

WORKING DRAFT - FOR USE BY ETHICS 2000 COMMISSION ONLY

11/23/1998

PROPOSED RULE 1.6 - 6th Draft
for discussion in Philadelphia, December 11 & 12, 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 [or a former client]
2 unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the
3 representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).
4

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

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

10
11 (2) to prevent the client from committing a crime or fraud that is likely to result in
12 substantial injury to the financial interests or property of another and in the furtherance
13 of which the client has used or is using the lawyer's services;...

14
15 (3) to rectify or mitigate substantial injury to the financial interests or property of another
16 that has resulted resulting from the client's commission of a crime or fraud in the
17 furtherance of which the client has used the lawyer's services;

18
19 (4) to secure legal advice about the lawyer's compliance with these Rules; or

20
21 (5) to establish a claim or defense on behalf of the lawyer in a controversy between the client
22 and the lawyer, to establish a defense to a criminal charge or civil claim against the lawyer that
23 is based upon conduct in which the client was involved, or to respond in any proceeding to
24 allegations concerning the lawyer's representation of the client.
25

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

COMMENT

1 ~~1. The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's~~

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1 functions is to advise clients so that they avoid any violation of the law in the proper exercise of their
2 rights.

3
4 [1] This Rule governs the disclosure by a lawyer of information relating to the representation of
5 a client both during and after the lawyer's representation of the client. See Rule 1.8(b) and 1.9(c) with
6 respect to the use of such information to the disadvantage of a client or a former client. [Also see Rule [
7] with respect to lawyer's confidentiality duty to prospective clients.]

8
9 [2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information
10 of the client not only facilitates the full development of facts essential to proper representation of the
11 client but also encourages people to seek early legal assistance.

12
13 [3] Almost without exception, clients come to lawyers in order to determine what their rights
14 are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law
15 recognizes that the client's confidences must be protected from disclosure. Based upon experience,
16 lawyers know that almost all clients follow the advice given, and the law is upheld.

17
18 [4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain
19 confidentiality of information relating to the representation. This contributes to the trust that is the
20 hallmark of the client-lawyer relationship. The client is thereby encouraged to communicate fully and
21 frankly with the lawyer even as to embarrassing or legally damaging subject matter.

22
23 [5] The principle of lawyer-client confidentiality is given effect by related bodies of law, the
24 attorney-client privilege (which includes the work-product doctrine) in the law of evidence, the work-
25 product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client
26 privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or
27 otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality
28 applies in situations other than those where evidence is sought from the lawyer through compulsion of
29 law. The confidentiality rule, for example, applies not only to matters communicated in confidence by
30 the client but also to all information relating to the representation, whatever its source. A lawyer may not
31 disclose such information except as authorized or required by the Rules of Professional Conduct or
32 other law. See also Scope.

33
34 [6] The requirement of maintaining confidentiality of information relating to representation
35 applies to government lawyers who may disagree with the policy goals that their representation is
36 designed to advance.

37
38 [7] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of
39 a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal
40 protected information but could reasonably lead to the discovery of such information by a third person.
41 A lawyer's use of hypotheticals to discuss issues relating to the representation is permissible so long as
42 there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the

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1 situation involved.

2
3 Authorized Disclosure

4
5 [8] [7] A lawyer is impliedly authorized to make disclosures about a client when appropriate in
6 carrying out the representation, except to the extent that the client's instructions or special circumstances
7 limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that
8 cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory
9 conclusion.

10
11 [9] [8] Lawyers in a firm may, in the course of the firm's practice, disclose to each other
12 information relating to a client of the firm, unless the client has instructed that particular information be
13 confined to specified lawyers.

