RRC2 – Rule 3-100 [1.6] [1.8.2][1.14]
Post-Agenda E-mails, etc. – Revised (August 11, 2015)
Zipser (Lead), Brown, Harris, Stout & Tuft

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POST AUGUST 14, 2015 AGENDA MAILING:

July 31, 2015 OCTC (Kim) Memo re 1.6 to Chair & Commission:

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.)

August 3, 2015 McCurdy Email re 1.6 [3-100] to Drafting Team, cc Chair, Difuntorum, Mohr, A. Tuft & Lee [Forwarding 7/31/15 OCTC Comment]:

The State Bar Office of Chief Trial Counsel (OCTC) memo providing comments on Rule 3-100 was received and is attached. Please consider these comments prior to the August meeting.

Attached:
RRC2 - [3-100][1.6] - 07-31-15 OCTC Memo re Rule.docx [See above]

August 3, 2015 Kehr Email re 1.14 to Drafting Team, cc Difuntorum & Mohr:

A few comments on Rule 1.14 ---

First, Rules 1.6 and 1.14 are stand-alone Rules despite their having been paired in the comments from Peter Stern and Yvonne Ascher. Their only connection is the cross-reference to Rule 1.14 that the first Commission included as Rule 1.6(b)(5). The Commission should examine whether and how to deal with Rule 1.14 without being distracted by any Rule 1.6 issues or concerns.

Second, the first Commission's careful attention to a possible Rule 1.14 was motivated by the information provided to us by trust and estates lawyers showing that practitioners in their field face a common and critical problem in dealing with clients with significantly impaired capacity. If the current Commission were not to take up this Rule, it would leave trust and estate lawyers in limbo. This is a significant client protection issue, and one that creates avoidable jeopardy to lawyers. The problem is not limited to trust and estate lawyers but can be faced by any lawyer who has individual clients, and those who spoke to the first Commission in favor of Rule 1.14 included lawyers in other areas of practice. One example of where this issue would be important to other lawyers would be those involved with legal services programs.

Third, the first Commission also was motivated by the risk of the alternative, which would be for the legislature to attack the problem without the resources and sophistication available to the Commission. The Trust and Estate section had announced its intention of going directly to the legislature for a statutory solution, and I believe already had taken steps in that direction. There was a strong feeling on the first Commission that the difficulty of the issues raised by this problem made it terribly risky to leave this to the legislature without the Commission's input.

Finally, there was at least one member of the first Commission who strongly voiced the view that the Supreme Court has the authority to approve this Rule just as judicial decisions have made what might be seen as exceptions to 6068(e). See, for example, Chubb & Son v. Superior Court, 228 Cal. App. 4th 1094 (2014) (lawyer permitted to disclose confidential client information to his or her own lawyer and relying on General Dynamics Corp. v. Superior Court, 7 Cal.4th 1164 (1994) and Fox Searchlight Pictures, Inc. v. Paladino, 89 Cal.App.4th 294 (2001)). This is something that would have to be explored with the Court. If the Court were not willing to act on its own, the alternative would be a Rule 1.14 that would be effective on the adoption of 6068(e)(2) approving the new Rule.

Rule 1.14 addresses a topic that is too important to be ignored or to be left to the legislature without the Commission's assistance. I hope that the Commission will decide to take it up.

August 3, 2015 Peter Stern Email re 1.14 to McCurdy, cc Yvonne Ascher & Mohr:

What is the proper protocol to respond to the Drafting Team memo?

August 4, 2015 McCurdy Email re 1.14 to Stern, cc Ascher & Mohr:

You can submit a written response by email to Audrey Hollins and we will circulate it to the drafting team for consideration. Time permitting, we will also post it online with the other agenda materials for that item. Here's a link to an FAQ that provides information about commenting and participating in the rules revision process:

http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/RRC2%20-Commission%20Meeting%20FAQs%20(05-19-15).pdf

August 4, 2015 Rothschild Email re 1.14 to Drafting Team, cc Difuntorum & Mohr:

I have read and considered your report on Rule 1.14. I understand the difficulties you faced in dealing with this issue, and agree that consideration by the full Commission is warranted before more time is spent on drafting or rejecting a rule. Saying that, I hope that the Commission will agree that this rule is an important one, and should be given full consideration.

