CHAPTER 5

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Introductory Note: This Chapter considers the law protecting the confidentiality of client information. The rules derive from agency law and professional regulations (see Topic 1), the attorney-client privilege (see Topic 2), and the lawyer work-product immunity (see Topic 3). Confidentiality is of great significance in both litigation practice and office practice. Moreover, the rules governing conflicts of interest (see Chapter 8) are founded on concepts of confidentiality that go beyond the attorney-client privilege and work-product immunity.

While the professional obligation to keep client information secret is a hallmark of professional practice, confidentiality can also be exploited to violate the law. The rules of confidentiality therefore provide exceptions to guard against abuse. The law is molded on the

premise that a greater good inheres in encouraging all clients, most of whom incline toward complying with the law, to consult freely with their lawyers under the protection of confidentiality in order to gain the benefit of frank communication.

The Chapter first considers, in Topic 1, the legal responsibilities of lawyers in dealing with "confidential client information"—a category that includes much of the information that a lawyer learns about a client (see § 59). The basic requirement is that a lawyer use confidential client information only to advance the interests of the client (see § 60). Much of the law on client confidentiality derives from the attorney-client privilege, considered in Topic 2. The immediate remedial consequence of the privilege—excluding evidence at hearings and depositions—is only one aspect of the rights and liabilities concerning client confidentiality. Nonetheless, judicial decisions construing the limits of the attorney-client privilege are the source of much of the law governing other aspects of client confidentiality. The Chapter concludes with Topic 3, which considers the lawyer work-product immunity, a protective rule that arose in response to broadened pretrial discovery.

Other Chapters address remedies for violations of the confidentiality responsibilities of lawyers, including the sanctions of professional discipline (see § 5), civil actions for negligent or intentional violation of the rules of confidentiality (see Chapter 4), disqualification of lawyers from representing clients (see § 6, Comment *i*), and injunctive remedies (see § 6).

The rules of client confidentiality have differed in some particulars from one jurisdiction to another. Those variations reflect different relative weight to be accorded to protection of clients and to protection of third parties through disclosure of information about a client. The differences were manifested in the variant reactions in the states to the ABA's proposed Rule 1.6 of the ABA Model Rules of Professional Conduct (1983) on lawyer disclosure of client involvement in wrongdoing. Similar differences have existed between the evidentiary law of some states and that formulated by the federal courts under Rule 501 of the Federal Rules of Evidence. The federal courts apply the state law of attorney-client privilege with respect to claims or defenses in civil actions that are governed by state law, but articulate through the "principles of the common law" the law of the attorney-client privilege as it applies to claims and defenses governed by federal law. Questions of choice of law in applying the law governing lawyers, including doctrines of confidentiality, are examined in § 1, Comment *e*, § 5, Comment *h*, and § 48, Comment *f*.

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§ 59. Definition of "Confidential Client Information"

Confidential client information consists of information relating to representation of a client, other than information that is generally known.

Comment:

a. Scope and cross-references. This Section defines information concerning the representation of a client governed by the confidentiality rule stated in § 60 and for which exceptions are stated in other Sections in this Topic. For the most part, the definition of this Section is relevant to applications of the general duty of confidentiality (see § 60) owed to a current client and to former clients. On the relevance of the definition of confidential information to a determination whether

a former matter is "substantially related" to a current matter, see § 132, Comment *d(ii)*.

b. Kinds of confidential client information. A client's approach to a lawyer for legal assistance implies that the client trusts the lawyer to advance and protect the interests of the client (see § 16(1)). The resulting duty of loyalty is the predicate of the duty of confidentiality. The information that a lawyer is obliged to protect and safeguard is called *confidential client information* in this Restatement.

This definition covers all information relating to representation of a client, whether in oral, documentary, electronic, photographic, or other forms. It covers information gathered from any source, including sources such as third persons whose communications are not protected by the attorney-client privilege (see § 70). It includes work product that the lawyer develops in representing the client, such as the lawyer's notes to a personal file, whether or not the information is immune from discovery as lawyer work product (see Topic 3). It includes information acquired by a lawyer in all client-lawyer relationships (see § 14), including functioning as inside or outside legal counsel, government or private-practice lawyer, counselor or litigator, advocate or intermediary. It applies whether or not the client paid a fee, and whether a lawyer learns the information personally or through an agent, for example information acquired by a lawyer's partners or associate lawyers or by an investigator, paralegal, or secretary. Information acquired by an agent is protected even if it was not thereafter communicated to the lawyer, such as material acquired by an investigator and kept in the investigator's files.

The definition includes information that becomes known by others, so long as the information does not become generally known. See Comment *d* hereto; compare § 71 (condition of attorney-client privilege that communication be made with reasonable expectation of confidentiality); § 79 (waiver of the attorney-client privilege by subsequent disclosure). The fact that information falls outside the attorney-client privilege or work-product immunity does not determine its confidentiality under this Section.

A lawyer may learn information relevant to representation of a client in the course of representing another client, from casual reading or in other accidental ways. On the use of information learned from representation of another client, see § 60, Comment *l*. In the course of representation, a lawyer may learn confidential information about the client that is not necessary for the representation but which is of a personal or proprietary nature or other character such that the client evidently would not wish it disclosed. Such information is confidential under this Section.

c. The time at which information is acquired. Information acquired during the representation or before or after the representation is confidential so long as it is not generally known (see Comment *d* hereto) and relates to the representation. Such information, for example, might be acquired by the lawyer in considering whether to undertake a representation. On the duties of a lawyer with respect to confidential information of a prospective client, see § 15, Comment *c*. Post-representation confidential client information might be acquired, for example, in the form of information on subsequent developments.

Illustrations:

1. Lawyer represents Employer in defending against a claim of employment discrimination by Plaintiff. Plaintiff has joined both Employer and Personnel Director as defending parties. Lawyer extensively confers with Inside Legal Counsel, general counsel of Employer, who provides information about the claim as it relates to Personnel Director. Subsequently, Inside Legal Counsel authorizes Lawyer to represent Personnel Director as a co-client. Information acquired by Lawyer relating to representation of Personnel Director prior to forming the client-lawyer relationship is confidential client information under this Section. On application of the attorney-client privilege, compare § 76 (common-interest arrangements).

2. Lawyer represented Defendant in civil litigation, in which Defendant prevailed. Two years after the representation ended, a Juror in the case writes a letter to Lawyer stating that Defendant approached Juror and several other jurors in a recess during their deliberations and improperly provided them with new evidence that persuaded the jury to find for Defendant. Juror states in the letter that Juror wishes Lawyer to show the letter to the Judge who presided at the trial. Although not subject to the attorney-client privilege (see §§ 70 & 71), the letter relates to Lawyer's representation of Defendant and is thus confidential under this Section. Whether Lawyer may disclose the information is governed by §§ 61–67.

d. Generally known information. Confidential client information does not include information that is generally known. Such information may be employed by lawyer who possesses it in permissibly representing other clients (see § 60, Comments *g* & *h*) and in other contexts where there is a specific justification for doing so (compare Comment *e* hereto). Information might be generally known at the time it is

conveyed to the lawyer or might become generally known thereafter. At the same time, the fact that information has become known to some others does not deprive it of protection if it has not become generally known in the relevant sector of the public.

Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositaries such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known.

A lawyer may not justify adverse use or disclosure of client information simply because the information has become known to third persons, if it is not otherwise generally known. Moreover, if a current client specifically requests that information of any kind not be used or disclosed in ways otherwise permissible, the lawyer must either honor that request or withdraw from the representation (see § 32; see also §§ 16(2) & 21(2)).

e. Information concerning law, legal institutions, and similar matters. Confidential client information does not include what a lawyer learns about the law, legal institutions such as courts and administrative agencies, and similar public matters in the course of representing clients. Such information is part of the general fund of information available to the lawyer. During legal research of an issue while representing a client, a lawyer may discover a particularly important precedent or devise a novel legal approach that is useful both in the immediate matter and in other representations. The lawyer and other members of the lawyer's firm may use and disclose that information in other representations, so long as they thereby disclose no confidential client information except as permitted by § 60. A lawyer may use such information—about the state of the law, the best way to approach an administrative agency, the preferable way to frame an argument before a particular judge—in a future, otherwise unrelated representation that is adverse to the former client. On the otherwise general prohibition against adverse use or disclosure of confidential information of a former client, see § 132, Comment *f*.

