

9/16/98
PROPOSED RULE 1.6 - 5th Draft
for discussion in Chicago, September 27 and 28, 1998

Confidentiality of Information

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

1 (a) A lawyer shall not reveal information relating to the representation of a client, and shall not use
2 such information to the client's disadvantage, unless the client gives informed consent,
3 the disclosure or use is impliedly authorized in order to carry out the representation, or the disclosure or
4 use is permitted by paragraph (b) or required by paragraph (c).

5
6 (b) A lawyer may reveal or use information relating to the representation of a client to the extent the
7 lawyer reasonably believes necessary:

8
9 (1) to prevent ~~the client from committing a criminal act that the lawyer believes is likely~~
10 ~~to result in~~ [imminent] [reasonably certain] [probable] death or substantial bodily harm;

11
12 (2) to prevent the client from committing a crime or fraud that is likely to result in
13 substantial injury to the financial interests or property of another and in the furtherance
14 of which the client is using, or has used, the lawyer's services;

15
16 (3) to rectify or mitigate substantial injury to the financial interests or property of another
17 that has resulted from the client's commission of a crime or fraud in the furtherance of
18 which the client has used the lawyer's services;

19
20 (4) to secure confidential legal advice about the lawyer's compliance with these Rules; or

21
22 (5) to establish a claim or defense on behalf of the lawyer in a controversy between the client
23 and the lawyer, to establish a defense to a criminal charge or civil claim against the lawyer that
24 is based upon conduct in which the client was involved, or to respond in any proceeding to
25 allegations concerning the lawyer's representation of the client.

26
27 (c) A lawyer shall reveal or use information relating to the representation of a client to the extent
28 required by law or court order, or when necessary to comply with Rules 3.3, ____, ____, or ____.

COMMENT

1 ~~1. The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions~~
2 ~~is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.~~
3

1 2. The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the
2 client not only facilitates the full development of facts essential to proper representation of the client but
3 also encourages people to seek early legal assistance.
4

5 3. Almost without exception, clients come to lawyers in order to determine what their rights are and
6 what is, in the maze of laws and regulations, deemed to be legal and correct. The common law
7 recognizes that the client's confidences must be protected from disclosure. Based upon experience,
8 lawyers know that almost all clients follow the advice given, and the law is upheld.
9

10 [1] [4] A fundamental principle in the client-lawyer relationship is that, in the absence of the
11 client's informed consent, the lawyer must not reveal information relating to the representation and also
12 must not use such information to the disadvantage of the client. This contributes to the trust that must be
13 a hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance
14 and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging
15 subject matter so that the lawyer will have all the information the lawyer needs to effectively represent
16 the client and, if necessary, to advise the client to refrain from wrongful conduct. The prohibition against
17 the use by the lawyer of information relating to the representation to the client's disadvantage is derived
18 from the lawyer's general duty of loyalty to the client.
19

20 **Information Relating to the Representation of a Client**

21
22 [2] This Rule governs the disclosure or use by a lawyer of information relating to the
23 representation of a client during the course of the lawyer's representation of the client. See Rule [] for
24 the duties a lawyer owes to a prospective client. See Rule 1.9 for the lawyer's duties to former clients.
25
26

27 [3] [5] The principle of lawyer-client confidentiality is given effect by the law of evidence and
28 civil procedure as well as by these Rules. related bodies of law, the attorney-client privilege (which
29 includes the work product doctrine) in the law of evidence and the rule of confidentiality established in
30 professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a
31 lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The
32 work product rule applies in civil discovery proceedings and affords a defense against a request for
33 production of documents prepared in anticipation of litigation. As a matter of professional
34 responsibility, however, this Rule more broadly requires a lawyer to preserve the confidentiality of
35 information relating to the representation of the client. The rule of client-lawyer confidentiality, for
36 example, applies in situations other than those where evidence is sought from the lawyer through
37 compulsion of law. The confidentiality rule applies not only to matters communicated in confidence by
38 the client but also to all any other information relating to the representation, whatever its source, that a
39 client would expect the lawyer to keep confidential because disclosure might be embarrassing or
40 detrimental or because the client had requested the lawyer to treat the information as confidential. A
41 lawyer may not disclose such information except as authorized or required by the Rules of Professional
42 Conduct or other law. See also Scope.
43

44 [6] The requirement of maintaining confidentiality of information relating to representation

1 applies to government lawyers who may disagree with the policy goals that their representation is
2 designed to advance.

3
4 [4] Organizational clients, including governmental agencies, are entitled to the protection of this
5 Rule. When one of the a constituent of an organizational client communicates with the organization's
6 lawyer in his or her the person's organizational capacity, the communication is protected by Rule 1.6 as
7 information relating to the representation of the organizational client. Thus, by way of example, if an
8 organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the
9 course of that investigation between the lawyer and the client's employees or other constituents are
10 covered by Rule 1.6. The lawyer's duty to protect this information is a duty owed to the organizational
11 client, and disclosure of such information to persons not associated with the organization, or the use of
12 such information to the disadvantage of the organization, requires the informed consent of a duly
13 authorized organizational constituent.

