November 2005 Meeting Announcement:

Recent Developments in Attorney-Client Privilege, Work Product Protection, and Attorney Confidentiality Obligations

Just in time for those of us with last names beginning with H, I, J, K, L, or M, we present the More-or-Less-Annual IP Inn of Court Ethics Program.

The past year has seen significant developments in the law of attorney-client privilege, work product protection, and attorney confidentiality obligations.:

- The Court of Appeals for the Federal Circuit, *en banc*, decided *Knorr-Bremse v. Dana Corp.*, which restored to the clients of patent lawyers the full panoply of rights under the attorney-client privilege.
- The California Supreme Court is currently considering two cases involving issues of attorney-client privilege, including the effects of inadvertent disclosure (or worse) and the responsibilities of the recipients of such disclosures.
- Amended Business and Professions Code § 6068(e) now permits attorneys to disclose client confidences to prevent a criminal act likely to result in death or substantial bodily injury, and the California Supreme Court has approved substantially similar provisions in new Rule of Professional Conduct 3-100.

These and related issues will be addressed at the November 2005 meeting.

Panelists:	**Annette Hurst**	*Heller Ehrman*
(in formation)	**Paul Vapnek**	*Townsend & Townsend & Crew*
	Fred Von Lohmann	*Electronic Frontier Foundation*
Time and Location:	November 16, 2005 at 6:00pm **Heller Ehrman**, 333 Bush Street, San Francisco, 415.772.6000	
Dinner to Follow at:	**B44,** 44 Belden Place, San Francisco, 415.986.6287	

November 16, 2005 IP Inns of Court Ethics Hypothetical

Universal Software Co. v. Small Aftermarket Ltd. is a copyright infringement and DMCA action pending in the United States District Court for the Northern District of California. Among its many contributions to our society, Universal sells a dedicated video game console (DVGC) and also publishes games for consumers to use in conjunction with that console. Universal, a Seattle based company, licenses third parties to publish games for use with the DVGC

The DVGC contains an encryption protocol that prevents unlicensed parties from playing games or using accessories with the DVGC. Small Aftermarket, a San Francisco based company, has developed a special joystick (the "Accelerator") for use with several of the action games published by Universal and its licensees on the DVGC. Small Aftermarket approaches Universal for a license, but discussions break down because Small Aftermarket views the terms as too onerous, and Universal is concerned that the joystick may adversely affect the play of games.

Small Aftermarket then consults attorney Problem Solver. Problem Solver meets with Small Aftermarket's CEO and Engineer. Engineer expresses concern that she cannot get Accelerator working with DVGC because the encryption scheme is masking certain APIs to which she requires access in order to assure performance of the Accelerator. CEO asks Problem Solver whether there is anything to be done. CEO explains to Problem Solver that the DVGC and licensed games come with shrinkwrap licenses prohibiting reverse engineering.

Problem Solver reviews the DMCA and is convinced that there is no problem circumventing the encryption for reverse engineering purposes. But she is concerned about the enforceability of the shrinkwrap prohibition on reverse engineering. Other circuits have ruled that such prohibitions are enforceable, but she believes that the Ninth Circuit may go the other way. In order to enhance Small's chances of success, Problem Solver conceives of a means whereby Small will also be able to rely upon the first sale doctrine. Problem Solver suggests to CEO and Engineer that she locate an unrelated third party to purchase the items needed and agree to the license, and then sell the items to Small free of the license terms. CEO and Engineer agree that this sounds like a good idea.

Problem Solver engages a well-known copyleft activist, Free Software Now, to engage in the initial transaction. Free Software purchases the DVGC and one copy of each game, opens them, plays with them, and the then sells the entire batch to Small Aftermarket. Engineer proceeds to circumvent the encryption, reverse engineer the APIs, and complete the Accelerator. The Accelerator contains a very small amount of code from the APIs that Engineer believes is the only way to make Accelerator work with all of the games.

Universal learns that the Accelerator is coming to market and sues Small Aftermarket and brings a motion for preliminary injunction. Attorney Fierce Affect represents Universal, while Problem Solver continues to represent Small. Fierce takes the deposition of Engineer, which becomes hotly contested concerning the issue of why and how Small obtained the DVGC in the fashion described. Eventually the deposition is terminated in an atmosphere of rancor, and Problem Solver and Engineer depart the deposition room.

In the course of gathering up extra copies of the voluminous exhibits used during the deposition, unbeknownst to Fierce, she also gathers up the notepad of Problem Solver. This notepad contains on top Problem Solver's notes of her original conversation with Small's CEO and Engineer. Fierce gives the box of documents to her paralegal for filing.

