

May 20, 1998

Memorandum

To: Ethics 2000 Commission
From: Carl Pierce
Re: Proposed Rule 1.6 - Third Draft

Attached is a Third Draft of Rule 1.6 that represents a significant revision of the Second Draft that was reviewed in Wilmington. Highlights of this draft include:

1. The transfer of the substance of paragraphs (a), (e), and (f) in the Second Draft to Comments. The remaining three paragraphs have been relettered. The core prohibition against disclosure or use of information relating to the representation of a client is now in paragraph (a). Permissive disclosure is treated in Paragraph (b). Mandatory disclosure is now treated in a barebones Paragraph (c). Unless indicated to the contrary by a specific reference to the Model Rule or to the Second Draft, all subsequent references to paragraphs are to the paragraphs as lettered or numbered in this draft.

2. The deletion from paragraph (a) of the prohibition against using information relating to the representation of a client to the advantage of the lawyer or a third person. This issue is now treated in Comment [9]. I am also asking the Commission to consider whether the prohibition against use of information to the disadvantage of the client should be limited to uses that are “reasonably likely” to disadvantage the client.

3. A substantial revision of the Comments that relate to Paragraph (a). The revisions incorporate many of the suggestions made by the Commission in Wilmington.

4. A revision of paragraph (b)(1) with respect to permissive disclosure to prevent death or substantial bodily harm coupled with a recommendation that the Commission reconsider its decision to require that the death or injury be imminent. I am recommending that the Commission replace “imminent” with “reasonably certain.” I have also added a Comment [15] that addresses illness and child sexual abuse.

5. Per my sense of the views of at least a significant number of the members, I have compressed paragraphs (c)(3) and (4) from the prior draft into a single paragraph (b)(2) that limits permissive disclosure to prevent, mitigate, or rectify substantial financial loss to situations in which the lawyer’s services were used by the client to further a fraud or crime. As discussed in the Reporter’s Observations, however, I am recommending that the Commission approve a slightly revised version of the two-paragraph proposal that was contained in paragraphs (c)(3) and (4) of the Second Draft.

6. I am still proposing that the Commission approve the five part paragraph (b)(3), but have also suggested an option for putting these confidentiality exceptions into a Comment that includes the five exceptions as examples of disclosures that are impliedly authorized to enable the lawyer to carry out the representation in accordance with the Rules and other law.

7. Comments [15] through [26] are new and relate to paragraphs (b) and (c).

May 29-30, 1998
PROPOSED RULE 1.6 - 3rd Draft

Confidentiality of Information

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2
3 (a) Unless the client gives informed consent, or the disclosure or use is permitted by paragraph (b) or
4 required by paragraph (c), a lawyer shall not

5
6 (1) reveal information relating to the representation of a client, except for disclosures that are
7 impliedly authorized in order to carry out the representation; or

8
9 (2) use information relating to representation of a client to the disadvantage of if such use is
10 reasonably likely to disadvantage the client.

11
12 (b) A lawyer may reveal or use information relating to the representation of a client as permitted by Rules
13 ____, _____, and _____ or to the extent that the lawyer reasonably believes that the disclosure or use is
14 necessary

15
16 (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result
17 in imminent [reasonably certain] death or substantial bodily harm; or

18
19 (2) to prevent, mitigate or rectify substantial financial loss that the lawyer has substantial reason
20 to believe will result, or has resulted, from criminal or fraudulent conduct of the client in which
21 the lawyer's services have been used in furtherance of the crime or fraud; or

22
23 (3) to enable the lawyer

24
25 (i) to respond to a request for information about the lawyer's representation of the client
26 in a matter if the request is from a lawyer who is representing the client in the same or a
27 substantially related matter; or

28
29 (ii) to consult with another lawyer for the sole purpose of identifying conflicts of interest
30 that may arise because of the lawyer's current or proposed association with a law firm,
31 but only if the lawyer reasonably believes that the disclosure will not materially
32 disadvantage the client; or

33
34 (iii) to secure confidential legal advice from another lawyer about the lawyer's
35 compliance with these Rules or other law in connection with the representation of the
36 client; or

37
38 (iv) to advise a person with whom the lawyer has previously communicated on behalf of
39 the client that the lawyer is no longer representing the client; or

40
41 (v) to disaffirm a communication that the lawyer has previously made on behalf of the

1 client and that the lawyer has reason to believe is false or misleading.

2
3 (4) (B)(2) to establish a reasonable claim or defense on behalf of the lawyer, or the lawyer's
4 firm, in a controversy with between the client, and the lawyer, to establish a reasonable defense
5 to a formally instituted criminal charge or civil claim against the lawyer, or another person
6 participating in the representation of the client, that is based upon conduct in which the client
7 was involved, or to respond reasonably in any other proceeding to specific allegations made
8 against the lawyer, or another person participating in the representation of the client, and that
9 concerns the representation of the client.

10
11 (c) A lawyer shall reveal or use information relating to the representation of a client to the extent the
12 lawyer reasonably believes the disclosure or use is necessary to comply with Rules _____,
13 _____, or to comply with other law.

14 15 Comments

16 Guidelines for Interpretation and Application

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

19
20 2. ~~The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the~~
21 ~~client not only facilitates the full development of facts essential to proper representation of the client but~~
22 ~~also encourages people to seek early legal assistance.~~

23
24 3. ~~Almost without exception, clients come to lawyers in order to determine what their rights are and~~
25 ~~what is, in the maze of laws and regulations, deemed to be legal and correct. The common law~~
26 ~~recognizes that the client's confidences must be protected from disclosure. Based upon experience,~~
27 ~~lawyers know that almost all clients follow the advice given, and the law is upheld.~~

28
29 [1] [4] A fundamental principle in the client-lawyer relationship is that, in the absence of the
30 client's informed consent, the lawyer must not reveal information relating to the representation and also
31 must not use such information to the disadvantage of the client. This contributes to the trust that is a
32 hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and
33 to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject
34 matter so that the lawyer will have all the information the lawyer needs to effectively represent the client
35 and, if necessary, to advise the client to refrain from wrongful conduct. This protection also recognizes
36 that controlling the dissemination of information about one's affairs is an important aspect of a person's
37 autonomy and that a person should not be required to surrender this autonomy because he or she must
38 share private information with a lawyer in order to secure effective legal assistance. The prohibition
39 against the use by the lawyer of information relating to the representation of a client to the client's
40 disadvantage is derived from the lawyer's general duty of loyalty to the client.

Information Relating to the Representation of a Client

[2] This Rule governs the disclosure or use by a lawyer of information relating to the representation of a client during the course of the lawyer's representation of the client. See Rule 1.0 for the duties a lawyer owes to a prospective client. See Rule 1.9 for the lawyer's duties to former clients.