14 **Protecting Information Related to the Representation of the Client**

15
16
17 [5] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of
18 a client that the client would not expect the lawyers to share with others. This prohibition also applies
19 to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably
20 lead to the discovery of such information by a third person. Using an anonymous "hypothetical" to
21 discuss issues relating to the representation of a client, for example, does not ordinarily reveal
22 information relating to the client's representation, but informed client consent will be required if there is
23 a reasonable likelihood that the hypothetical would permit discovery of other information that the lawyer
24 would not be permitted to reveal.

25
26 [6] Paragraph (a) also prohibits a lawyer from using information relating to a client's
27 representation to the disadvantage of the client. Learning by virtue of the representation of a client that
28 the client intends to purchase and develop several parcels of land, for example, a lawyer may not seek
29 to purchase one of the parcels in competition with the client. Also, if by virtue of his or her
30 representation of a client in a business matter, a lawyer comes to know of the availability of a related
31 business opportunity of which the client is unaware, the lawyer may be under a legal obligation to refrain
32 from taking the opportunity without first affording the client an opportunity to do so. The lawyer's
33 undisclosed seizure of the opportunity would disadvantage the client by depriving the client of a first
34 option to which he or she was legally entitled. Such a use of information relating to the representation
35 of the client violates the lawyer's duty of loyalty to the client.

36
37 [7] In some situations, a lawyer may be able to use information relating to the representation of
38 a client for the advantage of the lawyer or a third person without revealing the information to others.
39 The lawyer may do so provided that the use of the information does not disadvantage the client or
40 violate client instructions, is not dishonest, fraudulent or deceitful, and does not constitute a crime that
41 reflects substantially on the lawyer's fitness to practice law. See Rule 8.4.

42 **Informed Consent and Impliedly Authorized Disclosures**

1
2 [8] A client's consent to the disclosure or use of information protected by this Rule must be
3 informed and secured by the lawyer in advance of the disclosure or use in question. See the definition
4 of "informed consent" in Rule []. A lawyer may not seek a client's consent to a disclosure or use of
5 information relating to the client's representation if so doing would be inconsistent with the lawyer's
6 duties to competently and loyally represent the client. See Rules 1.1 and Rule 1.7.
7

8 [9] [7] A lawyer is impliedly authorized to make disclosures about a client when appropriate in
9 carrying out the representation, except to the extent that the client's instructions or special circumstances
10 limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that
11 cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory
12 conclusion.
13

14 [10] [8] Lawyers associated in a firm may, in the course of the firm's practice, are impliedly
15 authorized to disclose to each other information relating to a client of the firm, unless the client has
16 instructed that particular information be confined to specified lawyers. This implied authorization also
17 extends to disclosures on a need-to-know basis to lawyers who are not associated with the firm but
18 who are participating in the representation of the client in the matter either as an independent co-counsel
19 or as a temporary lawyer. See Rule [] with respect to the need for the lawyer to secure client
20 consent prior to associating co-counsel or permitting a temporary lawyer to participate in the client's
21 representation.
22

23 **Joint Representation of Multiple Client and Common-Interest Arrangements Among** 24 **Separately Represented Clients** 25

26 [11] If a lawyer is jointly representing multiple clients in a matter, each client is, absent informed
27 consent to the contrary, entitled to the full protection of this Rule. Information relating to the joint
28 representation provided to the lawyer by one of the clients will be regarded as information relating to
29 the representation of each client. The lawyer who is jointly representing the clients must obtain the
30 informed consent of each of the clients before disclosing protected information to third persons. In the
31 absence of instructions to the contrary, however, a lawyer jointly representing multiple clients is
32 impliedly authorized to share information relating to the representation with all the clients to the extent
33 necessary to accomplish the objectives of the joint representation. See Rule 1.7 for the lawyer's duties
34 if a conflict of interest arises because one jointly-represented client refuses to permit the lawyer to
35 disclose to another jointly-represented client information relating to the representation that the other
36 client needs to know in order make informed decisions about the representation.
37

38 [12] Occasionally, clients represented by separate lawyers will agree to cooperate with each
39 other in connection with a matter in which they have a common interest. It is common in such
40 arrangements for the clients to agree to share information relating to the matter in which they have a
41 common interest. This Rule specifies the duties of each lawyer to his or her own client to protect
42 information relating to such a common-interest arrangement. [See Rule [] for the duty of the lawyer to
43 abide by confidentiality agreements between the lawyer's client and other participants in such an
44 arrangement.]