A week later, Paralegal comes to Fierce with the notebook, indicating that she has read it and believes it may belong to Problem Solver. Fierce reviews the notebook and is astounded by Problem's advice to knowingly and deliberately avoid the contractual restrictions, adjudging such actions to be promissory fraud by Small, or at a minimum the inducement of fraud by Free Software Now. Fierce reads on in the notebook and learns a lot about Problem's analysis of the case. At about the same time, Problem realizes that the notebook is missing, and sheepishly calls Fierce to see if she has it and will return it without looking at it.

Question 1:

What should Fierce do now with the notebook?

Variation 1:

Problem calls Fierce before the notebook is discovered by Paralegal and asks that it be returned. What should Fierce do?

Continued Hypothetical

Fierce has ignored your advice to return the notebook and makes a motion to compel all documents listed on Small's privilege log related to the development of the Accelerator on the ground of the crime-fraud exception to the attorney-client privilege. Fierce submits the notebook to the court in support of the Motion.

Problem is aghast at the situation and makes a cross-motion to disqualify Fierce's firm and anyone else exposed to the notebook from further representation of Universal in the lawsuit. Problem also argues that the Court is barred from consideration of the notebook in connection with the two motions because of California Evidence Code Section 915.

Question 2:

Should the Court consider the notebook in ruling on the motions?

How should the Court rule on the motions?

Recent Cases on Confidentiality and Privilege

Pending before the California Supreme Court

Rico v. Mitsubishi Motors Corporation (2004) 116 CA4th 51, 10 CR3d 601 - attorney who obtained work product document (allegedly by stealing it from opposing counsel's briefcase), used it and then refused to return it, disqualified from case along with his experts who had been shown the document (**Review Granted June 9, 2004**)

Jasmine Networks Inc. v. Marvell Semiconductor, Inc. (2004) 117 CA4th 794, 12 CR3d 123 - attorney client privilege waived by general counsel's participation in an office conference that was inadvertently recorded on opposing counsel's voicemail system. (**Review Granted July 21, 2004**)

California Supreme Court

HLC Properties, Ltd. v. Superior Court (MCA Records, Inc.) (2005) 35 Cal. 4th 54, 24 Cal.Rptr.3d 199

California Court of Appeal

Laguna Beach County Water District v. Superior Court (Woodhouse) (2004) 124 Cal.App.4th 1453, 22 Cal.Rptr.3d 387

Venture Law Group v. Superior Court (Singhania) (2004) 118 Cal.App.4th 96, 12 Cal.Rptr.3d 656

*Oxy Resources LLC v. Superior Court (Calpine Natural Gas LP) (*2004) 115 Cal.App.4th 874, 9 Cal.Rptr.3d 621

McKesson HBOC, Inc. v. Superior Court (State of Oregon) (2004) 115 Cal.App.4th 1229, 9 Cal.Rptr.3d 812

2022 Ranch LLC v. Superior Court (Chicago Title Insurance Co.) (2003) 113 Cal.App.4th 1377, 7 Cal.Rptr.3d 197

Snider v. Superior Court ((Quantum Productins, Inc.) (2003) 113 Cal.App.4th 1187, 7 Cal.Rptr.3d 119

State Compensation Insurance Fund v. WPS, Inc. (1999) 70 Cal.App.4th 644, 82 Cal.Rptr.2d 799

Aerojet-General Corp. v. Transport Indemnity Insurance (1993) 18 Cal.App.4th 996, 22 Cal.Rptr.2d 862

Circuit Courts of Appeals

Massachusetts Eye & Ear Infirmary v. QLT Phototherapeutics, Inc. (1st Cir. 2005) 75 USPQ2d 1225

Barton v. U.S. District Court (SmithKline Beecham Corp.) (9thCir. 2005) 410 F3d 1104

Fort James Corp. v. Solo Cup Co. (Fed.Cir. 2005) 75 USPQ2d 1257

Knorr-Bremse v. Dana Corp. (Fed.Cir. 2005) 72 USPQ2d 1560, 383 F3d 1337

International Rectifier Corp. v. IXYS Corp. (Fed.Cir. 2004) 70 USPQ2d 1209

Goldstein v. Moatz (4thCir. 2004) 70 USPQ2d 1801

ATTORNEY-CLIENT CONFIDENTIALITY UNDER ATTACK

Jerome Sapiro, Jr.

And

Mark Tuft

for the

Litigation Section of the State Bar of California

September 8, 2005

1. Attorney-Client Confidentiality in England.

   (a) Lawyer-client privilege in English common law originated as a "consideration for the oath and the honor of the attorney, rather than for the apprehension of his client." 4 Wigmore, *A Treatise On The System Of Evidence In Trials At Common Law*, § 2290, p. 3194 (1905).