[3] ~~[5]~~ The principle of lawyer-client confidentiality is given effect by the law of evidence and civil procedure as well as by these Rules. ~~related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics.~~ The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The work product rule applies in civil discovery proceedings and affords a defense against a request for production of documents prepared in anticipation of litigation. As a matter of professional responsibility, however, this Rule more broadly requires a lawyer to preserve the confidentiality of information relating to the representation of the client even though some of that information may not be protected by the attorney-client privilege or the work product rule. The rule of client-lawyer confidentiality, for example, applies in situations other than those where evidence is sought from the lawyer through compulsion of law. It ~~The confidentiality rule~~ applies not merely to matters communicated in confidence by the client but also to all information relating to the representation gained in the course of or as a result of the lawyer's representation of the client, ~~whatever its source,~~ without regard to the source of the information or the timing of its acquisition. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. ~~See also Scope. The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.~~

[4] Organizational clients, including governmental agencies, are entitled to the protection of this Rule. When ~~one of the~~ a constituent of an organizational client communicates with the organization's lawyer in ~~his or her the person's~~ organizational capacity, the communication is protected by Rule 1.6 as information related to the representation of the organizational client. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. The lawyer's duty to protect this information, however, is a duty owed to the organizational client. With respect to disclosure of such information to persons not associated with the organization, or the use of such information to the disadvantage of the organization, the lawyer must secure the informed consent of a duly authorized organizational constituent. ~~[17]~~ Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization's constituents. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

[5] A client may be represented by a law firm and in the course of that representation some lawyers associated with the law firm will acquire information relating to the client's representation. For purposes of this Rule, the knowledge of these lawyers is not imputed to other lawyers associated with

1 the law firm. In some circumstances, however, a lawyer in a firm may be disqualified from representing
2 a client because the lawyer's confidentiality obligations to one client will materially limit and have a
3 material adverse affect on the representation of another client. The lawyer would not be able to
4 simultaneously represent both clients because of this conflict of interest, and, although the lawyer's
5 knowledge is not be imputed to the other lawyers in the firm for purposes of this Rule, the other lawyers
6 may nonetheless be vicariously disqualified from undertaking the representation in question. See Rule
7 1.7 and 1.10(a).

8
9 [6] Occasionally, lawyers who are neither partners nor full-time employees of a law firm will
10 enter into a working relationship with the law firm in connection with the representation of one or more
11 of the firm's clients. Such a lawyer might be a co-counsel or a temporary lawyer employed by a firm to
12 assist with a single matter or might be an "of counsel" lawyer who frequently assists in the
13 representation of a significant number of the firm's clients. For purposes of this Rule, such a lawyer will
14 be deemed to represent any client of the firm in whose representation the lawyer is participating or
15 about whom the lawyer receives information by virtue of the lawyer's relationship with the firm. If,
16 however, such a lawyer is "associated" with the firm, the lawyer will be deemed to represent all the
17 firm's clients and will be required to afford all clients of the firm the full protection of this Rule. A
18 lawyer is associated with a firm for purposes of this Rule only if the lawyer has general access to
19 information about clients of the firm on whose matters he or she is not working. Normally this would
20 not be the case when a lawyer is working on a single matter either as co-counsel or as a temporary
21 lawyer. A lawyer who is "of counsel" to a law firm, on the other hand, will normally be associated with
22 the firm because of the close, ongoing personal relationship that characterizes the "of counsel"
23 relationship. Lack of access to information about firm clients may be established by the utilization of
24 screening procedures that would satisfy the requirements of Rule [. . .].

25 26 **Protecting Information Related to the Representation of the Client**

27
28 [7] Paragraph (a)(1) prohibits a lawyer from revealing information relating to the representation
29 of a client. This duty applies without regard to the effect of the disclosure on the client, the lawyer, or
30 third persons. It also applies to statements by a lawyer that do not in themselves reveal protected
31 information but could reasonably lead to the discovery of such information by a third person. Using an
32 anonymous "hypothetical" to discuss issues relating to the representation of a client, for example, does
33 not ordinarily reveal information relating to the client's representation, but such a discussion may
34 constitute a disclosure requiring client consent if there is a reasonable likelihood that the hypothetical
35 would permit detection of the client's identity or lead to the discovery of other information relating to
36 the client's representation that otherwise would not have been discovered. This broad duty not to
37 reveal information relating to the representation comports with the client's legitimate expectation that the
38 lawyer will not contribute to the public's awareness of client affairs without client consent.

39
40 [8] Paragraph (a)(2) prohibits a lawyer from using information relating to a client's
41 representation to the reasonably likely disadvantage of the client. Learning by virtue of the
42 representation of a client that the client intends to purchase and develop several parcels of land, for
43 example, a lawyer may not seek to purchase one of the parcels in competition with the client. Also, if
44 by virtue of his or her representation of a client in a business matter, a lawyer comes to know of the

1 availability of a related business opportunity of which the client is unaware, the lawyer may be under a
2 legal obligation to refrain from taking the opportunity without first affording the client an opportunity to
3 do so. The lawyer's undisclosed seizure of the opportunity would disadvantage the client by depriving
4 the client of a first option to which he or she was legally entitled. Such a use of information relating to
5 the representation of the client violates the lawyer's duty of loyalty to the client.

6
7 [9] In some situations, a lawyer may be able to use information relating to the representation of
8 a client for the advantage of the lawyer or a third person without revealing the information to others.
9 The lawyer may do so provided that the use of the information does not disadvantage the client, is not
10 dishonest, fraudulent or deceitful, and does not constitute a crime that reflects substantially on the
11 lawyer's fitness to practice law. See Rule 8.4. Lawyers must, of course, refrain from buying or selling
12 publicly-traded securities based on non-public information related to the representation of a client.
13 Such "insider trading" is criminal conduct that reflects adversely on the lawyer's fitness to practice law.
14 See Rule 8.4 (b).

15 **Informed Consent and Impliedly Authorized Disclosures**

16
17
18 [10] A client's consent to the disclosure or use of information protected by this rule must be
19 informed and secured by the lawyer in advance of the disclosure or use in question. See the definition
20 of "informed consent" in Rule []. For a consent to the disclosure of information relating to the
21 representation of a client to be informed, the client must at least be aware of the effect of the disclosure
22 on the availability of the attorney-client privilege and work-product rule. The lawyer must also advise
23 the client of any material respect in which the lawyer's personal interests would be furthered by the
24 disclosure or use of the information in question. A lawyer may seek advance consent from a client to a
25 possible future use or disclosure of information relating to the lawyer's representation the client, but
26 such consent will not be informed unless the circumstances present at the time the lawyer subsequently
27 discloses or uses the information were specifically within the contemplation of the client at the time the
28 client's consent was obtained. A lawyer may not seek a client's consent to a disclosure or use of
29 information relating to the client's representation if so doing would be inconsistent with the lawyer's
30 duty to provide competent representation to the client. See Rule 1.1.

31
32 [11] (7): A lawyer is impliedly authorized to make disclosures of information relating a client's
33 representation when appropriate in carrying out the representation, except to the extent that the client's
34 instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose
35 information by admitting a fact that cannot properly be disputed, or in negotiation by making a
36 disclosure that facilitates a satisfactory conclusion. Implied authority, however, does not extend to
37 disclosures that present a significant risk that the client might be materially disadvantaged by the
38 disclosure in question. Such disclosures require the informed consent of the client. See Rule 1.14 for
39 the extent to which a lawyer who is representing an impaired client is impliedly authorized to make
40 disclosures the lawyer reasonably believes necessary to protect the client's interests.

