

**September 19, 2001**  
**Revisions to Rule 1.6, 4.1, and 1.2 to Reflect the Deletion by the House of Delegates of**  
**Proposed Rule 1.6 (b)(2) and (b)(3)**

RULE 1.6: CONFIDENTIALITY OF INFORMATION

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

(b) A lawyer may reveal ~~such~~ information relating to the representation of a client 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~~ reasonably certain death or substantial bodily harm; ~~or~~

~~(2) — to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;~~

~~(3) — to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;~~

~~(2) (4)~~ to secure legal advice about the lawyer's compliance with these Rules;

~~(2) (3) (5)~~ to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

~~(4) (6)~~ to comply with other law or a court order.

**Comment**

[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

~~[2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.~~

~~[3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.~~

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

~~[4] [2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer ~~maintain confidentiality of~~ must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby 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.~~

~~[5] [3] The principle of client-lawyer confidentiality is given effect ~~in two~~ by related bodies of law, the attorney-client privilege, ~~(which includes the work product doctrine) in the law of evidence~~ and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not ~~merely~~ only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.~~

~~[6] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.~~

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

### **Authorized Disclosure**

[7] [5] A Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation some situations, for example, a lawyer may disclose information by admitting to a fact that cannot properly be disputed or, in negotiation by making to make a disclosure that facilitates a satisfactory conclusion to a matter. [8] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

### **Disclosure Adverse to Client**

[9] [6] The Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[10] ~~Several situations must be distinguished.~~

[11] ~~First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false~~

evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

[12] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

[13] Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.

[14] The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.

[17] [7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or a fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

[8] — Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent

necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses.

[7] ~~[9]~~ A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(2) ~~(4)~~ permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

### **Dispute Concerning a Lawyer's Conduct**

~~[18] [8] ~~[10]~~ Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)~~(2)~~~~(3)~~ ~~(5)~~ does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.~~

~~[19] [9] ~~[11]~~ If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)~~(2)~~ ~~(3)~~ ~~(5)~~ to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.~~

[10] ~~[12]~~ Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(4)~~(6)~~ permits the lawyer to make such disclosures as are necessary to comply with the law.

[11] ~~[13]~~ Paragraph (b)(6) also permits compliance with a court order requiring a lawyer to disclose information relating to a client's representation. If a lawyer is called as a witness to give testimony concerning a client or is otherwise ordered to reveal information relating to the client's representation, however, the A lawyer ~~must~~ may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure.~~absent~~ Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal. See to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)~~(4)~~ (6) permits the lawyer to comply with the court's order.

[12] ~~[14]~~ Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[13] ~~[15]~~ Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)~~(4)~~~~(6)~~. In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

## ***Withdrawal***

~~[14] [15]~~ *If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).  
~~[16]~~ *After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise permitted by ~~provided in~~ Rule 1.6. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. ~~[17]~~  
*Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).***

### **~~Disclosures Otherwise Required or Authorized~~**

~~[20]~~ *The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable. 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.*

~~[21]~~ *The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supercedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.*

### **Acting Competently to Preserve Confidentiality**

~~[15] [16]~~ *A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.*

~~[16] [17]~~ *When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.*

### **Former Client**

~~[22]~~ [17] ~~[18]~~ The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Reporter=s Explanation of Changes to Rule 1.6

Paragraph (b)(2): Deleted per vote of House of Delegates.

Paragraph (b)(3): Deleted per vote of House of Delegates.

Comments

[7]: Deleted due to deletion of paragraph (b)(2).

[8] Deleted due to deletion of paragraph (b)(3).

[9] - [15]: Renumbered [7] -[13] to reflect deletion of Comments [7] and [8]. Citations to Rule text revised to reflect the deletion of paragraphs (b)(2)and (b)(3).

[11]: Changes approved by House of Delegates.

Caption: Add AWithdrawal.@

[14]: Reinsert Model Rule Comments permitting notice of withdrawal and disaffirmance of opinions, affirmations and the like.

This Comment incorporates into a single Comment the exact substance of Model Rule Comments [15], [16] and [17]. These Comments address Anoisly withdrawal@ when a client is using a lawyer=s services to commit a crime a fraud. They were not included in the Commission=s proposal because proposed paragraph (b)(2) permitted disclosure to prevent the client from committing a crime reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client is using or has used the lawyer=s services. Interpreting the House of Delegates deletion of paragraph (b)(2) as evidence of an intent to retain the current Model Rule, the Reporter recommends that these Model Rule Comments be reinserted into the Comment.

[16]-[18]: Renumbered [15]-[17] to reflect deletion of Comments [7] and [8] and the addition of Comment [14].