   (b) *Berd v. Lovelace*, 21 Eng. Rep. 33 (1577).

   (c) *Waldron and Ward*, Style 450 (K.B. 1654).

   (d) *Bulstrod and Letchmere*, 22 Eng. Rep. 1019 (Ch. 1676).

   (e) *Lord Say and Seal's Case*, 10 Mod. 40 (K.B. 1712).

   (f) *Greenough v. Gaskell*, 39 Eng. Rep. 618 (1833) characterized the foundation of the privilege as essential if people are to have access to justice. If the privilege did not exist, no one could safely consult an attorney.

   (g) *Radcliffe v. Fursman*, 1 Eng. Rep. 1101 (1730).

   (h) *Annesley v. Earl of Anglesea*, 17 How. St. Trials 1139 (1743).

2. Attorney-Client Confidentiality in the United States.

(a) *Parker v. Carter*, 18 Va. 273 (1814).

(b) *Andrews v. Solomon*, 1 F. Cas. 899 (C.C.D. Pa. 1816).

(c) *Dixon v. Parmelee*, 2 Vt. 185 (1829).

(d) *Jackson v. French*, 3 Wend. 337 (N.Y. Sup. Ct. 1829).

(e) *Foster v. Hall*, 29 Mass. 89 (1831).

(f) *Jenkinson v. State*, 5 Blackf. 465 (Ind. 1840).

(g) *Crosby v. Berger*, 5 N.Y. Ch. Ann. 168 (1844).

(h) *Aiken v. Kilbourne*, 14 Shep. 252 (Maine 1847).

(i) *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528 (N.Y. 1848).

(j) *Rochester City Bank v. Suydam, Sage & Co.*, 5 How. Pr. 254 (N.Y. Sup. Ct. 1851).

(k) *United States v. Costen*, 38 Fed. 24 (1889).

3. Codification of Attorney's Duty.

(a) New York Code of Civil Procedure § 511 (1849). It is the duty of an attorney and counsellor,

* * * *

> 5. To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets, of his clients.

* * * *

(b) Steven Field's California Code of Civil Procedure, § 282 (1872). It is the duty of an attorney and counsellor,

* * * *

> 5. To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets, of his clients.

* * * *

(c) Business and Professions Code section 6068(e) (1937)

> To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client.

(d) Sharswood, *An Essay on Professional Ethics* (1907), pp. 85-86. Footnote 2 stated:

> A counsel, attorney, or solicitor, will in no case be permitted, even if she should be willing to do so, to divulge any matter which has been communicated to him in professional confidence. This is not his privilege, but the privilege of the client, and none but the client can waive it. [Citations omitted.]

(e) Alabama Code of Ethics (1887), Rule 21.

> Communications and confidence between client and attorney are the property and secrets of the client, and can not be divulged, except at his instance; even the death of the client does not absolve the attorney from his obligation of secrecy.

4. Strict Interpretation of Duty of Confidentiality in California.

(a) California State Bar Committee on Legal Ethics, 3 Cal. St. Bar. J. 216 (1929).

(b) *People v. Kor*, 129 Cal. App. 2d 436, 447 (1954).

(c) *In re Soale*, 31 Cal. App. 144 (1916).

(d) COPRAC Formal Opinions 1993-133, 1988-96, 1986-87, 1981-58, 1981-52, & 1976-37.

(e) Duty to safeguard secret information applies even if the information is otherwise publicly available. *Matter of Johnson*, 4 Cal. St. Bar Ct. Rptr. 179, 189 (2000).

(f) Duty to safeguard secret information applies to secrets about the client learned from sources other than the client. Los Angeles Bar Ass'n Formal Opn., 436 (1985). ABA Formal Opn. 98-411.

(g) The premise is that justice cannot be administered if clients cannot confer with counsel without apprehension in both litigation and non-litigation context. *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). *Flatt v. Superior Court*, 9 Cal. 4th 275, 289 (1994). *Jeffrey v. Pounds*, 67 Cal. App. 3d 6, 9 (1977).

5. American Bar Association's Assault on Confidentiality.

(a) Confidentiality under American Bar Association Canons.

(1) Canon 6: Protect the "secrets or confidences" of clients.

(2) Canon 37: "It is the duty of a lawyer to preserve his client's confidences. Duty outlasts employment and extends to the employees of the lawyer.

(3) Canon 41: If fraud or deception has been practiced, lawyer should endeavor to rectify it. If client refuses to forego advantage gained, lawyer should promptly inform injured person or his counsel.