14
15 Disclosure Adverse to Client

16
17 [10] [9] ~~Although the public interest is usually best served by a strict rule requiring lawyers to~~
18 ~~preserve the confidentiality of information relating to the representation of their clients, the confidentiality~~
19 ~~rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may~~
20 ~~foresee that the client intends serious harm to another person. However, to the extent a lawyer is~~
21 ~~required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts~~
22 ~~which would enable the lawyer to counsel against a wrongful course of action. The public is better~~
23 ~~protected if full and open communication by the client is encouraged than if it is inhibited. Paragraph~~
24 ~~(b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably~~
25 ~~necessary to prevent reasonably certain death or substantial bodily harm. Substantial bodily harm~~
26 ~~includes life threatening and debilitating illnesses and the consequences of child sexual abuse. Such~~
27 ~~injuries are reasonably certain to occur if they will be suffered imminently or if there is a present and~~
28 ~~substantial threat that a person will suffer such injuries at a later date if the lawyer fails to take action~~
29 ~~necessary to eliminate the threat. [Thus, a lawyer who knows that a client has accidentally discharged~~
30 ~~toxic materials waste into a town's water supply may reveal this information to the authorities if there is~~
31 ~~a present and substantial risk that a person who drinks the water will contract a life-threatening or~~
32 ~~debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number~~
33 ~~of victims.]~~

34
35 [10] Several situations must be distinguished.

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

41
42 [12] Second, the lawyer may have been innocently involved in past conduct by the client that

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1 was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to
2 "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.
3

4 ~~[13] Third, the lawyer may learn that a client intends prospective conduct that is criminal and~~
5 ~~likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer~~
6 ~~has professional discretion to reveal information in order to prevent such consequences. The lawyer~~
7 ~~may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer~~
8 ~~reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a~~
9 ~~heinous purpose will actually be carried out, for the client may have a change of mind.~~

10
11 ~~[15] If the lawyer's services will be used by the client in materially furthering a course of~~
12 ~~criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).~~

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

18
19 ~~[11] [17] Paragraph (b)(2) is a limited exception to the confidentiality principle that enables the~~
20 ~~lawyer to reveal information relating to the representation of a client to the extent necessary to prevent~~
21 ~~the client from committing a crime or fraud that is likely to result in substantial injury to the financial or~~
22 ~~property interests of another and in furtherance of which the client has used or is using the lawyer's~~
23 ~~services. Such serious abuse of the client-lawyer relationship by the client forfeits the protection of this~~
24 ~~Rule and frees the lawyer to protect the victims of the client's misconduct. The client can, of course,~~
25 ~~prevent such disclosure by refraining from the wrongful conduct. Where the client is an organization,~~
26 ~~the lawyer may be in doubt whether contemplated conduct will actually be carried out by the~~
27 ~~organization's constituents. Where necessary to guide conduct in connection with this Rule, the lawyer~~
28 ~~may make inquiry within the organization as indicated in Rule 1.13(b).~~

29
30 ~~[12] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's~~
31 ~~crime or fraud until after it has been consummated and the loss has been suffered by the victim.~~
32 ~~Although the client no longer has the option of preventing disclosure by refraining from the wrongful~~
33 ~~conduct, there will be situations in which the loss suffered by the victim can be rectified or mitigated. In~~
34 ~~such situations, the lawyer may reveal such information as is necessary to secure substantial relief for the~~
35 ~~victim. This properly enables the lawyer to help those who have been victimized by wrongful conduct~~
36 ~~in which the lawyer was implicated because of the client's abuse of the client-lawyer relationship.~~

37
38 ~~[13] A lawyer's services further a client's commission of a crime or fraud if the lawyer~~
39 ~~represents the client in dealings with the affected persons or the client provides the affected persons~~
40 ~~with work product prepared by the lawyer. A lawyer does not further a client's crime or fraud,~~
41 ~~however, if the lawyer's participation in the matter is limited to giving advice to the client about the~~
42 ~~legality of the client's conduct. See Rule 1.2(d). Also see Rule 1.16 with respect to the lawyer's~~

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1 obligation or right to withdraw from the representation of the client in such circumstances.
2

3 [14] A lawyer's confidentiality obligations do not preclude a lawyer from securing legal advice
4 about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing
5 information to secure such advice will be impliedly authorized for the lawyer to carry out the
6 representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such
7 disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.
8 For the protection of the client, such disclosures may be made only if they will be protected by the
9 attorney-client privilege.
10

