

January 14, 1998

Memorandum

To: ABA Ethics 2000 Commission

From: Carl A. Pierce, Reporter

Re: Proposed Rule 1.6

Attached is my proposal for Rule 1.6 as modified in response to some of the comments I received from Geoffrey Hazard, Loeber Landau, and Arthur Garwin. I have incorporated the previous two reports - respectively dated December 15 and December 22 - into a single document and have highlighted the modifications with bold print. Except as noted in this introductory memorandum, I have not made any changes in the Reporter's observations.

Per a suggestion of Geoffrey Hazard, I am proposing the deletion of my reference in paragraph (a) to "similar matters." I concur with his suggestion that confidentiality concerns transcend specific matters and that a single consultation with a new client about confidentiality should suffice.

With respect to subparagraphs (c)(2), (c)(3), and (c)(4), Professor Hazard recommends use of a "reasonable belief" standard rather than the "knowledge" standard used in my proposed draft. His concern is that many lawyers will interpret the knowledge standard to mean that they must be certain beyond a reasonable doubt. Because "almost all lawyers have extreme inhibitions against revealing client confidences," Professor Hazard believes that too strict a standard (knowledge rather than reasonable belief) "make[s] the escape hatch perilous to use" and will therefore "close it for many lawyers." I concur with Professor Hazard's understanding of the significance of the proposal's use of a "knowledge" standard. For purposes of direct comparison with a "reasonable belief" standard I would liken the "knowledge" standard to a "substantial reason to believe" standard. I have added bracketed references in subparagraphs (c)(2) and (c)(4) to call the Commission's attention to this issue. If the Commission concurs with Professor Hazard I would revise subparagraph (c)(3) to read

"(3) to prevent substantial injury to the financial or property interests of a person [or a class of similarly situated persons] if the lawyer reasonably believes, after reasonable inquiry, that there is a significant likelihood that such injury will result from criminal or fraudulent conduct of the client [or a third person]."

In the context of disclosures that will implicate a client in conduct that is arguably criminal or fraudulent, I continue to prefer a stricter standard - either "knowledge" or "substantial reason to believe" - because I think any doubts about the criminality or fraudulent nature of the client's conduct ought to be resolved in favor of the client.

Professor Hazard has also noted a reservation about the requirement in subparagraph (d)(2) that the lawyer exhaust the client's rights to appeal an adverse ruling on the client's claims of privilege. He thinks the decision whether to appeal such rulings should remain a matter of practical judgment rather than an ethical requirement. I have added brackets around the pertinent language to call the

Commission's attention to this issue. The Rule as currently drafted would require the lawyer to impress upon the client the practical reasons for not pursuing an appeal and secure the client's consent to forego the appeal and make the disclosures in question. Deleting the reference to the appeal in subparagraph (d)(2) would leave the issue to be resolved under Rule 1.2 - the issue being whether the lawyer or the client has the authority to determine whether to take an interlocutory appeal from an adverse decision rejecting the client's invocation of the attorney-client privilege. Because of the profession's general policy of allocating to the client the authority to make decisions about the revelation of confidential information, I think the final call on whether to undertake a non-frivolous appeal of an adverse judgment on a privilege question should be made by the client after consultation with lawyer. Thus I prefer the Rule as currently formulated. I would, however, address Professor Hazard's concerns in the Comment.

Finally, Professor Hazard has raised a very legitimate question about whether the Rule itself is too detailed. I think this is an important question that the Commission will have to resolve over and over again in the course of our review of the Model Rules. What needs to be addressed in the Rule text? What can be relegated to the Comments? The substance of Paragraphs (a), (e), and (f) could be relegated to the Comments, but I thought the issues were of sufficient importance to be addressed in the Rule. I also struggled to simplify subparagraph (c)(5), but was unable to deal more generally with the variety of settings in which claims by or against a lawyer might be in issue. This clearly merits discussion.

You should have already received Loeber Landau's comments. I have incorporated some of his suggestions into the draft. I would also like to highlight the following points made by Loeber:

1. Loeber's concerns about the application of paragraph (a) to law firms and organizational clients are well taken. I would like the Commission to discuss these issues with an eye to addressing them in a Comment. With reference to paragraph (b), however, I still think that the proposed extension of a lawyer's confidentiality obligations to include information related to the representation of a client by the lawyer's firm (without regard to whether the lawyer is participating in the firm's representation of the client) is a necessary addition to the rule.

2. Loeber has recommended that paragraph (b) be modified so that it protects not only "information relating to the representation of the client" but also any other information "acquired in the course of the representation of the client." I initially modified paragraph (b) as recommended by Loeber, but then identified some drafting problems that have led me to leave the proposal in its current form. To provide a vehicle for discussing some of the issues raised by Loeber's recommendation, however, I am suggesting that the Commission consider adopting new paragraph (a) (with subsequent paragraphs to be relettered accordingly). The new paragraph would read as follows:

“(A) A client’s confidential information is information acquired by a lawyer, or another lawyer with whom the lawyer is associated in a firm, that relates to the representation of the client by the lawyer or the lawyer’s firm and such other information relating to the client that is acquired by the lawyer or the lawyer’s firm during or by virtue of the

representation of the client.”

If this new paragraph is approved, subsequent paragraphs would simply refer to the client’s confidential information. This is the approach taken by §111 of the Restatement of the Law Governing Lawyers. My proposed definition, however, differs substantively from the Restatement version. I think it should help us focus our discussion of Loeber’s recommendation.

3. With respect to subparagraph (b)(2), Loeber prefers the formulation in §113 of the Restatement of the Law Governing Lawyers over the Model Rule. If the Commission concurs with Loeber, subparagraph (b) would be changed to read

“(2) the lawyer reasonably believes that doing so will advance the interests of the client in the representation.”

My recommendation is that we use the Model Rule formulation in the text of the Rule and then use the Restatement language as one example of a circumstance in which the lawyer will be deemed to have been impliedly authorized to make a disclosure in order to carry out the representation of the client.

3. I have bracketed the reference in paragraph (f) to “any other person to whom the lawyer has provided such information” to highlight Loeber’s concern that such an extension of the duty of care is too broad and unworkable. My preference would be to leave the reference in the Rule and draft a Comment that explains what would constitute reasonable care in this situation. At a minimum reasonable care would require that the lawyer secure an undertaking by the recipient of the information that he or she will treat the information as confidential. I think this issue merits some discussion.

4. Agreeing with Loeber that it is important that the reference to “serious” be understood as modifying illness, bodily harm and sexual abuse, I would prefer to do this in the Comment rather than modify the Rule as Loeber has suggested.

Becky Stretch has also forwarded to me some comments by Arthur Garwin:

1. With respect to the reference to “reasonable inquiry” in the lead-in to paragraph (c), subparagraph (c)(1), and subparagraph (d)(3), Art calls attention to the need for a comment to make clear that in emergency situations it is reasonable for the lawyer to make a decision about disclosure without further inquiry. More generally I think we will need a Comment in which there is further discussion of what we think will constitute a “reasonable” inquiry.

2. Per another suggestion from Art, I have added bracketed language to limit disclosure in false imprisonment situations to cases in which a person is falsely imprisoned for a felony. Art also raises a good question about the timing of such disclosures. Should disclosure be permitted upon wrongful indictment, wrongful conviction, or only upon wrongful imprisonment following a wrongful conviction? The proposal in its current form was intended to make the

lawyer wait until the client is on the way to jail. If the Commission is inclined to permit disclosure to prevent such a miscarriage of criminal justice, I think we should explicitly discuss the questions Art has raised.

3. Art is also concerned about the lead-in to paragraph (c) that precludes a lawyer from making disclosures permitted by paragraph (c) if the disclosure is “prohibited by other law.” He comments that “we are saying that the rules of professional conduct are automatically subservient to every other law. This seems too general. It may be that our rules should take precedence over some other laws.” I think this is an important issue, but I am not quite sure how to deal with it in this context (as distinct from the context in which other law requires rather than prohibits disclosure). We might change the lead-in phrase to read “Unless the lawyer knows that disclosure is prohibited by other law.” Such a formulation would permit disclosure in spite of other law if the lawyer could fashion a non-frivolous argument that the other law in question was subservient to the Rules of Professional Conduct. With respect to the more general issue of whether the Rules of Professional Conduct trump other law or vice versa, it is my view that the Rules of Professional Conduct only trump other law if the courts hold that the rule in question is a proper exercise of the judiciary’s inherent and exclusive constitutional authority to regulate the judicial branch of government. For the moment, however, I would simply suggest that the Commission should identify the relationship of the Rules of Professional Conduct to other law as one of the “overriding” issues to be considered in our deliberations.

January 15, 1998 Discussion Draft
PROPOSED RULE 1.6
CONFIDENTIALITY OF INFORMATION

1 (a) Before or within a reasonable time after agreeing to represent a client in a matter, a lawyer who has
2 not ~~previously regularly~~ represented the client ~~in similar matters~~ shall consult with the client about
3 the lawyer's obligations to protect information relating to the representation and the circumstances in
4 which the lawyer will be required or permitted to reveal or use such information to the disadvantage of
5 client.

6
7 (b) (a) A lawyer shall not [~~knowingly~~][~~intentionally~~] reveal information relating to the representation of a
8 client by the lawyer or by a law firm with which the lawyer is associated, unless

9
10 (1) the client consents after consultation ~~with the lawyer~~; or

11
12 (2) ~~except as the disclosures are~~ the client has impliedly authorized the lawyer to make such
13 disclosure in order to carry out the representation ~~of the client~~; or

14
15 (3) the disclosure is for a proper professional purpose, the lawyer reasonably believes that
16 there is no significant risk that the disclosure will [~~materially~~] disadvantage the client, and the
17 client has not prohibited the lawyer from making the disclosure in question; or

18 (4) ~~and except as stated in paragraph (b)~~ the disclosure is ~~that are~~ permitted by paragraph (c)
19 or required by paragraph (d).

20
21 (c) ~~Unless prohibited by other law,~~ a lawyer may reveal such information ~~as permitted by Rules _____,~~
22 ~~_____ and _____~~ or if and when, but only to the extent that, the lawyer reasonably believes, after
23 reasonable inquiry, that the disclosure of such information is necessary

24
25 (1) to prevent the client from committing a criminal act ~~loss of life or serious illness, bodily~~
26 ~~harm, or sexual abuse~~ that the lawyer believes, after reasonable inquiry, is likely to result in
27 ~~imminent death or substantial bodily harm~~ be suffered by a person; or

28
29 (2) to prevent or rectify what the lawyer knows [~~has reason to believe~~] to be the wrongful
30 imprisonment of a person [~~for a felony~~]; or

31
32 (3) to prevent substantial injury to the financial or property interests of a person [or a class of
33 ~~similarly situated persons~~] if the lawyer reasonably believes, after reasonable inquiry, that there
34 is a significant likelihood that such injury will result from

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1 (i) future conduct of the client [or a third person] that the lawyer knows ~~is will be~~
2 criminal or fraudulent; or

3
4 (ii) past conduct of the client [or a third person] that the lawyer knows ~~is to be~~ criminal
5 or fraudulent; or

6
7 (4) to rectify or mitigate substantial injury to the financial or property interests of a person that
8 the lawyer knows **[has reason to believe]** has been caused by the criminal or fraudulent
9 conduct of the client in a matter in which [the lawyer is representing or has represented the
10 client] **[the lawyer's services have been or are being utilized by the client]**; or

11
12
13 (5) ~~(B)(2)~~ to establish

14
15 (i) a reasonable claim or defense on behalf of the lawyer, or the lawyer's firm, in a
16 controversy between the lawyer and the client; or

17
18 (ii) a reasonable defense to a formally instituted criminal charge or civil claim against
19 the lawyer, or another person participating in the representation of the client, that is
20 based upon conduct in which the client was involved; or

21
22 (iii) a reasonable defense to a complaint against the lawyer, or another lawyer
23 participating in the representation of the client, that is submitted to or instituted by a
24 disciplinary authority and relates to the representation of the client; or

25
26 (iv) a reasonable response to a specific allegation that is made against the lawyer, or
27 another person participating in the representation of the client, in any other proceeding
28 and relates to concerning the lawyer's representation of the client.

29
30 (d) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer
31 reasonably believes disclosure is necessary:

32
33 (1) to comply with Rules _____; and

34
35 (2) to comply with an order of a tribunal, administrative agency or a legislative body requiring
36 disclosure but only **if to the extent** finally ordered to do so by the tribunal, agency or body
37 after the lawyer has asserted on behalf of the client all non-frivolous claims that the information
38 sought by the tribunal or agency is protected against disclosure by the attorney-client privilege
39 or other applicable law [and has exhausted the client's rights to appeal adverse rulings on the
40 client's claims]; and

41
42 (3) to comply with other law, provided, however, that a lawyer may refrain from making such
43 disclosure if the lawyer has a non-frivolous reason to believe **[reasonably believes]**, after
44 reasonable inquiry, that the law in question does not legally obligate the lawyer to make the

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disclosure in question; and

(e) Prior to disclosing such information as permitted by paragraph (c), or as required by paragraph (d), a lawyer shall, if reasonably feasible,

(1) advise the client to take such action, or refrain from taking such action, as the lawyer reasonably believes is necessary to accomplish the purpose for which the lawyer would otherwise be permitted to disclose information relating to the representation of the client; and

(2) consult with the client about the consequences of the client’s failure to do so, including whether and to what extent the lawyer is required or permitted by these Rules to disclose or use information relating to the representation to prevent or rectify the harmful consequences of the act; and

(3) provide the client with reasonable advance notice of the lawyer’s determination to make the disclosure in question.

(f) A lawyer shall act with reasonable care to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer, by other persons who are participating in the representation of the client and who are subject to the lawyer’s supervision, **[or by any other person to whom the lawyer has provided such information.]**

Reporter’s Observations

Introduction

Only Alabama, Delaware, Louisiana, Missouri, Montana, and Rhode Island have adopted ABA Model Rule 1.6 without any modification. There is considerable variation among the states, and the ALI Restatement of the Law Governing Lawyers differs significantly from the Model Rule.

This draft is premised on the assumption that the prohibition against use of information relating to the client’s representation to the disadvantage of the client (and any new rules governing use of such information to the advantage of the lawyer or a third person) will be located in Rule 1.8(b), that any confidentiality duties to prospective clients will be contained in a new Rule 1.0 that will address all duties a lawyer owes to prospective clients, and that the lawyer’s confidentiality obligations to former clients will be set forth in Rule 1.9(c). Also, as will be reflected in specific cross- references to other Rules of Professional Conduct in paragraphs (c) and (d), I also envision that confidentiality obligations will be addressed in Rule 3.3 (disclosures necessary to prevent or rectify criminal offenses against the administration of justice), a new paragraph in Rule 3.4 (dealing with tangible evidence that comes into the possession of a lawyer who is representing a client in a criminal matter), Rule 3.9 (candor in non-adjudicative proceedings), Rule 4.1 (truthfulness in statements to others), a new paragraph in Rule 4.4 (addressing the responsibilities of lawyers who receive misdirected or wrongfully directed privileged

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1 communications), Rule 8.1(candor in bar admission and disciplinary proceedings) and Rule 8.3
2 (reporting lawyer misconduct). I also have in mind a new Rule 2.5 that will set forth the rights and
3 responsibilities of lawyers who are serving as “mentors” for lawyers with whom they are not associated
4 in a firm, a new Rule 4.5 that will address the confidentiality obligations of lawyers to third persons who
5 confide information to a lawyer in what §126 of the Restatement of the Law Governing Lawyers refers
6 to as a “Common-Interest Arrangement,” and a yet unnumbered new Rule that would address the
7 obligations of lawyers who are representing clients in their capacity as trustees, guardians, executors
8 and other similar fiduciary relationships.

9
10 The Observations that follow are organized by reference to the various Paragraphs and
11 Subparagraphs in the Proposed Rule.

12
13 **I. Paragraph (a)**

14
15 (a) Before or within a reasonable time after agreeing to represent a client in a matter, a lawyer
16 who has not **previously regularly** represented the client **in similar matters** shall consult with
17 the client about the lawyer’s obligations to protect information relating to the representation and
18 the circumstances in which the lawyer will be required or permitted to reveal or use such
19 information to the disadvantage of client.

20
21 I am not aware of any jurisdiction that has adopted such a provision. The idea for such a
22 requirement comes from Pizzamonte, “The Lawyer’s Duty To Warn Clients About The Limits Of
23 Confidentiality,” 39 Catholic U.L. Rev.441 (1990). The author’s conclusion is that a failure to so warn
24 or consult with a client about limitations would be unethical and constitute actionable malpractice. I
25 agree. Such consultation may already be required by Rule 1.4.

26
27
28 **II. Paragraph (b)**

29
30 (b) (a) A lawyer shall not ~~knowingly~~~~intentionally~~ reveal information relating to the
31 representation of a client by the lawyer or by a law firm with which the lawyer is associated,
32 unless

33
34 (1) the client consents after consultation **with the lawyer**; or

35
36 (2) ~~except as the disclosures are~~ the client has impliedly authorized the lawyer to make such
37 disclosure in order to carry out the representation of the client; or

38
39 (3) the disclosure is for a proper professional purpose, the lawyer reasonably believes that
40 there is no significant risk that the disclosure will ~~materially~~ disadvantage the client, and the
41 client has not prohibited the lawyer from making the disclosure in question; or

42
43 (4) ~~and except as stated in paragraph (b)~~ the disclosure is ~~that are~~ permitted by paragraph

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1 (c) or required by paragraph (d).

2
3
4 Except for the highlighted language, I am recommending retention of the substance of Model
5 Rule 1.6(a).

