

Rule 1.6. CONFIDENTIALITY OF INFORMATION

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

(b) A lawyer must reveal information relating to the representation of a client when required by other provisions of these rules or to the extent the lawyer reasonably believes necessary:

(1) to prevent the client or another person from committing a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, a person other than the person committing the act; or

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

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

(c) A lawyer may reveal information relating to the representation of a client, though disclosure is not required by paragraph (b), when permitted under these rules or required by another provision of law or by court order or when the lawyer reasonably believes that disclosure is necessary:

(1) to prevent the client from committing a crime in circumstances other than those in which disclosure is required by paragraph (b) or to prevent the client or another person from committing an act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, the person committing the act;

(2) to secure legal advice about the lawyer's compliance with these rules; or

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.—Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

[1] This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This 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.

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

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

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to important exceptions. The provisions of Rule 1.6(b) set forth exceptions designed to bring the mandates of the Rules of Professional Conduct into line with those of the common or statutory law of torts and crimes. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and requires disclosure reasonably necessary to prevent a criminal act that is likely to cause death or substantial bodily harm. Such harm is likely to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has discharged toxic waste into a town's water supply must reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims. There is an exception to the disclosure requirement when the likelihood of death or harm is only to the person (whether the client or another) threatening the act. While the lawyer may disclose such information pursuant to paragraph (c)(1), disclosure is not required under paragraph (b)(1) as a matter of respect for personal autonomy and privacy.

[7] Paragraph (b)(2) requires disclosure of information relating to the representation to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct, and the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), concerning the lawyer's responsibilities when the client is an organization.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer must disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does

not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] Paragraph (c) permits, but does not require, disclosures not required by paragraph (b) when these rules permit it, or when another provision of law or a court order requires it. Whether another provision of law supersedes Rule 1.6 is a question of law beyond the scope of these rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this rule and requires disclosure, paragraph (c) permits the lawyer to make such disclosures as are necessary to comply with the law. When a lawyer is ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure, the lawyer, absent informed consent from the client to do otherwise, should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (c) permits the lawyer to comply with the court's order. Both provisions are permissive, however, allowing a lawyer to follow the dictates of conscience in cases where disclosure is not required by paragraph (b) by suffering the consequences of nondisclosure.

[10] Paragraph (c)(1) permits a lawyer to reveal information relating to the representation as necessary to prevent the client from committing any crime even though the conduct is not such as to require disclosure under paragraph (b), and to reveal information, disclosure of which is not required by paragraph (b)(1), when, in the lawyer's judgment, the client or another person should be prevented from committing a suicidal or other act harmful to the actor. Cf. Rule 1.14(c).

[11] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (c)(2) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[12] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (c)(3) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[13] A lawyer entitled to a fee is permitted by paragraph (c)(3) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[14] Paragraphs (b) and (c) require or permit disclosure, respectively, only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (c) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (c)(1) through (c)(3). In exercising the discretion conferred by this rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (c) does not violate this rule. Disclosure may be required, however, by other rules and thus by paragraph (b). See Rules 1.2(d), 3.3(b), 4.1(b), 8.1 and 8.3.

Acting Competently to Preserve Confidentiality

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

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Reporter's Notes — 2009 Amendment

V.R.P.C. 1.6 is amended to blend unique features of the Vermont rule as adopted in 1999 with the language and format of the changes to Model Rule 1.6.

The original Vermont rule differed significantly from Model Rule 1.6 in a number of respects. The Vermont rule required disclosure of client information when required by other rules, when necessary to prevent a crime that involved the risk of death or substantial bodily harm, and when necessary to avoid assisting a criminal or fraudulent act by a client. The rule permitted disclosure when permitted under other rules, when required by law or court order, or when necessary to reveal the client's intention to commit a crime not involving death or bodily injury or to defend against claims or charges arising out of the representation. See Reporter's Notes to V.R.P.C. 1.6 (1999). Model Rules 1.6(b) and 4.1(b) made disclosures to prevent death or bodily harm, or for defense of the lawyer's interests, permissive only and prohibited other disclosures. Model Rule 1.6, as amended in 2002 and again, on the recommendation of the Task Force on Corporate Responsibility and the Standing Committee on Ethics and Professional Responsibility, in 2003, makes language changes and adds to the list of permissive disclosures those necessary to prevent or rectify substantial financial injury caused by the client's fraud in which the lawyer's services were used, to secure legal advice about compliance with the rules, and to comply with other law or court order.

The present amendments retain the mandatory disclosure requirements of the prior Vermont rule with changes in language and structure intended to incorporate the form of the amended ABA rule and to address confusion that had arisen concerning the meaning of the prior Vermont Rule. The ABA Comments have been adapted to the Vermont changes.