REPORTER'S NOTE

Comment b. Kinds of confidential client information. The expansive definition of client information not protected by the attorney-client privilege that nonetheless a lawyer is obliged to keep confidential comes primarily from the law of agency and rules of professional regulation. A somewhat similarly described area of protected information was referred to in DR 4–101 of the ABA Model Code of Professional Responsibility (1969) as client "secrets." Secrets were to be distinguished from "confidences"—information protected by the applicable law of attorney-client privilege—although a lawyer's responsibilities with respect to both were generally the same. See C. Wolfram, Modern Legal Ethics § 6.7.2, at 297 (1986). Courts have occasionally extended the legally operative range of secrets beyond lawyer-disciplinary proceedings. E.g., In re Advisory Opinion No. 544, 511 A.2d 609, 614–15 (N.J.1986) (neither public nor private organizations that funded legal-services organization could be given names of clients by service lawyers because such information, if not a confidence protected by attorney-client privilege, was a secret entitled to legal protection).

The origin of the separate legal obligation that requires a lawyer to protect secrets, as opposed to the evidentiary privilege, is uncertain. The "secrets" terminology became widely used when it appeared—conjoined with "confidences"—in ABA Canons of Ethics, Canon 6 (1908) and, even more significantly, in the ABA Model Code, DR 4–101(A) in 1969. The ABA Model Rules of Professional Conduct, Rule 1.6(a) (1983), altered the terminology, discarding the "confidences and secrets" term and concept in favor of an expansive and unitary notion of "information relating to representation of a client" without regard to the source or time it was acquired. Id., Comment ¶ [5] (confidentiality rule applies "to all information relating to the representation, whatever its source").

On the coverage of information gathered by agents of a lawyer, compare § 70, Comment *h* (protection under attorney-client privilege).

Comment c. The time at which information is acquired. On the time period during which receipt of confidential information about a client is protected, compare DR 4–101(A) (information "gained in the professional relationship") with ABA Model Rule 1.6(a) (information "relating to representation of a client" apparently without regard to time at which lawyer learns of it). See generally 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.6:201, at 258 (2d ed.1990, Supp.1992 & 1994). This Section is based upon the ABA Model Rules definition. Both the Code (EC 4–6) and the ABA Model Rules (Comment ¶ 21 ("The duty of confidentiality continues after the client-lawyer relationship has terminated.")) assume that the confidentiality duty endures indefinitely.

Comment d. Generally known information. The "generally known" standard of this Section is the standard of ABA Model Rules of Professional Conduct, Rule 1.9(b) (1983), which is not further elaborated upon in its Comment. The ABA Model Code of Professional Responsibility (1969) included in DR 4–101(A) all information, without regard to its public or private nature, within its definition of "confidences and se-

crets." See EC 4–4 (" ... This broad ethical concept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.... "). Cf. ABA Canons of Ethics, Canon 37 (1908) (lawyer may not employ information gained in a representation to disadvantage of former client "even though there are other available sources of such information"). ABA Model Rule 1.9(b), on the other hand, excepts from its requirement of confidentiality information that "has become generally known." No similar exception is contained, however, in the general-purpose analog to ABA Model Rule 1.9(b), ABA Model Rule 1.8(b) ("A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3."). Commentators have differed over the wisdom of the ABA Model Rule approach. Compare, e.g., C. Wolfram, Modern Legal Ethics §§ 6.7.4, 7.4.2(c), at 364–65 (1986) (arguing against excepting public information from duty to safeguard confidential client information), with, e.g., 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.6:401, at 311–12 (2d ed.1990 & Supp.1994) (defending exception of generally known from ABA Model Code definition of confidential client information for conflict-of-interest purposes). Case law is sparse, but extant authority agrees with the position taken in the Section and Comment. See Cohen v. Wolgin, 1993 WL 232206 (E.D.Pa.1993) (citing Restatement).

The law generally provides that a client communication cannot become public and still remain protected by the attorney-client privilege. See §§ 71 and 79. The general law of agency also permits a former agent to compete with a former principal so long as the agent employs only information about the principal that is "a matter of general knowledge." See Restatement Second, Agency § 395. The scant case authority is divided on the question whether the definition of confidential client information includes publicly available information. Compare, e.g., City of Wichita v. Chapman, 521 P.2d 589, 595–96 (Kan. 1974) (no former-client conflict when relevant information about common issue that created substantial-relationship linkage was based on former client's appraisal report that, during former representation, was provided to opposing counsel and to government agencies as part of their publicly accessible records), with, e.g., Kaufman v. Kaufman, 405 N.Y.S.2d 79, 80 (N.Y.App.Div.1978) (lawyer disqualified in substantially related, subsequent representation against former client despite argument that all relevant information relating to common issue was available from public sources). In general, the authorities agree that the category of confidential information includes nonsecret information. E.g., NCK Org., Ltd. v. Bregman, 542 F.2d 128, 133 (2d Cir.1976) (for conflict-of-interest purposes, former client's information was "confidential" even if not secret); H. Drinker, Legal Ethics 135 (1953) (confidential client information includes nonsecret information).

The position taken in the Section and Comment—that "generally known" information is not part of the definition of confidential client information for either present or past clients—adheres to ABA Model Rule 1.9(b). The absence of a similarly limiting provision in ABA Model Rule 1.8(b), which applies to ongoing rep-

resentations, is not inconsistent. Any such lawyer use would be impermissible on the broad ground (see ABA Model Rule 1.7) that a lawyer may not use even publicly known information to the detriment of a current client, whether to further a personal interest of the lawyer (§§ 60 & 125) or to further the interest of another client (Topic 3 hereto). Revealing client information adversely (see § 60(1)) in a way that is gratuitous or negligent would violate the duty to take all reasonably available steps to advance the client's lawful objectives (§ 16(1)).

Comment e. Information concerning law, legal institutions, and similar matters. No judicial decisions have been found that specifically address the issues raised here. The Section is based on the principles behind the concept of generally known information, the customary and accepted practices of lawyers, and the public interest in effective professional practice consistent with the general protection of confidential client information. On conflicts of interest in law-reform activities, see § 125, Comment *e*.

§ 60. A Lawyer's Duty to Safeguard Confidential Client Information

(1) Except as provided in §§ 61–67, during and after representation of a client:

(a) 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;

(b) the lawyer must take steps reasonable in the circumstances to protect confidential client information against impermissible use or disclosure by the lawyer's associates or agents that may adversely affect a material interest of the client or otherwise than as instructed by the client.

(2) Except as stated in § 62, a lawyer who uses confidential information of a client for the lawyer's pecuniary gain other than in the practice of law must account to the client for any profits made.

Comment:

a. Scope and cross-references. This Section states the principal duties of a lawyer with respect to confidential client information. The first duty is negative—not to use or disclose the information. The second is positive—to safeguard confidential client information in the client's interests. The third duty protects clients against lawyer use or disclosure of confidential information for self-profit (see Comment *j*

hereto). The duty not to use or disclose confidential client information is subject to the exceptions provided in §§ 61–67. The duty to safeguard entails the corollary duties to provide adequate supervision of nonlawyer personnel (see § 11) and to assert privileges and other legal protection applicable to confidential client information such as the attorney-client privilege (see § 86(1)(b)) and the work-product immunity (see § 87). See Comment *c* hereto. The duty to safeguard such information is also a principal basis for the rules prohibiting former client conflicts of interest (see Chapter 8, Topic 4). On a lawyer's duty to safeguard confidential information of a prospective client, see § 15.

Remedies for a lawyer's breach of the obligation of § 60 may depend upon the kind of information involved and the nature of the improper use or disclosure. Remedies include exclusion or suppression of the lawyer's attempted testimony in violation of the attorney-client privilege (see § 86), the protection of lawyer work-product against intrusion by third parties (see Topic 3), a client's right to recover damages for negligent (see § 48) or intentional (see § 56) breach of an obligation of confidentiality, professional discipline (see § 5), and the remedies relating to conflicts of interest (see § 6, Comment *i*).

b. Conflicts between protection of confidential client information and other values. The broad prohibition against divulging confidential client information comes at a cost to both lawyers and society. Lawyers sometimes learn information that cannot be disclosed because of the rule of confidentiality but that would be highly useful to other persons. Those may include persons whose personal plight and character are much more sympathetic than those of the lawyer's client or who could accomplish great public good or avoid great public detriment if the information were disclosed. Moreover, the free-speech interests of lawyers is impinged by a broad rule of confidentiality. Nonetheless, despite those costs, the confidentiality rule reflects a considered judgment that high net social value justifies it. It is recognized that the rule better protects legitimate client expectations about communications to their lawyers and that permitting divulgence would be inconsistent with the goal of furthering the lawful objectives of clients (see § 16(1)).

