

California's Duty of Confidentiality: Is It Time for a Life-Threatening Criminal Act Exception?

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I. INTRODUCTION

In August 2001, the House of Delegates of the American Bar Association (ABA) voted in favor of a revision to the duty of confidentiality contained in the ABA's Model Rules of Professional Conduct, a set of ethics rules that has been adopted in some form by over forty states. Specifically, the House voted to broaden the exception in Model Rule 1.6 that permits a lawyer to reveal confidential information of the client to the extent the lawyer reasonably believes necessary to prevent likely death or substantial bodily harm.¹ It is uncertain whether that vote will have any effect on the duty of confidentiality in California. This is because California, which has not adopted the Model Rules, has the strictest duty of confidentiality of any state: it is the duty of every lawyer "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."² Alone among the states, California has no express exceptions to its duty of confidentiality.³ Accordingly, California

1. At the ABA's annual meeting in Chicago on August 7, 2001, the revisions to the exception in the Model Rule of Professional Conduct 1.6(b)(1) prevailed by a vote of 243 to 184. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2001); Jonathan D. Glater, *Lawyers May Reveal Secrets of Clients, Bar Group Rules*, N.Y. TIMES, Aug. 8, 2001, at A12.

2. CAL. BUS. & PROF. CODE § 6068(e) (West 1990 & Supp. 2002).

3. Although California's attorney-client privilege, contained in California Evidence Code section 954, has exceptions, *see* CAL. EVID. CODE §§ 956-962 (West 1995), the privilege is not coterminous with the duty of confidentiality. *See infra* notes

is also the only state that does not have an express bodily harm exception to the duty.

What precisely is meant by allowing a lawyer to disclose confidential information to prevent likely death or serious bodily harm? Consider, for example, the following hypothetical scenario adapted from the *Restatement (Third) of the Law Governing Lawyers*:

Client seeks legal advice from Lawyer about client's dismissal from a maintenance position by Landlord and eviction from his apartment. Client, visibly angry, reveals that he has set a timed device to burn down the building. Lawyer knows there are people living in the building. Despite Lawyer's attempts to persuade him, Client refuses to take any action to prevent the fire or to warn others.⁴

In the foregoing situation, the lawyer has knowledge derived from his client's *confidential* communication that death or substantial bodily injury is likely to result. A person not trained in the law (or at least not an avid viewer of legal-themed television shows) would probably assume that the lawyer would disclose the information to prevent the client from causing the described harm. In fact, the duty of confidentiality in every state but California has an express exception that would allow such a disclosure.

This Article takes the position that it is finally time for California to make an unambiguous statement that under appropriate circumstances—a client's criminal actions that will likely result in death or serious bodily harm—a lawyer may reveal confidential client information to the extent necessary to prevent that harm. True, the duty of confidentiality is one of the core duties of the legal profession, fashioned over time to help ensure the strong attorney-client relationship that is essential to the effective operation of our legal system. It prohibits lawyers from disclosing confidential information about their clients, regardless of source.⁵ Yet, under the compelling circumstances where the client is engaging in criminal activity likely to result in death or serious bodily harm, public policy considerations should outweigh the duty and *permit—not require*—the lawyer to disclose confidential information.

Although there are persuasive arguments that certain California statutes and case law impliedly permit lawyers to reveal confidential information where life-threatening criminal activity is present,⁶ the law regarding confidentiality remains uncertain. The recent approval by the

27–37 and accompanying text (explaining the difference between the duty of confidentiality and the attorney-client privilege). There is uncertainty whether those exceptions apply equally to the duty of confidentiality. See *infra* Part III.

4. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 66 illus. 2 (1998).

5. See *infra* notes 34–36 and accompanying text (explaining the scope of the duty of confidentiality).

6. See *infra* Part III.

ABA's Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000 Commission) of a broader exception than most states currently have, as well as the recent publication of the *Restatement (Third) of the Law Governing Lawyers*, places Business and Professions Code section 6068(e)'s absolute terms in even starker contrast than in the past. The time has come for either the California Supreme Court, the California Legislature, or both working in concert to unequivocally permit lawyers to act in these circumstances.

Part II of this Article provides background on the duty of confidentiality and distinguishes it from the attorney-client privilege. It also describes the duty and its bodily harm exception as it exists in jurisdictions other than California. It concludes with a discussion of the changes to the exception proposed by the Ethics 2000 Commission. Part III then considers the relationship of the duty of confidentiality to the attorney-client privilege in California, concluding that a bodily harm exception cannot be inferred from either the language or statutory scheme of the privilege, nor can it be inferred from California case law. Part III also explains why California needs to have an express exception that would allow a lawyer to prevent a client's life-threatening criminal activity. Part IV discusses the nature and scope such an exception should take, concluding that it should authorize rather than mandate disclosure and also that criminal action should be a predicate to a lawyer disclosing confidential information. Finally, Part V considers various strategies for implementing an exception to the duty of confidentiality. After first discussing the several previous attempts to modify the statutory duty of confidentiality through a rule of professional conduct, it concludes that the preferred approach is to transfer the duty from the statute, where it currently resides, to a rule and create exceptions to the rule.

II. THE MODEL RULES, ETHICS 2000, AND THE *RESTATEMENT OF THE LAW GOVERNING LAWYERS*: EXCEPTIONS TO THE DUTY OF CONFIDENTIALITY

The duty of confidentiality is one of the core duties lawyers owe to their clients, the performance of which permits an effective lawyer-client relationship, which in turn is central to the effective operation of our adversarial legal system. The duty of confidentiality operates to create a relationship of trust between client and lawyer: if the client feared the lawyer would later reveal the client's information, the client would not provide the kind of information—often damaging to the client's case—

the lawyer requires to adequately advise or to zealously advocate for the client.⁷

Given its central role in our legal system, it might be expected that the duty would be absolute; only where a client was assured that his communications with his lawyer were sacrosanct would the client disclose damaging or embarrassing information to the lawyer. Indeed, California's duty of confidentiality, set out in the Business and Professions Code section 6068(e), is, by its express terms, absolute.⁸ It provides no exceptions to its stated duty. Other jurisdictions, however, have adopted exceptions to the duty of confidentiality. This Part discusses the exceptions to the duty of confidentiality that other jurisdictions have adopted, as well as revisions to those exceptions proposed by the recently-published *Restatement (Third) of the Law Governing Lawyers* and the Ethics 2000 Commission. While a number of exceptions are described, the focus will be on the character and scope of the exception concerning life-threatening activity by a client.

At present, all of the states except California have adopted either the ABA Model Rules of Professional Conduct (Model Rules) or the ABA Model Code of Professional Responsibility (ABA Code) in some form.⁹

7. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 4 (2001) ("A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.").

A note is in order concerning the nomenclature the author applies throughout this Article. References to the "current" Model Rules refer to the ABA Model Rules of Professional Conduct as adopted by the ABA in 1983, and later adopted by over forty states, some with modifications, as those states' code of lawyer ethics. This distinction is drawn because in February, 2002, at the ABA's 2002 mid-year meeting, the ABA House of Delegates voted to approve all of the rules, as amended, that the Ethics 2000 Commission submitted for approval. Together with the rules the House of Delegates had approved at the ABA's August 2001 annual meeting, the House of Delegates had voted on all of the proposed revised rules the Ethics 2000 Commission had submitted for its consideration with the exception of Rules 5.5 and 8.5, whose consideration was withheld pending their review by the ABA's Commission on Multijurisdictional Practice. See Ctr. for Prof'l Responsibility, American Bar Ass'n, *Ethics 2000—February 2000 Report* (Feb. 2002), at http://www.abanet.org/cpr/e2k-202report_summ.html [hereinafter *Ethics 2000*]; see also *Conference Report: ABA Midyear Meeting*, 18 ABA LAWYERS MANUAL ON PROF'L CONDUCT, 99–100 (2002). In one sense, then, because the House of Delegates is the policy-making body of the ABA, the rules the House approved in August 2001 and February 2002 arguably are the current Model Rules. However, as no state has yet adopted this recently-approved version of the Model Rules, the 1983 Model Rules are referred to herein as the current Model Rules.

8. California Business and Professions Code section 6068(e) provides that it is the duty of every California lawyer "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." CAL. BUS. & PROF. CODE § 6068(e) (West 1990 & Supp. 2002).

9. See Attorneys' Liability Assurance Society, Inc., *Ethics Rules on Client Confidences* (2000), reprinted in THOMAS D. MORGAN & RONALD D. ROTUNDA, MODEL

At a minimum, these states *permit* a lawyer to reveal client information to prevent death or serious bodily injury.¹⁰ Again, only California has no exception to the duty of confidentiality that would allow a lawyer to take steps to prevent life-threatening acts by the lawyer's client.¹¹

CODE OF PROFESSIONAL RESPONSIBILITY, MODEL RULES OF PROFESSIONAL CONDUCT AND OTHER SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 134-51 app. A (2001). Forty-two states and the District of Columbia have adopted some form of the Model Rules; seven states have adopted the ABA's Model Code of Professional Responsibility. California has its own rules. CAL. RULES OF PROF'L CONDUCT (2000).

The legal profession is self-regulated, primarily through the various codes of professional conduct the states have adopted during this century. The codes, which generally set forth minimally acceptable conduct for lawyers, are a means for determining a lawyer's liability for professional discipline. For a general discussion of the regulation of the legal profession, see Kevin E. Mohr, *Legal Ethics and A Civil Action*, 23 SEATTLE U. L. REV. 283, 287-89 (1999).

10. Under Disciplinary Rule 4-101(C)(3) of the Model Code, a lawyer may reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime." By its terms then, DR 4-101 includes within its ambit substantial bodily injury or death. Most states that have adopted the Model Rules have kept the Model Rules' discretionary language. See, e.g., ALASKA RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1999) ("A lawyer *may* reveal a confidence or secret to the extent the lawyer reasonably believes necessary . . ." (emphasis added)). Some states provide that a lawyer "shall" or "must" disclose client information to prevent death or substantial bodily injury. See, e.g., ARIZ. RULES OF PROF'L CONDUCT R. 1.6(b) (1997) ("A lawyer *shall* reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm." (emphasis added)). New Mexico's rule is hortatory in nature. See N.M. RULES OF PROF'L CONDUCT R. 16-106(B) (2001) ("To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, a lawyer *should* reveal such information to the extent the lawyer reasonably believes necessary." (emphasis added)).

11. That California has no exception is not for want of trying. On several occasions, the California State Bar has unsuccessfully proposed a rule of professional conduct that would permit lawyers to reveal confidential client information to prevent a client from committing a criminal act that is reasonably certain to result in death or substantial bodily harm. See *infra* notes 238-49 and accompanying text. The state bar's inability to push forward an exception is probably due less to an aversion on the part of the bar's members or the California Supreme Court to such exceptions as it is to California's unique system of lawyer regulation. Unlike other states where a lawyer's duty of confidentiality is set out in a professional discipline rule, in California the duty is found in a statute, California Business and Professions Code section 6068(e). Section 6068(e) provides that it is the duty of California lawyers to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." This *sui generis* professional regulatory system—regulating lawyers' conduct by both statutes and rules—has, as we shall see, played a major role in California being the only state without a life-threatening criminal activity exception to its duty of confidentiality. See *infra* notes 72-76, 238-49 and accompanying text.

*A. Current Regulatory Regimes Concerning Confidentiality:
The Model Rules and the ABA Code*

Current Model Rule of Professional Conduct 1.6, entitled “Confidentiality of Information,” provides that “[a] lawyer shall not reveal information relating to [the] representation.”¹² This prohibition on disclosures is limited by several exceptions.¹³ One exception is disclosure with client consent and another is “disclosures that are impliedly authorized in order to carry out the representation.”¹⁴ A third exception, the one with which this Article is mainly concerned, is that a lawyer may reveal information related to the representation “to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a *criminal act* that the lawyer believes is likely to result in *imminent* death or substantial bodily harm.”¹⁵ Before proceeding with a discussion of this

12. In its entirety, Model Rule 1.6(a), provides: “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).” For a discussion of the meaning and scope of the term “relating to representation,” see *infra* notes 20–26 and accompanying text.

13. In addition to client-consented and impliedly authorized disclosures in paragraph (a), paragraph (b) of Model Rule 1.6 provides:

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

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

(2) 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.

MODEL RULES OF PROF’L CONDUCT R. 1.6(b) (2001).

14. Comments 7 and 8 to Model Rule 1.6, explain what is intended by the “impliedly authorized” language in paragraph (a):

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

[8] 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.

Id. R.1.6 cmts. 7–8.

15. *Id.* R. 1.6(b)(1) (emphasis added). The Ethics 2000 Commission has recommended that both the “criminal act” and “imminent” limitations be removed and, as noted, the ABA House of Delegates agreed. See Glater, *supra* note 1, at A12; see also *infra* notes 63–65 and accompanying text. Model Rule 1.6 also allows disclosure to the extent necessary when the lawyer reasonably believes required:

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

life-threatening criminal activity exception, it will be helpful to first review briefly the relevant ABA Code provision and compare it to its Model Rule counterpart, and then consider the relationship of the duty of confidentiality to the attorney-client privilege.

Although over forty states have adopted some form of the ABA's Model Rules, a number of states still look to a variant of the ABA Code to regulate the legal profession. The primary section related to confidentiality in the ABA Code is Disciplinary Rule (DR) 4-101.¹⁶ Similar to Model Rule 1.6, DR 4-101(B) prohibits lawyers from revealing confidential client information.¹⁷ Paragraph (C) of DR 4-101 provides exceptions to the prohibitions of paragraph (B), including an exception permitting a lawyer to reveal his client's intention to commit a crime.¹⁸ While the ABA Code still provides the basis for discipline in

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.

MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2). This exception is sometimes referred to as the lawyer's "self-defense exception."

16. The Model Code is divided into Canons, each of which expresses "in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession." MODEL CODE OF PROF'L RESPONSIBILITY, preliminary statement (1981). For example, Canon 4 of the Model Code states, "A Lawyer Should Preserve the Confidences and Secrets of a Client." *Id.* Canon 4. Each Canon in turn is subdivided into a number of "Ethical Considerations" and "Disciplinary Rules." The Ethical Considerations (EC) are "aspirational in character and represent the objectives toward which every member of the profession should strive." *Id.* preliminary statement. The words "may" and "should," implying that the statement is precatory rather than mandatory, pervades most ECs. Disciplinary Rules (DR), on the other hand, are mandatory in character. They "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." *Id.*

17. DR 4-101(B) provides:

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

- (1) Reveal a confidence or secret of his client.
- (2) Use a confidence or secret of his client to the disadvantage of the client.
- (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

Id. DR 4-101(B) (footnotes omitted).

18. DR 4-101(C) provides:

(C) A lawyer may reveal:

- (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
- (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
- (3) The intention of his client to commit a crime and the information necessary to prevent the crime.

seven states, the trend among states is to adopt the Model Rules. Therefore, given the stated purpose of the ABA's Ethics 2000 Commission—to evaluate and identify rules among the current Model Rules that may require revision¹⁹—the focus of the ensuing discussion will be on the Model Rules.

The duty to protect “information relating to representation of a client” in Model Rule 1.6 is somewhat broader than the duty of confidentiality under the ABA Code’s DR 4-101, which concerns only a client’s “confidences” and “secrets.” DR 4-101 defines “confidence” as “information protected by the attorney-client privilege.”²⁰ It defines “secret” as “other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client,”²¹ which by its terms is not limited to information learned from the client.

Unlike the ABA Code, the Model Rules adopted a single standard for information the lawyer must protect. The terminology used, “information relating to representation of a client,” includes any other information the lawyer learns that is related to the representation of the client, whether subject to the attorney-client privilege or not.²² The client does not have to indicate whether the information is to be kept confidential, nor does the lawyer have to speculate whether the information will embarrass or be harmful to the client.²³ The lawyer’s duty is not dependent on whether the lawyer acquired the information before or after the attorney-client relationship existed.²⁴ Nor is the duty dependent on whether the lawyer received it from the client or from another source.²⁵ In short, if the information is about the client’s matter, then the lawyer may not reveal it unless one of the exceptions applies.

One further point to emphasize about “information relating to representation of a client” is that it necessarily contains within its ambit

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

Id. DR 4-101(C) (footnotes omitted).

19. Ctr. for Prof’l Responsibility, American Bar Ass’n, *ABA Ethics 2000 Comm’n Final Report—Summary of Recommendations* (June 9, 2001), at http://www.abanet.org/cpr/e2k-mlove_article.html.

20. MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101(A).

21. *Id.*

22. *See infra* note 26 and accompanying text.

23. MODEL RULE OF PROF’L CONDUCT R. 1.6 model code comparison (2001). Where relevant, the Model Rules contain a comparison between the rule and its equivalent or analog under the Model Code.

24. *Id.*

25. *Id.*

any attorney-client privileged matter. Although the concept of confidentiality in Model Rule 1.6 encompasses both attorney-client privileged communications and other confidential client information,²⁶ it is important to distinguish the parameters of the duty of confidentiality and the attorney-client privilege.

1. *A Digression: The Attorney-Client Privilege and the Duty of Confidentiality Compared*

The *privilege* is a narrow *evidentiary* privilege that allows a client to prevent a witness from revealing confidential *communications* between client and lawyer (or either's agents).²⁷ It is a privilege against compelled testimony. Put another way, its protection is triggered whenever a person, proceeding under the authority of the subpoena power of the state, attempts to *compel* a lawyer or party to the proceeding to disclose confidential client information.²⁸ The privilege applies only to

26. See *id.* R.1.6 cmt 5.

27. The attorney-client privilege is governed by statute in many states. See, e.g., CAL. EVID. CODE § 952 (West 1995). Nevertheless, the statutes appear to be, for the most part, codifications of the common law rule. See, e.g., *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 581 N.E.2d 1055, 1059-60 (N.Y. 1991) (describing the attorney-client privilege statute as "a 'mere re-enactment of the common-law rule'" (quoting *Hurlburt v. Hurlburt*, 28 N.E. 651, 652 (N.Y. 1891))); see also J.F. Rydstrom, Annotation, *Applicability of Attorney-Client Privilege to Communications with Respect to Contemplated Tortious Acts*, 2 A.L.R. 3d 861 (1965). For example, in California, no new privilege can be created except by statute. CAL. EVID. CODE § 911 (West 1995). On the other hand, no federal statute or rule sets out a federal attorney-client privilege. Instead, the Federal Rules of Evidence provide a more general framework for deciding evidentiary questions based on a claim of privilege:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501; see also *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (discussing the attorney-client privilege following the death of the client); *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (discussing the extension of the attorney-client privilege to the employees of a corporate client).

28. See *infra* notes 250-58 and accompanying text (discussing the statutory framework of California's attorney-client privilege). To invoke the privilege, it is not necessary to actually be present in a proceeding in a court or other government tribunal, nor is it necessary that a state official be attempting to compel the disclosure of

information the client herself (or one of her agents) has communicated to her counsel in the course of seeking legal advice (and it also applies to the advice the client's counsel gives to the client).²⁹

The policy underlying the privilege is to encourage candor between the client and lawyer.³⁰ A lawyer cannot adequately represent his client unless he knows the client's side of the story.³¹ Without the assurance of the attorney-client privilege, it is believed the client would not reveal the information necessary to enable effective representation. By assuring the client of the lawyer's confidentiality, the privilege encourages the client to frankly disclose information to assist the lawyer in the representation. This, in turn, "promote[s] broader public interests in the observance of law and the administration of justice."³² Nevertheless, because it is a narrow evidentiary privilege, it will usually fall unless each of the elements giving rise to it is satisfied.³³

information. For instance, depositions and other discovery requests propounded by nongovernment, private lawyers also implicate the privilege because lawyers conduct discovery under the general authority of the courts and, thus, state authority. A lawyer compels compliance with a discovery request by invoking the state's authority and filing a motion in court to compel the other party's compliance with Federal Rule of Civil Procedure 26. See *People v. Superior Court (Laff)*, 23 P.3d 563, 570–71 (Cal. 2001) (holding that the attorney-client privilege may be invoked in response to a search warrant issued as part of a criminal investigation).

29. See, e.g., CAL. EVID. CODE § 952 (West 1995) (defining "confidential communication between client and lawyer,"); *id.* § 954, (providing *inter alia* that the client only "has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer" (emphases added)). The statutory framework of the attorney-client privilege in California is discussed in more detail *infra* notes 250–58 and accompanying text.

30. *Swidler & Berlin*, 524 U.S. at 403 (citing *Upjohn Co.*, 449 U.S. at 389).

31. See, e.g., *id.*; *Jaffee v. Redmond*, 518 U.S. 1, 11–12 (1996); see also MODEL RULES OF PROF'L CONDUCT pmb. ¶ 7, R. 1.6 cmts. 2, 4 (2001).

32. *Swidler & Berlin*, 524 U.S. at 403 (quoting *Upjohn Co.*, 449 U.S. at 389); see also *Mitchell v. Superior Court*, 691 P.2d 642, 646 (Cal. 1984).

[T]he fundamental purpose behind the privilege is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters. In other words, the public policy fostered by the privilege seeks to insure "the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense."

Mitchell, 691 P.2d at 646 (citations omitted).

33. Wigmore set out the classic statement of the rule governing the application of the privilege:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (John T. McNaughton revisor 1961) (footnote omitted). Section 68 of the *Restatement (Third) of the Law Governing Lawyers* reduces the number of elements, stating the rule as follows:

The *duty* of confidentiality, on the other hand, while having the same policy underpinnings as the attorney-client privilege, is broader than the *privilege*. It applies in every other situation that the privilege does not; it is, in essence, the lawyer's duty "not to gossip."³⁴ The duty prohibits a lawyer, of his or her own volition, from divulging client information that is confidential or embarrassing, even if the lawyer learned the information from a source other than the client. The duty encompasses both attorney-client privileged *communications* and any *other information relating to representation* of the client that may be embarrassing or detrimental to the client.³⁵ The duty need not be triggered by another party seeking to coerce disclosure; it is simply one of the lawyer's paramount duties she must observe at all times.³⁶

This distinction between the scope of the duty and privilege is important to understanding why there remains confusion about whether California has a bodily harm exception to the duty of confidentiality. The current confusion over this will be discussed in Part III of this Article.³⁷

Except as otherwise provided in this Restatement, the attorney-client privilege may be invoked as provided in § 86 with respect to:

- (1) a communication
- (2) made between privileged persons
- (3) in confidence
- (4) for the purpose of obtaining or providing legal assistance for the client.

RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS § 68 (1998). California's attorney-client privilege is contained in several sections of the Evidence Code. *See* CAL. EVID. CODE §§ 952-954 (West 1995); *see also infra* notes 250-58 and accompanying text.

34. Referring to the duty as a "duty not to gossip" is not intended to denigrate the lawyer's duty to preserve client confidential information, but rather is intended to impress upon the reader the broad reach of the duty. It is critical to maintaining an effective lawyer-client relationship for the same reasons that the attorney-client privilege is viewed as critical within the legal system. *See supra* notes 30-35 and accompanying text. Indeed, some authorities argue that the proscription on discussing confidential client information applies even when the information has subsequently become public. *See, e.g.,* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.7.4, at 301 (1986); *see also* State Bar of Cal. Comm. on Prof'l Responsibility and Conduct, Formal Op. 1986-87 (1987) (stating that a lawyer may not reveal a client's criminal record to the court, even though the criminal record is public).

35. *See, e.g.,* L.A. County Bar Ass'n Comm. on Legal Ethics, Op. 436 (1985).

36. For example, a lawyer could not disclose to a friend in friendly conversation confidential information about a client's business that the client disclosed to the lawyer. Nor could the lawyer be compelled to disclose the substance of the communication to a party in a lawsuit against the client who is seeking that information.

37. *See infra* Part III.

