

Ethics 2000 Commission
Proposed Rule 1.6 - Revised Public Discussion Draft
March 21, 2000

Material added to the current Model Rule has been underlined; deletions from the current Model Rule have been ~~struck through~~.

CONFIDENTIALITY OF INFORMATION

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

6
7 (b) A lawyer may reveal ~~such~~ information relating to the representation of a client or
8 a former client to the extent the lawyer reasonably believes necessary

9
10 (1) ~~to prevent the client from committing a criminal act that the lawyer~~
11 ~~believes is likely to result in imminent~~ reasonably certain death or substantial bodily
12 harm;

13
14 (2) to prevent the client from committing a crime or fraud that is
15 reasonably certain likely to result in substantial injury to the financial interests or
16 property of another and in furtherance of which the client has used or is using the
17 lawyer's services;

18
19 (3) to prevent, mitigate, or rectify substantial injury to the financial
20 interests or property of another resulting that is reasonably certain to result or
21 has resulted from the client's commission of a crime or fraud in furtherance of
22 which the client has used the lawyer's services;

23
24 (4) to secure legal advice about the lawyer's compliance with these Rules; or

25
26 (5) ~~(2)~~ to establish a claim or defense on behalf of the lawyer in a controversy
27 between the lawyer and the client, to establish a defense to a criminal charge or civil
28 claim against the lawyer based upon conduct in which the client was involved, or to
29 respond to allegations in any proceeding concerning the lawyer's representation of the
30 client.

31
32 (6) *to comply with law or [a court order] [an order of a tribunal].*

33
34 (c) A lawyer shall reveal information relating to the representation of a client ~~or a~~
35 ~~former client~~ to the extent required by law or court order or when necessary to comply with

1 these Rules 3.3, [3.4(c),] or 4.1.

2
3
4 **Comment**

5
6 [1] ~~The lawyer is part of a judicial system charged with upholding the law. One of the~~
7 ~~lawyer's functions is to advise clients so that they avoid any violation of the law in the proper~~
8 ~~exercise of their rights.~~

9
10 [2] ~~The observance of the ethical obligation of a lawyer to hold inviolate confidential~~
11 ~~information of the client not only facilitates the full development of facts essential to proper~~
12 ~~representation of the client but also encourages people to seek early legal assistance.~~

13
14 [3] ~~Almost without exception, clients come to lawyers in order to determine what~~
15 ~~their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct.~~
16 ~~The common law recognizes that the client's confidences must be protected from disclosure.~~
17 ~~Based upon experience, lawyers know that almost all clients follow the advice given, and the law~~
18 ~~is upheld.~~

19
20 [1] This Rule governs the disclosure by a lawyer of information relating to the
21 representation of a client *both during and after* the lawyer's representation of the client. *See*
22 *Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a*
23 *prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the*
24 *lawyer's prior representation of a former client, and See Rules 1.8(b) and 1.9(c)(1) for the*
25 *lawyer's duties with respect to the use of such information to the disadvantage of clients and*
26 *former clients.*

27
28 [4] [2] A fundamental principle in the client-lawyer relationship is that, *in the absence of*
29 *the client's informed consent,* the lawyer ~~maintain confidentiality of~~ must not reveal information
30 relating to the representation. *This contributes to the trust that is the hallmark of the client-*
31 *lawyer relationship.* The client is thereby encouraged to seek legal assistance and to
32 communicate fully and frankly with the lawyer even as to embarrassing or legally damaging
33 subject matter. The lawyer needs this information to represent the client effectively and, if
34 necessary, to advise the client to refrain from wrongful conduct. *Almost without exception,*
35 *clients come to lawyers in order to determine their rights and what is, in the complex of laws and*
36 *regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost*
37 *all clients follow the advice given, and the law is upheld.*

38
39 [5] [3] The principle of *client-lawyer confidentiality* is given effect ~~in two~~ by related
40 bodies of law, the attorney-client privilege, ~~(which includes the work product doctrine) in the~~
41 ~~law of evidence,~~ and the rule of confidentiality established in professional ethics. The
42 attorney-client privilege applies in judicial and other proceedings in which a lawyer may be
43 called as a witness or otherwise required to produce evidence concerning a client. The rule of
44 client-lawyer confidentiality applies in situations other than those where evidence is sought from

1 the lawyer through compulsion of law. The confidentiality rule, for example, applies not merely
2 only to matters communicated in confidence by the client but also to all information relating to
3 the representation, whatever its source. A lawyer may not disclose such information except as
4 authorized or required by the Rules of Professional Conduct or other law. See also Scope.