41
42 [12] {8} Lawyers associated in a firm may, in the course of the firm's practice, are impliedly
43 authorized to disclose to each other information relating to a client of the firm, unless the client has
44 instructed that particular information be confined to specified lawyers. This implied authorization also

1 extends to disclosures on a need-to-know basis to lawyers who are not associated with the firm but
2 who are participating in the representation of the client in the matter either as an independent co-
3 counsel or as a temporary lawyer. See Comment [] to Rule [] with respect to the need for the
4 lawyer to secure client consent prior to associating co-counsel or permitting a temporary lawyer to
5 participate in the client's representation.
6

7 **Joint Representation of Multiple Client and Cooperative Arrangements Among Separately** 8 **Represented Clients**

9
10 [13] If a lawyer is representing multiple clients in a matter in compliance with Rule 1.7, each
11 client is, absent informed consent to the contrary, entitled to the full protection of this Rule. Information
12 relating to the joint representation provided to the lawyer by one of the clients will be regarded as
13 information relating to the representation of each client. The lawyer who is jointly representing the
14 clients must obtain the informed consent of each of the clients before disclosing protected information to
15 third persons. In the absence of instructions to the contrary, however, a lawyer jointly representing
16 multiple clients is impliedly authorized to share information relating to the representation with all the
17 clients to the extent necessary to accomplish the objectives of the joint representation. See Rule 1.7 for
18 the lawyer's duties if a conflict of interest arises because one jointly-represented client refuses to permit
19 the lawyer to disclose to another jointly-represented client information relating to the representation that
20 the other client needs to know in order make informed decisions about the representation. See
21 Comment [25] for a general statement of the lawyer's responsibility to consult with each of the jointly
22 represented clients about the lawyer's obligations to protect the confidentiality of information relating to
23 the joint representation.
24

25 [14] Occasionally, clients represented by separate lawyers will agree to cooperate with each
26 other in connection with a matter in which they have a common interest. The separately represented
27 clients in such a cooperative arrangement may be co-defendants or co-plaintiffs in a lawsuit or co-
28 obligors in a business transaction. It is common in such arrangements for the clients to agree to share
29 information relating to the matter in which they have a common interest. Unlike the situation in which
30 one lawyer represents multiple clients, however, a lawyer participating in a cooperative arrangement is
31 not impliedly authorized to share information relating to the representation with the cooperating parties
32 or their lawyers. Informed client consent is required. If a lawyer receives information relating to the
33 cooperative arrangement from one of the participants, the lawyer must not reveal or use that information
34 to the disadvantage of his or her client without informed client consent. [See Rule [4.5] for the duties of
35 the lawyer to the participant who provided the information to the lawyer.]
36

37 **Permitted Disclosure or Use of Information Relating to a Client's Representation**

38
39 [15] ~~f9]~~ Although the public interest is usually best served by a strict rule requiring lawyers to
40 preserve the confidentiality of information relating to the representation of their clients, the confidentiality
41 rule is subject to limited exceptions. ~~In becoming privy to information about a client, a lawyer may~~
42 ~~foresee that the client intends serious harm to another person. However, to the extent a lawyer is~~
43 ~~required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts~~
44 ~~which would enable the lawyer to counsel against a wrongful course of action. The public is better~~

1 ~~protected if full and open communication by the client is encouraged than if it is inhibited. Paragraph~~
2 ~~(b)(1), for example, recognizes the overriding value of life and physical integrity and permits disclosure~~
3 ~~reasonably necessary to prevent [imminent] [reasonably certain] death or substantial bodily harm.~~
4 ~~Substantial bodily harm includes life threatening and debilitating illnesses, such as cancer and AIDS, and~~
5 ~~the consequences of child sexual abuse. [Before making the disclosure permitted by this Rule, the~~
6 ~~lawyer must reasonably believe that there is a present threat of probable death or substantial bodily~~
7 ~~harm. If there is such a present threat, the lawyer need not wait until the death or injury is imminent.]~~
8

9 ~~[16] Paragraph (b)(2) permits disclosure of information relating to a client's representation to~~
10 ~~prevent, mitigate or rectify substantial financial loss resulting from the client's abuse of the attorney-~~
11 ~~client relationship. If the client has used or is using the lawyer's services to further the commission of a~~
12 ~~crime or fraud, the client forfeits the protection of this Rule and the lawyer is permitted to make such~~
13 ~~disclosures as are necessary to protect the victims of the client's misconduct. This rule applies in three~~
14 ~~distinct situations. If the client has not engaged in the conduct in question but the lawyer has substantial~~
15 ~~reason to believe that the client will do so, that the conduct will constitute a crime or fraud, and that the~~
16 ~~crime or fraud will result in a substantial financial loss, the lawyer may take such action as is reasonably~~
17 ~~necessary to prevent the client from proceeding as intended. The lawyer may also take such preventive~~
18 ~~action in cases in which the client has already committed a criminal or a fraudulent act, but the loss has~~
19 ~~yet to be suffered by the intended victims. Finally a lawyer will be permitted to take action reasonably~~
20 ~~necessary to mitigate or rectify substantial financial loss that has already been suffered because of the~~
21 ~~past criminal conduct of the client. Disclosure is only permitted, however, if the client has used the~~
22 ~~lawyer's services in furtherance of the crime or fraud. A lawyer's services further the commission of a~~
23 ~~client's crime or fraud if the lawyer has served as a representative of the client in dealings with the~~
24 ~~affected persons or if the client has provided the affected persons with work product prepared by the~~
25 ~~lawyer or has made statements about the lawyer's participation in the matter that will contribute to the~~
26 ~~consummation of the client's crime or fraud. A lawyer does not further a client's crime or fraud if the~~
27 ~~lawyer's participation in the matter is limited to the provision of advice to the client about the legality of~~
28 ~~the client's conduct. The lawyer must not, of course, counsel or assist the client in conduct that is~~
29 ~~criminal or fraudulent. See Rule 1.2(d).~~
30

31 ~~[10] Several situations must be distinguished:~~
32

33 ~~[11] First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent.~~
34 ~~See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty~~
35 ~~is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal~~
36 ~~or fraudulent conduct.~~
37

38 ~~[12] Second, the lawyer may have been innocently involved in past conduct by the client that~~
39 ~~was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to~~
40 ~~"counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.~~
41

42 ~~[13] Third, the lawyer may learn that a client intends prospective conduct that is criminal and~~
43 ~~likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer~~
44 ~~has professional discretion to reveal information in order to prevent such consequences. The lawyer~~

1 may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer
2 reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a
3 heinous purpose will actually be carried out, for the client may have a change of mind.
4

5 [17] Paragraph (b)(3) permits disclosure of information relating to a client's representation in
6 limited situations in which the lawyer's need to conduct his or her practice in a professionally
7 responsible fashion outweighs any adverse effect that the permitted disclosure might have on the client.
8

9 [18] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's
10 conduct or other misconduct of the lawyer involving representation of the client, or the lawyer is
11 otherwise charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality
12 should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil,
13 criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by
14 the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to
15 have been defrauded by the lawyer and client acting together. The lawyer may respond to the extent
16 the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a
17 claim involving the conduct or representation of a former client. [The lawyer's right to respond arises
18 when an assertion of such complicity has been made. Paragraph (b)(4) does not require the lawyer to
19 await the commencement of an action or proceeding that charges such complicity, so that the defense
20 may be established by responding directly to a third party who has made such an assertion. The right to
21 defend, of course, applies where a proceeding has been commenced.] ~~Where practicable and not~~
22 ~~prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third~~
23 ~~party's assertion and request that the client respond appropriately. In any event, disclosure should be no~~
24 ~~greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should~~
25 ~~be made in a manner which limits access to the information to the tribunal or other persons having a~~
26 ~~need to know it, and appropriate protective orders or other arrangements should be sought by the~~
27 ~~lawyer to the fullest extent practicable.~~
28