11 [15] [H8] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a
12 client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may
13 respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true
14 with respect to a claim involving the conduct or representation of a former client. Such a charge can
15 arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly
16 committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a
17 person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to
18 respond arises when an assertion of such complicity has been made. Paragraph (b)(2)(5) does not
19 require the lawyer to await the commencement of an action or proceeding that charges such complicity,
20 so that the defense may be established by responding directly to a third party who has made such an
21 assertion. The right to defend, of course, applies where a proceeding has been commenced. Where
22 practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise
23 the client of the third party's assertion and request that the client respond appropriately. In any event,
24 disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence,
25 the disclosure should be made in a manner which limits access to the information to the tribunal or other
26 persons having a need to know it, and appropriate protective orders or other arrangements should be
27 sought by the lawyer to the fullest extent practicable.
28

29 [16] [H9] ~~If the lawyer is charged with wrongdoing in which the client's conduct is implicated,~~
30 ~~the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a~~
31 ~~charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a~~
32 ~~wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for~~
33 ~~example, a person claiming to have been defrauded by the lawyer and client acting together.~~ A lawyer
34 entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect
35 it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not
36 exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort
37 practicable to avoid unnecessary disclosure of information relating to a representation, to limit
38 disclosure to those having the need to know it, and to obtain protective orders or make other
39 arrangements minimizing the risk of disclosure.
40

41 [17] [H4] Paragraph (b) permits but does not require the disclosure or use of information
42 relating to a client's representation to accomplish the purposes specified in paragraphs

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1 ~~(b)(1)-(5). In exercising the discretion conferred by this Rule, The lawyer's exercise of discretion~~
2 ~~requires consideration~~ of the lawyer may consider such factors as the nature of the lawyer's relationship
3 with the client and with those who might be injured by the client, the lawyer's own involvement in the
4 transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should
5 seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's
6 interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's
7 decision not to take preventive action permitted by paragraph (b) does not violate this Rule.

8
9 **Disclosure Otherwise Required or Authorized**

10
11 [18] ~~{21}~~ The Rules of Professional Conduct in various circumstances permit or require a
12 lawyer to disclose information relating to the representation. See Rules ~~2.2~~, 2.3, 3.3 and 4.1. In
13 addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give
14 information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of
15 interpretation beyond the scope of these Rules, but a presumption should exist against such a
16 supersession.

17
18 [19] ~~{20}~~ A lawyer must also comply with lawful orders of a tribunal, an administrative or
19 executive agency, or a legislative body. ~~The attorney-client privilege is differently defined in various~~
20 ~~jurisdictions.~~ If a lawyer is called as a witness to give testimony concerning a client, or is otherwise
21 ordered to reveal information relating to the client's representation, the lawyer must, absent waiver by
22 informed consent of the client to do otherwise, paragraph (a) requires the lawyer to invoke the privilege
23 when it is applicable. assert on behalf of the client all non-frivolous claims that the information sought is
24 protected against disclosure by the attorney-client privilege or other applicable law. The lawyer must,
25 however, comply with the final order of a court or other tribunal of competent jurisdiction requiring the
26 lawyer to provide information about the client.

27
28 **Acting Competently to Preserve Confidentiality**

29
30 [20] A lawyer must act competently to safeguard information relating to the representation of a
31 client against inadvertent or unauthorized disclosure by the lawyer or by other persons who are
32 participating in the representation of the client or who are subject to the lawyer's supervision. See Rules
33 1.1, 5.1, and 5.3.

34
35 [21] When transmitting a communication that includes information relating to the representation
36 of a client, the lawyer must take reasonable precautions to prevent the information from coming into the
37 hands of unintended recipients. This duty, however, does not require that the lawyer utilize special
38 security measures if the method of communication affords a reasonable expectation of privacy. Special
39 circumstances, however, may warrant special precautions. Factors to be considered in determining the
40 reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information
41 and the extent to which the privacy of the communication is protected by law or by a confidentiality
42 agreement. A client may require the lawyer to implement special security measures not required by this

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1 Rule or may give informed consent to the use of a means of communication that would otherwise be
2 prohibited by this Rule.

3

4

~~Former Clients~~

5

6 ~~[22] The duty of confidentiality continues after the client-lawyer relationship has been~~
7 ~~terminated.~~

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Reporter's Observations

A. Rule Text

1. Paragraph 1.6(a): "Former Client"

With the exception of the proposed addition of the reference to a former client, Paragraph 1.6(a) was approved by the Commission in Chicago after it voted to leave the prohibition against use of information to the disadvantage of the client in Rule 1.8(b) rather than incorporate it into Rule 1.6.