The original impetus for the first Commission to consider Rule 1.14 came from the Trusts and Estates section of the State Bar. While they face substantial problems in dealing with impaired clients, the issues are not limited to those areas of practice. Virtually any lawyer who represents individual clients, particularly where there is a potential for a monetary award, often faces the problem of how to best assist a client with diminished capacity. One example from my practice demonstrates the issue.

We represented an elderly woman who lived in a nursing home and was on Medi-Cal. She lost her house in a mortgage scam. We sued the scammers and agreed to a settlement. When settlement became a possibility, her daughter came with her for the first time. The client had

not seen the daughter for some time, and did not have a close relationship with her. Once the settlement was agreed to, we began discussions with the client about receiving the money. The daughter became very interested. We discussed a special needs trust with the client, but the daughter insisted that the mother wanted a lump sum, and that she would take care of her mother and have the mother move in with her. We spoke to the client without the daughter present and explained the potential problems of this approach, but she insisted that her daughter would take care of her. We could see the problem arising, but had no way to contact her son or Adult Protective Services to protect her. Seeing no other choice, we gave the client a check for the settlement and she moved in with her daughter. Sure enough, less than one week later, we had a call from the nursing home telling us that the client had returned to the home because her daughter had taken the money and kicked the client out. The nursing home could not help her, as Medi-Cal would not pay them until she had spent down the money. As a result, she was homeless. Had we been able to contact her son, he might have been able to persuade her to set up a special needs trust that would not have affected her benefits.

This case was in a legal services program, involving a poor client. But it could just as easily been in a personal injury practice, involving an injured client or a workers comp practice involving an injured worker. The issue of clients with diminished capacity is a potential problem for any lawyer with individual clients.

It is my belief that the Supreme Court does have the authority to adopt a rule like 1.14 without legislative authorization, but I think the Commission would be better off preparing for the rule both ways by adopting the drafting committee's proposals #5, 6 and 7.

In drafting the rule, the Commission should limit the scope of any disclosure as was reflected by the first Commission, rather than adopting the broad exception to confidentiality of ABA Model Rule 1.14.

While I believe that the Commission should draft and adopt a rule such as 1.14, I should note that there is a substantial opposition to this position from the disability rights community. It is my understanding that they are concerned about lawyers jumping to a conclusion that the client has diminished capacity just because they are difficult to deal with, and that will ignore the requirement of Rule 1.14 (a) that the lawyer maintain a normal attorney-client relationship as much as possible. The drafting team should get input from both the Trusts and Estates Section and the disability rights community.

August 5, 2015 McCurdy Email re 1.14 to Zipser & Rothschild, cc Difuntorum, Mohr & Lee:

Concerning the point raised in the last paragraph of Toby's comments below, we've identified the following disability rights groups and point persons, who submitted a joint comment on the first Commission's Proposed Rule 1.14 in November 2009. Please let us know if you'd like us to reach out to some or all of these groups, and if only some, which ones you suggest. Thanks. Lauren

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Disability Rights California
Bay Area Regional Office
1330 Broadway, Suite 500

Oakland, CA 94612
(510) 267-1200
dara.schur@disabilityrightsca.org

Linda D. Kilb, Esq.
Director, California Legal Services Trust Fund Support Center Program
Disability Rights Education and Defense Fund, Inc. (DREDF)
2212 Sixth Street
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www.dredf.org

Paula D. Pearlman
Executive Director, Disability Rights Legal Center
Visiting Associate Professor of Law, Loyola Law School
919 Albany Street Los Angeles, CA 90015
213 736-8362--direct dial 213 736-1031--main number
paula.pearlman@lls.edu
www.disabilityrightslegalcenter.org

Melissa Morris
Senior Attorney
Kyra Kazantzis
Directing Attorney
Public Interest Law Firm and Fair Housing Law Project
Law Foundation of Silicon Valley
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San Jose, CA 95112
Phone (408) 280-2401
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James Preis
Executive Director
Mental Health Advocacy Services, Inc.
3255 Wilshire Blvd., Ste. 902
Los Angeles, CA 90010
(213) 389-2077
www.mhas-la.org