29 [19] A lawyer entitled to a fee is permitted by paragraph (c)(4) to prove the services rendered
30 in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary
31 relationship may not exploit it to the detriment of the fiduciary. ~~As stated above, the lawyer must make~~
32 ~~every effort practicable to avoid unnecessary disclosure of information relating to a representation, to~~
33 ~~limit disclosure to those having the need to know it, and to obtain protective orders or make other~~
34 ~~arrangements minimizing the risk of disclosure.~~
35

36 [20] Paragraph (b) only permits disclosure or adverse use of information relating to a client's
37 representation if and only to the extent reasonably necessary to accomplish one of the specified
38 purposes. Such disclosure or use must be a last resort. The lawyer must reasonably believe that there
39 is no other way to accomplish the purpose for which disclosure is permitted and that immediate action
40 is required. Prior to disclosure, the lawyer must, if reasonably feasible, make a good faith effort to
41 persuade the client to act so as to obviate the necessity for the lawyer's disclosure or adverse action
42 and to advise the client about the consequences of the client's failure to do so, including whether and to
43 what extent the lawyer is required or permitted by these Rules to disclose or use information relating to
44 the client's representation to prevent the harm in question. If reasonably feasible, the lawyer must also

1 give the client advance notice of the disclosure. Finally, the lawyer must also limit the disclosure to such
2 information as is necessary to accomplish the purpose for which disclosure is permitted. If, for
3 example, a lawyer reasonably believes that notice of the lawyer's withdrawal and a disaffirmation of the
4 lawyer's prior work in a matter will be sufficient to enable the intended victim to prevent the
5 consummation of an ongoing fraud, the lawyer may not provide the affected person with additional
6 detail about the client's conduct in the matter.

7
8 ~~[21] [14]~~ Paragraph (b) does not mandate disclosure or use of information relating to a client's
9 representation to accomplish the specified purposes. In exercising the discretion conferred by this Rule,
10 the lawyer's exercise of discretion requires consideration of the lawyer may consider such factors as the
11 nature of the lawyer's relationship with the client and with those who might be injured by the client, the
12 lawyer's own involvement in the transaction and factors that may extenuate the conduct in question.
13 Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a
14 disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes
15 necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)
16 does not violate this Rule.

17 18 **Mandatory Disclosure or Use of Information Relating to the Representation**

19
20 ~~[22] [21]~~ The Rules of Professional Conduct in various circumstances permit or require a
21 lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In
22 addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give
23 information about a client. A lawyer must conduct his or her practice in compliance with the law,
24 including law which may require the lawyer to reveal information relating to a client's representation.
25 Such law may take the form of a statute, a regulation having the force of law, or a judicial decision.
26 Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of
27 these Rules, but a presumption should exist against such a supersession. A lawyer may refrain from
28 making a disclosure if the lawyer reasonably believes, after reasonable inquiry, that the law in question
29 does not legally obligate the lawyer to make the disclosure in question.

30
31 ~~[23] [20]~~ A lawyer must also comply with a lawful order of a tribunal, an administrative or
32 executive agency, or a legislative body. The attorney-client privilege is differently defined in various
33 jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, or is otherwise
34 ordered to reveal information relating to the client's representation, the lawyer must, absent waiver by
35 informed consent of the client to do otherwise, paragraph (a) requires the lawyer to invoke the privilege
36 when it is applicable. assert on behalf of the client all non-frivolous claims that the information sought is
37 protected against disclosure by the attorney-client privilege or other applicable law [and exhaust the
38 client's rights to appeal adverse rulings on the client's claims]. The lawyer must, however, comply with
39 the final order of a court or other tribunal of competent jurisdiction requiring the lawyer to provide
40 information about the client.

41 42 **Competence and Communication**

1 [24] A lawyer shall act competently to safeguard information relating to the representation of a
2 client against inadvertent or unauthorized disclosure by the lawyer, by other persons who are
3 participating in the representation of the client and who are subject to the lawyer's supervision, [or by
4 any other person to whom the lawyer has provided such information.] See Rules 1.1, 5.1, and 5.3.
5 When transmitting a communication that includes information relating to the representation of a client,
6 the lawyer must take reasonable precautions to prevent its delivery to or interception by unintended
7 recipients, but this duty does not require that the lawyer utilize extraordinary security measures, such as
8 the encryption of electronic mail, if lawyer uses a method of communication that affords the lawyer a
9 reasonable expectation that the communication will only be seen or heard by the intended recipient or
10 recipients.

11
12 [25] Before or within a reasonable time after agreeing to represent a client in a matter, a lawyer
13 who has not previously represented the client shall consult with the client about the lawyer's obligations
14 to protect information relating to the representation and the circumstances in which the lawyer will be
15 required or permitted to reveal or use such information to the disadvantage of the client. If the lawyer
16 subsequently has reason to believe that a client misunderstands the extent to which information relating
17 to the client's representation is protected by this Rule, the lawyer shall act reasonably to correct the
18 misunderstanding. See Rule 1.4.

19 20 **Withdrawal**

21
22 [26] ~~†5†~~ This Rule deals exclusively with confidentiality. It does not address the question of
23 whether the lawyer will be required or permitted to withdraw from the representation of the client in
24 situations in which this Rule is implicated. If, however, the lawyer's services will be used by the client in
25 materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in
26 Rule 1.16(a)(1). As provided in Rule 1.16(b), the lawyer may withdraw if the client persists in a course
27 of conduct the lawyer reasonably believes is criminal or fraudulent, has used the lawyer's services to
28 perpetrate crime or fraud, or insists on pursuing an objective that the lawyer considers repugnant or
29 imprudent. A lawyer who discloses information relating to a client's representation without the client's
30 informed consent may in some cases be required by Rule 1.7 to withdraw from further representation
31 of the client. A lawyer who must testify about his or her representation of a client may in some cases be
32 prohibited by Rule 3.7 from serving as an advocate at the client's trial. ~~†6†~~ After withdrawal, the
33 lawyer's confidentiality obligations are defined by Rule 1.9(c) rather than this Rule. ~~is required to~~
34 ~~refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6.~~
35 Neither this rule, Rule 1.9(c), nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of
36 withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the
37 like.

38
39 ~~†22†~~ The duty specified in this rule of confidentiality continues after the client-lawyer relationship has
40 terminated.

41 **Reporter's Observations**

A. Paragraphs (a), (e), and (f) of the Second Draft

1. Delete paragraph (a) of the Second Draft and transfer its substance to Comment [25].

The Second Draft included a paragraph (a) that provided:

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

As this is a specific application of Rule 1.4, I think it can be included as a Comment and does not need to be elevated into the Rule. I have simply transferred the statement to Comment [25]. I would recommend that this issue be revisited when the Commission works on Rule 1.4.

2. Delete paragraph (e) of the Second Draft and transfer its substance to Comment [20].

The Second Draft included a paragraph (e) that provided:

(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.

As all these actions can be viewed as things that one must do before it is reasonably necessary to disclose information relating to a client's representation, I think they can be included as a Comment and do not need to be elevated into the Rule. I have simply transferred this material to Comment [20].