1
2 **Permitted Disclosure or Use of Information Relating to a Client's Representation**
3

4 [13] ~~{9}~~ Although the public interest is usually best served by a strict rule requiring lawyers to
5 preserve the confidentiality of information relating to the representation of their clients, the confidentiality
6 rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may
7 foresee that the client intends serious harm to another person. However, to the extent a lawyer is
8 required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts
9 which would enable the lawyer to counsel against a wrongful course of action. The public is better
10 protected if full and open communication by the client is encouraged than if it is inhibited. Paragraph
11 (b)(1), for example, recognizes the overriding value of life and physical integrity and permits disclosure
12 reasonably necessary to prevent [probable] death or substantial bodily harm. Substantial bodily harm
13 includes life threatening and debilitating illnesses, such as cancer and AIDS, and the consequences of
14 child sexual abuse. The lawyer must reasonably believe that a person will [probably] die or suffer
15 substantial bodily harm unless the lawyer reveals information otherwise protected by this Rule. Death or
16 substantial bodily harm is [probable] not only if it will be suffered immediately, but also if there is a
17 present and substantial threat that a person will suffer such injury at a later date.
18

19 [14] Paragraphs (b)(2) and b(3) permit disclosure of information relating to a client's
20 representation to prevent the client from committing a crime or fraud that is likely to result in substantial
21 injury to the financial or property interests of another or to rectify or mitigate such loss that has resulted
22 from the client's commission of a crime of fraud. Disclosure is only permitted, however, in situations in
23 which the client is using or has used the lawyer's services in furtherance of the crime or fraud. Such a
24 serious abuse of the client-attorney relationship warrants the forfeiture of the protections afforded by
25 this Rule. A lawyer's services further the commission of a client's crime or fraud, for example, if the
26 lawyer has represented the client in dealings with the affected persons or the client has provided the
27 affected persons with work product prepared by the lawyer, and such actions facilitate the
28 consummation of the client's crime or fraud. A lawyer does not further a client's crime or fraud,
29 however, if the lawyer's participation in the matter is limited to the provision of advice to the client
30 about the legality of the client's conduct. The lawyer must not, of course, counsel or assist the client in
31 conduct that the lawyer knows is criminal or fraudulent. See Rule 1.2(d).
32

33 ~~{10}~~ Several situations must be distinguished.
34

35 [11] First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent.
36 See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty
37 is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal
38 or fraudulent conduct.
39

40 [12] Second, the lawyer may have been innocently involved in past conduct by the client that
41 was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to
42 "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.
43

44 [13] Third, the lawyer may learn that a client intends prospective conduct that is criminal and

1 likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer
2 has professional discretion to reveal information in order to prevent such consequences. The lawyer
3 may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer
4 reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a
5 heinous purpose will actually be carried out, for the client may have a change of mind.
6

7 ~~[15] If the lawyer's services will be used by the client in materially furthering a course of
8 criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).~~
9

10 ~~[16] After withdrawal, the lawyer is required to refrain from making disclosure of the client's
11 confidences, except as otherwise provided in Rule 1.6. Neither this rule, Rule 1.9(c), nor Rule 1.16(d)
12 prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or
13 disaffirm any opinion, document, affirmation, or the like.~~
14

15 ~~[17] Where the client is an organization, the lawyer may be in doubt whether contemplated
16 conduct will actually be carried out by the organization's constituents. Where necessary to guide
17 conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in
18 Rule 1.13(b).~~
19

20 [15] A lawyer's confidentiality obligations should not preclude a lawyer from securing legal
21 advice about the lawyer's personal responsibility to comply with these Rules. Paragraph (b)(4),
22 therefore, permits the lawyer to reveal information relating to a client's representation to the extent
23 necessary to secure such advice. In other situations in which the lawyer may want to reveal information
24 relating to the client's representation in order to secure advice or assistance, the lawyer must secure the
25 informed consent of the client or determine that the disclosure is impliedly authorized to carry out the
26 representation.
27

28 [16] [H8] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a
29 client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may
30 respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true
31 with respect to a claim involving the conduct or representation of a former client. Such a charge can
32 arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly
33 committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a
34 person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to
35 respond arises when an assertion of such complicity has been made. Paragraph (b)(2)(4) does not
36 require the lawyer to await the commencement of an action or proceeding that charges such complicity,
37 so that the defense may be established by responding directly to a third party who has made such an
38 assertion. The right to defend, of course, applies where a proceeding has been commenced. ~~Where~~
39 ~~practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise~~
40 ~~the client of the third party's assertion and request that the client respond appropriately. In any event,~~
41 ~~disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence,~~
42 ~~the disclosure should be made in a manner which limits access to the information to the tribunal or other~~
43 ~~persons having a need to know it, and appropriate protective orders or other arrangements should be~~
44 ~~sought by the lawyer to the fullest extent practicable.~~
45

1 ~~[17] [19] If the lawyer is charged with wrongdoing in which the client's conduct is implicated,~~
2 ~~the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a~~
3 ~~charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a~~
4 ~~wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for~~
5 ~~example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer~~
6 ~~entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect~~
7 ~~it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not~~
8 ~~exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort~~
9 ~~practicable to avoid unnecessary disclosure of information relating to a representation, to limit~~
10 ~~disclosure to those having the need to know it, and to obtain protective orders or make other~~
11 ~~arrangements minimizing the risk of disclosure.~~