B. Current Model Rule 1.6's Life-Threatening Criminal Activity Exception

Current Model Rule 1.6 has two requirements that must be satisfied before a lawyer may (*not* must) disclose information to prevent a client from doing harm to a third person. First, the potential harm to third persons must be the result of the client's prospective *criminal* conduct.³⁸ It is not enough that noncriminal acts of the client may cause potential harm. This limitation prevents a lawyer from revealing activities in which the client engages that are lawful but nevertheless may threaten life.³⁹

Second, the potential harm must be *imminent*. The rule is narrowly drawn to ensure that the lawyer can disclose client information only when he or she stands as the last barrier to the prospective harm.⁴⁰ There are other limitations on the lawyer's discretion to disclose client information in this situation; for example, the lawyer must believe that the harm is "likely" to occur, and the lawyer may reveal information only "to the extent the lawyer reasonably believes necessary" to prevent the harm.⁴¹

It is the "criminal act" and "imminent" limitations, however, that are of primary concern. The drafters of the *Restatement (Third) of the Law Governing Lawyers* removed these limitations from their life-threatening harm exception,⁴² and the ABA House of Delegates recently adopted the ABA Ethics 2000 Commission's recommendation that they be removed.⁴³

C. The Restatement (Third) of the Law Governing Lawyers

In an event long awaited, the final draft of the *Restatement (Third) of the Law Governing Lawyers*⁴⁴ was published in late 2000 by the American Law Institute (ALI). The drafters worked on the final project, which was conceived in 1985, for about thirteen years.⁴⁵ The ALI's Restatements are works that collect decisional and statutory law in a particular subject area (for example, torts or contracts) from the fifty-plus jurisdictions in the United States and organize the law "into a

38. MODEL RULES OF PROF'L CONDUCT R. 1.6 (b)(1), R. 1.6 cmt 13 (2001).

39. *See infra* Part IV.C.

40. *See infra* Part IV.B.

41. MODEL RULES OF PROF'L CONDUCT R. 1.6(b), R. 1.6 cmt. 14.

42. *See infra* notes 57–62 and accompanying text.

43. *See infra* notes 63–67 and accompanying text.

44. RESTATEMENT (THIRD) OF THE LAW GOVERNORS LAWYERS (1998).

45. *Id.* at XXII.

coherent and more readily digestible treatise."⁴⁶ Generally, Restatements are objective, simply reporting what the law is generally recognized to be. The Restatements record positional splits among the jurisdictions, and usually take sides only when the dispute is evenly divided.⁴⁷ In addition, where the ALI discerns trends, the Restatements may identify them and give them prominence in their black letter law.⁴⁸ To a certain extent, the *Restatement (Third) of the Law Governing Lawyers* followed a similar path; in other areas, however, it broke new ground.

Unlike the states' ethics codes, which are largely adopted for use by tribunals charged with applying discipline to lawyers, the *Restatement (Third) of the Law Governing Lawyers* attempts to cut a broader swath. Although it includes rules concerned with lawyer discipline that parallel those in the codes, the *Restatement (Third) of the Law Governing Lawyers* also contains a chapter on civil liability for malpractice and an entire chapter devoted to the formation of the attorney-client relationship.⁴⁹ In relation to confidentiality, the *Restatement (Third) of the Law Governing Lawyers* has included terms and provisions not otherwise found in a majority of jurisdictions. As noted, it is not

46. Richard C. Stanley, *The Restatement of the Law Governing Lawyers: Lawyer Regulation Coming of Age*, 48 LA. B.J. 22, 22 (2000).

47. *Id.*

48. See, e.g., J. Denny Shupe and Todd R. Steggerda, *Toward a More Uniform and "Reasonable" Approach to Products Liability Litigation: Current Trends in the Adoption of the Restatement (Third) and Its Potential Impact on Aviation Litigation*, 66 J. AIR L. & COM. 129, 132 (2000) ("The drafters of the Third Restatement [of Torts: Products Liability] have attempted not merely to restate existing doctrine but to move it in what they consider to be the right direction." (quoting *Stanton v. Carlson Sales, Inc.*, 728 A.2d 534, 549 (Conn. Super. Ct. 1998))); see also Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 828-49 (2001) (recounting the "rebellion" at the 1970 meeting of the American Law Institute, in which members of the Institute were able to incorporate into the Restatement (Second) of Torts section 821C's public nuisance "special injury rule" federal court concepts of standing, notwithstanding the fact that hardly any state had taken that position in its decisional law). Indeed, as Antolini notes, in the years since the adoption of the Restatement's proposed change to the special injury rule, only one state, Hawaii, has ever adopted the proposed change, and most courts have simply ignored it. Antolini, *supra*, at 856.

49. For the most part, the ethics codes all presume the formation of an attorney-client relationship. But see, e.g., CAL. EVID. CODE § 951 (West 1995) (defining "client" as one who "consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity," but not actually requiring the person consulting the lawyer to retain him in an attorney-client relationship). See also *Ethics 2000*, *supra* note 12 (discussing proposed Rule 1.18 entitled "Duties to Prospective Client").

unusual for a Restatement in a particular area of law to detect a trend and weigh in on one side or the other.⁵⁰ Some commentators, however, believe that the drafters of the *Restatement (Third) of the Law Governing Lawyers* may have gone farther than those of other Restatements in choosing which variation of the law to propose as the black letter law.⁵¹ For example, despite the usual approach of the Restatements to synthesize and restate the law in a particular subject area objectively, the drafters of the *Restatement (Third) of the Law Governing Lawyers* have proposed substantial changes to the duty of confidentiality as presently set forth in the Model Rules or the ABA Code, modifying some existing exceptions and adding some controversial new ones.

The *Restatement (Third) of the Law Governing Lawyers*' chapter on confidentiality, although consisting of several sections, is set up in a manner similar to both the Model Rules and the ABA Code—it defines the subject matter, sets forth the general rule, and then provides for exceptions to that general rule. The first section defines “confidential client information.”⁵² The next section (section 60) states the basic duty, restricting a lawyer’s right to use or disclose such information, subject to certain exceptions.⁵³ The exceptions are set out in sections 61 through 67 and include exceptions found in the Model Rules,⁵⁴ as well as a controversial section 67 which would permit using or disclosing confidential information to prevent, rectify, or mitigate substantial financial loss resulting from the criminal acts of a client.⁵⁵ The exception with which

50. See *supra* note 48 and accompanying text.

51. Stanley, *supra* note 46, at 23.

52. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 (1998) (“Confidential client information consists of information relating to representation of a client, other than information that is generally known.”).

53. *Id.* § 60(1)(a).

Except as provided in §§ 61–67, . . . the lawyer may not use or disclose confidential client information as defined in § 59 if there is a reasonable prospect that doing so will adversely affect a material interest of the client or if the client has instructed the lawyer not to use or disclose such information . . .

Id. Subsection (1)(b) of section 60 requires the lawyer to take reasonable steps to protect the information from disclosure or adverse use by the lawyer’s associates, and subsection (2) requires a lawyer to account to the client for pecuniary gain from using the client’s confidential information. *Id.* § 60(1)–(2).

54. For example, section 62 allows disclosure with the client’s consent, section 63 permits disclosures required by law, sections 64 and 65 allow disclosure, respectively, to enable the lawyer to defend against accusations brought by any person that the lawyer acted improperly or illegally in representing the client, and to resolve a compensation dispute with the client. *Id.* §§ 62–65. Section 66, discussed *infra* notes 57–62 and accompanying text, allows disclosure to prevent death or serious bodily harm. *Id.* § 66.

55. *Id.* § 67. Some states already include similar provisions. See, e.g., ALA. RULES OF PROF’L CONDUCT R. 1.6(b)(1) (1999); CONN. RULES OF PROF’L CONDUCT R. 1.6(c)(1) (2001); HAW. RULES OF PROF’L CONDUCT R. 1.6(b) (2000); MD. RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2001); MASS. RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2001). The majority of states permit disclosure to *prevent* such a crime; however, only

this Article is primarily concerned is contained in section 66, which permits a lawyer to use or disclose confidential client information to prevent death or serious bodily harm.

Section 66 provides in pertinent part: "A lawyer may use or disclose confidential client information when the lawyer reasonably believes that its use or disclosure is necessary to prevent reasonably certain death or serious bodily harm to a person."⁵⁶ The drafters thus made two major changes to the life-threatening harm exception set out in the current Model Rules. First, the harm need no longer result from the criminal act or acts of the client; life-threatening harm, even if it results from an undertaking by the client that is perfectly legal, can trigger the exception. Second, the harm no longer must be imminent; the lawyer may reveal confidential client information even if the serious harm will not manifest itself for many years.⁵⁷

That the drafters would discard both of these limitations is somewhat surprising given that, to date, only three states have removed *both* the crime and temporal limitations from their statutory adoptions of the current Model Rules.⁵⁸ In addition, one state has removed the criminal

a minority permits disclosure to *rectify* a prior crime. See Attorneys' Liability Assurance Society, Inc., *supra* note 9, at 136-46. The drafters, perhaps recognizing this section is controversial, have provided for a "safe harbor" from civil liability in the event the lawyer exercises discretion and decides not to take any action under these circumstances. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 67(4).

A lawyer who takes action or decides not to take action permitted under this Section is not, solely by reason of such action or inaction, subject to professional discipline, liable for damages to the lawyer's client or any third person, or barred from recovery against a client or third person.

Id.

56. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 66(1).

57. Although the drafters removed these limitations from the life-threatening injury exception, they retained the permissive nature of the rule as adopted in most jurisdictions. Lawyers are not required to disclose information to prevent serious bodily harm, but rather are given the option of doing so without being subject to discipline. Along these same lines, as with the fraud exception set out in section 67, the drafters have added a safe harbor provision with the intent to protect lawyers from liability or discipline for acting (or not acting) as permitted under the rule. See *id.* § 66(3).

A lawyer who takes action or decides not to take action permitted under this Section is not, solely by reason of such action or inaction, subject to professional discipline, liable for damages to the lawyer's client or any third person, or barred from recovery against a client or third person.

Id.

58. See FLA. RULES OF PROF'L CONDUCT R. 4-1.6(b)(2) (1994); GA. RULES OF PROF'L CONDUCT R. 1.6(b)(1)(ii) (1989); ILL. RULES OF PROF'L CONDUCT R. 1.6(b) (1993). Tennessee currently has a proposed Rule 1.6 under consideration which also would remove both limitations (establishing that "A lawyer may reveal information

act limitation while retaining the imminence standard.⁵⁹ The remaining states and the District of Columbia retain a threshold requirement that the client has committed or intends to commit a criminal act before a lawyer can make any disclosure. Of these, only eleven jurisdictions still adhere to a requirement that the death or bodily injury be imminent.⁶⁰ Thirteen jurisdictions that specifically identify life-threatening harm as appropriate to trigger disclosure have discarded the imminence standard.⁶¹ Finally, another nineteen jurisdictions do not expressly mention death or bodily injury, but do allow or require disclosures of a client's intent to commit *any* crime.⁶² None of these latter states include a requirement of imminence.

relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary: (1) to prevent reasonably certain death or substantial bodily harm"). TENN. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (Proposed Draft 2001), *available at* <http://www.tba.org/committees/Conduct/index.html>.

59. See N.D. RULES OF PROF'L CONDUCT R. 1.6(a) (2000) (providing that disclosure or use of confidential information is "[r]equired to the extent the lawyer believes necessary to prevent the client from committing *an act* that the lawyer believes is likely to result in imminent death or imminent substantial bodily harm." (emphasis added)).

60. ALA. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1999); DEL. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2001); KY. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2001); LA. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2000); MO. RULES OF PROF'L CONDUCT R. 4-1.6(b)(1) (2001); MONT. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2000); NEV. RULES OF PROF'L CONDUCT R. 156(2) (2001); N.M. RULES OF PROF'L CONDUCT R. 16-106(B) (2001); R.I. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2001); S.D. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1995); VT. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1995).

61. ALASKA RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1999); ARIZ. RULES OF PROF'L CONDUCT R. 1.6(b) (1997); CONN. RULES OF PROF'L CONDUCT R. 1.6(b) (2001); D.C. RULES OF PROF'L CONDUCT R. 1.6(c)(1) (1999); HAW. RULES OF PROF'L CONDUCT R. 1.6(c)(1) (2000); MD. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2001); MASS. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2001); N.H. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2001); N.J. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2001); PA. RULES OF PROF'L CONDUCT R. 1.6(c)(1) (2001); TEX. RULES OF PROF'L CONDUCT R. 1.05(e) (2001); UTAH RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2001); WIS. RULES OF PROF'L CONDUCT R. 20:1.6(b) (2001). Rule 3.6(H)(4) in Maine, while not specifically referring to "death" or "bodily injury," provides: "This provision is not violated by the disclosure of a client's intention to commit a crime or the information necessary to prevent the crime or to avoid subjecting others to risk of harm." ME. RULES OF PROF'L CONDUCT R. 3.6(H)(4) (2000).

62. For example, Arkansas provides: "A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: . . . to prevent the client from committing a criminal act." ARK. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2001); *see also* COLO. RULES OF PROF'L CONDUCT R. 1.6(b) (2001); IDAHO RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2002); KAN. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2001); MICH. RULES OF PROF'L CONDUCT R. 1.6(c)(4) (1988); MINN. RULES OF PROF'L CONDUCT R. 1.6(b)(3) (1993); MISS. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2001); N.C. RULES OF PROF'L CONDUCT R. 1.6(d)(4) (2001); OKLA. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2001); S.C. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2000); VA. RULES OF PROF'L CONDUCT R. 1.6(c)(1) (2001); WASH. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2001); W. VA. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2001); WYO. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2001). In addition, six states that have retained the provisions of the Model Code in some form permit disclosure of a crime without specifically mentioning life-threatening harm. *See* IOWA CODE OF PROF'L RESPONSIBILITY DR 4-

D. The ABA's Ethics 2000 Commission

It appears at first glance that the drafters of the *Restatement (Third) of the Law Governing Lawyers*, at least with respect to confidentiality, have gone beyond an objective statement of what the law currently is. However, the ABA's Ethics 2000 Commission also voted to include in its final report to the ABA House of Delegates a provision virtually identical to section 66(1) of the *Restatement (Third) of the Law Governing Lawyers*.⁶³ Proposed Model Rule 1.6(b)(1) would provide: "A lawyer may reveal information *relating to the representation of a client* to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm." The Reporter for the Ethics 2000 Commission explained these changes:

The Commission recommends that the exception currently recognized for client crimes threatening *imminent* death or substantial bodily harm be replaced with a broader exception for disclosures to prevent reasonably certain death or substantial bodily harm, with no requirement of client criminality. 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 "reasonably certain," to include a present and substantial threat that a person will suffer such injury at a later date, as in some instances involving toxic torts.⁶⁴

At the time of this writing, there has been substantial opposition to the Ethics 2000 Commission's proposed changes to the confidentiality rule.⁶⁵ While most of the opposition has been directed at the criminal

101(C)(3) (2001); NEB. CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(3) (2001); N.Y. CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(3) (2002); OHIO CODE OF PROF'L RESPONSIBILITY 4-101(C)(3) (2001); OR. CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(3) (2002); TENN. CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(3) (2002). As noted previously, *see supra* note 58, Tennessee is considering the adoption of a modified Rule 1.6, which would remove both the criminal act and temporal limitations to disclosure.

63. The ABA formed the Ethics 2000 Commission, formally known as the Commission on Evaluation of the Rules of Professional Conduct, in 1997 to review the current Model Rules and propose revisions. The genesis of the Commission was the concern of the then-President of the ABA, Jerome J. Shestack, his immediate predecessor, N. Lee Cooper, and his successor, Philip S. Anderson, that the current Model Rules, as adopted by the states, had created a "patchwork pattern" of state regulation, and some rules had "substantive shortcomings," while others had "lack of clarity." *See* Ctr. for Prof'l Responsibility, *supra* note 19.

64. *See* Ctr. for Prof'l Responsibility, American Bar Ass'n, *Model Rule 1.6: Reporter's Explanation of Changes* ¶ 2 (May 2001), at <http://www.abanet.org/cpr/e2k-rule16rem.html> (emphasis added).

65. *See, e.g.,* William Glaberson, *Lawyers Consider Easing Restriction on Client Secrecy*, N.Y. TIMES, July 31, 2001, at A1; Henry Weinstein, *ABA Considers Ethics of*

fraud exceptions that parallel section 67 of the *Restatement (Third) of the Law Governing Lawyers* and were contained in the Ethics 2000 Commission's proposed Rule 1.6, paragraphs (b)(2) and (3),⁶⁶ there has also been some opposition to the proposed revisions in the life-threatening harm exception to the duty.⁶⁷ This Article will address these issues below in discussing the scope that a life-threatening harm exception in California should take.⁶⁸ Before proceeding to that analysis, however, it is necessary to first consider the duty of confidentiality and its parameters in California, its relationship to the attorney-client privilege, and why California should have an express exception that would allow a lawyer to prevent a client's life-threatening criminal activity.

III. CONFIDENTIALITY AND PRIVILEGE IN CALIFORNIA: DOES THE LIFE-THREATENING CRIMINAL ACTIVITY EXCEPTION IN EVIDENCE CODE SECTION 956.5 ALSO APPLY TO BUSINESS AND PROFESSIONS CODE SECTION 6800(E)?

As noted in the preceding section, California remains the only state without an express exception to its duty of confidentiality for life-threatening criminal activity. California's lack of such an exception, however, should not be attributed to indifference on the part of either the State Bar of California or its membership. As will be discussed in some

Client Secrecy, L.A. TIMES, Aug. 5, 2001, at A19.

66. See, e.g., AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT OF THE LEGAL ETHICS COMMITTEE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS ON DUTIES OF CONFIDENTIALITY 7-24 (2001). Along the same lines as section 67 of the *Restatement (Third) of the Law Governing Lawyers*, the ABA Ethics 2000 Commission Proposed Rule 1.6(c)(2) and (3) would provide:

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . .

.....
(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;

(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 . . .

Ctr. For Prof'l Responsibility, American Bar Ass'n, *Proposed Rule 1.6*, at <http://www.abanet.org/cpr/e2k-rule16.html> (last visited Jan. 23, 2002). Proposed Rule 1.6(b)(2) was defeated by a vote of 255 to 151 at the ABA's annual meeting on August 7, 2001, in Chicago. See Glater, *supra* note 1, at A12. After that vote, the proponents of the fraud exception rules withdrew Proposed Rule 1.6(b)(3). *Id.*

67. See, e.g., DAVID J. PASTERNAK, L.A. COUNTY BAR ASS'N, RULE 1.6(b): PROPOSED AMENDMENT TO ETHICS 2000 COMMISSION REPORT (2001).

68. See *infra* Part IV.

detail below,⁶⁹ the State Bar, on three separate occasions over the course of eleven years, proposed a rule of professional conduct that would have allowed a lawyer to disclose a client's confidential information to prevent death or serious bodily harm. Each time, the California Supreme Court rejected the proposal. While it is not certain why the court rejected three different versions of the proposed rule, some authorities have suggested there is no need for such a rule, either because the corresponding exceptions to the attorney-client privilege apply equally to the duty of confidentiality,⁷⁰ or because the public policies underlying the exception mandate that such an exception be implied.⁷¹ Before analyzing these contentions, it is helpful first to describe the duty of confidentiality in California.

A. California's Unique System for Regulation of the Legal Profession and Its Duty of Confidentiality

California has a unique system for the regulation of lawyers. Whereas other states regulate their lawyers through their ethics codes, some version of either the Model Rules or the ABA Code,⁷² California regulates the legal profession by both legislatively enacted statutes⁷³ and rules drafted by the state bar, published for public comment, and adopted by the supreme court.⁷⁴

Unlike other states where a lawyer's duty of confidentiality is set out in a professional discipline rule, in California, the duty is found in a statute, Business and Professions Code section 6068(e). Section 6068(e) provides that it is the duty of every California lawyer to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."⁷⁵ Although not certain, it appears that California's *sui generis* regulatory system—lawyers'

69. See *infra* Part V.B.1.

70. The conclusion that the attorney-client privilege's express exceptions, CAL. EVID. CODE §§ 956–962 (West 1995), are applicable to the duty of confidentiality, CAL. BUS. & PROF. CODE § 6068(e) (West 1990 & Supp. 2002), is derived from analysis of the legislative history of Cal Evidence Code section 956.5, the privilege's life-threatening criminal activity exception, see *infra* Parts III.B.1–2, or from the California Supreme Court's allegedly implied holding that the privilege's exceptions also apply to the duty of confidentiality. See *infra* Part III.C.

71. See *infra* Part III.D.

72. See *supra* notes 9–11 and accompanying text.

73. CAL. BUS. & PROF. CODE §§ 6000–6210 (West 1990 & Supp. 2002).

74. See CAL. RULES OF PROF'L CONDUCT (2000).

75. CAL. BUS. & PROF. CODE § 6068(e) (West 1990 & Supp. 2002).

conduct being subject to regulation by both legislatively enacted statutes and court-adopted rules—has played the starring role in California being the only state without a life-threatening criminal activity exception to its duty of confidentiality.⁷⁶

Although there appear to be some exceptions to the duty created by case law,⁷⁷ and some commentators have considered whether exceptions to the statutory attorney-client privilege also apply to the duty of confidentiality contained in section 6068(e),⁷⁸ California remains the only state without any express exceptions to its duty of confidentiality.⁷⁹ It is possible, however, that despite this omission, there is no need for an express exception. Determining whether that contention is true requires a consideration of legislative history and a landmark California Supreme Court opinion.

B. Can an Exception to the Duty of Confidentiality Be Implied from Evidence Code Section 956.5's Legislative History?

Perhaps the most compelling argument that there is no need for any express exceptions to section 6068(e) resides in California's enactment in 1993 of Evidence Code section 956.5.⁸⁰ Section 956.5 carves out an exception to the attorney-client privilege. It provides:

76. See *infra* Part V.B.2; *infra* note 263 and accompanying text.

77. See, e.g., *Arden v. State Bar of Cal.*, 341 P.2d 6, 12 (Cal. 1959) (noting that a lawyer's use of confidential client information in a disciplinary proceeding to defend himself against allegations by client may be permissible); *Fox Searchlight Pictures, Inc. v. Paladino*, 106 Cal. Rptr. 2d 906, 923 (Ct. App. 2001) (stating that a lawyer may disclose a client's confidential information to the lawyer's own attorney to determine whether those communications are admissible evidence in the lawyer's action against the client); *Carlson, Collins, Gordon & Bold v. Banducci*, 64 Cal. Rptr. 915, 923 (Ct. App. 1967) (noting the "established principle" that use of confidential client information to protect an attorney's rights, in this case the right to fees, is permissible in litigation between the attorney and his client). See also *infra* Part III.C.

In addition, at least two ethics opinions of the L.A. County Bar Association have concluded that disclosures are allowed to prevent a client from committing a criminal act that is likely to result in imminent death or serious bodily injury. L.A. County Bar Ass'n Ethics Comm., Formal Op. 436 (1985); L.A. County Bar Ass'n Ethics Comm., Op. 264 (1959); see *infra* Part III.D.

78. See, e.g., Fred C. Zacharias, *Privilege and Confidentiality in California*, 28 U.C. DAVIS. L. REV. 367, 378–96 (1995) (discussing whether section 956.5 of the California Evidence Code impliedly created an exception to Business and Professions Code section 6068(e)'s duty of confidentiality). Professor Zacharias concluded it did not. *Id.* at 396. His analysis is discussed more fully, *infra* Part III.B.2.

79. See Attorneys' Liability Assurance Society, Inc., *supra* note 9, at 136–46 (showing that every state except California has adopted either the Model Rules or the Model Code and thus every other state has express exceptions to the duty of confidentiality).

80. 1993 Cal. Stat. 982, § 8 (codified at CAL. EVID. CODE § 956.5 (West 1995)).

There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.⁸¹

Evidence Code section 956.5 thus appears to permit lawyers to disclose confidential client information to protect human life.

As already noted, however, the attorney-client privilege is not coterminous with the duty of confidentiality,⁸² causing some California lawyers to question whether section 956.5 impliedly created an exception to the confidentiality duty in Business and Professions Code section 6068(e).⁸³ A number of arguments have been advanced in favor of both positions.