3. Delete paragraph (f) of the Second Draft and transfer its substance to Comment

[24].

The Second Draft included a paragraph (f) that provided:

(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.]

As this is a specific application of Rule 1.1, I think it can be included as a Comment and does not need to be elevated into the Rule. I have simply transferred the statement to Comment [24]. I would recommend that this issue be revisited when the Commission works on Rule 1.1.

B. Paragraph (a) and Comments [1]-[14]

1. Delete from paragraph (a) the prohibition against using confidential information to the advantage of the client and add Comment [9].

Per vote of the Commission at Wilmington, paragraph (a) has been modified to delete the general prohibition against using information relating to the representation of the client to the advantage of the lawyer or a third person. Comment [1] has been amended to reflect this deletion. This subject is now addressed in Comment [9]. The only action item is the approval of Comment [9].

2. Limit paragraph (a)'s prohibition against the use of confidential information to the disadvantage of a client to uses that are "reasonably likely" to disadvantage the client.

The Commission has rejected the idea of limiting the prohibition against the use of confidential information to the disadvantage of a client to uses that would "materially" disadvantage the client. This proposal is not intended to undo the Commission's resolution of that issue, but rather recognizes that the lawyer will be making a judgment about the likely future effect on the former client of the lawyer's proposed use of information relating to the former client's representation. I think the lawyer should be judged as of the moment the lawyer makes the decision to use the information in question and that the standard for judgment should be whether a reasonable lawyer would have thought it likely (rather than either certain or merely possible) that the client would be disadvantaged by the proposed use. Otherwise the lawyer could be held strictly responsible for any material adverse consequences that resulted from the lawyer's use of the information even though the lawyer could not have reasonably foreseen that the former client would be injured by the lawyer's use of the information. It would also be possible for a lawyer to escape responsibility because the former client fortuitously escaped serious harm that was reasonably likely to be caused by the lawyer's use of the information in question. Neither outcome seems right. The proposed rule would reverse these outcomes.

This idea comes from §111(1)(a) of the Restatement of the Law Governing Lawyers that reads in pertinent part: “the lawyer may not use ... confidential client information ... if there is a reasonable prospect that doing so will adversely affect ... the client.”

3. Replace Model Rule Comments [1], [2], [3], and [4] with a New Comment [1]

I think the first Comment should be a concise statement of the reason for the rule. I think the proposed Comment [1] is more forceful than the Model Rule comments.

4. Add Comment [2].

I think this cross-reference to Rule 1.9 (c) and our forthcoming rule specifying the confidentiality obligations owed by a lawyer to a prospective client is important because the lawyer’s duties differ.

5. Modify Model Rule Comment [5] and renumber as Comment [3].

Comment [3] is a substantially condensed version of the more expansive Comments that were included in the Second Draft for the purpose of explaining the Rule’s reference to “information relating to the representation of a client” and how such information relates to information protected by the attorney-client privilege and the work-product rule. I would also ask the Commission to consider adding the following statements to the Comment:

Information relating to the representation of a client may consist of facts, opinions about facts and law, and information about the law, as well as communications between the lawyer and the client and third persons. Similarly, although not normally privileged, the client’s identity and information about fee arrangements between the lawyer and client (or a third person) constitutes information relating to the lawyer’s representation of the client. If there is an arguable question whether particular information relates to a lawyer’s representation of a client, it must be resolved by reference to the client’s reasonable expectations for confidentiality and loyalty, taking into account the nature and sensitivity of the information, the relevance of the information to the subject matter of the lawyer’s representation, and the circumstances surrounding the lawyer’s acquisition of the information, including the source of the information, the lawyer’s role in the acquisition of the information, and whether the information was acquired prior to or during the lawyer’s representation of the client.

6. Add Comment [4] with respect to Rule 1.6’s application to organizational clients.

A member of the Commission has suggested that the discussion in Comment [4] should be placed in a comment to Rule 1.13. I still think the application of Rule 1.6 to the representation of organizational clients is sufficiently important that it warrants a Comment in Rule 1.6. The second and

third sentences come from Comment [2] to Rule 1.13. I think the only question for the Commission is whether to retain or delete this Comment.

7. Add Comments [5] and [6] with respect to Rule 1.6's application to law firms.

Comments [5] and [6] explain the application to Rule 1.6 to lawyers who are associated with a firm or who, although not associated with the firm, are assisting the firm with its representation of a client. Comment [5] incorporates the decision made by the Commission in Wilmington to require all lawyers who are associated with a firm to fully comply with Rule 1.6 with respect to any information they may possess that relates to the representation of any of the firm's clients. Comment [6] addresses the question of when lawyers will be deemed associated with a law firm. It takes an approach to this matter that is in accord with ABA Formal Ethics Opinion 88-358 (Temporary Lawyers). The question for the Commission is whether this holding of the Ethics Committee is sufficiently important to be incorporated into a Comment. Because of the substantial increase in the number of lawyers working for law firms on a temporary basis and the increased use of lawyer "teams" (as distinct from a firm) to represent a single client in matter, I think a Comment is needed.

8. Delete Model Rule Comment [6]

Model Rule Comment [6] provides that "The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance." I think that it is sufficient to say, as does proposed Comment [4], that governmental agencies are entitled to the protections of the Rule.

9. Add Comments [7] through [9] to explain the core prohibition in paragraph (a).

Comments [7] through [9] explain the prohibitions in paragraphs 1.6 (a)(1) and (2). Comment [7] articulates a standard to be used in determining when a lawyer may use hypotheticals based on information relating to the representation of a client without having "revealed" the underlying information. I think this is an issue that deserves attention in a Comment. Per a suggestion of a member of the Commission, the last three sentences in Comment [8] attempt to make clear that a lawyer can disadvantage a client by using information relating to the client's representation to take a business opportunity in circumstances in which the law of agency gives the client a right of first refusal. Comment [9] then explains the significance of the lack of general prohibition against a lawyer using information relating to a client's representation to the advantage of the lawyer or a third party. Does the Commission think I should add some examples of uses to the advantage of a lawyer or a third person that are permitted by virtue of Rule 1.6's silence on the subject?

10. Add Comment [10].

Comment [10] relates to informed consent. For the moment at least, I have left Comment [10] in place because I think it is a good idea to provide lawyers with some specific guidance about some

information that the client must always have in order for a consent to the disclosure of confidential information to be informed. The discussion of advance consent is consistent with ABA Formal Ethics Opinion 93-372's treatment of anticipatory waivers of future conflicts of interest, but goes beyond that opinion and explicitly permits a lawyer to rely on a client's advance consent to the disclosure or adverse use of information relating to a client's representation so long as the consent was informed in the sense that the circumstances as eventually materialized were specifically within the contemplation of the client at the time the consent was obtained. If advanced consent is eventually addressed in Rule 1.4, this Comment might be modified.

11. Modify Model Rule Comments [7] and [8] and renumber as Comments [11] and [12].

The most substantively significant sentence in Comments [11] and [12] is the sentence in Comment [11] that reads: "Implied authority, however, does not extend to disclosures that present a significant risk that the client might be materially disadvantaged by the disclosure in question." Comment [12] imposes a need-to-know restriction on impliedly authorized disclosures to co-counsel and temporary lawyers who are participating in the representation of a client of a law firm with which they are not "associated." There is no need-to-know restriction on impliedly authorized disclosures among lawyers associated in a firm.