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Director, Long-Term Care Project
National Senior Citizens Law Center
3435 Wilshire Boulevard, Suite 2860
Los Angeles, California 90010-1938
(213) 674-2813
ecarlson@nsclc.org

Attached:
RRC2 - [3-100][1.14] - RRC1 Public Comment - E-2009-365 Dara Schur [1.14].pdf

August 5, 2015 Rothschild Email re 1.14 to McCurdy, cc Zipser, Difuntorum, Mohr & Lee:

My only change would be to reflect that Katherine Tucker has replaced Paula Pearlman at the Disability Rights Legal Center. Paula is now at DFEH.

August 6, 2015 Kehr Email re 1.6 & 1.18 to Drafting Team, cc Difuntorum & Mohr:

I generally support your recommendations on this Rule but have the following comments and questions ---

1) I disagree with the removal of the "client" reference in the title to the Rule. The Rule deals only with confidential client information, not information that a lawyer is obligated to keep confidential by contract with non-clients or by court order. The current reference to "client" helps to explain what follows, which includes nothing about any other duty of confidentiality. The drafters' Report at p. 26 of the agenda materials provides two arguments in support of this change:

> a. The first is that most other jurisdictions use the title the drafting team recommends, but that is something that I think the Commission should give no weight. The use of nearly identical numbering facilitates ease reference for California lawyers acting in other jurisdictions and other lawyers acting here. The exact title is irrelevant for that or any other purpose.
>
> b. The second argument is that 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)". I again disagree. The information protected by 6068(e) is only client information. The proposed change to replace "confidential information" does not change the substance of the Rule.

2) The change in paragraph (a) from "as provided" to "the disclosure is permitted" works fine, but it makes the next word - "in" - awkward. It would leave us with: "the disclosure is permitted in paragraph (b) ...." I would replace "in" with "by" or "under" (I prefer the former).

3) The reference to 6068(e) in paragraph (b) should include the section symbol to be consistent.

4) To my eye, the insertion of "protected by Business and Professions Code § 6068(e)(1)" in proposed paragraph (c)(2) appears redundant because that already is the subject of paragraph (c).

5) The agenda materials at pp. 29-30 discusses the pros and cons of replacing the current use of "confidential information" with the references to 6068(e)(1). There is another con, which is that the legislature's use of "confidential information" in 6068(e)(2) tracks the way lawyers speak. Lawyers commonly refer to "confidential information", or in the context of this rule "confidential client information". Referring to the statute likely would be met with a questioning stare. I have more on this in my paragraphs 8) and 11).

6) Immediately following that insertion in paragraph (c)(2) there is "as provided in paragraph (b)", language that was altered in paragraph (a). We could track that language here or simplify by replacing the quoted phrase with: "under paragraph (b)".

7) The "as provided in" language appears again in paragraph (d), and if it is worth changing that to "permitted by" in paragraph (a) (and I think it is), I would do the same thing here.

8) The history of current rule 3-100 as recounted beginning at p. 27 of the agenda materials shows that this Rule is intended to provide guidance and therefore, as approved by the Supreme Court several years ago, would be an exception to it current directions that we aim for Rules that are narrowly disciplinary. If the Court gives us no different guidance on Rule 1.6, the Comments become particularly important. This is heightened by the proposal to replace the Rule references to confidential information with references to 6068(e), making the Rule circular and shifting to the Comments the definition of what that reference means. A lawyer who reads proposed Rule 1.6 will learn only of the obligation to comply with 6068(e) but nothing about what 6068(e) requires and, because 6068(e) provides no explanation, the guidance can come only from the Rule 1.6 Comments. Assuming that we are to treat Rule 1.6 more broadly than the other Rules - and we are yet to hear from the Court on that - I think there still is some editing that can be done with the proposed Comments.

9) Comment [1] does not explain the Rule. In part it discusses the Rule's policy background and in part repeats the Rule. I believe it could be removed in full.