5
6 [6] ~~The requirement of maintaining confidentiality of information relating to~~
7 ~~representation applies to government lawyers who may disagree with the policy goals that their~~
8 ~~representation is designed to advance.~~

9
10 [4] Paragraph (a) prohibits a lawyer from revealing information relating to the
11 representation of a client. This prohibition also applies to disclosures by a lawyer that do not in
12 themselves reveal protected information but could reasonably lead to the discovery of such
13 information by a third person. A lawyer's use of hypotheticals to discuss issues relating to the
14 representation is permissible so long as there is no reasonable likelihood that the listener will be
15 able to ascertain the identity of the client or the situation involved.

16 17 **Authorized Disclosure**

18
19 [7] [5] ~~A~~ Except to the extent that the client's instructions or special circumstances limit
20 that authority, a lawyer is impliedly authorized to make disclosures about a client when
21 appropriate in carrying out the representation, except to the extent that the client's instructions or
22 special circumstances limit that authority. In litigation some situations, for example, a lawyer
23 may disclose information by admitting be impliedly authorized to admit a fact that cannot
24 properly be disputed or, in negotiation by making to make a disclosure that facilitates a
25 satisfactory conclusion to a matter. [8] Lawyers in a firm may, in the course of the firm's
26 practice, disclose to each other information relating to a client of the firm, unless the client has
27 instructed that particular information be confined to specified lawyers.

28 29 **Disclosure Adverse to Client**

30
31 [9] [6] ~~The~~ Although the public interest is usually best served by a strict rule requiring
32 lawyers to preserve the confidentiality of information relating to the representation of their
33 clients, the confidentiality rule is subject to limited exceptions. In becoming privy to information
34 about a client, a lawyer may foresee that the client intends serious harm to another person.
35 However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client
36 will be inhibited from revealing facts which would enable the lawyer to counsel against a
37 wrongful course of action. The public is better protected if full and open communication by the
38 client is encouraged than if it is inhibited. Paragraph (b)(1) recognizes the overriding value of
39 life and physical integrity and permits disclosure reasonably necessary to prevent reasonably
40 certain death or substantial bodily harm. *Substantial bodily harm includes life-threatening or*
41 *debilitating injuries and illnesses and the consequences of child sexual abuse.* Such harm is
42 reasonably certain to occur if it will be suffered imminently or if there is a present and
43 substantial threat that a person will suffer such harm at a later date if the lawyer fails to take
44 action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally

1 discharged toxic waste into a town's water supply may reveal this information to the authorities
2 if there is a present and substantial risk that a person who drinks the water will contract a life-
3 threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat
4 or reduce the number of victims.

5
6 [10] Several situations must be distinguished.

7
8 [11] First, the lawyer may not counsel or assist a client in conduct that is criminal or
9 fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false
10 evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid
11 assisting a client in criminal or fraudulent conduct.

12
13 [12] Second, the lawyer may have been innocently involved in past conduct by the
14 client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d),
15 because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct
16 is of that character.

17
18 [13] Third, the lawyer may learn that a client intends prospective conduct that is
19 criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph
20 (b)(1), the lawyer has professional discretion to reveal information in order to prevent such
21 consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily
22 injury which the lawyer reasonably believes is intended by a client. It is very difficult for a
23 lawyer to "know" when such a heinous purpose will actually be carried out, for the client may
24 have a change of mind.

25
26 [14] The lawyer's exercise of discretion requires consideration of such factors as the
27 nature of the lawyer's relationship with the client and with those who might be injured by the
28 client, the lawyer's own involvement in the transaction and factors that may extenuate the
29 conduct in question. Where practical, the lawyer should seek to persuade the client to take
30 suitable action. In any case, a disclosure adverse to the client's interest should be no greater than
31 the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take
32 preventive action permitted by paragraph (b)(1) does not violate this Rule.