6
7 **A. “information relating to the representation of a client”**

8
9 The core of proposed paragraph 1.6(a) is its prohibition against disclosure of “information
10 relating to the representation of a client.” This language is taken from the current Model Rule and is
11 currently used in 33 jurisdictions. Loeber Landau has recommended that paragraph (b) be modified
12 so that it protects not only “information relating to the representation of the client” but also any other
13 information “acquired in the course of the representation of the client.” I initially modified paragraph (b)
14 as recommended by Loeber, but then identified some drafting problems that have led me to leave the
15 proposal in its current form. To provide a vehicle for discussing some of the issues raised by Loeber’s
16 recommendation, however, I am suggesting that the Commission consider adopting new paragraph (a)
17 (with subsequent paragraphs to be relettered accordingly). The new paragraph would read as follows:
18

19 “(a) A client’s confidential information is information acquired by a lawyer, or another
20 lawyer with whom the lawyer is associated in a firm, that relates to the representation of
21 the client by the lawyer or the lawyer’s firm and such other information relating to the
22 client that is acquired by the lawyer or the lawyer’s firm during or by virtue of the
23 representation of the client.”

24
25 Alternative formulations the Commission may wish to consider include:

26
27 1. The formulation in the ABA Model Code: “confidences” (information protected by the
28 attorney client-privilege under applicable law) and “secrets” (other information gained in the
29 professional relationship that the client has requested be held inviolate or the disclosure of which
30 would be embarrassing or would be likely to be detrimental to the clients). This formulation is
31 used in D.C., Georgia, Illinois, Iowa, Maine, Minnesota, Michigan, Nebraska, New York,
32 Ohio, Oregon, Tennessee, Texas, Virginia, and Vermont. Massachusetts uses the Model
33 Code formulation of “information gained in the professional relationship,” but drops the
34 requirement that the client request the information be held inviolate or that it be embarrassing or
35 detrimental to the client.

36
37 2. § 111, ALL, Restatement of the Law Governing Lawyers: “confidential client information”
38 defined in pertinent part as “information relating to that client, acquired by a lawyer or an agent
39 of the lawyer in the course of or as a result of representing the client ...”

40
41 3. The American Lawyer’s Code of Conduct: “a client’s confidence” defined as “any
42 information obtained by the client’s lawyer in the course of and by reason of the lawyer-client
43 relationship.”

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1 4. Mississippi: “information which is confidential or privileged by law or relating to the
2 representation of a client which a lawyer has reason to believe may be detrimental to the client
3 or which client has requested not be disclosed.”
4

5 5. Texas: “confidential information” includes “privileged” and “unprivileged” client information.
6 “Unprivileged information includes all information relating to the client or furnished by the client
7 ... or acquired by the lawyer during the course of or by reason of the representation of the
8 client.”
9

10 6. Massachusetts: “ A lawyer shall not reveal confidential information relating to the
11 representation of a client ...” (emphasis added). There is then a lengthy discussion of the
12 significance of limiting the scope of the rule’s protection to “confidential” information.
13

14 I would retain the Model Rule formulation because it affords protection to all information that
15 relates to the lawyer’s representation without need for argumentation over when the representation
16 commenced or ended or whether the information came to the lawyer because or by virtue of the
17 representation. The only variables in the Model Rule formulation are the scope of the lawyer’s
18 representation and whether the information is relevant to that representation. I am amenable to
19 broadening the scope of Rule 1.6 so that it will also protect information about the client that is acquired
20 by the lawyer either during or by virtue of the lawyer’s representation of the client.
21

22 B. “[Knowingly] [Intentionally]”
23

24 Although only five jurisdictions (DC, Illinois, Maine, Michigan, Minnesota and Texas) currently
25 do so, the Commission should entertain the possibility of limiting the prohibition in Rule 1.6(a) so that a
26 lawyer will violate Rule 1.6(a) only if the lawyer “knowingly” discloses information relating to the
27 representation. My thought is that it would be useful for disciplinary purposes to have two distinct
28 duties - the duty in Rule 1.6(a) not to “knowingly” or “intentionally” disclose information relating to the
29 representation of a client and a separate duty to exercise reasonable care to safeguard information
30 relating to the representation of a client against inadvertent disclosure by the lawyer or inadvertent or
31 unauthorized disclosure by other persons for whose conduct the lawyer should be responsible. This
32 latter duty is set forth in paragraph (f). For purposes of determining sanctions, this formulation would
33 permit a disciplinary authority to differentiate between intentional and negligent disclosure of protected
34 information and treat the former as a more serious offense. I like the idea of differentiating between
35 intentional and negligent misconduct, but am cognizant of the fact that only a handful of jurisdictions
36 have done so. Although “knowingly” is the formulation currently in use, I added the bracketed
37 reference to “intentional” because lawyers tend to think in terms of the distinction between intentional
38 and negligent conduct and that such terminology better communicates what I hope to accomplish by
39 limiting paragraph (a) and adding paragraph (f).
40

41 C. “[by the lawyer or by a law firm with which the lawyer is associated]”
42

43 This proposed reference to the lawyer’s firm is needed to make it clear that a lawyer’s

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1 confidentiality obligations are vicariously extended to all lawyers with whom the lawyer is associated in
2 a firm and to provide a point of reference in the Rule for a paragraph in the Comment that will discuss
3 the confidentiality obligations of lawyers who are of counsel to a firm, who are temporarily employed by
4 a firm, who are associated with a firm that is affiliated with another firm, or who are participating in what
5 §126 of the ALI Restatement of the Law Governing Lawyers refers to as a “Common-Interest
6 Arrangement.” As it relates to temporary lawyers, this issue was addressed in ABA Formal Ethics
7 Opinion 88-356 in which the Ethics Committee generally held that a lawyer who was associated with a
8 firm was obligated to preserve confidentiality of information relating to the representation of any client of
9 the firm without regard to whether the lawyer was participating in the client’s representation or how the
10 lawyer acquired the information. With respect to a temporary lawyer only involved in a limited number
11 of discrete cases for a limited period so of time, however, the Committee held that the temporary
12 lawyer’s confidentiality obligation is limited to information relating to cases on which he or she is
13 working or has worked (regardless of source) and to information about other clients of the firm the
14 lawyer may have acquired by virtue of the temporary association with the firm.

15
16 Although these issues could be discussed in the Comment in terms of situations “in which a
17 lawyer will be deemed to be representing a client,” I think it better to think of individual lawyers as
18 representing clients only if they participate in the representation and to expand the confidentiality
19 obligation of a lawyer to include information related to the representation of clients being represented by
20 the lawyer’s firm, but in whose representation the lawyer is not participating.

21
22 D. Subparagraph (b)(1)

23
24 “the client consents after consultation”

25
26 This is the Model Rule formulation which is employed in 33 jurisdictions. Consultation is
27 defined as denoting “communication of information reasonably sufficient to permit the client to
28 appreciate the significance of the matter in question.” The ABA Model Code of Professional
29 Responsibility refers to client consent “after full disclosure.” My best estimate is that this formulation is
30 used in 12 jurisdictions. §114 of the ALI Restatement of the Law Governing Lawyers provides that “a
31 lawyer may use or disclose confidential client information when the client consents after being
32 adequately informed concerning the use or disclosure.” (Emphasis added). Professor Moore’s
33 proposal for Rule 1.7 refers to client consent to the representation “after receiving reasonably adequate
34 information about the material risks of the representation.” (Emphasis added). I prefer the Model Rule
35 formulation because of its conciseness and generality. I also think “consultation” is preferable to
36 “disclosure” because consultation implies explanation as well as the provision of information. I also think
37 that it is important that the Rule clearly indicate that the lawyer who is seeking the client’s consent must
38 take the initiative and provide the client with the necessary information. I would, therefore, recommend
39 that the Commission use the current Model Rule formulation requiring client consent “after consultation”
40 but I also would recommend a slight modification of the definition of consultation so it would read
41 “communication of information by the lawyer to the client that is reasonably sufficient to permit the client
42 to appreciate the significance of the matter in question.”
43

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E. Subparagraph (b)(2)

~~(2) except as the disclosures are the client has impliedly authorized the lawyer to make such disclosure in order to carry out the representation of the client; or~~

Subparagraph (b)(2) is a slight rewording of the current rules’s reference to “disclosures impliedly authorized in order to carry out the representation.” 32 jurisdictions have adopted the Model Rule formulation. Illinois, Maine, Michigan, Minnesota, Mississippi and the Model Code jurisdictions make no reference to “impliedly authorized” disclosures. DC requires the lawyer have “reasonable grounds for believing that the client has impliedly authorized disclosure. Florida permits disclosure “to serve the client’s interests unless it is information the client specifically requires not to be disclosed.” Texas interestingly differentiates between privileged and unprivileged client information and limits the exception for impliedly authorized disclosures to unprivileged client information.

§113 of the ALI Restatement of the Law Governing Lawyers does not include a reference to “implied authorization” but more directly provides that “a lawyer may use or disclose confidential information when the lawyer reasonably believes that doing so will advance the interests of the client in the representation.”

I see no need to depart from the Model Rule. I will be proposing a Comment that makes it clear that client instructions to the contrary trump the lawyer’s discretion in this regard. The Comment will in effect incorporate the substance of Florida’s rule that permits disclosure “to serve the client’s interests unless it is information the client specifically requires not to be disclosed.” I will also be adding to the Comment a statement to the effect that a lawyer will not be deemed “impliedly authorized” to reveal or use information in situations in which a reasonable lawyer would conclude that there is a significant risk that the disclosure or use would be materially disadvantageous to the client. This would be true even though the disclosure might be deemed necessary to carry out the representation. I think client consent ought to be obtained in such circumstances.

F. Subparagraph (b)(3)

~~(4) the disclosure is for a proper professional purpose, the lawyer reasonably believes that there is no [significant] risk that the disclosure will [materially] disadvantage the client, and the client has not instructed the lawyer that the lawyer is not to make the disclosure in question; or~~

There is no counterpart to this subparagraph in Model 1.6. 34 jurisdictions have adopted the Model Rule approach in which the Rule does not on its face appear to permit any disclosure absent consent or an implied authorization to carry out the representation or as otherwise permitted or required by the rule. Under the ABA Model Code of Professional Responsibility there is no such limitation to the lawyer’s duty not to reveal “confidences” (information protected by the attorney-client privilege), but information will only be protected as a “secret” if the disclosure “would be embarrassing or would be likely to be detrimental to the client” or the client had instructed the lawyer not to make the disclosure in question. 15 jurisdictions utilize the ABA Model Code approach.

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1 §112 of the ALI Restatement of the Law Governing Lawyers only prohibits the use or
2 disclosure of confidential client information “if there is a reasonable prospect that doing so will adversely
3 affect a material interest of the client or if the client has instructed the lawyer not to ... disclose such
4 information.” Note that the Restatement exception to the lawyer’s confidentiality obligation is broader
5 than that contained in the ABA Model Code. This is because the Restatement would permit disclosure
6 of information protected by the attorney-client privilege so long as the disclosure would not present a
7 reasonable prospect of a material adverse affect on the client. The ABA Model Code does not so
8 permit a “harmless” disclosure of a client “confidence.”
9

10 Although initially disinclined to recommend adoption of either the ALI or the ABA Model Code
11 approach, I am now recommending adoption of a modified version of the Restatement approach. The
12 primary substantive modification is the addition of a requirement that the disclosure be for a proper
13 professional purpose. Idle gossip about client matters should not be permitted even if there is no
14 prospect of harm to the client. I have also restructured the ALI formulation to make it even more clear
15 that the lawyer’s judgments about the risk and magnitude of an adverse affect must be reasonable.
16 Finally by the bracketed inclusion of “significant” to modify “risk” and “materially” to modify
17 “disadvantage, I am raising for the Commission’s consideration the question of how broad this limitation
18 of the lawyer’s confidentiality obligation should be. The version of the proposal that would provide the
19 client with the most protection would be one in which the lawyer would be required to reasonably
20 believe that there is no risk of any disadvantage. The version that would permit the lawyer the greatest
21 freedom to reveal client information for proper professional purposes would be one that permitted
22 disclosure without client consent so long as the lawyer reasonably believes that there is no significant
23 risk that the client will be materially disadvantaged.
24

25 I think that there is a need for a provision like this in the text of the Rule to which one can refer
26 in a Comment that explains, for example, that a lawyer is permitted to reveal information related to the
27 representation of the client to the extent reasonably necessary to “secure legal advice from another
28 lawyer about the lawyer’s compliance with the rules of Professional Conduct or other law in connection
29 with the representation of the client.” This might not be a disclosure that is “impliedly authorized to carry
30 out the representation” because the lawyer may be seeking advice about whether the lawyer is required
31 to do something the client has instructed the lawyer not to do. Because the consultation with the lawyer
32 would be privileged and the lawyer who was consulted would also have to comply with Rule 1.6, there
33 would be slight, if any, disadvantage to the client. There is no language in the current formulation of
34 Rule 1.6 to which one can refer to justify a lawyer disclosing information relating to the representation
35 of a client for this very legitimate professional purpose.
36

37 Another example of the need for a “harmless” limitation would relate to the need for a lawyer
38 who is changing jobs to alert the prospective employer to any conflicts between the prospective
39 employer’s clients and what will soon be or are the lawyers former clients. To do this the lawyer must
40 inform the prospective employer of the identity and general subject matter of the representation. The
41 problem is that this information is information related to the representation of the lawyer’s clients and
42 the disclosure is not being made to carry out the representation of the lawyer’s clients. The information
43 is being disclosed for the protection of the new firm and its clients. In most cases, however, disclosure

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1 of such limited information will not present any risk of harm to the clients, and the disclosure is certainly
2 for a proper professional purpose. Again, I think it would be desirable to have language in the text of
3 the Rule that would support a Comment explaining that such limited disclosure is permissible without
4 prior client consent except in a few rare cases in which revelation of the client’s identity and general
5 nature of the representation would disadvantage the client. The Comment to §112 of the Restatement
6 offers further examples of such “harmless divulgements.”

7
8 **G. Other Alternatives**

9
10 The proposed draft does not limit the protections of Rule 1.6 to “confidential” information or to
11 information that is “not generally known.” I call the Commission’s attention to this because §111 of the
12 ALI Restatement of the Law Governing Lawyers exempts “information that is generally known” from its
13 definition of “confidential information.” Neither Model Rule 1.6 or 1.9(c) (confidentiality obligation to
14 former clients) has such a limitation. Only North Dakota currently permits a lawyer to reveal or use
15 information when the information has become “publicly known.” I am not in favor of changing the
16 Model Rule in this regard because I do not think that lawyers should fuel further public dissemination of
17 information about their current clients. Just because information about a client may be generally known
18 does not mean it will be known by the person who hears about it from the lawyer. Nor does the fact
19 that it is generally known mean that the information is not embarrassing or that further dissemination will
20 not be harmful to the client.

21
22 **III. Paragraph (c)**

23
24 Paragraph (c) represents a proposed answer to the question of when, if ever, a lawyer should
25 be permitted to disclose information relating to the representation of a client even though the client
26 objects and the disclosure might have a significant adverse affect on the client. The proposal is premised
27 on the following assumptions:

- 28
29 1. The lawyer’s duty to protect the confidentiality of information related to the representation of
30 the lawyer’s clients serves important public and private purposes. It serves these purposes by
31 contributing to the trust and confidence that is a hallmark of the client-lawyer relationship. The
32 client is thereby encouraged to seek legal assistance and to communicate fully and frankly with
33 the lawyer even as to embarrassing or legally damaging subject matter. This results in the
34 lawyer having all the information the lawyer needs to effectively represent the client and to be
35 aware of situations in which the client needs to be advised to refrain from engaging in conduct
36 that is likely to result in serious injury to the legally protected interests of others. It is obviously
37 in the best interest of the client to be well represented. It is also in the best interest of the client
38 to refrain from engaging in wrongful conduct. It is also generally assumed that larger interests of
39 the society are well-served by the ability of all citizens to secure effective representation of a
40 lawyer in connection with their legal affairs. It is equally obvious that third persons as
41 individuals and the society at large have an interest in minimizing the occasions in which such
42 persons suffer serious injury to their legally protected interests. To the extent that confidentiality
43 promotes disclosure to the lawyer that enables the lawyer to provide sound legal advice to the

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1 client and to prevail upon the client to act or refrain from acting in a way that will prevent harm
2 to a third person, all these interests will be well-served by the lawyer' duty to preserve client
3 confidentiality. The rub comes, of course, when the lawyer is faced with a situation in which the
4 lawyer possesses confidential information that leads the lawyer to conclude that a third person
5 is likely to suffer, or has already suffered serious injury - due to conduct of the client or
6 otherwise - and the client refuses to take or to authorize the lawyer to take steps - including
7 disclosure of confidential information - that would facilitate the prevention, mitigation, or
8 rectification of the injury.