Amended V.R.P.C. 1.6(a), like other amendments, substitutes "gives informed consent" for "consents after consultation." See amended Rule 1.0(e) and Reporter's Notes. The amendment also makes clear that both required and permitted disclosures are exceptions to the basic rule of confidentiality set forth in the paragraph.

Amended V.R.P.C. 1.6(b) continues the Vermont requirement of disclosure but adopts in modified form the language of the permissive provisions of amended Model Rule 1.6(b)(1)-(3) to describe the three key situations in which disclosure is required by the Vermont rule. The ABA rule has been further modified, in view of the mandatory character of the Vermont rule, to continue to confine the required disclosure to criminal acts and, as the Vermont modifications to Comment [6] state, to create an exception for disclosure of the intention of a client or another person to commit suicide or otherwise engage in behavior harmful to her- or himself. The lawyer is permitted to disclose such an intention pursuant to Rule 1.6(c)(1), however, when in the lawyer's judgment the best interests of the person involved require it. (The exception for the intention of another person covers the situation in which the information comes to the lawyer through the confidential communication of a client other than that person—for example, a treating psychologist or guardian.)

Amended V.R.P.C. 1.6(c), like the original Vermont rule, lists permissive disclosures, making clear that the provision applies to information other than that for which disclosure is required under V.R.P.C. 1.6(b). The provision in the first sentence permitting disclosure when required by law or court order is carried forward from the original rule and has been added to the Model Rules as Rule 1.6(b)(6). The disclosure continues to be permissive in the amended Vermont rule so that “A lawyer willing to take the risk of contempt or other legal penalties on behalf of a client should not also be subject to professional discipline for nondisclosure.” Reporter’s Notes to V.R.P.C. 1.6(c) (1999).

Amended V.R.P.C. 1.6(c)(1) makes clear that a lawyer may, but is not required to, disclose client information to prevent a crime other than one threatening likely death or substantial bodily harm. There is no general permission to disclose merely tortious conduct. As the Vermont additions to Comment [10] explain, however, there is such an exception where the noncriminal conduct is a threat of suicide or other serious harm to the potential actor. Cf. Rule 1.14(c). In making a decision to disclose under this provision, competent representation would call for a lawyer to seek appropriate professional consultation if available. See Comment [16]. V.R.P.C. 1.6(c)(2), which is new, adopts Model Rule 1.6(b)(4).

Former V.R.P.C. 1.6(c)(2), redesignated as (3), is unchanged and continues to track former Model Rule 1.6(b)(2), which has been redesignated as (5). The ABA Reporter’s Explanation of the amendments to Model Rules 1.6(b) is as follows in pertinent part:

Paragraph (b)(1): Modify to permit [require in the Vermont rule] disclosure to “prevent [likely] death or substantial bodily harm”

... This change is in accord with Section 66 of the American Law Institute’s Restatement of the Law Governing Lawyers. The Rule replaces “imminent” with [“likely”] to include a present and substantial threat that a person will suffer such injury at a later date, as in some instances involving toxic [discharges].

Paragraph (b)(2): Add paragraph permitting [requiring in the Vermont rule] disclosure to prevent client crimes or frauds reasonably certain to cause substantial economic injury and in which client has used or is using lawyer’s services

The Commission recommends that a lawyer be permitted [required in the Vermont rule] to reveal information relating to the representation to the extent necessary to prevent the client from committing a crime or fraud reasonably certain to result in substantial economic loss, but only when the lawyer’s services have been or are being used in furtherance of the crime or fraud. Use of the lawyer’s services for such improper ends constitutes a serious abuse of the client-lawyer relationship. The client’s entitlement to the protection of the Rule must be balanced against the prevention of the injury that would otherwise be suffered and the interest of the lawyer in being able to prevent the misuse of the lawyer’s services. Moreover, with respect to future conduct, the client can easily prevent the harm of disclosure by refraining from the wrongful conduct. See also Comment [7].

Support for the Commission’s proposal can be found in the eight jurisdictions that permit disclosure 56 when clients threaten crimes or frauds likely to result in substantial injury to the financial or property interests of another and the 25 jurisdictions that permit a lawyer to reveal the intention of a client to commit any crime. The Commission’s proposal is also in accord with Section 67 of the American Law Institute’s Restatement of the Law Governing Lawyers.

Paragraph (b)(3): Add paragraph permitting [requiring in the Vermont rule] disclosure to prevent, mitigate or rectify substantial economic loss resulting from client crime or fraud in which client has used lawyer’s services

The rationale for this exception is the same as that for paragraph (b)(2), the only difference being that the client no longer can prevent disclosure by refraining from the crime or fraud. See also Comment [8]. The Commission believes that the interests of the affected persons in mitigating or recouping their substantial losses and the interest of the lawyer in undoing a wrong in which the lawyer’s services were unwittingly used outweigh the interests of a client who has so abused the client-lawyer relationship. Support for the Commission’s proposal can be found in the 13 jurisdictions that permit disclosure to rectify the consequences of a crime or fraud in the commission of which the client used the lawyer’s services. The proposal is also in accord with Section 67 of the American Law Institute’s Restatement of the Law Governing Lawyers.