33 **Withdrawal**

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36 [15] If the lawyer's services will be used by the client in materially furthering a course
37 of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

38
39 [16] After withdrawal the lawyer is required to refrain from making disclosure of the
40 client's confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b)
41 nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer
42 may also withdraw or disaffirm any opinion, document, affirmation, or the like.

43
44 [17] [7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that enables

1 the lawyer to reveal information to the extent necessary to prevent the client from committing a
2 crime or fraud that is ~~likely~~ *reasonably certain* to result in substantial injury to the financial or
3 property interests of another and in furtherance of which the client has used or is using the
4 lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the
5 protection of this Rule. The client can, of course, prevent such disclosure by refraining from the
6 wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's
7 misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is
8 criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's
9 obligation or right to withdraw from the representation of the client in such circumstances.
10 Where the client is an organization, the lawyer may be in doubt whether contemplated conduct
11 will actually be carried out by the organization. Where necessary to guide conduct in connection
12 with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

13
14 [8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the
15 client's crime or fraud until after it has been consummated *and substantial loss has been suffered*
16 *by the victim*. Although the client no longer has the option of preventing disclosure by refraining
17 from the wrongful conduct, there will be situations in which the loss suffered by the affected
18 person can be *prevented*, rectified or mitigated. In such situations, the lawyer may disclose
19 information relating to the representation to the extent necessary to enable the affected persons to
20 *prevent or mitigate reasonably certain loss or to attempt to recoup their losses*.

21
22 [9] A lawyer's confidentiality obligations do not preclude a lawyer from securing
23 confidential legal advice about the lawyer's personal responsibility to comply with these Rules.
24 In most situations, disclosing information to secure such advice will be impliedly authorized for
25 the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized,
26 paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance
27 with the Rules of Professional Conduct.

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

29
30
31 ~~[8]~~ [10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a
32 client's conduct or other misconduct of the lawyer involving representation of the client, the
33 lawyer may respond to the extent the lawyer reasonably believes necessary to establish a
34 defense. The same is true with respect to a claim involving the conduct or representation of a
35 former client. Such a charge can arise in a civil, criminal, *or professional* disciplinary, or other
36 proceeding and can be based on a wrong allegedly committed by the lawyer against the client or
37 on a wrong alleged by a third person; for example, a person claiming to have been defrauded by
38 the lawyer and client acting together. The lawyer's right to respond arises when an assertion of
39 such complicity has been made. Paragraph (b)(2)(5) does not require the lawyer to await the
40 commencement of an action or proceeding that charges such complicity, so that the defense may
41 be established by responding directly to a third party who has made such an assertion. The right
42 to defend *also applies*, of course, *applies* where a proceeding has been commenced. ~~Where~~
43 ~~practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should~~
44 ~~advise the client of the third party's assertion and request that the client respond appropriately. In~~

1 any event, disclosure should be no greater than the lawyer reasonably believes is necessary to
2 vindicate innocence, the disclosure should be made in a manner which limits access to the
3 information to the tribunal or other persons having a need to know it, and appropriate protective
4 orders or other arrangements should be sought by the lawyer to the fullest extent practicable.
5

6 ~~[19] [11]~~ If the lawyer is charged with wrongdoing in which the client's conduct is
7 implicated, the rule of confidentiality should not prevent the lawyer from defending against the
8 charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and
9 can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong
10 alleged by a third person, for example, a person claiming to have been defrauded by the lawyer
11 and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(2)(5) to prove
12 the services rendered in an action to collect it. This aspect of the Rule expresses the principle
13 that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.
14 As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure
15 of information relating to a representation, to limit disclosure to those having the need to know
16 it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.
17