1. Pro: The Legislative History of Evidence Code Section 956.5 Demonstrates Legislative Intent to Create an Exception to Business and Professions Code Section 6068(e)

First, pointing to Evidence Code section 956.5's language, there are those who argue that section 956.5 demonstrates legislative intent to override Business and Professions Code section 6068(e) not only in the evidentiary context, but also in more general situations.⁸⁴ Unlike other exceptions to the attorney-client privilege, Evidence Code section 956.5 is applicable only if the lawyer "reasonably believes" that disclosure is necessary. It provides a lawyer with a threshold standard for exercising

81. CAL. EVID. CODE § 956.5 (West 1995).

82. See *supra* notes 27–35 and accompanying text. To restate briefly, the duty of confidentiality is broader than the attorney-client privilege. See *Goldstein v. Lees*, 120 Cal. Rptr. 253, 257 n.5 (Ct. App. 1975). The attorney-client privilege is a narrow evidentiary privilege intended to protect client-lawyer confidential communications from compelled disclosure in the courtroom. The duty of confidentiality applies to lawyers both inside and outside the courtroom, and protects not only information communicated by the client, but also information the lawyer has learned from other sources in representing the client (including, for example, the lawyer's own investigation of the matter).

83. See, e.g., Jeffrey P. Kerrane, *Will Tarasoff Liability Be Extended to Attorneys in Light of New California Evidence Code Section 956.5?*, 35 SANTA CLARA L. REV. 825, 832–33 (1995); see also STATE BAR OF CAL. OFFICE OF PROF'L COMPETENCE, PLANNING & DEV., REQUEST THAT THE SUPREME COURT OF CALIFORNIA APPROVE PROPOSED RULE 3-100 OF THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA AND MEMORANDUM AND SUPPORTING DOCUMENTS IN EXPLANATION 3–4 (1998) (recognizing the difference of opinion among members of the bar). But cf. Zacharias, *supra* note 78, at 378–97.

84. Zacharias, *supra* note 78, at 378–97.

her discretion; the lawyer can disclose confidential client information only if she has a reasonable belief that such a disclosure is necessary to prevent the threatened consequences of the client's acts. None of the other exceptions to California's attorney-client privilege have similar language; they are all absolute.⁸⁵ Moreover, "reasonably believes" is virtually identical to the language used by the ABA ethics codes in carving out a lawyer's discretionary exception to the duty of confidentiality.⁸⁶ The use of this threshold-standard language thus might suggest a legislative intent to allow lawyers to prospectively prevent client conduct that will likely result in serious bodily harm by *threatening* disclosure of confidential information, in addition to allowing them to testify when compelled.⁸⁷

Second, the legislative history of California's Senate Bill 645 contains express references to Business and Professions Code section 6068(e). These references, in two separate California Assembly Committee reports, suggest, some might argue, that the legislators who voted for the bill contemplated that the exception contained in Evidence Code section 956.5 would override the strict confidentiality duty contained in Business and Professions Code section 6068(e).⁸⁸ Each committee report states: "Business and Professions Code section 6068(e) requires attorneys to 'maintain inviolate the confidence, at every peril to himself or herself,' of his or her client."⁸⁹ In each report, this sentence is immediately followed with an explanation of Evidence Code section 956.5's significance, noting for example, that disclosure of imminent client criminal conduct would be "permissive."⁹⁰ The juxtaposition of

85. Other exceptions or exclusions to the attorney-client privilege are not qualified by similar "reasonably believes" language. See, e.g., CAL. EVID. CODE § 956 (West 1995) ("There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud."); *id.* § 958 ("There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.").

86. For example, Model Rule 1.6(b)(1) provides, "A lawyer may reveal such information to the extent the lawyer *reasonably believes* necessary . . . to prevent the client from committing a criminal act." MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2001) (emphasis added); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 67 (1998).

87. But see *infra* notes 109–13 and accompanying text.

88. See Assembly Comm. Report on SB 645, 1993–94 Reg. Sess. (Cal. Aug. 25, 1993); Assembly Comm. Report on SB 645, 1993–94 Reg. Sess. (Cal. Aug. 18, 1993); Kerrane, *supra* note 83, at 832–33.

89. Assembly Comm. Report on SB 645 1993–94 Reg. Sess. (Cal. Aug. 25, 1993); Assembly Comm. Report on SB 645 1993–94 Reg. Sess. (Cal. Aug. 18, 1993).

90. Both of the cited committee reports follow the foregoing sentence with the following observations:

The proposed statutory exception to the privilege raises the following issues:

a) There is no requirement that the attorney reveal the imminent criminal

these observations to a reference to Business and Professions Code section 6068(e), even though neither report expressly states that Evidence Code section 956.5 will override Business and Professions Code section 6068(e), could therefore suggest that legislators believed they were modifying Business and Professions Code section 6068(e)'s duty of confidentiality and not just the more narrow attorney-client privilege.⁹¹

conduct of a client. The provision is entirely permissive.

b) The proposed provision does not state to whom the disclosure may, or shall, be made. There is no requirement that a clearly identified victim be warned. Nor is there any requirement that law enforcement be informed.

c) Should the exception to the privilege be limited to instances of death or substantial bodily harm? Should confidentially obtained knowledge of massive financial fraud be subject to disclosure? Electoral fraud? Widespread illegal dumping of toxic waste? Drug smuggling?

The proposal is well-motivated. Clearly . . . , it may be forcefully argued that attorneys have some obligation to protect other members of society from violent criminal conduct.

Assembly Comm. Report on SB 645 1993-94 Reg. Sess. (Cal. Aug. 25, 1993); *Assembly Comm. Report on SB 645* 1993-94 Reg. Sess. (Aug. 18, 1993).

91. Some have even argued that the legislative history of section 956.5 also demonstrates legislative intent not only to carve out an exception to the duty of confidentiality, but also to create an obligatory duty to disclose. See Michael A. Backstrom, *Unveiling the Truth when It Matters Most: Implementing the Tarasoff Duty for California's Attorneys*, 73 S. CAL. L. REV. 139, 152-53 (1999); Kerrane, *supra* note 83, at 832-33. As Mr. Backstrom explains, S.B. 645 was an attorney disciplinary bill addressing several issues of attorney regulation. S.B. 645, 1993-94 Reg. Sess., (Cal. 1993-94). The bill, as originally introduced, provided for an alternative dispute resolution mechanism within the state bar to resolve client complaints against lawyers that do not warrant discipline, defined the composition and powers of the state bar's grievance panel, expanded the number of state bar hearing judges, and re-established a pilot project requiring lawyers to read and sign papers in civil cases testifying to their accuracy. *Id.* When proposed section 956.5 was subsequently added, it contained a safe harbor provision, exempting lawyers from civil liability in the event the lawyer declined to reveal client confidences. *Id.* (as amended May 12, 1993). Sharp criticism of this provision appeared in an Assembly Committee report dated August 18, 1993. The report noted that the safe harbor provision would treat lawyers differently from psychotherapists, who are not similarly protected:

This immunity departs from the law that governs psychotherapists under similar circumstances. Evidence Code Section 1010 et. seq. creates a psychotherapist-patient privilege. However, Civil Code Section 43.92 does not immunize a psychotherapist who fails to warn (the potential victim and a law enforcement agency) of a serious threat of physical violence against a reasonably identifiable victim or victims.

Assembly Comm. Report on SB 645, 1993-94 Reg. Sess. (Cal. Aug. 18, 1993). The report then added, "It is not clear why attorneys should not be held to a similar standard of conduct." *Id.* Fifteen days after this report appeared, the provision was removed from the bill. S.B. 645, 1993-94 Reg. Sess., (Cal. 1993-94) (as amended Sept. 2, 1993).

Mr. Backstrom has argued that "[s]uch a measure in the wake of criticism indicated a strong legislative intent to impose civil liability on attorneys who chose not to prevent

2. *Con: The Legislative Intent of Evidence Code Section 956.5 Is, at Best, Ambiguous*

Another commentator, Professor Fred Zacharias, however, has argued that the Legislature's intent in enacting Evidence Code section 956.5 is hardly unambiguous.⁹² Professor Zacharias relied on a leading California Supreme Court case on statutory interpretation, *Hays v. Wood*, which holds that a court can find a statute impliedly repealed or amended "only where the two acts are so *inconsistent* that there is no possibility of concurrent operation, or where the later provision gives *undebatable evidence of an intent* to supersede the earlier."⁹³

Professor Zacharias posited three arguments to satisfy the *Hays* prerequisites: (1) the legislative history for Evidence Code section 956.5 *expressed* clear intent to amend a previous, related law; (2) previous legislative action demonstrates a clearly *implied* legislative intent; and (3) the statutes are so contradictory that an exception has to be implied.⁹⁴

a. *The Legislative History Does Not Express a Clear Intent to Amend Business and Professions Code Section 6068(e)*

With respect to Senate Bill 645's legislative history, for which California courts require "undebatable evidence of an intent to supersede the earlier [statute],"⁹⁵ Professor Zacharias noted that it is at best "murky," and discussed the contradictory language in both the committee reports and in the statute itself.⁹⁶ While it is possible that the

harm, thus creating an obligatory duty of disclosure." Backstrom, *supra* note 91, at 152. Although this argument is persuasive, it does not necessarily demonstrate an unmistakable intent by the legislature to override section 6068(e). Indeed, a subsequent Assembly Committee report, dated only eight days later, removed the language criticizing the safe harbor provision on which this argument so heavily relies. See *Assembly Comm. Report on SB 645*, 1993-94 Reg. Sess. (Cal. Aug. 25, 1993). Further, the subsequent report expressly continues to caution readers that "[t]here is no requirement that the attorney reveal the imminent criminal conduct of a client. The provision is entirely permissive." *Id.* The August 25, 1993 report was the last to address whether disclosure would be mandatory or permissive. The express cautionary language in that report militates against an interpretation establishing a duty for lawyers, along the lines of psychotherapists, to disclose life-threatening criminal activity of their clients. See *infra* notes 169-70 and accompanying text (arguing that a life-threatening criminal activity exception to the duty of confidentiality should be permissive in nature).

92. See Zacharias, *supra* note 78, at 380-97.

93. 603 P.2d 19, 24 (Cal. 1979) (emphasis added).

94. Zacharias, *supra* note 78, at 381.

95. *Hays*, 603 P.2d at 24.

96. Zacharias, *supra* note 78, at 353-85. In this regard, the Assembly report does make mention of section 6068(e) and refers to a Los Angeles case in which a law firm's client had threatened a judge but the firm felt constrained from disclosing the information by section 6068(e). Both of these references suggest that the legislature intended to modify section 6068(e). See *Assembly Comm. Report on SB 645*, 1993-94

legislature confused the privilege with the duty of confidentiality and may have thought it was addressing Business and Professions Code section 6068(e) in its enactment of Evidence Code section 956.5, this does not meet the "undebatable evidence" standard of *Hays*. Indeed, as Professor Zacharias noted, there are signs that argue against such a conclusion.

For example, Senate Bill 645 was a bill addressing several areas of lawyer discipline, of which Evidence Code section 956.5 was only a part. The legislature did amend other sections of the Business and Professions Code. If it intended to modify section 6068(e), why did it not do so? Further, the language of Evidence Code section 956.5 itself argues against modification of Business and Professions Code section 6068(e); the section begins, "There is no *privilege* under this article,"⁹⁷ thus limiting its effect to the article of the Evidence Code containing the attorney-client privilege.⁹⁸ The Evidence Code section thus appears to be targeted at the attorney-client privilege, not the duty of confidentiality.

b. The Legislative Intent Cannot Be Inferred from the Confused History of Privilege and Confidentiality in California

The second argument that would satisfy the *Hays* prerequisites is that notwithstanding the "privilege" language in Evidence Code section 956.5, it is possible that California authorities have always equated the privilege with confidentiality. Thus, we might be able to *infer* legislative intent from the history of privilege and confidentiality in California, if not from the express language of Evidence Code section 956.5 or its legislative history.⁹⁹

Reg. Sess. (Cal. Aug. 25, 1993); *Assembly Comm. Report on SB 645*, 1993-94 Reg. Sess. (Cal. Aug. 18, 1993); see also *supra* notes 88-91 and accompanying text.

97. CAL. EVID. CODE § 956.5 (West 1995).

98. Zacharias, *supra* note 78, at 385. Moreover, the report's discussion mentions that the language of section 956.5 runs counter to *People v. Clark*, 789 P.2d 127, 152 (Cal. 1990), which had stated that "[n]o express exception to the attorney-client privilege exists for threats of future criminal conduct." *Assembly Comm. Report on SB 645*, 1993-94 Reg. Sess. (Cal. Aug. 25, 1993) (emphasis added). In short, some legislators may have voted for Evidence Code section 956.5 simply to overrule *Clark's* interpretation of the attorney-client privilege and not to modify the duty of confidentiality to allow lawyers to prevent their clients from committing life-threatening crimes. Zacharias, *supra* note 78, at 385-86.

99. Zacharias, *supra* note 78, at 386-92. Professor Zacharias considered several arguments that might support a finding of implied legislative intent, only some of

For example, as Professor Zacharias noted, California appears to be alone among the states in referring to “confidential information” in its version of the attorney-client privilege.¹⁰⁰ In addition, although Evidence Code section 952 defines “confidential communication” as “information transmitted between a client and his or her lawyer . . . [that] includes a legal opinion formed and the advice given by the lawyer,”¹⁰¹ section 6068(e), unlike other states’ ethics codes, does not itself contain a definition of “confidential information.”¹⁰² This might suggest that the legislature intended that lawyers look to the Evidence Code’s definition of confidential information to determine the scope of the lawyer’s duty of confidentiality.¹⁰³

Further, the California Supreme Court’s rejection of a proposed Rule 3-100 that would have provided an exception to the duty of confidentiality for life-threatening criminal activity also argues for implied intent. Aware of that rejection, based at least in part on the court’s concern that it would have trespassed on the legislature’s sole authority to amend the statutory privilege,¹⁰⁴ we might infer that the

which are discussed here.

100. *Id.* at 387–88.

101. CAL. EVID. CODE § 952 (West 1995).

102. For example, Model Code, Rule 4-101(A) defines “confidence” and “secret” as follows:

“Confidence” refers to information protected by the attorney-client privilege under applicable law, and “secret” refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101(A) (1981). Business and Professions Code section 6068(e) also refers to “confidence” (as opposed to “confidences”) and “secrets,” but does not define either term. CAL. BUS. & PROF. CODE § 6068(e) (West 1990 & Supp. 2002). California ethics opinions have viewed “confidence” to mean that a lawyer “may not do anything to breach the trust reposed in him or her by the client,” while preserving secrets means not revealing anything “gained in the professional relationships . . . the disclosure [of] which would be embarrassing and would be likely to be detrimental to the client.” *See, e.g.,* State Bar of Cal. Comm. on Prof’l Responsibility & Conduct, Formal Op. 1986–87 (1987). *But cf.* L.A. County Bar Ass’n Comm. on Legal Ethics, Formal Op. 436 (1985), (adopting the Model Code definition of “confidence” and “secrets” contained in DR 4-101(A)). *See infra* notes 152–55 and accompanying text.

103. That there may be confusion in the California law of confidentiality can be seen in a number of cases in which the courts themselves appear to have equated privilege with confidentiality. *See, e.g.,* Zacharias, *supra* note 78, at 389–90, n.75; *see also infra* notes 115–50 and accompanying text.

104. The supreme court’s rejection of the proposed rule appears to have been tied to its concern that adopting such an exception to the duty of confidentiality would trespass on the legislature’s prerogative to amend the attorney-client privilege that has been codified from the common law. In a June 1988 letter to the then-President of the State Bar of California regarding proposed Rule 3-100’s exceptions to confidentiality, the California Supreme Court wrote:

Regarding proposed Rule 3-100(C)(3) (*Duty to Maintain Client Confidence*

legislature's 1993 amendment of the Evidence Code to create the life-threatening criminal act exception to the attorney-client privilege was intended to treat privilege and confidentiality with a single stroke, thus appearing to address both the privilege and the supreme court's demonstrated reluctance to revise the duty of confidentiality.¹⁰⁵

As Professor Zacharias points out, however, the supreme court's declining to adopt a confidentiality exception in the face of the Evidence Code would have emphasized to the legislature the confusion inherent in the area of privilege and confidentiality.¹⁰⁶ Should not the legislature have been expected to address the issue head-on and expressly state its intent that section 6068(e) be read in concert with section 956.5? The legislature's failure to rectify or clarify the confusion thus argues against implying an exception to the duty of confidentiality.¹⁰⁷

c. The Irreconcilable Contradiction Between Evidence Code Section 956.5 and Business and Professions Code Section 6068(e) Does Not Warrant Their Harmonization to Remove the Inconsistency

If, as discussed, there is no clearly expressed or clearly implied legislative intent to place limits on Business and Professions Code section 6068(e)'s duty of confidentiality by the amendments to Evidence

and Secrets Inviolable), in what context does it allow for disclosure of otherwise privileged attorney-client information? To the extent it permits disclosure in a judicial proceeding where no statutory exception to the privilege exists, it may be inconsistent with, or contravene the Legislature's intent underlying Evidence Code section 950 et seq. (Cf. *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 539-540.) Where the Legislature has codified, and revised, or supplanted privileges previously available at common law, does the court have inherent authority to modify this statutory privilege?

STATE BAR OF CAL. OFFICE OF PROF'L COMPETENCE, PLANNING & DEV., *supra* note 83, at 10-11 (quoting Letter from California Supreme Court, to Terry Anderlini, President, State Bar of California (June 9, 1998)). The court thus appears to have viewed any change to the duty of confidentiality as overreaching its authority. That, however, may be too broad a reading of the court's letter. See *infra* notes 247-72 and accompanying text for a discussion of Rule 3-100's history and its implications for implementing a life-threatening criminal activity exception.

105. Zacharias, *supra* note 78, at 390.

106. *Id.* at 390-91.

107. This is particularly true with respect to the California Evidence Code, which contains language in section 911 that expressly limits privileges to those created by statute. See CAL. EVID. CODE § 911 (West 1995). The California Supreme Court has interpreted section 911 to strictly prohibit judges from implying "unwritten exceptions to existing statutory privilege." *Roberts v. City of Palmdale*, 853 P.2d 496, 501 (Cal. 1993). For a full discussion of this argument, see Zacharias, *supra* note 78, at 391.

Code section 956.5, then there is a third possibility supporting a harmonization of the two statutes: the sections are so contradictory in their terms that courts would be justified to infer an exception to remove the *inconsistency*.¹⁰⁸

The initial question is whether the two sections are irreconcilable as they stand. Professor Zacharias suggests not. First, the 1993 amendment to Evidence Code section 956.5 can “be viewed as providing litigants—the victim or a prosecutor—with access to probative evidence *after* the occurrence of third-party harm.”¹⁰⁹ Put another way, the litigant who seeks disclosure of the confidential information would be provided with evidence in the form of confidential information that the policies underlying the privilege would otherwise protect from compelled disclosure. The reason disclosure is allowed is because the client, having committed the crime, “is not entitled to secrecy at all.”¹¹⁰ Implicit in this interpretation of Evidence Code section 956.5 is the view that the lawyers may warn clients of eventual disclosure to persuade the client not to commit a criminal act, but are foreclosed from disclosing the information unless the client actually commits the act. In other words, the lawyers may use the threat of disclosure to reason with the client, but may disclose the client’s act only if the client goes through with it.¹¹¹ In this way, clients who desist from going forward with their criminal intent are not punished; only those who actually commit the criminal act face disclosure of the proof.¹¹²

Thus, eliminating the privilege for life-threatening criminal activity, but preserving the protections of confidentiality makes sense in terms of policy. When there is no irreconcilable conflict between the two statutes, there is no further need to harmonize Business and Professions Code section 6068(e) with Evidence Code section 956.5 by importing the latter’s exception into the former.¹¹³ Under this view, however,

108. See Zacharias, *supra* note 78, at 392–96.

109. *Id.* at 394 (emphasis added). The idea here is that, while the lawyer could *not* voluntarily disclose confidential information *before* the event, she could be *compelled* by subpoena to produce it *after* the fact. *Id.* at 395–96 & n.99.

110. *Id.* at 395. See also Gen. Dynamics Corp. v. Superior Court, 876 P.2d 487, 504 (Cal. 1994); *infra* notes 129–33 and accompanying text.

111. See Zacharias, *supra* note 78, at 394–95.

112. *Id.* at 395.

113. Although this argument resolves the inconsistency between the two sections, it still is not completely satisfactory. For example, the language of section 956.5 provides that “[t]here is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication . . . is necessary to prevent the client from committing a criminal act.” CAL. EVID. CODE § 956.5 (West 1995). The “disclosure” is expressly the kind that the lawyer “reasonably believes” is “necessary” to “prevent” the client from committing a criminal act, not to “rectify” a criminal act. As for reasoning with the client, a lawyer cannot “disclose” confidential information to a client. According to the *Merriam-Webster Collegiate Dictionary*, disclose means “to expose to

California lawyers are left without guidance about how to proceed when they confront life-threatening criminal activity by their clients.

C. The General Dynamics Case: Has the California Supreme Court Already Impliedly Held that the Attorney-Client Privilege's Exceptions Are to Be Read into the Duty of Confidentiality?

Court opinions appear to demonstrate a confusion between the duty of confidentiality and the attorney-client privilege that is commensurate with that of the statutory landscape.¹¹⁴ The 1994 California Supreme Court decision in *General Dynamics Corp. v. Superior Court*¹¹⁵ is a case on point. There, the court appears to have used the concepts of privilege and confidentiality interchangeably. Nevertheless, a California appellate court recently concluded that *General Dynamics* stands for the proposition that the attorney-client privilege's express exceptions, including Evidence Code section 956.5, can be read into the duty of confidentiality prescribed in Business and Professions Code section 6068(e).¹¹⁶ To understand that appellate court's position, it is necessary to discuss *General Dynamics* in some depth.

In *General Dynamics*, the supreme court held that under certain narrow circumstances, an in-house lawyer can bring a retaliatory discharge claim against her former corporate client, notwithstanding the ethical duties of confidentiality and loyalty the lawyer owes the client. Noting that wrongful discharge claims are rooted in public policy considerations, the court first laid out the stiff requirements that any employee—not just a lawyer—must satisfy before she will be allowed to pursue such a suit.¹¹⁷

view," or "to make known or public." MERRIAM-WEBSTER COLLEGIATE DICTIONARY 113 (9th ed. 1985). A lawyer need not disclose information to someone who is already privy to the information. Professor Zacharias' argument would be better served if section 956.5 used the language "threatened disclosure" in addition to "disclosure." Given the California Supreme Court's view on reading too much into the language of privilege, see *supra* note 107, we should probably conclude that disclosure means just that, and not a threat of disclosure. Nevertheless, that does not mean that the legislature has created a statutory scheme that is hopelessly inconsistent and warrants implying an exception for Business and Professions Code section 6068(e).

114. Zacharias, *supra* note 78, at 389 n.75.

115. 876 P.2d 487 (Cal. 1994).

116. Fox Searchlight Pictures, Inc. v. Paladino, 106 Cal. Rptr. 2d 906, 923 (Ct. App. 2001).

117. *Gen. Dynamics*, 876 P.2d at 497. First, the discharge must be in violation of a public policy "that is not only 'fundamental' but is clearly established in the Constitution

Assuming a lawyer has satisfied those general requirements, she still has other obstacles to hurdle. Put simply, while in-house counsel are employees and thus ostensibly can claim protection pursuant to the policies underlying the wrongful discharge tort, the court still had to address whether lawyers, because of their professional duties creating fiduciary obligations to their clients, are a breed apart from nonprofessional employees.