12
13 [18] Paragraph (b) only permits disclosure to the extent reasonably necessary to accomplish
14 one of the purposes specified in subparagraphs (b)(1)-(5). Prior to disclosure, the lawyer must, if
15 reasonably feasible, make a good faith effort to persuade the client to act so that it will be unnecessary
16 for the lawyer to do so and to advise the client about the consequences of the client's failure to do so.
17 If reasonably feasible, the lawyer must also give the client advance notice of the disclosure. If
18 disclosure is permitted, the lawyer must limit the disclosure to such information as is reasonably
19 necessary to accomplish the purpose for which disclosure is permitted. If, for example, a lawyer
20 reasonably believes that notice of the lawyer's withdrawal and a disaffirmation of the lawyer's prior
21 work in a matter will be sufficient to enable the intended victim to prevent the consummation of an
22 ongoing fraud, the lawyer may not provide the affected person with additional detail about the client's
23 conduct in the matter. If disclosure is necessary to defend against charges of misconduct or to collect a
24 fee, the disclosure ~~should~~ must be made in a manner which limits access to the information to the
25 tribunal or other persons having a need to know it, and appropriate protective orders or other
26 arrangements should be sought by the lawyer to the fullest extent practicable.

27
28 [19] [14] Paragraph (b) permits but does not require the disclosure or use of information
29 relating to a client's representation to accomplish the purposes specified in paragraphs
30 (b)(1)-(5). In exercising the discretion conferred by this Rule, ~~The lawyer's exercise of discretion~~
31 requires consideration of the lawyer may consider such factors as the nature of the lawyer's relationship
32 with the client and with those who might be injured by the client, the lawyer's own involvement in the
33 transaction and factors that may extenuate the conduct in question. ~~Where practical, the lawyer should~~
34 seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's
35 interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's
36 decision not to take preventive action permitted by paragraph (b) does not violate this Rule.

37 38 **Mandatory Disclosure or Use of Information Relating to the Representation**

39
40 [20] [21] The Rules of Professional Conduct in various circumstances permit or require a
41 lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In
42 addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give
43 information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of
44 interpretation beyond the scope of these Rules, but a presumption should exist against such a

1 supersession. A lawyer may refrain from making a disclosure if the lawyer reasonably believes, after
2 reasonable inquiry, that the law in question does not legally obligate the lawyer to make the disclosure in
3 question.

4
5 [21] ~~{20}~~ A lawyer must also comply with lawful orders of a tribunal, an administrative or
6 executive agency, or a legislative body. ~~The attorney-client privilege is differently defined in various~~
7 ~~jurisdictions.~~ If a lawyer is called as a witness to give testimony concerning a client, or is otherwise
8 ordered to reveal information relating to the client's representation, the lawyer must, absent waiver by
9 informed consent of the client to do otherwise, ~~paragraph (a) requires the lawyer to invoke the privilege~~
10 ~~when it is applicable.~~ assert on behalf of the client all non-frivolous claims that the information sought is
11 protected against disclosure by the attorney-client privilege or other applicable law. The lawyer must,
12 however, comply with the final order of a court or other tribunal of competent jurisdiction requiring the
13 lawyer to provide information about the client.

14 **Acting Competently to Preserve Confidentiality**

15
16
17 [22] A lawyer shall act competently to safeguard information relating to the representation of a
18 client against inadvertent or unauthorized disclosure by the lawyer, by other persons who are
19 participating in the representation of the client and who are subject to the lawyer's supervision, [or by
20 any other person to whom the lawyer has provided such information.] See Rules 1.1, 5.1, and 5.3.

21
22 [23] When transmitting a communication that includes information relating to the representation
23 of a client, the lawyer must take reasonable precautions to prevent it from coming into the hands of
24 unintended recipients. This duty, however, does not require that the lawyer utilize extraordinary
25 security measures, such as encryption, if the method of communication employed by the lawyer affords
26 a reasonable expectation that the communication will only be accessible to the intended recipient or to a
27 person whose access is necessary for its transmission and who can be expected to honor the
28 confidentiality of the communication. Factors to be considered in determining the reasonableness of the
29 lawyer's expectation of confidentiality include the sensitivity of the information, and the extent to which
30 the privacy of the communication is protected by law or by a confidentiality agreement. In most cases a
31 lawyer need not implement special security measures when communicating information relating to the
32 representation of a client by telephone, cellular phone, telegraph, facsimile or electronic mail. A client
33 may require the lawyer to implement special security measures not required by this Rule or may give
34 informed consent to the use of a means of communication that would otherwise be prohibited by this
35 Rule.

36
37 [24] ~~{22}~~ The duty of confidentiality continues after the client-lawyer relationship has been
38 terminated. See Rule 1.9(c).

Reporter's Observations

A. Rule Text

1. 1.6(a) and Comment [3]: Disclosure and use of confidential information prohibited; disclosure and use of other information prohibited only if disadvantageous to client.