18 ~~[21] [12] [14]~~ *The Rules of Professional Conduct in various circumstances permit or*
19 *require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3,*
20 *and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other*
21 *provisions of Other law or an order of a tribunal may require a lawyer to provide give*
22 *information about a client. Whether another provision of law or the order of a tribunal*
23 *supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a*
24 *presumption should exist against such a supersession. The lawyer must discuss with the client the*
25 *possibility of challenging the law or order. See Rule 1.4. If another provision of law or the*
26 *order of a tribunal supersedes these Rules, however, paragraph (b)(6) permits disclosure to the*
27 *extent reasonably necessary for the lawyer to comply with the law or the order. Disclosure is*
28 *only permitted if it would be unreasonable under the circumstances for the lawyer to challenge*
29 *the validity or applicability of the law or the lawfulness of the order, such as would be the case if*
30 *there were no non-frivolous basis for the challenge.*
31

32 ~~[13] [12]~~ Paragraph (b) permits disclosure only to the extent the lawyer reasonably
33 believes the disclosure is necessary to accomplish one of the purposes specified. Where
34 practicable, the lawyer should first seek to persuade the client to take suitable action *to obviate*
35 *the need for disclosure.* In any case, a disclosure adverse to the client's interest should be no
36 greater than the lawyer reasonably believes necessary to accomplish the purpose. If the
37 disclosure will be made in connection with a judicial proceeding, the disclosure should be made
38 in a manner that limits access to the information to the tribunal or other persons having a need to
39 know it and appropriate protective orders or other arrangements should be sought by the lawyer
40 to the fullest extent practicable.
41

42 ~~[14] [13]~~ Paragraph (b) permits but does not require the disclosure of information
43 relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) -
44 ~~(5)~~ (6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors

1 as the nature of the lawyer's relationship with the client and with those who might be injured by
2 the client, the lawyer's own involvement in the transaction, and factors that may extenuate the
3 conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not
4 violate this Rule. In some circumstances, however, other rules may require the lawyer to reveal
5 information relating to the client's representation. See paragraph (c) and Comment [15].
6

7 **Disclosure Otherwise Required by the Rules of Professional Conduct or Authorized**

8
9 ~~[20] The attorney-client privilege is differently defined in various jurisdictions. If a~~
10 ~~lawyer is called as a witness to give testimony concerning a client, absent waiver by the client,~~
11 ~~paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must~~
12 ~~comply with the final orders of a court or other tribunal of competent jurisdiction requiring the~~
13 ~~lawyer to give information about the client.~~
14

15 ~~[21] [14] The Rules of Professional Conduct in various circumstances permit or require~~
16 ~~a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3, and 4.1.~~
17 ~~In addition to these provisions, a lawyer may be obligated or permitted by other provisions of~~
18 ~~law give information about a client. Whether another provision of law supersedes Rule 1.6 is a~~
19 ~~matter of interpretation beyond the scope of these Rules, but a presumption should exist against~~
20 ~~such a supersession.~~
21

22 [15] Paragraph (c) recognizes that compliance with Rules 3.3, 3.4(c) and 4.1 may
23 require disclosure of information relating to a client's representation and provides that the
24 lawyer's compliance with such duties take precedence over this Rule. A lawyer must also
25 comply with lawful orders of a tribunal, an administrative or executive agency, or a legislative
26 body. If, for example, a lawyer is called as a witness to give testimony concerning a client or is
27 otherwise ordered to reveal information relating to the client's representation, the lawyer must,
28 absent informed consent of the client to do otherwise, assert on behalf of the client all non-
29 frivolous claims that the information sought is protected against disclosure by the attorney-client
30 privilege or other applicable law. In the event of an adverse ruling, the lawyer *must should*
31 consult with the client about the possibility of appeal. See Rule 1.4. Unless an appeal is taken,
32 however, the lawyer must comply with the order. See Rule 3.4 (c).
33

34 **Acting Competently to Preserve Confidentiality**

35
36 [16] A lawyer must act competently to safeguard information relating to the
37 representation of a client against inadvertent or unauthorized disclosure by the lawyer or by
38 other persons who are participating in the representation of the client or who are subject to the
39 lawyer's supervision. See Rules 1.1, 5.1, and 5.3.
40

41 [17] When transmitting a communication that includes information relating to the
42 representation of a client, the lawyer must take reasonable precautions to prevent the information
43 from coming into the hands of unintended recipients. This duty, however, does not require that
44 the lawyer use special security measures if the method of communication affords a reasonable

1 expectation of privacy. Special circumstances, however, may warrant special precautions.
2 Factors to be considered in determining the reasonableness of the lawyer's expectation of
3 confidentiality include the sensitivity of the information and the extent to which the privacy of
4 the communication is protected by law or by a confidentiality agreement. A client may require
5 the lawyer to implement special security measures not required by this Rule or may give
6 informed consent to the use of a means of communication that would otherwise be prohibited by
7 this Rule.