After noting that in-house attorneys differ from outside counsel because of their dependence for livelihood on the goodwill and confidence of a single employer, the court concluded that such lawyers, because their professional duties are “affected with a public interest,” have a stronger claim to judicial protection than their nonprofessional colleagues.¹¹⁸

Despite this general observation that a lawyer’s duties are “affected with a public interest,” the court still had to resolve whether a lawyer’s duties relating to confidentiality mandate the denial of a wrongful discharge remedy to the lawyer. After all, confidentiality is at the heart of the attorney-client relationship,¹¹⁹ and a lawyer’s breach of confidentiality will undermine the fiduciary relationship. The court thus had to determine whether the policy underpinnings of the retaliatory discharge claim can warrant a breach of fiduciary duties.¹²⁰

Rejecting the reasoning of other courts that had denied a retaliatory discharge recovery to lawyers as reflecting an “adherence to an

and positive law of the state.” *Id.* Second, the public policy that the employee’s conduct vindicated “must be a truly *public* one, that is, ‘affect[ing] a duty which inures to the benefit of the *public* at large rather than to a particular employer or employee.’” *Id.* (quoting *Foley v. Interactive Data Corp.*, 765 P.2d 373, 379 (Cal. 1988)). Finally, the court observed that there was a third limiting characteristic of retaliatory discharge suits: the employee is allowed a cause of action not in the interest of preserving the employee’s employment, but rather to vindicate the underlying public policy to protect the public: “decisions recognizing a tort action for discharge in violation of public policy *seek to protect the public, by protecting the employee* who refuses to commit a crime . . . , who reports criminal activity to proper authorities, or who discloses other illegal, unethical, or unsafe practices.” *Id.* (citations omitted) (quoting *Foley*, 765 P.2d at 373). In short, an employee is provided a tort remedy not so much to compensate the individual, but rather to vindicate indirectly the underlying public policy. The court stated:

An employee who states a wrongful discharge claim for having refused to join a criminal conspiracy in violation of the antitrust laws, or for having resisted efforts to induce him to give false information in a public investigation of sexual harassment charges filed by a coworker, is provided a remedy in tort *not only* to compensate the individual plaintiff for the loss of employment but as an indirect means of vindicating the underlying fundamental *public policy* *itself*.

Id. (citations omitted).

118. *Id.* at 498.

119. See *supra* note 7 and accompanying text.

120. *Gen. Dynamics*, 876 P.2d at 497.

anachronistic model of the attorney's place and role in contemporary society,"¹²¹ the court concluded that in-house counsel should be provided a retaliatory discharge remedy. Notwithstanding their confidentiality duties,¹²² in-house counsel should have a remedy "in those instances in which *mandatory ethical norms* embodied in the Rules of Professional Conduct *collide with illegitimate demands of the employer* and the attorney insists on *adhering to his or her clear professional duty*."¹²³ Nevertheless, an in-house lawyer who seeks to sue her former corporate client employer for retaliatory discharge has additional obstacles not faced by her nonprofessional colleagues.

First, a court must "ask whether the attorney was discharged for following a mandatory ethical obligation prescribed by professional rule or statute."¹²⁴ For example, if the in-house counsel refuses an employer's request to commit a crime or engage in an act of moral turpitude that is disciplinable by disbarment and is therefore discharged, then the lawyer will have been discharged for complying with a mandatory ethical obligation and will thus have a claim for retaliatory discharge.¹²⁵ Such a mandatory ethical rule would allow the lawyer to engage in nonfiduciary conduct in the interests of the public.

A lawyer, however, is not limited to a remedy only if she adheres to a mandatory ethical obligation. The lawyer will still have a claim even if the actions for which she was discharged involved an ethical obligation that is merely permissive so long as:

some statute or ethical rule, *such as the statutory exceptions to the attorney-client privilege codified in the Evidence Code (see id., §§ 956-958)* specifically permits the attorney to depart from the usual requirement of confidentiality with respect to the client-employer and engage in the "nonfiduciary" conduct for which he was terminated.¹²⁶

121. *Id.* at 500 & n.5. The court rejected the reasoning in three non-California decisions that focused on the lawyer's primary duty to the client. *Id.* at 498-501 (citing *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991)); *Herbster v. N. Am. Co. for Life and Health Ins.*, 501 N.E.2d 343 (Ill. App. Ct. 1986); *Willy v. Coastal Corp.*, 647 F. Supp. 116 (S.D. Tex. 1986), *rev'd on other grounds*, 855 F.2d 1160 (5th Cir. 1988)).

122. The court recognized the "the priest-like license to receive the most intimate and damning disclosures of the client, [and] the sanctity of the professional privilege." *Gen. Dynamics*, 876 P.2d at 501.

123. *Id.*

124. *Id.* at 502.

125. *Id.* at 502-03.

126. *Id.* at 503 (emphasis added). The court, however, stressed the limited nature of the lawyer's remedy, as "[t]he lawyer's high duty of fidelity to the interests of the client

The question thus comes down to *when* an in-house lawyer can engage in nonfiduciary conduct and still maintain an action against her client employer after being discharged for that conduct. The court resolved this question by first, noting that the mutual trust and confidence essential to the attorney-client relationship can be protected by limiting in-house counsel's resort to the courts to claims rooted in "*explicit and unequivocal ethical norms embodied in the Rules of Professional Responsibility and statutes,*" and maintainable by a nonlawyer employee.¹²⁷ Moreover, the court cautioned that such an action can be maintained only "under circumstances in which the Legislature has manifested a judgment that the principle of professional confidentiality *does not apply,*" such as in Evidence Code section 956.5.¹²⁸ In other words, if the in-house lawyer is under a duty to preserve the clients' confidences, she will not find a welcome ear in the courts.

The court stressed that the "contours of the statutory *attorney-client privilege* should continue to be strictly observed."¹²⁹ Importantly, the court noted that most situations in which the in-house lawyer confronts an ethical quandary will lie outside the privilege's scope:

Matters involving the commission of a crime or a fraud, or circumstances in which the attorney reasonably believes that disclosure is necessary to prevent the commission of a criminal act likely to result in death or substantial bodily harm, are statutory and well-recognized exceptions to the attorney-client privilege. Although their revelation in the course of a retaliatory discharge suit may do lasting damage to the expectations of the corporate client (or, more likely, a corporate executive) that disclosures to counsel would remain inviolate, *a concern for protecting the fiduciary aspects of the relationship in the case of a client who confides in counsel for the purpose of planning a crime or practicing a fraud is misplaced; such disclosures do not violate the privilege.*¹³⁰

In essence, the court observed that a client who uses a lawyer to plan a crime or fraud or creates circumstances in which the lawyer reasonably believes disclosure is necessary to prevent the client's life-threatening criminal activity, should have no expectation that the lawyer will not subsequently disclose confidential client information. Under such circumstances, there simply is no privilege. By expressly referring to Evidence Code section 956.5's privilege exception for life-threatening

work against a tort remedy that is coextensive with that available to the non-attorney employee." *Id.*

127. *Id.*

128. *Id.* In quoting Evidence Code section 956.5, the court emphasized the language, "[t]here is no privilege." *Id.*; see *infra* notes 133–50 and accompanying text.

129. *Gen. Dynamics*, 876 P.2d at 504 (emphasis added). Indeed, the court observed that "the in-house attorney who publicly exposes the client's secrets will usually find no sanctuary in the courts." *Id.* at 503.

130. *Id.* at 504 (citations omitted) (emphasis added).

criminal activity¹³¹ and discussing criminal and fraudulent acts which are the subject of the crime-fraud privilege exception contained in Evidence Code section 956,¹³² the court appears to have impliedly concluded that the exceptions to the attorney-client privilege found in Evidence Code sections 956 through 962 apply equally to the duty of confidentiality set forth in Business and Professions Code section 6068(e).¹³³

But is that really what the court intended? Or was it simply confusing the privilege that is excepted in Evidence Code section 956.5 with the duty that is set forth in Business and Professions Code section 6068(e)? The reason we might ask that question is because, as already noted,¹³⁴ the attorney-client privilege generally protects against the compelled disclosure of confidential information.¹³⁵ It is a narrow evidentiary privilege that will generally fall in the face of fundamental public policies that mandate that the privileged material be disclosed to assist the trier of fact in its search for the truth.¹³⁶

When a lawyer sues her former client-employer for retaliatory discharge, however, the privilege's protection against compelled

131. *Id.* at 503.

132. California Evidence Code section 956 provides: "There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud." CAL. EVID. CODE § 956 (West 1995).

133. As already noted, *supra* note 116 and accompanying text, the California Court of Appeal, Second District, in ruling that a former in-house lawyer could disclose confidential information of her former corporate client to the lawyers she retained to prosecute her wrongful discharge case, held precisely that. *See Fox Searchlight Pictures, Inc. v. Paladino*, 106 Cal. Rptr. 2d 906 (Ct. App. 2001). The court stated that "[a]lthough the statute on its face brooks no exceptions, it must be read in conjunction with other statutes and ethical rules which specifically permit the attorney to depart from the usual rules of client confidentiality." *Id.* at 922. The court then reasoned that section 958 of the California Evidence Code, which states that the privilege does not apply "to a communication relevant to an issue of breach, by the lawyer or the client, of a duty arising out of the lawyer-client relationship," might be relevant to the case before it, where the discharged lawyer was claiming the employer had discriminated against her on the basis of sex. *Id.* (quoting CAL. EVID. CODE § 958).

134. *See supra* Part II.A.1.

135. *See infra* notes 255–58 and accompanying text. California Evidence Code section 901 provides that any privilege, including the attorney-client privilege, applies in any proceeding where "testimony can be compelled to be given." CAL. EVID. CODE § 901. Section 902 defines "civil proceeding" and section 903 defines "criminal proceeding". *Id.* §§ 902–903. Section 911 of the California Evidence Code provides, *inter alia*, that "[e]xcept as otherwise provided by statute, . . . [n]o person has a privilege to refuse to be a witness." *Id.* § 911. Together, these sections demonstrate that the attorney-client privilege may be asserted in a civil or criminal proceeding to protect against being compelled to disclose information subject to a privilege.

136. *See supra* notes 27–32 and accompanying text.

disclosure would not be the client's (or the court's) primary concern. Rather, an in-house lawyer would be seeking *voluntarily* to disclose the privileged information to support her case against the employer, presumably because it would be necessary evidence without which she could not prove her case. No party to the proceeding would be trying to *compel* the disclosure. On the contrary, in a retaliatory discharge suit, the employer's lawyers would be using every procedural device in their arsenal to prevent the former in-house lawyer from disclosing information subject to the privilege.

The supreme court would have understood that, on the one hand, an employee would want to voluntarily disclose information, implicating the duty, while on the other hand, the employer would utilize its lawyers to prevent that information from being disclosed in open court, thus implicating the privilege. The court, after all, noted that "trial courts can and should apply an array of ad hoc measures from their equitable arsenal designed to permit the attorney plaintiff to attempt to make the necessary proof while protecting from disclosure client confidences subject to the privilege,"¹³⁷ suggesting it well understood the tension between the employee's need for evidence to prove her suit and the employer's desire to maintain the confidentiality of its privileged information.¹³⁸ Moreover, the court stated that "where the elements of a wrongful discharge [claim] . . . cannot . . . be fully established without [*the employee lawyer*] *breaching the attorney-client privilege*, the suit must be dismissed in the interest of preserving the privilege."¹³⁹ Although the court used the term "attorney-client privilege," its use of the word "breaching" in relation to it (rather than the phrase "failing to claim")¹⁴⁰ suggests it may have meant the duty of confidentiality. Its apparent transposition of privilege and confidentiality in the context of the case leaves the reader with the sense that it viewed the two terms as

137. *Gen. Dynamics Corp. v. Superior Court*, 876 P.2d 487, 504 (Cal. 1994). Presumably, the court interpreted "disclosure" to mean "public" disclosure. The court identified what kind of measures it contemplated would avoid disclosure of privileged information beyond the parties to the suit:

The use of sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, in camera proceedings, are but some of a number of measures that might usefully be explored by the trial courts as circumstances warrant.

Id.

138. Moreover, the court expressly recognized that the duty of confidentiality contained in section 6068(e) was part of the California "principle of professional confidentiality" that came into play in wrongful discharge cases. *Id.* at 503 & n.6.

139. *Id.* at 503-04 (emphasis added).

140. Section 955 of the California Evidence Code provides that a lawyer "shall claim the privilege whenever he is present when the communication is sought to be disclosed." CAL. EVID. CODE § 955 (West 1995); see also *infra* notes 255-58 and accompanying text.

interchangeable. In doing so, it added to the confusion regarding confidentiality law in California.

There is, however, another possibility: the court was fully aware of what it was saying and simply set forth a threshold standard for confidential client information that can be disclosed in such suits. The court appears to have been well aware that where there is an exception to the privilege, the employer will not be able to assert the privilege to prevent a lawyer from disclosing the information. Rather, its discussion of privilege may have been intended not to focus on the lawyer's duty to assert the privilege or the context in which the duty to assert the privilege may arise,¹⁴¹ but rather on the *kind of information* that is subject to the privilege's protection—client *communications*.¹⁴² The court in essence was stating that even this kind of information—which courts generally protect even in the face of undermining the “truth-seeking” function of the court—can be disclosed by in-house counsel under the proper circumstances.¹⁴³

What then of information the lawyer learns from other sources, that is, information that is not communicated to the lawyer by the client?¹⁴⁴ The court repeatedly speaks of the “privilege” or “privileged information,” but says little, if anything, about other sources of information protected under Business and Professions Code section 6068(e)'s broader duty of

141. Section 955 of the California Evidence Code requires a lawyer to assert the privilege in any proceeding in which another party is seeking disclosure of a client communication (as that term is defined in section 952). CAL. EVID. CODE § 955; *see also infra* notes 250–62 and accompanying text.

142. “Confidential communication between client and lawyer” is defined in section 952 of the California Evidence Code. CAL. EVID. CODE § 952.

143. After quoting Justice Cardozo's assertion that “[t]he privilege takes flight if the relation is abused,” the *General Dynamics* court noted that although disclosure of client information regarding criminal acts or fraud “may do lasting damage to the expectations of the corporate client . . . that disclosures to counsel would remain inviolate,” such disclosures do not violate the attorney-client privilege. *Gen. Dynamics*, 876 P.2d at 504 (quoting *Clark v. United States*, 289 U.S. 1, 15 (1933)). That is because exceptions to the attorney-client privilege, including the crime-fraud and life-threatening criminal act exceptions, all provide that “there is no privilege” if facts giving rise to the exception exist. *See* CAL. EVID. CODE §§ 956, 956.5; *see also supra* notes 129–30 and accompanying text. If there is no privilege to protect such information—information directly communicated from the client to the lawyer and therefore information generally subject to the privilege—then the lawyer should be able to decline to “claim” the privilege when the unprivileged communication “is sought [by another party] to be disclosed.” CAL. EVID. CODE § 955. In short, the lawyer would disclose by “not claiming” the privilege. Moreover, the lawyer should also be able affirmatively to disclose the communication to support her wrongful discharge claim.

144. *See supra* Part II.A.1.

confidentiality.¹⁴⁵ Is it possible that the court did not mean to limit the reach of its opinion to “privileged” information (including only information “communicated” between the lawyer and the client), but simply set a threshold for information that can be disclosed? Put another way, can we assume that if information subject to the attorney-client privilege, a privilege which the “judicial system has carefully safeguarded,”¹⁴⁶ can be disclosed under appropriate circumstances, then other confidential client information, not directly communicated by the client, is also subject to disclosure when one of the statutory exceptions to the privilege is present?¹⁴⁷ If we can so assume, then *General Dynamics* stands for the proposition that the exceptions to the attorney-client privilege apply equally to any information covered by the duty of confidentiality.¹⁴⁸

If that is the case, however, why did the court not simply say so? At the time it decided *General Dynamics*, it had already considered and rejected two proposals by the State Bar to add a new rule of professional conduct that would have created a life-threatening criminal activity exception to the duty of confidentiality. As is discussed in more detail below, in 1988, the court expressed its concern that, at least in the testimonial context, such an exception to the duty of confidentiality would probably infringe on the authority of the legislature to define the scope of evidentiary privileges.¹⁴⁹ The court was thus aware of the

145. The only reference the court makes to Business and Professions Code section 6068(e) is noting that an attorney who unsuccessfully pursues a retaliatory discharge suit reveals privileged client confidences, “may be subject to State Bar disciplinary proceedings.” *Gen. Dynamics*, 876 P.2d at 504.

146. *Mitchell v. Superior Court*, 691 P.2d 642, 646 (Cal. 1984).

147. It is possible that the *General Dynamics* court was perfectly aware of what it was doing. By referring repeatedly in its opinion to “privileged information,” the court was setting a standard for the kind of information the lawyer could use. The court wanted future litigants who otherwise met the requirements of a retaliatory discharge claim to understand that they could use so-called “privileged information”—information communicated by the client itself—in making out their claims, so long as one of the legislatively-sanctioned exceptions to the privilege was applicable. Other kinds of confidential information would also be fair game, so long as they were at least analogous to the privilege exceptions. Alternatively, the court may have focused on the privilege language simply because in a retaliatory discharge suit, the kind of confidential information to which the lawyer would be privy and which would be relevant to the claim would most likely have been learned through a client communication and thus would have been privileged. Other kinds of information related to the representation would be relatively immaterial to the suit, or even may have been something the court simply did not contemplate. If that is what the court intended, however, it should have expressly stated its intent. Instead, its wholesale swapping of terms only added to the confusion surrounding confidentiality in California.

148. This is precisely the holding of a recent court of appeal decision. See *Fox Searchlight Pictures, Inc. v. Paladino*, 106 Cal. Rptr. 2d 906, 923 (Ct. App. 2001).

149. See *infra* notes 259–67 and accompanying text. As already discussed, in 1988 there was no life-threatening criminal activity exception to the attorney-client privilege.

difference between the duty and the privilege, and the State Bar's desire to provide an exception for the duty. The court had an opportunity to resolve the issue by simply stating that the privilege exceptions also apply to the duty of confidentiality, but it did not take it.

Thus, by focusing on language that emphasized "privileged information" rather than "confidential information" or "confidentiality," the *General Dynamics* court contributed to the murkiness of the ongoing confidentiality-privilege debate about whether exceptions to the attorney-client privilege can be read into the duty of confidentiality. While it is possible to infer that conclusion from the opinion,¹⁵⁰ it is important to state it expressly, so lawyers have no doubt about their obligations when determining the scope of the duty of confidentiality.¹⁵¹

D. Do the Public Policies Underlying the Life-Threatening Criminal Activity Exception Mandate that Such an Exception Be Implied to Apply to the Duty of Confidentiality?

A formal ethics opinion of the Los Angeles County Bar Association concluded that an attorney may be permitted to divulge future crimes where it "may prevent immediate and serious injury."¹⁵² The Los Angeles County Bar reaffirmed this conclusion in 1985 by adopting current Model Rule 1.6's standard, which allows disclosure where a client's criminal activity is likely to result in imminent death or substantial bodily harm.¹⁵³ Implicit in this standard is the recognition that the preservation of human life outweighs the duty of confidentiality.¹⁵⁴ In essence, the Los Angeles County Bar concluded that even in the absence of express exceptions to Business and Professions Code section 6068(e), the policy of preserving human life outweighs the policies of candor and effective representation underlying the duty of confidentiality.¹⁵⁵ While this approach is attractive—it does

The legislature enacted the exception in September 1993, effective January 1, 1994. See *infra* notes 264–69 and accompanying text.

150. See *supra* notes 141–48 and accompanying text.

151. See *infra* note 167 and accompanying text.

152. L.A. County Bar Ass'n Comm. on Legal Ethics, Op. 264 (1959).

153. L.A. County Bar Ass'n Comm. on Legal Ethics, Formal Op. 436 (1985) (adopting MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1983)).

154. See *Ethics 2000*, *supra* note 12.

155. Implicit in this approach is the recognition that the state bar, for obvious reasons, would be unlikely to prosecute a lawyer whose disclosure of confidential information of a client's criminal act has saved a life or prevented serious bodily harm.

not require any statute or rule revisions—there are problems with it.

First, in Opinion 436, the Los Angeles County Bar adopted a standard from the ABA's Model Rules. It is true that California Rule of Professional Conduct 1-100 provides that "[e]thics opinions and rules and standards promulgated by other jurisdictions and bar associations may . . . be considered" by lawyers to determine what ethical courses of action to take.¹⁵⁶ Nevertheless, in *General Dynamics*, the California Supreme Court expressly declined to adopt either the Model Rules or the ABA Code as a predicate for retaliatory discharge claims, recognizing that ABA ethics codes have "no legal force of their own."¹⁵⁷ Further, while other jurisdictions' rules and ethics opinions may be consulted, it is usually "in areas where there is no direct authority in California and there is no conflict with the public policy of California."¹⁵⁸ In addition, although the Los Angeles County Bar Ethics Committee is well-respected in California ethics circles for the sophistication of analysis in its opinions, its opinions are advisory only.¹⁵⁹ They are not legal authority. It is unlikely that the Los Angeles County Bar's position on this issue would provide the kind of assurance to California lawyers that a rule or statute would.¹⁶⁰

Perhaps more important, even if the Los Angeles County Bar's position were to gain widespread acceptance, the members of the California Bar would still be left without clear guidance on how to proceed. Business and Professions Code section 6068(e) would still be absolute on its face, and a lawyer would still be unsure whether any actions she took in accordance with Opinion 436 might subject her to discipline should the State Bar decide to prosecute her.

E. Does California Need an Express Exception to Its Duty of Confidentiality?

The foregoing analyses of the plain language and legislative history of Evidence Code section 956.5, the California Supreme Court's

156. CAL. RULES OF PROF'L CONDUCT R. 1-100(A) (2000).

157. *Gen. Dynamics Corp. v. Superior Court*, 876 P.2d 487, 503 n.6 (Cal. 1994) (quoting 1 HAZARD & HODES, *THE LAW OF LAWYERING* § 206 (1998)). *But see* *State Comp. Ins. Fund v. WPS, Inc.*, 82 Cal. Rptr. 2d 799, 807-08 (Ct. App. 1999) (relying on analysis of an ABA formal ethics opinion to set a standard for future instances involving the inadvertent disclosure of confidential information).

158. *State Comp. Ins. Fund.*, 82 Cal. Rptr. 2d at 807 (citing *State Bar of Cal. Comm. on Prof'l Responsibility & Conduct*, Formal Op. 1983-71 (1983)).

159. Rule 1-100 also provides that for guidance on proper professional conduct, a lawyer should also consult opinions of ethics committees in California, even though they are not binding. CAL. RULES OF PROF'L CONDUCT R. 1-100(A).

160. See *infra* Part V for a discussion of how to implement an exception that would provide the necessary assurance to lawyers.

decision in *General Dynamics*, and the Los Angeles County Bar Ethics Opinion 436 all demonstrate that the California law concerning the duty of confidentiality is murky at best and confusing at worst. At present, lawyers in California are not provided with the kind of guidance afforded to lawyers in other states in deciding how to proceed when their clients are involved in criminal activity likely to result in death or serious injury. In other states, lawyers at least know they have the option to disclose confidential information to prevent the harm. In California, *if* lawyers agree with some commentators and trust that the legislature intended Evidence Code section 956.5 to apply also to Business and Professions Code section 6068(e),¹⁶¹ or *if* they are confident that in *General Dynamics*, the supreme court impliedly held the same,¹⁶² or *if* they consider the Los Angeles County Bar Association Commission on Legal Ethics Formal Opinion 436 to be persuasive,¹⁶³ then they might believe that they can reveal confidential client information.

The simple fact is, however, that a lawyer cannot be certain she can reveal confidential information in the face of Business and Professions Code section 6068(e)'s strict confidentiality language.¹⁶⁴ If the lawyer is

161. See *supra* Part III.B.1 (discussing that the legislature so intended); Backstrom, *supra* note 91, at 152–53; Kerrane, *supra* note 83, at 832–33. But cf. Zacharias, *supra* note 78, at 380–97 (discussing the California courts' "strong presumption against inferring silent amendments to statutes" and concluding that "there is ample reason to believe a [California] court would not infer an exception to confidentiality from the mere adoption of section 956.5").