9 2. The lawyer's obligation to preserve the confidentiality of information related to the
10 representation of a client also recognizes that the right to prevent and control the dissemination
11 of information about one's affairs is an important individual right that a person in need of legal
12 representation should not be required to surrender just because he or she must share private
13 information with the lawyer in order to secure effective legal assistance. The protection
14 afforded the client by the lawyer's confidentiality obligation is important because it
15 demonstrates respect for the autonomy of the client as an individual. Again the rub comes in
16 situations in which the client's exercise of his or her autonomy is likely to result in, or has
17 already caused, serious injury to another person.
18

19 3. In cases in which confidentiality conflicts with the prevention, mitigation or rectification of
20 serious loss to a third person, the affected person obviously has a private interest in there being
21 an exception to the confidentiality principle. Given the current indisposition of our society to
22 impose upon the general citizenry a duty to rescue, however, the third person's interest should
23 be understood as an interest in the chance that a lawyer will decide to attempt to rescue the
24 third person from the injury in question. Except in limited circumstances in which society has
25 deemed it appropriate to impose a special obligation on lawyers to rescue persons (or tribunals)
26 affected by the conduct of a client, the third person's interest should not be defined in terms of
27 the preservation of an legal entitlement to the lawyer's assistance in preventing, mitigating or
28 rectifying the harm. Society at large also has an interest in preserving the freedom of all its
29 citizens, including lawyers, to take action to prevent, mitigate, or rectify serious injury to the
30 legally protected interest of innocent third persons.
31

32 4. In cases in which confidentiality conflicts with prevention, mitigation or rectification of
33 serious loss to a third person, the lawyer also has two private interests in there being an
34 exception to the confidentiality principle. The first- which is always at issue - is the lawyer's
35 interest in the preservation of the lawyer's individual autonomy to attempt a rescue he or she
36 thinks is necessary for the protection of an innocent third person. Are there situations in which
37 it is simply unconscionable to deprive a lawyer of the right to act in a way in which they (and
38 most of the public) would feel morally impelled to act? I think so. The second interest of the
39 lawyer is the lawyer's interest in being able to effectively disassociate herself from client action
40 or inaction that the lawyer believes is improper and in which the lawyer might be implicated. In
41 some instances a lawyer might reasonably believe that withdrawal by itself might not adequately
42 vindicate this interest. To the extent that it is important to the administration of justice that
43 lawyers both behave properly and appear to be behaving properly, the public is also well

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1 served by a rule that permits the lawyer to make such disclosures as will permit the lawyer to
2 fully disassociate from the client conduct in question.¹
3

4 5. A final public interest that is frequently discussed in this context is the public interest in
5 minimizing the net amount of harm to innocent third persons. The issue becomes whether strict
6 confidentiality or liberal freedom to disclose (or some “optimal” blend thereof) will produce the
7 smallest aggregate amount of serious injury to third persons.

8 The argument in favor of strict confidentiality is premised on the assumption that a client who is
9 secure in the confidentiality of what he tells a lawyer will, more often than not, inform the lawyer
10 about the injurious conduct, the lawyer will, more often than not, advise the client to do the right
11 thing, and that the client will, more often than not, abide by the lawyer’s advice. If the client is
12 not secure in the confidentiality of the communications, on the other hand, the client will, more
13 often than not, lack trust in the lawyer and therefore not provide the lawyer with the
14 information that would, more often than not, prompt the lawyer to render the advice that the
15 client would, more often than not, follow. The argument in favor of disclosure is basically a
16 rejection of the argument in favor of confidentiality, but we must add to the pro-disclosure side
17 of the balance the further assumptions that lawyers will, more often than not, make the
18 disclosure that the client has instructed them not to make and that the disclosure will, more often
19 than not, prevent the harm in question.
20

21 6. I have three reservations about this utilitarian social calculus:
22

23 a. The interests of a currently identifiable person who is or is likely to become a victim
24 in the immediately foreseeable future should be elevated over the more remote interests
25 of currently unidentifiable persons who might be injured in the future because of the
26 possibility that the current disclosure, or a rule permitting such disclosure, might deter
27 some person in the future from making such full disclosure to a lawyer as might permit
28 the lawyer to successfully dissuade the client from engaging in the harmful conduct.
29

30 b. I question the assumption that a carefully limited exception to the lawyer’s
31 confidentiality obligation (e.g., to prevent loss or life or serious bodily or to prevent
32 substantial financial loss that the lawyer had reason to believe would otherwise occur)
33 will undermine the trust reasonable clients will have in a lawyer whose assistance they
34 are seeking for legitimate purposes. More particularly, I do not think that reasonable
35 clients who are consulting a lawyer for a proper purpose will be disinclined to confide in
36 their lawyer just because the lawyer will be permitted or required to reveal the
37 confidence in such extraordinary circumstances. Such reasonable clients are also the
38 ones who are most likely to abide by their lawyer’s subsequent advice to act so that
39 innocent third person will not suffer serious injury. There may indeed be some

¹ I would note that lawyers might have an interest in a strict confidentiality obligation because such an obligation would enable the lawyer to rationalize a self-interested desire not to get involved in an attempt to rescue the affected third party. I do not regard this as a legitimate self-interest.

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1 calculating clients who will withhold information from their lawyer because they know
2 that there are exceptions to the lawyer’s duty to preserve confidentiality, and this may
3 prevent the lawyer in some (but clearly not all) cases from learning of the prospective
4 harm to the third person. In my judgment, however, such clients are also the ones least
5 likely to abide by their lawyer’s advice - particularly if they know that the lawyer’s
6 confidentiality obligation precludes the lawyer from doing anything about it. I would also
7 note that although the client’s assumed unwillingness to confide in the lawyer will
8 certainly reduce the likelihood that the lawyer will learn of the threat to third party
9 interests, it is also possible that the lawyer will learn of the threat from other sources
10 consulted by the lawyer in connection with the representation of the client.

11
12 c. I am not aware of any evidence that supports the assumption that the sacrifice of
13 current victims will result in there being fewer victims in the long run. Nor, on the other
14 hand, is there clear evidence establishing that permitting lawyers to reveal client
15 confidences will produce a net reduction in the amount of harm to third persons. I think
16 that uncertainty about the “calculus” in this context should be resolved in favor of
17 permitting the prevention, mitigation, or rectification of immediate loss rather than in
18 favor of protecting remote unidentifiable future victims. In this regard, I would remind
19 the Commission that at least since the widespread adoption of Rule 1.13, it has been
20 clear that corporate constituents must deal with the corporation’s lawyer with an
21 awareness that what they tell the corporate counsel may, and in some cases must, be
22 reported to higher authorities in the corporation. Not being sure of what implications to
23 draw from this fact
24 (e.g., more or less corporate wrongdoing?), the fact remains that the legal
25 representation of corporate America is currently conducted according to rules which
26 deprive corporate constituents of any assurance that their communications will be
27 confidential. Has the sky fallen? Maybe? Maybe not? Do we know? No. Is it likely
28 we will be able to find out? Probably not very likely.

29
30 6. A client has no legitimate private interest in preventing disclosures that would prevent serious
31 injury to legally protected interests of others or a miscarriage of injustice. In our legal system,
32 however, a lawyer’s client does have a legitimate interest in preventing disclosure of past
33 misconduct which might subject the client to criminal prosecution or assist the prosecution to
34 overcome the presumption of innocence that is the hallmark of our criminal justice system. The
35 public at large is also deemed to be well served by this systemic protection of the individual
36 against the power of the state. In situations in which a lawyer’s disclosure of confidential
37 information to prevent serious injury to a third person does not implicate the client in a
38 previously committed crime, the client will have no legitimate interest that might override the
39 interests of the affected third not to be injured. Where the disclosure would implicate the client
40 in past criminal misconduct, a choice will have to be made between the public and private interests
41 served by the client’s “right” not to be implicated in past criminal conduct confided to his or her
42 lawyer and the public and private interests in preventing serious harm to the innocent third
43 persons.

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1 7. Because of the importance of confidentiality, a lawyer should only be permitted to reveal
2 information relating to the representation of a client in extraordinary situations in which
3 substantial harm to important interests of the lawyer or third persons can only be prevented,
4 mitigated, or rectified by the lawyer's disclosure. Life, limb, and freedom from illness and
5 sexual abuse are most important. Not being wrongly imprisoned is probably of equal
6 importance. Although certainly not as important, money is also very important, at least when
7 substantial amounts are at risk and the conduct that threatens such loss has been branded by the
8 society as wrongful. It is also extremely important that no individual be required, as a condition
9 of employment or pursuit of a profession, to surrender his or her autonomy to take action to
10 prevent serious injury to another person or to rectify substantial harm caused by wrongful
11 conduct of the client in which he or she has unwittingly participated. In these circumstances, no
12 legal obligation should prevent a lawyer or any other person from acting on a moral impulse to
13 help the victim.

14
15 8. A lawyer should not generally be able to reveal past misconduct of a client if there is any
16 likelihood that the conduct might be characterized as a crime. I feel less strongly about the
17 revelation of past misconduct if the conduct does not amount to a crime, but am willing to
18 accept the broader proposition that in general a lawyer should not be permitted to reveal past
19 misconduct of a client. It is easy to endorse these principles when the conduct has occurred,
20 the loss has been suffered, and there is no way that the suffering can be ameliorated. If, for
21 example, the only effect of the lawyer's enforced silence is to deprive the state of information
22 necessary for the successful prosecution of the lawyer's client, I have no problem requiring the
23 state to fend for itself. There are, however, four distinct situations in which I think the balance
24 of interests tilt in favor of permissive disclosure even though the disclosure will implicate the
25 client in a crime. They are as follows:

26
27 a. The prevention of loss of life, serious bodily injury, the contraction of a serious
28 disease, or serious sexual abuse. The conduct may have already occurred but the loss
29 has not yet been suffered. Or the conduct in question is likely to recur (as may be case
30 with dumping of toxic chemicals or sexual abuse), and the only way to prevent the
31 recurrence is to reveal the past misconduct. The interests of the victim, the lawyer, and
32 the society at large are so great as to override the presumption in favor of
33 confidentiality.

34
35 b. The prevention or rectification of the wrongful imprisonment of an innocent person.
36 There are two circumstances in which I have no problem with permissive disclosure to
37 prevent wrongful imprisonment: 1) when the client was not the perpetrator (or an aider
38 or abettor an accessory after the fact) of the crime in question, or 2) the statute of
39 limitations has run for any crime in which the client might be implicated. The tough issue,
40 of course, is the one faced by the lawyer whose client was the perpetrator of the
41 offense for which another has been wrongfully imprisoned and the client can still be
42 prosecuted for the offense. Even in this tough case, however, I have concluded that
43 the interests of the victim and the lawyer, and the interests of society in the due

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1 administration of justice, are sufficiently great to override the presumption in favor of
2 confidentiality. I present this issue to the Commission because Massachusetts has
3 recently adopted a rule permitting disclosure to prevent the wrongful incarceration of
4 another.

5
6 c. The prevention or rectification of loss resulting from client misconduct in which the
7 lawyer was innocently implicated. For the client to so use the lawyer's services is an
8 abuse of the attorney-client relationship that should discharge the lawyer from any
9 confidentiality obligation. Additionally, the lawyer's interest in disassociating himself
10 from the client's conduct is sufficiently great to tilt the balance in favor of permissive
11 disclosure, which may be the only way a lawyer will be able to convincingly prove he
12 was not knowingly involved in the misconduct.

13
14 d. The prevention of substantial financial loss that is likely to result from past misconduct
15 but has not yet occurred. This is the toughest issue for me. I have two situations in
16 mind. The first is the situation in which misconduct has already occurred - e.g., a
17 fraudulent loan application - but no loss has yet been suffered -e.g., the lender has not
18 yet disbursed the funds to the client. The second situation is the one in which there has
19 been misconduct, substantial loss has been suffered, but further substantial loss might be
20 prevented by the lawyer revealing the past misconduct, - e.g., a fraudulent application
21 for line of credit, a substantial sum already paid out, and it is likely that substantial
22 additional sums will be paid out absent revelation of the fraud. Although this is the
23 closest call for me, I have decided that loss prevention is more important than the
24 client's right not to be implicated in past conduct that may still be criminal even though
25 the lawyer's disclosure prevents consummation of the crime in the first situation or
26 prevents additional loss in the second situation.

27
28 9. The rules should focus on loss prevention rather than crime or fraud prevention.

29
30 10. Except in cases involving loss of life, serious illness, serious bodily harm, or serious sexual
31 abuse, a lawyer should only be permitted to disclose information relating to the representation
32 of the client to prevent or rectify harm to another if the harm is due to criminal or seriously
33 wrongful conduct of the client. Only in such cases can the lawyer be sufficiently certain that
34 prevention of the injury in question will be consistent with public policy.

35
36 11. Because of the importance of the client's confidentiality interests, a lawyer should not be
37 allowed to reveal information relating to the representation of a client unless the lawyer is
38 reasonably certain that the disclosure will materially contribute to the prevention, mitigation or
39 rectification of the losses in question.

40
41 12. Similarly, except in cases involving the prevention of loss of life, serious illness, serious
42 bodily harm or serious sexual abuse, the lawyer should not be permitted to reveal information
43 relating to the representation of a client unless the lawyer is reasonably certain that the harm is

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1 likely to be suffered by the prospective victim. When life and bodily integrity is at stake, all that
2 should be required of the lawyer is an honest belief that the injury is likely to befall the victim.
3

4 **A. The Lead-in Phrase**
5

6 (c) Unless prohibited by other law, a lawyer may reveal such information as otherwise permitted
7 by Rules _____, _____, and _____ or if and when, but only to the extent that, the lawyer reasonably
8 believes, after reasonable inquiry, that the disclosure of such information is necessary:
9

10 This lead-in to paragraph (c) applies to all five subparagraphs and is intended to make it clear
11 that even if all of the elements specified in one of the subparagraphs are present the lawyer is only
12 permitted to disclose information relating to the representation of the client if the lawyer reasonably
13 believes, after reasonable inquiry, that there is no alternative way to prevent the harm and that
14 immediate disclosure is of the essence to the prevention, mitigation or rectification of the harm. It also
15 makes clear that the lawyer must not disclose any more information than is necessary to prevent,
16 mitigate or rectify the harm. I added the cross-reference to other Rules of Professional Conduct in
17 anticipation that permissive disclosure of client wrongdoing might be addressed in Rule 3.3 (Candor
18 Toward the Tribunal) , Rule 3.9 (Advocate in Non-Adjudicative Proceedings) and in a possible new
19 Rule specifying the responsibilities of lawyers who are representing trustees, executors, guardians, or
20 other similar fiduciaries. Subparagraph (e) provides further specification of some steps the lawyer must
21 take, if feasible, prior to disclosing information relating the lawyer’s representation of the client.
22

23 1. “Unless prohibited by other law”
24

25 I have added this qualification to account for the possibility that there may be an inconsistency
26 between what this rule permits and what other law prohibits. In Tennessee, for example, it is a
27 misdemeanor to reveal privileged information. The proposed exceptions in this paragraph are broader
28 than the crime-fraud exception to the attorney-client privilege. Similarly, in some jurisdictions a
29 disclosure permitted by these rules might be prohibited by the attorney’s common law fiduciary duties.
30 The basic idea is that our rules should not appear to permit lawyers to do things that they are prohibited
31 from doing by other law. It is the converse of the proposition that lawyers must reveal confidential
32 information to comply with other law.
33

34 2. “if and when, but only to the extent that, ”
35

36 I added the words “if and when, but only ” to make it more apparent on the face of the rule that
37 the lawyer must act reasonably in determining that there are no alternative measures that will prevent,
38 mitigate, or rectify the harm in question, that disclosure is currently necessary, and that the intended
39 disclosure reveals no more confidential information than is necessary to prevent the harm. This will be
40 reinforced by the Comment. The proposed formulation provides a stronger warning against unneeded,
41 premature, and excessive disclosure than does the current Model Rule (“may disclose ... to the extent
42 the lawyer reasonably believes necessary”). The only analogous provision in the ABA Model Code of
43 Professional Responsibility is DR 4-101(C)(3). It provides that “A lawyer may reveal ...[t]he intention

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1 of his client to commit a crime and the information necessary to prevent the crime.” This formulation
2 could be interpreted to permit disclosure of the client’s intention to commit the crime even it wasn’t
3 necessary to do so. The general reference to “information necessary to prevent the crime” does not
4 make it clear that there must be no alternative means of preventing the crime, that immediate disclosure
5 must be of the essence to the preventive effort, and that the disclosure must be limited to the minimum
6 information necessary to prevent the crime. Note also that the Model Code formulation provides no
7 guidance whatsoever with respect to whether the lawyer must believe, have reason to believe, or have
8 substantial reason to believe that the client intends to commit the offense.
9

10 §117(A) and (B) of the ALI Restatement of the Law Governing Lawyers provide that “a
11 lawyer may ... disclose confidential client information when and to the extent the lawyer reasonably
12 believes such ... disclosure is necessary to” Maybe one can infer “if” from “when”so that the
13 Restatement will be understood to mean “if and when and to the extent that.”

14 My proposal, on the other hand, touches all the bases. “If” alerts the lawyer to look for other ways to
15 prevent the potential injury. “When” alerts the lawyer to wait if it is likely that intervening events may
16 make disclosure unnecessary. “But only to extent” makes it clear the disclosure must be as limited as
17 possible. If at all possible, I think our rules should say what we intend the rule to mean, and I think
18 that we should not allow unnecessary, premature or excessive disclosure. If the Commission has
19 reservations about the proposed formulation, my preferred alternative would be “if, when, and to the
20 extent that.” Then I would drop back to “if , but only to the extent that.” A final alternative, of course,
21 would be to stick with the status quo - “to the extent that” and explain in the comment all that is meant
22 but not explicitly said in the Rule.
23

24 3. “Reasonably believes” or “believes”
25

26 The proposal requires that the lawyer “reasonably believe” that disclosure is necessary. This is
27 a carryover from the current Model Rule. The terminology section of the Model Rules explains that
28 “reasonably believes” denotes that a lawyer of reasonable prudence and competence would ascertain
29 the matter in question.
30

31 31 jurisdictions have adopted the Model Rule formulation. The ABA Model Code formulation
32 is currently in use in 9 jurisdictions. I am recommending the continued use of an objective “ reasonably
33 believes” standard to judge the lawyer’s determination with respect to the need for and the timing and
34 extent of the disclosure. In this regard, however, I would note that Utah permits a lawyer to breach
35 confidentiality to the extent the lawyer “believes” necessary to prevent the adverse consequences of
36 client misconduct. This indicates that Utah wants to afford the lawyer considerable discretion in
37 determining whether, when and to what extent the lawyer should disclose protected information for the
38 purpose of preventing, mitigating or rectifying harm to a third person. There are no jurisdictions that
39 have moved in the other direction and conditioned disclosure on the lawyer having “substantial reason
40 to believe” that the disclosure is needed.
41

42 Finally I would call the Commission’s attention to Massachusetts’ recent modification of Model
43 Rule 1.6(b)(1). The new Massachusetts (b)(1) simply states that “A lawyer may reveal ... [confidential]

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1 information to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes
2 is likely to result in death or substantial bodily harm or in substantial injury to the financial interests or
3 proterty of another” What intrigues me is that in connection with both the lawyer self-defense
4 exception and the rectification of client fraud exception set forth in the immediately following
5 subparagraphs, the lawyer is only permitted to disclose confidential information “to the extent the
6 lawyer reasonably believes necessary” to accomplish the specified purpose. On the face of the rules,
7 then, it appears as if Massachusetts has decided that when it comes to preventing a crime that a lawyer
8 reasonably believes is likely to result in substantial harm, the lawyer should be free to disclose
9 confidential information without fear that a disciplinary committee might second guess the lawyer’s
10 judgments about the need for, the timing of, or the extent of the disclosure. Comment 12 then provides
11 that

12
13 “Before disclosure is made, the lawyer should have a reasonable belief that a crime is likely to
14 be committed and that disclosure of confidential information is necessary to prevent it. The
15 lawyer should not ignore facts that would lead a reasonable lawyer to conclude that disclosure
16 is permissible.”

