

Draft from 11/00 Public Comment Draft
RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

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

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

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

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

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

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

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

Comment

[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.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer 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.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply 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 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.

[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

[5] 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. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. 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

[6] 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. 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.

[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. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[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)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[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)(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, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(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.

[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)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[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 lawyer must, absent informed consent of the client to do otherwise, assert on behalf of the client all nonfrivolous claims 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 Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[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.

[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)(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).

Acting Competently to Preserve Confidentiality

[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.

[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

[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.

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;

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

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

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

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 and work-product doctrine apply 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~~ be impliedly authorized to admit 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.~~

Withdrawal

~~[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 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] [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. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.~~

[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)(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] [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)(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] [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)(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.~~

[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)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[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 lawyer must, absent informed consent of the client to do otherwise, assert on behalf of the client all nonfrivolous claims 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 Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[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.

[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)(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).

~~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

[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.

[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] [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.

Model Rule 1.6 Reporter's Explanation of Changes

The Commission is proposing a substantial expansion of the grounds for permissive disclosure under Rule 1.6. While strongly reaffirming the legal profession's commitment to the core value of confidentiality, the Commission also recognizes the overriding importance of human life and the integrity of the lawyer's own role within the legal system. In this regard, the Commission agrees with the substantial criticism that has been directed at current Rule 1.6 and regards the Rule as out of step with public policy and the values of the legal profession as reflected in the rules currently in force in most jurisdictions.

As revised, Rule 1.6 will permit (though it will not require) disclosure to prevent death or substantial bodily harm and to prevent or rectify substantial injury resulting from a client's serious abuse of the lawyer's services. It will also explicitly permit a lawyer to disclose confidences to obtain legal advice about the lawyer's compliance with the Rules. Finally, it will

permit disclosure where it is required by a law or court order. In light of these substantial changes to Rule 1.6, the Commission has both reorganized and substantially revised the Comments.

TEXT:

1. Paragraph (a): Replace "consents after consultation" with "informed consent"

The Commission is recommending that throughout the Rules the phrase "consent after consultation" be replaced with "gives informed consent," as defined in Rule 1.0(e). No change in substance is intended.

2. Paragraph (b)(1): Modify to permit disclosure to "prevent reasonably certain death or substantial bodily harm"

The Commission recommends that the exception currently recognized for client crimes threatening imminent death or substantial bodily harm be replaced with a broader exception for disclosures to prevent reasonably certain death or substantial bodily harm, with no requirement of client criminality. This change is in accord with Section 66 of the American Law Institute's Restatement of the Law Governing Lawyers. The Rule replaces "imminent" with "reasonably certain," to include a present and substantial threat that a person will suffer such injury at a later date, as in some instances involving toxic torts.

3. Paragraph (b)(2): Add paragraph permitting disclosure to prevent client crimes or frauds reasonably certain to cause substantial economic injury and in which client has used or is using lawyer's services

The Commission recommends that a lawyer be permitted to reveal information relating to the representation to the extent necessary to prevent the client from committing a crime or fraud reasonably certain to result in substantial economic loss, but only when the lawyer's services have been or are being used in furtherance of the crime or fraud. Use of the lawyer's services for such improper ends constitutes a serious abuse of the client-lawyer relationship. The client's entitlement to the protection of the Rule must be balanced against the prevention of the injury that would otherwise be suffered and the interest of the lawyer in being able to prevent the misuse of the lawyer's services. Moreover, with respect to future conduct, the client can easily prevent the harm of disclosure by refraining from the wrongful conduct. See also Comment [7].

Support for the Commission's proposal can be found in the eight jurisdictions that permit disclosure when clients threaten crimes or frauds likely to result in substantial injury to the financial or property interests of another and the 25 jurisdictions that permit a lawyer to reveal the intention of a client to commit any crime. The Commission's proposal is also in accord with Section 67 of the American Law Institute's Restatement of the Law Governing Lawyers.