162. See *Fox Searchlight Pictures, Inc. v. Paladino*, 106 Cal. Rptr. 2d 906, 923 (Ct. App. 2001); *supra* Part III.C; see also Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and Its Exceptions: Spaulding v. Zimmerman Revisited*, 83 MINN. L. REV. 63, 125 n.196 (1998) (noting that *General Dynamics* "holds that all of the exceptions to California's statutory attorney-client privilege are also exceptions to the lawyer's duty of confidentiality").

163. See *supra* Part III.D.

164. A recently decided case presented a situation that could have resulted in the first California appellate decision that squarely addressed whether the exception contained in Evidence Code section 956.5 also applies to Business and Professions Code section 6068(e). See *People v. Dang*, 113 Cal. Rptr. 2d 763 (Cal. Ct. App. 2001). Unfortunately, the court limited its ruling to the narrow issue before it: whether, under section 956.5, a lawyer may testify about a client's prospective life-threatening criminal act, disclosing information which the client had disclosed to the lawyer in confidence. *Id.* at 767. The court answered that question in the affirmative, but in doing so, it did not resolve the interplay between Evidence Code section 956.5 and Business and Professions Code section 6068(e). *Id.*

In *Dang*, the criminal defendant, charged with several counts, including burglary and false imprisonment, told his lawyer that he would try to bribe the witnesses against him and that "he would 'whack' the witnesses if he was not successful in bribing them." *Id.* at 765. The lawyer reported the defendant's threats to the district attorney and was

wrong, she may be subject to discipline for violating the duty. Consequently, it would be natural for a lawyer to err on the side of caution and preserve the client's confidential information. If preserving life is an important public policy as Evidence Code section 956.5's language suggests, then lawyers maintaining silence in the face of life-threatening criminal activity as the norm should be unacceptable.

Yet it has also been suggested that if indeed the exceptions apply, the

allowed to withdraw from the representation. *Id.* The lawyer then testified at trial over the objection of the defendant. *Id.* at 766. The defendant was convicted and sentenced and timely appealed. *Id.* at 765.

In holding that the lawyer's testimony was admissible under Evidence Code section 956.5, the court recognized that there is "a possible conflict between" that section and Business and Professions Code section 6068(e). *Id.* at 767. Although the defendant's threats to "whack" the witnesses would appear to easily come within Evidence Code section 956.5, this "possible conflict" was relevant in *Dang* because the lawyer would not have been testifying in the first instance had he not *voluntarily* disclosed the defendant's confidential communication to the district attorney, thus implicating Business and Professions Code section 6068(e). The defendant, however, had not raised that issue either at trial or in his appellate brief. *Id.* Nor did either party appear to have addressed the issue at oral argument, notwithstanding the court's invitation that they do so. *Id.* Accordingly, without Business and Professions Code section 6068(e) before it, the court could limit its inquiry to the Evidence Code 956.5 issue and conclude that the lawyer properly testified about information received in a confidential client communication. *Id.*

It appears that the court, if squarely confronted with the Business and Professions Code section 6068(e) issue, would have concluded that section 956.5's exception to the attorney-client privilege applies equally to section 6068(e)'s duty of confidentiality. After concluding that the testimony was properly admitted, the court proceeded:

We note that the State Bar Court has held the duty of confidentiality under Business and Professions Code section 6068, subdivision (e) is modified by the exceptions to the attorney-client privilege codified in the Evidence Code. (See *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 314, 106 Cal.Rptr.2d 906; see also *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1191, 32 Cal.Rptr.2d 1, 876 P.2d 487 [recognizing exception to attorney-client privilege where attorney reasonably believes disclosure necessary to prevent criminal act likely to result in death or substantial bodily harm].)

Id. Simply by making the foregoing observation, it is possible that the court was declaring that its conclusion would have been the same even if the Business and Professions Code section 6068(e) issue had been before it. Nevertheless, despite that language, lawyers in California are still left not knowing whether they can proceed to disclose confidential client information when confronted with a client's life-threatening criminal activity. First, the court's language, which was not required to resolve the appeal, remains dicta. Second, the court's cited references are confusing. The court refers to the *Paladino* case, which in turn cites to *In re Lilly*, 2 CAL. ST. B. REP. 473, 478 (Review Dept. 1993). *Paladino* cites *Lilly* for the proposition that "the State Bar Court 'has shown no interest in such catch-22 prosecutions. To the contrary, the court has held the duty of confidentiality expressed in Business and Professions Code section 6068, subdivision (e) is modified by the exceptions to the attorney-client privilege contained in the Evidence Code.'" 106 Cal.Rptr. 2d at 923. Yet *Lilly* does not support that conclusion. See *In re Lilly*, 2 CAL. ST. B. REP. 473 (Review Dept. 1993). Finally, as already discussed, the *Dang* court's reference to *General Dynamics* provides no further enlightenment on what that case stands for. See *supra* Part III.C.

lawyer may face *Tarasoff*-like liability for failing to have warned third parties who are harmed by the client's criminal conduct.¹⁶⁵ Whether that kind of liability is likely to be imposed on a lawyer is questionable.¹⁶⁶ Nevertheless, such liability remains a possibility and lawyers should be provided adequate guidance on how to proceed. In the absence of a supreme court decision that expressly holds that Evidence Code section 956.5 applies to Business and Professions Code section 6068(e), a rule addition or statutory revision is required.

Giving lawyers unambiguous guidance as to what their obligations are in these situations is important. Yet another consideration should also inform any decision by California to resolve uncertainties in the law of confidentiality. Although, as we have seen, there is still some question whether attorney-client privilege exceptions apply to the duty of confidentiality, California is the only state in which the duty of confidentiality does not have an express exception for life-threatening criminal activity. This may appear at best curious to the public, especially since California courts appear to have provided lawyers with exceptions to confidentiality to defend themselves.¹⁶⁷ It may even appear curious to lawyers as well. At the Fourth Annual Statewide Ethics Symposium held in June 2000 in Fullerton, California, a member of a panel on the Ethics 2000 Commission asked the audience

165. See, e.g., Backstrom, *supra* note 91, at 152-53; Kerrane, *supra* note 83, at 832-33. As nearly any California lawyer knows (and probably any lawyer in the United States who attended law school after 1976), *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976), is the case in which the California Supreme Court held that when a psychotherapist determines that a patient intends to harm a third person, the psychotherapist owes a duty to use reasonable care to protect the potential victim, including warning the patient, even if it means the psychotherapist must divulge confidential information. *Tarasoff*, 551 P.2d at 345.

166. The author is aware of no case in California or any other state in which a court has held a lawyer to a similar duty. Nearly every state that has a life-threatening harm exception to the duty of confidentiality has drafted it to be permissive, the same as Model Rule 1.6, so the question is whether a court would hold that a lawyer had a duty to warn similar to the psychotherapist in *Tarasoff*. Nevertheless, courts have held lawyers liable for failing to disclose the fraudulent acts of their clients, even where there is no exception to the duty of confidentiality permitting lawyers to do so. See, e.g., *FDIC v. O'Melveny & Myers*, 61 F.3d 17, 19-20 (9th Cir. 1995).

167. See *supra* note 77 and accompanying text. Law students studying professional responsibility often comment on the irony in providing lawyers an exception to defend themselves, but not providing an exception for life-threatening criminal activity that would permit lawyers to protect the public. Although, as discussed in Part III, there may be an implied bodily harm exception that can be parsed from California Evidence Code section 956.5 and *General Dynamics*, students rightfully note that there is no case that expressly so holds. See also *supra* note 164.

for a show of hands on whether California lawyers should be able to disclose confidential information to prevent life-threatening criminal activity. There was near unanimity among those present that they should.

The idea that California should have such an exception should not be controversial.¹⁶⁸ The need to reveal confidential information to prevent serious bodily harm arising from the client's prospective criminal activity is not a situation that is likely to arise often. Every other jurisdiction has such an exception, and there is no indication that the attorney-client relationship or the justice system has suffered irreparable harm. Lawyers in California should be provided with an unmistakable signal from the supreme court or the legislature that when serious bodily harm arising from criminal activity is likely, they may disclose without fear of being subject to discipline. Lawyers will have certainty; they will have the means to protect the public.

In summary, it is not certain whether we can assume the exception to the attorney-client privilege for life-threatening criminal activity applies equally to the duty of confidentiality, either because it can be implied from Evidence Code section 956.5's legislative history or because *General Dynamics* so held. Nor can lawyers presume that the public policy underlying a life-threatening criminal activity exception to the duty of confidentiality warrants an implied exception to the duty. The law of confidentiality in California remains uncertain. There is a need for a clear statement by the California Supreme Court or the legislature.

Before proceeding to a discussion on strategies to implement an exception, a discussion of the nature and scope of such an exception is in order.

IV. THE NATURE AND SCOPE OF THE BODILY HARM EXCEPTION THAT THE DUTY OF CONFIDENTIALITY SHOULD HAVE

Having determined that there should be an expressly stated life-threatening criminal activity exception to the lawyer's duty of confidentiality in California, the next question is what the scope or breadth of that exception should be. In this Section, the general substantive parameters the exception should have will be discussed; drafting and other strategic considerations are discussed in the next section.

168. The emphasis here is on the word "should." In identifying legal ethical principles, California traditionally has been a client-centric state. The emphasis has been on protecting the client. As the duty of confidentiality is viewed as central to the attorney-client relationship and protection of the client, not even a life-threatening criminal activity exception will be greeted with unanimous acclaim by the bar. See *infra* Part V.A.

The term for the exception used throughout this Article, life-threatening *criminal activity*, answers a good deal of the scope question. The exception should be limited to situations in which a client intends to commit a *criminal act* that is reasonably likely to result in death or substantial bodily injury. Before proceeding to that issue, two other scope issues must be considered: whether the exception should be permissive or mandatory, and whether the threatened harm must be "imminent" before disclosure is allowed.

A. Permissive Versus Mandatory

As an initial matter, the exception should be permissive. It should provide only that the lawyer *may* disclose confidential information.¹⁶⁹ No exception should create a duty that *requires* the lawyer to breach confidentiality. Few states so require, and the current Model Rule 1.6, the Ethics 2000 Commission's proposed Rule 1.6, and the *Restatement (Third) of the Law Governing Lawyers* similarly do not mandate disclosure.¹⁷⁰ Given California's strong interest in confidentiality and protecting the client, any rule or statutory provision should only authorize disclosure, and any such disclosures should be made only to the extent reasonably necessary to prevent the foreseen harm.

B. Imminent Harm

As an initial matter, this Article proposes that any life-threatening confidentiality exception that California might adopt include the threshold requirement that the harm resulting from the client's actions be "likely" or "reasonably certain." This is a departure from a requirement that the harm be "imminent," as is provided in current Model Rule 1.6,¹⁷¹ but comports with the recently approved Ethics 2000 Commission version of the life-threatening activity exception,¹⁷² as well as with the *Restatement (Third) of the Law Governing Lawyers*.¹⁷³

169. Or, if a rule is framed more as a safe harbor rather than a direct modification of the duty of confidentiality, then the rule should provide that the lawyer is not subject to discipline should the lawyer make any confidential disclosures to prevent death or serious bodily injury. See *infra* notes 242-50 and accompanying text.

170. See *supra* notes 38-67 and accompanying text.

171. See *supra* Part II.B.

172. See *supra* Part II.D.

173. See *supra* note 57 and accompanying text.

From a *substantive* perspective, removing “imminent” from the lawyer’s calculus for deciding whether to disclose confidential information of the client would allow the lawyer to reveal such information where the feared harm may not occur for years, for example, in a situation where toxic waste is released into the environment.¹⁷⁴ A lawyer should be permitted to prevent a client from violating the law¹⁷⁵ in releasing toxic waste that will likely cause serious bodily harm. Lawyers, however, should not be put in a position where they could breach confidentiality upon the mere possibility that the harm may come to pass. In the case of an environmental tort, for example, disclosure of confidential client information would be permitted only when the lawyer can be reasonably certain that the course of environmental damage, once begun, will proceed to an inevitable end, resulting in harm to the public by causing death or other serious injury. As already noted,¹⁷⁶ both the Ethics 2000 Commission proposal and the *Restatement (Third) of the Law Governing Lawyers* have removed the “imminent” modifier from the rule and provide that the threat to life need only be “reasonably certain.”¹⁷⁷

From a *procedural* point of view, eliminating the imminent requirement would conform the confidentiality exception to Evidence Code section 956.5. As noted, Evidence Code section 956.5 provides there is no attorney-client privilege if the lawyer reasonably believes a client’s criminal act “is likely to result in death or substantial bodily harm.”¹⁷⁸ As will also be discussed, in rejecting the 1987 Rule 3-100 proposal, the California Supreme Court voiced its concern about

174. See *Ethics 2000*, *supra* note 12 (“Such harm is reasonably certain 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.” (quoting language from a proposed addition to comment 6 of Model Rule 1.6)).

175. As discussed in Part IV.C, retaining the “criminal act” limitation in the exception is important to maintaining a strong attorney-client relationship in the face of eliminating an imminence requirement. See *infra* notes 190–204 and accompanying text.

176. See *supra* note 57 and accompanying text.

177. Each version of the proposed rule 3-100 also rejected an imminent harm requirement, providing only that the lawyer reasonably believe that a client’s criminal act “is likely to result in death or substantial bodily harm.” STATE BAR OF CAL. OFFICE OF PROF’L COMPETENCE, PLANNING & DEV., *supra* note 83 at enclosures 4, 6, 9 (emphasis added); see *infra* notes 240–50 and accompanying text. Moreover, both the Ethics 2000 Commission and the *Restatement (Third) of the Law Governing Lawyers* use a toxic waste hypothetical in their comments and illustrations, respectively. See MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 6 (2001); RESTATEMENT (THIRD) OF THE LAW GOVERNING Lawyers § 66 illus. 3 (1998); *Ethics 2000*, *supra* note 12.

178. CAL. EVID. CODE § 956.5 (West 1995) (emphasis added); see *supra* note 81 and accompanying text.

adopting a rule of confidentiality that would be "inconsistent with" the legislature's intent in having enacted the attorney-client privilege.¹⁷⁹ It is unlikely that an exception to the duty of confidentiality, at least one contained in a rule of professional conduct, would pass muster with the California Supreme Court unless at a minimum it conforms to the language in Evidence Code section 956.5.

There are, however, proponents of retaining the stricter imminent standard found in current Model Rule 1.6.¹⁸⁰ Their arguments focus on the duty of loyalty lawyers owe each of their clients. While lawyers are also officers of the court, owing certain duties to the legal system, proponents of an imminent standard argue that a lawyer should not act as a law enforcement officer against the lawyer's own client.¹⁸¹ The potential for such disclosures, they argue, would weaken the bond of trust that the duty of loyalty fosters.¹⁸² The client should be able to feel that the lawyer is available to provide legal advice and will preserve the client's confidences. If clients believed their lawyers could disclose to third parties the confidential information they have revealed to their lawyers to obtain legal advice, they will refrain from giving their lawyers information the lawyers need to properly fulfill their counseling function. Clients will "withhold from their lawyers information that clients think will be harmful or embarrassing if they suspect that their lawyers will use that information for any purpose other than to further the interests of a client."¹⁸³

Nevertheless, proponents of an imminent standard concede that

179. See STATE BAR OF CAL. OFFICE OF PROF'L COMPETENCE, PLANNING & DEV., *supra* note 83, at 10-11 (citing Letter from the California Supreme Court, to Terry Anderlini, President, State Bar of California (June 9, 1998)); see also *infra* notes 241, 259-67 and accompanying text.

180. See, e.g., PASTERNAK, *supra* note 67, at 2-3. The L.A. County Bar Association's motion was filed with the Ethics 2000 Commission just prior to the ABA's August 2001 annual meeting, at which the ABA's House of Delegates considered the commission's proposed revisions to the Model Rules. See also Letter from Harry B. Sondheim, Chair of California State Bar Standing Committee on Professional Responsibility and Conduct, to ABA Ethics 2000 Commission (Jan. 13, 1999), at <http://www.abanet.org/cpr/e2k/selegate.html> [hereinafter Letter from Harry B. Sondheim]. The proposed rule, without an imminence limitation, passed the ABA's House of Delegates by a vote of 243 to 184. See Glater, *supra* note 1, at A12.

181. See PASTERNAK, *supra* note 67, at 2; Letter from Harry B. Sondheim, *supra* note 180.

182. PASTERNAK, *supra* note 67, at 2; Letter from Harry B. Sondheim, *supra* note 180; see also *supra* notes 7-8 and accompanying text.

183. PASTERNAK, *supra* note 67, at 2.

under certain circumstances, the lawyer might be the last person standing between the client's actions and the threatened harm.¹⁸⁴ Under those circumstances, a temporally limiting imminent standard would allow lawyers to disclose confidential client information. Before such time as the lawyer is the "last resort," however, there are alternatives for preventing the client's actions, such as law enforcement authorities, the regulatory authorities of the client's industry, and even nonlawyer employee whistle blowers. Otherwise, lawyers' effectiveness in counseling clients on the legal and ethical implications of their chosen courses of action may be lost. Society in the long run would suffer from this loss of legal advice.¹⁸⁵

Despite the appeal of these arguments, the public's interest in preventing the client from following a *criminal* course of action, the effects of which might not be felt for years, warrants the removal of the imminence standard. The arguments for an imminent standard ignore the significance of the illustration both the Ethics 2000 Commission and the *Restatement (Third) of the Law Governing Lawyers* have used: the release of toxic waste into the environment.¹⁸⁶ True, there may be others within a corporate client, such as a nonlawyer employee, who are not so constrained as a lawyer from disclosing confidential information. However, the use of the modifier "imminent" suggests that the death or substantial bodily harm will occur in the near future.¹⁸⁷ This limitation is problematic because even though the harm that results from the client's acts may not manifest itself for years—for example, death or a debilitating disease from contact with the toxic waste—immediate disclosure may be "necessary to eliminate the threat or reduce the number of victims."¹⁸⁸ Removing the temporal limitation would allow a

184. *Id.*

185. *Id.* The L.A. County Bar Association set forth several other arguments favoring an imminence requirement as follows:

First, there is a risk of harm to the client if the lawyer is mistaken as to the facts or their consequence and discloses confidential information based on that mistaken belief. Second, there is a similar risk of harm to others including, for example, shareholders of publicly owned corporations, and a related risk of violating the securities laws. Third, the disclosures that would be authorized by the proposed revisions might violate other provisions of law. For example, California Health & Safety Code § 120980 makes it a crime in certain situations to disclose the results of an HIV test.

Id. at 3.

186. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 6 (2001); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 66, illus. 3 (1989); *Ethics 2000*, *supra* note 12.

187. The *Merriam-Webster Collegiate Dictionary* defines "imminent" to mean "ready to take place; *esp[ecially]*: hanging threateningly over one's head." MERRIAM-WEBSTER COLLEGIATE DICTIONARY, 602 (9th ed. 1985).

188. MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. 6 (2001); RESTATEMENT (THIRD)

lawyer to take necessary steps to prevent "reasonably certain" or "likely" harm from occurring. Such a rule would allow lawyers to reveal confidential information—if necessary—so they do not have to wait for another employee of an organizational client to blow the whistle or for the authorities to uncover the client's conduct.¹⁸⁹

Removing the imminent standard, moreover, should not interfere with the attorney-client relationship, subverting the lawyer's role as the client's counselor, as some of the imminent standard's proponents fear. Retaining the current Model Rule's requirement that the client not merely act, but instead that the client's acts be criminal in nature, should address those concerns.

OF THE LAW GOVERNING LAWYERS § 66 *illus.* 3 (1988); *Ethics 2000*, *supra* note 12. This is a particular concern if the severity of the effect of exposure is cumulative over time.

189. It is arguable that even with an imminent standard in the exception, a lawyer would still be allowed to disclose a client's criminal activities that are reasonably certain to result in death or substantial bodily harm. It would involve, however, a tortured interpretation of the word "imminent." To include harm not expected to arise for several years within the purview of an exception with an imminent limitation, the word would have to be deemed to mean not only harm that is "ready to take place," MERRIAM-WEBSTER COLLEGIATE DICTIONARY 602 (9th ed. 1985), but also "inevitable" harm that will be imminently put in motion by the client's act (or failure to act). For example, if the lawyer learned from an employee of a corporate client that the client has plans to release toxic waste into the environment in the near future, which the lawyer determines is likely to cause serious injury to the public but not for several years, and the lawyer is unsuccessful in persuading the client to dispose of the waste properly, then it could be argued that a course of conduct that will lead to inevitable harm will imminently be put in motion and the lawyer would then be allowed to disclose the confidential information to the extent necessary to prevent the toxic release or the aggravation of harm. The same reasoning would apply to a situation where the client has already released toxic waste into the environment, whether intentionally or inadvertently. Assuming the lawyer has unsuccessfully tried to persuade the client to report the release or otherwise to take steps to rectify the situation, it can still be argued that the course of conduct leading to inevitable harm to the public (here, the client's failure to take appropriate action) has been put in motion. The problem with the foregoing analysis is that such an interpretation of imminent effectively removes the word as a modifier for harm. The word might just as well be removed from the rule, as already argued above.

Nevertheless, keeping imminent in the black letter rule, but explaining its "expanded" meaning in a comment, might serve a purpose. Having the word in the black letter—the part of a rule that a lawyer would read first—would signal to the lawyer that a decision to breach confidentiality should not be taken lightly as not every kind of harm will (or should) trigger the exception. That cautionary function, however, can just as easily be realized by retaining from the current Model Rule 1.6, the requirement that the harm be the result of the client's criminal activity. See *infra* notes 190–211 and accompanying text.

C. Criminal Act

Current Model Rule 1.6 permits a lawyer to disclose confidential client information only to the extent the lawyer reasonably believes necessary "to prevent the client from committing a *criminal act*" that "is likely to result in imminent death or substantial bodily harm."¹⁹⁰ Both the Ethics 2000 Commission and the *Restatement (Third) of the Law Governing Lawyers*, however, have removed the requirement that the client's conduct be criminal. Under their approach, lawyers would be able to disclose confidential client information to prevent client acts that are legal, as well as criminal acts. The only limitation would be that the harm that might result is "reasonably certain."

The problem with this approach is apparent. Giving lawyers the right to determine what is in the client's best interests, and allowing them to take action on that determination without the client's consent, flies in the face of the traditional allocation of responsibilities and authority between lawyer and client.

An effective attorney-client relationship depends on the appropriate allocation of responsibility between lawyer and client. Generally speaking, when a lawyer's advice is sought, the lawyer first must give a reasoned consideration of the law in light of the facts. After such consideration, the lawyer can then provide the advice to the client to help the client decide how to proceed in the matter for which the client sought the lawyer's assistance. The advice the lawyer provides should be based on the prevailing law, the particular facts of the matter on which the client seeks advice, and on the lawyer's knowledge of surrounding circumstances. While the lawyer can recommend a particular course (in fact, it is the lawyer's duty to communicate with and advise the client)¹⁹¹ it is the client's sole right to make the final decision regarding anything that may affect the client's substantive rights.¹⁹² This is true regardless of the relative knowledge and experience of the lawyer and client. Even if the lawyer is extremely knowledgeable and the client is relatively unsophisticated, it is the client who is empowered to make the ultimate decision about how to proceed.

Removing the criminal act limitation could turn the lawyer-client relationship on its head. If the lawyer is not constrained by that limitation, then even where the client is acting legally, the lawyer could

190. MODEL RULES OF PROF'L CONDUCT R. 1.6 (emphasis added).

191. See, e.g., CAL. BUS. & PROF. CODE § 6068(m) (West 1990 & Supp. 2002); CAL. RULES OF PROF'L CONDUCT R. 3-500, 3-510; see also MODEL RULES OF PROF'L CONDUCT R. 14; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20.