17
18 My reading of the Massachusetts Rule and Comment, then, tells me that although a lawyer must
19 be reasonable in determining that the harm is likely, the lawyer does not have to be (but should be)
20 reasonable in determining that disclosure is necessary to prevent the harm. This seems to be the
21 complete opposite of the current Model Rule which, as will be discussed in greater deatil below,
22 permits disclosure if the lawyer “believes” a client’s criminal act is likely to result in imminent loss of life
23 or substantial bodily harm but only to the extent the lawyer “reasonably believes” disclosure is
24 necessary to prevent the act. I think the Commission ought to discuss the questions raised by the Utah
25 and Massachusetts variations. If the Commission wishes to allow a lawyer more leeway with respect to
26 the determination that disclosure is necessary, it could, as does Utah, permit disclosure so long as the
27 lawyer “believes” the disclosure is needed. On the other hand, if the Commission wishes to require that
28 the lawyer be very certain that the disclosure is necessary, it should permit disclosure only if the lawyer
29 has “substantial reason to believe” that such disclosure is necessary. It would, of course, be possible
30 for the Commission to vary the standard depending on the purpose to be served by the disclosure -e.g.,
31 a subjective “belief” standard when the issue is the necessity of disclosure to prevent of death or
32 substantial bodily harm, and an objective “reasonable belief” when the issue is the necessity to prevent
33 substantial injury to financial and property interests of another, and a heightened “substantial reason to
34 believe” standard when the lawyer is trying to collect a fee from a recalcitrant client.

35
36 3. “After reasonable inquiry”

37
38 No jurisdiction currently specifies that a lawyer must make reasonable inquiry prior to
39 determining whether or not disclosure of a harm is necessary in order to prevent the harm. It might be
40 argued, however, that a lawyer’s belief cannot be reasonable unless the lawyer is reasonably informed,
41 and that a lawyer will not be deemed reasonably informed unless he or she makes a reasonable inquiry
42 into the matter at hand. My proposal is based on the premise that confidentiality is sufficiently important
43 that, if time and circumstances permit, the lawyer should not be allowed to make a decision in partial

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1 light if further inquiry might reasonably be expected to throw more light on the situation. Support for
2 requiring reasonable inquiry can be found in Comment d to § 117A and Comment h to §117B of the
3 ALI Restatement of the Law Governing Lawyers which similarly state: “Some facts, particularly
4 pertaining to future acts and a client’s subjective state of mind, may be difficult to ascertain. Before
5 making disclosure in such circumstances, the lawyer must make a reasonable effort to determine the
6 relevant facts.” (emphasis added).

7
8 **B. Subparagraph (c)(1)**

9
10 ~~(1) to prevent the client from committing a criminal act loss of life or serious illness, bodily harm,~~
11 ~~or sexual abuse that the lawyer believes, after reasonable inquiry, is likely to result in imminent~~
12 ~~death or substantial bodily harm be suffered by a person; or~~

13
14 Because of the special importance attached to life and freedom from serious injury, illness, or
15 sexual abuse (particularly in cases involving children), Subparagraph (c)(1) broadly permits disclosure
16 of otherwise protected information to prevent death and serious illness or bodily harm without regard to
17 the cause of the threat. The scope of the proposed exception is considerably broader than current
18 Model Rule 1.6(b)(1).

19
20 1. “to prevent ~~the client from committing a criminal act likely to result in imminent death or~~
21 ~~substantial serious bodily harm, illness, or sexual abuse ... likely to be suffered by a person.”~~

22
23 Proposed paragraph (c)(1) represents a substantial broadening of the lawyer’s discretion to
24 reveal client confidences to prevent loss of life or serious personal injury. Unlike the current Model
25 Rule, it does not limit disclosure to situations in which the harmful acts are done by the client. Nor must
26 there be a commission of a crime. The limited focus of the Model Rule on death or substantial bodily
27 harm has been broadened to encompass serious bodily harm, illness or sexual abuse. I added the
28 reference to serious illness to deal with serious communicable diseases like AIDS and serious illnesses
29 such as cancer that can be caused by toxic wastes. I added the reference to sexual abuse to deal
30 overtly with non-forcible rape and sexual abuse of children. A client’s threat of suicide would also
31 justify disclosure of such confidential information as necessary to prevent the suicide even if attempted
32 suicide is not a crime. Note also that the proposed formulation would permit disclosure to prevent the
33 wrongful execution of an innocent person. The harm need only be likely not imminent.

34
35 24 jurisdictions presently track the ABA Model Rule to the extent that disclosure is permitted
36 (or required as in 8 of the 24 jurisdictions) if necessary to prevent death or substantial bodily harm.
37 New Hampshire stands alone in not requiring that the bodily harm be substantial. Alabama, Delaware,
38 Kentucky, Louisiana, Missouri, Montana, and Rhode Island - have adopted the ABA Model Rule in its
39 current form. Alaska, Arizona, Connecticut, D.C., Florida, Hawaii,, Nevada, New Hampshire, New
40 Jersey, Utah, Pennsylvania, Maryland, North Dakota and Wisconsin do not currently require that the
41 death or substantial bodily harm be “imminent.” New Mexico tracks the Model Rule except that it
42 exhorts the lawyer to disclose by substituting “should” for “may.”

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1 Arkansas, Colorado, Georgia, Oklahoma, Idaho, Illinois, Indiana, Iowa, Kansas, Maine,
2 Minnesota, Michigan, Mississippi, Nebraska, New York, Ohio, Oklahoma, Oregon, South Carolina,
3 Tennessee, Washington, Vermont, West Virginia, and Wyoming permit disclosure to prevent the client
4 from committing any crime. Most of these jurisdictions use the ABA Model Code formulation: “the
5 lawyer may reveal the intention of his client to commit a crime and the information necessary to prevent
6 the crime.” Although these jurisdictions permit more disclosure than the Current Model Rule - e.g.
7 disclosure would be permitted to prevent any criminal sexual misconduct - they would not permit
8 disclosure in life-threatening situations that were not the product of a client’s crime.
9

10 The most recent version of §117(A) of the ALI Restatement of the Law Governing Lawyers
11 provides that “ a lawyer may use or disclose confidential client information when and to the extent that
12 the lawyer reasonably believes such use or disclosure is necessary to prevent death or serious bodily
13 harm to a person.” (emphasis supplied). The cause of the death or the serious bodily harm is irrelevant.
14 If the cause of the injury is the conduct of a person, it does not matter whether the person is the
15 lawyer’s client or whether the act that threatens life or limb is a crime. The final draft was adopted in
16 place of a prior draft of §117(A) that limited disclosure to circumstances in which the lawyer
17 reasonably believed the disclosure was necessary “to prevent death or serious bodily injury from
18 occurring as the result of a crime that the client has committed or intends to commit.”
19

20 The Comment to the Restatement concisely but eloquently explains that “[t]he exception
21 recognized by the Section is based on the overriding value of life and physical integrity.” With respect to
22 the proposed inclusion of serious illness and sexual abuse, the Comment to §117(A) asserts that
23 “[s]erious bodily injury within the meaning of the Section includes life-threatening illness and injuries and
24 consequences of ... child sexual abuse.” No jurisdiction, however, makes specific reference to illness
25 or sexual abuse in their rules. Interestingly, Massachusetts has recently adopted a Comment which
26 explains that the reference in its rule 1.6(b)(1) to “bodily harm “is not meant to require physical injury as
27 a prerequisite.” By way of example, the Comment says that an act of statutory rape would fall within
28 the concept of bodily harm.
29

30 The current Model Rule only permits disclosure if the bodily harm is “substantial.” In Model
31 Rule terms, “substantial” when used in reference to degree or extent denotes “a material matter of clear
32 and weighty importance.” Materiality is not defined. With the exception of New Hampshire (which
33 permits disclosure to prevent any bodily harm), all jurisdictions that limit disclosures to those necessary
34 to prevent criminal acts likely to result in death or bodily harm require that the harm be “substantial.”
35 §117(A) of the ALI Restatement of the Law Governing Lawyers, on the other hand, permits
36 disclosure to prevent “serious” bodily harm. No definition of serious is provided. I regard a serious
37 injury to be somewhat less damaging than a substantial injury. In the interest of expanding somewhat
38 the lawyer’s discretion to disclose confidential information to protect innocent third parties, I am
39 recommending that the lawyer’s discretion to disclose be broadened to include cases in which the harm
40 to be prevented is serious.
41

42 At this point I have not attempted to draft a definition of “serious” that would try to capture the
43 sense in which “serious” ranks below “substantial” on a scale to be used to differentiate between

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1 degrees of injury ranging from “inconsequential” to “minor” to “significant” to “serious” to “substantial”
2 to “severe.” The problem is similar to that presented by the reference in Professor Moore’s Proposed
3 Rule 1.7 to a “significant” risk of an adverse affect on the representation. She prefers that formulation to
4 the ALI Restatement’s reference to a “substantial” risk of an adverse affect on the representation. I
5 note this only to call the Commission’s attention to the need for us to be consistent with respect to
6 terminology throughout the Rules and to decide the extent to which we should attempt to craft
7 definitions in an effort to throw some additional light on what is meant by such general concepts as
8 material, significant, serious, or substantial. An alternative approach would be to eschew definitions and
9 try to use discussion and examples in the Comment to convey a sense of what we mean by such useful
10 but necessarily ambiguous concepts.

11
12 2. “believes or “reasonably believes”
13

14 Model Rule 1.6(b)(1) currently permits a lawyer to disclose information relating to the
15 representation of a client “to the extent the lawyer reasonably believes necessary to prevent the client
16 from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial
17 bodily harm.” (Emphasis added). This represented a change from the Kutak Commission’s original
18 proposal which required that the lawyer “reasonably believe” that death or substantial bodily harm was
19 likely to result from a criminal act of the lawyer’s client.

20
21 The “believes is likely” formulation of the current Model Rule has been adopted in 18
22 jurisdictions, including 4 jurisdictions which mandate rather than merely permit disclosure. Only Alaska,
23 D.C., Wisconsin and now Massachusetts have adopted the Kutak Commission’s original formulation.
24 The 24 jurisdictions which permit disclosure of a client’s “intention to commit a crime and the
25 information necessary to prevent the crime” employ a formulation that seems to beg this question.

26
27 The most recent version of §117(A) of the ALI Restatement of the Law Governing Lawyers
28 provides that “ a lawyer may use or disclose confidential client information when and to the extent that
29 the lawyer reasonably believes such use or disclosure is necessary to prevent death or serious bodily
30 harm to a person.” (emphasis added). The Comment to §117(A) of the Restatement indicates that a
31 lawyer cannot reasonably believe that disclosure is necessary unless the lawyer “reasonably believes”
32 that the death or bodily harm is likely. This differs from the current Model Rule which permits
33 disclosure reasonably necessary to prevent a criminal act the lawyer believes likely to result imminent
34 death ...” (emphasis added)

35
36 This difference between the Restatement and the current version of Rule 1.6(b)(1) highlights a
37 choice the Commission needs to make about how certain a lawyer should be about the likelihood that a
38 person will suffer death or significant bodily harm or contract a serious disease. This is a prediction of
39 what might happen in the future so the disciplinary committee must assess the lawyer’s decisions in
40 terms of the lawyer’s belief rather than knowledge. It is not possible to know the future. The question
41 is how strong we want the lawyer’s belief about impending harm to be before permitting the lawyer to
42 take up the question of whether, when, and how much disclosure is needed to prevent what the lawyer
43 believes, or reasonably believes, or has substantial reason to believe, is likely to occur.

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1 inquiry might reasonably be expected to throw more light on the situation. Support for requiring
2 reasonable inquiry can be found in Comment d to § 117A of the ALI Restatement of the Law
3 Governing Lawyers which states

4
5 “ A lawyer’s discretion to take appropriate action to prevent harm under this Section is
6 predicated on the lawyer’s reasonable belief that the action is necessary to prevent death or
7 serious bodily injury to a person. Some facts, particularly pertaining to future acts and
8 probabilities and a client’s or third person’s subjective state of mind, may be difficult for a
9 person in the lawyer’s position to ascertain. Before making disclosure where such facts are
10 ambiguous, the lawyer must make a reasonable effort to determine the relevant facts, taking into
11 account the risks inherent in either the lawyer’s action or inaction.”

12
13 4. An Alternative - Mandatory Disclosure

14
15 It is important to emphasize that paragraph (c)(1) only permits a lawyer to make disclosure
16 necessary to prevent the death or serious illness, bodily harm, or sexual abuse. It does not require that
17 the lawyer do so. Arizona, Connecticut, Florida, New Jersey, Nevada, Virginia, and Wisconsin, on the
18 other hand, require disclosure when death and substantial bodily harm is at stake. Nevada tracks the
19 Model Rule except for the fact that disclosure is required rather than permitted. Arizona and
20 Connecticut track Nevada, except that death or substantial bodily harm does not have to be
21 “imminent.” Wisconsin and New Jersey track Arizona and Connecticut, except that the lawyer must
22 “reasonably believe” that the death or substantial bodily harm is likely. Interestingly, New Jersey
23 defines a reasonable belief as “a belief or conclusion of a reasonable lawyer that is based upon
24 information that has some foundation in fact and constitutes prima facie evidence of the matters ... [in
25 question].”

26
27 Illinois requires that “the lawyer reveal information about a client to the extent it appears
28 necessary to prevent the client from committing an act that would result in death or serious bodily
29 harm.” In addition to this required disclosure, an Illinois lawyer is permitted but not required to reveal
30 the intention of a client to commit any crime. Texas takes a slightly different tack and calls for
31 mandatory disclosure “[w]hen a lawyer has confidential information clearly establishing that a client is
32 likely to commit a criminal ... act that is likely to result in death or substantial bodily harm. Disclosure is
33 permitted only “to the extent revelation reasonably appears necessary to prevent ... the client from
34 committing the criminal act.” As in Illinois, a Texas lawyer is also permitted but not required to reveal
35 confidential information “when the lawyer has reason to believe it is necessary to do so to prevent the
36 client from committing a criminal act.” Finally, Florida requires disclosure to the extent the lawyer
37 reasonably believes necessary to prevent the client from committing any crime or to “prevent a death or
38 substantial bodily harm to another.”

39
40 It is interesting to note that in Connecticut, New Jersey Nevada and Wisconsin the lawyer who
41 is faced with a life/death choice is either required to disclose or prohibited from disclosing client
42 information. There is no provision for permissive disclosure. If a lawyer does not disclose because of
43 an unreasonable misjudgment about the likely consequences of a criminal act, the rule will be violated.