Illustration:

1. Lawyer is appointed to represent Client, a person who has been accused of murder. During confidential conferences between them, Client informs Lawyer that Client in fact committed not only the murder charged but two others as well. Client gives Lawyer sufficient detail to confirm beyond question that Client's story is true. The two other murders involve victims

whose bodies have not yet been discovered. Because of similarities between the circumstances of the murders, parents of one of the victims approach Lawyer and beg for any information about their child. Lawyer realizes the personal anguish of the victim's parents and the peace the information that he knows could bring them. Unless Client consents to disclosure (see § 62), Lawyer must respond that Lawyer has no information to give them.

c. Impermissible use or disclosure—in general. A lawyer is prohibited from using or disclosing confidential client information if either of two conditions exists—risk of harm to the client or client instruction.

c(i). Impermissible use or disclosure—a reasonable prospect of adverse effect on a material client interest. The duty of confidentiality is defined in terms of the risk of harm. Subject to exceptions provided in §§ 61–67, use or disclosure of confidential client information is generally prohibited if there is a reasonable prospect that doing so will adversely affect a material interest of the client or prospective client. Although the lawyer codes do not express this limitation, such is the accepted interpretation. For example, under a literal reading of ABA Model Rules of Professional Conduct, Rule 1.6(a) (1983), a lawyer would commit a disciplinary violation by telling an unassociated lawyer in casual conversation the identity of a firm client, even if mention of the client's identity creates no possible risk of harm. Such a strict interpretation goes beyond the proper interpretation of the rule.

What constitutes a reasonable prospect of adverse effect on a material client interest depends on the circumstances. Whether such a prospect exists must be judged from the perspective of a reasonable lawyer based on the specific context of the client matter. Some representations involve highly secret client information; others involve routine information as to which secrecy has little or no material importance. In most representations, some information will be more sensitive than other information. In all representations, the relevant inquiry is whether a lawyer of reasonable caution, considering only the client's objectives, would regard use or disclosure in the circumstances as creating an unreasonable risk of adverse effect either to those objectives or to other interests of the client. For example, a lawyer advising a client on tax planning for a gift that the client intends to keep anonymous from the donee would violate this Section if the lawyer revealed the client's purpose to the donee. If there is a reasonable ground to doubt whether use or disclosure of a client's confidential information would have the described effect, the lawyer should take reasonable steps to ascertain whether adverse effect would

result, including consultation with the client when appropriate. Alternatively, the lawyer in such circumstances may obtain client consent to the use or disclosure (see § 62).

Adverse effects include all consequences that a lawyer of reasonable prudence would recognize as risking material frustration of the client's objectives in the representation or material misfortune, disadvantage, or other prejudice to a client in other respects, either during the course of the present representation or in the future. It includes consequences such as financial or physical harm and personal embarrassment that could be caused to a person of normal susceptibility and a normal interest in privacy.

Both use and disclosure adverse to a client are prohibited. As the term is employed in the Section, *use* of information includes taking the information significantly into account in framing a course of action, such as in making decisions when representing another client or in deciding whether to make a personal investment. *Disclosure* of information is revealing the information to a person not authorized to receive it and in a form that identifies the client or client matter either expressly or through reasonably ascertainable inference. Revealing information in a way that cannot be linked to the client involved is not a disclosure prohibited by the Section if there is no reasonable likelihood of adverse effect on a material interest of the client. Use of confidential client information can be adverse without disclosure. For example, in representing a subsequent client against the interests of a former client in a related matter, a lawyer who shapes the subsequent representation by employing confidential client information gained about the original client violates the duty of § 60(1) not to use that information, even if the lawyer does not disclose the information to anyone else (see § 132).

c(ii). Impermissible use or disclosure—specific client instructions. Even in the absence of a reasonable prospect of risk of harm to a client, use or disclosure is also prohibited if the affected client instructs the lawyer (see § 21(2)) not to use or disclose information. Such a direction is the client's definition of the client's interests (see § 16(1)), which controls (see § 21(2)). Such an instruction may also limit a lawyer's implied authority to use or disclose confidential client information to advance a client's interests. On the ability of a lawyer to withdraw, see § 32. However, client limitations on a lawyer's authority do not alter a lawyer's obligations under § 63 (using or disclosing confidential client information when required by law or court order) (see § 23). With respect to communications with a third person such as a relative of a client with diminished capacity, see § 24, Comment *c*.

When a fee for a client is paid by a third person (see § 134(1)) and in the absence of different client agreement or instructions, the client and not the third person directs the lawyer with respect to such matters as the treatment of files or other confidential client information. For the special instance of liability insurers, compare § 134, Comment *f*.

d. A lawyer's duty to safeguard confidential client information. A lawyer who acquires confidential client information has a duty to take reasonable steps to secure the information against misuse or inappropriate disclosure, both by the lawyer and by the lawyer's associates or agents to whom the lawyer may permissibly divulge it (see Comment *e*). This requires that client confidential information be acquired, stored, retrieved, and transmitted under systems and controls that are reasonably designed and managed to maintain confidentiality. In responding to a discovery request, for example, a lawyer must exercise reasonable care against the risk that confidential client information not subject to the request is inadvertently disclosed (see § 79). A lawyer should so conduct interviews with clients and others that the benefit of the attorney-client privilege and work-product immunity are preserved (see § 70, Comment *f*). On the release of information to further a client's objectives, including the waiver of claims of privilege or immunity, see § 61, Comment *d*. On asserting objections to attempts to obtain the client's confidential information, see § 63, Comment *b*.

A lawyer must take reasonable steps so that law-office personnel and other agents such as independent investigators properly handle confidential client information. That includes devising and enforcing appropriate policies and practices concerning confidentiality and supervising such personnel in performing those duties (see § 11). A lawyer may act reasonably in relying on other responsible persons in the office or on reputable independent contractors to provide that instruction and supervision (see id.). The reasonableness of specific protective measures depends on such factors as the duties of the agent or other person, the extent to which disclosure would adversely affect the client, the extent of prior training or experience of the person, the existence of other assurances such as adequate supervision by senior employees, and the customs and reputation of independent contractors.

Greater precautions may be necessary when use or disclosure is not directed toward representation of the client (see Comment *f* hereto) or facilitating the lawyer's law practice (see Comment *g*), for example when information is provided to a lawyer outside the firm to assist that lawyer's own representations. A lawyer must not engage in

casual or frivolous conversation about a client's matters that creates an unreasonable risk of harm to the interests of the client.

e. Postrepresentation safeguarding. The duty of confidentiality continues so long as the lawyer possesses confidential client information. It extends beyond the end of the representation and beyond the death of the client. Accordingly, a lawyer must take reasonable steps for the future safekeeping of client files, including files in closed matters, or the systematic destruction of nonessential closed files. A lawyer must also take reasonably appropriate steps to provide for return, destruction, or continued safekeeping of client files in the event of the lawyer's retirement, ill health, death, discipline, or other interruption of the lawyer's practice.

f. Divulgence to persons assisting a lawyer in representing a client. A lawyer generally has authority to use or disclose confidential client information to persons assisting the lawyer in representing the client. Those include other lawyers in the same firm and employees such as secretaries and paralegals. A lawyer also may disclose information to independent contractors who assist in the representation, such as investigators, lawyers in other firms, prospective expert witnesses, and public courier companies and photocopy shops, to the extent reasonably appropriate in the client's behalf (see also § 70, Comment *h*). Such disclosures are not permitted contrary to a client's instructions, even within the lawyer's firm (see Comment *c(ii)* hereto), or when screening is required to avoid imputed disqualification of the lawyer's firm (see § 124, Comment *d*, & § 133, Comment *g*).