192. Blanton v. Womancare Inc., 696 P.2d 645, 654 (Cal. 1985); see also MODEL RULES OF PROF'L CONDUCT R. 1.2(a) & cmt. 1.

force the client to make decisions the client does not want to make—based simply on the lawyer's assessment that death or harm is likely to follow.¹⁹³ There are few products sold that would not, under some circumstances, cause death or serious injury. It is virtually impossible to make a perfectly safe product, and manufacturers often must make decisions involving cost-benefit analyses. Reasonable people can differ about where to draw the line as to when the dangers inherent in a product outweigh the benefits it provides (or the profit it can accrue for the manufacturer).

The model for a lawyer and client in this situation has been described.¹⁹⁴ The client will be candid with the lawyer because the client knows that the lawyer is duty bound to preserve information the client has communicated confidentially. The lawyer can then use that information in an attempt to persuade the client not to proceed as planned, or, in the case where a toxic substance has been released, to persuade the client to take action to remedy the situation and prevent the harm that likely will result.¹⁹⁵

In attempting to persuade the client, the lawyer may go beyond a simple discussion of the legal consequences to point out the consequences—financial, reputational, and others—that can accompany a decision to proceed with the client's proposed course of action.¹⁹⁶

193. There are recent examples of cases where businesses have made what can at best be described as poor decisions in this regard, leading to the sale of products that resulted in severe injuries resulting in enormous judgments or the potential for enormous judgments. See, e.g., Myron Levin, *A History of Fiery Deaths on the Road*, L.A. TIMES, Apr. 29, 2001, at A1; Ann W. O'Neill et al., *GM Ordered to Pay \$4.9 Billion in Crash Verdict*, L.A. TIMES, July 10, 1999, at A1. It is precisely these kinds of cases, however, that a lawyer can marshal in persuading clients on how they should proceed. The lawyer can make the client aware that in the current litigation atmosphere, juries generally will not accept as reasonable a manufacturer's decision to save a few dollars per product at a high risk (or to the jurors after the fact, an apparent high risk) of death. See, e.g., Levin, *supra*, at A1. This is not to suggest the countenancing of the actions of the lawyers who represented the tobacco companies and assisted their clients in concealing information. See *infra* note 201. What they did was wrong. But providing an exception that does not require a criminal act predicate would not have changed the conduct of those lawyers, who actively assisted their tobacco company clients in concealing information that should have been produced during discovery.

194. See *supra* notes 30–35 and accompanying text.

195. See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 14.

196. See, e.g., *id.* R. 2.1 (addressing the lawyer as advisor, providing that, "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be

Indeed, given the seeming spate of instances involving, for example, automobiles, where the corporation has pursued a course of conduct that has proven very damaging to the corporation, not only legally (lost lawsuits), but also financially and reputationally,¹⁹⁷ a lawyer would have a large arsenal of arguments to use in persuading the client. The lawyer, however, will be unable to employ those arguments if the client, fearing the lawyer will go public, decides to keep its legal advisers in the dark. The lawyer cannot sway a client without information. For the lawyer to obtain that information, the client must trust in the lawyer and believe that the lawyer will keep confidential the information that the client communicates. That, as already pointed out, is the policy rationale underlying both the duty of confidentiality and the attorney-client privilege.

It is not surprising that, while a dozen or so states have modified Model Rule 1.6 by removing its imminent limitation,¹⁹⁸ only four states have completely removed the requirement that the client engage in a *criminal* activity before the exception is triggered.¹⁹⁹ Removing the criminal activity limitation from a life-threatening exception to the duty of confidentiality would disrupt the balance that currently exists in the attorney-client relationship. Without the criminal activity limitation, a lawyer would have the ability, without fear of discipline, to disclose information about a client's *lawful* actions, so long as the lawyer reasonably believes the client's actions will lead to death or serious injury. A client's assessment of the same situation may differ from that of the lawyer. For example, the client may have taken into consideration that some death or injury is unavoidable, but has decided to proceed; such business decisions are made all the time. But that would not matter; the lawyer could use the threat of disclosing confidential information to, in essence, make business decisions for the client based on the lawyer's own estimation of the benefits and risks to the public.

Giving the lawyer that power would turn the fundamental allocation of authority between lawyer and client on its head, an unfair result, as it is a rare product that is 100% safe.²⁰⁰ Manufacturers often have to balance

relevant to the client's situation"); see also *id.* R. 2.1 cmts. 1–5 (discussing the scope of advice the lawyer may give).

197. See *supra* note 193 and accompanying text.

198. See *supra* notes 58–59 and accompanying text.

199. See *supra* note 61 and accompanying text.

200. The topsy-turvy effect on the lawyer-client relationship of removing the criminal act requirement from the confidentiality exception is perhaps most apparent where the client is an organization. There is usually someone within the organization who is responsible for making decisions on behalf of the organization. It is in that person that the decision-making authority is properly reposed. It is not the lawyer's place to substitute her opinions on proper conduct for those of the organization's

benefits and risks in bringing a product to market. Such balancing is not illegal even if the product that is marketed contains some risk. Absent a requirement that the client's acts be criminal, clients such as tobacco companies, gun manufacturers, and chemical companies would be denied the same attorney-client relationship to which all persons within our legal

decision-maker. If the lawyer believes the decision-maker is in error, then the ethics rules provide her with a road map on the course to take. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.13; CAL. RULES OF PROF'L CONDUCT R. 3-600 (1999). The *Restatement (Third)* section 96(3), has also addressed this issue in similar fashion. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96(3) (1998).

California Rule 3-600 is an example of an ethical rule that provides guidance to lawyers who represent organizations. It provides that if the lawyer knows that a person acting on behalf of the corporation intends to act (or refuses to act) in a way that is a violation of law imputable to the organization or in a way that is likely to result in substantial injury to the organization, then the lawyer may urge the person to reconsider the matter or refer the matter to the highest internal authority that can act on behalf of the organization. CAL. RULES OF PROF'L CONDUCT R. 3-600 (1999). Paragraph (B) of Rule 3-600 provides:

(B) If a member acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:

- (1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or
- (2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.

Id. R. 3-600(B). Model Rule 1.13 is to substantially the same effect. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13.

These various ethical rules concerning the organization as client have a cardinal principle in common: the lawyer may not violate her duty of confidentiality in taking action to resolve the situation. The courses of conduct permitted lawyers under these rules all must be taken within the confines of the client organization; the lawyer is not permitted to externally disclose information protected by the duty of confidentiality. The rules recognize that decisions in an organization are made by authorized representatives of that organization; unless specifically so authorized to make decisions for the organization, the lawyer's only course is to pursue the approved course of conduct or resign. MODEL RULES OF PROF'L CONDUCT R. 1.13(c); CAL. RULES OF PROF'L CONDUCT R. 3-600(C) (1999). However, the lawyer's silence is mandated only if the information the lawyer has in her possession is subject to the duty of confidentiality. As discussed previously, a client has no expectation in the preservation of confidential information where the client is involved in criminal activity. *See Gen. Dynamics Corp. v. Superior Court*, 876 P.2d 487, 503 (Cal. 1994); *supra* notes 130-33 and accompanying text.

system are entitled.²⁰¹ Indeed, it is possible they would effectively be denied the benefits of the attorney-client privilege. And it would not just be manufacturers of inherently dangerous products. Not conditioning the exception on a crime could adversely affect any business that “in the climate of the day might be involved in controversial activities.”²⁰² It could also affect any business whose product or service has implicit risks of death or life—health care providers, health insurance companies, airlines, and the like.²⁰³

Where the client plans to engage in a *criminal* act that will result in death or serious bodily harm, however, the lawyer should be allowed to breach confidentiality to prevent serious bodily harm from resulting. In those situations, the client would have no reasonable expectation that the attorney is bound by a duty of confidentiality.²⁰⁴ No client should expect that it can rely on its lawyer to assist it in a course of criminal conduct that threatens human life.²⁰⁵ A lawyer disclosing confidential information in these limited circumstances should not leave the client feeling betrayed. With a criminal act limitation in place, both the client and the lawyer will have been put on notice that if the client engages in criminal conduct, the client cannot expect confidentiality.²⁰⁶ Conversely, the criminal act limitation will remind

201. It might be argued that the practices of concealment in which tobacco companies engaged for many years is a strong argument why there should be few limitations on allowing a lawyer to disclose confidential client information to prevent harm. See, e.g., Richard A. Zitrin & Carol M. Langford, *Ethics in Ashes: Big Tobacco's Lawyers Hide Behind the Cloak of Privilege*, CAL. LAW., Nov. 1988, at 46. The problem with that argument is that the tobacco lawyers were willing participants in the concealment. Even if those lawyers were operating under the Ethics 2000 Commission or the *Restatement (Third)*'s rules that have removed the criminal activity limitation, they would not have disclosed the information.

202. PASTANAK, *supra* note 67.

203. *Id.*

204. See, e.g., *Gen. Dynamics*, 876 P.2d at 504 (noting that any such expectation is “misplaced”).

205. See, e.g., *United States v. Cueto*, 151 F.3d 620, 634 (7th Cir. 1998) (affirming a lawyer's conviction for obstructing justice, the court stated: “We refuse to accept the notion that lawyers may do anything, including violating the law, to zealously advocate their clients' interests and then avoid criminal prosecution by claiming that they were ‘just doing their job’”); *United States v. Morris*, 988 F.2d 1335, 1336 (4th Cir. 1993) (discussing the marital privilege in a case concerning a lawyer charged in a drug conspiracy based on real estate work he did on house where crack cocaine was being manufactured).

206. The supreme court in *Gen. Dynamics*, 876 P.2d 487, appears to suggest that a client cannot expect a lawyer to stand by when it discloses to the lawyer confidential information for the purposes of committing a crime. The court stated:

Although their revelation in the course of a retaliatory discharge suit may do lasting damage to the expectations of the corporate client (or, more likely, a corporate executive) that disclosures to counsel would remain inviolate, a concern for protecting the fiduciary aspects of the relationship in the case of a client who confides in counsel for the purpose of planning a crime or practicing a fraud is misplaced; such disclosures do not violate the privilege.

the lawyer that the confidentiality exception is not a license to usurp the client's decision-making authority.

The possibility that the lawyer will reveal such information if the client engages in life-threatening criminal conduct should not prevent the vast majority of clients from providing their lawyers with all the information the lawyer needs to provide the client with competent advice on how to proceed. Thus, a criminal activity limitation will serve the purposes of protecting the public without undermining the attorney-client relationship.

Turning to the toxic waste hypothetical illustrations used both by the Ethics 2000 Commission and in the *Restatement (Third) of the Law Governing Lawyers*,²⁰⁷ we can see that a criminal activity limitation would not necessarily prevent a lawyer from disclosing information to prevent or reduce the number of deaths or injuries. Generally, businesses that handle toxic substances are highly regulated.²⁰⁸ In most, if not all situations where there is a toxic waste spill, regulations require the business responsible for the spill to report it to the regulatory authority or take necessary steps to protect the public.²⁰⁹ In California, dumping hazardous waste can lead to imprisonment, a fine, or both.²¹⁰ Failure to report an inadvertent spill will subject the client to civil penalties,²¹¹ and in some instances, criminal penalties. Thus, even with a criminal act limitation, if a lawyer learns that the organizational client has released a toxic substance into the environment that poses a serious threat to the public, and the client has not disclosed that information to the relevant authorities, the lawyer could reveal that information to the extent necessary to prevent or, in some cases, to lessen the harm.²¹²

Gen. Dynamics, 876 P.2d at 504.

207. See sources cited *supra* note 186.

208. See, e.g., 42 U.S.C. §§ 6901–6922k (1994 & Supp. V 1999).

209. See, e.g., CAL. HEALTH & SAFETY CODE §§ 25359.4(b), 25507(a) (West 1999 & Supp. 2002).

210. See CAL. PENAL CODE § 374.3(h)(1) (West 1999 & Supp. 2002). Under the statute, the "fine is mandatory and shall amount to not less than five hundred dollars (\$500) nor more than one thousand five hundred dollars (\$1,500) upon a first conviction." *Id.*

211. See, e.g., CAL. HEALTH & SAFETY CODE § 25359.4(d).

212. Under the proposed exception, the lawyer would be limited to disclosing *prospective* criminal acts of the client that are likely to result in substantial bodily harm or death. Even with this limitation, a potential problem may arise under certain situations. Consider, for example, the case where the lawyer becomes aware through the representation of the client that the client had discharged toxic waste into the environment several times in the past but never reported it to the appropriate authorities,

In summary, retaining the criminal act limitation from the current Model Rules preserves the traditional allocation of authority between client and lawyer. It prevents the lawyer from making decisions for the client based on the lawyer's own beliefs. It provides notice to both the client and lawyer that the client who engages in criminal activity cannot have any expectation of confidentiality. Just as important, it reminds the lawyer that he may not reveal confidential information where there is no criminal act.²¹³

nor take the client any steps to rectify the spillage. Assuming the lawyer knows the discharge is likely to cause death in the future and that the law requires the client to report each incidence of such discharges, the client has been committing criminal acts by not making the reports. If the lawyer remonstrates with the client but the client refuses to take appropriate remedial action, and the lawyer then discloses the spills to the authorities, then the lawyer arguably will be disclosing a *past* criminal act—instances of nonreporting. Moreover, the disclosure of a past criminal act would be even more apparent in a case where the client deliberately discharged toxins into the environment. Similarly, in the bomb-planting hypothetical discussed previously, *see supra* note 4 and accompanying text, the lawyer could prevent a potentially murderous act by the client through disclosure to the authorities. At the same time, however, the lawyer arguably would be revealing a completed criminal act, attempted murder, by disclosing that the client had planted the timed incendiary device. Put another way, in some cases, disclosure of *prospective* criminal acts will necessarily result in disclosure of *past* criminal acts.

It is true that our legal system places great import on the lawyer preserving the client's confidential information, particularly information of past criminal acts the client has disclosed to the lawyer. *See supra* notes 30–33 and accompanying text. Nevertheless, in those limited instances where the client's continued inaction will not only result in reasonably likely death or substantial bodily harm (where, for example, the discharged toxin has been shown likely to cause death in the future), but also continues to constitute a criminal act (for example, failure to report or past deliberate discharges in violation of law), the scales should tip in favor of disclosure. Preservation of innocent lives should trump the preservation of client confidences in these narrow circumstances. The exception would not allow wholesale disclosure of clients' past criminal acts. They would be disclosed only where those past acts continue to threaten life, and the lawyer would be able to disclose client confidences only to the extent it is necessary to prevent the client's prospective act. On balance, both policies—protection of client confidences and protection of life—will be vindicated.

213. The proposed exception would limit the lawyer to reporting prospective criminal acts *by the client*. At the ABA's February 2002 mid-year meeting in Philadelphia, the Los Angeles County Bar Association (LACBA) submitted a motion to reconsider the Ethics 2000 Commission's amendment to Model Rule 1.6(b) that was approved by the ABA House of Delegates at its 2001 annual meeting. AM. BAR ASS'N HOUSE OF DELEGATES, ADDITIONAL AMENDMENT TO ETHICS 2000 PROPOSAL (REPORT 401) (2002) (on file with the author) (stating the proposed amendment to Rule 1.6 by the Los Angeles County Bar). In its motion, the LACBA proposed that the criminal act limitation (a limitation rejected at the ABA's August 2001 annual meeting) it was proposing should not be restricted to the acts of the client. The LACBA proposed that Rule 1.6(b)(1) should provide: "(b)A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent ~~reasonably certain~~ *imminent* death or substantial bodily harm *resulting from a criminal act.*" *Id.* The foregoing language would allow a lawyer to disclose a prospective criminal act not only by the client, but also by a third person, which the lawyer discovered in the course of the representation of the client. This Article is not in substantive disagreement with this proposal. If a lawyer

D. Definition of "Confidential Information"

There is a final issue on the scope of the life-threatening criminal activity exception: it should also include a definition of "confidential information" so that lawyers will be on notice concerning the kind of information that comes within the scope of the duty's protection. At present, unlike the Model Rules,²¹⁴ the ABA Code²¹⁵ or the *Restatement (Third) of the Law Governing Lawyers*,²¹⁶ Business and Professions Code section 6068(e) provides no definition. Two California State Bar ethics opinions have considered section 6068(e)'s reference to "confidence" and "secrets" and concluded that "maintaining confidence" of the client refers to the lawyer not doing anything that would "breach the trust reposed in him or her by the client,"²¹⁷ while "secrets" refers to "information gained in the professional relationships [sic] . . . the disclosure which would be embarrassing and would be likely to be detrimental to the client."²¹⁸

is aware of a crime that is about to be committed and which is likely to result in death or serious bodily injury, the lawyer should not be foreclosed from disclosing that information simply because the prospective crime is to be committed by one other than the client. This Article proposes for now, however, that any proposed exception to the duty of confidentiality in California be limited to prospective criminal acts *by the client*. As already noted, *see supra* notes 178-79 and accompanying text, Evidence Code section 956.5 provides that there is no attorney-client privilege if the lawyer reasonably believes disclosure of a confidential client communication is necessary "to prevent the client from committing a criminal act that . . . is likely to result in death or substantial bodily harm." CAL. EVID. CODE § 956.5 (West 1995). It is unlikely that an exception to the duty of confidentiality would pass muster with the California Supreme Court unless, at a minimum, it conforms to the language in Evidence Code section 956.5.

214. The Model Rules provide that the duty of confidentiality covers "information relating to representation of a client." *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2001); *supra* notes 20-26 and accompanying text.

215. DR 4-101(A) includes within its scope of protection both information protected by the attorney-client privilege and "secrets." *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(A) (1981); *see also supra* notes 20-21 and accompanying text.

216. Section 59 of the *Restatement (Third) of the Law Governing Lawyers* defines "confidential information" to mean "information relating to representation of a client, other than information that is generally known." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 (1998).

217. State Bar of Cal. Compendium on Prof'l Responsibility, Formal Op. 1988-96 (Mar. 1989); State Bar of Cal. Compendium on Prof'l Responsibility, Formal Op. 1986-87 (June 1987).

218. State Bar of Cal. Compendium on Prof'l Responsibility, Formal Op. 1988-96 (Mar. 1989); State Bar of Cal. Compendium on Prof'l Responsibility, Formal Op. 1986-87 (June 1987) (quoting MODEL CODE OF PROF'L RESPONSIBILITY, DR 4-101(A)). The definition of "secrets" the bar adopted is the definition contained in the Model Code,

A better definition that would communicate to California lawyers precisely what kind of information is to be protected was included in the 1998 proposal to add Rule 3-100 to the Rules of Professional Conduct. That proposal provided that:

“confidential information” means information related to the representation of a client that: (1) is subject to the lawyer-client privilege, or (2) has been acquired from any source, and (a) which the client has requested be held inviolate, or (b) the disclosure of which is likely to be embarrassing or detrimental to the client.²¹⁹

That definition is preferable because it combines the best of both Model Rule 1.6 and ABA Code DR 4-101.

First, it includes the broad definition included in Model Rule 1.6, “information relating to representation,” which is not restricted to information that is learned from the client.²²⁰ It thus emphasizes that it applies to any information relevant to the representation of the client, regardless of its source. Unlike the Model Rule, however, it does not stop with the broad definition. Subparagraphs (1) and (2) spell out precisely what is covered: attorney-client privileged communications and information from any other source. As to the latter information, so long as it is embarrassing or would likely be detrimental to the client, the client need not request that it be kept inviolate. The definition’s breadth and specificity will put lawyers on notice as to precisely what information they must protect when honoring their duty of confidentiality.

In summary, an exception to the duty of confidentiality for life-threatening criminal activity should be just that. A lawyer’s authority to disclose confidential information should be limited to the client’s prospective criminal acts, though disclosure should not require that harm be imminent. It should also include a definition of “confidential information” that is both broad, yet at the same time, precise.

Having determined that California should have an exception and having described the proposed scope of that exception, this Article will now address strategies for implementing the exception.

although it redacted the clause that states “that the client has requested be held inviolate.” See MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101(A) (“[S]ecret” refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.”). The LACBA adopted the definition of DR 4-101(A), which also defines “confidence” as referring “to information protected by the attorney-client privilege under applicable law.” MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101(A).

219. See STATE BAR OF CAL. OFFICE OF PROF’L COMPETENCE, PLANNING & DEV., *supra* note 83, at enclosure 1.

220. See *supra* notes 22–26 and accompanying text.

V. IMPLEMENTING THE EXCEPTION: NOT AS EASY AS IT
MIGHT APPEAR

Part II of this Article described the parameters of the life-threatening criminal activity exception in other jurisdictions and discussed how California has no express exception to its duty of confidentiality that would allow a lawyer to disclose confidential information to prevent a client's life-threatening criminal activity. Part III demonstrated that the life-threatening criminal activity exception to the attorney-client privilege probably does not apply to Business and Professions Code section 6068(e), and concluded that at any rate, the uncertainty in the law of confidentiality in California warrants an express life-threatening activity exception to its duty of confidentiality. Part IV considered the nature and scope of such an exception, concluding it should be permissive, and should retain the criminal activity limitation but not the imminent standard of current Model Rule 1.6, and should contain a definition of "confidential information." This Part of the Article now considers how such an exception could be implemented.

There are several ways to implement a confidentiality exception. First, the legislature could amend Business and Professions Code section 6068(e) to provide for an express exception.²²¹ Second, the California Supreme Court could adopt a rule of professional conduct that either provides an express exception to 6068(e) or immunizes the disclosing lawyer from discipline.²²² Third, amending section 6068(e), in concert with the adoption of a rule of professional conduct is yet another possibility.²²³

Although the latter approach would come closest to avoiding problems of conflicting authority inherent in California's unique dual regulatory framework,²²⁴ none of these approaches are completely satisfactory. To avoid the problems inherent in the dual regulatory system, a fourth approach is suggested, involving the repeal of section 6068(e), effective upon the adoption of a rule of professional conduct.²²⁵

221. See *infra* Part V.A.

222. See *infra* Part V.B.4.

223. See *infra* Part V.C.1.

224. California's unique regulatory system involving both legislatively enacted statutes and court-adopted rules of professional conducts is discussed *supra* notes 72-76 and accompanying text.

225. See *infra* Part V.C.2.

A. Amending Section 6068(e)

The most direct approach to implementing an exception to the duty of confidentiality is to amend Business and Professions Code section 6068(e), either by revising the section itself or by enacting a separate section that creates the exception.²²⁶ Professor Roger Cramton has argued in favor of such an approach and has proposed language for such an amended section.²²⁷ Professor Cramton's proposal cuts a much broader swath than the exception this Article envisions. Putting aside the merits of the scope or the language of his proposed exception, however, it is debatable whether an amendment of Business and Professions Code section 6068(e) could be enacted.

Section 6068(e) has been part of California's Business and Professions Code since 1873. It is part of section 6068, which is titled "Duties of Attorney" and which, in fifteen separate paragraphs, lists duties of California lawyers. In the nearly 130 years section 6068(e) has been California law, it has not been amended. There have been attempts to amend or modify the effect of section 6068(e), but they have proven unsuccessful. For example, during the 1999–2000 legislative session, Assembly Member Tony Strickland introduced Assembly Bill (AB) 1286, which would have required "a lawyer to reveal to a law enforcement agency information regarding the location of a person missing against his or her will, and to reveal the identity of the person who has that information."²²⁸ Initially fashioned as an amendment to the Evidence Code,²²⁹ it was amended on April 26, 1999, to instead provide for a new section 6068.5. That section would have modified section 6068(e) by providing that, notwithstanding any other provision of law (presumably, section 6068(e)), a lawyer has a duty to report to a law

226. This latter strategy was the approach taken by the sponsors of Assembly Bill 1286, discussed *infra* notes 227–41 and accompanying text, and Assembly Bill 363, a bill that when first introduced proposed an exception to the duty of confidentiality by providing that, notwithstanding their duties under section 6068(e), government lawyers could report improper governmental activity. See Assemb. B. 363, 2001 Reg. Sess. (Cal. 2001), available at http://www.leginfo.ca.gov/pub/bill/asm/ab_0351-0400/ab_363_bill_20010220_introduced.html. Both bills proposed a section 6068.5 that would have created the respective exception to Business and Professions Code section 6068(e). See *infra* note 291 for the subsequent history of Assembly Bill 363.