The Reporters are now recommending the addition to Paragraph (a) (and to paragraphs (b) and (c) as well) of a reference to former clients. We are doing this in conjunction with our recommendation to delete Rule 1.9(c)(2) (duty of the lawyer not to reveal information relating to the representation of a former client.) The Reporters recommend this change because Rule 1.9(c)(2) is a confidentiality rule that seems misplaced in the middle of a series of conflict of interest rules. This misplacement seems all the more evident because the 1.9(c)(2) duty not to reveal information regarding a former client is identical to the Rule 1.6 duty not to reveal information regarding a currently represented client.

Our proposal will significantly improve the organization of the Rules - with confidentiality comprehensively addressed in Rule 1.6 and conflicts of interests then addressed in Rules 1.7 through 1.12. We recognize that this proposal might be seen as tinkering inconsistent with our minimalist principle, but we believe that the currently disjointed treatment of confidentiality is an organizational defect worthy of correction. In this regard, it is interesting to note that only 13 jurisdictions have adopted Rule 1.9(c)(2) since it was added to the Model Rules in 1989. About twice that number use a version of Rule 1.9 that contains a provision comparable to 1.9(c)(1) but does not include a provision comparable to 1.9(c)(2).

Our proposal is premised on the assumption that the confidentiality duty a lawyer owes to a former client is the same as the duty owed to a currently represented client. A question has been raised, however, about the fact that Rule 1.9(c)(1) permits a lawyer to use information to a former client's disadvantage if the information is generally known, but that Rule 1.9(c)(2) does not similarly permit the disclosure of generally known information. The question is whether Rule 1.9(c)(2) should be conformed to Rule 1.9(c)(1) so that a lawyer is only prohibited from revealing information relating to a former client's representation if the information is not generally known. Support for such a proposal can be found in the Restatement of the Law Governing Lawyers. If the Commission wants to conform the lawyer's duty not to reveal information regarding former clients to the lawyer's duty not use such information to the former client's disadvantage, it might be preferable to make that change to Rule 1.9(c) and leave the lawyer's confidentiality obligation to former clients in that Rule.

Model Rule 1.9(c) in its current form can be explained in terms of the proposition that Rules 1.8(b) and Rule 1.9(c)(1) are loyalty rules, that for the most part the lawyer's duty of loyalty terminates

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with the termination of the representation, and that the continuing duty of loyalty is properly limited to the prohibitions against changing sides and not using “confidential” information to the disadvantage of the former client. This latter duty would not be violated by adverse use of information that is generally known. Rule 1.6 and Rule 1.9(c)(2), on the other hand, are confidentiality rules, and the profession has consistently taken the position that a lawyer’s confidentiality obligations continue in full force beyond the termination of the client-lawyer relationship. Thus disclosure is prohibited even though the information is generally known.

2. Paragraph (b)(1): “Reasonably certain” death or substantial bodily harm

Paragraph (b)(1) reflects the decision of the Commission in Chicago to permit disclosure to prevent “reasonably certain” death or substantial bodily harm.

3. Paragraph (b)(2): Prevention of crimes and frauds resulting in substantial injury to financial or property interests and in which the client is using or has used lawyer’s services.

Paragraph (b)(2) was approved in Chicago and reflects the Commission’s decision that lawyers should be permitted to reveal information relating to the representation to prevent a client from committing a crime or fraud only if the client has abused the client-lawyer relationship by using the lawyer’s services in furtherance thereof. The changes are proposed to eliminate some unnecessary wordiness.

a. Alternative: It has been suggested that this paragraph would be less wordy if it were revised to read:

(2) to prevent the client from committing a crime or fraud that is likely to result in substantial injury to the financial interests or property of another and in the furtherance of which the client ~~has used or is using~~ lawyer’s services were or are being used;

The Reporter prefers the use of the active voice and also thinks that is desirable to emphasize that it is the client’s misuse of the lawyer’s services that justifies the disclosure. The passive formulation eliminates the specific reference to the client’s use of the lawyer’s services.

