent or Unauthorized Disclosure or Unauthorized Access to Client Information. The ABA adopted this provision in 2012 as part of the Ethics 20/20 Commission Study. California has no similarly specific rule or statute. Compare *Rico v. Mitsubishis Motors Corp.* (2007) 42 Cal.4th 807, 68 Cal.Rptr.3d 758 (discussing a receiving lawyer's duties when the lawyer receives confidential documents that "obviously" appear to be confidential); *Clark v. Superior Court* (2011) 196 Cal.App.4th 37 (duty of receiving when receiving unauthorized confidential documents); and *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 82 Cal.Rptr.2d 799 (duty re inadvertently produced documents). But see *Aerojet-General Corp. v. Transport Indemnity Ins.* (1993) 18 Cal.App.4th 996, 22 Cal.Rptr.2d 862 (lawyer permitted to use information claimed to be confidential as it was discoverable).

6. ***Use*** of Confidential Information. Current rule 3-100 appears to address only the duty not to reveal 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). Should California have a rule that similarly prohibits the "use" of a client's confidential information to the client's disadvantage?[12] (See proposed Rule 1.8.2[13] Materials, attached.)

[12] Note that rule 3-100 may impliedly prohibit the use of confidential information by cross-referencing "information protected from disclosure by Business and Professions Code section 6068(e)(1)" in paragraph (A). Subdivision (e)(1) is not limited by its terms to prohibiting a lawyer from "revealing" confidential information. It provides simply that it is a lawyer's duty to "maintain inviolate the confidence, and at every peril to himself or herself to protect the secrets, of his or her client." That language, which is not limited to "revealing" or "disclosing," can be interpreted to prohibit not just the disclosure but also the use of a client's information to the client's disadvantage.

7. Duty to Protect Confidential Information of ***Prospective Client***. Model Rule 1.18 imposes a duty on lawyers to protect information disclosed during a consultation by a prospective client.[14] California does

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Moreover, paragraph (E) of the general California rule that addresses conflicts of interest, 3-310, provides:

> (E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

Because paragraph (E) applies to both former and current clients in the context of a conflict, it might also be interpreted to apply to the use of a current client's confidential information. However, paragraph (E) is limited to situations where the lawyer has accepted "employment adverse to the client," and thus does not sweep as broadly as Model Rule 1.8(b).

[13] Model Rule 1.8(b) provides:

> (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

[14] A "prospective client" is defined as "[a] A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter." Model Rule 1.18(a).

In its entirety, the black letter of Model Rule 1.18 provides:

> **Rule 1.18 Duties To Prospective Client**
>
> (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
>
> (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.
>
> (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
>
> (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
>
> (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
>
> (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

not have a similar rule but Evidence Code § 951 defines client to mean "a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity." Section 951 does not require that a lawyer-client relationship ensue. See also Cal. State Bar Ethics Op. 2003-161. (See proposed Rule 1.18 Materials, attached.)

8. 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. (See proposed Rule 1.14 Materials, attached.)

9. Informed *Written* Consent. Current rule 3-100 permits a lawyer to disclose information protected by Bus. & Prof. Code § 6068(e)(1) if the client gives "informed consent." (See rule 3-100(A).) However, the consent does not have to be in writing. Question whether such consent should be in writing. Compare rule 3-310(C) through (F), all of which require the clients' informed written consent to a conflict of interest.