227. See Roger C. Cramton, *Proposed Legislation Concerning a Lawyer's Duty of Confidentiality*, 22 PEPP. L. REV. 1467, 1473–76 (1995). It is not certain whether Professor Cramton still believes such an amendment is necessary, given his subsequent statement that *General Dynamics* probably held that the exceptions to California's attorney-client privilege also apply to its duty of confidentiality. See Cramton & Knowles, *supra* note 162, at 126 n.196.

228. See *Hearing Before the Assembly Committee on Public Safety*, 1999–2000 Reg. Sess. (Cal. May 13, 1999) (discussing Assembly Bill 1286).

229. It would have added a new section 964 to the California Evidence Code.

enforcement agency information about a missing person and to identify any person, including a client of the lawyer, whom the lawyer reasonably believes has information about that missing person.²³⁰ It was subsequently amended to take its original approach, that is, adding a section to the Evidence Code.²³¹ The Evidence Code amendment permitted, but did not require, that the lawyer report to the law enforcement agency.²³² Nevertheless, it failed to gain passage in the committee and expired.²³³

As with the life-threatening criminal activity exception with which this Article is concerned, AB 1286 evinced a concern for life of a third person.²³⁴ It attempted to carve out an exception either to the duty of confidentiality or to the attorney-client privilege. Its failure, however, does not necessarily mean that a proposed revision of Business and Professions Code section 6068(e) to permit the life-threatening criminal activity exception would similarly fail. Arguably, AB 1286 was not a bill that should have passed. It was an impassioned reaction to a notorious crime that would have unnecessarily invaded the duty of confidentiality. Its rejection in the committee may simply have reflected cooler heads acting to prevent the passage of a bill borne of a sensational, albeit tragic, event. Nevertheless, AB 1286 cautions against unbridled optimism for legislative change.

California has traditionally had a strong interest in protecting the client and the lawyer-client relationship. AB 1286's failure to leave the committee demonstrates this. Moreover, it points out that anyone who seeks to tinker with the duty of confidentiality or the attorney-client privilege in California will likely face stiff opposition. Even Assembly Member Strickland recognized this just prior to introducing the bill:

230. See Assemb. B. 1286, 1999–2000 Reg. Sess. (Cal. 1999–2000) (as amended Apr. 26, 1999).

231. See Assemb. B. 1286 (Cal. 1999–2000) (as amended Jan. 3, 2000) (proposing to add section 964 to the California Evidence Code).

232. *Id.*

233. See *Complete Bill History: Bill Number: A.B. No. 1286*, available at http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_1251-1300/ab_1286_bill_20000203_history.html (last visited Jan. 26, 2002).

234. The bill grew out of a case involving the abduction of a fourteen-year-old girl whose body was not found for nearly a week after her disappearance. See Pamela J. Johnson, *Manley Case Prompts Bill Proposal*, L.A. TIMES (Ventura County), Mar. 9, 1999, at B1. A suspect led authorities to her body. It was discovered that the suspect's lawyer had probably known that his client had information about the location of the body even as the lawyer negotiated with prosecutors. *Id.* Although the victim was dead at the time the lawyer was negotiating, one of the aims of the bill was to address situations where a missing person might still be alive and threatened with death if not found.

“[a]ny time you want to touch this area—the attorney-client privilege—you are certainly going to have to put up a fight.”²³⁵

Whether the same fate would face an attempt to amend or otherwise modify Business and Professions Code section 6068(e) cannot be foreseen. There are vested interests in California that would like to preserve the current confidentiality framework. Section 6068(e) is a venerable statutory provision that has remained unchanged for nearly 130 years. Any attempt to carve out an exception to the duty in the legislature will have to confront this reality.²³⁶ To gain passage of any exception will require deft lobbying by its proponents. Nevertheless, the recent approval of a broader exception than most states currently have by the Ethics 2000 Commission places section 6068(e)’s absolute prohibition on disclosure in even starker contrast than in the past. California stands alone, and, given the strong policies underlying a life-threatening criminal activity exception, a bill seeking to modify section 6068(e) along the lines suggested in this Article might garner sufficient support to be passed.²³⁷ There may, however, be other means to accomplish the same thing. These are discussed in the following sections.

B. Providing an Exception by a Rule of Professional Conduct: The History and Significance of Proposed California Rule 3-100, the Lessons It Has Taught, and a Possible Rule-Making Strategy

Another possibility for implementing a life-threatening criminal activity exception to the duty of confidentiality would be for the California Supreme Court to adopt a rule of professional conduct. Carving out an exception by rule, however, is not a novel concept. Indeed, that approach has a storied history in California. Since 1987, the California State Bar has attempted on several occasions to create exceptions to the duty by proposing that the supreme court adopt a rule of professional conduct, Rule 3-100. In the dozen or so years that Rule

235. *Id.* Assembly Member Strickland did not misuse the term “attorney-client privilege.” When the bill was introduced, it proposed to make an exception to the attorney-client privilege. As to the “fight” Assembly Bill 1286 encountered, the only listed opposition to the bill was California Attorneys for Criminal Justice. *Hearing Before the Assembly Committee on Public Safety*, 1999–2000 Reg. Sess. (Cal. Jan. 11, 2000), at 7, at http://info.sen.ca.gov/pub/99-00/bill/asm/ab_1251-1300/ab_1286_cfa_20000111_075754_asm_comm.html. That does not mean, however, that there were not other opponents of the bill who may have been working behind the scenes to defeat the bill.

236. So too would an attempt to create an exception by rule of professional conduct.

237. *See supra* Part IV (discussing the character and scope an exception should take).

3-100 has been on the table, at least five different versions of it have been released for public comment.²³⁸ The California State Bar withdrew two of these before submitting them to the supreme court for approval. The supreme court rejected the other three, the two most recent rejections being made without comment.

A consideration of Rule 3-100's history is instructive. What becomes apparent is that California's unique regulatory framework,²³⁹ regulation of lawyers by both legislatively enacted statutes and court-adopted rules, has presented obstacles to rule adoption that are not present in other jurisdictions.

1. *The History of Rule 3-100: A Doomed Rule?*

The initial incarnation of Rule 3-100, submitted to the court in 1987, included five separate express exceptions to the duty, including an exception for life-threatening criminal activity.²⁴⁰ The court rejected

238. For a comprehensive summary of the history of proposed Rule 3-100, see STATE BAR OF CAL. OFFICE OF PROF'L COMPETENCE, PLANNING & DEV., *supra* note 83.

239. *See supra* Part III.A.

240. The rule proposed in 1987 provided in its entirety:

Rule 3-100. Duty to Maintain Client Confidence and Secrets Inviolable.

(A) It is the duty of a member to maintain inviolate the confidence, and, at every peril to himself or herself, to preserve the secrets of a client or former client.

(B) Definitions.

(1) As used in this rule, "confidence" means information as defined in Evidence Code section 952.

(2) As used in this rule, "secrets" means any information obtained by the member during the professional relationship, or relating to the representation, which the client has requested to be inviolate or the disclosure of which might be embarrassing or detrimental to the client.

(C) A member may reveal a confidence or secret:

(1) With the consent of the client; or

(2) Upon the lawful order of a tribunal and after the member has asserted all relevant privileges of the client or former client and has given the earliest reasonable notice of such order to the client or former client to permit him or her to protect such confidence or secret; or

(3) To the extent the member reasonably believes necessary:

(a) to prevent the commission of a criminal act that the member believes is likely to result in death or substantial bodily harm; or
(b) to establish a claim or defense on behalf of a member in a controversy between the member and the client, to establish a defense to a disciplinary or criminal charge or civil claim against the member based upon conduct in which the client was

that proposal, apparently taking the position that it did not have authority to adopt the rule.²⁴¹

Subsequent proposals for exceptions to the duty of confidentiality were narrower in breadth, but they had in common an exception to allow lawyers to disclose confidential information if their clients intended to engage in life-threatening criminal activity. However, those proposals fared no better than the 1987 proposal.

The proposed Rule 3-100 submitted to the supreme court in 1992 was limited to exceptions applicable when the client consents and when life-threatening criminal activity by the client is present.²⁴² The

involved, or to respond in any proceeding to allegations by a client of incompetent representation in a criminal matter.

(D) Except where disclosure is otherwise permitted by this rule, a member shall not:

- (1) Use a confidence or secret of a client or former client to the disadvantage of the client; or
- (2) Use a confidence or secret of a client for the advantage of the member or of a third person, provided that member may make use of work product, if that is done without disclosing the client's identity or the nature of the professional engagement for the client.

When a member comes to know beyond a reasonable doubt that material evidence offered to a tribunal by the member on behalf of a client is false, the member shall confidentially exhort the client to permit the correction of the false evidence. If the client refuses to permit such correction, the member shall withdraw from further representation of the client before the tribunal if permissible under rule 3-700. If such withdrawal is not possible, the member shall not further the deception, subject to the duty in this rule to protect the client's confidence and secrets.

See STATE BAR OF CAL. OFFICE OF PROF'L COMPETENCE, PLANNING & DEV., *supra* note 83, at enclosure 4.

241. The court, in a letter to then State Bar President Terry Anderlini, suggested that if the rule was intended to permit disclosure in a proceeding where the attorney-client evidentiary privilege attached, the supreme court might not have the authority to approve such a rule. See *supra* note 104 and accompanying text; *infra* notes 251-67 and accompanying text (discussing the import of this letter).

242. The 1992 proposal provided:

Rule 3-100. Duty to Maintain Client Confidence and Secrets Inviolable.

- (A) It is the duty of a member to maintain inviolate the confidence, and, at every peril to himself or herself, to preserve the secrets of a client.
- (B) Definitions.
 - (1) As used in this rule, "confidence" means information as defined in Evidence Code section 952.
 - (2) As used in this rule, "secrets" means any information obtained by the member during the professional relationship, or relating to the representation, which the client has requested to be inviolate or the disclosure of which might be embarrassing or detrimental to the client.
- (C) A member is not subject to discipline who reveals a confidence or secret:

drafters of the 1992 proposal took a different approach to providing an exception to the duty of confidentiality. In 1987, the proposed rule was written as an express exception to the duty of confidentiality, that is, it stated that a lawyer "may reveal a confidence or secret."²⁴³ In essence, the 1987 version stated that, notwithstanding section 6068(e)'s prohibitions on disclosure of confidential information, a lawyer "may" disclose under the stated circumstances.²⁴⁴ Such an approach runs directly counter to the express language of the legislatively enacted section 6068(e) and could have been viewed as a frontal attack on a legislative prerogative.

The 1992 proposed rule, on the other hand, was drafted to provide a safe harbor for the disclosing lawyer. It stated that a lawyer "is not subject to discipline who reveals a confidence or secret."²⁴⁵ A rule phrased in that way would not have directly contravened the language of section 6068(e). Instead, it would have been an unambiguous statement by the State Bar of California that, under the narrow circumstances identified in the rule (disclosures with client consent or where life-threatening criminal activity is present), it would not subject a lawyer to discipline. That this approach might be a distinction without a difference is suggested not only by the supreme court's rejection of the 1992 proposal, but also by the California State Bar in 1998 abandoning the safe harbor strategy in favor of a rule taking the 1987 approach—expressly permitting disclosures.²⁴⁶ The latter

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- (1) With the consent of the client; or
 - (2) To the extent the member reasonably believes necessary to prevent the commission of a criminal act that the member believes is imminently likely to result in death or substantial bodily harm.

See STATE BAR OF CAL. OFFICE OF PROF'L COMPETENCE, PLANNING & DEV., *supra* note 83, at enclosure 9.

243. *Id.* at enclosure 4.

244. *Id.*

245. *Id.* at enclosure 9.

246. The 1998 proposal provided:

Rule 3-100: Confidential Information Relating to Certain Criminal Acts.

- (A) 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 the client from committing a criminal act that the member believes is likely to result in death or substantial bodily harm.
- (B) For purposes of this rule, "confidential information" means information related to the representation of a client that:

approach fared no better than it had in 1987; the supreme court again rejected the proposed rule.

2. *The California Supreme Court's Concern: A Statutory Framework Impervious to Rulemaking*

Although we cannot know precisely why the California Supreme Court has rejected the Rule 3-100 proposals, its letter to then State Bar President Terry Anderlini in 1987 provides strong clues.²⁴⁷ In that letter, the court stated: "To the extent it [proposed Rule 3-100] permits disclosure in a judicial proceeding where no statutory exception to the privilege exists, it may be inconsistent with, or contravene the Legislature's intent underlying Evidence Code section 950 et seq."²⁴⁸ This observation appears to show a court concerned that its adoption of a life-threatening crime exception to the duty of confidentiality would undermine the legislative framework created for the attorney-client privilege. That the court was unsure of its authority under these circumstances is reflected in the question it asked in closing: "Where the Legislature has codified, and revised, or supplanted privileges previously available at common law, does the court have inherent authority to modify this statutory privilege?"²⁴⁹

To understand the court's concern, it is helpful to review the framework of the attorney-client privilege within the California Evidence Code. Evidence Code section 954 contains the basic statement of the attorney-client privilege.²⁵⁰ It provides, in pertinent part, that "except as otherwise provided in this Article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by" the privilege holder,²⁵¹ the privilege holder's

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- (1) is subject to the lawyer-client privilege, or
 - (2) has been acquired from any source, and
 - (a) which the client has requested be held inviolate, or
 - (b) the disclosure of which is likely to be embarrassing or detrimental to the client.

Id., at enclosure 1.

247. *See id.* at 10–11 (quoting Letter from the California Supreme Court, to Terri Anderlini, President, State Bar of California (June 9, 1998)).

248. *Id.*

249. *Id.*

250. California Evidence Code section 954 remains largely unchanged since the supreme court wrote that letter. The only change since then was in 1994, when the section was amended to clarify that the word "person" as used in the section also includes "limited liability companies." S.B. 2053, 1993–1994 Leg. Sess. (Cal. 1994), *available at* http://leginfo.ca.gov/pub/93-94/bill/sen/sb_2051-2100/sb_2053_bill_940613_amended_asm.

251. CAL. EVID. CODE § 954(a) (West 1995). California Evidence Code section 953 defines the "holder of the privilege" to mean:

authorized representative,²⁵² or "the person who was the lawyer at the time of the confidential communication."²⁵³ Thus, section 954 identifies *who* may claim the privilege and under what *circumstances* it may be claimed.²⁵⁴

Moreover, section 955 of the Evidence Code provides that any lawyer who has "received or made a communication subject to the privilege" must claim the privilege "whenever he is present when the communication is sought to be disclosed" and the lawyer "is authorized to claim the privilege."²⁵⁵ Put another way, section 955 sets forth *when* a lawyer *must* claim the privilege.²⁵⁶ Together with section 954, which

(a) The *client* when he has no guardian or conservator.

(b) A *guardian or conservator of the client* when the client has a guardian or conservator.

(c) The *personal representative of the client* if the client is dead.

(d) A successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence.

Id. § 953 (emphasis added).

252. *Id.* § 954(b).

253. *Id.* § 954(c).

254. Other sections of the Evidence Code offer "lawyer" definitions. "Lawyer" is defined as: "a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation." *Id.* § 950. "Client" is defined as:

a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent.

Id. § 951. "A confidential communication between client and lawyer" means:

[I]nformation transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

Id. § 952.

255. In its entirety, section 955 provides: "The lawyer who received or made a communication subject to the privilege under this article *shall* claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 954." *Id.* § 955 (emphasis added).

256. Section 955 creates for California lawyers a *duty* to claim the privilege whenever a person seeks to compel disclosure. Compare section 954, which sets out the circumstances under which the privilege *may* be claimed—when disclosure is sought to be compelled. *Id.* § 954. Because section 954 is "[s]ubject to Section 912," the provision

sets out the circumstances under which the privilege *may* be claimed and by whom, section 955 *requires* a lawyer to assert the privilege whenever some person seeks to *compel disclosure* of a *communication* subject to the privilege.

The privilege, however, is not absolute. Sections 956 through 962 of the Evidence Code remove the evidentiary protection of the privilege under certain circumstances.²⁵⁷ Thus, the attorney-client privilege set out in section 954, and the corresponding lawyer's duty to assert it under section 955, are not triggered if one of the exceptions contained in sections 956 through 962 is applicable. If an exception to the privilege exists, a lawyer can be compelled to disclose the client's "confidential communication."²⁵⁸ Conversely, if there is no exception, then the lawyer has a duty to assert the privilege pursuant to Evidence Code section 955. Keeping in mind the foregoing framework that requires a lawyer to assert the privilege unless there is an exception, the court's preoccupation with the *privilege* in the context of the California State Bar's proposal to revise the lawyer's duty of confidentiality is evident.

In 1988 when the court wrote President Anderlini, there was no exception to the attorney-client privilege allowing a lawyer to disclose a client's life-threatening criminal activity. The legislature did not enact section 956.5 of the Evidence Code until September 17, 1993.²⁵⁹ Without that exception, a lawyer could not, consistent with her duty under Evidence Code section 955 that mandates assertion of the privilege, disclose information otherwise protected by the privilege, including a client's life-threatening criminal activity. Thus, the supreme court in 1988 was faced with the following dilemma: if it were to carve out a life-threatening criminal activity exception to the duty of confidentiality (which includes within its scope attorney-client

that addresses waiver of the privilege, it also recognizes that a client may waive the privilege. *Id.* Section 912 provides that the privilege is waived "if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone." *Id.* § 912.

257. Sections 956 through 962 all begin by stating, "There is no privilege" and then proceed to describe the conditions under which the privilege is deemed not to apply. *See id.* §§ 956–962. For example, section 956 provides that "There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud." *Id.* § 956.

258. See section 952 for the definition of "confidential communication." *See id.* § 952; *supra* note 254 and accompanying text.

259. Section 956.5 was enrolled on September 17, 1993, signed by the Governor on October 9, 1993, and chaptered by the Secretary of State on October 11, 1993. It became effective on January 1, 1994. *See Complete Bill History: Bill Number: S.B. No. 645, available at* http://info.sen.ca.gov/pub/93-94/bill/sen/sb_0601-0650/sb_645_bill_history (last visited May 18, 2002). Links to other related documents are available at http://info.sen.ca.gov/cgi-bin/postquery?bill_number=sb_645&sess=9394&house=B&site=sen (last visited May 18, 2002).

privileged matter)²⁶⁰ and the statutory attorney-client privilege did not contain a corresponding exception, the court would have interfered with the framework reflecting the legislature's intent in codifying the attorney-client privilege.

That is why the court suggested that "[t]o the extent [an exception to the duty of confidentiality] permits disclosure in a judicial proceeding where no statutory exception to the privilege exists, it may be inconsistent with, or contravene the Legislature's intent underlying Evidence Code section 950 et seq."²⁶¹ The effect of a rule allowing disclosure would effectively run at counter-purposes to the then absolute duty to assert the privilege under section 955. Given that a privilege can be created, and presumably modified, only by statute,²⁶² the court understandably questioned whether it had the authority to modify the duty of confidentiality.²⁶³

If the foregoing interpretation of the 1988 version of Rule 3-100 and the supreme court's rejection is accurate, then the California Supreme Court should not be averse to modifying the duty of confidentiality to include an express exception so long as there is a corresponding exception to the attorney-client privilege. As section 956.5 now provides a life-threatening criminal activity exception to the attorney client privilege, one would think the court should welcome the opportunity to adopt a rule that provides such an exception.

There are problems with this analysis, however, not the least of which are the court's rejections of a proposed Rule 3-100 in 1993 and 1998.²⁶⁴ Although the 1993 rejection possibly can be explained by the legislature not yet having enacted section 956.5, it is more difficult to square the foregoing analysis with the 1998 rejection.

First, in June 1993, when the supreme court rejected without comment the proposed rule, the legislature was considering an amendment to the Evidence Code to create an exception for life-threatening criminal activity. The bill containing language that is now codified at section 956.5 was not passed until September 17, 1993, so it is possible that the

260. See *supra* notes 34-35 and accompanying text.

261. STATE BAR OF CAL. OFFICE OF PROF'L COMPETENCE, PLANNING & DEV., *supra* note 83, at 10-11.

262. See CAL. EVID. CODE § 911 (West 1995) ("Except as otherwise provided by statute . . ."); see also *supra* note 107.

263. See discussion *supra* note 104; sources cited *supra* note 104; *supra* note 107.

264. See *id.* at 12-14; see also Nancy McCarthy, *Court Rejects Rule to Bare Secrets*, CAL. BAR J., Oct. 1998, at 4.

court's rejection of Rule 3-100 in 1993 was for the same reasons posited above for its 1988 rejection. However, is it really conceivable that the court was unaware that section 956.5 was under consideration?²⁶⁵ Assuming the court was aware of the pending bill containing new section 956.5, and further, assuming that the reason the court rejected the 1987 proposal was the absence of a bodily harm exception to the lawyer-client privilege, why would it not have awaited final legislative resolution of the bill? With a privilege exception in place, the objections it stated in 1988 should have been assuaged.

Second, and even more telling, is the supreme court's rejection in 1998 of yet another version of proposed Rule 3-100.²⁶⁶ There would have been no question then whether the court was aware of the disconnect between Business and Professions Code section 6068(e) and Evidence Code section 956.5. Indeed, it was that very inconsistency that motivated the California State Bar to again submit a proposed Rule 3-100. The California State Bar announced that its express purpose in submitting another Rule 3-100 was to harmonize Business and Professions Code section 6068(e) with Evidence Code section 956.5.²⁶⁷ Therefore, the court was abundantly aware not only of the existence of Evidence Code section 956.5, but also of the inconsistency between it and Business and Professions Code section 6068(e). Nevertheless, the court rejected the proposed rule.²⁶⁸

The mostly likely explanations for what we see in the court's rejection of Rule 3-100 is either antipathy on the part of the court to

265. As already discussed, the bill that contained then-proposed section 956.5 was introduced on March 2, 1993, so it would have been pending as the court considered the 1993 proposal. See discussion *supra* note 91.

266. See McCarthy, *supra* note 264, at 4.

267. In its May 1998 submission to the supreme court, the state bar stated:

The intent of proposed new rule 3-100 is to accomplish the limited goal of harmonizing the ethical duty of confidentiality stated in Business and Professions Code section 6068, subdivision (e), with the statutory exception to the lawyer-client privilege stated in Evidence Code section 956.5. Evidence Code section 956.5, which became operative on January 1, 1994, creates an exception to the lawyer-client privilege. . . .

....

The enactment of section 956.5 has caused concern among members of the bar because it creates uncertainty regarding the relationship between it and the ethical duty to maintain a client's confidence and secrets under Business and Professions Code section 6068, subdivision (e), which states that it is a duty of an attorney to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." While there are numerous statutory exceptions to the lawyer-client privilege found in Evidence Code section 950 et seq., there are no statutory exceptions to the ethical duty found in Business and Professions Code section 6068, subdivision (e).

STATE BAR OF CAL. OFFICE OF PROF'L COMPETENCE, PLANNING & DEV., *supra* note 83, at 2.

268. But see *infra* notes 277-85 and accompanying text.

confidentiality exceptions, or simply its reluctance to invade a statutory framework. Of course, it is always possible that the court believed it had already addressed the issue in *General Dynamics* by reference to Evidence Code section 956.5 in the context of a retaliatory discharge suit,²⁶⁹ and was sending a signal that the members of the bar should recognize that.²⁷⁰ There is yet another possible explanation to be drawn from Rule 3-100's notorious history, discussed below, but before addressing that, it is worth considering a recent California Supreme Court opinion that demonstrates the court's reluctance to invade a legislatively enacted statutory scheme.