Conforming Change to Rule 4.1, Comment [3]:

In light the changes to Rule 1.6, The Reporter recommends that Comment [3] to Rule 4.1 be revised as follows:

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) recognizes that states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client=s crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client=s crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose certain information relating to the representation to avoid being deemed to have assisted the client=s crime or fraud. The requirement of If the lawyer can avoid assisting a client=s crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure created by this paragraph is, however, subject to the obligations created is prohibited by Rule 1.6. See Rule 1.2(d). Rule 1.6 permits a lawyer to disclose information when necessary to prevent or rectify certain crimes or frauds. See Rule 1.6(b). If disclosure is permitted by Rule 1.6, then such disclosure is required under this Rule, but only to the extent necessary to avoid assisting a client crime or fraud. Because Rule 1.6 does not prohibit the lawyer in such a situation from giving notice of the fact of withdrawal, or from withdrawing or disaffirming any opinion, document, affirmation, or the like, this Rule requires the lawyer to do so to the extent necessary to avoid being deemed, as a matter of substantive law, to have assisted the client=s crime or fraud.

Reporter=s Explanation for Conforming Change to Rule 4.1, Comment [2]

Given the deletion of Rule 1.6(b)(2), the two stricken sentences are no longer appropriate. Given the proposed reinsertion of the Model Rule Comments to Rule 1.6 that permit Anoisly withdrawal,@ the Reporter recommends the addition of a new sentence that clarifies that Anoisly withdrawal@ may be required by Rule 4.1(b) because permitted by Rule 1.6(b).

Conforming Change to Rule 1.2, Comment [11]

In light of the proposed changes to Rule 1.6, the Reporter recommends the following change to Rule 1.2, Comment [11]:

~~[7]~~ [11] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. ~~The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the~~ The lawyer is required to avoid furthering the purpose assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is supposed was legally proper but then discovers is criminal or fraudulent. Withdrawal The lawyer must, therefore, withdraw from the representation, therefore, may be required of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. *In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud.* See Rule 4.1.

Reporter=s Explanation of Conforming Change to Rule 1.2, Comment [11]

Given the deletion of Rule 1.6(b)(2), the deleted sentence is inappropriate.

## Reporter=s Observations and Possible Alternatives

The revised draft is premised on acceptance of the outcome in Chicago as interpreted to mean that the House wants no change in the Model Rule status quo, which, of course, includes the Comment indicating that Annoisy withdrawal@ is permitted by Rule 1.6. The only change is the new sentence in Comment [2] to Rule 4.1 that makes explicit that noisy withdrawal as is permitted by Rule 1.6 is required by Rule 4.1(b) to the extent necessary for the lawyer to avoid assisting a client crime or fraud.

The Reporter has been requested to consider alternatives. One alternative, of course would be to seek reconsideration of the Commission=s original proposals and try to change the minds of those who voted nay. If we think we might prevail, the Reporter would like to try. With that said, however, and in response to several suggestions, I am presenting several alternatives each of which differs both from our original proposal and the Model Rule status quo.

### Alternative 1: Codify Annoisy withdrawal.@

As an alternative to simply reinserting the Annoisy withdrawal@ Comments, the Reporter recommends the addition of a new paragraph (c) that would expressly recognize Annoisy withdrawal@ as an exception to confidentiality:

(c) If a lawyer is required by Rule 1.16(a) to withdraw from the representation of a client in order to avoid assisting a client to commit a crime or fraud, the lawyer may, without further disclosure of information relating to the representation and only to the extent necessary to avoid assisting the client commit the crime or fraud, give notice of the lawyer=s withdrawal and withdraw or disaffirm any opinion, document, affirmation, or the like.

The black-letter is consistent with the Comment and the discussion of noisy withdrawal in ABA Formal Ethics Opinion 92-366. It is intended to eliminate the problem of reconciling the Comment with the broad protection afforded by Rules 1.6, 1.8(b) and 1.9(c). Although simply resurrecting the Comment may be the route of least resistance, the Reporter thinks that noisy withdrawal should be viewed as a limited exception to confidentiality and that the exception should be explicitly recognized in the Rule. Such an exception can be presented as a principled compromise between client confidentiality and permitting lawyers to comply with Rule 1.2(d)=s prohibition against assisting a client commit a crime.

### Alternative 2: Restructure and revise paragraph (b) to incorporate recommendations of A. P. Carlton and Seth Rosner:

(b) A lawyer ~~may~~ has the right but no duty to reveal ~~such~~ information relating to the representation of a client 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~~ reasonably certain death or substantial bodily harm; ~~or~~

(2) to prevent the client from committing a crime ~~or fraud~~ that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime ~~or fraud~~ in furtherance of which the client has used the lawyer's services;

(c) A lawyer *may* reveal ~~such~~ information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

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

(2) ~~(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; or

(4) ~~(6)~~ to comply with other law or a court order.

a. Replace Amay reveal@ with Ahas the right but no duty to reveal.@ This change was suggested by A. P. Carlton. Its purpose is to assuage concerns about a lawyer being held liable for not revealing information when permitted to do so by Rule 1.6(b). This formulation would serve both as an exception to confidentiality and as what the Scope refers to as a Aconstitutive and descriptive@ Rule that Adefine[s] the nature of relationships between lawyers and others.@