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1 The same will be true, however, if such a misjudgment leads the lawyer to disclose. The lawyer had
2 better get it right. In Arizona, Florida, Illinois and Texas, on the other hand, lawyers are expressly
3 permitted to disclose crimes without regard to risk of death and substantial bodily harm. As long as the
4 lawyer reasonably gauges the client’s intention to commit a crime, the lawyer is permitted to disclose
5 the crime even though the lawyer did so because of an unreasonable judgment that death or substantial
6 bodily harm was likely to result from the crime. In Connecticut, New Jersey, Nevada and Wisconsin
7 there is no such cushion in the Rules as would protect the lawyer for erring on the side of disclosure
8 when there is uncertainty (as there well might be) about the likelihood that the client will engage in
9 criminal conduct and what the consequences of that conduct will be. North Dakota’s Rule 1.6 takes a
10 slightly different approach to the relationship between mandatory and permissive disclosure for the
11 purpose of preventing death or substantial bodily harm. Disclosure is mandatory “to the extent the
12 lawyer believes necessary to prevent the client from committing an act that the lawyer believes is likely
13 to result in imminent death or imminent substantial bodily harm.” Disclosure is permitted but not
14 required “to the extent the lawyer reasonably believes necessary to prevent the client from committing a
15 criminal ... act that the lawyer reasonably believes is likely to result in non-imminent death ... [or] non-
16 imminent substantial bodily harm. In either case, North Dakota specifically requires that “the revelation
17 be no greater than the lawyer reasonably necessary to the purpose.”
18

19 I am not recommending that a lawyer be required to reveal information relating to the
20 representation of a client unless they are acting as “an officer of the court” in an adjudicative proceeding
21 (such duty to be set forth in Rule 3.3), are required by general law or a court order (as would be any
22 other citizen) to make the disclosure in question, or need to correct a prior statement that the lawyer
23 comes to know is now false. If the Commission decides to entertain the possibility of requiring
24 disclosure to prevent loss of life or serious bodily harm, however, I would recommend limiting the
25 mandatory disclosure obligation to situations in which the lawyer has substantial reason to believe that
26 the disclosure is necessary to prevent what the lawyer has substantial reason to believe will be imminent
27 death or bodily harm. Such a mandatory obligation would be in addition to the permission granted to
28 the lawyer by the proposed rules to disclose threats to life and limb when the lawyer is less certain
29 about what the future will hold.
30

31 As relates to mandatory disclosure of client misconduct, I see no reason to require a lawyer to
32 be more of a police person than any other citizen, except when the lawyer is in court simultaneously
33 functioning as an advocate and as an officer of the court. I have no problem with a limited police
34 person role (limited to offenses against the administration of justice) for the lawyer when the lawyer is
35 participating in a judicial proceeding. Other than that, however, I see no reason to require a lawyer to
36 be more (or less) of a policeman than any other citizen. Were there a duty to rescue that was
37 applicable to all citizens, I would not argue to exempt lawyers from that duty, but in the absence of such
38 a duty I see nothing in the lawyer’s role or presumed special expertise that would justify imposing a
39 special duty to rescue on lawyers.
40

41 As relates to permissive disclosure, on the other hand, I am very hesitant to deprive a lawyer of
42 the capacity to act to prevent loss of life or substantial bodily harm when the lawyer’s conscience says
43 action must be taken. When life and limb is at stake, I am very comfortable in permitting the lawyer to

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1 favor the interests of the victim over any interests of the client. Also with respect to the arguments
2 against disclosure that focus on the need for the lawyer to respect the client’s autonomy - arguments
3 with which I strongly agree in most contexts - I also have no problem allowing the autonomy of a
4 person who would prevent loss of life or serious bodily harm to override the autonomy of a person who
5 would inflict such injury or who would prohibit another from taking action to prevent such injury.
6

7 If the Commission is strongly pro-disclosure when life or limb is at stake and desires to give the
8 lawyer more discretion to disclose confidential information in such a situation than in other situations in
9 which less important interests are at stake - as might be reflected in the adoption of a rule that only
10 requires the lawyer to believe in good faith that loss of life or substantial bodily harm is likely and then
11 only requires the lawyer to believe in good faith that the disclosures to be made are necessary - it might
12 be wise to address this issue in a paragraph of its own, rather than including it in a single paragraph that
13 specifies all the circumstances in which disclosure is permitted.
14

C. Subparagraph (c)(2)

15 (2) to prevent or rectify what the lawyer knows [has reason to believe] to be the wrongful
16 imprisonment of a person [for a felony]; or
17
18
19

20 Massachusetts is the only jurisdiction that currently permits disclosure to prevent or rectify the
21 wrongful imprisonment of a person. The Massachusetts text only refers to “preventing” the wrongful
22 incarceration of another, but I think that a lawyer will be preventing wrongful incarceration when
23 disclosure is made to prevent the wrongful continuation of the imprisonment. Comment c to the most
24 recent version of §117(A) of the ALI Restatement of the Law Governing Lawyers addresses this issue
25 by a Comment which explains that “serious bodily injury within the meaning of the Section includes life-
26 threatening illness and injuries and the consequences of such events as imprisonment for a substantial
27 period and child sexual abuse.”(emphasis added). I do not think this issue should be dealt with in a
28 comment that is based on what is at best an extremely strained interpretation of the rule. The
29 Commission needs to confront this issue head-on. The problem with this exception is that it permits the
30 lawyer to disclose a client’s past crime if necessary to prevent or rectify the wrongful imprisonment of
31 another person. Although I do not think that the client’s privilege against self- incrimination is
32 implicated, permitting a lawyer to reveal a past crime as inconsistent with a longstanding professional
33 tradition prohibiting lawyers from taking any action that might incriminate their client in past criminal
34 activity in which the client had not employed the services of the lawyer. Having said this, however, I
35 would rank loss of freedom on a par with serious physical injury without regard to the possibility of
36 physical or sexual abuse by other prisoners. I think wrongful convictions have to be specially troubling
37 to lawyers because the injury results from a failure of the justice system around which our vocation
38 revolves and for the sound administration of which we bear special responsibility. I considered limiting
39 what the lawyer would be permitted to disclose - e.g., no disclosure of anything the client could not be
40 compelled to tell the government - but in the end I have chosen to present the issue to the Commission
41 in a form which will require us to grapple with the full implications of what Massachusetts has done in
42 full view of the profession and what the ALI Restatement has less overtly tried to accomplish in its
43 Comment. Having opened this Pandora’s box, I am wondering if the Commission also needs to

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1 consider permitting disclosure to prevent or rectify the wrongful imposition of a substantial fine. Indeed
2 given the stigma and civil disabilities that attach to being convicted of any felony, one could even
3 contemplate permissive disclosure to prevent or rectify what the lawyer knows to be a wrongful
4 conviction of a felony, without regard to whether the innocent person was fined or imprisoned.

5
6 **D. Subparagraph (c)(3)**
7

8 (3) to prevent substantial injury to the financial or property interests of a person [or a class of
9 similarly situated persons] if the lawyer reasonably believes, after reasonable inquiry, that there
10 is a significant likelihood that such injury will result from

11
12 (i) future conduct of the client [or a third person] that the lawyer knows **is will be**
13 criminal or fraudulent; or

14
15 (ii) past conduct of the client [or a third person] that the lawyer knows **is to be**
16 criminal or fraudulent; or
17

18 For purposes of sharpening the focus of the Commission’s consideration of the circumstances in
19 which a lawyer should be permitted to reveal information relating to the representation of a client if
20 disclosure is necessary to protect the financial and property interests of third persons, I am treating loss
21 prevention and loss mitigation or rectification in separate paragraphs. Loss that has not yet occurred
22 can be prevented. Loss that has already occurred can be mitigated or rectified. If a loss has already
23 occurred but additional loss is possible, the additional loss can be prevented, but the loss that has
24 already occurred can only be rectified or mitigated. Paragraph (c)(3) deals exclusively with the
25 prevention of losses not yet suffered. It is divided into two parts - one dealing with intended frauds or
26 crimes about which the lawyer acquires information prior to any fraudulent or criminal act by the
27 client and the other dealing with the situation in which the lawyer comes to know that the client has
28 previously engaged in a fraudulent act but no loss has yet been suffered by the intended victim. An
29 example of the latter situation would be when a lawyer learns that a client has lied on a loan application
30 but the bank has not yet issued a check to the client. Paragraph (c)(4), on the other hand, addresses
31 the situation when a lawyer comes to know of the fraud after a loss has been suffered by a victim.
32 Although several jurisdictions attempt to address all these situations in a single rule, I am recommending
33 that they be treated separately.
34

35 The big issue, of course, is whether lawyers should ever be permitted to reveal information
36 related to the representation of a client for the purpose of preventing substantial loss to the financial or
37 property interests of a third person. Model Rule 1.6 currently answers this question in the negative. If
38 the Commission answers this question affirmatively, the question becomes under what circumstances
39 the lawyer should be permitted to do so. If the Commission answers the question in the negative, I will
40 propose a rule that specifically permits “noisy withdrawal.” Based on my review of the various ways in
41 which these questions have been answered, the Commission will need to address and resolve the
42 following issues:
43

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1 1. Should disclosure be permitted only in such cases in which the loss is substantial or will any
2 loss or serious loss be sufficient? What if the conduct in question will not substantially or
3 seriously injure any one person, but will cause an aggregate substantial loss on a class or
4 similarly-situated persons?
5

6 2. Should it be sufficient that the lawyer “believe” the loss is likely to be suffered or should the
7 lawyer be required to “reasonably believe” that the loss will be suffered? Or, for that matter,
8 should the standard be “substantial reason to believe?” How certain do we want the lawyer to
9 be that substantial financial harm will be suffered by the victim. Should we require the lawyer to
10 make reasonable inquiry prior to deciding the disclosure is permissible?
11

12 3. Should permissive disclosure be restricted to situations in which the client will be committing
13 or aiding and abetting the crime or fraud or should the lawyer be able to use confidential
14 information to prevent a crime or fraud by a third person?
15

16 4. Should permissive disclosure be restricted to situations in which the client’s conduct
17 occurred while the lawyer is or was representing the client or (even more restrictively) to
18 situations in which the client has used the lawyer’s services in committing the crime or fraud?
19

20 5. Should the lawyer be permitted to disclose confidential information to prevent substantial or
21 serious injury likely to result from any tortious or intentionally tortious conduct or should such
22 disclosure be limited to criminal and fraudulent conduct?
23

24 There is no counterpart to the paragraph (c)(3) in the Model Rules. By way of background,
25 however, it is important to note that the original proposal of the Kutak Commission permitted disclosure
26 “to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is
27 likely to result in ... substantial injury to the financial interests or property of another.” This language
28 was deleted from the final draft. Note that this formulation requires a “reasonable belief” and restricts
29 disclosure to situations in which the client intends to commit a criminal or fraudulent act likely to result in
30 “substantial” injury, but makes no reference to the lawyer’s involvement in the client proposed conduct.
31
32

33 8 jurisdictions have adopted the Model Rule in its current form or a rule that similarly does not
34 permit disclosure to prevent crimes and frauds if the only resulting injury is to the financial or property
35 interests of the victim. 8 jurisdictions permit and 3 jurisdictions require disclosure in circumstances
36 involving crimes and non-criminal frauds that are likely to result in substantial injury to another person’s
37 financial or property interests. None of these jurisdictions condition disclosure upon the nature of the
38 lawyer’s involvement in the client’s conduct. Of those permitting disclosure, 7 do so if the lawyer
39 “believes” the injury is likely, and only one requires that the lawyer “reasonably believe” the injury is
40 likely. Two of the three jurisdictions that mandate disclosure require that the lawyer’s belief be
41 reasonable.
42

43 25 jurisdictions permit and one requires a lawyer to reveal the intention of their client to commit

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1 a crime without regard to the amount of injury caused the intended victim. In these jurisdictions,
2 however, a lawyer will not be permitted to reveal non-criminal frauds even if the fraud was likely to
3 cause substantial injury to the financial or property interests of another. 23 of these jurisdictions use the
4 Model Code formulation which does not clearly indicate whether the lawyer must believe or reasonably
5 believe that the client intends to commit the crime. The rules of two jurisdictions can be read to require
6 that the lawyer have a reasonable belief that the client will commit the crime. Nevada has taken a
7 unique track in that it permits disclosure to the extent reasonably necessary to “prevent ... the
8 consequences of a criminal or fraudulent act in the commission of which the lawyer’s services have
9 been used.” Note that the rule stands alone because it permits disclosure of fraudulent acts without
10 regard to the amount of injury caused by the fraud. It also stands alone in that disclosure is limited to
11 client crimes and frauds in the commission of which the lawyer’s services have been used.
12

13 Yet another source of variation among the states arises from the fact the ABA Model Code’s
14 DR 7-102(b)(1) is still in force in a handful of jurisdictions. In pertinent part it provides that [a] lawyer
15 who receives information that ...[h]is client has, in the course of the representation, perpetrated a fraud
16 upon a person ... shall reveal the fraud to the affected person..., except when the information is
17 protected as a privileged communication.” Applying this rule to the situation in which a lawyer learns
18 that a client has committed a fraudulent act during the lawyer’s representation of the client, but no loss
19 has yet been suffered by the victim because the deal has not been closed and no money has yet
20 changed hands, one reasonable interpretation of this rule leads to a conclusion that disclosure is
21 prohibited. An equally reasonable - although more complicated - interpretation leads to the conclusion
22 that disclosure is required. Let it suffice for the moment to say that our goal should be to provide better
23 guidance to the bar about their responsibilities when they become entangled in a client’s ongoing effort
24 to commit a crime or fraud.
25

26 The most recent draft of §117(B)(1) of the ALI Restatement provides in pertinent part:

27
28 “ A lawyer may... disclose confidential client information when and to the extent the lawyer
29 reasonably believes necessary to prevent a crime or fraud; and:

- 30
- 31 (a) the crime or fraud threatens substantial loss to a person;
 - 32
 - 33 (b) the loss has not yet occurred;
 - 34
 - 35 (c) the lawyer’s client intends to commit the crime or fraud either directly or through a
36 third person; and
 - 37
 - 38 (d) the client has employed or is employing the lawyer’s services in committing the
39 crime or fraud.”
40

41 A prior version of this Rule that was included in the Proposed Final Draft No.1 of the
42 Restatement, but was not approved by the ALI, provided in pertinent part that
43

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1 “(1) A lawyer may ... disclose confidential client information when and to the extent necessary
2 to prevent ... substantial financial loss from occurring as the result of a crime or fraud that the
3 client has committed or intends to commit [and in the commission of which the lawyer’s
4 services were or are being employed].
5

6 (2) In a situation described in Subsection (1), if the client has acted at the time the lawyer learns
7 of the threat of an injury or loss to a victim, use or disclosure is permissible only if the injury or
8 loss has not yet occurred.”
9

10 There was such considerable disagreement about whether the bracketed language should be
11 included in the rule that the Chief Reporter thought the disagreement should be specifically noted in the
12 Proposed Final Draft. As explained by the Chief Reporter, the version which did not limit disclosure to
13 situations in which the client was using or had used the lawyer’s services to commit the crime or fraud
14 was premised on “a balance between protecting interests in client confidentiality and protecting the
15 interests of society and third persons against known client wrongs. The more limited version of the
16 exception was premised “on concepts of waiver -reflecting the judgment that the client’s wrongful
17 abuse of the client-lawyer relationship and the consequent threat of implicating the innocent lawyer are
18 both necessary, together with social interest in preventing harm, to warrant setting aside the general rule
19 of confidentiality in the case of financial harm.”
20

21 1. The Core Proposal
22

23 To facilitate a comparison of proposed paragraph (c)(3) with these various alternatives, I
24 recommend that the Commission focus first on what I will call the core proposal. The core proposal
25 reads as follows:
26

27 (3) to prevent substantial injury to the financial or property interests of a person if the lawyer
28 reasonably believes, after reasonable inquiry, that there is a significant likelihood that such injury
29 will result from
30

31 (i) future conduct of the client that the lawyer knows ~~is will be~~ criminal or fraudulent; or
32

33 (ii) past conduct of the client that the lawyer knows ~~is to be~~ criminal or fraudulent; or
34
35

36 The core proposal is similar to both the Kutak Commission’s proposal and §117B of the
37 Restatement of the Law Governing Lawyers in that it permits disclosure reasonably necessary to
38 prevent substantial injury to the financial or property interests of a person that the lawyer reasonably
39 believes is likely to result from a criminal or fraudulent act of the client. To that extent it differs both
40 from the current Model Rule (which does not permit disclosure to prevent injury to financial or property
41 interests) and the ABA Model Code (which permits disclosure to prevent the commission of any crime
42 without regard to injury suffered by the victim, but does not permit disclosure to prevent the
43 perpetration of a non-criminal fraud even if such fraud is sure to result in substantial injury to the

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1 financial or property interests of another.)
2

3 There is one respect in which the core proposal differs from both the Kutak Commission’s
4 proposal and §117B of the Restatement of the Law Governing Lawyers and another respect in which
5 the core proposal tracks the Kutak Commission’s proposal but differs from §117B. The first
6 difference is that the core proposal emphasizes loss prevention rather than the prevention of criminal or
7 fraudulent acts. Both the Kutak Commission’s proposal and §117B focus on the prevention of criminal
8 or fraudulent acts. I would note, however, that the Proposed Final Draft No.1 of the Restatement that
9 was not approved by the ALI was structured to emphasize prevention of loss rather than the prevention
10 of crimes and frauds.
11

12 The second difference is that neither the core proposal nor the Kutak Commission’s proposal
13 include as a predicate for disclosure the requirement in §117B that “the client has employed or is
14 employing the lawyer’s services in committing the crime or fraud.” As noted above, there was
15 considerable disagreement within the ALI about this issue. The core proposal accords with the position
16 of those lawyers who did not want to limit disclosure to those situations in which the client had used or
17 was using the lawyer’s services to commit the crime or fraud.
18

19 The core proposal makes it clear that the lawyer may disclose information relating to the
20 representation of a client to prevent any substantial pecuniary loss that has not yet been suffered by the
21 victim without regard to whether (1) the client has or has not already engaged in a criminal or fraudulent
22 act, (2) some loss has already been suffered, and (3) whether the client employed or is employing the
23 lawyer’s services in committing the crime or fraud. It permits disclosure in three distinct situations:
24

25 (1) where the loss has not yet been suffered because no fraudulent or criminal action has yet
26 been taken (no false loan application, no disbursement of funds; and
27

28 (2) where there has already been a criminal or fraudulent act, but no loss has yet been suffered
29 because of the criminal or fraudulent act (fraudulent loan application submitted by client, but
30 closing has not yet occurred and no funds yet disbursed to the borrower); and
31

32 (3) where there already has been a criminal or fraudulent act and loss suffered, but it is likely
33 that substantial additional loss will result (fraudulent application for line of credit submitted by
34 client, line of credit approved and initial disbursements made to client, but the client intends to
35 draw down the rest of the line of credit).
36

37 Apart from its substantive effect - to be discussed below - I think the core proposal’s focus on
38 loss prevention and its differentiation in subparagraphs (C)(3)(i) and (C)(3)(ii) between prevention of
39 losses likely to be caused by future conduct of the client and the prevention of losses likely to result
40 from past conduct of the client is important for three reasons. First, it highlights that the primary reason
41 for this exception to the lawyer’s confidentiality obligation is loss prevention, not crime or fraud
42 prevention. Second, by its clear differentiation between the acts of the client and the loss, it speaks
43 more clearly to the common situation in which there is a temporal hiatus between the primary criminal or