A lawyer's authority to disclose information for purposes of carrying out the representation is implied and therefore does not require express client consent (see § 21(3)). Agents of a lawyer assisting in representing a client serve as subagents and as such independently owe a duty of confidentiality to the client. See generally Restatement Second, Agency § 428(1) (subagent's general duties to known principals); id. § 395 (agent's general duty of confidentiality).

g. Divulgence to facilitate law practice. A lawyer may disclose confidential client information for the purpose of facilitating the lawyer's law practice, where no reasonable prospect of harm to the client is thereby created and where appropriate safeguards against impermissible use or disclosure are taken. Thus, disclosure is permitted to other lawyers in the same firm and to employees and agents such as accountants, file clerks, office managers, secretaries, and similar office assistants in the lawyer's firm, and with confidential, independent consultants, such as computer technicians, accountants, bookkeepers, law-practice consultants, and others who assist in furthering the law-practice business of the lawyer or the lawyer's firm.

Use or disclosure of confidential client information, if prohibited under § 60, is not permitted for other business purposes, such as aiding investment or business, including one in which the lawyer owns an interest.

h. Divulgence for purpose of professional assistance and development; historical research. When no material risk to a client is entailed, a lawyer may disclose information derived from representing clients for purposes of providing professional assistance to other lawyers, whether informally, as in educational conversations among lawyers, or more formally, as in continuing-legal-education lectures. Thus, a lawyer may confer with another lawyer (whether or not in the same firm) concerning an issue in which the disclosing lawyer has gained experience through representing a client in order to assist the other lawyer in representing that lawyer's own clients.

A lawyer may cooperate with reasonable efforts to obtain information about clients and law practice for public purposes, such as historical research, when no material risk to a client is entailed, such as financial or reputational harm. A lawyer thereby cooperates in furthering public understanding of the law and law practice.

i. Divulgence concerning property dispositions by a deceased client. The attorney-client privilege does not apply to communications relevant to an issue between parties who claim an interest through the same decedent (see § 81). As a corollary, the lawyer may reveal confidential client information to contending heirs or other claimants to an interest through a deceased client, in advance of testifying, if there is a reasonable prospect that doing so would advance the interests of the client-decedent (see § 61). Authority to instruct the lawyer (see Comment *c(ii)* hereto) with respect to such divulgence is determined under the law of succession.

j. A lawyer's self-dealing in confidential client information. Subsection (2) prohibits a lawyer from using or disclosing confidential client information for the lawyer's personal enrichment, regardless of lack of risk of prejudice to the affected client. The duty is removed by client consent (see § 62). The sole remedy of the client for breach of the duty is restitutionary relief in the form of disgorgement of profit (see Restatement Second, Agency § 388, Comment *c*). The lawyer codes differ over whether such self-enriching use or disclosure constitutes a disciplinary violation in the absence of prejudice to the client.

The strict confidentiality duty of the Subsection is warranted for prophylactic purposes. A lawyer who acquires confidential client information as the result of a representation should not be tempted by expectation of profit to risk a possibly incorrect assessment of future harm to a client. There is no important social interest in permitting

lawyers to make unconsented use or revelation of confidential client information for self-enrichment in personal transactions.

On limitations on business transactions between a lawyer and client, see § 126.

It is not inconsistent with Subsection (2) for a lawyer to use one client's confidential information for the benefit of another client in the course of representing the other client, even if doing so might also redound to the lawyer's gain, such as by enhancing a contingent-fee recovery. In all such instances, of course, the lawyer may not do so when it would create a material risk of harm to the original client. Thus, if otherwise permissible, a lawyer representing a plaintiff who has acquired extensive confidential information about the manner in which a defendant manufactured a product may employ that information for the benefit of another client with a claim against the same defendant arising out of a defect in the same product.

k. Confidentiality duties to a prospective client. See § 15, Comment *e*.

l. Use or disclosure of confidential information of co-clients. A lawyer may represent two or more clients in the same matter as co-clients either when there is no conflict of interest between them (see § 121) or when a conflict exists but the co-clients have adequately consented (see § 122). When a conflict of interest exists, as part of the process of obtaining consent, the lawyer is required to inform each co-client of the effect of joint representation upon disclosure of confidential information (see § 122, Comment *c(i)*), including both that all material information will be shared with each co-client during the course of the representation and that a communicating co-client will be unable to assert the attorney-client privilege against the other in the event of later adverse proceedings between them (see § 75).

Sharing of information among the co-clients with respect to the matter involved in the representation is normal and typically expected. As between the co-clients, in many such relationships each co-client is under a fiduciary duty to share all information material to the co-clients' joint enterprise. Such is the law, for example, with respect to members of a partnership. Limitation of the attorney-client privilege as applied to communications of co-clients is based on an assumption that each intends that his or her communications with the lawyer will be shared with the other co-clients but otherwise kept in confidence (see § 75, Comment *d*). Moreover, the common lawyer is required to keep each of the co-clients informed of all information reasonably necessary for the co-client to make decisions in connection with the matter (see § 20). The lawyer's duty extends to communicating information to other co-clients that is adverse to a co-client, whether

learned from the lawyer's own investigation or learned in confidence from that co-client.

Co-clients may understand from the circumstances those obligations on the part of the lawyer and their own obligations, or they may explicitly agree to share information. Co-clients can also explicitly agree that the lawyer is not to share certain information, such as described categories of proprietary, financial, or similar information with one or more other co-clients (see § 75, Comment *d*). A lawyer must honor such agreements. If one co-client threatens physical harm or other types of crimes or fraud against the other, an exception to the lawyer's duty of confidentiality may apply (see §§ 66–67).

There is little case authority on the responsibilities of a lawyer when, in the absence of an agreement among the co-clients to restrict sharing of information, one co-client provides to the lawyer material information with the direction that it not be communicated to another co-client. The communicating co-client's expectation that the information be withheld from the other co-client may be manifest from the circumstances, particularly when the communication is clearly antagonistic to the interests of the affected co-client. The lawyer thus confronts a dilemma. If the information is material to the other co-client, failure to communicate it would compromise the lawyer's duties of loyalty, diligence (see § 16(1) & (2)), and communication (see § 20) to that client. On the other hand, sharing the communication with the affected co-client would compromise the communicating client's hope of confidentiality and risks impairing that client's trust in the lawyer.

Such circumstances create a conflict of interest among the co-clients (see § 121 & § 122, Comment *h*). The lawyer cannot continue in the representation without compromising either the duty of communication to the affected co-client or the expectation of confidentiality on the part of the communicating co-client. Moreover, continuing the joint representation without making disclosure may mislead the affected client or otherwise involve the lawyer in assisting the communicating client in a breach of fiduciary duty or other misconduct. Accordingly, the lawyer is required to withdraw unless the communicating client can be persuaded to permit sharing of the communication (see § 32(2)(a)). Following withdrawal, the lawyer may not, without consent of both, represent either co-client adversely to the other with respect to the same or a substantially related matter (see § 121, Comment *e(i)*).

In the course of withdrawal, the lawyer has discretion to warn the affected co-client that a matter seriously and adversely affecting that person's interests has come to light, which the other co-client refuses to permit the lawyer to disclose. Beyond such a limited warning, the

lawyer, after consideration of all relevant circumstances, has the further discretion to inform the affected co-client of the specific communication if, in the lawyer's reasonable judgment, the immediacy and magnitude of the risk to the affected co-client outweigh the interest of the communicating client in continued secrecy. In making such determinations, the lawyer may take into account superior legal interests of the lawyer or of affected third persons, such as an interest implicated by a threat of physical harm to the lawyer or another person. See also § 66.

Illustration:

2. Lawyer has been retained by Husband and Wife to prepare wills pursuant to an arrangement under which each spouse agrees to leave most of their property to the other (compare § 130, Comment *c*, Illustrations 1–3). Shortly after the wills are executed, Husband (unknown to Wife) asks Lawyer to prepare an inter vivos trust for an illegitimate child whose existence Husband has kept secret from Wife for many years and about whom Husband had not previously informed Lawyer. Husband states that Wife would be distraught at learning of Husband's infidelity and of Husband's years of silence and that disclosure of the information could destroy their marriage. Husband directs Lawyer not to inform Wife. The inter vivos trust that Husband proposes to create would not materially affect Wife's own estate plan or her expected receipt of property under Husband's will, because Husband proposes to use property designated in Husband's will for a personally favored charity. In view of the lack of material effect on Wife, Lawyer may assist Husband to establish and fund the inter vivos trust and refrain from disclosing Husband's information to Wife.