4. Paragraph (b)(3): Add paragraph permitting disclosure to prevent, mitigate or rectify substantial economic loss resulting from client crime or fraud in which client has used lawyer's services

The rationale for this exception is the same as that for paragraph (b)(2), the only difference being that the client no longer can prevent disclosure by refraining from the crime or fraud. See also Comment [8]. The Commission believes that the interests of the affected persons in mitigating or recouping their substantial losses and the interest of the lawyer in undoing a wrong in which the lawyer's services were unwittingly used outweigh the interests of a client who has so abused the client-lawyer relationship. Support for the Commission's proposal can be found in the 13 jurisdictions that permit disclosure to rectify the consequences of a crime or fraud in the commission of which the client used the lawyer's services. The proposal is also in accord with Section 67 of the American Law Institute's Restatement of the Law Governing Lawyers.

5. Paragraph (b)(4): Add paragraph permitting disclosure to the extent necessary to secure legal advice regarding lawyer's compliance with Rules

Questions have been raised regarding the propriety of a lawyer revealing confidential information in order to secure legal advice regarding the lawyer's obligations under the Rules, including the lawyer's duty not to counsel or assist clients in crimes or frauds. In most instances, disclosing information to secure such advice is impliedly authorized. Nevertheless, in order to clarify that such disclosures are proper even when not impliedly authorized, the Commission recommends that such disclosures be explicitly permitted under this Rule. It is of overriding importance, both to lawyers and to society at large, that lawyers be permitted to secure advice regarding their legal obligations. Moreover, clients are adequately protected by the requirement that such disclosures be made only when protected by the attorney-client evidentiary privilege. See also Comment [9].

6. Paragraph (b)(6): Add paragraph permitting disclosure to comply with law or court order

The current Rule does not address whether lawyers are permitted or required to disclose information when such disclosure is required by other law or a court order. Current Comment [20], however, states that a lawyer must comply with the final orders of a court or other tribunal requiring the lawyer to give information about the client, and current Comment [21] refers to other law that may supersede Rule 1.6. The Commission recommends that the text of Rule 1.6 be amended to explicitly permit, but not require, disclosure to comply with law or court orders. No change in substance is intended. See also Comments [12] and [13].

COMMENT:

~~[1]~~, ~~[2]~~ and ~~[3]~~ The points made in these Comments have been incorporated into Comment [2]. No change in substance is intended.

[1] This new Comment provides cross-references to the other Rules that protect clients, prospective clients and former clients against the disclosure or adverse use of information relating to the representation.

[2] This modification of current Comment [4] combines material in current Comments [1] through [4] into a single Comment setting forth the rationale for the confidentiality duty. No change in substance is intended.

[3] Current Comment [5] has been edited slightly to clarify that the work-product doctrine is separate from the attorney-client evidentiary privilege. No change in substance is intended.

~~[6]~~ Given that Rule 1.6 contains no suggestion that there might be an exception for government lawyers who disagree with government policy, the Commission recommends the deletion of current Comment [6] as unnecessary.

[4] This new Comment reminds lawyers that the prohibition applies even when the disclosure does not itself reveal protected information but could lead to the discovery of such information, including the use of a hypothetical that poses an unreasonable risk that the listener will ascertain protected information. No change in substance is intended.

[5] This Comment combines and makes minor stylistic changes to current Comments [7] and [8]. No change in substance is intended.

[6] This new Comment replaces and modifies current Comments [9] and [13]. It states the rationale for the exception recognized in paragraph (b)(1) - disclosures to prevent reasonably certain death or substantial bodily harm. It also explains when such harm is reasonably certain, providing an illustration.

~~[10], [11], [12], [14], [15] and [16]~~ The substance of these Comments has been included in various new Comments. The caption "Withdrawal" has also been deleted.