4. Paragraph (b)(3): Rectification or mitigation of substantial injury to financial or property interests resulting from a client’s commission of a crime or fraud in which the client used the lawyer’s services.

With the exception of the highlighted material, Paragraph (b)(3) was approved in Chicago. The changes conform with the Reporter’s recommendation with respect to Paragraph (b)(2).

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a. Alternative: It has been suggested that paragraph (b)(3) would be less wordy if it were revised to read:

(3) to 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 has used the lawyer's services~~ were used;

For the same reasons as noted above with respect to paragraph (b)(2), the Reporter prefers the use of the active voice.

5. Alternative: Combine (b)(2) and (b)(3) into a single paragraph.

The Reporter was asked to draft an alternative that would combine paragraphs (b)(2) and (b)(3) into a single paragraph. Such an alternative would read:

(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 which the client has used or is using the lawyer's services.

Because most states treat prevention of crimes and frauds separately from the rectification or mitigation of loss resulting from such crimes and frauds, the Reporter recommends that the Commission do so as well. Also, as indicated in Comments [9] and [10], there are sufficient differences in the rationale for these exceptions to treat them in different paragraphs. It has also been suggested that (b)(3) should be presented separately from (b)(2) because (b)(3) represents such a major change in the profession's position with respect to disclosure by a lawyer of a client's past misconduct.

B. Comments

Comment [1]: Cross Reference To Other Confidentiality Rules

Comment [1] is new and is premised on the assumption that Rule 1.6 will prohibit revealing information relating to the representation of both clients and former clients. It serves as a cross-reference to the other confidentiality rules. The reference to prospective clients is bracketed because the Commission has not yet considered whether to add a Rule specifying a lawyer's duties to prospective clients.

a. Alternative: If the Commission decides to leave the confidentiality duty to former clients in Rule 1.9(c)(2), the Reporter would recommend that Comment [1] be revised to read as follows:

[1] This Rule defines the lawyer's obligation not to reveal information relating to the representation of a client. Rule 1.9(c)(2) provides for the continuation of

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this duty after the client-lawyer relationship has been terminated. See Rules 1.8(b) and 1.9(c)(1) with respect to the use of information relating to the representation to the disadvantage of a client or a former client. [See also Rule [] with respect to a lawyer’s confidentiality duties to prospective clients.]

Comments [2], [3] and [4]: Purpose of Rule

Comment [2], [3] and [4] are identical to Model Rule Comments [2],[3] and [4] except for the addition in Comment [4] of the reference to trust as a hallmark of the client-attorney relationship. The Reporter thinks this is an important feature of confidentiality that merits Comment.

Comment [5]: Information Relating to Representation

Comment [3] is substantially similar to Model Rule Comment [5]. The only change is to correct the incorrect reference to the work-product rule as included within the attorney-client privilege.

Comment [6]: Government Lawyers

This Comment is identical to Model Rule Comment [6].

Comment [7]: Hypotheticals

Comment [5] is new 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.

Too many lawyers are careless when talking shop. This Comment gives them a warning.

Comment [8]: Impliedly Authorized Disclosures

Comment [8] is identical to Model Rule Comment [7].

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Comment [9]: Lawyers in Firms

Comment [9] is identical to Model Rule Comment [8].

Comment [10]: “Prevent reasonably certain death or substantial bodily harm

Comment [10] replaces Model Rule Comments [9] and [13]. The questions for the Commission’s review are:

a. Should substantial bodily harm be explained as including “life threatening and debilitating illness?” Comment *c* to §117A of the Restatement of the Law Governing Lawyers includes “life-threatening illness” within the meaning of “serious bodily harm.”

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

c. Is the Comment’s explanation of what is meant by “reasonably certain” death or substantial bodily harm acceptable? It is consistent with Comment *d* to §117 of the Restatement of the Law Governing Lawyers.

d. Should the Comment include the toxic discharge example? It tracks Illustration 3 to Comment *c* of §117A of the Restatement of the Law Governing Lawyers. The Reporter thinks it is a fair and useful example of a situation in which death or substantial bodily harm is not imminent but there is nonetheless a “present and substantial threat” that such injury will be suffered. In opposition to inclusion of the example, it has been suggested that it will be easier to secure approval of the principle that disclosure should be permitted if there is a “present and substantial threat of death or substantial bodily harm” than it will be to secure approval of this or any other specific example of what constitutes such a threat.