3. *Further Evidence of the Court's Reluctance to Invade a Statutory Framework: Foxgate Homeowners Ass'n v. Bramalea California, Inc.*

A further hint that the supreme court may not welcome any further proposals to modify the duty of confidentiality by rule can be found in one of its recent opinions, *Foxgate Homeowners Ass'n, Inc. v. Bramalea California, Inc.*,²⁷¹ where the court invalidated a judicially created exception to a statutory scheme that the legislature had enacted to encourage mediation. *Foxgate* involved a mediation held pursuant to statutes designed to ensure the confidentiality of mediations.²⁷² The

269. See *supra* notes 115–51 and accompanying text.

270. It is always possible, however, that this Article's surmises about section 956.5, *General Dynamics*, and the duty of confidentiality are simply misguided and that the court believes it has plainly addressed the issues raised in this Article already. This is reminiscent of the scene from Woody Allen's film, "Annie Hall," where Mr. Allen's character, Alvy Singer, is waiting in line to see a film, listening with increasing irritation to the person in front of him who is pontificating to his date about Marshal McLuhan. Finally, Alvy can take no more and tells the man (who has informed Allen that he teaches a course on McLuhan at Columbia University) that he does not know anything about McLuhan. Alvy then brings McLuhan out from behind a standing movie poster. McLuhan, in bowler hat, tells the man: "I heard what you were saying. You know nothing of my work. You mean my whole fallacy is wrong. How you ever got to teach a course in anything is totally amazing." ANNIE HALL (MGM Home Entm't 1977). The Author, like all law professors who attempt to parse what they believe is an ambiguous opinion, fears such a "McLuhan moment."

271. 25 P.3d 1117 (Cal. 2001).

272. CAL. EVID. CODE §§ 703.5, 1121, 1119 (West 1995 & Supp. 2002). For example, section 703.5 provides in pertinent part:

No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be

mediator submitted a report to the superior court that included statements made during the mediation. The statements in turn became the basis for the superior court's imposition of sanctions against the appellants. In affirming, the court of appeal created a narrow, nonstatutory exception to the statutes' confidentiality requirements that would permit "a mediator to report to a court only information that is reasonably necessary to describe sanctionable conduct and place that conduct in context."²⁷³

The supreme court granted review and reversed. It first noted that "[t]o carry out the purpose of encouraging mediation by ensuring confidentiality, the statutory scheme, which includes sections 703.5, 1119, and 1121, unqualifiedly bars disclosure of communications made during mediation absent an express statutory exception."²⁷⁴ The court then stated:

[W]e do not agree with the Court of Appeal that the court may fashion an exception for bad faith in mediation because failure to authorize reporting of such conduct during mediation may lead to "an absurd result" or fail to carry out the legislative policy of encouraging mediation. The Legislature has decided that the policy of encouraging mediation by ensuring confidentiality is promoted by avoiding the threat that frank expression of viewpoints by the parties during mediation may subject a participant to a motion for imposition of sanctions by another party or the mediator who might assert that those views constitute a bad faith failure to participate in mediation. Therefore, even were the court free to ignore the plain language of the confidentiality statutes, there is no justification for doing so here.²⁷⁵

The court's language in *Foxgate* demonstrates a decided reluctance on its part to interpose itself into a statutory scheme, at least through the device of a judicially created exception. The same view has probably informed its repeated rejections of Rule 3-100. Those rejections

the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings . . .

Id. § 703.5.

Section 1121 provides:

Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

Id. § 1121.

Finally, section 1119(c) provides: "All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation *shall remain confidential.*" *Id.* § 1119(c) (emphasis added).

273. *Foxgate Homeowners Ass'n, Inc.*, 25 P.3d at 1123.

274. *Id.* at 1126.

275. *Id.* at 1128.

probably do not reflect a deep-seated antipathy, alluded to earlier, on the court's part to exceptions to the duty of confidentiality. Rather, they more likely evince the court's belief that it does not have the authority to upend the absolute language of Business and Professions Code section 6068(e), notwithstanding the existence of 956.5.²⁷⁶ In short, California's unique regulatory framework comprised of both statutes and professional conduct rules has probably done more than anything else to forestall the adoption in California of a life-threatening criminal activity exception.

276. In 1998, the California Supreme Court decided a case that has surface appeal for supporting the proposition that under its inherent authority to regulate the legal profession, the court can adopt a rule that runs counter to section 6068(e). In that case, *In re Attorney Discipline Sys.*, 967 P.2d 49, 54 (Cal. 1998), the court held that it had inherent authority over the discipline of lawyers, and that it could impose fees on lawyers without invading either the legislature's taxation power or its appropriation power, or violating the separation of powers clause of the California Constitution. That case, however, was decided under extenuating circumstances—a bar disciplinary system choked with a backlog of client complaints against lawyers due to then Governor Wilson's refusal to approve the bill the legislature had passed authorizing the state bar to collect dues from its members during 1998 and 1999. Nancy McCarthy, *Supreme Court Orders \$173 Fee: Unprecedented, Unanimous Ruling Enables Bar to Begin Rebuilding Discipline System*, CAL. B.J., Jan. 1999, at 1, <http://www.calbar.ca.gov/calbar/2cbj/99jan/index.htm>. The court resolved that impasse, but in doing so it stressed the pressing public need to take the action that it did. *In re Attorney Discipline Sys.*, 967 P.2d at 68–70. It also cannot be stressed enough that the court was operating in a vacuum. There was no statute enabling the bar to collect dues; the court acted to fill a void created by the governor's refusal to sign the fees bill. Indeed, in rejecting the governor's argument that the court could use the "resources" of the bar but not its "structure" in implementing a disciplinary system under the court's direct control, the court stated:

In our view, it would be far more intrusive for the court to exert authority over resources that the bar has available to it under previous legislative authorization that dedicates these resources to purposes other than discipline, than to impose additional fees to support the existing disciplinary system Tampering with the existing resources collected and allocated to the bar pursuant to valid existing legislation, particularly funds designated for uses other than discipline, would not be deferential to the Legislature's traditional and continuing role in this area.

Id. at 71. Notwithstanding its continued acknowledgement that it has inherent authority to regulate the legal profession, the court's recognition that it was acting to fill a void created by the inaction of the legislative and executive branches suggests that the court would not reverse its previously stated concerns about its authority to change a legislative enactment. *Id.* at 54. Thus, *In re Attorney Discipline System* probably does not support the proposition that the court may now act to approve a rule of professional conduct creating an exception to the statutory duty of confidentiality. *But see infra* notes 277–85 and accompanying text (suggesting that the court's inherent authority to discipline lawyers may allow it to provide lawyers a safe harbor from discipline).

4. A Safe Harbor Rule: A Small Window of Opportunity or a Stubborn Refusal to Give Up?

Nevertheless, there may yet be a small window of opportunity for the court, without trespassing on the legislature's domain, to promulgate a rule that would signal to lawyers that they may disclose confidential information where life-threatening criminal conduct by their clients exists. As discussed previously, in 1993, the bar submitted a "safe harbor" approach for the court's approval.²⁷⁷ Under that strategy, it could be argued that the court would not invade the legislature's power; rather, the rule would simply be a statement that under the narrow circumstances identified in the rule (disclosure where life-threatening criminal activity is present), the bar would not prosecute the lawyer.

As already noted, the history of Rule 3-100 suggests this might be a distinction without a difference, as the 1993 proposal was rejected.²⁷⁸ When the supreme court rejected the 1993 proposal, however, section 956.5, which would have assuaged the concerns the court expressed in 1987, had not yet been enacted. Further, recall that in 1998, with section 956.5 then in effect, the bar abandoned its safe harbor strategy and returned to a rule that provided an express exception to section 6068(e). It is possible, then, that the 1998 proposal owes its rebuff to the bar's decision to make a "frontal assault" on section 6068(e). Had the bar pursued a strategy proposing the safe harbor rule in concert with section 956.5, the court may well have adopted the rule.²⁷⁹

But why would a safe harbor rule stating that the disclosing lawyer will not be subject to discipline be different from a rule expressly stating that the lawyer could disclose in contravention of section 6068(e)? Are the two approaches not in effect the same: both result in the disclosing lawyer not being disciplined? Perhaps the answer to this question lies in the court's acknowledgement in *In re Attorney Discipline System* of its well-established, inherent authority over the discipline of California lawyers.²⁸⁰ While the two approaches may have the same effect, the

277. See *supra* notes 242–50 and accompanying text. The rule would state: "A lawyer is not subject to discipline who reveals a confidence or secret to the extent the member reasonably believes necessary to prevent the commission of a criminal act that the member believes is likely to result in death or substantial bodily harm," or something to that effect.

278. See *supra* notes 242–50 and accompanying text.

279. There is, of course, the possibility that when the court rejected the 1993 safe harbor proposal, it was because it expected Evidence Code section 956.5 to be enacted. The court could have believed that section 956.5 would apply with equal force to both the attorney-client privilege and Business and Professions Code section 6068(e). If that were the case, it would have seen no purpose at all in a Rule 3-100. See discussion *supra* note 270.

280. *In re Attorney Discipline System*, 967 P.2d at 54.

direct approach invades the legislature's authority to amend section 6068(e). The safe harbor approach, on the other hand, preserves the integrity of section 6068(e)'s language, but gives notice to lawyers that, notwithstanding section 6068(e)'s absolute prohibition on disclosures, under certain circumstances public policy considerations militate against the imposition of discipline. Under this approach, the language of section 6068(e) would continue to put lawyers on notice of their critical duty to preserve their client's confidential information. Moreover, lawyers who disclose still would have to satisfy stiff requirements—their reasonable belief that disclosure is necessary to prevent a criminal act that will result in death or serious bodily harm—to escape discipline. However, lawyers would no longer be subject to the uncertainty generated by the “logical disconnect” between Evidence Code section 956.6 and Business and Professions Code section 6068(e) when confronted with life-threatening criminal activity. They would be able to make the difficult decision about whether to disclose without having bar discipline hanging over their heads.²⁸¹

281. The approach espoused in this Section should be reminiscent of the position the Los Angeles County Bar took in its Formal Opinion 436, that is, that policy considerations underlying the bodily harm exception should permit an implied exception to section 6068(e). The difference here is that protection from discipline for the disclosing lawyer need no longer be implied and consequently, need no longer be uncertain. Moreover, a rule of professional conduct carries with it the authority lacking in a local bar opinion. See CAL. RULES OF PROF'L CONDUCT R. 1-100 (2000).

The advantages of a rule that provides unambiguous guidance to lawyers can be seen in the Ossias-Quackenbush Insurance Department matter that played out in California in late spring and summer of 2000. Chuck Quackenbush, California's Insurance Commissioner, improperly settled cases against insurance companies and used the proceeds of the settlement to fund television commercials in which he starred. A lawyer in the department, Cindy Ossias, frustrated by Mr. Quackenbush's conduct, eventually provided the Assembly's Insurance Committee with documentation of the Commissioner's misconduct. She was put on immediate administrative leave by the department, but after Mr. Quackenbush resigned, she was reinstated. Her troubles did not end there. She became the subject of a state bar investigation. Virginia Ellis & Carl Ingram, *Whistle-Blower Emerges in Quackenbush Probe*, L.A. TIMES, June 23, 2000, at A1; Virginia Ellis & Miguel Bustillo, *Quackenbush Hearings Take Dramatic Turn*, L.A. TIMES, June 27, 2000, at A1; Virginia Ellis & Carl Ingram, *Quackenbush Resigns; Probe Will Continue*, L.A. TIMES, June 29, 2000, at A1; Virginia Ellis, *State Insurance Dept. Reinstates Whistle-Blower*, L.A. TIMES, Aug. 13, 2000, at A33. Eventually, the state bar closed its investigation. Letter from Donald R. Steedman, Deputy Trial Counsel, State Bar of California, to Richard A. Zitrin, Counsel for Cindy Ossias (Oct. 11, 2000), in DAILY RECORDER, Dec. 13, 2000, at 7. However, Ossias had no guidance on how to proceed. Had she had proper guidance, perhaps in the form of a rule that spelled out for her what her options were when confronted by a situation where it is the head of the governmental agency who is acting improperly, she and the state bar may have avoided

C. Strategies Involving Coordination Between the Supreme Court, the State Bar, and the Legislature

There are two other strategies for implementing a bodily harm exception. They both would involve coordination between the bar, the supreme court, and the legislature.

1. Parallel Regulation by Statute and Rule

First, the legislature and the court could coordinate the amendment of Business and Professions Code section 6068(e) to include the bodily harm exception with the promulgation of a rule of professional conduct that mirrors the amended statute. There is precedent for such parallel regulation. For example, both Business and Professions Code section 6068(m) and Rule 3-500 require that a lawyer notify his or her client of significant developments that arise during the representation.²⁸² Requiring a lawyer to notify the client of significant developments and promptly complying with reasonable requests for information and significant documents is not, however, either a very controversial issue or one that involves the balancing of competing public policies that underlie exceptions to the core duty of confidentiality.

Any rule involving the duty of confidentiality is much more

the time, expense, and emotional drain of a formal investigation.

Eventually, her experience led to the introduction of Assembly Bill 363. *See* Assemb. B. 363, 2001 Reg. Sess. (Cal. 2001), *available at* http://www.leginfo.ca.gov/pub/bill/asm/ab_0351-0400/ab_363_bill_20010220_introduced.html. Consideration of Assembly Bill 363 was suspended while the State Bar of California reviewed and addressed the issue. For a history of Assembly Bill 363, see *Complete Bill History*, http://www.leginfo.ca.gov/pub/bill/asm/ab_0351-0400/ab_363_bill_20010822_history.html (last visited May 21, 2002). The state bar's review, in cooperation with parties interested in the issue, resulted in proposed revisions to Rule 3-600. STATE BAR OF CAL., REQUEST THAT THE SUPREME COURT OF CALIFORNIA APPROVE AMENDMENTS TO RULE 3-600 OF THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA, AND MEMORANDUM AND SUPPORTING DOCUMENTS IN EXPLANATION (2002), *available at* <http://www.calbar.ca.gov/calbar/pdfs/rule3-600request.pdf>. *See also infra* note 291.

282. California Business and Professions Code section 6068(m) provides that the attorney's duty is: "To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services." CAL. BUS. & PROF. CODE § 6068(m) (West 1990 & Supp. 2002).

Cal. Rule 3-500, provides: "A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed." CAL. RULES OF PROF'L CONDUCT R. 3-500.

controversial, and the likelihood of reaching a consensus among the bar, the court, and the legislature on the scope, or even the efficacy, of the rule would not be great.²⁸³ Moreover, even if the rule proved amenable to consensus on the issue of life-threatening criminal activity, there may be other exceptions to the duty that are warranted that may not be as susceptible to achieving consensus. This consideration leads to a proposal that will no doubt be viewed as controversial in itself: transfer the duty of confidentiality from Business and Professions Code section 6068(e) to a rule of professional conduct.

2. Transferring the Duty of Confidentiality to a Rule of Professional Conduct

A second proposal that would involve coordination among the court, the legislature, and the bar is for the legislature to repeal Business and Professions Code section 6068(e), effective upon the supreme court adopting a rule of professional conduct that parallels section 6068(e). This is a controversial proposal if for no other reason than it would put the duty of confidentiality out of the house, where it has resided (both literally and figuratively) for nearly 130 years.

As can be seen from the previous discussion regarding the introduction and expiration of AB 1286,²⁸⁴ the legislature may be more susceptible than the court to political pressures brought on by sensational events. Indeed, even where proposed amendments to the duty are compelling, the legislature is probably more susceptible than the court to the pressures of various interested parties, and the compromises that likely would ensue might weaken the proposed legislation. Given the centrality of the duty of confidentiality to the attorney-client relationship and by extension, our legal system, the compromises that are the lifeblood of legislation might ultimately prove fatal.

This is not to say that the court is immune to political pressures. However, free from term limits and being subject to elections only once every twelve years, the court is probably less susceptible to such pressures than the legislature. In addition, the public comment review period for proposed rules is well-designed to garner opinion from the public and the various sectors within the bar. Both the California State Bar and the court are sensitive to the concerns of their constituents, and

283. See *supra* notes 228–39 and accompanying text.

284. See *supra* notes 228–39 and accompanying text.

there are numerous instances where public comment has resulted in substantial revisions of, or even withdrawal of the proposed rule.²⁸⁵ Moreover, the court has demonstrated a marked inclination to protect the interests of the client and preserve the attorney-client relationship, two of the policy objectives of the duty of confidentiality.²⁸⁶ It would not be quick to engage in wholesale modifications to this most central of a lawyer's duties.

A further consideration favoring the transfer of the duty to a rule of professional conduct is the California State Bar's Commission for the Revision of the Rules of Professional Conduct (Commission). The Commission has been charged by the state bar with reviewing the current California Rules in light of the revisions to the Model Rules proposed by the Ethics 2000 Commission.²⁸⁷ The Commission will thus

285. Consider, for example, the history of Rule 3-100. In addition, recent rule proposals have been withdrawn after being sent out for public comments. See, e.g., State Bar of Cal., *Member/Public Comment: Proposed Amendment to Rule 3-310*, available at <http://www.calbar.org/2bar/3com/3cp9805.htm> (last visited Apr. 24, 2002) (addressing conflict of interest); State Bar of Cal., *Member/Public Comment: Proposed New Rule 4-110*, available at <http://www.calbar.org/2bar/3com/3cpro22a.htm> (last visited Apr. 24, 2002) (addressing issue of advanced fees).

286. See, e.g., *Gen. Dynamics Corp. v. Superior Court*, 876 P.2d 487, 503 (Cal. 1994) ("We emphasize the limited scope of our conclusion that in-house counsel may state a cause of action in tort for retaliatory discharge. The lawyer's high duty of fidelity to the interests of the client work against a tort remedy that is coextensive with that available to the nonattorney employee."); *id.* at 503-04 ("In any event, where the elements of a wrongful discharge in violation of a fundamental public policy claim cannot, for reasons peculiar to the particular case, be fully established without breaching the attorney-client privilege, the suit must be dismissed in the interest of preserving the privilege."); see also *Flatt v. Superior Court*, 885 P.2d 950, 951 (Cal. 1994).

287. The Commission's Charter states, *inter alia*, that:

[T]he Commission is to consider, along with judicial and statutory developments, the Final Report and Recommendations of the American Bar Association's ("ABA") Ethics 2000 Commission and the American Law Institute's Restatement of the Law Third, The Law Governing Lawyers ("Restatement"), as well as other authorities relevant to the development of professional responsibility standards.

Commission for the Revision of the Rules of Professional Conduct, *Commission Charter*, at <http://www.calbar.org/2eth/3crrpc/index.htm> (last visited Apr. 24, 2002). Related to the theme of this Article, it is of some interest to also note that:

The Commission is to develop proposed amendments to the California Rules that:

1. Facilitate compliance with and enforcement of the rules by eliminating ambiguities and uncertainties in the rules;
2. Assure adequate protection to the public in light of developments that have occurred since the rules were last reviewed and amended in 1989 and 1992;
3. Promote confidence in the legal profession and the administration of justice; and
4. Eliminate and avoid unnecessary differences between California and other states, fostering the evolution of a national standard with respect to professional responsibility issues.

be well positioned to consider any proposed revisions to the duty of confidentiality and their interrelationship with any other proposed revisions that will be before it.

Finally, it is important to remember that even if the duty of confidentiality is transferred to a rule of professional conduct, the legislature will not be relinquishing control in the area of confidentiality. The attorney-client privilege, which in California is a exclusively a legislative bailiwick,²⁸⁸ will still be within its sole purview. Moreover, the court's reluctance to adopt rule 3-100 absent an exception to the privilege that paralleled the proposed rule,²⁸⁹ and its strong statements in *General Dynamics* that an in-house lawyer would be able to proceed with a retaliatory discharge claim only where there were "well-recognized exceptions to the attorney-client privilege,"²⁹⁰ both demonstrate that the court will not blaze new trails in California's law of confidentiality without legislative input.

This proposal would require cooperation among the legislature, the court, and the bar. Such cooperation is not unusual. Within the last year, these three entities or their representatives have worked in concert to address pressing ethical issues.²⁹¹ There is no reason why they cannot

Id.

288. See CAL. EVID. CODE § 911 (West 1995).

289. See *supra* notes 241–50 and accompanying text.

290. *General Dynamics*, 876 P.2d at 504.

291. During 2000–2001, the California State Bar (authorized by a study bill, Assembly Bill 2069) worked through its Standing Committee on Professional Responsibility and Conduct (COPRAC) with various constituencies of the bar and representatives from the legislature and other interested parties, including representatives from the California Judicial Conference, to address the efficacy of California's tripartite insurance defense system. See Assemb. B. 2069, 1999–2000 Reg. Sess. (Cal. 2000), available at http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_2051-2100/ab_2069_bill_20000918_chaptered.html. Further, during 2001, interested parties, including various constituencies of the bar, representatives of the legislature and Judicial Conference, and COPRAC cooperated in drafting a proposed amendment to Rule 3-600 to address the issue of government lawyer whistleblowers raised by Assembly Bill 363, which in turn sought to address issues raised by the Ossias-Quackenbush insurance matter. See State Bar of Cal., *Member/Public Comment: Proposed Amended Rule 3-600*, available at <http://www.calbar.org/2bar/3com/3cp0107.htm> (last visited Apr. 24, 2002); See *supra* note 281 and accompanying text. After a public comment period, the rule returned to COPRAC, which made further modifications. On January 26, 2002, the State Bar of California's Board of Governors voted to transmit the proposed amendments to Rule 3-600 to the California Supreme Court for its consideration. The proposed rule and supporting documents were forwarded to the supreme court on February 27, 2002. See STATE BAR OF CAL., REQUEST THAT THE SUPREME COURT OF CALIFORNIA APPROVE AMENDMENTS TO RULE 3-600 OF THE RULES OF PROFESSIONAL

again cooperate to finally bring California in line with other states in having a life-threatening criminal activity exception to the duty of confidentiality.

VI. CONCLUSION

California's law concerning lawyer confidentiality and the ability of its lawyers to reveal confidential information to prevent life-threatening criminal activity remains somewhat murky, notwithstanding several attempts by the California State Bar to fashion a rule of professional conduct *that would unequivocally permit such disclosures*. In light of the recent publication of the *Restatement (Third) of the Law Governing Lawyers* and revisions to the ABA's Model Rules, both of which make strong statements favoring such disclosures, it is time for California to join the rest of the states. Whether by modifying the duty of confidentiality statute, by rule of professional conduct, or by an unambiguous statement of the California Supreme Court, California should state unequivocally that lawyers will not be subject to discipline if they reveal confidential client information for the narrow purpose of preventing criminal activity reasonably likely to cause death or serious bodily harm.

CONDUCT OF THE STATE BAR OF CALIFORNIA, AND MEMORANDUM AND SUPPORTING DOCUMENTS IN EXPLANATION (2002), *available at* <http://www.calbar.ca.gov/calbar/pdfs/rule3-600request.pdf>. On May 10, 2002, however, the California Supreme Court denied the request for a rule amendment with the following explanation: "The State Bar Board of Governors' request to adopt amendments to the Rules of Professional Conduct, rule 3-600, is denied because the proposed modifications conflict with B & P Code 6068, (e)." California Appellate Courts, *Docket Entries (Register of Actions)*, http://appellatecases.courtinfo.ca.gov/search/dockets.cfm?dist=0&doc_id=194954&case=S104682 (last visited May 22, 2002). Despite the participation of interested parties from a wide spectrum working together to craft a solution to the concerns identified in the Quackenbush-Ossias matter, the supreme court ultimately determined that an amendment to rule 3-600 could not avoid the harsh realities of Business and Professions Code section 6068(e). This disposition of the matter, perhaps predictable given California's unique system of professional regulation, *see supra* Part III.A., does not necessarily mean that diverse constituencies cannot cooperate to shape ethics rules. It does suggest, however, that so long as a logical disconnect between the Business and Professions Code section 6068(e) and Evidence Code section 956.5 exists, it will be difficult if not impossible to amend the duty of confidentiality in California. The supreme court's decision on the request to amend rule 3-600 instead demonstrates the efficacy of the foregoing proposal: to transfer the duty of confidentiality to a rule of professional conduct. The different groups have worked well together; they should be able to cooperate again to accomplish the worthwhile goal of giving California an unambiguous statement on a life-threatening criminal activity exception to the duty of confidentiality.