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1 fraudulent act (e.g., a loan application containing intentionally false representations of material fact) and
2 the effect of the act (e.g., the suffering of the loss through the disbursement of funds). Finally it enables
3 us to more clearly identify when it is proper to focus either on the lawyer’s “reason to believe” (or
4 “belief” or “substantial reason to believe”) or on the lawyer’s “knowledge” (or “reason to know” or
5 “substantial reason to know” as our measure of how certain the lawyer must be when making the
6 various determinations that the lawyer must make in order to justify revealing confidential client
7 information to prevent a third person from suffering substantial pecuniary loss.
8

9 a. Loss Prevention v. Crime/Fraud Prevention
10

11 I think it is important that this exception to confidentiality be formulated so that it highlights loss
12 prevention rather than crime or fraud prevention. This is because I do not see this exception as derived
13 from a sense that lawyers have some special responsibility to police their client’s compliance with the
14 law for the purpose of preventing crime. Surely lawyers must advise clients to comply with the law and
15 have a responsibility not to assist their clients in the commission of a crime and fraud - see Model Rule
16 1.2 - and I can understand imposing a limited policing responsibility on lawyers who are representing a
17 client before a tribunal, but lawyers have been and should be opposed to a conceptualization of the
18 lawyer as a police officer - even in the limited sense that the lawyer is permitted but not required to
19 assume that role for the purpose of preventing serious crime. The core proposal is formulated to
20 eliminate any suggestion that crime or fraud prevention is the primary reason for the rule. Unlike the
21 Kutak Commission proposal (which permits disclosure to prevent criminal or fraudulent acts) and
22 §117B of the Restatement (which permits disclosure to prevent a crime or fraud), the core proposal
23 permits disclosure to prevent substantial injury to the financial or property interests of another. Indeed
24 the subsequent limitation of the exception to situations in which the client’s act is criminal or fraudulent is
25 added for the primary purpose of making sure that the third party interests are sufficiently important to
26 justify the exception to the lawyer’s confidentiality obligation. There needs to be some limitation in this
27 regard because there are many situations in which our society recognizes that it is legitimate for one
28 person to intentionally engage in conduct that is likely to cause substantial injury to the pecuniary
29 interests of another. After all, isn’t that what competition is all about? If our justification for permitting
30 disclosure in this situation is loss prevention (or preserving the moral autonomy of lawyers to act in a
31 way that will save another person from suffering a substantial loss), then we should formulate the rule to
32 emphasize the prevention of such substantial loss as is likely to be caused by criminal or fraudulent acts
33 rather than use a formulation that seems to put crime and fraud prevention first. It also should be noted
34 that preventing a criminal or fraudulent act is only one way in which a lawyer might prevent loss likely to
35 result from such an act. Indeed, in some situations the lawyer will be unable to prevent the act but still
36 will be able to prevent the loss that otherwise would result of from the act.
37

38 b. Losses Resulting from Future, Past and Ongoing Crimes/Frauds
39

40 The second advantage of the way the core proposal is formulated is that it provides a structure
41 within which it is easier to address each of the three distinct situations in which a lawyer may learn about
42 fraudulent or criminal conduct of a client. There are only two variables to work with: an act of the client
43 and a pecuniary loss suffered by a victim. The act, of course must be criminal or fraudulent and the

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1 pecuniary loss must be substantial.
2

3 The first situation is the one in which the lawyer learns that a client intends to engage in a
4 criminal or fraudulent act, but knows that the client has not yet done so. This is the “future crime or
5 fraud” situation in which it really doesn’t matter whether the rule differentiates between the criminal or
6 fraudulent act and the loss that may result from the act. This is because the loss can be prevented by
7 preventing the act. This situation is addressed in subparagraph (C)(3)(i). Disclosure of confidential
8 information is permitted if the lawyer reasonably believes that it is likely that the client will engage in the
9 acts in question, knows that the acts will be criminal or fraudulent, reasonably believes that the intended
10 victim will suffer substantial pecuniary loss if the client so acts, and reasonably believes that the
11 disclosure is necessary to prevent this from happening. With the exception of the specific reference to
12 the lawyer’s knowledge that the client’s acts will be criminal or fraudulent - a requirement I will discuss
13 in more detail below - this treatment of the future crime or fraud problem is substantively identical to the
14 Kutak Commission proposal which permitted disclosure necessary to prevent a client from committing
15 a criminal or fraudulent act that the lawyer reasonably believes is likely to result in substantial injury to
16 the financial or property interests of a person.
17

18 With the exception of the specific reference in the core proposal to the lawyer’s knowledge that
19 the client’s intended act will be criminal or fraudulent and the requirement in §117B(1)(d) of the
20 Restatement that “the client has employed or is employing the lawyer’s services in committing the crime
21 or fraud,” the analysis called for by §117B(1) is the same as that required by the core proposal. Apart
22 from the requirement that the client use the lawyer’s service to commit the crime or fraud - which is not
23 included in the core proposal - disclosure will be permitted when and to the extent necessary to prevent
24 a crime or fraud if the client intends to commit a crime or fraud, the loss has not yet occurred, and the
25 crime or fraud threatens substantial financial loss to the intended victim. Note also that if the intended
26 act was criminal, disclosure would also be permitted in the numerous jurisdictions which permit the
27 lawyer to reveal the intention of a client to commit a crime and the information necessary to prevent it.”
28 In such jurisdictions, however, a lawyer would not be permitted to reveal the intention of the client to
29 commit a non-criminal fraud.
30

31 With respect to the core of subparagraph (c)(3)(i), then, the key issues for the Commission
32 appear to be whether disclosure in this situation should be
33

- 34 (1) prohibited (current Model Rule),
- 35
- 36 (2) permitted but only in to cases in which the client’s act will be criminal (ABA Model Code),
- 37
- 38 (3) permitted in cases in which the client’s act is fraudulent, (Kutak and §117B)
- 39
- 40 (4) restricted to cases in which substantial harm is likely to result (Kutak and §117B), or
- 41
- 42 (5) restricted to cases in which the client has employed or is employing the lawyer’s services in
- 43 committing the crime or fraud (§117B).

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1
2 The only substantive difference between the core proposal (and the Kutak Commission
3 proposal) and §117B(1) of the Restatement is the latter’s restriction of disclosure to situations in which
4 the client has employed or is employing the lawyer’s services in committing the crime or fraud. I am
5 opposed to including such a limitation in the Model Rule.
6

7 The Restatement refers to the client having employed or currently employing the lawyer’s
8 services in committing the crime or fraud. If a client comes to a lawyer and seeks advice about how to
9 commit a crime or fraud or has the lawyer draft documents that the client intends to use to commit a
10 crime or fraud, the client will clearly have used the lawyer’s services and disclosure would be permitted
11 if the other prerequisites for disclosure were satisfied. Disclosure would also be permitted by the core
12 proposal. But what will be the outcome if the client does no more than innocently seek the advice of a
13 lawyer about the legality of a proposed course of conduct, learns from the lawyer for the first time that
14 the proposed conduct is criminal or fraudulent, is advised by the lawyer to refrain from engaging in the
15 conduct in question, but then decides to proceed with the conduct. I do not think this constitutes using
16 the services of the lawyer to commit a crime or fraud but rather involves nothing more than a client
17 seeking the advice of a lawyer about the legality of a proposed course of conduct and not heeding the
18 lawyer’s advice to refrain from conduct that the lawyer knows will be criminal or fraudulent. If this
19 conclusion is correct, the lawyer faced with this situation would be precluded from disclosing
20 confidential client information to prevent the client from committing the crime or fraud even if the
21 pecuniary effect of the crime or fraud on the victim would be devastating. I find this unacceptable. I
22 also find little support for such a limitation in current law. Indeed, as far as I am aware, only Nevada
23 has incorporated such a limitation into a rule which applies to future criminal or fraudulent conduct and I
24 suspect that it happened because they tried to address prevention and rectification in a single rule.
25

26 Assume, on the other hand, that a client tells a lawyer that he has previously committed a
27 criminal or fraudulent act that has already caused substantial pecuniary loss to a victim. The criminal act
28 cannot be prevented. The loss cannot be prevented. For purposes of the core proposal, the key
29 variable is that the loss has already been suffered by the victim. The core proposal prohibits disclosure
30 because there is no loss to be prevented. But the loss might be mitigated or rectified. This issue is
31 addressed in subparagraph (c)(4) which will be discussed in greater detail below. For the moment let
32 me just note that the core proposal, the Kutak Commission proposal and §117B(2) all restrict
33 disclosure of confidential client information in this “completed crime or fraud” situation to cases in which
34 the client has used the lawyer’s services to further consummation of the crime or fraud.
35

36 This leaves us to consider what is commonly referred to as the “ongoing” fraud problem. As
37 noted above, there are two distinct versions of this problem. The first arises when a lawyer learns that
38 a client has already committed a criminal or fraudulent act, but that no loss has yet been suffered
39 because of the client’s act (fraudulent loan application submitted by client, but closing has not yet
40 occurred and no funds yet disbursed to the borrower). The second arises when a lawyer learns that a
41 client has already committed a criminal or fraudulent act and that loss already has been suffered loss,
42 but the lawyer also has reason to believe that considerably more loss will be suffered if the crime or
43 fraud remains undetected (fraudulent application for line of credit submitted by client, line of credit

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1 approved and initial disbursements made to client, but the client intends to draw down the rest of the
2 line of credit).

3
4 The core proposal permits disclosure in both situations if the lawyer knows that the conduct has
5 occurred, knows that the conduct was criminal or fraudulent, and has reason to believe that it is likely
6 that a substantial loss will be suffered or that an additional substantial loss will be suffered. This
7 disclosure is permitted without regard to whether the lawyer's services were used by the client in
8 furtherance of the crime. Indeed it does not even matter if the lawyer was representing the client at the
9 time of the previously committed act.

10
11 Let us first consider the situation in which the lawyer learns that a client has previously
12 committed a criminal or fraudulent act but no loss has yet been suffered by the victim. The core
13 proposal would permit disclosure to prevent the loss if the lawyer knows that the client committed the
14 act in question, knows that the act was criminal or fraudulent, has reason to believe that loss is likely to
15 be suffered and likely to be substantial, and has reason to believe that disclosure is necessary to prevent
16 the loss. It doesn't matter whether the lawyer's services had been used to further the crime or fraud or
17 whether the lawyer was representing the client at the time of the client committed the criminal or
18 fraudulent act. Under the Kutak Commission proposal the result would be the same, but only if there
19 was some additional criminal or fraudulent act of the client that would be needed for the loss to be
20 suffered. This is because the Kutak Commission proposal only permits disclosure to prevent a criminal
21 or fraudulent act. If the loss to be suffered will be suffered because the victim makes a payment or
22 transfers property to the client, it might be said that the client's acceptance of the payment or property
23 will constitute a new criminal or fraudulent act that the lawyer may try to prevent by revealing
24 confidential client information. One of the advantages of the core proposal, however, is that it obviates
25 the need to search for a future criminal or fraudulent act of the client.

26
27 The focus on loss prevention will have substantive significance when the client who has
28 previously committed a criminal or fraudulent act does not need to do anything else in order for the loss
29 to be suffered by the victim. This could be the case if a lawyer's client was co-signing a note the
30 proceeds of which would be paid to a relative. Assume that without knowledge of the relative who is
31 to receive the proceeds from the loan, the client fraudulently overstates his assets in the loan application,
32 the bank approves the loan in reliance on the co-signature, and all that remains to be done is for the
33 bank to disburse the loan proceeds to the innocent relative. The client does not participate at all in the
34 chain of events that follow inexorably from the criminal or fraudulent act. The borrower will not commit
35 a fraudulent act by accepting the funds. The borrower is not an agent of the client. The core proposal
36 permits disclosure because disclosure is permitted to prevent the loss not the fraudulent act. The
37 fraudulent act cannot be prevented, but the loss can still be prevented. It would take a big
38 interpretative stretch to read the Kutak Commission proposal in a way that would permit disclosure in
39 this situation.

40
41 Under §117B(1) of the Restatement, disclosure is permitted to prevent a crime or a fraud
42 rather than to prevent a criminal or fraudulent act. This broader formulation permits an argument that a
43 crime or fraud occurs both when the original misrepresentation is made but also whenever the loss is

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1 eventually suffered. Indeed Comment f indicates that

2
3 “a lawyer may take preventive measures even though some act has already occurred, if some
4 material part of the crime or fraud has not yet occurred or has not yet been inflicted on a victim.
5 For example, in a criminal or fraudulent transaction involving more than one step, a lawyer
6 would have discretion to take preventive action ... if some acts remained to be accomplished.
7 Further if all steps in a transaction to be taken by the client have already occurred, but the
8 intended victim has not taken a final step, such as dispatching funds to the client, action to warn
9 the victim not to take final steps is permissible preventive action.”

10
11 Although I concur with the conclusion reached in the Comment, I think it would be preferable if
12 this outcome were more apparent on the face of the rule. In this situation, the real difference between
13 the core proposal and §117B(1) of the Restatement once again boils down to the omission from the
14 core proposal of the requirement in §117B(1)(d) of the requirement that the client has employed or is
15 employing the lawyer’s services in committing the crime. I have dispensed with that requirement in the
16 core proposal. Illustration 2 in Comment 2 to § 117B provides a good example of the difference:

17
18 “Client has put in place a scheme to defraud Victim of substantial funds. After doing so, but
19 before victim has lost any funds, Client seeks Lawyer’s assistance in meeting regulatory action
20 and a suit by victim seeking restitution that might ensue. Despite lawyer’s counseling, Client
21 refuses to warn Victim Because Lawyer’s services have not been employed in the
22 commission of Client’s fraud Lawyer may not use or disclose Client’s confidential information
23 under this Section.”

24
25 I also presume the Restatement outcome would be the same if the client initially consulted the
26 lawyer without having formed a purpose to defraud the victim, sought legal advice about the legality of
27 the proposed transaction, was advised by the lawyer that the transaction would be criminal or
28 fraudulent, told the lawyer that he planned to proceed with the transaction, and the lawyer then
29 withdrew from the representation so as not to assist the client commit the crime or fraud. In my view
30 the client did not use the lawyer’s services to commit the crime or fraud. What if the lawyer
31 subsequently comes to know that the former client had taken the first criminal or fraudulent step toward
32 his goal of victimizing a third person, but that no loss has yet been suffered by the victim. The lawyer
33 would only know the act was criminal or fraudulent because he had represented the client. His
34 knowledge would therefore be based on information relating to his representation of the former client.
35 Assuming the other predicates for disclosure are present, my core proposal would permit the lawyer to
36 disclose such confidential information as necessary to prevent the loss. §117B(1) of the Restatement
37 would prohibit the lawyer from taking action to prevent the final steps in the fraud because the lawyer’s
38 services were never used by the client in committing the crime or fraud. Given the principles I think
39 should be followed in deciding when lawyers should be permitted to reveal confidential information to
40 prevent the client from inflicting injury on innocent third person, I do not find this answer to be
41 acceptable. Although clearly relevant, the key point is not that the client has improperly used the
42 lawyer or may have put the lawyer at risk of being wrongfully charged as an accomplice, but rather that
43 the interests of the lawyer and the victim clearly outweigh the interests of the client and any remote

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1 future victims who might suffer loss because the rules of professional conduct permit the lawyer to
2 reveal the client's misconduct.

3
4 The second version of the "ongoing fraud" arises when a lawyer learns that a client has already
5 committed a criminal or fraudulent act and that some loss has already been suffered, but the lawyer also
6 has reason to believe that substantially more loss will be suffered if the crime or fraud remains
7 undetected (fraudulent application for line of credit submitted by client, line of credit approved and
8 initial disbursements made to client, but the client intends to draw down the rest of the line of credit).
9 Assuming the other predicates for disclosure are present, paragraph (c)(3)(ii) would permit disclosure
10 to prevent the additional loss even if the effect of the disclosure would be to alert the victim to the loss
11 already suffered. Although the effect of the disclosure may be twofold - facilitating mitigation or
12 rectification of the prior loss and preventing the future loss - the core proposal elevates prevention over
13 rectification and permits disclosure even though the lawyer's services were not used by the client to
14 commit the fraud or crime.

15 The outcome would be the same under §117B, but only if the client had used the lawyer's
16 services in committing the crime or fraud - i.e., §117B(1) would permit the lawyer to reveal client
17 confidential necessary to prevent the additional loss and §117B(2) would permit disclosure necessary
18 to rectify or mitigate the loss already suffered.

19
20 It is interesting to note that §117A(2) of the Proposed Final Draft No. 1 that was not adopted
21 by the ALI addressed this issue and provided that "if the client has acted at the time the lawyer learns of
22 the threat of an injury or loss to a victim, use or disclosure is permissible only if the injury or loss has not
23 yet occurred." Does this mean that disclosure is permissible only if no injury has been suffered?
24 Conversely, is disclosure prohibited if any loss has been suffered? If that is what is meant by the
25 reference to no injury having occurred, then §117A(2) would be inconsistent with the core proposal. I
26 do not think that the language of §117A(2) provides a clear answer to these questions, but Comment a
27 indicates that "[t]he Section does not apply to a past act of a client, no matter how clearly illegal or
28 serious, if all of the harmful consequences of the act have already occurred." (emphasis added).
29 Comment d further indicates that "a lawyer may take preventive measures under the Section, even
30 though some act has already occurred, if some material, harmful consequence of the act ... has not yet
31 been inflicted on the victim." These Comments are consistent with the core proposal.