12. Add Comments [13] and [14].

A member of the Commission suggested that the special confidentiality issues associated with joint representations and "cooperative arrangements" be addressed in separate Comments. Please note my proposed treatment of the lawyer's implied authority to share information as necessary to carry out the representation. In a joint representation, the lawyer has such implied authority. In a "cooperative arrangement, the lawyer does not. Do you agree?

Comment [13] is generally in accord with Comment *l* to §112 of the Restatement of the Law Governing Lawyers (Proposed Final Draft No. 1, May 29, 1996), except for that portion of comment *l* that deals with the confidentiality obligations of a lawyer who is required to withdraw from a joint representation because one of the jointly represented clients refuses to permit the lawyer to reveal information that other co-clients need to know. Comment *l* permits not only a warning to the affected co-client "that a matter seriously and adversely affecting that person's interests has come to light, which the other co-client refuses to permit the lawyer to disclose," but also confers upon the lawyer "the further discretion to inform the affected co-client of the specific communication if, in the lawyer's reasonable judgment, the immediacy and magnitude of the risk to the affected co-client outweigh the interest of the communicating client in continued secrecy." The illustrations make clear that the lawyer's discretion in this regard is broader than would be the case if the affected person was not a co-client. To distinguish this from a "noisy withdrawal," I would call this a withdrawal with "a big bang." Comment [13] does not so broaden the lawyer's discretion to reveal one co-client's confidences in order to protect the interests of other co-clients. Unless the lawyer is permitted or required to make the disclosure in question by one of the generally applicable exceptions in Rule 1.6(b) or (c), the lawyer

cannot make a “big bang” in connection with the lawyer’s withdrawal from a joint representation of multiple clients. The core issue for the Commission to resolve is whether traditional confidentiality norms should be modified when lawyers undertake the joint representation of multiple clients. Should the lawyer’s implied authority to reveal information among the jointly represented clients be broadened to include information that would materially disadvantage one of the co-clients? Should there be a special rule that permits a lawyer to disclose one co-client’s confidential information to protect the interests of another co-client in situations in which such disclosure would not be permitted to protect the interests of a person who is not a co-client? I have answered these questions in the negative. If the Commission favors an affirmative answer, I think the answer belongs in the Rule rather than in a Comment.

Comment [14] elevates to Comment status the holding in ABA Formal Ethics Opinion 95-395 (Obligations of a Lawyer Who Formerly Represented A Client in Connection with a Joint Defense Consortium). The bracketed language contemplates a new rule articulating the duties of a lawyer to a non-client who confidentially provides information to the lawyer that is related to the lawyer’s representation of a client.

C. Paragraph (b)(1) and Comment 15

1. Substitute “reasonably certain” for “imminent” in paragraph (b)(1).

I have modified paragraph (b) (1) to reflect the Commission’s decisions in Wilmington with respect to disclosures for the purpose of preventing death, bodily harm, illness and sexual abuse, but I am now recommending that Commission replace the requirement that the death or substantial bodily harm be imminent with a less restrictive requirement that the death or substantial bodily harm be “reasonably certain.” This is in accord with the change in the wording of §117A of the Restatement of the Law Governing Lawyers that was included in Proposed Final Draft No. 2 (April 6, 1998). This draft was not available when we discussed this matter in Wilmington. I share the concern set forth in Comment *d* to §117 that the concept of imminence is subject to an overly narrow interpretation that the lawyer has to wait until death was literally at the victim’s doorstep. I think the lawyer should be able to take action in response to a present threat of probable death or bodily harm even if the death or harm appears likely to occur sometime in the future.

2. Modify Model Rule Comment [9] and renumber as Comment [15].

Comment 15 makes it clear that “substantial bodily harm includes life threatening and debilitating illness, such as cancer and AIDS, and the consequences of child sexual abuse.” The bracketed language explains the significance of the proposed requirement that the death or substantial bodily harm be “reasonably certain” rather than “imminent.” The bracketed language will be deleted if the Commission retains the requirement the death or substantial bodily harm be imminent.

3. Delete Model Rule Comment [13].

This Comment is unnecessary in light of the changes in paragraph (b)(1) and the adoption of

D. Paragraph (b)(2) and Comment [16]

1. Add paragraph (b)(2) to permit disclosure to prevent, mitigate, or rectify substantial financial loss caused by a client's crime or fraud in the furtherance of which the lawyer's services were used.

a. Our discussion in Wilmington indicated considerable sentiment in favor of the adoption of a single rule that would permit disclosure to prevent, mitigate or rectify substantial financial loss resulting from a client's crime or fraud, but only in cases in which the client had used the lawyer's services in furtherance of the crime or fraud.

b. I have required that the lawyer have "substantial reason to believe" that a substantial loss has been or will be suffered and that the loss was or will be the result of the client's criminal or fraudulent conduct. I use this strict standard because I think doubts about intended conduct or the characterization of that conduct must be resolved in favor of the client. A lawyer should be as sure as possible before publicly accusing his or her client of a crime of fraud. The only stricter standard would be a "knowledge standard" and one cannot "know" the future. One can only know the past and whether intended or past conduct is properly characterized as criminal or fraudulent. Having combined the prevention of future losses and the rectification and mitigation of past loss into a single Rule, I think that using a substantial reason to believe standard makes the most sense. If the Commission wants to require that the lawyer know that the conduct of the client is criminal but wants to allow the lawyer to act if the lawyer reasonably believes the loss will be suffered, I would suggest the following wording:

(2) to prevent, mitigate or rectify substantial financial loss that the lawyer has reason to believe will result, or has resulted, from conduct of the client that the lawyer knows is criminal or fraudulent and in the furtherance of which the client has used the lawyer's services.

c. By way of a alternative, I am still recommending that the Commission adopt a slightly modified version of my prior proposal that treats prevention of future loss and the mitigation or rectification of loss already suffered in separate paragraphs and permits disclosure to prevent substantial loss even though the lawyer's services had not been used to further the client's crime. The two exceptions would read as follows:

(2) to prevent substantial injury to the financial or property interests of a person if the lawyer has [substantial] reason to believe that there is a significant likelihood that such injury will result from conduct of the client that the lawyer knows is criminal or fraudulent; or