10) If proposed Comment [1] is retained, its third sentence is imprecise because it is not limited to information that is embarrassing or detrimental to the client. I suggest: "The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to information that is embarrassing or detrimental to the client."

11) At the end of Comment [1], I object to the phrase "information relating to the representation". That phrase has been removed from the proposed Rule - properly in my view - and using it here would conflict with the Rule. Also, the use of that phrase in Comment [1] would be inconsistent with Proposed Comment [2]. The latter alters this phrase to speak instead of information that "a lawyer acquires by virtue of the representation". This is more precise, and the two Comments should be coordinated. As an example of the difference between the two statements, a lawyer would not violate this Rule or 6068(e) by disclosing information that already is generally known even if it in some fashion is information "relating to the representation". A lawyer for GM who at a cocktail party discusses the fact that GM makes automobiles does not warrant professional discipline. I believe the correct statement is that 6068(e) obligates a lawyer to protect the confidentiality of any information obtained by the lawyer as a result of a lawyer-client relationship if doing so likely would be harmful or embarrassing to the client, or if the client has directed the lawyer to not disclose the information. See, e.g., Cal. State Bar Formal Ops. 2004-165, 2003-161, 1999-154, 1993-133, 1981-58, and 1980-52, Los Angeles County Bar Assoc. Formal Ops. 456, 436, and 386, S.D. County Ethics Op. 2011-1. The use of this language would provide direct and specific guidance on the meaning of the Rule and of 6068(e), and that is the guidance this Rule was intended to provide to lawyers.

12) The first sentence of Comment [2] inserts the word "any", and this might cause some confusion because it soon as followed by "and encompasses". Is what follows from "encompasses" intended to be a complete statement of what is included in the duty of confidentiality? If so, the use of "any" would not be correct because it suggests that what follows are only examples. Moreover, it would be incorrect because, as an example: Friend knows that Lawyer represents Client X and tells Lawyer that there is a news story revealing information about Client X; if that information is generally known it is not protect by the duty of confidentiality.

13) The letter from the Orange County Bar Association (beginning at the foot of p. 18 of the agenda materials) questions the "other law" reference at the end of Comment [2]. I don't have time to dig through the materials from the first Commission to see what we had in mind, but the letter is right that there is no citation or explanation of what this might be.

14) Comments [3] and [4] repeat the Rule and provide policy background but do not explain the meaning of the Rule. I recommend that both be removed.

15) I don't believe that Comment [5] adds anything to the content of paragraphs (b) and (c), and I believe both could be removed without reducing the comprehensibility of the Rule or the value of the Comments.

16) I'm in agreement with the use of "last resort" in Comment [6], but does it violate the principle that a Comment should not contradict the Rule? The balance of the Comment is the sort of best practices guidance that we have been directed to exclude.

17) The first word in Comment [7] is: "Subparagraph", but I think the correct usage would be "Paragraph".

18) I support Comments [9] - [11] as providing helpful explanation of the meaning of the Rule.

19) I also support Comment [12], but the "may" is inconsistent with our required usage (because is refers to something that is permitted rather than something that might happen). Either "could" or "might" would work in that sentence.

20) To what does Comment [13] refer? In any event, it would not be correct to say that a lawyer is required to "preserve information" under 6068(e). The lawyer's duty is to preserve secrets, and that is only a narrow subset of "information".

21) I ask that the Commission discuss the issue of compliance with a court order. See n. 11 on agenda materials p. 39. There is a conflict between the absolute terms of 6068(e)(1) and a lawyer's duty to respect the courts under Bus. & Prof. C. section 6068(a) and (b) and 6103. Lawyers have been disciplined for failing to obey a court order. See, e.g., In the Matter of Burke, 2014 Calif. Op. LEXIS 27. This is a subject on which guidance would be helpful to lawyers in trying to comply with their duties to clients and to the courts.

22) I also ask that the Commission discuss the drafting teams recommendation against adding a Rule 1.18 and the drafting teams thought that the duties to potential clients should be paired with the rule governing duties to former clients. See agenda materials pp. 42-43.