(4) Rejected argument that all attorneys should be compelled to disclose any facts communicated to them by their clients that would require a decision of the case adverse to their clients. William Howard Taft, *Ethics in Service*, pp. 31-32 (1915).

(5) Canon 15: Must act within bounds of law.

(6) Canon 22: Candor to the court.

(7) ABA Canon 29: Attorney to reveal perjury to prosecutors.

(b) ABA Model Code (1969).

(1) Canon 4: "A Lawyer Should Preserve the Confidences and Secrets of a Client."

(2) EC 4-1: Full knowledge of facts essential to proper representation and is facilitated by "observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client."

(3) EC 4-2: Lawyer must not disclose confidences and secrets of one client to another client and must maintain confidentiality in all social and business conversations.

(4) EC 4-2: Exceptions to duty of confidentiality if client consents after full explanation of why disclosure was needed; when disclosure necessary for effective representation of client; when required by law; or when otherwise permitted by the Model Code.

(5) EC 4-4: Lawyer required to retain in confidence all information received from client regardless of source and nature of information and even though others might also know about it. Should not reveal under any circumstances.

(6) EC 4-5: Lawyer required to reject employment that might require disclosure of confidential information.

(7) EC 4-6: Duty to maintain confidentiality continues after termination of attorney-client relationship.

(8) DR 4-101: Confidence is information protected by attorney-client privilege. Secret refers to "other information . . . the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client."

(9) DR 4-101(C)(2): Lawyer may divulge client confidences and secrets when required by law or court order.

(10) DR 4-101(C)(3): Lawyer may reveal confidences or secrets related to the intention of client to commit crime and information necessary to prevent the crime.

(11) DR 4-101(C)(4): Lawyer may reveal client confidences or secrets necessary to establish defense to criminal charge or civil claim against lawyer based on conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

(12) DR 7-102(A)(4): Lawyer may not knowingly use perjured testimony or false evidence.

(13) DR 7-102(B)(1): If client committed fraud on tribunal, lawyer to call upon client to rectify fraud. If client refuses or is unable to do so, lawyer required to reveal fraud to the affected person or tribunal.

(14) *S.E.C. v. National Student Marketing Corp.*, 457 F. Supp. 682 (D.D.C. 1978) held attorneys violated anti-fraud provisions of federal securities laws by not delaying close of merger until after disclosure of materially false financial information regarding corporation that survived after the merger. In reaction to that decision, in 1974 ABA amended DR 7-102(B)(1) to add an exception to the duty to reveal a client's fraud on a court or third party. Exception read: "except when the information is protected as a privileged communication." This brought the "crime fraud" exception back under the umbrella of DR 4-101, so confidences and secrets of client were to be preserved.

(15) 1975 Amendment to DR 7-102(B)(1) to define "privileged communication" as including all confidences and secrets learned during the attorney-client relationship.

(16) EC 8-5: Lawyer should reveal fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before tribunal unless constrained by duty to preserve confidences and secrets of client.

(17) ABA Opinion 341 (1975): Client confidentiality is "so important that it should take precedence, in all but the most serious cases . . . ."

(18) *People v. Belge*, 372 N.Y.S. 2d 798 (1975).

6. American Bar Association Model Rules.

(a) Kutak Commission 1980 discussion draft:

i. Model Rule 3.1: Lawyers must reveal client perjury to court in civil cases and may be permitted to do so in criminal cases, even if doing so requires disclosure of a confidence of the client or disclosure that the client is implicated in the falsification; may reveal client confidences and secrets to other side if the information would be favorable to the other side; must disclose to court if lawyer learned that lawyer had offered to material evidence that was false and if the client made false statement and the court relied upon lawyer's silence as corroboration.

ii. Proposed Model Rule 4.1(b): Lawyer must disclose information necessary to prevent assisting client in any fraudulent or criminal act.

iii. Proposed Model Rule 1.6: Lawyer may reveal information necessary to prevent a client from committing a criminal act lawyer believes is likely to result in death or substantial bodily harm.

iv. Proposed Model Rule 1.6: Lawyer may reveal information to prevent substantial injury to the financial interest or property of another or to rectify consequences of client's criminal or fraudulent act in the furtherance of which lawyer services had been used.

(b) Attack on Kutak proposals.

i. 1980 California Conference of Delegates.

ii. Proposed Model Rule 3.1(e) not included in proposed final draft.