3. Same facts as Illustration 2, except that Husband's proposed inter vivos trust would significantly deplete Husband's estate, to Wife's material detriment and in frustration of the Spouses' intended testamentary arrangements. If Husband refuses to inform Wife or to permit Lawyer to do so, Lawyer must withdraw from representing both Husband and Wife. In the light of all relevant circumstances, Lawyer may exercise discretion whether to inform Wife either that circumstances, which Lawyer has been asked not to reveal, indicate that she should revoke her recent will or to inform Wife of some or all the details of the information that Husband has recently provided so that Wife may protect her interests. Alternatively, Lawyer may inform Wife only

that Lawyer is withdrawing because Husband will not permit disclosure of relevant information.

4. Lawyer represents both A and B in forming a business. Before the business is completely formed, A discloses to Lawyer that he has been convicted of defrauding business associates on two recent occasions. The circumstances of the communication from A are such that Lawyer reasonably infers that A believes that B is unaware of that information and does not want it provided to B. Lawyer reasonably believes that B would call off the arrangement with A if B were made aware of the information. Lawyer must first attempt to persuade A either to inform B directly or to permit Lawyer to inform B of the information. Failing that, Lawyer must withdraw from representing both A and B. In doing so, Lawyer has discretion to warn B that Lawyer has learned in confidence information indicating that B is at significant risk in carrying through with the business arrangement, but that A will not permit Lawyer to disclose that information to B. On the other hand, even if the circumstances do not warrant invoking § 67, Lawyer has the further discretion to inform B of the specific nature of A's communication to B if Lawyer reasonably believes this necessary to protect B's interests in view of the immediacy and magnitude of the threat that Lawyer perceives posed to B.

Even if the co-clients have agreed that the lawyer will keep certain categories of information confidential from one or more other co-clients, in some circumstances it might be evident to the lawyer that the uninformed co-client would not have agreed to nondisclosure had that co-client been aware of the nature of the adverse information. For example, a lawyer's examination of confidential financial information, agreed not to be shown to another co-client to reduce antitrust concerns, could show in fact, contrary to all exterior indications, that the disclosing co-client is insolvent. In view of the co-client's agreement, the lawyer must honor the commitment of confidentiality and not inform the other client, subject to the exceptions described in § 67. The lawyer must, however, withdraw if failure to reveal would mislead the affected client, involve the lawyer in assisting the communicating client in a course of fraud, breach of fiduciary duty, or other unlawful activity, or, as would be true in most such instances, involve the lawyer in representing conflicting interests.

m. Use or disclosure of confidential information of a nonclient. A lawyer may come into possession of confidential information of a nonclient, such as that of an opposing party in litigation or in negotia-

tions. Such information may come from the other person or the lawyer or other agent of the person. When the receiving lawyer reasonably concludes that the transmission was authorized, the lawyer may use the information for the client's benefit, for example, where an opposing lawyer has conveyed the information apparently to advance representation (see § 61). Otherwise, the receiving lawyer's responsibilities depend on the circumstances. If the disclosure operates to end legal protection for the information, the lawyer may use it for the benefit of the lawyer's own client and may be required to do so if that would advance the client's lawful objectives (see § 16(1)). That would follow, for example, when an opposing lawyer failed to object to privileged or immune testimony (compare §§ 78, 86(1)(b), & 91(3)). The same legal result may follow when divulgence occurs inadvertently outside of court (see §§ 79 & 91). The receiving lawyer may be required to consult with that lawyer's client (see § 20) about whether to take advantage of the lapse.

If the person whose information was disclosed is entitled to have it suppressed or excluded (see § 79, Comment *c*), the receiving lawyer must either return the information or hold it for disposition after appropriate notification to the opposing person or that person's counsel. A court may suppress material after an inadvertent disclosure that did not amount to a waiver of the attorney-client privilege (see § 79, Comment *h*).

Where deceitful or illegal means were used to obtain the information, the receiving lawyer and that lawyer's client may be liable, among other remedies, for damages for harm caused or for injunctive relief against use or disclosure. The receiving lawyer must take steps to return such confidential client information and to keep it confidential from the lawyer's own client in the interim.

Similarly, if the receiving lawyer is aware that disclosure is being made in breach of trust by a lawyer or other agent of the opposing person, the receiving lawyer must not accept the information. An offending lawyer may be disqualified from further representation in a matter to which the information is relevant if the lawyer's own client would otherwise gain a substantial advantage (see § 6, Comment *i*). A tribunal may also order suppression or exclusion of such information.

REPORTER'S NOTE

Comment b. Conflicts between protection of confidential client information and other values. Illustration 1 is based on the well-known Lake Pleasant Bodies Case. See People v. Belge, 376 N.Y.S.2d 771 (N.Y.App. Div.1975), aff'd, 359 N.E.2d 377 (N.Y. 1976). See generally 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.6:303 (2d ed.1990); C. Wolfram,

Modern Legal Ethics § 12.6.1, at 664–65 (1986).

Comment c. Impermissible use or disclosure—in general. See generally ABA Model Rules of Professional Conduct, Rule 1.6(a) (1983) ("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)."); id., Rule 1.9(b) ("A lawyer who has formerly represented a client shall not thereafter: ... (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known."). ABA Model Code of Professional Responsibility, DR 4–101(B)(1)-(3) (1969) provides as follows:

> (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.

See also 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.6:200, at 158–158.2 (2d ed.1990); C. Wolfram, Modern Legal Ethics § 6.7.5 (1986), and authorities cited. On the particular challenges of electronic modes of communication, see, e.g., ABA Formal Opin. 99–413 (1999) (protecting the confidentiality of unencrypted electronic mail sent or received by lawyer).

Comment c(i). Impermissible use or disclosure—a reasonable prospect of adverse effect on a material client interest. All authorities agree that lawyer use, even without disclosure, of confidential client information adverse to the material interests of a client is prohibited. E.g., ABA Model Code of Professional Responsibility, DR 4–101(B)(2) (1969); ABA Model Rules of Professional Conduct, Rule 1.6 (1983). Case law is sparse. See authorities noted at Reporter's Note to Comment *e*, below. Most reported decisions deal with egregious instances in which lawyers have improperly used or disclosed confidential client information in order to gain an advantage for the lawyer or to act vengefully toward a client. E.g., In re Nelson, 327 N.W.2d 576, 578–79 (Minn.1982) (discipline of lawyer who, following discharge by client in dispute over lawyer's fee, made unfounded reports of client's tax violations to government agencies); Bar Ass'n of Greater Cleveland v. Watkins, 427 N.E.2d 516 (Ohio 1981) (lawyer suspended indefinitely for threatening client with report to authorities of assertedly illegal payments unless client withdrew bar-association complaint against lawyer). The prohibition against adverse use of a client's confidential information is one of the principal bases for the rules against both concurrent (Chapter 8, Topic 3) and former-client (§ 132) conflicts of interest.

Comment c(ii). Impermissible use or disclosure—specific client instructions. The point is made explicitly in ABA Model Code of Professional Responsibility, DR 4–101(A) (1969) in

the definition of "secret." See supra, Reporter's Note to Comment c. ABA Model Rules of Professional Conduct, Rule 1.6(a) (1983) comprehensively includes (all) "information relating to representation of a client" and so includes a fortiori information that the client expressly instructed the lawyer to keep confidential. See also In re Pressly, 628 A.2d 927 (Vt.1993) (discipline for violating client instruction not to reveal to husband's lawyer client's suspicion that husband was sexually abusing daughter until client had gathered additional evidence).

Comment d. A lawyer's duty to safeguard confidential client information. See generally Williams v. Trans World Airlines, Inc., 588 F.Supp. 1037, 1044 (W.D.Mo.1984) (access of paralegal to confidential information requires imposition of confidentiality rules similar to those applicable to lawyers on paralegal's change of employment to another law firm); Florida Bar v. Wolding, 579 So.2d 736 (Fla.1991) (no violation of duty to secure files and premises in absence of evidence of divulgence of harmful information); see also, e.g., ABA Formal Opin. 99–413 (1999) (permissible for lawyer to transmit confidential client information on unencrypted electronic mail). On lawyer gossip and "shop talk," see, e.g., 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.6:202, at 159–60 (2d ed.1990) (drawing distinction between beneficial and justifiable shop-talk within a "rule of reason" that notes factors such as need of listener to know, utility of conversation in lawyer's practice, degree of confidence lawyer can have that client remains anonymous, and innocuous nature of information).