8 9 **Former Clients**

10
11 [22] [18] The duty of confidentiality continues after the client-lawyer relationship has
12 terminated. See Rule 1.9(c)(2) Thus, Rule 1.6(a) prohibits the disclosure of information relating
13 to the representation of a former client. See Rule 1.9(c)(1) for the prohibition against using such
14 information to the disadvantage of the former client.

Reporter's Observations

Paragraph (a):

As approved by the Commission in Dallas. The duty to former clients will once again be addressed in Rule 1.9(c)(2). See also Comments [1] and [18]

Paragraph (b)(2):

As approved by the Commission in Dallas. See the Reporter's Observation for paragraph (b) (3) for a recommendation for compressing paragraphs (b)(2) and (b)(3) into a single paragraph.

Paragraph (b)(3):

The addition of "prevent" was approved by the Commission. The Reporter replaced "resulting" with "resulting or reasonably certain to result in," because the paragraph is now addressing injury yet to be suffered as well as injury already suffered. If the crime has not yet caused injury, the lawyer should be reasonably certain that it will do so, just as we require in paragraph (b) that the lawyer be reasonably certain both that a crime will be committed and that it will cause substantial harm.

If the Commission concurs with this analysis, the Reporter would raise the question of whether paragraphs (b)(2) and (b)(3) should be compressed into a single paragraph that would read:

(b)(2/3) 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 is using or has used the lawyer's services;

This paragraph would permit disclosure to prevent a crime or fraud that is reasonably certain to result in substantial harm, as does paragraph (b)(2). The only difference is that paragraph (b)(2) speaks in terms of preventing a crime or fraud reasonably certain to result in substantial injury, while the combined paragraph speaks of preventing harm reasonably certain to result from the client's commission of a crime or fraud. There is nothing in the latter formulation that precludes its interpretation to permit disclosure prior to the commission of the crime or fraud so long as the lawyer is reasonably certain both that the crime or fraud will be committed and that substantial injury will result therefrom. This point could easily be reinforced in the Comments, which otherwise would not need to be revised. As does paragraph (b)(3) as currently revised, the combined paragraph would also permit disclosure to prevent, mitigate or rectify substantial harm is reasonably certain to or has already resulted form a completed crime of fraud. Philosophically, the Reporter prefers an approach that emphasizes the prevention of the loss rather than prevention of the crime because the former does not suggest that the lawyer's role is to police the client's conduct, but more simply permits the lawyer to protect innocent victims of a client's abuse of the attorney-client relationship.

Paragraph (b)(6):

In Dallas, the Commission decided that disclosure to comply with law and a court order should be permitted but not required unless the disclosure was otherwise required by the Rules of Professional Conduct. To that end, paragraph (b)(6) has been added. Concerned that his formulation could be read to preclude a lawyer from making a disclosure to an administrative tribunal in circumstances in which the lawyer could present no non-frivolous arguments that the order was legally invalid, however, I have offered a bracketed alternative replaced the narrower reference to a “court” order with a broader reference to an order of “a tribunal.” Although this broadens the exception, I don’t think we can appropriately single out court orders in this regard and thereby effectively require a lawyer to disobey an administrative tribunal’s order when it would be unreasonable under the circumstances to challenge it. Nothing in this paragraph, of course, requires disclosure, and disclosure is only permitted if the lawyer reasonably believe it is required. See Comment [12].

This proposal raises the more general question of whether we should refer to “tribunal” rather than a “court” throughout the rules. In Rule 4.2, for example, we now refer to court order. In Rule 3.4(c), however, we refer to the rules of a “tribunal.” The Reporter recommends that further attention be given to this issue once the Commission has decided whether the exception paragraph (b)(6) should be limited to compliance with “court” orders or be broadened to embrace orders of a “tribunal.”