(c) 1983 House of Delegates.

i. Adopted Model Rule 3.3(a)(4) [lawyer must inform court if lawyer learns that lawyer had offered false evidence.

ii. Adopted Model Rule 3.3(a)(2) [lawyer must contradict client if court relied upon lawyer's silence as corroboration].

iii. Adopted Model Rule 1.6(a) [lawyer shall not reveal information relating to representation of client]; but approved exception that permits lawyer to reveal client confidential information to prevent client from committing crime likely to result in imminent death or substantial bodily harm.

iv. Rejected parts of Rule 1.6 that would have required lawyer to disclose fraud on third parties and that would have allowed disclosure to prevent or mitigate effects of economic or property crimes.

v. Debate and vote indicated overwhelming opposition to Kutak proposal for violating confidentiality. Hazard, *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 3 Emory L.J. 271, 302 (1984).

vi. Amended Model Rule 4.1(b) to require lawyer to disclose information necessary to prevent assisting client in any fraudulent or criminal act unless disclosure is prohibited by Model Rule 1.6. Subsequently, Senator Arlen Spector introduces bill in Congress to make disclosure standards of the rejected Model Rule 1.6 binding on lawyers in criminal cases in federal court. Both attorneys who had opposed Model Rule 1.6 and those who had supported it opposed that legislation.

7. Amendment of Model Rules by Trickery.

(a) 1983 House of Delegates did not vote on Comments to Model Rules.

(b) Subsequent meeting of House of Delegates adopted comments to Model Rules without further debate.

(c) Professor Geoffrey C. Hazard, Jr., and others were able to sneak in an exception to Model Rule 1.6 that they admit they "buried disingenuously" in the ambiguous Comment to Model Rule 1.6. 1 G. Hazard & W. Hodes, *The Law of Lawyering*, p. 9-108 (2003 Supplement). The resulting exception to Model Rule 1.6 is broader than anything ever proposed by Kutak Commission and results in far more disclosure of client confidences. *Id.*, p. 9-108. *E.g.*:

i. If lawyer services will be used by client in materially furthering a course of criminal or fraudulent conduct, a lawyer must withdraw. Comment [10].

ii. After withdrawal, lawyer may give notice of the fact of withdrawal and ". . . may also withdraw or disaffirm any opinion, document, affirmation, or the like." Comment [15].

iii. This will allow attorney who has closed a transaction to notify other side that a document the lawyer prepared is "withdrawn"; to withdraw a document filed with Securities and Exchange Commission; or to "withdraw" document that has been received by successor counsel. 1 G. Hazard & W. Hodes, *supra*, p. 9-108. As a result, ". . . some fools may not understand that Rule 1.6 does not mean what it seems to mean." Hazard, *Rectification of Client Fraud, Death and Revival of a Professional Norm*, 33 Emory L.J. at 306.

iv. Comment to Model Rule 1.6 broader than MR 1.6(b)(2): A lawyer may respond to "an assertion," not just to respond to an allegation in lawsuit or prosecution. A lawyer need not await commencement of action or proceeding. Thus, a lawyer may disclose client confidence or secret to respond to accusation by newspaper reporter or prosecutor accusing lawyer of being party to client misconduct.

v. 1980 discussion draft Model Rule 1.7(b) [adopted as Model Rule 1.6] would have required disclosure of client confidences when necessary to save a life. As adopted, Model Rule 1.6(b)(1) left issue of whether to disclose, or not, to discretion of lawyer, if needed to prevent client from committing act lawyer believes is likely to result in imminent death or substantial bodily harm.

vi. Adopted Model Rule 1.6(b)(2): Lawyer may reveal client confidences and secrets to establish claim or defense in criminal charge or civil claim against lawyer or allegations in a proceeding.

vii. Adopted ABA Model Rule 3.3(a)(4): Exception to duty of confidentiality prohibits lawyer from "knowingly" offering evidence that the lawyer "know[s]" to be false. If later learns proffered evidence is false, lawyer required to take reasonable remedial measures.

8. Entrapment of Clients.

(a) The 1980 discussion draft of then proposed Model Rule 1.4(b) [became Model Rule 1.2(e)] would have required lawyers to warn clients about limitations on attorney-client confidentiality in the first meeting with the client.

(b) Not adopted by House of Delegates. Exceptions to duty of confidentiality contained in Model Rule 1.6 do not require warning to client or client's informed consent before disclosure.

(c) Model Rule 1.2(e) on "Scope of Representation" adopted in 1983 merely, vaguely stated that, when a lawyer knows that a client expects assistance not permitted by rules or law, "the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct."

(d) ABA Formal Opinion 87-353: If lawyer learns client intends to commit perjury, should warn client of consequences including lawyer's duty to disclose to tribunal. If client then testifies falsely, lawyer has duty to inform court of perjury.

9. ABA Ethics 2000.

(a) Deleted Model Rule 1.2(e).

(b) Vestiges of Model Rule 1.2(e) now in Model Rule 1.4(a)(5). Model Rule 1.4 is titled "COMMUNICATION." Paragraph (a)(5) requires the lawyer to ". . . consult with the client about any relevant limitations on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted . . . by the rules or law."