Comment e. Postrepresentation safeguarding. Most of the authority arises in the context of disqualification motions by a former client. E.g., United States v. Calabria, 614 F.Supp. 187, 192 (E.D.Pa.1985) (former defense lawyer's continuing duty to prosecution witness not to disclose confidential information); Beck v. Bd. of Regents of State of Kansas, 568 F.Supp. 1107, 1111 (D.Kan.1983); Rodriguez v. District Court, 719 P.2d 699, 704 (Colo.1986); Greene v. Greene, 391 N.E.2d 1355, 1358 (N.Y. 1979); Gleason v. Coman, 693 S.W.2d 564, 566 (Tex.Ct.App.1985). See also, e.g., Sargent v. Buckley, 697 A.2d 1272 (Me.1997) (damage claim for use of information gained in negotiating antenuptial agreement for client wife used against former client in representing husband in dissolution action); Thiery v. Bye, 597 N.W.2d 449 (Wis.Ct.App.1999) (damage claim for failure to redact identifying information when file of former personal-injury client was passed out in technical college course).

Comment f. Divulgence to persons assisting a lawyer in representing a client. On a lawyer's implied agency authority to divulge confidential client information to other lawyers and employees in the same firm assisting the lawyer or who have legitimate need to deal with the information in order to carry on the operation of the firm, see, e.g., ABA Model Code of Professional Responsibility, EC 4–2 (1969); cf. ABA Model Rules of Professional Conduct, Rule 1.6, Comment ¶ [8] (1983) (to lawyers within same firm, unless client has otherwise instructed); id. Rule 5.3, Comment (supervising office personnel in firm). See generally C. Wolfram, Modern Legal Ethics § 6.4.4, at 271 (1986). The same implied authority permits a lawyer to disclose confidential client information to the extent necessary to

obtain assistance from appropriate experts, lawyers, and other agents outside the lawyer's firm. E.g., State v. Schneider, 402 N.W.2d 779, 787 (Minn.1987) (proper for defense lawyer to disclose facts of client's history to psychiatrist whom lawyer consulted for advice on insanity defense); Sprader v. Mueller, 121 N.W.2d 176, 180 (Minn.1963). But see EC 4–3 (client consent required before consulting with lawyer outside firm, but no consent required before consulting with nonlawyer consultants outside firm). The lawyer's implied authority to divulge information to such persons does not permit disclosures if they conflict with the manifest best interests or expressed or evident wishes of an affected client. E.g., Schetter v. Schetter, 239 So.2d 51 (Fla.Dist.Ct.App.1970) (lawyer, who tape-recorded conversation with client without client's knowledge, had no authority to divulge tape to psychiatrist for purpose of preparing psychiatrist to testify as expert that client was incompetent in support of lawyer's motion to have guardian ad litem appointed for client in divorce action). On the obligation of other firm lawyers to safeguard confidential client information, see, e.g., Duplan Corp. v. Deering Milliken, Inc., 397 F.Supp. 1146, 1193 (D.S.C.1974).

On a supervising lawyer's responsibility to assure that both in-firm and external representational agents observe appropriate precautions in dealing with confidential client information, see, e.g., ABA Model Code of Professional Responsibility, DR 4–101(D) (1969); id. EC 4–2 (employees); id. EC 4–3 (outside agencies); ABA Model Rules of Professional Conduct, Rule 5.3, Comment (1983). See generally C. Wolfram, Modern Legal Ethics § 16.3.1, at 894 (1986). See also § 11, Reporter's Note.

Comment g. Divulgence to facilitate law practice. E.g., ABA Inf. Opin. 1364 (1976) (lawyer not required to obtain client consent to practice of sending detailed timesheet information to computerized data-processing company for purposes of bookkeeping).

Comment h. Divulgence for purpose of professional assistance and development; historical research. No authority specifically in point has been found. The Comment seems to follow from the limited risk of adverse use or disclosure of client information and the superior legal interest in the described uses.

With respect to divulgence for the purpose of cooperating in historical research, it may be desirable to create special legal mechanisms by which lawyers may obtain clearance to disclose confidential client information to assist such research. Such a procedure should provide for notice to the client or a representative of a deceased or defunct client and for the right of the client or the client's representative to intervene. The procedure could permit a weighing of the relative importance of releasing the information in the circumstances and the magnitude of any risk of impairing confidentiality interests. Compare § 77, Comment *d* (similar balancing standard suggested for post-death waiver of attorney-client privilege in cases of need and undue hardship).

Comment i. Divulgence concerning property dispositions by a deceased client. No authority directly in point has been found. The point made in the Comment, however, is both consistent with the corresponding Section on the attorney-client privilege,

§ 81, and consistent with the general doctrine of Subsection (1), allowing a lawyer to use or reveal confidential client information to advance client interests.

Comment j. A lawyer's self-dealing in confidential client information. See generally Restatement Second, Agency § 388, Comment c; 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.8:300, at 266–67 (2d ed.1990 & Supp.1993); C. Wolfram, Modern Legal Ethics § 6.7.6, at 304 (1986). See generally § 55, Comment *d*, Reporter's Note. The position in the Section and Comment is based on Restatement Second, Agency § 388, Comment c. Section 388 states that, beyond the duty of an agent not to use confidential information to the disadvantage of a principal, an agent "also has a duty to account for any profits made by the use of such information, although this does not harm the principal. . . . "

Most decisions involve instances of lawyer use of a client's confidential information that was harmful to the client. E.g., Tri–Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg, 265 Cal.Rptr. 330 (Cal.Ct. App.1989) (lawyer in defendant law firm was also limited partner in client entity; trial required on client's claim that lawyer usurped business opportunity (real-estate purchase) by use of confidential information); David Welch Co. v. Erskine & Tulley, 250 Cal.Rptr. 339 (Cal.Ct.App.1988) (defendant law firm liable for damages for use of former client's confidential information in setting up competing debt-collection business); City of Hastings v. Jerry Spady Pontiac–Cadillac, Inc., 322 N.W.2d 369 (Neb.1982) (client could void sale of property to lawyer's other client, where lawyer used first client's confidential information to usurp intended purchase of property); In re Wood, 631 A.2d 1340 (N.H.1993) (discipline of lawyer for public use of client's confidential information in opposing client's plan to develop shopping mall on property adjacent to lawyer's home); Perez v. Kirk & Carrigan, 822 S.W.2d 261 (Tex.Ct.App.1991) (claim that lawyer induced truck driver to reveal information as if client-lawyer relationship existed, then provided information to prosecutor to enhance criminal conviction of employer, defendant in damage suits by other clients of lawyer).

The lawyer codes differ with respect to whether lawyer self-dealing in confidential client information is impermissible if not shown to be harmful to the client. ABA Model Rules of Professional Conduct, Rule 1.9(b) (1983) provides that ("a lawyer who has formerly represented a client in a matter shall not ... (b) use information relating to the representation to the disadvantage of the former client except as rule 1.6 would permit with respect to a client or when the information has become generally known."). See also id. Rule 1.8(b) ("A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.") ABA Model Code of Professional Responsibility, DR 4–101(B)(3) (1969) contains a stricter rule: "a lawyer shall not knowingly ... (3) [u]se a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure." The prohibition of the ABA Model Code does not require a showing that the lawyer's self-profiting use was to the disadvan-

tage of the client, while the ABA Model Rules do require that showing.

The merits of the differing approaches in the lawyer codes have been debated. Compare, e.g., 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.8:300, at 266–67 (2d ed.1990 & Supp.1993) (advancing the position taken in the ABA Model Rules), with, e.g., C. Wolfram, Modern Legal Ethics § 6.7.6 and § 7.4.2(c), at 364–65 (1986) (arguing that all self-dealing of lawyers in client information, regardless of harm to client, should be prohibited).

Even in a jurisdiction otherwise following the ABA Model Rules, a court has disciplined a lawyer despite the absence of harm to the client. See, e.g., In re Guidone, 653 A.2d 1127 (N.J.1994) (lawyer who, without client's knowledge, acquired 20% interest in purchaser of client's property is disciplined, despite finding that client suffered no economic loss). However, and in general agreement with the position in the Section, courts have required a showing of harm to the client when the client seeks damages other than profits gained by the lawyer. E.g., Hooper v. Gill, 557 A.2d 1349 (Md.1989) (even if lawyer's report of client wrongdoing to prosecutor was violation of duty, client, who was acquitted, could not recover absent showing of damages); cf., e.g., American Motors Corp. v. Huffstutler, 575 N.E.2d 116 (Ohio 1991) (injunction against lawyer who left staff of inside legal counsel of automobile manufacturer and advertised availability as expert witness against manufacturer in same type of roll-over cases as those on which lawyer had worked).