Comment [11]: Disclosure to Prevent Client Crimes Resulting in Substantial Financial Loss

With the exception of the sentence about organizational clients (which is identical to Model Rule Comment [17]), Comment [11] is new and sets out the rationale for Paragraph 1.6(b)(2).

Comment [12]: Rectification and Mitigation of Substantial Financial Loss.

This Comment is new and is intended to explain the difference between paragraphs (b)(2) and (b)(3). It also makes the point that disclosure is not permitted in cases in which the losses

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cannot be rectified or mitigated.

Comment [13]: The primary purpose of this Comment is to provide two examples of ways in which a client may use a lawyer's services in connection with the commission of a crime or fraud. It also makes the point that advising a client about the illegality of a course of conduct is not a service that furthers the client's commission of the crime or fraud. This latter point is consistent with Illustration 2 in Comment *e* to §117B of the Restatement of the Law Governing Lawyers (Proposed Final Draft No. 2, April 6, 1998) which reads:

2. Client has put in place a scheme to defraud Victim of substantial funds. After doing so, but before victim has actually lost any funds, Client seeks Lawyer's assistance in meeting regulatory action and a suit by Victim seeking restitution that might ensue. Despite Lawyer's counseling, Client refuses to warn Victim, return the funds or take other corrective action. Because Lawyer's services have not been employed in the commission of Client's fraud, Lawyer may not use or disclose Client's confidential information under this Section.

The Reporter is proposing that these Comments replace Model Rule Comments [10], [11] and [12] (explaining Rule 1.2(d)'s prohibition against assisting a client commit a crime or fraud) and Comments [15], [16] and [17] (addressing 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. Note, however, the cross-reference to Rules 1.2 and 1.16 in proposed Comment [11].

Comment [14]: Legal Advice for the Lawyer

Comment [14] 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 [15]: Lawyer Self-Defense

Comment [15] is identical to Model Rule Comment [18], except for addition of the third sentence that is taken verbatim from Model Rule Comment [19].

Comment [16]: Collecting Fees

Comment [16] is identical to Model Rule Comment [19], except for the deletion of the first

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sentence and the transfer of the second sentence to Proposed Comment [15].

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Comment [17]: The Lawyer's Discretion

Comment [17] tracks Model Rule Comment [14].

Comment [18]: Disclosure Mandated by Law

Comment [18] is identical to Model Rule Comment [21].

Comment [19]: Disclosure Mandated by Order of Tribunal

Comment [19] 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 [20]: Competently Preserving Confidentiality

Comment [20] is new. By way of a cross-reference to Rules 1.1, 5.1 and 5.3, it calls attention to the responsibility of the lawyer to act competently to safeguard information relating to a client's representation. Colorado, D.C., Georgia, Iowa, Maine, Michigan, Minnesota, Nebraska, New York, Ohio, Oregon, Virginia, and 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." Much of the recent discourse about confidentiality has focused on the lawyer's duty to act competently to prevent disclosure. The Reporter thinks this problem is sufficiently pervasive and important that it ought to be flagged in a Comment.

Comment [21]: Electronic Transmission of Confidential Information

Comment [21] is new and addresses the lawyer's duty of care when transmitting confidential information. Although this Comment was prompted by the current debates over the use of unencrypted e-mail, I have formulated the Comment so it speaks more generally in terms of special security measures and reasonable expectations of privacy. I have taken a case-by-case approach with a tilt in favor of allowing use of current technology, including 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

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Force concluded its Report with a cautious call for consultation by the lawyer with the client prior to the use of 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.

Model Rule Comment [22]: Confidentiality After Termination of Representation

The proposed incorporation into Rule 1.6 of Rule 1.9(c)(2)'s prohibition against disclosure of information relating to a former client's representation eliminates the need for this Comment. If the Commission decides to retain Rule 1.9(c)(2), the Reporter would still recommend the deletion of Comment [22] because the cross-reference to Rule 1.9(c) will be prominently included in Comment [1].