(c) Model Rule 1.2 Comment [10] amended: If lawyer has withdrawn because lawyer concludes client's conduct is criminal or fraudulent, it ". . . may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation, or the like."

(d) Model Rule 4.1 Comment [3]: If lawyer can avoid assisting a crime or fraud by client only by disclosing information relating to the representation, under Model Rule 4.1(b) ". . . the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6."

(e) Model Rule 1.6(a): Lawyer prohibited from disclosing information related to representation of client unless client first gives informed consent, unless disclosure is impliedly authorized in order to carry out the representation, or unless disclosure is permitted by exceptions contained in Model Rule 1.6(b).

(f) Model Rule 1.6(b)(1): Lawyer may disclose confidential information "to prevent reasonably certain death or substantial bodily harm." This deleted two prerequisites. The feared death or bodily harm need no longer be the result of a criminal act by client; and death or bodily harm need no longer be "imminent." Instead, death or bodily harm need only be "reasonably certain." Permits disclosure of past acts of client if past acts may result in death or substantial bodily harm in future. Client information may be disclosed even if client conduct was not related to a crime or fraud.

(g) Model Rule 1.6(b)(2): If client may commit a crime or fraud reasonably certain to result in substantial injury to financial interests or property of another, a lawyer may now disclose confidential client information.

(h) Model Rule 1.6(b)(3): If client has committed crime in past, lawyer may now disclose confidential client information to prevent future harm to financial interests or property.

(i) Model Rule 1.6(b)(5): A lawyer may disclose confidential client information in controversy between lawyer and client, to establish defense to criminal charge or civil claim against lawyer based on client's conduct; or to respond to allegations in any proceeding concerning lawyer's representation of client.

(j) Model Rule 1.6(b)(6): A lawyer may disclose confidential client information "to comply with other law or a court order." No requirement that lawyer resist court order or contest the validity of the law.

(k) Model Rule 1.6(b) permits disclosure of "information relating to the representation." That phrase is not defined.

(l) Rejected proposals:

i. May disclose if serious risk of potential financial harm to third parties and if necessary to prevent client from committing crime or fraud.

ii. May disclose confidential client information to prevent, mitigate, or rectify substantial injury to financial interest or property of another

reasonably certain to result or that has resulted from client's commission of crime or fraud.

(m) ABA Task Force on Corporate Responsibility 2002, proposed on exception from confidentiality regarding economic harm. Recommended amend Model Rule 1.6 to permit lawyers to disclose information related to the representation in the context of past or future crime or fraud by client that results in harm to financial interests or property of another and that involved use by client of the services of the lawyer. Adopted by House of Delegates August, 2003. Now Model Rule 1.6(b)(2) and (3).

(n) 2001 Model Rule 1.6(b) Amendment: New sixth exception permitting attorney to disclose confidential information "to comply with other law or a court order."

(o) ABA House of Delegates rejected amendment to make disclosure under Model Rule 1.6(b)(6) mandatory to prevent client conduct known by the lawyer to involve a crime.

10. Sarbanes-Oxley.

(a) 15 U.S. Code § 7245: Up the line reporting.

(b) 17 C.F.R. Part 205 "Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer."

(1) Section 205.7(a): Definition of appearing and practicing before the Commission.

(2) Section 205.3: Issuer as client.

(3) Section 205.3(b): Duty to report evidence of material violation.

(4) Proposed Section 205.3(b)(2) withdrawn: Proposed rule requiring that all reports and responses be documented and maintained for reasonable period. Would have required lawyer to document report of evidence of material violation. The chief legal officer would have been required to document any inquiry in response to a report. A reporting attorney would have been required to document when he or she received an appropriate response to a report. Attorney who

believed he or she did not receive an appropriate response to report would have been required to document that response.

(5) Section 205.3(d): Issuer confidences. Attorney may use any records attorney may have made in the course of fulfilling his or her reporting obligations to defend himself or herself against charges of misconduct. Section 205.3(d)(1).

(6) Section 205.3(d)(2): Attorney may reveal to SEC, without issuer's consent, confidential information related to representation to extent attorney reasonably believes necessary to prevent issuer from committing material violation that is likely to cause substantial injury to financial interest or property of issuer or investor; to prevent issuer from committing perjury in Commission investigation or administrative proceeding, suborning perjury, or committing any act likely to perpetrate a fraud on the SEC; or to rectify consequences of material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in furtherance of which the attorney's services were used.