10. Definition of Information Protected by Business & Professions Code § 6068(e). The Model Rules do not include a definition or description of what "information relating to the representation of a client," the term used throughout the Model Rules to denote confidential client information. In fact, only several states include in their rules of professional conduct a description of what "information relating to the representation of a client" or "confidential information" is intended to encompass. (See Alaska Rule 1.6(a); D.C. Rule 1.6(b); Maine Rule 1.6(d); Michigan Rule 1.6(a); N.Y. Rule 1.6(a); Texas Rule 1.05(a); and Virginia Rule 1.6(a).) The first Commission attempted to describe the parameters of the duty of confidentiality in comments to the proposed rule 1.6 that it recommended by expanding the definition of current rule 3-100, Discussion ¶.2.[15]

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

[15] Comments [3] to [6] of RRC1 proposed Rule 1.6 provided:

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

[3] As used in this Rule, "information protected by Business and Professions Code section 6068(e)" consists of information gained by virtue of the representation of a client, whatever its source, that (a) is protected by the

Question whether rule 3-100 should be amended to include a similar expanded description, either in the black letter or the comments.

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lawyer-client privilege, (b) is likely to be embarrassing or detrimental to the client if disclosed, or (c) the client has requested be kept confidential. Therefore, the lawyer's duty of confidentiality as defined in Business and Professions Code section 6068(e) is broader than lawyer-client privilege. See In the Matter of Johnson (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; Goldstein v. Lees (1975) 46 Cal.App.3d 614, 621 [120 Cal. Rptr. 253].

Scope of the Lawyer-Client Privilege

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

Scope of the Duty of Confidentiality

[5] A lawyer's duty of confidentiality, on the other hand, is not so limited as the lawyer-client privilege. The duty protects the relationship of trust between a lawyer and client by preventing the lawyer from revealing the client's protected information, regardless of its source and even when not confronted with compulsion. As a result, any information the lawyer has learned during the representation, even if not relevant to the matter for which the lawyer was retained, is protected under the duty so long as the lawyer acquires the information by virtue of being in the lawyer-client relationship. Information protected by Business and Professions Code section 6068(e) 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 (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

D. Possible Deficiencies in Rule identified in Public Comment received during Initial Public Comment Period Ending June 18, 2015. [Public comment attached]

1. California does not have an exception to confidentiality that permits government lawyers to blow the whistle. (See May 25, 2015 Letter from Glenn Alex, 2015-016c).[16]

[16] Note that three times an attempt has been made to carve out an exception for government whistleblower lawyers.

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."

2. The Executive Committee of the Trusts & Estates Section ("TEXCOM") has urged the Commission to adopt proposed Rules 1.6 and 1.14 (Client With Diminished Capacity) as recommended by the first Commission. (See 6/15/15 Letter from Yvonne Ascher, Chair of Executive Committee, 2015-32). See also Section IV.C.8, above.)

3. Peter Stern, a former Chair and member of TEXCOM, who assisted the first Commission in drafting proposed Rule 1.14 (Client With Diminished Capacity), has also urged the Commission to adopt proposed Rules 1.6 and 1.14 as recommended by the first Commission. (See Peter Stern Submission, 2015-30).

4. The Orange County Bar Association ("OCBA") identifies the following issues for consideration by the Commission in its study of rule 3-100. Many of these issues are identified in Sections IV.C, above, and VIII, below.

- Is it time to bring California's confidentiality rules more in line with the rest of the country?
- Noisy withdrawal- should it be permitted in appropriate circumstances?
- Clarify the "other law" exception in Comment 2 to Rule 3-1 00;
- Should California permit an exception for preventing financial injury - as in MR 1.6(b)(3)?
- Whether to adopt an express exception for compliance with a court order -MR 1.6(b)(6); We believe there is a need to clarify whether lawyers are protected from discipline if they make disclosures in compliance with a court order. At present, Business and Professions Code section 6068 (e) generates uncertainty whether lawyers must violate a court order in order to preserve confidences and secrets;
- Clarity is needed in a rule as to what conduct regarding confidential information will or will not expose lawyers to disciplinary action.
- If the Legislative framework remains, the RRC should consider providing appropriate definitions for "confidence" and "secrets," and lawyers should not have to guess what is meant by "at every peril to himself or herself preserve the secrets of the client";
- The rule should address and resolve whether a lawyer may be disciplined for disclosing privileged information to the SEC or other government agency when they "encourage" you to provide the information (knowing that it's in your client's best interest to cooperate.)