August 6, 2015 Kehr Email re 1.8.2 to Drafting Team, cc Difuntorum & Mohr:

I support your proposed Rule 1.8.2 but ask that the Commission discuss the addition of two sentences to the proposed Comment. Both come from the recommendation of the first Commission, and both I think provide valuable guidance.

> This Rule applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer, to the disadvantage of the client.
>
> The Rule does not prohibit uses that do not disadvantage the client.

I will be glad to explain when we meet, but for now I only have the time to raise the issue.

August 10, 2015 Zipser Email to Drafting Team, cc Difuntorum & Mohr:

As you know, we received comments from Robert Kehr and Toby Rothschild regarding our recommendations. Bob's comments regarding 1.6 are below. His comments to 1.14 and 1.82, and Toby's to 1.14 are attached. We should put our heads together before Friday, particularly as to Bob's comments.

Please let me know your availability for a conference call on Wednesday between 11:00 a.m. and 5:00 p.m. In the meantime, we can share thoughts through email exchange.

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August 10, 2015 Tuft Email re 1.6 to Drafting Team, cc Difuntorum & Mohr:

Here are my responses to Bob's comments and questions

Dean and all: I generally support your recommendations on this Rule but have the following comments and questions ---

1) I disagree with the removal of the "client" reference in the title to the Rule. The Rule deals only with confidential client information, not information that a lawyer is obligated to keep confidential by contract with non-clients or by court order. The current reference to "client" helps to explain what follows, which includes nothing about any other duty of confidentiality. The drafters' Report at p. 26 of the agenda materials provides two arguments in support of this change:

   a. The first is that most other jurisdictions use the title the drafting team recommends, but that is something that I think the Commission should give no weight. The use of nearly identical numbering facilitates ease reference for California lawyers acting in other jurisdictions and other lawyers acting here. The exact title is irrelevant for that or any other purpose.

   b. The second argument is that 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)". I again disagree. The information protected by 6068(e) is only client information. The proposed change to replace "confidential information" does not change the substance of the Rule. [**On balance, I favor our proposed title]**

2) The change in paragraph (a) from "as provided" to "the disclosure is permitted" works fine, but it makes the next word – "in" – awkward. It would leave us with: "the disclosure is permitted in paragraph (b) …." I would replace "in" with "by" or "under" (I prefer the former). **[ok]**

3) The reference to 6068(e) in paragraph (b) should include the section symbol to be consistent. **[agree]**

4) To my eye, the insertion of "protected by Business and Professions Code § 6068(e)(1)" in proposed paragraph (c)(2) appears redundant because that already is the subject of paragraph (c). **[disagree]**

5) The agenda materials at pp. 29-30 discusses the pros and cons of replacing the current use of "confidential information" with the references to 6068(e)(1). There is another con, which is that the legislature's use of "confidential information" in 6068(e)(2) tracks the way lawyers speak. Lawyers commonly refer to "confidential information", or in the context of this rule "confidential client information". Referring to the statute likely would be met with a questioning stare. I have more on this in my paragraphs 8) and 11). **[disagree]**

6) Immediately following that insertion in paragraph (c)(2) there is "as provided in paragraph (b)", language that was altered in paragraph (a). We could track that language here or simplify by replacing the quoted phrase with: "under paragraph (b)". **[disagree]**

7) The "as provided in" language appears again in paragraph (d), and if it is worth changing that to "permitted by" in paragraph (a) (and I think it is), I would do the same thing here. **[disagree]**

8) The history of current rule 3-100 as recounted beginning at p. 27 of the agenda materials shows that this Rule is intended to provide guidance and therefore, as approved by the Supreme Court several years ago, would be an exception to it current directions that we aim for Rules that are narrowly disciplinary. If the Court gives us no different guidance on Rule 1.6, the Comments become particularly important. This is heightened by the proposal to replace the Rule references to confidential information with references to 6068(e), making the Rule circular and shifting to the Comments the definition of what that reference means. A lawyer who reads proposed Rule 1.6 will learn only of the obligation to comply with 6068(e) but nothing about what 6068(e) requires and, because 6068(e) provides no explanation, the guidance can come only from the Rule 1.6 Comments. Assuming that we are to treat Rule 1.6 more broadly than the other Rules – and we are yet to hear from the Court on that - I think there still is some editing that can be done with the proposed Comments. **[I disagree with Bob's characterization of the rule. It is incorrect to say that all the rules are narrowly disciplinary. Rule 3-100 is one of several permissive rules in the current rules of professional conduct. It was adopted as the request of the legislature to provide guidance to lawyers on exercising discretion under §6068(e)(2). Without the comments, the rule would not serve its intended purpose]**