(3) to rectify or mitigate substantial injury to the financial or property interests of a person the lawyer knows has been caused by the criminal or fraudulent conduct of the

client in a matter in which the lawyer's services were utilized by the client to further the crime or fraud; or

d. Background - Preventing Loss: By way of background with respect to permitting disclosure for the purpose of preventing loss likely to be caused by future criminal or fraudulent conduct, § 117B of the Restatement of the Law Governing Lawyers only permits disclosure if the lawyer's services were used or will be used by the client in furtherance of the crime or fraud. The Chief Reporter (Charles Wolfram), however, was strongly opposed to limiting disclosure for the purpose of preventing substantial financial loss to situations in which the lawyer's services has been used in furtherance of the client's crime or fraud. As explained by Professor Wolfram, an earlier draft that did not limit disclosure to situations in which the client was using or had used the lawyer's services to commit the crime or fraud was premised on "a balance between protecting interests in client confidentiality and protecting the interests of society and third persons against known client wrongs." The draft that was eventually approved was premised "on concepts of waiver - reflecting the judgment that the client's wrongful abuse of the client-lawyer relationship and the consequent threat of implicating the innocent lawyer are both necessary, together with social interest in preventing harm, to warrant setting aside the general rule of confidentiality in the case of financial harm." Eight jurisdictions currently permit and three jurisdictions currently require disclosure in circumstances involving crimes and non-criminal frauds that are likely to result in substantial injury to another person's financial or property interests. None of these jurisdictions condition disclosure upon the nature of the lawyer's involvement in the client's conduct. Twenty-five jurisdictions permit and one requires a lawyer to reveal the intention of her client to commit a crime without regard to the amount of injury inflicted upon the intended victim. In these jurisdictions, however, a lawyer will not be permitted to reveal non-criminal frauds even if the fraud was likely to cause substantial injury to the financial or property interests of another. It would be my guess that such jurisdictions would be more likely to expand their exception to permit disclosure to prevent frauds than they would be to limit the exception to situations in which the client had used or would be using the lawyer's services in furtherance of a crime or fraud. I would also remind the Commission that the original proposal of the Kutak Commission permitted 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." This language was deleted from the final draft. Most recently, however, the drafters of the Draft Federal Rules of Attorney Conduct have proposed the adoption of Rule 2(b)(1) that permits a lawyer to reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary "to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or in substantial injury to another's financial interests or property." My views accord with the Kutak Commission, Professor Wolfram, and the Draft Federal Rule.

e. Background - Mitigating or Rectifying Loss: By way of background with respect to the separate issue of permitting disclosure to mitigate or rectify substantial financial loss that has resulted from a client's crime or fraud in which the lawyer's services have been used in furtherance of the crime or fraud, the Commission should also be aware that a rule permitting such disclosure would still represent a minority view. There are only thirteen jurisdictions that currently permit disclosure to rectify

the consequences of a crime or fraud in the commission of which the client used the lawyer's services. Twenty-nine jurisdictions do not permit such disclosure. There are also eight jurisdictions in which DR 7-102(B)(1) of the ABA Model Code of Professional Responsibility (or a variation thereof) remains in force. In pertinent part DR 7-102(B) provides that "a lawyer who receives information clearly establishing that ... his client has, in the course of the representation, perpetrated a fraud upon a person ... shall ... reveal the fraud to the affected person..., except when the information is protected as a privileged communication." The prevailing interpretation of this Rule, however, is that confidentiality generally trumps disclosure. The Commission should also consider that the Kutak Commission's original draft provided that "a lawyer may reveal such information to the extent the lawyer reasonably believes necessary to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used." This provision was deleted from the version approved by the House of Delegates. In 1991 a proposal to add similar language to Rule 1.6(b) was defeated in the House of Delegates by a 251-158 margin. The Draft Federal Rules of Attorney Conduct do not permit disclosure to rectify or mitigate substantial financial loss. §117B of the Restatement of the Law Governing Lawyers, on the other hand, allows disclosure for the purpose of mitigating or rectifying substantial financial loss resulting from a client's crime or fraud in which the client has used the lawyer's services. On this issue, I side with the Restatement rather than the majority in the House of Delegates.

2. Add Comment [16].

Comment [16] attempts to differentiate the three distinct situations in which disclosure will be permitted by this Rule. I have also tried my hand at an explanation of what is meant by the reference in the Rule to the use of the lawyer's services in furtherance of the client's crime or fraud.

3. Delete Model Rule Comments [10] through [12].

If the Commission approves Comment [16], I think that these Comments are unnecessary.

E. Paragraph 1.6(b)(3) and Comment [17]

1. Delete paragraph (b)(3) and incorporate its substance into a Comment permitting the disclosures as being impliedly authorized to carry out the representation.

A member of the Commission suggested that I transfer as many of these exceptions as possible to a Comment that would categorize them disclosures that are impliedly authorized in order to carry out the representation. I have not done so at this time because a client can countermand impliedly authorized disclosures by prohibiting the lawyer from making the disclosures in question. I do not think a client should be able to prohibit a lawyer from doing what Rule 1.6(b)(3) permits. If the Committee so instructs, however, I can draft a Comment that explains that a lawyer is impliedly authorized to make certain limited disclosures as are reasonably necessary for the lawyer to conduct the lawyer's practice in accordance with the Rules and other law. I would then list the exceptions currently listed in Rule 1.6(b)(3) as examples. This would make it unnecessary for the lawyer to secure the client's consent to the specified disclosures, but would allow a client to withdraw the lawyer's implied authority. Listing the

exceptions in Rule 1.6(b)(3) precludes the client from prohibiting the disclosures. This is a fundamental decision that needs to be resolved by vote of the Commission.

2. Add paragraph 1.6(b)(3)(i).

Paragraph 1.6(b)(3)(i) is intended to prevent the situation that arose in the OPM case in which the client went to another law firm, did not reveal to the new firm what had been disclosed to the former law firm, and then proceeded to use the services of the new firm to continue the fraud that had been revealed to the former firm.

3. Add paragraph 1.6(b)(3)(ii).

Paragraph 1.6(b)(3)(ii) permits such limited disclosures as are necessary to prevent the inadvertent disqualification of law firms because they bring in a lawyer without knowledge that the lawyer has a conflict of interest relative to an existing client of the firm. The exception is carefully worded to limit the exception to the minimum amount of information need to “identify” conflicts. This would normally include no more than the identity of clients represented and a general statement of the nature of the representation. Such information is information relating to the client’s representation. Consequently, unless we want to require lawyers to ask their clients for permission to make these disclosures, an exception is needed. A lawyer should not, however, be permitted to make such a disclosure if it would materially disadvantage the client.

4. Add paragraph 1.6(b)(3)(iii).

Paragraph (b)(3)(iii) finds support in Kershen, “Further Thoughts on the Ethics of Ethics Consultation,” 1997 Symposium Issue of the Professional Lawyer 7 (1997). Professor Kershen proposes the adoption of a rule that would permit a lawyer to “reveal such information to the extent the lawyer reasonably believes necessary ... to consult a non-affiliated lawyer about a client matter involving a bona-fide ethical dilemma so long as the consulting lawyer establishes a confidential relationship with the consulted lawyer.” Lawyers, like others, may find themselves in need to secure legal advice about the conduct of their business (profession). As long as the lawyer protects the confidentiality interests of the client by establishing an attorney-client relationship with the consulted lawyer, I do not think a client ought to be able to preclude the lawyer from securing the advice of an independent lawyer about what the lawyer is permitted or required to do, or prohibited from doing, in connection with the lawyer’s representation of the client.

5. Add paragraph (b)(3)(iv).

Paragraph (b)(3)(iv) finds support in Arkansas’ Rule 1.6(c) that provides: “Neither this Rule nor Rule 1.8 (b) prevents the lawyer from giving notice of the fact of withdrawal “ This language is taken from Comment [16] of the Model Rule.

6. Add paragraph (b)(3)(v).

Paragraph (b)(3)(v) takes an intermediate position between New York’s DR 4-101(c)(5) and Arkansas’s Rule 1.6(c). The New York rule provides that “A lawyer may reveal ... confidences and secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied on by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.” The Arkansas rule more broadly states that a lawyer “may ... withdraw or disaffirm any opinion, document, affirmation or the like.” This language is taken from Comment [16] of the current Model Rule. This issue is also addressed in ABA Formal Ethics Opinion 92-366.