A clear instance of lawyer liability for use of confidential client information even in the absence of harm to a client is insider trading in a client's stock. E.g., SEC v. Singer, 786 F.Supp. 1158, 1171 (S.D.N.Y.1992) (breach of fiduciary duty for lawyer to invest in stock of client based on confidential, nonpublic information). In several cases, lawyers have been disciplined following a criminal conviction for insider trading using information gained in representing clients. E.g., In re Glauberman, 586 N.Y.S.2d 601 (N.Y.App.Div.1992); In re Rubinstein, 506 N.Y.S.2d 441 (N.Y.App.Div. 1986); In re Florentino, 478 N.Y.S.2d 289 (N.Y.App.Div.1984); In re Hall, 455 N.Y.S.2d 258 (N.Y.App.Div.1982).

Comment l. Use or disclosure of confidential information of co-clients. On the nature of the relationship and the consequent duty of the common lawyer to keep all co-clients informed, see, e.g., Sky Valley Ltd. Partnership v. ATX Sky Valley, Ltd., 150 F.R.D. 648 (N.D.Cal.1993); see also § 75, Comment *d*, and Reporter's Note thereto. On the conflict of interest created when the interests of the joint clients diverge, as evidenced by hostile communications by one of the co-clients, see, e.g., P. Rice, Attorney-Client Privilege in the United States 245 (1993); cf. Eureka Investment Corp. v. Chicago Title Ins. Co., 743 F.2d 932, 937–38 (D.C.Cir.1984) (even if conflict of interest existed in lawyer's representation of co-clients at same time lawyer was advising one about rights against the other, that would not affect second client's right to invoke attorney-client privilege in subsequent litigation arising out of side representation). In *Eureka Investment*, supra, the affected client was aware that the lawyer was also advising the communicating client on a matter on which they were at odds. The decision is thus authority for preserving confidentiality for communi-

cations excluded from the co-client representation, but it does not extend to the situation of a lawyer representing co-clients whose interests are apparently congruent.

The position in the Comment on a lawyer's discretion to disclose hostile communications by a co-client has been the subject of very few decisions. It was approved and followed in A. v. B., 726 A.2d 924 (N.J.1999). It is also the result favored by the American College of Trusts and Estates Counsel in its *ACTEC Commentaries on the Model Rules of Professional Conduct* 68 (2d ed.1995) ("In such cases the lawyer should have a reasonable degree of discretion in determining how to respond to any particular case.... "); on the need to withdraw when a disclosing client refuses to permit the lawyer to provide the information to another co-client, see id. at 69; see generally Collett, Disclosure, Discretion, or Deception: The Estate Planner's Ethical Dilemma from a Unilateral Confidence, 28 Real Prop. Prob. Tr. J. 683 (1994). Council Draft No. 11 of the Restatement (1995) took the position that disclosure to an affected, noninformed co-client was mandatory, in view of the common lawyer's duties of competence and communication and the lack of a legally protected right to confidentiality on the part of the disclosing co-client. That position was rejected by the Council at its October 1995 meeting, resulting in the present formulation.

Comment m. Use or disclosure of confidential information of a nonclient. On authority concerning a client's ability to introduce into evidence otherwise privileged communications of an opposing party due to failure to assert the privilege properly on the part of the opposing party or that party's lawyer or agent, see § 78(3), Comment c, and Reporter's Note thereto. The ABA ethics committee has taken the position that a lawyer must return inadvertently disclosed confidential documents, without consulting his or her client, regardless of whether disclosure waived confidentiality for evidentiary or other legal purposes. See ABA Formal Opin. 92-368 (1992); cf. also ABA Formal Opin. 47 (1931) (lawyer must resign from representation and not inform client when lawyer learns of confidential information concerning client's adversary from lawyer for adversary in clear violation of other lawyer's confidentiality obligations). That position is contrary to the Section and Comment. It has, however, received some judicial support. E.g., State Compensation Ins. Fund v. WPS, Inc., 82 Cal.Rptr.2d 799 (Cal. Ct.App.1999) (lawyer who receives obviously privileged material inadvertently transmitted should refrain from examining and promptly notify sender).

On a lawyer's duties on receipt of material wrongfully taken from an opposing party, see, e.g., In re Shell Oil Refinery, 143 F.R.D. 105 (E.D.La.1992), amended and reconsidered on other grounds, 1992 WL 275426 (E.D.La.1992) and 144 F.R.D. 73 (E.D.La.1992) (ordering suppression of confidential documents of defendant supplied to plaintiff's lawyer by unidentified current employee); Cooke v. Superior Court, 147 Cal. Rptr. 915 (Cal.Ct.App.1978) (evidence excluded, but lawyer for wife in dissolution action not required to be disqualified despite receipt of confidential information about husband, including confidential communications between husband and his lawyer, purloined and passed to lawyer

by husband's unfaithful agent without complicity of receiving lawyer); Lipin v. Bender, 644 N.E.2d 1300 (N.Y.1994) (client plaintiff took and surreptitiously copied confidential documents of opposing counsel sitting on deposition table while lawyers engaged in heated discussion outside room; extent and blatant nature of harm require extreme remedy of dismissal of plaintiff's action); Estate of Weinberg, 509 N.Y.S.2d 240 (N.Y.Surr.Ct.1986) (Lawyer Y representing Client B came into possession of Client A's privileged information on dissolution of firm of Lawyer X who represented A; privileged information ordered suppressed but court refuses to disqualify Lawyer Y from further representing B); Restatement Second, Agency § 312, Comment c (if divulgence to third person occurs because of "breach of the obligations" of agent, third person not entitled to use divulged information against interests of wronged principal); ABA Formal Opin. 94-382 (1994) (receipt of confidential information of opposing party from person without authority to make disclosure). See also Geralnes B.V. v. City of Greenwood Village, 609 F.Supp. 191 (D.Colo.1985) (Lawyer Y sought and obtained confidential client information from Lawyer X, opposing client's former lawyer, after latter incorrectly opined that no privilege was involved; except for Lawyer Y's good-faith confusion about Lawyer X's status and fact that Lawyer Y had given advance notice of interview of Lawyer X to client's present lawyer, Lawyer Z, court would have disqualified Lawyer Y from further representing party adverse to client whose confidential information was obtained).

Under the constitutional guarantee of the effective assistance of counsel in criminal trials, a stricter standard may apply to the use by the government of confidential client information of an accused person obtained, even if without government complicity, from a defense lawyer. See People v. Knippenberg, 362 N.E.2d 681, 685 (Ill.1977) (defendant denied fair trial when prosecutor used as evidence summary of client interview taken by defense investigator that somehow reached prosecutor).

TITLE B. USING OR DISCLOSING CONFIDENTIAL CLIENT INFORMATION

Section

61. Using or Disclosing Information to Advance Client Interests
62. Using or Disclosing Information with Client Consent
63. Using or Disclosing Information When Required by Law
64. Using or Disclosing Information in a Lawyer's Self–Defense
65. Using or Disclosing Information in a Compensation Dispute
66. Using or Disclosing Information to Prevent Death or Serious Bodily Harm
67. Using or Disclosing Information to Prevent, Rectify, or Mitigate Substantial Financial Loss

§ 61. Using or Disclosing Information to Advance Client Interests

A lawyer may use or disclose confidential client information when the lawyer reasonably believes that doing so will advance the interests of the client in the representation.

Comment:

a. Scope and cross-references. This Section defines the agency power of lawyers to use and disclose confidential client information in the course of representation. The power of the client and lawyer to define the scope of the representation and the client's power to instruct a lawyer to take greater precautions are considered in Comment *c* hereto. With respect to acts for a client with diminished capacity, see § 24.

Succeeding Sections in this Title describe situations in which a lawyer may use or disclose confidential client information even when doing so will adversely affect a material interest of the client (see §§ 62–67).

b. A lawyer's authority to use or disclose confidential client information. A lawyer has general authority to take steps reasonably calculated to further the client's objectives in the representation (see § 21(3)). This Section is a particular application of that general authority. No explicit request or grant of permission is required. On a lawyer's duty to communicate with a client, see § 20.