(7) Proposed Section 205.3(e)(3) withdrawn: If issuer, through its attorney, shares with SEC information related to material violation pursuant to a confidentiality agreement, that sharing of information shall not constitute a waiver of any otherwise applicable privilege or protection as to other persons.

(8) Section 205.4: Responsibilities of supervisory attorneys.

(9) Section 205.5: Responsibilities of subordinate attorney.

(10) Conflict of SEC Attorney-Client Rules With California Duty of Confidentiality: 17 C.F.R. § 205.6(c): Attorney who complies in good faith with SEC rules ". . . shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorneys admitted or practices.

11. Government Encroachment on Attorney-Client Privilege and Work Product.

(a) Prosecutors obtain waivers of attorney-client confidentiality and work product by threatening to prosecute and by seeking more serious charges or sanctions if privileges are not waived. Once prosecution has chosen crimes to be charged and obtain a conviction, courts must impose sentence for the level of crime prescribed by Federal Sentencing Guidelines.

(b) Memorandum from Eric Holder, Jr., Deputy Attorney General, to All Heads of Department Components and U.S. Attorneys (June 16, 1999), applies to both individuals and corporations. Available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00100.htm.

(c) Policy of attacking privileges in *ex parte* proceedings asserting that crime-fraud exception vitiates any privilege. The person under investigation has no opportunity to be heard, and government need only make *prima facie* showing.

i. *United States v. Zolin*, 491 U.S. 554, 557 (1989).

ii. *In re Grand Jury Subpoena*, 92-1 (SJ), 31 F.3d 826, 830 (9th Cir. 1994).

iii. *In re Grand Jury Subpoena*, 884 F.2d 124, 127 (4th Cir. 1989).

iv. *United States v. de la Jara*, 973 F.2d 746, 749 (9th Cir. 1992).

v. *United States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996).

(d) Waivers of corporate attorney-client and work product privilege are sought to permit government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements. U.S. Attorney's Manual, tit. 9, Criminal Resource Manual, art. 162, § VI.B.

(e) Policy of offering not to indict corporation if it gives complete cooperation, including whether corporation waived attorney-client and work product protections ". . . both with respect to its internal investigation and with

respect to communications between specific officers, directors, and employees and counsel." *Ibid.*

(f) Sentencing guidelines give credit to corporations that have engaged in self-reporting, cooperation, and acceptance of responsibility for purposes of calculating the "culpability score of" the corporation. U.S. Sentencing Guidelines Manual, § 8C2.5(g) (2001). To qualify for credit, "cooperation must be both timely and thorough."

(g) If the government demands waiver of attorney-client privilege and work product protection, corporation must either give in to demand or reject demand and risk indictment and conviction. If corporation complies with the demand, employees are at risk.

(h) In conducting internal investigation, attorneys must assume that the results of investigation may be delivered to prosecution.

(i) Need of employees for independent representation.

(j) Risk to corporation if it advances fees to individual employees for separate representation.

(k) Trap for house counsel.

12. Internal Revenue Service.

(a) Revised Circular 230.

(b) Internal Revenue Code section 6111.

13. Business and Professions Code Section 6068(e) Under Fire.

(a) AB 1101.

(b) Business and Professions Code § 6068: It is the duty of an attorney to do all of the following:

* * * *

(e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(c) Rule 3-100. Confidential Information of a Client

(A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.

(B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:

(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and

(2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).

(D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.

(E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.

Discussion:

[1] Duty of confidentiality. Paragraph (A) relates to a member's obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a member: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A member's duty to preserve the confidentiality of client information involves public policies of paramount importance. (In Re Jordan (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (A) thus recognizes a fundamental principle in the client-lawyer relationship, that, in the absence of the client's informed consent, a member must not reveal information relating to the representation. (See, e.g., Commercial Standard Title Co. v. Superior Court (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

[2] Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine and ethical standards of confidentiality. The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See In the Matter of Johnson (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; Goldstein v. Lees (1975) 46 Cal.3d 614, 621 [120 Cal. Rptr. 253].) The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member's ethical duty of confidentiality is not so limited in its scope of protection for the client-lawyer relationship of trust and prevents a member from revealing the client's confidential information even when not confronted with such compulsion. Thus, a member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law.

[3] Narrow exception to duty of confidentiality under this Rule. Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited under Business & Professions Code section

6068(e), subdivision (1). Paragraph (B), which restates Business and Professions Code section 6068, subdivision (e)(2), identifies a narrow confidentiality exception, absent the client's informed consent, when a member reasonably believes that disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in the death of, or substantial bodily harm to an individual. Evidence Code section 956.5, which relates to the evidentiary attorney-client privilege, sets forth a similar express exception. Although a member is not permitted to reveal confidential information concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

[4] Member not subject to discipline for revealing confidential information as permitted under this Rule. Rule 3-100, which restates Business and Professions Code section 6068, subdivision (e)(2), reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a member reasonably believes is likely to result in death or substantial bodily harm to an individual. A member who reveals information as permitted under this rule is not subject to discipline.