Several concerns about the prior draft of Rule 1.6(a) were aired at our meeting in Toronto:

1. The Rule should begin with the basic prohibition rather than with a string of exceptions.
2. The relocation of Rule 1.8(b) into Rule 1.6(a) had created some uncertainty about the relationship between the two rules - one of which is a confidentiality rule and the other of which is a conflict of interest rule.
3. Taken at face value, the Toronto draft (and the current Model Rule) prohibits harmless disclosures of non-confidential information relating to a client's representation. Some Commissioners voiced the concern that this prohibition was too broad. This is an issue that was initially discussed and tentatively resolved during our meeting in Wilmington, but it resurfaced in Toronto. More recently, this issue has been called to the attention of the Commission by the memorandum of David Isbell to Margy Love in which he explained his concern that:

“... there is a lot of information that relates to the representation of most clients but that nonetheless is attended by no expectation or interest of the client that would be betrayed by disclosure, and few if any lawyers would think for a moment that disclosure of such information was ethically prohibited. Thus, the Rule is clearly not meant to be read literally, but it provides no guidance as to how much less than literal its reach is meant to be.”

Professor Tom Morgan has shared similar concerns with the Reporters. He indicated a preference for the Model Code protection of “confidences” and “secrets” and his hope that this matter would be addressed either in the Rule or by way of a Comment.

4. The Toronto draft did not permit use (as distinct from disclosure) of protected information as even though such use was impliedly authorized to carry out the representation.

The Reporter was asked to draft an alternative that would prohibit the disclosure and use of information only if doing so would disadvantage the client and an alternative that would address disclosure and use in separate paragraphs. Because of some of the Comments I have received since our meeting in Toronto I have also prepared two alternatives that try to limit the scope of Rule 1.6(a) to confidential information and to such other information that a client would expect to be kept confidential.

a. Reporter's recommendation: The proposed draft of Rule 1.6(a) is consistent with the substance of both Model Rules 1.6(a) and 1.8(b) and allows both the disclosure and use of information if impliedly authorized to carry out the representation. On its face, however, this proposal does not

respond to concerns about the “overbreadth” of the Rule’s reference to “information relating to the representation of a client.” The Reporter recommends that the Commission address such concerns by including the following statement in proposed Comment [3]:

“The confidentiality rule applies not only to matters communicated in confidence by the client but also to all any other information relating to the representation, whatever its source, that a client would expect the lawyer to keep confidential because its disclosure might be embarrassing or detrimental or because the client had requested the lawyer to treat the information as confidential.

The purpose of the highlighted language is to limit the broad reference to “information relating to the representation of a client” so that it will be understood to embrace all confidential information relating to a client’s representation and only such other information about the representation that the client would expect the lawyer to keep confidential, such as embarrassing or potentially harmful information. Without using the labels, then, this Comment generally limits “information relating to the representation of a client” to what the Model Code referred to as “confidences” and “secrets.” The only difference is that the Comment refers more generally to confidential information, rather than to information specifically protected by the attorney-client privilege. Beyond this nothing is said, suggesting that information acquired by the lawyer that the client would not expect to be kept confidential - i.e., that was not transmitted to the lawyer in confidence or likely to be embarrassing or harmful - is not related to the representation for the purposes for Rule 1.6.

Although the replacement of the Model Code’s protection of “confidences” and “secrets” by Model Rule’s protection of “information relating to the representation of a client” was a well-intended effort to broaden the lawyer’s confidentiality obligations, the Reporter concurs with the concerns aired by David Isbell and Tom Morgan and recommends adoption of this commentary to limit Rule 1.6’s protection to information that clients expect to be kept confidential. Although the Comment cuts back on the meaning that normally would be ascribed to a broad reference to “information relating to the representation of a client,” I think it is consistent with what most clients and lawyers would think to be the intended purpose for Rule 1.6.

b. Alternative 1: Revise Rule 1.6(a) to prohibit disclosure and use of confidential information and to prohibit disclosure and use of other information only if disadvantageous to the client.

Such a rule would read:

(a) A lawyer shall not reveal or use confidential information relating to the representation of a client, and shall not reveal or use other information relating to the representation of the client to the client’s disadvantage, unless the client

gives informed consent, the disclosure or use is impliedly authorized in order to carry out the representation, or the disclosure or use is permitted by paragraph (b) or required by paragraph (c).

The Reporter thinks that this alternative is awkward and prefers use of commentary to narrow the breadth of the Rule's reference to "information relating to the representation of a client." I also do not think that the overbreadth issue is of such paramount importance that it requires resolution in the rule text.

c. Alternative 2: Disclosure and use only prohibited if disadvantageous to the client

As a possible solution to the overbreadth problem, the Reporter was asked to prepare a draft of Rule 1.6(a) that would permit disclosures and uses of client information would not disadvantage the client. It was also suggested that such a rule would make it unnecessary to specify an exception for "impliedly authorized disclosures." The rule would read:

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

The problem with this formulation is that it would permit the disclosure of confidential or privileged information without client consent so long as the disclosure would not disadvantage the client. This would not have been permitted under the Model Code, is not permitted by the Model Rule, and would represent a major relaxation of the lawyer's confidentiality obligation. For that reason, the Reporter does not recommend adoption of this alternative.

d. Alternative 3: Disclosure and use in separate paragraphs.

The Commission asked the Reporter to prepare a draft that treated disclosure and use of client information in separate paragraphs. Such an alternative draft would read:

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

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client, unless the client gives informed consent, or the use is permitted by paragraph (c) or required by paragraph (d).