The ABA Reporter’s Explanation of Model Rule 1.6(b)(4) is as follows:

Questions have been raised regarding the propriety of a lawyer revealing confidential information in order to secure legal advice regarding the lawyer’s obligations under the Rules, including the lawyer’s duty not to counsel or assist clients in crimes or frauds. In most instances, disclosing information to secure such advice is impliedly authorized. Nevertheless, in order to clarify that such disclosures are

proper even when not impliedly authorized, the Commission recommends that such disclosures be explicitly permitted under this Rule.

It is of overriding importance, both to lawyers and to society at large, that lawyers be permitted to secure advice regarding their legal obligations. Moreover, clients are adequately protected by the requirement that such disclosures be made only when protected by the attorney-client evidentiary privilege. See also [Vermont Comment [11]].

The ABA Reporter's Explanation of the amendments to Comments [1]-[5] is as follows:

The points made in these Comments [first three paragraphs of former Vermont Comments] have been incorporated into Comment [2]. No change in substance is intended.

[1] This new Comment provides cross-references to the other Rules that protect clients, prospective clients and former clients against the disclosure or adverse use of information relating to the representation.

[2] This modification of [former ABA] Comment [4] combines material in [former ABA] Comments [1] through [4] into a single Comment setting forth the rationale for the confidentiality duty. No change in substance is intended.

[3] [Former ABA] Comment [5] has been edited slightly to clarify that the work-product doctrine is separate from the attorney-client evidentiary privilege. No change in substance is intended. Given that Rule 1.6 contains no suggestion that there might be an exception for government lawyers who disagree with government policy, the Commission recommends the deletion of [former ABA] Comment [6] as unnecessary.

[4] This new Comment reminds lawyers that the prohibition applies even when the disclosure does not itself reveal protected information but could lead to the discovery of such information, including the use of a hypothetical that poses an unreasonable risk that the listener will ascertain protected information. No change in substance is intended.

[5] This Comment combines and makes minor stylistic changes to [former ABA] Comments [7] and [8]. No change in substance is intended.

Amended ABA Comments [6] and [7] have been modified in the Vermont amendments to reflect the mandatory nature of the disclosures required by V.R.P.C. 1.6(b). The intent of the last three sentences of Comment [6] is described in the ABA Reporter's Explanation as follows: "This new Comment ... states the rationale for the exception recognized in paragraph (b)(1)-disclosures to prevent reasonably certain death or substantial bodily harm. It also explains when such harm is reasonably certain, providing an illustration." The intent of Comment [7] is to provide "the rationale for paragraph (b)(2)-disclosure to prevent future crimes or frauds threatening substantial economic harm. It also provides a cross-reference to Rules 1.2 and 1.16, which govern the lawyer's conduct regardless of whether the lawyer chooses to exercise the lawyer's discretion to disclose. *Id.*

The paragraphs between Comments [6] and [7] (former ABA Comments [10]-[17]) have been deleted because their "substance has been included in various new Comments [e.g., Comments [6], [7]]. The caption "Withdrawal" has also been deleted. *Id.*

The intent of Comment [8] is described in the ABA Reporter's Explanation as follows: "This new Comment provides the rationale for the exception recognized in paragraph (b)(3) disclosure to prevent, mitigate or rectify substantial economic loss resulting from a client's past crimes or frauds in the furtherance of which the client has used the lawyer's services."

Comment [9] incorporates the language of amended ABA Comments [12] and [13] in the context of explaining the permissive nature of the disclosures covered by V.R.P.C. 1.6(c). The final sentence in the Vermont Comment reflects the distinction between disclosures required by these Rules and those required by other law or court order found in V.R.P.C. 1.6(b), (c), discussed above. The ABA Reporter's Explanation notes that the subject of both comments is covered in former ABA Comments [20] and [21] (deleted following Vermont Comment [15] and that "No change in substance is intended."

Comment [10] explains V.R.P.C. 1.6(c)(1) and carries forward the essence of the fourth paragraph deleted between Comments [6] and [7].