[5] No duty to reveal confidential information. Neither Business and Professions Code section 6068, subdivision (e)(2) nor this rule imposes an affirmative obligation on a member to reveal information in order to prevent harm. (See rule 1-100(A).) A member may decide not to reveal confidential information. Whether a member chooses to reveal confidential information as permitted under this rule is a matter for the individual member to decide, based on all the facts and circumstances, such as those discussed in paragraph [6] of this discussion.

[6] Deciding to reveal confidential information as permitted under paragraph (B). Disclosure permitted under paragraph (B) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing information as permitted under paragraph (B), the member must, if reasonable under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose confidential information are the following:

1. the amount of time that the member has to make a decision about disclosure;
2. whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;
3. whether the member believes the member's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;

4. the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the member;
5. the extent of other adverse effects to the client that may result from disclosure contemplated by the member; and
6. the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A member may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure and a member may disclose the information without waiting until immediately before the harm is likely to occur.

[7] Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm. Subparagraph (C)(1) provides that before a member may reveal confidential information, the member must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, or if necessary, do both. The interests protected by such counseling is the client's interest in limiting disclosure of confidential information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the member's counseling or otherwise, takes corrective action - such as by ceasing the criminal act before harm is caused - the option for permissive disclosure by the member would cease as the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the member who contemplates making adverse disclosure of confidential information may reasonably conclude that the compelling interests of the member or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the member should, if reasonable under the circumstances, first advise the client of the member's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the member should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent the harm. Even when the member has concluded that paragraph (B) does not permit the member to reveal confidential information, the member nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.

[8] Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act. Under paragraph (D),

disclosure of confidential information, when made, must be no more extensive than the member reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the confidential information to only those persons who the member reasonably believes can act to prevent the harm. Under some circumstances, a member may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable depends on the circumstances known to the member. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the member's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the member.

[9] Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2). A member is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 3-500; Business and Professions Code, section 6068, subdivision (m). Paragraph (C)(2), however, recognizes that under certain circumstances, informing a client of the member's ability or decision to reveal confidential information under paragraph (B) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the member or the member's family or associates. Therefore, paragraph (C)(2) requires a member to inform the client of the member's ability or decision to reveal confidential information as provided in paragraph (B) only if it is reasonable to do so under the circumstances. Paragraph (C)(2) further recognizes that the appropriate time for the member to inform the client may vary depending upon the circumstances. (See paragraph [10] of this discussion.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

1. whether the client is an experienced user of legal services;
2. the frequency of the member's contact with the client;
3. the nature and length of the professional relationship with the client;
4. whether the member and client have discussed the member's duty of confidentiality or any exceptions to that duty;
5. the likelihood that the client's matter will involve information within paragraph (B);
6. the member's belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and
7. the member's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

[10] Avoiding a chilling effect on the lawyer-client relationship. The foregoing flexible approach to the member's informing a client of his or her

ability or decision to reveal confidential information recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Discussion paragraph [1].) To avoid that chilling effect, one member may choose to inform the client of the member's ability to reveal information as early as the outset of the representation, while another member may choose to inform a client only at a point when that client has imparted information that may fall under paragraph (B), or even choose not to inform a client until such time as the member attempts to counsel the client as contemplated in Discussion paragraph [7]. In each situation, the member will have discharged properly the requirement under subparagraph (C)(2), and will not be subject to discipline.

[11] Informing client that disclosure has been made; termination of the lawyer-client relationship. When a member has revealed confidential information under paragraph (B), in all but extraordinary cases the relationship between member and client will have deteriorated so as to make the member's representation of the client impossible. Therefore, the member is required to seek to withdraw from the representation (see rule 3-700(B)), unless the member is able to obtain the client's informed consent to the member's continued representation. The member must inform the client of the fact of the member's disclosure unless the member has a compelling interest in not informing the client, such as to protect the member, the member's family or a third person from the risk of death or substantial bodily harm.

[12] Other consequences of the member's disclosure. Depending upon the circumstances of a member's disclosure of confidential information, there may be other important issues that a member must address. For example, if a member will be called as a witness in the client's matter, then rule 5-210 should be considered. Similarly, the member should consider his or her duties of loyalty and competency (rule 3-110).

[13] Other exceptions to confidentiality under California law. Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law. (Added by order of the Supreme Court, operative July 1, 2004)

(d) Will past be prolog?

(9930.16:143:vy)

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