Were the Commission to approve this alternative, the “overbreadth” problem could be addressed by adopting proposed Comment [3]. Commentary could also be added to explain that paragraph (a) is a confidentiality rule and that paragraph (b) is a conflict of interest rule. If need be, we could also add commentary to explain why there is no exception in paragraph (b) for uses that are impliedly authorized to carry out the representation. The Reporter sees nothing to be gained by treating disclosure and use in separate paragraphs.

2. Paragraph (b)(1): disclosure or use necessary to prevent “imminent,” “reasonably certain”, or “probable” death or bodily harm

In Montreal, the Commission tentatively approved a tersely formulated paragraph (b)(1) that permitted disclosure “to the extent the lawyer reasonably believes necessary to prevent death or substantial bodily harm.” In Toronto, the Commission revisited this issue and voted to add a requirement that the death or bodily harm be “imminent.” After more discussion, the Commission asked the Reporter to draft a comment explaining that an imminence requirement would not require the lawyer to wait until death was at the doorstep and to consider other possible formulations of the Rule text.

a. Alternative 1: “Imminent” death or substantial bodily harm.

After voting to retain the Model Rule requirement that death or bodily harm be “imminent,” the Commission instructed the Reporter to draft a single sentence that would be added to a Comment and indicate that the “imminence” requirement does not mean that the lawyer has to wait until death is at the doorstep. Such a sentence might read:

Death or substantial bodily harm is imminent not only if it will be suffered immediately, but also if there a present and substantial threat that a person will suffer such injury at a later date.

This sentence is consistent with Comment *d* to §117A of the Restatement of the Law Governing Lawyers that serves as an explanation of the Restatement’s requirement that the death or bodily harm be “reasonably certain.” The problem with this comment language is that it bears no resemblance to the standard dictionary definition of “imminent” as “likely to occur at any moment.” The Reporter does not recommend that the Commission explain imminence in these terms.

b. Alternative 2: “reasonably certain” death or substantial bodily harm.

As an alternative, the Commission could track §117A of the Restatement and require that the death or bodily harm be “reasonably certain.” This would be coupled with a Comment that would read:

Death or substantial bodily harm is reasonably certain not only if it will be suffered immediately, but also if there is a present and substantial threat that a person will suffer such injury at a later date.

My only concern about this formulation is that it uses “reasonably” in a way that differs from how “reasonably” is used throughout the Model Rules. As used to modify death or substantial harm, I think the drafters of the Restatement used the phrase “reasonably certain” to convey the sense that the lawyer must only be moderately rather than completely certain. They wanted the reasonable lawyer to be “pretty sure” or “confident.” According to Model Rule terminology, however, “‘reasonable’ and ‘reasonably’ when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.” This would suggest that the reference to “reasonably certain death or substantial bodily harm” should be construed to require that the lawyer be “certain” that death or substantial bodily will be suffered and that the lawyer’s determination must comport with the judgment of a reasonably prudent and competent lawyer. Although a Comment to Rule 1.6(b)(1) could make clear that we are using “reasonably certain” in the Restatement sense of the term, I think we should, if at all possible, restrict our use of “reasonable” or “reasonably” to situations in which we want to require the lawyer to act as would a prudent and competent lawyer. I would, therefore, only recommend using a reference to “reasonably certain” death or substantial bodily harm if there is no other way in which we can tersely convey the sense that the reasonable lawyer must be pretty sure or confident, but does not have to be certain, that death or substantial injury will result if the lawyer remains silent.

c. Alternative 3: “probable” death or substantial bodily harm

This formulation avoids the problem associated with the reference to “reasonable certainty.” One accepted meaning of “probable” implies a “strong” or “substantial” likelihood that death or injury will result if the lawyer does not act. It does not, however, imply certainty. The Comment language would read:

Death or substantial bodily harm is probable not only if it will be suffered immediately, but also if there is a present and substantial threat that a person will suffer such injury at a later date.

The lawyer’s judgment will still have to be reasonable because Rule 1.6(b) requires that the lawyer “reasonably believe” that the disclosure is “necessary” to prevent the “probable” injury. The problem with this alternative is that probable is sometimes used as a synonym for “likely” and might also cause some lawyers to think in terms of probable cause rather than in terms of a substantial or significant likelihood. Additional commentary might be necessary to clarify the precise sense in which we are using the term.

d. Alternative 4: “the Montreal formulation.”

Preferring a terse formulation of this exception and having struggled without complete success

to come up with an appropriate modifier, the Reporter requests that the Commission reconsider using the formulation that was tentatively approved in Montreal:

(b) “the lawyer may disclose ... to the extent the lawyer reasonably believes necessary

(1) to prevent death or substantial bodily harm.”

Comment language could be added to specify that:

Disclosure is reasonably necessary to prevent death or substantial bodily harm not only if the injury is imminent, but also if there is a present and substantial threat that a person will suffer such injury at a later date.