Comment [11] "provides the rationale for the exception recognized in paragraph [(c)(2)]securing confidential legal advice about the lawyer's personal responsibility to comply with the Rules." ABA Reporter's Explanation to ABA Comment [9]. "The caption ['Dispute Concerning a Lawyer's Conduct'] has been deleted as no longer necessary." *Id.*

Amended Comment [12] "is derived from [former] Comment [18]. The new third sentence is taken from [former ABA] Comment [19]. The deleted last sentence has been incorporated into [Vermont] Comment [14]. No change in substance is intended." *Id.*

Amended Comment [13] “contains the core of [former ABA] Comment [19] that addresses disclosure necessary to collect a lawyer’s fees. The deleted second sentence has been included in [Vermont Comment [12]] and the deleted last sentence has been incorporated into [Vermont] Comment [14]. No change in substance is intended.” *Id.*

[14] The ABA Reporter’s Explanation of Comment [14] is as follows: “Combining points made in [former ABA] Comments [14], [18] and [19], this new Comment explains the Rule 1.6(b) requirement that disclosure be limited to information the lawyer reasonably believes is needed to accomplish the purpose for which disclosure is permitted. It emphasizes remonstrating with the client to take appropriate action, disclosing no more than necessary and, where appropriate, seeking protective orders against further dissemination of the information. No change in substance is intended.”

[15] This Comment differs from ABA Comment [15] in order to reflect the distinction between mandatory and permissive disclosure in V.R.P.C. 1.6(b), (c). The ABA Reporter’s Explanation of Comment [15] is as follows: “This new Comment incorporates the substance of [former ABA] Comment [14] [deleted between Vermont Comments [6] and [7]]. A new introductory sentence has been added, and the beginning of the second sentence has been revised for stylistic reasons. The last [sentence provides] a cross-reference to other Model Rules that may require disclosure.”

The caption and the two paragraphs between Comments [15] and [16] have been deleted because these matters are now discussed in Comment [9].

The ABA Reporter’s Explanation of Comments [16] and [17] is as follows:

Caption. This new caption has been added to call attention to the two new Comments that discuss the requirement that lawyers act competently and diligently to preserve confidentiality.

[16] This new Comment cross-references Rules 1.1, 5.1 and 5.3, calling attention to the responsibility of the lawyer to act competently to safeguard information relating to the representation. A number of states have retained the formulation of ABA Model Code of Professional Responsibility 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 confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.” Much of the recent discourse about confidentiality has focused on the lawyer’s duty to act competently to prevent disclosure. The Commission believes this issue is important and ought to be flagged in the Comment. No change in substance, however, is intended.

[17] This new Comment addresses the lawyer’s duty of care when transmitting confidential information. Although much of the current debate concerns the use of unencrypted e-mail, the Comment speaks more generally in terms of special security measures and reasonable expectations of privacy. It takes a case-by-case approach to the problem. The Commission believes this Comment is consistent with the prevailing resolution of this issue in recent ethics committee decisions.

Comment [18] is identical to ABA Comment [18] and to the last sentence of the original Vermont Comment, “with the addition of cross-references to Rule 1.9(c)(1) and (2).” ABA Reporter’s Explanation.

Reporter’s Notes

This rule represents a significant departure from the Vermont Code. It imposes a duty of confidentiality concerning information relating to the representation regardless of whether it is acquired before or after the relationship existed. The information must be kept confidential regardless of whether the client indicates a desire for confidentiality or whether disclosure of particular information might be embarrassing or detrimental.

The rule further departs from both the Vermont Code and the Model Rule by requiring a lawyer to disclose information necessary to prevent a crime that involves the risk of death or substantial bodily harm. A similar modification of the Model Rules has been adopted in a number of states. See, e.g., Ariz. R. Prof. Conduct, Rule 1.6(b); Conn. R. Prof. Conduct, Rule 1.6(b); Ill. R. Prof. Conduct, Rule 1.6(b). The proposed rule reflects a judgment that the values underlying client confidentiality are outweighed by the need to protect human life. See A.J. Taylor, “Work in Progress: The Vermont Rules of Professional Conduct,” 20 Vt. L. Rev. 901, 905-10 (1996). In any event, there may be a common-law duty to disclose in such circumstances. Cf. *Peck v. Counseling Service*, 146 Vt. 61, 499 A.2d 422 (1985).

The proposed rule also departs from the Model Rule by carrying forward the express exceptions from present DR 4-101 for disclosures required by other provisions of the rules, by other law, or by court order. Disclosures required by other rules are mandatory under Rule 1.6(b), as noted in the comment, to

avoid any implication that the requirements of those provisions are subject to Rule 1.6. To avoid confusion, a disclosure obligation contained in Model Rule 4.1(b) for information that would avoid assisting a criminal or fraudulent act by a client is placed here in paragraph (b)(2) and is made absolute. See Reporter's Note to Rule 4.1. All other disclosures required by other law or by court order are permissive under Rule 1.6(c). A lawyer willing to take the risk of contempt or other legal penalties on behalf of the client should not also be subject to professional discipline for nondisclosure.