(See 6/11/15 Letter from OCBA (Ashleigh E. Aitken, Pres.), 2015-024c).

5. An anonymous submission urges the Commission "NOT to recommend that the confidentiality obligations imposed under Rule 3-100 be watered down to correspond to the erosion of the confidentiality obligations that we have seen in the ABA Model Rules." (See Anonymous Submission 2015-023b).

6. Gerald McNally has requested that California "conform to the ABA on disclosure of confidential information." (See Gerald McNally submission, 2015-005a).

V. California Context:

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

A. 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.)

B. Duty of Confidentiality. As noted above, the duty of confidentiality is set forth in Business & Professions Code § 6068(e)(1). It is much broader than the lawyer-client privilege, which is limited to communications between client and 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* (Rev. 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. (*Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. 179).

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 sec. 952 for the definition of a "confidential communication" between a "lawyer" (see Evid. Code sec. 950 for the definition of "lawyer") and a "client" (see Evid. Code sec. 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 sec. 956.5 that provides for an exception that is coextensive with the exception in Bus. & Prof. Code sec. 6068(e)(2)).

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 sec. 6149) and also provides that a paralegal is subject to the same duty of confidentiality as an attorney (see Bus. & Prof. Code sec. 6453).

C. 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).

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 Civ. Proc. sec. 2018.030). Also, the exceptions to the work-product doctrine do not function as exceptions to the duty (but see, Code of Civ. Proc. sec. 2018.050 providing for a crime or fraud exception that might in some circumstances be coextensive with the exception in Bus. & Prof. Code sec. 6068(e)(2)).

VI. Approach In Other Jurisdictions (National Backdrop):

A. The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.6: Confidentiality of Information," revised May 13, 2015, is available at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_6.pdf

- Two states have adopted Model Rule 1.6 verbatim.[17] Thirty-nine states have adopted a slightly modified version of Model Rule 1.6.[18] Ten jurisdictions have adopted a version of the rule that is substantially different to Model Rule 1.6.[19]

B. Some jurisdictions having adopted some 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

- Forty-one jurisdictions permit disclosure to prevent crime (including criminal fraud). Five states required disclosure to prevent crime (including criminal fraud). Five states do not permit or require disclosure to prevent crime (including criminal fraud).
    - Of the states that permit or require disclosure, thirty jurisdictions require the amount of loss to be "substantial" in order to disclose. Sixteen states 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. Three states require disclosure to prevent non-criminal fraud likely to result in substantial loss. Twenty-one states do not allow disclosure to prevent non-criminal fraud likely to result in substantial loss.

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[17] The two states are: Delaware and West Virginia.

[18] The thirty-nine states 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.

[19] The ten jurisdictions are: Alabama, California, District of Columbia, Florida, Massachusetts, Michigan, Minnesota, New Jersey, New York, and Texas.

- In nineteen jurisdictions disclosure is limited situations where the lawyer's services were used perpetrate a crime or fraud. Thirteen states do not limit it to situations where the lawyer's services were used. Seventeen states 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 states do not require disclosure to rectify substantial financial loss resulting from crime or fraud. One state permits disclosure to rectify financial loss unless the loss is substantial, in which case disclosure is required.

VII. Public Comment Received by the First Commission:

A. The clean text of proposed Rule 1.6 drafted by the first Commission and adopted by the Board to replace rule 3-100 is enclosed with this assignment, together with the synopsis of public comments received on those proposed rules and the full text of those comments. Although the proposed rule differs from current rule 3-100, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 3-100 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have

already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

(1) Whether the phrase "information relating to the representation of a client" in rule 3-100(B) should amended to stated "information protected by Business & Professions Code § 6068(e)" or something similar to remove the disjunction that current exists between current paragraphs (A) and (B). (See Section IV.C.1, above.)