F. Paragraph 1.6(b)(4) and Comments [18] and [19]

Per a suggestion from a member of the Commission, I have eliminated the subparagraphing that was used in the Second draft. Relative to the Model Rule, the current draft calls for the Commission to resolve four issues:

1. Should the lawyer be required to wait until criminal charges or civil claims are “formally instituted?”

This proposal comes from the D.C. Rules. My sense is that the D.C. bar was concerned about lawyers being too quick to assert their right to self-defense and that opposing lawyers might try to take advantage of this inclination by threatening to file claims or complaints in the hope that the lawyer will try to exonerate himself by disclosing information that might be damaging to the client. The effect of the D.C. modification is to limit the self-defense exception. §116 of the Restatement of the Law Governing Lawyers, on the other hand, provides that “[a] lawyer may use or disclose confidential information when and to the extent that the lawyer reasonably believes it necessary in order to defend the lawyer or the lawyer’s associate or agent against **a charge or threatened charge** by any person that the lawyer or such associate or agent acted wrongfully in the course of representing the client.” (Emphasis supplied). If the Commission chooses to require the lawyer to wait until formal charges or claims have been filed, the bracketed language in Comment [18] - which indicates that a lawyer does not have to await until the commencement of a proceeding - will have to be deleted and the Comment will probably need revision.

2. Should the self-defense exception be limited to “specific” allegations?

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

3. Should the lawyer be permitted to make disclosures to protect other persons who have also participated in the representation of the client?

I added the reference to “a person associated with the lawyer” to incorporate into the rule the

ABA Model Code's extension of the self-defense exception to the lawyer's employee's and associates. I chose the broad reference to "a person associated with the lawyer" so that it includes not only other lawyers and personnel in the lawyer's firm, but other lawyers and non-legal personnel who might be involved in the representation of the client and might be wrongly accused of wrongdoing in connection with the representation. I do not think it is necessary to refer to both associates and agents in the rule.

4. Should the lawyer's right to use confidential information be limited to reasonable claims, defenses, and responses?

I would like the Commission to consider whether the right of the lawyer to reveal confidential client information should be limited to disclosures necessary to establish "reasonable" claims or defenses. This is obviously more restrictive than Rule 3.1 which only prohibits frivolous claims. Because of the importance of confidentiality and possibility of misuse of the fee-collection and self-defense exceptions, I think that disclosure should only be permitted where the claim or defense is reasonable. It is interesting to note in this regard that §116 of the Restatement of the Law Governing Lawyers does not require that a lawyer's defense to a criminal or civil charge be reasonable, but that §117 of the Restatement provides that "[a] lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes necessary in order to permit the lawyer to resolve a dispute with the client concerning compensation or reimbursements that the lawyer **reasonably claims to be due**." (Emphasis supplied).

G. Comments [20] and [21]

1. Add Comment [20] discussing when disclosure will be deemed reasonably necessary.

Paragraph (b) only permits disclosure or use of information relating to the representation of a client to the extent the lawyer reasonably believes is necessary to accomplish one of the specified purposes. Comment [20] identifies some things that a lawyer must do in order to establish that disclosure is reasonably necessary. Most of what is said in this comment was previously contained in paragraph (e) of the Second Draft. The requirement that the lawyer make a good faith effort to persuade the client to act properly and advise the client of the consequences of a failure to do so finds support in §§ 117A(2) and 117(B)(3) of the Restatement of the Law Governing Lawyers. The requirement that the lawyer give the client advance notice of the disclosure (if doing so is reasonably feasible) is derived from Rule 1.4's general duty to keep a client reasonably informed about the status of the representation.

2. Modify Comment [14] and renumber as Comment [21].

The changes are minor.

H. Paragraph 1.6(c) and Comments [22] and [23]

1. Add Paragraph 1.6(c) or modify Paragraph 1.6(a).

Per a suggestion of a member of the Commission, I have proposed a bare bones rule and have transferred most of what was in paragraphs (c)(1) and (c) (2) in the Second Draft to Comments [22] and [23].

An alternative approach would be to delete paragraph (c) and revise paragraph (a) to read:

(a) Unless the client gives informed consent or the disclosure or use is permitted by paragraph (b) or is required by these Rules or other law, a lawyer shall not

(1) reveal information relating to the representation of a client, except for disclosures that are impliedly authorized in order to carry out the representation;
or

(2) use such information relating to representation of a client to the reasonably likely disadvantage of a client.

2. Modify Model Rule Comment [21] and renumber as Comment [22].

The most important sentence in Comment [22] is the last sentence that reads: “A lawyer may refrain from making a disclosure if the lawyer **reasonably believes**, after reasonable inquiry, that the law in question does not legally obligate the lawyer to make the disclosure.” The key issue here is whether we should permit the lawyer to remain silent “if the lawyer has a **non-frivolous** reason for believing that the law in question does not legally obligate the lawyer to make the disclosure.”

3. Modify Model Rule Comment [20] and renumber as Comment [23].

Prior to our January meeting, a member of the Commission raised a question about the bracketed language in Comment [23]. The member thought that the decision whether to appeal a decision denying a claim of privilege should remain a matter of practical judgment rather than an ethical requirement. The Comment 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 the Comment 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 disclosure 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 the lawyer. Thus I prefer the Comment as currently formulated.

I. Comments [24] and [25]

1. Add Comment [24].

Comment [24] contains the substance of what was paragraph (f) in the Second Draft.

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

A member of the Commission has recommended the deletion of the bracketed reference to “any other person to whom the lawyer has provided such information.” The concern is that it is unrealistic to expect a lawyer to monitor the conduct persons to whom confidential information is given. I do not think, however, that exercise of reasonable care would require monitoring. But it probably would require that the lawyer secure from the recipient a promise to maintain the confidentiality of the information provided by the lawyer.

I have added a sentence that I think roughly summarizes the direction in which Ethics Committees have been headed with respect to the use of new technology, such as facsimile and e-mail, for communication of confidential information. Most are not requiring encryption of e-mail. I thought that ought to be explicitly addressed in the Comment, but I also thought that the Comment should specifically remind lawyers that they are required to take reasonable precautions, as distinct from the employment of extraordinary security measures, when using either modern or old-fashioned methods of communicating confidential information. The draft leaves open the possibility that extraordinary security measures may be required in the rare case in which the means of communication used in a particular situation would not afford the lawyer a reasonable expectation of privacy.

2. Add Comment [25].

Comment [25] contains the substance of what was paragraph (a) in the Second Draft. I am not aware of any jurisdiction that has adopted such a provision. The idea for such a requirement comes from Pizzamante, “The Lawyer’s Duty To Warn Clients About The Limits Of Confidentiality,” 39 Catholic U.L. Rev. 441 (1990). The author’s conclusion is that a failure to so warn or consult with a client about limitations would be unethical and constitute actionable malpractice. I agree. Such consultation may already be required by Rule 1.4.

J. Comment [26]

1. Combine and modify Model Rule Comments [15] and [16] into Comment [26].

This Comment is intended to draw the lawyer’s attention to the withdrawal issues that can be

entangled with confidentiality issues. Its primary purpose is to distinguish the withdrawal issues from the confidentiality issues and provide cross-references to the pertinent Rules.