9) Comment [1] does not explain the Rule. In part it discusses the Rule's policy background and in part repeats the Rule. I believe it could be removed in full. **[disagree]**

10) If proposed Comment [1] is retained, its third sentence is imprecise because it is not limited to information that is embarrassing or detrimental **to the client**. I suggest: "The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to information that is embarrassing or detrimental to the client." **[I believe Bob is referring to the fourth sentence; I disagree with this change. Clients are encourage to discuss subjects that are embarrassing or detrimental to someone else as well as the client]**

11) At the end of Comment [1], I object to the phrase "information relating to the representation". That phrase has been removed from the proposed Rule – properly in my view – and using it here would conflict with the Rule. Also, the use of that phrase in Comment [1] would be inconsistent with Proposed Comment [2]. The latter alters this phrase to speak instead of information that "a lawyer acquires by virtue of the representation". This is more precise, and the two Comments should be coordinated. As an example of the difference between the two statements, a lawyer would not violate this Rule or 6068(e) by disclosing information that already is generally known even if it in some fashion is information "relating to the representation". A lawyer for GM who at a cocktail party discusses the fact that GM makes automobiles does not warrant professional discipline. I believe the correct statement is that 6068(e) obligates a lawyer to protect the confidentiality of any information obtained by the lawyer as a result of a lawyer-client relationship if doing so likely would be harmful or embarrassing to the client, or if the client has directed the lawyer to not disclose the information. See, e.g., Cal. State Bar Formal Ops. 2004-165, 2003-161, 1999-154, 1993-133, 1981-58, and 1980-52, Los Angeles County Bar Assoc. Formal Ops. 456, 436, and 386, S.D. County Ethics Op. 2011-1. The use of this language would provide direct and specific guidance on the meaning of the Rule and of 6068(e), and that is the guidance this Rule was intended to provide to lawyers. **[If this is a concern, the solution is to change "information relating to the representation" to "information protected by §6068(e)" In regard to many of Bob's comments, our Commission is not able to fix the anomaly the Legislature created in drafting the wording of §6068(e)(2)]**

12) The first sentence of Comment [2] inserts the word "any", and this might cause some confusion because it soon as followed by "and encompasses". Is what follows from "encompasses" intended to be a complete statement of what is included in the duty of confidentiality? If so, the use of "any" would not be correct because it suggests that what follows are only examples. Moreover, it would be incorrect because, as an example: Friend knows that Lawyer represents Client X and tells Lawyer that there is a news story revealing information about Client X; if that information is generally known it is not protect by the duty of confidentiality. **[Ok, though not necessary]**

13) The letter from the Orange County Bar Association (beginning at the foot of p. 18 of the agenda materials) questions the "other law" reference at the end of Comment [2]. I don't have time to dig through the materials from the first Commission to see what we had in mind, but the letter is right that there is no citation or explanation of what this might be. **[there is other law, e.g., Penal Code §1367.1, §1368, 26 USC §60501; see generally *California Practice Guide: Professional Responsibility* ¶7:92 ff. The comment does not require a citation]**

14) Comments [3] and [4] repeat the Rule and provide policy background but do not explain the meaning of the Rule. I recommend that both be removed. **[disagree]**

15) I don't believe that Comment [5] adds anything to the content of paragraphs (b) and (c), and I believe both could be removed without reducing the comprehensibility of the Rule or the value of the Comments.**[disagree]**

16) I'm in agreement with the use of "last resort" in Comment [6], but does it violate the principle that a Comment should not contradict the Rule? The balance of the Comment is the sort of best practices guidance that we have been directed to exclude. [**disagree]**

17) The first word in Comment [7] is: "Subparagraph", but I think the correct usage would be "Paragraph" **[disagree]**