[7] Except for the last two sentences, which are identical to current Comment [17], Comment [7] is new and provides the rationale for paragraph (b)(2) - disclosure to prevent future crimes or frauds threatening substantial economic harm. It also provides a cross-reference to Rules 1.2 and 1.16, which govern the lawyer's conduct regardless of whether the lawyer chooses to exercise the lawyer's discretion to disclose.

[8] This new Comment provides the rationale for the exception recognized in paragraph (b)(3) - disclosure to prevent, mitigate or rectify substantial economic loss resulting from a client's past crimes or frauds in the furtherance of which the client has used the lawyer's services.

[9] This new Comment provides the rationale for the exception recognized in paragraph (b)(4) - securing confidential legal advice about the lawyer's personal responsibility to comply with the Rules.

Caption The caption has been deleted as no longer necessary.

[10] This Comment relating to paragraph (b)(5), disclosure permitted to defend against charges of lawyer misconduct, is derived from current Comment [18]. The new third sentence is taken from current Comment [19]. The deleted last sentence has been incorporated into Comment [14]. No change in substance is intended.

[11] This Comment contains the core of current Comment [19] that addresses disclosure necessary to collect a lawyer's fees. The deleted second sentence has been included in Comment [10] and the deleted last sentence has been incorporated into Comment [14]. No change in substance is intended.

[12] This new Comment addresses the lawyer's responsibilities when the lawyer is faced with other law that may require disclosure of information relating to a client's representation. This issue is cursorily discussed in current Comment [21]. Although recognizing that paragraph (b)(6) permits disclosure to comply with other law, this Comment emphasizes the lawyer's duty to consult with the client to the extent required by Rule 1.4. No change in substance is intended.

[13] This new Comment addresses the lawyer's responsibilities when the lawyer is faced with a court order requiring disclosure of information relating to a client's representation or is called to testify concerning a client. This issue is addressed in current Comment [20]. Although recognizing that paragraph (b)(6) permits disclosure to comply with a court order, this Comment requires the lawyer, absent the client's informed consent to the contrary, to invoke all nonfrivolous claims that the information is privileged and to consult with the client about the possibility of appealing an adverse ruling. No change in substance is intended.

[14] Combining points made in current Comments [14], [18] and [19], this new Comment explains the Rule 1.6(b) requirement that disclosure be limited to information the lawyer reasonably believes is needed to accomplish the purpose for which disclosure is permitted. It emphasizes remonstrating with the client to take appropriate action, disclosing no more than necessary and, where appropriate, seeking protective orders against further dissemination of the information. No change in substance is intended.

[15] This new Comment incorporates the substance of current Comment [14]. A new introductory sentence has been added, and the beginning of the second sentence has been revised for stylistic reasons. The last two sentences provide a cross-reference to other Model Rules that may require disclosure.

Caption This caption has been deleted because current Comments [20] and [21] have been deleted.

~~[20] and [21]~~ Current Comments [20] and [21] have been deleted because these matters are now discussed in Comments [12] and [13].

Caption This new caption has been added to call attention to the two new Comments that discuss the requirement that lawyers act competently and diligently to preserve confidentiality.

[16] This new Comment cross-references Rules 1.1, 5.1 and 5.3, calling attention to the responsibility of the lawyer to act competently to safeguard information relating to the representation. A number of states have retained the formulation of ABA Model Code of Professional Responsibility DR 4-101(D), "A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee." Much of the recent discourse about confidentiality has focused on the lawyer's duty to act competently to prevent disclosure. The Commission believes this issue is important and ought to be flagged in the Comment. No change in substance, however, is intended.

[17] This new Comment addresses the lawyer's duty of care when transmitting confidential information. Although much of the current debate concerns the use of unencrypted e-mail, the Comment speaks more generally in terms of special security measures and reasonable expectations of privacy. It takes a case-by-case approach to the problem. The Commission believes this Comment is consistent with the prevailing resolution of this issue in recent ethics committee decisions.

[18] This comment is identical to current Comment [22], with the addition of cross-references to Rule 1.9(c)(1) and (2).