I think this Comment works quite well as an explanation of the requirement that the lawyer reasonably believe that disclosure is “necessary” to prevent death or substantial bodily harm. This suggests that there may be no need to add an adjective to modify the Rule’s reference to death or substantial bodily harm. To the extent additional commentary is needed to explain nuances, such commentary can be tied to the Rule’s requirement that the disclosure be necessary.

d. Reporter’s Recommendation: Given the primacy of life and bodily integrity, the Reporter recommends the adoption of the formulation approved in Montreal - a terse grant of permission to a lawyer to reveal client information to the extent the lawyer “reasonably believes necessary” to prevent death or substantial bodily harm, with resort to commentary to the extent necessary to convey the message that the lawyer must be careful not to jump to premature conclusions, but that the lawyer need not wait until the last possible moment before taking preventive action. If, however, the Commission concludes that a modifier is needed, I would recommend using “probable” rather than “reasonably certain.”

3. Paragraph (b)(2): prevention of client crimes or frauds “in the furtherance of which the lawyer’s services have been or are being used.”

a. Reporter’s Recommendation: This draft reflects the Commission’s decision that lawyers should be permitted to reveal client information to prevent the client from committing a crime or fraud only if the lawyer’s services were used by the client in furtherance thereof.

I recommend that the Commission retain paragraph (b)(2) rather than combining it with paragraph (b)(3) because most states treat prevention of crimes and frauds separately from the rectification or mitigation of loss resulting from such crimes and frauds.

b. Alternative: Prevention and rectification in a single paragraph.

Although I do not recommend combining paragraphs (b)(2) and (3) into a single paragraph, the

Commission's decision to limit preventive disclosure to situations in which the client has used or is using the lawyer's services to perpetrate the crime or fraud would permit such a joinder. The paragraph would read:

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

(2) to prevent, rectify or mitigate substantial injury to the financial interests or property of another resulting from the client's commission of a crime or fraud in the furtherance of which the client is using, or has used, the lawyer's services;

4. Deletion of paragraph (b) (5) from prior draft

In Toronto, the Commission referred paragraph (b)(5) of the prior draft back to the Reporter for further review. The Commission voted to delete the first two subparagraphs because the specified disclosures were deemed to be "impliedly authorized." No final action was taken with respect to paragraph (b)(5)(iii) that permitted disclosure to enable the lawyer "to disaffirm a communication that the lawyer has previously made on behalf of the client and that the lawyer has reason to believe is false or misleading."

The Reporter has not included this paragraph in this draft. Whether a lawyer should be allowed to disaffirm a statement the lawyer has made on behalf of a client should be reconsidered when the Commission reviews Rule 4.1.

B. Comments

Comment [1]: Purpose of Rule

Comment [1] replaces Model Rule Comments [1], [2], [3], and [4].

Comment [2]: Cross Reference To Other Confidentiality Rules

Comment [2] is new. It cross-references the other confidentiality rules.

Comment [3]: Information Relating to Representation

Comment [3] is a modification of Model Rule Comment [5]. Its purpose is to explain 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. See the

discussion of this Comment in the Reporter's Observations about Rule 1.6(a).

Comment [4]: Organizational Clients

Although taken in part from Comment [2] to Model Rule 1.13, this Comment is basically new. Its purpose is to explain how Rule 1.6 applies to organizational clients. A member of the Commission has suggested that this discussion should be placed in a comment to Rule 1.13. I 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.

Comment [5]: Hypotheticals

Comment [5] is new and offers and 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. See the discussion of "shop talk" in G. Hazard & W. Hodes, *The Law of Lawyering*, Vol. 1, §1.6:202 (1997) in which the authors explain:

In functional terms, the line between permissible and impermissible disclosure should probably be drawn at the point of anonymity: a lawyer may talk shop if she is virtually certain that the listeners could not ascertain the identity of the client or the situation involved.

Comment [6]: Using Information to Disadvantage of Client

Comment [6] is new and offers an explanation of the prohibition against using information to the disadvantage of a client. Per a suggestion of a member of the Commission, the last three sentences in Comment [6] 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 [7]: Using Information For Advantage of Lawyer or Third Person

Comment [7] is new and 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.

Comment [8]: Informed Consent

Comment [8] is new and serves as a cross-reference to the proposed definition of informed consent. It also explains that the lawyer is precluded from asking a client to give informed consent if doing so would violate Rule 1.1 (competence) or Rule 1.7(conflict of interest).

Comment [9]: Impliedly Authorized Disclosures

Comment [9] is identical to Model Rule Comment [7].

Comment [10]: Disclosure Among Associated Lawyers

Comment [10] supplements Model Rule Comment [8] with 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.

Comment [11]: Joint Representation

Comment [11] is new and explains the application of Rule 1.6 to the joint representation of multiple clients by a single lawyer. Each client is entitled to the full protection of the Rule, but is deemed to have impliedly authorized such disclosures to the other clients as are necessary for them to make informed decisions with respect to the matter. This implied authority may be trumped by any client. The Comment alerts the lawyer that this may give rise to a conflict between the lawyer’s Rule 1.6 duty to that client and his or her Rule 1.4 duties to the other client[s] and directs the lawyer to Rule 1.7.