(2) Whether to revise the rule to state a catchall exception when a lawyer is "impliedly authorized" to disclose "in order to carry out the representation." (See Section IV.C.2, above.)

(3) Whether to revise the rule to state an exception to the duty of confidentiality that allows a lawyer to secure legal advice about the lawyer's compliance with professional obligations. (See *Fox Searchlight Pictures, Inc., v. Paladino* (2001) 89 Cal.App.4th 294 [106 Cal.Rptr.2d 906], and compare MR 1.6(b)(4).) (See Section IV.C.3.a, above.)

(4) Whether to revise the rule to state an exception to the duty of confidentiality that allows a lawyer to establish a claim or defense in a controversy with a client arising from that client's representation. (Compare CA Evid. Code § 958.) (See Section IV.C.3.b, above.)

(5) Whether to revise the rule to state an exception to the duty of confidentiality allowing a lawyer to comply with a lawful order of a court that would require the lawyer's revelation of confidential information. (Compare CA Bus. & Prof. Code § 6103.) (See Section IV.C.3.c, above.)

(6) Whether any of the other exceptions in Model Rule 1.6(b), as described in Section IV.C.4, above, should be recommended for adoption by the Board. (See Model Rule 1.6(b)(2), (3), (7), and the "other law" prong of 1.6(b)(6).)

(7) Whether a specific duty to prevent inadvertent or unauthorized disclosure or unauthorized access to client information as in Model Rule 1.6(c) should be included in the Rule. (See Section IV.C.5, above.)

(8) Whether a related new rule specifically addressing a lawyer's ***use*** (vs. disclosure) of confidential information should be recommended for adoption by the Board. (See Section IV.C.6, above.)

(9) Whether a related new rule specifically addressing the confidentiality of information provided to a lawyer by a ***prospective client*** should be recommended for adoption by the Board. (Compare State Bar Formal Ethics Opn. 2003-161 and ABA MR 1.18.) (See Section IV.C.7, above.)

(10) Whether a related new rule specifically permitting a lawyer to disclose client confidential information or to 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), should be recommended for adoption by the Board. (See Section IV.C.8, above.)

(11) Whether to revise the rule to require that when a lawyer seeks a client's informed consent to reveal confidential information that the consent be in writing and that the lawyer retain a copy of that writing to be made available to the State Bar in the event of a disciplinary investigation of the lawyer involving the issue of that revelation of confidential information. (See Section IV.C.9, above.)

(12) Whether to include in either the black letter or the comment to the rule a description of what is encompassed by the term, "information protected by Business and Professions Code section 6068(e)(1)". (See Section IV.C.10, above.)

IX. Research Resources:

- In re Jordan (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371]
- Commercial Standard Title Co. v. Superior Court (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr. 393]
- *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179
- Goldstein v. Lees (1975) 46 Cal.App.3d 614, 621 [120 Cal.Rptr. 253]
- People v. Kor (1954) 129 Cal.App.2d 436 [277 P.2d 94]
- Business and Professions Code § 6068(e)
- Fox Searchlight Pictures, Inc., v. Paladino (2001) 89 Cal.App.4th 294 [106 Cal.Rptr.2d 906]
- In the Matter of Johnson (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179
- People v. Dang (2001) 93 Cal.App.4th 1293 [113 Cal.Rptr.2d 763]
- CAL 1986-87 (Disclosure of client's criminal conviction)
- CAL 1996-146 (Disclosure of client fraud)
- CAL 2003-161 (Duties owed a prospective client)
- Cal 2010-174 (Confidentiality in client files)
- CAL 2010-179 (Confidentiality and Technology)
- CAL 2012-183 (Confidentiality and Seeking Legal Advice)
- CAL 2012-184 (Confidentiality & Virtual Legal Office)
- CAL 2015-192 (Disclosure of Confidences at Motion to Withdraw)
- CAL 2015-193 (Interaction of Duty of Competence & Confidentiality)
- Business and Professions Code § 6068
- Evidence Code § 956.5