18) I support Comments [9] – [11] as providing helpful explanation of the meaning of the Rule. **[agree]**

19) I also support Comment [12], but the "may" is inconsistent with our required usage (because is refers to something that is permitted rather than something that might happen). Either "could" or "might" would work in that sentence.**[disagree; we have already fought this battle]**

20) To what does Comment [13] refer? In any event, it would not be correct to say that a lawyer is required to "preserve information" under 6068(e). The lawyer's duty is to preserve secrets, and that is only a narrow subset of "information". **[if this is an issue, add "protected by §6068(e)" after "preserve information']**

21) I ask that the Commission discuss the issue of compliance with a court order. See n. 11 on agenda materials p. 39. There is a conflict between the absolute terms of 6068(e)(1) and a lawyer's duty to respect the courts under Bus. & Prof. C. section 6068(a) and (b) and 6103. Lawyers have been disciplined for failing to obey a court order. See, e.g., *In the Matter of Burke*, 2014 Calif. Op. LEXIS 27. This is a subject on which guidance would be helpful to lawyers in trying to comply with their duties to clients and to the courts.**[I am not sure what this has to do with exercising discretion to reveal information under paragraph (b) or the rule §6068(e)(2)]**

22) I also ask that the Commission discuss the drafting teams recommendation against adding a Rule 1.18 and the drafting teams thought that the duties to potential clients should be paired with the rule governing duties to former clients. See agenda materials pp. 42-43. **[Rule 1.18 deals with defining the duties to prospective clients and taking steps to avoid imputation. The rule could be considered with rule 1.6, but is more appropriately considered in regard to the duties to former clients, since the rules are closely related.**

August 10, 2015 Tuft Email re 1.14 to Drafting Team, cc Difuntorum & Mohr:

I don't believe Toby's comments regarding rule 1.14 require any action on our part at this time.

August 10, 2015 Tuft Email re 1.14 to Drafting Team, cc Difuntorum & Mohr:

I agree, and meant to note that in my initial email.

August 10, 2015 Tuft Email re 1.8.2 to Drafting Team, cc Difuntorum & Mohr:

I have no objection to adding the first of Bob's two sentences to the comment to proposed Rule 1.8.2 (see below).

I have a problem with adding the second sentence without further explanation. The example in the Model Rule is helpful, but may not be appropriate for our rules. Without further clarification, the sentence is ambiguous and raises a number of questions.

August 10, 2015 Mohr Email re 1.8.2 to Tuft, cc Drafting Team & Difuntorum:

The Drafting Team (you, the two Deans & Lee) earlier agreed to delete the first sentence Bob Kehr wants included (it was carried over from RRC1). The decision was made in response to my 7/22 and 7/24/15 inquiries. Here is my inquiry and explanation for deleting it again:

> After rereading this sentence, I recommend that it not be included. The ABA Code of Professional Responsibility prohibited the use of client confidential information not only to the disadvantage of the client, see DR 4-101(B)(2), but also for the advantage of the lawyer or a third person, DR 4-101(B)(3). Violation of either provision by itself could subject a lawyer to discipline. The Model Rules, however, deleted the latter prohibition. This sentence from the Model Rule comment seems to retain that "advantage" prohibition by stating the rule applies when the information is used to benefit the lawyer or a third person. Moreover, by stating the rule applies when a lawyer or third person is benefited, the sentence suggests that it is not sufficient to use information to the disadvantage of a client but there also must be a benefit that accrues to the lawyer or a third person. Is the rule so limited? Is the comment being used to limit the scope of the black letter? I think the best approach is to not include the sentence.

I still believe that including the sentence will cause more confusion than is warranted and is not necessary to explain the rule. Any mention of "benefit" here will conflict with the black letter.

I agree Bob's second sentence is a problem because it purports to give a lawyer a free pass to use information that benefits the lawyer (or TP) so long as it does not disadvantage the client (e.g., purchasing property nearly a client's prospective development knowing that the property will increase in value.) Although the lawyer might not be subject to discipline for that purchase (assuming the client has no interest in expanding the development in the future), the lawyer might still be liable to the client under agency law.