32
33 As long as the loss still to be suffered is substantial I favor permitting disclosure without regard
34 to the amount of loss already suffered and whether the lawyer's services have been used by the client to
35 commit the crime or fraud. Even though the disclosure could be seen either as preventing the future loss
36 or rectifying the past loss, I would treat this situation in accordance with the rules governing disclosure
37 to prevent future loss. The only situation in which I think this question might be answered differently is
38 one in which the loss already suffered is substantial too. It then becomes a toss up as whether we
39 should characterize the lawyer's disclosure either as a preventive disclosure (no requirement that the
40 client used the lawyer's services to commit the crime or fraud) or as a disclosure to mitigate or rectify
41 loss already suffered (see paragraph (c)(4) limiting disclosure to rectify or mitigate loss to situations in
42 which the client used the lawyer's services to commit the crime or fraud). My recommendation,
43 however, is that disclosure be permitted whenever substantial loss can be prevented without regard to

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1 the extent of losses previously suffered.

2
3 c. Knowledge of Criminal or Fraudulent Conduct
4

5 The final feature of the core proposal that warrants some explanation may be its most important
6 feature. Please take careful note of the way in which the rule requires that the lawyer “reasonably
7 believe” that future conduct or loss is likely to occur, but requires that the lawyer “know” that past
8 conduct has occurred and that the client’s conduct was or will be criminal or fraudulent. This is an
9 important matter because it determines how certain the lawyer must be when making the various
10 determinations the lawyer must make en route to a decision whether he or she may or must not reveal
11 confidential client information to protect a third person against substantial pecuniary loss.
12

13 The core proposal clearly requires that the lawyer must know that the client’s conduct will be
14 criminal or fraudulent. With respect to future conduct, the lawyer cannot know that his or her client will
15 do a particular act in the future, but a lawyer can know or have reason to know whether a particular
16 act, if committed, will be a crime or fraud. With respect to past conduct, it is possible for the lawyer to
17 know both that conduct has occurred and that such conduct is a crime or fraud. Subparagraph
18 (c)(3)(i) reflects my firm conviction that a lawyer should not be permitted to reveal future conduct of a
19 client unless the lawyer actually knows that the conduct, if it occurs, will be criminal or fraudulent. This
20 is a question of law, and if the lawyer is aware of any non-frivolous argument that the client’s conduct is
21 not fraudulent or criminal, the lawyer does not know that the conduct is criminal or fraudulent and
22 therefore should not be permitted to disclose confidential client information. It does not matter that a
23 reasonable lawyer would conclude that the argument will fail and that the conduct in question will be
24 held to be a crime or fraud. If the lawyer does not know that the conduct will be a crime or fraud,
25 Model Rule 1.2 permits the lawyer to assist the client to engage in the conduct. Surely in such
26 circumstances a lawyer should not be permitted to reveal confidential information to prevent loss
27 resulting from conduct which another lawyer would be permitted to assist. What is surprising is that this
28 aspect of the future crime\fraud issue has not been addressed by any jurisdiction or in the Restatement.
29

30 2. Variations

31 a. “substantial” or “significant” injury ?
32
33

34 The core proposal restricts disclosure to crimes or frauds likely to result in “substantial” injury
35 to the financial or property interests of another. This is consistent with the original Kutak Commission
36 proposal and the Restatement. Compared with the ABA Model Code’s grant of permission for a
37 lawyer to reveal the intention of a client to commit any crime, the core proposal is more restrictive.
38 Unlike the Model Code, on the other hand, the core proposal permits disclosure to prevent non-
39 criminal frauds. The Commission could permit disclosure to prevent any crime or fraud or it could take
40 an intermediate position and only require that the injury be “significant” rather than substantial. Yet
41 another approach would be to treat crimes and non-criminal frauds differently - e.g., dispensing with the
42 requirement of substantial injury in the case of criminal conduct but not in cases in which the client
43 intends to engage in non-criminal but fraudulent behavior. After considering these alternatives, my

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1 recommendation is to permit disclosure only in cases in which the likely loss will be substantial. I prefer
2 such a requirement for several reasons. Of some importance is the fact that this standard has passed
3 muster with the ALI. I also like the way in which a requirement that financial loss be substantial will
4 stand in comparison with the requirement that bodily harm, illness or sexual abuse be serious. This
5 reflects the policy judgment that bodily integrity is more important than money. The requirement that
6 the loss be substantial also is consistent with the basic proposition that confidentiality is important and
7 should only be compromised in exceptional cases. Finally the requirement that the pecuniary loss be
8 substantial highlights that we are concerned about loss prevention rather than crime prevention.

9
10 b. [for a class of similarly situated persons]

11
12 I am recommending that the rule be broadened to permit disclosure to prevent substantial
13 aggregate loss that will be suffered by a class of similarly situated person even though no single person
14 will suffer substantial injury. In this age of commercial and securities transactions that involve large
15 numbers of people, it will appear as if the profession were sticking its head in the sand if it continues to
16 think about fraudulent transactions in terms of “one-to-one” dealing rather than in terms of the “one-to-
17 many” dealing that has come to dominate the American mass marketplace. I see no reason to permit a
18 client to seal a lawyer’s lips because the fraud the client is committing allows the accumulation of
19 substantial ill-gotten gains from a large number of people no one of whom loses a great deal of money.

20
21 c. “believe” or “reasonably believe” or “have substantial reason to believe”

22
23 The Kutak Commission’s original proposal permitted disclosure “to prevent the client from
24 committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in ...
25 substantial injury to the financial interests or property of another.” (Emphasis added) Of the nine Model
26 Rule jurisdictions which permit disclosure to prevent crimes and frauds likely to result in substantial
27 injury to the financial or property interests of person, however, only two require that the lawyer’s belief
28 be reasonable. The other seven permit disclosure if the lawyer “believes” that the loss is likely. Two
29 of the three jurisdictions that require disclosure require that the lawyer reasonably believe that the harm
30 is likely. 23 jurisdictions use the Model Code formulation which does not clearly indicate whether the
31 lawyer must believe or reasonably believe that the client intends to commit the crime. The rules of two
32 jurisdictions can be read to require that the lawyer have a reasonable belief that the client will commit
33 the crime.

34
35 § 117B of the Restatement does not address this issue in its text, but comment h indicates that
36 “lawyer’s discretion to take appropriate measures to prevent harm under this Section ... is predicated
37 on the lawyer’s reasonable belief that the client intends to engage in the described crime or fraud.”

38
39 I think the stricter objective standard is appropriate because less important interests are at
40 stake. If the Commission wants to require lawyers to be very certain that substantial loss is likely to
41 result from the client crime or fraud, this can easily be done by requiring the lawyer to have “substantial
42 reason to believe” that substantial loss is likely to result from the client’s crime or fraud.

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d. [or a third person]

I included the bracketed reference to a third person so the Commission could consider whether it wanted to limit this exception to circumstances in which the client is committing the crime or fraud (or aiding or abetting the commission of a crime or fraud). Deleting the bracketed language would so limit the exception. Alaska, Hawaii, Connecticut, New Hampshire, New Mexico, North Dakota, Utah, and Maryland, have adopted the Kutak Commission’s original draft and only permit disclosure “to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in substantial injury to the financial interests or property of another.” (Emphasis added). The numerous jurisdictions which have retained the Model Code formulation similarly restrict disclosure to situations in which the lawyer’s client is the perpetrator of the crime. The most recent version of §117(B) of the ALI Restatement of the Law Governing Lawyers also requires as a condition of disclosure that “the lawyer’s client intends to commit the crime or fraud either directly or through a third person..”

Although I recognize that the weight of authority favors limiting disclosure to situations in which the lawyer’s client is the perpetrator, I have been unable to come up with a justification for this limitation. Indeed I would think that the client has less interest in preventing disclosure in this situation than would be the case when the client is the wrongdoer. If the interest served by permissive disclosure in this situation is the same as in the case in which death and substantially bodily harm is at stake - e.g., to preserve the lawyer’s moral autonomy to act so as to prevent substantial loss to others - I see no reason to deprive the lawyer of that autonomy because the perpetrator is not the lawyer’s client.

e. Crimes, Frauds or Torts

The core proposal only permits disclosure to prevent likely substantial pecuniary loss if the lawyer knows that the client’s conduct will be or was criminal or fraudulent. It should be noted, however, that more than one-half of the jurisdictions that permit disclosure of confidential information to prevent client conduct likely to cause substantial financial injury limit the exception to cases in which the client’s conduct is a crime. In almost all of these jurisdictions the client’s intention to commit the crime can be revealed without regard to the extent of the injury likely to be suffered by the intended victim. The jurisdictions which have extended the exception to include fraudulent as well as criminal conduct only permit disclosure in cases in which the intended victim is likely to suffer substantial loss. I am recommending that the Commission not limit this exception to crimes. Although I am not sure the idea ought to be rejected out of hand, I have considered and rejected the possibility of permitting lawyers to reveal any crime or fraud without regard to the extent of the loss likely to be suffered by the intended victim. One alternative that might be appealing to the Commission would be to permit disclosure of any intended crime (or felony if the Commission wants to limit the exception to serious crimes) without regard to the amount of harm likely to be caused by the conduct. The Commission could then additionally permit disclosure to prevent substantial loss resulting from a client’s perpetration of non-criminal fraud. The differing treatment of crimes and fraud could be justified by reference to the legislature’s decision to criminalize the behavior in question as evidencing a legislative determination that substantial harm to persons or the society will result from the conduct in question. One can also infer

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1 such a determination from judicial decisions that brand various conduct as fraudulent or tortious. In the
2 judicial context, however, injury is not presumed. It must be proven by the victim. It surely would
3 make sense to permit disclosure to prevent any loss resulting from a crime and to permit loss resulting
4 from a non-criminal but fraudulent act only if the resulting loss will be substantial. The more I think
5 about it, the more I like this alternative. But in the end my recommendation remains that permissive
6 disclosure be allowed to prevent loss from future crimes and frauds only if the resulting injury will be
7 substantial.

8
9 I would also like the Commission to consider whether it might be appropriate to broaden this
10 exception to the lawyer's confidentiality obligation by permitting disclosure to prevent loss that is likely
11 to result from any form of intentional tortious conduct. Currently there are no jurisdictions which
12 permit lawyers to reveal confidential information to prevent substantial monetary loss likely to be caused
13 by future conduct of a client that is tortious (intentional or otherwise) but not fraudulent or criminal.
14 Such tortious conduct could be disclosed, of course, if the victim was going suffer death or serious
15 bodily harm or illness.

16
17 Comment d to §117(b) of the Restatement addresses this issue in the following terms:

18
19 “Many acts that will have seriously harmful financial consequences are denominated as crimes
20 or frauds in the law. However, some acts causing financial harm to third person constitutes
21 breaches of other legal obligations, such as intentional torts, breaches of contract, violation of
22 property rights, or violations of statutory, regulatory, or other legal duties that are not crimes or
23 frauds. Some of those acts may be particularly opprobrious in specific instances. However,
24 society has traditionally defined serious wrongful conduct in terms of crime and fraud. Limiting
25 the exceptions in the Section to crime and fraud is also a matter of practicality, because no
26 other categorical description of harmful acts provides an equally definite limitation on these
27 exceptions to a lawyer's duty of confidentiality.”

28
29 Comment d to §132 of the Restatement (crime/fraud exception to the attorney client privilege)
30 also addresses this issue:

31
32 “Authorities agree that the exception stated in this Section applies to client conduct defined as a
33 crime or fraud However, the evidence codes and judicial decisions are divided on the
34 question of extending the exception to other wrongs such as intentional torts, which, although
35 not criminal or fraudulent, have hallmarks of clear illegality and the threat of serious harm.
36 Legislatures and courts classify illegal acts as crimes and frauds for purposes and policies
37 different than those defining the scope of the privilege. Thus limiting the exception to crimes and
38 frauds produces an exception narrower than principle and policy would otherwise indicate.
39 Nonetheless the prevailing view limits the exception to crimes and frauds. The actual instances
40 in which a broader exception might apply are probably few and isolated, and it would be
41 difficult to formulate a broad exception that is not objectionably vague.

42
43 I do not find “the prevailing view” to be a particularly persuasive reason to deprive lawyers of

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1 their autonomy to protect others from substantial financial loss or property loss for which the victim may
2 never be adequately compensated. Is it any more difficult for a lawyer to identify an intentional tort,
3 recklessness, gross negligence, or ordinary negligence than it is for a lawyer to determine that conduct
4 constitutes a crime or fraud? I think not, and even were it so, the uncertainty problem is diminished in
5 significance because of the requirement in the proposed exception that the lawyer “know” that the
6 conduct is a crime, a fraud, or an intentional tort. The one point at which I would draw the line is with
7 respect to non-fraudulent or tortious breaches of contract. This is because modern contract policy does
8 not want to deter efficient breaches of contract. If there is any inclination of the Commission to
9 seriously considering broadening the exception beyond crimes and fraud, I will look more closely at the
10 materials relating to the broadening of the crime/fraud exception to the attorney client privilege that are
11 noted in the Reporter’s Notes to §132 of the Restatement.
12

13 Even if the Commission restricts the exception to crimes and frauds, questions have been raised
14 about what conduct should be deemed fraudulent for purposes of this rule. The Model Rules speak of
15 “fraud” or “fraudulent” as “denoting conduct having the purpose to deceive and not merely negligent
16 misrepresentation or failure to apprise another of relevant information.” One question is whether
17 “negligent” modifies both “misrepresentation” and “failure to apprise another of relevant information.
18 What about an intentional failure to disclose information which the client is legally obligated to reveal to
19 the affected person? What about an intentional failure to correct a prior statement that was true (or
20 thought to be true) when made but which the lawyer knows is no longer true? If such conduct is not
21 understood to be fraud, should the definition of fraud be broadened?
22

23 § 117(B) of the Restatement, by way of a cross reference in the comment to §132 (crime/fraud
24 exception to the attorney-client privilege) takes the position, as set forth in the Comment to §132 that
25 “fraud, for the purpose of the exception, requires a knowing or reckless misrepresentation (or
26 nondisclosure when applicable law requires disclosure) likely to injure another.” New York has
27 addressed this issue more explicitly, defining fraud as not including “conduct, although characterized as
28 fraudulent by statute or administrative rule, which lacks an element of scienter, deceit, intent to mislead,
29 or knowing failure to correct misrepresentations which can be reasonably expected to induce
30 detrimental reliance by another.” Tennessee’s Proposed Rule defines fraudulent in terms of “an
31 intentionally false or misleading statement of material fact, an intentional omission from a statement of
32 fact of such additional information as would be necessary to make the statement made not materially
33 misleading, and such other conduct by a person intended to deceive a person or tribunal with respect to
34 a material issue in a proceeding or other matter.” I have not yet tried to identify any other departures
35 from variations from the Model Rule definition of fraud, but wanted to at least call it to the
36 Commission’s attention.
37

38 **3. An Alternative: Mandatory Disclosure**

39 Four jurisdictions require disclosure to prevent crimes or frauds likely to result in substantial
40 injury to the financial or property interests of another. For the reasons set forth in my discussion of the
41 possibility of requiring disclosure to prevent death or substantial bodily harm, I am not recommending
42 mandatory disclosure unless such disclosure is required by other law.
43

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1 4. An Alternative: “Noisy” Withdrawal and the Disaffirmation of Representations Previously Made by
2 the Lawyer to Potential Victims
3

4 If the Commission decides that lawyers should not be permitted to disclose confidential
5 information to prevent loss from prior conduct of the lawyer’s client, I will propose the adoption of a
6 rule that will specifically permit the lawyer
7

8 “ to give notice to a person with whom the lawyer has previously communicated on behalf of
9 the client of the fact that the lawyer has withdrawn from the representation of the client or that
10 the lawyer is withdrawing or disaffirming an opinion, document, affirmation or statement the
11 lawyer has previously communicated to the person on behalf of the client.”
12

13 The Comment would make clear that the notice of withdrawal or disaffirmation is only
14 permitted when the withdrawal or disaffirmation is permitted or required by the Rules of Professional
15 Conduct or other law. It would also make clear that the only information that may be revealed is the
16 fact of the withdrawal or disaffirmation and not the reasons for the withdrawal or the disaffirmation. I
17 see this proposal as striking an acceptable balance between the legitimate confidentiality interests of the
18 client, the legitimate interest of lawyers in disassociating themselves from a representation gone bad, and
19 the interests of persons with whom the lawyer was dealing on behalf of the client in knowing that the
20 person with whom they have been dealing (and upon whom they may have been relying) is no longer
21 representing the client or is disaffirming prior communications. If such a “noisy withdrawal” has the
22 incidental effect of raising a red flag in cases in which the lawyer has withdrawn because of client fraud,
23 that is fine with me. The proposal, however, is intended to more broadly permit the lawyer to provide
24 notice of withdrawal or disaffirmation to persons with whom the lawyer has communicated on behalf of
25 a client in any circumstances in which the lawyer is permitted by the Rules to so withdraw or disaffirm.
26

27 Arkansas has adopted a similar rule which provides that “[These Rules do not] ... prevent the
28 lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any
29 opinion, document, affirmation or the like.” New York more narrowly permits a lawyer to “reveal
30 confidences and secrets to the extent implicit in withdrawing a written or oral opinion or representation
31 given by the lawyer and believed by the lawyer still to be relied upon by a third person where the
32 lawyer has discovered that the opinion or representation was based on materially inaccurate information
33 or is being used to further a fraud or crime.” In pertinent part Tennessee’s Proposed Rule 4.1 provides
34 as follows:
35

36 (B) If a lawyer who is representing a client in a non-adjudicative matter has substantial reason
37 to believe that his or her client intends to perpetrate a fraud, the lawyer shall promptly advise
38 the client to refrain from engaging in the fraudulent conduct, consult with the client about the
39 consequences of the client's engaging in such conduct; and if, after such consultation, the lawyer
40 knows that the client still intends to engage in the wrongful conduct, the lawyer
41

42 (1) shall withdraw from the representation of the client in the matter; and
43

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1 (2) may, without further disclosure of information protected by Rule 1.6, notify a person
2 of the lawyer's withdrawal from the representation of the client in the matter, if the
3 lawyer reasonably believes that

4
5 (a) the person knows of the lawyer's representation of the client in the matter;
6 and

7
8 (b) the client's actions are likely to cause harm to the financial or property
9 interests of the person.