Paragraph (c):

The Commission voted to retain paragraph (c) as a cross-reference to the rules of professional conduct which trump Rule 1.6 and require disclosure. The cross-references to Rules 3.3 and 4.1 are obvious. I have added the cross-reference to Rule 3.4(c) because without it there would be no basis in the rule text for the generally accepted proposition that a lawyer must comply with a court order requiring disclosure. Indeed the permissive disclosure in paragraph (b)(b), standing alone, would support an argument to the contrary. Rule 3.4(c) precludes a lawyer from knowingly disobeying an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists. As one of those obligations would be to obey the tribunal’s orders, it follows that a lawyer would be required to comply with an order requiring disclosure of information relating to the representation of the lawyer’s client, unless the lawyer could make a non-frivolous argument that the order is invalid. Indeed, this is the point currently made in Comment [15]. The Commission should note in this regard that Rule 3.4(c) is incorporated into Rule 3.9 and thus is applicable to lawyers representing clients in non-adjudicative proceedings conducted by administrative agencies or legislative bodies. I don’t think that this is a problem because Rule 3.4 permits the lawyer to refuse to disclose on the ground that no valid obligation exists. Comment [15] would be equally applicable in such a situation, the only difference being that lawyer’s refusal or appeal will lead to the institution of a judicial proceeding in which, at some point, there may be an order with which the lawyer will be required to comply. The bottom line, however, is that I think there must be a basis in the rule text for requiring a lawyer to reveal information relating to the representation of a client when ordered to do so by a final order of a tribunal.

Alternative: The Reporters are concerned about having a separate paragraph requiring disclosure to comply with the Rules of Professional Conduct while not requiring compliance with other law that may well supersede Rule 1.6. It at least appears unseemly to say lawyer must abide by the some law but can refuse to abide by other law. As an alternative, therefore, we would recommend deletion of paragraph

(c). Disclosure would be permitted by paragraph (b)(6). Nothing would be said in the text of Rule 1.6 about law or rules that might require the lawyer to disclose information that they are permitted to reveal by paragraph (b)(6). Comment [15], however, would be retained to alert lawyers to the fact that in some cases they will be required to make the disclosure permitted by paragraph (b)(6).

Comment [1]:

The cross references have been modified in light of the addition of Rule 1.18 and the Commission's decision in Dallas to return the confidentiality obligation to former clients to Rule 1.9(c).

Comment [6]:

As approved in Dallas.

Comment [7]:

Modified to reflect change in paragraph (b)(2).

Comment [8]:

Modified to reflect change in paragraph (b)(3).

Comment [10]:

The addition of the reference to “an other” proceeding was approved in Dallas. The last sentence has been edited as suggested by a commentator.

Comment [12]:

This was Comment [14] in the public discussion draft, but has been moved here because it now relates to permissive rather than mandatory disclosure. The Comment has been modified to reflect the addition of paragraph (b)(6). It establishes the framework for a discussion between the lawyer and the client about the possibility of a challenge to the law or order requiring disclosure followed by a decision by the lawyer that disclosure is “reasonably necessary” because it would be unreasonable under the circumstances to mount a challenge to the law or order in question. An obvious example is provided.

Comments [13] and [14]:

Renumbered and a slight editorial modification to Comment [13] as suggested by a commentator. I have added a sentence to Comment [14] alert lawyers that in certain circumstances the lawyer will be required to make a disclosure permitted by paragraph (b).

Delete Public Discussion Draft Comment [14]:

The comment has been relocated and renumbered as Comment [12] because it now relates to permitted rather than required disclosure.

Comment [15]:

Comment [15] has been modified to reflect the changes in paragraph (c). If the Commission approves the deletion of paragraph (c), this Comment would be retained to alert lawyers that in some situations they will be required to reveal that which they are permitted to reveal by paragraph (b)(6).

Comment [18]:

The comment has been revised to reflect Commission's decision in Dallas to once again place the confidentiality obligation to former clients to Rule 1.9(c).