Comment [12]: Common Interest Arrangements Among Separately Represented Persons

Comment [12] is new and explains the application of Rule 1.6 to “common interest arrangements” between individuals each of whom is represented by his or her own lawyer. This Comment incorporates 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 the lawyer with information that is related to the lawyer’s representation of a client.

Comment [13]: Disclosure Necessary to Prevent [Probable] Death

Comment [13] replaces Model Rule Comments [9] and [13] and explains Paragraph (b)(1)’s permission to reveal client information to prevent death or substantial bodily harm.

The questions for the Commission’s review are:

Should substantial bodily harm be explained as including “life threatening and debilitating illness, such as cancer and AIDS?” Comment *c* to §117A of The Restatement includes “life-threatening illness” within the meaning of “serious bodily harm.”

Should substantial bodily harm be explained as including “the consequences of child sexual abuse?” Comment *c* to §117A of The Restatement includes “the consequences of events such as ... child sexual abuse” within the meaning of “serious bodily harm.”

I have drafted the Comment on the assumption that the Rule will permit disclosure to prevent “probable” death or substantial bodily harm. See the Reporter’s Observations about Rule 1.6(b)(1) for a discussion of the alternative ways in which this exception might be formulated. If the Commission one of the alternative formulations, the Comment can be modified accordingly.

Comment [14]: Disclosure to Prevent, Rectify or Mitigate Substantial Injury to Financial or Property Interests

Comment [14] is new and explains paragraphs 1.6(b)(2) and (3). The primary purpose of the Comment is to highlight and explain the requirement that the client have used or be using the lawyer’s services in furtherance of the crime or fraud.

The Reporter is proposing that this Comment replace Model Rule Comments [10], [11] and [12] (that explain Rule 1.2(d)’s prohibition against assisting a client commit a crime or fraud) and Comments [15], [16] and [17] (that address withdrawal from the representation of a client who is going to use the lawyer’s services to further a fraud or crime). These comments are not directly pertinent to Rule 1.6, and if such commentary is needed, the Reporter recommends they be incorporated into the Comments to Rule 1.2(d) and Rule 1.16

Comment [15]: Legal Advice for the Lawyer

Comment [15] is new and explains paragraph 1.6(b)(4)’s grant of permission to a lawyer to reveal client information to the extent necessary to secure legal advice about the lawyer’s personal legal and professional responsibilities in connection with the representation of the client.

Comment [16]: Lawyer Self-Defense

Comment [16] is identical to Model Rule Comment [18] except for addition of the third sentence (taken verbatim from Model Rule Comment [19]) and the deletion of the last two sentences. The last two sentences deal with issues now addressed in proposed Comment [18].

Comment [17]: Collecting Fees

Comment [17] is identical to Model Rule Comment [19], except for the deletion of the first sentence, the transfer of the second sentence to proposed Comment [16], and deletion of the last sentence. The point made in the last sentence is now made more generally in proposed Comment [18].

Comment [18]: Disclosure To the Extent Lawyer Reasonably Believes Necessary To ...

Comment [18] is new and attempts to specify some of the steps a lawyer may have to take before he or she can reasonably believe that disclosure is necessary to accomplish one of the purposes specified in paragraphs (b)(1) - (5). This Comment takes the place of sentences that have been deleted from the Model Rule counterparts to proposed Comments [16], [17] and [19].

Comment [19]: The Lawyer's Discretion

Comment [19] tracks Model Rule Comment [14] except for the deletion of two sentences that address issues now covered in proposed Comment [18].

Comment [20]: Disclosure Mandated by Law

Comment [20] is identical to Model Rule Comment [21] except for the addition of the last sentence that provides: "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."

Comment [21]: Disclosure Mandated by Order of Tribunal

Comment [21] is substantively identical to Model Rule Comment [20], but has been reworded to refer to more situations in which a lawyer might be ordered to reveal confidential information and to require the lawyer to invoke all non-frivolous claims that the information is privileged.

Comment [22]: Competence re Confidentiality

Comment [22] is new and sets forth the responsibility of the lawyer to competently safeguard information relating to a client's representation. 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 employees, associates and others 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.

Comment [23]: Electronic Transmission of Confidential Information

Comment [23] is new and addresses the lawyer's duty of care when transmit confidential information. I have taken a case-by-case approach with a tilt in favor of allowing use of unencrypted e-mail in the ordinary course of lawyer-client communications. Although there is a split of authority with respect to the need for encryption of e-mail, I believe this comment is consistent with the trend in recent Ethics Committee decisions as discussed in the thoughtful May 21, 1998 Discussion Draft of the Report of the Lawyer Business Ethics Committee's Task Force on E-Mail Privacy (provided to the Commission in Montreal). The Task Force concluded its Report with a cautious call for consultation by the lawyer with the client prior to the use unencrypted e-mail for confidential communications. The Report, however, does not call for a per se ban on the use of unencrypted e-mail without client consent. It would be fair to say that the tone of the Task Force's report is more cautionary than the proposed comment.

Comment [24]: Confidentiality After Termination of Representation

Comment [24] is identical to Model Rule Comment [22] except for the addition of the cross reference to Rule 1.9(c).