10
11 (C) If a lawyer who is representing or has represented a client in a non-adjudicative matter
12 comes to know, prior to the conclusion of the matter, that the client has, during the course of
13 the lawyer's representation of the client in the matter, perpetrated a fraud which the lawyer
14 reasonably believes will cause harm to the financial or property interests of another person, the
15 lawyer shall promptly advise the client to rectify the fraud, shall consult with the client about the
16 consequences of the client's failure to rectify the fraud, and if the client refuses or is unable to
17 rectify the fraud,

18
19 (1) the lawyer shall withdraw from the representation of the client in the matter; and

20
21 (2) if the lawyer reasonably believes that the client will use written statements, opinions
22 or other material submitted by the lawyer to the affected person to assist the client with
23 the consummation of the fraud, the lawyer shall, without any further disclosure of
24 information protected by Rule 1.6 or 1.9(C), inform the affected person of the lawyer's
25 withdrawal from the representation of the client and the lawyer's disaffirmation of any
26 written statements, opinions or other material previously submitted to the affected
27 person by the lawyer and which the lawyer reasonably believes have been rendered
28 false or misleading by the client's fraud.

29
30 In addition to authorizing "noisy" withdrawal and the disaffirmance of work product, I would
31 also recommend permitting lawyers to reveal confidential information.

32
33 "to provide all information relating to the representation of the client to another lawyer who the
34 lawyer knows has undertaken the representation of the client in the same or a substantially
35 related matter to which the information relates [and who has requested such information.]

36
37 This would at least prevent the client from duping successor counsel into doing what the
38 predecessor counsel could not do because of her knowledge of the client's intentions. What I have in
39 mind is the OPM scenario.

40
41 **D. Subparagraph (c)(4)**

42
43 (4) to rectify or mitigate substantial injury to the financial or property interests of a person that the

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1 lawyer knows [has reason to believe] has been caused by the criminal or fraudulent conduct of
2 the client in a matter in which the lawyer is representing or has represented the client [the lawyer's
3 services have been or are being utilized by the client]; or
4

5 The current Model Rule does not permit disclosure to rectify the consequences of a fraud or
6 crime in which the client used the lawyer's services. 29 jurisdictions similarly do not permit such
7 disclosure. The Kutak Commission's original draft provided that "a lawyer may reveal such information
8 to the extent the lawyer reasonably believes necessary to rectify the consequences of a client's criminal
9 or fraudulent act in the furtherance of which the lawyer's services had been used." This provision was
10 deleted from the version approved by the House of Delegates. In 1991 a proposal to add similar
11 language to Rule 1.6(b) was defeated in the House of Delegates by a 251-158 margin.
12

13 Currently 13 jurisdictions permit disclosure to rectify the consequences of a crime or fraud in
14 the commission of which the client used the lawyer's services. Most of these jurisdictions use the
15 formulation of the Kutak Commission's original proposal. Hawaii permits rectification of an act that the
16 lawyer "reasonably believes to have been criminal or fraudulent and in the furtherance of which the
17 lawyer's services had been used." Oklahoma only permits disclosure to rectify "what the lawyer
18 knows to be a client's criminal or fraudulent act in the commission of which the lawyer's services had
19 been used." (emphasis added)
20

21 By way of further background, there are also 8 jurisdictions in which DR 7-102(B)(1) of the
22 ABA Model Code of Professional Responsibility (or a variation therefore) remains in force. In
23 pertinent part DR 7-102(B) provides that "a lawyer who receives information clearly establishing that ...
24 his client has, in the course of the representation, perpetrated a fraud upon a person ... shall ... reveal
25 the fraud to the affected person..., except when the information is protected as a privileged
26 communication." Note that DR7-102(B)(1) applies to any fraud and not just those frauds that are
27 likely to result in substantial injury to the financial or property interests of the affected person.
28

29 The state variations are interesting. Georgia and Ohio have dropped the exception when the
30 information is protected as a privileged communication. In these states, then, a lawyer who receives
31 information "clearly establishing" that a client has perpetrated a fraud in the course of the lawyer's
32 representation of the client is required to reveal the fraud to the affected person if the client does not
33 rectify the fraud. Virginia takes the same approach as Georgia and Ohio except that the lawyer is
34 permitted rather than required to reveal the fraud. Iowa and Oregon limit the exception to information
35 that is protected by the attorney-client privilege. If the information that clearly established that the client
36 had perpetrated the fraud did not come from the client, the information would not be protected by the
37 attorney-client privilege and the lawyer would be required to reveal the fraud to the affected person if
38 the client did not rectify the fraud. If the information was protected by the attorney-client privilege,
39 however, disclosure would be prohibited. I would note one wrinkle in this regard: There is a crime-
40 fraud exception to the attorney-client privilege for cases in which the client consults the lawyer for the
41 purpose of perpetrating a fraud. If this exception to the privilege were applicable, one could conclude
42 that the information the lawyer received was not protected as a privileged communication and that the
43 lawyer would therefore be required to reveal the fraud. The wrinkle is that the crime-fraud exception to

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1 the attorney client privilege does not encompass all frauds that a client might commit in the course of the
2 lawyer’s representation of the client.

3
4 Nebraska, Tennessee and Vermont use the Model Code reference to “information protected as
5 a privileged communication.” While this language could be read to limit the exception to what the
6 Model Code refers to as “confidences” (information protected by the attorney-client privilege), ABA
7 Formal Ethics Opinion 341(1975) interpreted the reference to a privileged communication to include
8 both confidences and secrets (other information gained in the professional relationship). If these states
9 adopt the narrower reading of the exception they would join Iowa and Oregon as states that require a
10 lawyer to reveal a fraud committed by a client during the course of the lawyer’s representation unless
11 the information establishing the fraud is protected by the attorney-client privilege. If, on the other hand,
12 Nebraska, Tennessee and Vermont follow the ABA Ethics Opinion, they will join New York as states
13 that mandate disclosure to rectify a client fraud perpetrated during the lawyer’s representation unless
14 the information establishing the fraud is protected as a confidence or as a secret. As odd as it may
15 sound, this effectively means that the lawyer will be prohibited from revealing a client fraud unless the
16 lawyer’s knowledge of the fraud was acquired either after the termination of the lawyer’s employment
17 by the client or independently of the representation. The exception almost swallows the rule. For
18 present purposes, I will let it suffice to say that the ABA Model Code is not a paragon of either
19 simplicity or clarity.
20

21 Against this backdrop, §117(B) of the ALI Restatement of the Law Governing Lawyers
22 provides that a lawyer may use or disclose confidential client information when and to the extent the
23 lawyer reasonably believes such use or disclosure is necessary to rectify or mitigate a substantial
24 financial loss resulting from the client’s commission of a crime or fraud in which the client employed or is
25 employing the lawyer’s services in committing the crime or fraud.” The Commission should note that
26 my proposal refers more generally “to a matter in which the lawyer is representing or has represented
27 the client.” This is closer to the ABA Model Code reference to a perpetration of a fraud “in the course
28 of the representation” than it is to the Restatement requirement that the client use the lawyer’s services
29 in committing the crime or fraud. My reasoning is that if the fraud was committed while the lawyer was
30 on the job, the lawyer should have full freedom to disassociate herself from the misconduct and that the
31 only way to do this effectively is to reveal the misconduct to the affected parties so that they may seek
32 to mitigate or rectify their losses. To sit by and do nothing when rectification is possible makes the
33 lawyer look like an accessory both before and after the fact.
34
35

36 E. Subparagraph (c)(5)

37
38 ~~(5)~~(B)(2) to establish

39
40 (i) a reasonable claim or defense on behalf of the lawyer, or the lawyer’s firm, in a
41 controversy between the lawyer and the client; or

42
43 (ii) a reasonable defense to a formally instituted criminal charge or civil claim

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1 against the lawyer, or another person participating in the representation of the client,
2 that is based upon conduct in which the client was involved; or

3
4 (iii) a reasonable defense to a complaint against the lawyer, or another lawyer
5 participating in the representation of the client, that is submitted to or instituted by a
6 disciplinary authority and relates to the representation of the client; or

7
8 (iv) a reasonable response to a specific allegation that is made against the lawyer,
9 or another person participating in the representation of the client, in any other
10 proceeding and relates to concerning the lawyer's representation of the client.

11
12 Except for the references to “reasonable” claims and defenses, “formally instituted criminal
13 charges,” and “specific allegations,” the broadening of the exception to include criminal charges and
14 civil claims brought against “a person associated with the lawyer” and the addition of the phrase
15 specifically addressing disciplinary complaints against the lawyer or another lawyer participating in the
16 representation of the client, proposed subparagraph (c)(5) is substantively identical to ABA Model
17 Rule 1.6(b)(2).

18
19 27 jurisdictions have adopted the current Model Rule. Another 11 are substantially similar,
20 only three of which differ substantively. 10 jurisdiction model their rule after the ABA Model Code: “A
21 lawyer may reveal ... confidences or secrets necessary to establish or collect his fee or to defend
22 himself or his employees or associates against an accusation of wrongful conduct.” Maine only permits
23 disclosure “as necessary for the defense of the lawyer, the lawyer’s partners, employees, or associates
24 against an accusation of wrongful conduct in a judicial proceeding, including, but not limited to, any
25 grievance proceeding under these rules.”

26
27 §116 of the Restatement of the Law Governing Lawyers provides that “[a] lawyer
28 may use or disclose confidential information when and to the extent that the lawyer reasonably believes
29 it necessary in order to defend the lawyer or the lawyer’s associate or agent against a charge or
30 threatened charge by any person that the lawyer or such associate or agent acted wrongfully in the
31 course of representing the client.” §117 of the Restatement provides that [a] lawyer may use or
32 disclose confidential client information when and to the extent that the lawyer reasonably believes
33 necessary in order to permit the lawyer to resolve a dispute with the client
34 concerning compensation or reimbursements that the lawyer reasonably claims to be due.

35
36 The new phrase dealing with disciplinary complaint is for purpose of specifically recognizing an
37 arena in which the self-defense exception is frequently invoked. The Kutak Commission’s original
38 proposal and the rules of Hawaii, D.C., Texas, Maryland, Pennsylvania, and New Jersey specifically
39 refer to a “disciplinary complaint.”

40
41 I added the reference to “a person associated with the lawyer” to incorporate into the rule the
42 Model Code’s extension of the self-defense exception to the lawyer’s employee’s and associates. I
43 chose the broad reference to “a person associated with the lawyer” so that it includes not only other

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1 lawyers and personnel in the lawyer’s firm, but other lawyers and non-legal personnel who might be
2 involved in the representation of the client and might be wrongly accused of wrongdoing in connection
3 with the representation. I do not think it is necessary to refer to both associates and agents in the rule.
4

5 The D.C. Rules require the lawyer to wait until charges or claims have been “formally
6 instituted.” My sense is that the D.C. bar was concerned about lawyers being too quick to assert their
7 right to self-defense and that opposing lawyers might try to take advantage of this inclination by
8 threatening to file claims or complaints in the hope that the lawyer will try to exonerate himself by
9 disclosing information that might be damaging to the client. I added the language so that the
10 Commission could consider this issue. The effect of the D.C. modification is to limit the self-defense
11 exception. If the Commission chooses to require the lawyer to wait until formal charges or claims have
12 been filed, Comment [17] - which indicates that a lawyer does not have to await until the
13 commencement of a proceeding - will have to be modified.
14

15 The D.C. Rules only allow the lawyer to disclose information related to the representation of
16 the client to the extent necessary to respond to “specific allegations.” The effect of the D.C.
17 modification is to limit the self-defense exception.
18

19 I would like the Commission to consider whether the right of the lawyer to reveal confidential
20 client information should be limited to disclosures necessary to establish “reasonable” claims or
21 defenses. This is obviously more restrictive than Rule 3.1 which only prohibits frivolous claims.
22 Because of the importance of confidentiality and possibility of misuse of the fee-collection and self-
23 defense exceptions, I think that disclosure should only be permitted where the claim or defense is
24 reasonable.
25

26
27 **IV. Paragraph (d)**
28

29 (d) A lawyer shall reveal information relating to the representation of a client to the extent the
30 lawyer reasonably believes disclosure is necessary:

31
32 (1) to comply with the Rules _____; and
33

34 (2) to comply with an order of a tribunal, administrative agency or a legislative body
35 requiring disclosure but only **if to the extent** finally ordered to do so by the tribunal,
36 agency or body after the lawyer has asserted on behalf of the client all non-frivolous
37 claims that the information sought by the tribunal or agency is protected against
38 disclosure by the attorney-client privilege or other applicable law [and has exhausted
39 the client’s rights to appeal adverse rulings on the client’s claims]; and
40

41 (3) to comply with other law, provided, however, that a lawyer may refrain from
42 making such disclosure if the lawyer has a non-frivolous reason to believe **reasonably**
43 **believes**, after reasonable inquiry, that the law in question does not legally obligate the

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lawyer to make the disclosure in question; and

As previously noted I do not support mandatory disclosure in any of the circumstances addressed in paragraph (c).

Subparagraph (d)(1) will be an explicit cross reference to other rules that mandate disclosure even though such disclosure may include information related to the representation of a client. A number of jurisdictions use a more general reference to “these rules” or “the Rules of Professional Conduct.” I prefer a specific cross-reference to each rule in which a lawyer will find a disclosure obligation that overrides confidentiality.

Subparagraph (d)(2)’s requirement that a lawyer comply with a court order directing the lawyer to disclose information relating to the representation of a client is consistent with the rules of 12 jurisdictions. None of these rules, however, condition disclosure on resistance and exhaustion of remedies. § 115 of the Restatement of the Law Governing Lawyers states more generally that “[a] lawyer may use or disclose confidential client information when required by law, after the lawyer has taken reasonably appropriate steps to assert that the information is privileged or otherwise protected against its disclosure.” Florida provides that “When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.”

Subparagraph (d)(3)’s requirement that a lawyer comply with other law is consistent with the rules in 14 jurisdictions. The proviso is added to address the situation in which a lawyer has a non-frivolous reason to believe that the law in question does not require the disclosure in question - e.g., the law is unconstitutional or subject to an interpretation that would exempt the lawyer from having to make the disclosure in question. This is analogous to the approach taken in Rule 1.2 which prohibits a lawyer from counseling or assisting a client in conduct the lawyer knows is criminal or fraudulent, but then expressly permits the lawyer to counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”

V. Paragraph (e)

(e) Prior to disclosing such information as permitted by paragraph (c), or as required by paragraph (d), a lawyer shall, if reasonably feasible,

(1) advise the client to take or to refrain from taking such action as the lawyer reasonably believes will be necessary to accomplish the purpose for which the lawyer will otherwise be permitted to disclose information relating to the representation of the client; and

(2) consult with the client about the consequences of the client’s failure to do so, including whether and to what extent the lawyer is required or permitted by these Rules to disclose or use information relating to the representation to prevent or rectify the harmful consequences of the act; and

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(3) provide the client with reasonable advance notice of the lawyer’s determination to make the disclosure in question.

There is no comparable language in the current Model Rule.

§ 117A(3) of the Restatement of the Law Governing Lawyers provides that “[b]efore using or disclosing information pursuant to this Section, the lawyer must, if feasible, make a good faith effort to persuade the client either not to act or, if the client or another person has already acted, to warn the victim or take such other action to prevent the harm and, if relevant, to advise the client of the lawyer’s ability to use or disclose pursuant to this Section and the consequences thereof.” § 117B(3) similarly provides that “[b]efore using or disclosing information pursuant to this Section the lawyer must, if feasible, make a good faith effort to persuade the client either not to act or, if the client has already acted, to warn the victim or take other action to prevent, rectify or mitigate the loss and, if relevant, to advise the client of the lawyer’s ability to use or disclose pursuant to this Section and the consequences thereof.”

In conjunction with its requirement that a lawyer reveal the intention of a client to commit a crime, Virginia requires that “before revealing such information the attorney shall, where feasible, advise his client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client’s criminal intention unless thereupon abandoned”

This requirement could be incorporated into a Comment explaining that these steps must be taken, if reasonably feasible, before a lawyer could have a reasonable belief that disclosure is necessary, but I think that the communication called for by this paragraph is so important that it should be given the added prominence that goes with addressing the matter in the rule.

VI. Paragraph (f)

(f) A lawyer shall act with reasonable care to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer, by other persons who are participating in the representation of the client and who are subject to the lawyer’s supervision, [or by any other person to whom the lawyer has provided such information.]

This paragraph supplements Paragraph (b)’s prohibition against “knowingly” or “intentionally” revealing information relating to the representation of a client and affords the client protection against negligent conduct of the lawyer that would result in or substantially increase the likelihood of inadvertent disclosure by the lawyer or inadvertent or wrongful disclosures by other persons who are assisting the lawyer with the representation or who may have been provided such information by the lawyer. This can be viewed as a specialized application of both Rule 1.1 (Competence) and Rule 5.1(b) (Responsibilities of a Supervisory Lawyer). Because of the importance of confidentiality, I think this duty should be highlighted in the confidentiality rule and not left to the Comments.

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1 Colorado, D.C., Georgia, Iowa, Maine, Michigan, Minnesota, Nebraska, New York, Ohio,
2 Oregon, Virginia, Vermont have retained the formulation that was contained in ABA Model Code DR
3 4-101(D): “A lawyer shall exercise reasonable care to prevent the lawyer’s employee’s, associates and
4 other whose services are utilized by the lawyer from disclosing or using such information, except that
5 the lawyer may reveal the information allowed by paragraphs (b) and (c) through such persons.” I
6 modified this formulation to conform to the structure of the Model Rules.

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17