One problem with this change in terminology from Amay@ to Ahas the right, but no duty@ is that it could give rise to the negative inference that a lawyer could be held civilly liable for action taken in situations in which the Rule simply says that the lawyer Amay@ do something, rather than that the lawyer has Athe right but no duty@ to do something. An alternative might be to try to assuage the concern about liability by beefing up Comment [13] to make the point that Rules 1.6(b)(1), (2) and (3) may serve as evidence that the lawyer has no duty either to disclose or to refrain from disclosure. This would track the new sentence in Scope, paragraph [20]. Perhaps we could include an even stronger statement that it would be contrary to public policy to subject lawyers to liability for either revealing or choosing not to reveal information when permitted to do so by Rules 1.6(b)(1), (2) or (3).

b. Delete A fraud. This change was suggested by Seth Rosner and is responsive to concerns that the Commission's proposal went too far when it embraced non-criminal frauds. Only 11 jurisdictions currently permit disclosure to prevent non-criminal frauds. Also limiting the exception to crimes can be seen as properly deferring to a legislative judgment about the relative wrongfulness of the client's conduct. This change will not assuage the concerns of those who worry about the burgeoning number of *mala prohibita* regulatory crimes, but it represents a principled modification of the Commission's proposal that brings it more in line with the rules in most jurisdictions. If the Commission embraces this proposal, the Reporter would recommend it be supplemented by a right to noisily withdraw in situations in which the client is using the lawyer's services to further a non-criminal fraud.

c. Reorganizing the exceptions. The Reporter does not think that the Right-no duty formulation is needed for the legal advice or the self-defense exceptions and would be inconsistent with the exception in paragraph (b)(6) permitting disclosure to comply with other law or a court order. Accordingly, these three exceptions are placed in a new paragraph (c).

### Alternative 3: Only permit disclosure to rectify crimes.

Geoff Hazard has suggested that the Commission consider limiting the economic crimes exception to the rectification, rather than the prevention of a client crime. To accomplish this in conjunction with the Carlton and Rosner suggestions, we would delete paragraph (b)(2) and modify paragraph (b) to read:

(b) A lawyer ~~may~~ has a right but no duty to reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to

(1) prevent reasonably certain death ...; or

(2) 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;

Although fewer jurisdictions permit disclosure of past crimes for purpose of mitigation or rectification than permit disclosure to prevent commission of the crime, Geoff has suggested that there might be less resistance to an exception that is limited to rectification or mitigation because there would be no uncertainty about whether the client was going to carry out the crime or that the crime would cause substantial economic harm. The deed will have been done and at least part of the loss suffered. Additionally, Geoff suggests that such an exception might be accepted as a limited extension of the lawyer's right of self-defense to situations in which a claim against the lawyer has not yet been asserted, but the lawyer is reasonably certain that one will be forthcoming. Given that we withdrew paragraph (b)(3) after the defeat of (b)(2), we really have no basis for gauging the House's receptivity to such arguments. Again, were the Commission to

approve this proposal, the Reporter would recommend it be supplemented by a right to Anoisily withdraw@ in situations in which the client had not yet committed the criminal act or the losses had not yet been suffered.

Alternative 4: Disclosure permitted to avoid assisting a client commit a crime or fraud.

Assuming, contrary to Geoff=s suggestion, that there would have been even more resistance to proposed paragraph (b)(3) than to (b)(2), and that part of the concern about (b)(2) may be due to uncertainty about the breadth of the reference to the client using or having used the lawyer=s services Ain furtherance of @ the client=s intended crime or the fraud, the Reporter would suggest one additional alternative for the Commission to consider. In pertinent part, it would read:

(b) A lawyer may reveal information relating to the representation to the extent the lawyer reasonably believes necessary to ...

(2) avoid assisting the client in conduct that the lawyer knows is criminal or fraudulent.

In essence, this is an exception that permits the lawyer to make such disclosures as are needed for the lawyer to comply with Rules 1.2(d) and 4.1(b). No changes would be needed to either proposed Comment [11] to Rule 1.2 or proposed Comment [2] to Rule 4.1 because they clarify that compliance with Rules 1.2(d) and 4.1(b) may in some cases require noisy withdrawal, that in rare cases it may require further disclosure, and that the lawyer is permitted by Rule 1.6(b) to make whatever disclosures are required for the lawyer to avoid assisting the client commit a crime or fraud. This outcome is no different than would have been the case had the House approved (b)(2). Unlike (b)(2), however, this alternative clarifies that the exception to confidentiality is no broader than necessary to permit the lawyer to comply with Rules 1.2(d) and 4.1(b). It is, therefore, a considerably narrower exception than our proposed (b)(2). It also imports the stricter requirement in Rule 1.2(d) that the lawyer must Aknow@ that the client=s conduct is a crime or fraud. Also, unlike our 1.6 (b)(3), this exception would not allow disclosure to rectify or mitigate unless somehow the lawyer=s silence would make the lawyer an accessory after the fact. Finally, by focusing on avoiding assisting the client to commit a crime or fraud, rather than on preventing the crime or fraud, this alternative deprives our opponents of their argument that we are permitting or requiring lawyers to be policemen. We are not, but rather are only allowing or requiring lawyers to avoid being an accomplice.