This Section requires that a lawyer have a reasonable belief that the use or disclosure will further the objectives of the client in the representation. In certain instances, permissible use or disclosure under this Section may create a risk, reasonable in the circumstances, that may extend beyond what is permitted under § 60(1) alone. The fact that the client's interests are not in fact furthered does not demonstrate that the lawyer's belief at the point of use or disclosure was unreasonable. A lawyer must often contend with uncertainties, unexpected decisions, and the need for immediate action. For example, offering a witness reasonably believed to have generally favorable testimony may entail the risk of also revealing embarrassing or counterproductive facts about the client. So long as reasonably calculated to advance the client's interests, such use or disclosure is permissible under this Section.

An action of a lawyer in violation of this Section nonetheless may create a right in a third person that adversely affects the lawyer's client. For example, if the lawyer negligently fails to object to an adversary's introduction in evidence of a client's privileged communica-

tion, the opposing party may hold the client to a waiver of the privilege (see § 78(3)) despite the fact that the lawyer thereby breached an obligation to the client. With respect to the effect of an adversary's knowledge that a lawyer's out-of-court waiver exceeds the lawyer's authority, see § 60, Comment *m*, and § 79, Comment *h*.

c. A client direction limiting use or disclosure. See § 60, Comment *c(ii)*.

d. Reasonable calculation of advantage to a client. A lawyer may use or disclose confidential client information when presenting evidence or argument or engaging in other proceedings before a court, governmental agency, or other forum in behalf of a client. Thus, a lawyer may disclose such information in pleadings or other submissions, in presenting the testimony of witnesses and other evidence, in submitting briefs and other memoranda, or in discussing the matter with potential witnesses. Information thus disclosed may be not entirely favorable to the client. For tactical reasons, a lawyer may reasonably decide to present partly unfavorable information, even though it is confidential. A lawyer may do so in the interest of mitigating its damaging effect (for example, to prevent it from being brought out first by an adversary) or in order to present a complete account and thus gain the confidence of the factfinder.

A lawyer who reasonably believes that it is in the interests of the client to do so may refrain from objecting to an adversary's attempt to introduce otherwise inadmissible confidential client information, even if that failure will cause the waiver of a privilege (see § 78(3)). For example, a lawyer may acquiesce in an adversary's eliciting testimony from the lawyer's client that, although privileged under the attorney-client privilege, is favorable to the client's litigation position.

A lawyer has the same authority in matters other than litigation. A lawyer may, for example, exchange confidential client information reasonably calculated to further settlement of a lawsuit or negotiation of a business transaction. In most jurisdictions, statements made in the course of settlement negotiations are not thereafter admissible in evidence to establish liability against the person who or whose lawyer made the statement. In so using or disclosing information, a lawyer must use due care (see § 50) to avoid unintended waiver of the attorney-client privilege or other injury to the interests of the client.

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Comment b. A lawyer's authority to use or disclose confidential client information. E.g., ABA Model Code of Professional Responsibility, EC 4–2 (1969); ABA Model Rules of Professional Conduct, Rule 1.6(a) (1983).

See generally 8 J. Wigmore, Evidence, § 2325 (J. McNaughton rev. 1961); C. Wolfram, Modern Legal Ethics § 4.2, at 149–50 (1986). E.g., ABA Formal Opin. 98–411 (1998) (extent to which lawyer has implied authority to reveal limited confidential information to consulting lawyer called on for advice on limited issue).

Comment c. A client direction limiting use or disclosure. See § 21, Comment *d*, and Reporter's Note thereto. See also § 60, Comment *c(ii)*, and Reporter's Note thereto.

Comment d. Reasonable calculation of advantage to a client. E.g., ABA Model Code of Professional Responsibility, EC 4–2 (1969) (lawyer may disclose confidential information "when necessary to perform his professional employment"); ABA Model Rules of Professional Conduct, Rule 1.6(a) (1983) ("disclosures that are impliedly authorized to carry out the representation"); id., Comment (Authorized Disclosure). For decisions, see, e.g., United States v. Franklin, 598 F.2d 954 (5th Cir.), cert. denied, 444 U.S. 870, 100 S.Ct. 147, 62 L.Ed.2d 95 (1979) (plea-bargain disclosures); Schetter v. Schetter, 239 So.2d 51 (Fla.Dist.Ct.App.1970). On the requirement that a disclosure be in the interests of the disclosing lawyer's client, see, e.g., In re Wyse, 688 P.2d 758 (Mont.1984) (discipline for disclosing, without client's prior consent, information about first client's prior charges of sexual abuse for use of second client faced with possible prosecution for later charges of sexual abuse of first client), modified, 697 P.2d 94 (Mont.1985) (disciplinary sanction modified); Cruz v. State, 586 S.W.2d 861 (Tex.Crim.App.1979) (lawyer who took complete confession from client without informing him of his rights, took him to police station, and assisted police in duplicating confession for their use had no implied authority to waive attorney-client privilege).

The law generally permits a lawyer negotiating a settlement to make statements "without prejudice" or under a similar rubric that makes the statements inadmissible in evidence to establish liability in subsequent proceedings. See generally C. Wolfram, Modern Legal Ethics § 6.7.7, at 307 (1986). Modern evidence codes generally make inadmissible in evidence, at least for most purposes, both settlement offers and statements made in settlement discussions, even without the ceremony of stating that a disclosure is "without prejudice." E.g., Federal Rules of Evidence, Rule 408 (second sentence) ("conduct or statements made in compromise negotiations" not admissible "to prove liability for or invalidity of the claim or its amount"); Revised Uniform Rules of Evidence, Rule 408 (1974) (same). Similar rules make inadmissible statements made in the course of plea bargaining in criminal cases. E.g., Federal Rules of Evidence, Rule 410(4) ("any statement made" in course of plea bargaining inadmissible if plea is not accomplished); Revised Uniform Rules of Evidence, Rule 410(4) (1974). Ordinarily a lawyer will be well advised to consult with a client in advance when a lawyer proposes to take the risk of divulging particularly compromising client information that need not otherwise be divulged.

§ 62. Using or Disclosing Information with Client Consent

A lawyer may use or disclose confidential client information when the client consents after being adequately informed concerning the use or disclosure.

Comment:

a. Scope and cross-references. This Section states the general rule that client consent to a lawyer's use or disclosure of information otherwise defined as confidential client information under § 59 removes the limitations of § 60. On a lawyer's use or disclosure without regard to client consent, see §§ 63–67. On the prohibition against a lawyer contracting with a client to limit or avoid future instances of malpractice, see § 54. With respect to the validity of client consent in advance to future conflicted representations, see § 122, Comment *d*. On the limited conditions under which a client can withdraw consent to a conflict, once validly given, see § 122, Comment *f*.

b. Client consent to use or disclosure. A client can expressly relieve the lawyer of the duty of confidentiality stated in § 60, for example by consent to the lawyer's use of confidential client information in a book being written by the lawyer. A client may also consent to a lawyer's adverse use of confidential client information in a succeeding representation (see § 132). On client capacity to consent, see § 122, Comment *c*. On lawyer representation of a client with diminished capacity, see § 24.

c. Adequately informed client consent. A lawyer is required to consult with a client before the client gives consent under this Section. The legal effect of failure to consult depends upon whether the question concerns the lawyer's duty to the client or the rights or interests of third persons. When the question concerns the lawyer's duty to the client, the client's consent is effective only if given on the basis of information and consultation reasonably appropriate in the circumstances. When the question concerns the effect of consent with respect to the client's legal relationship with third persons, the principles of actual and apparent authority control. See §§ 26 and 27.

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Comment b. Client consent to use or disclosure. E.g., ABA Model Code of Professional Responsibility, DR 4–101(B)(3) (1969) (lawyer shall not knowingly "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(C)(1) (lawyer "may reveal" "confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them"). The references to client con-

sent in the ABA Model Code, although probably only the result of a drafting lapse, are possibly open to the interpretation that client consent after full disclosure is effective as to any "revelation," but only with respect to those "uses" that do not operate to the disadvantage of the client. The consent provision of the ABA Model Rules avoids any such possible ambiguity. See ABA Model Rules of Professional Conduct, Rule 1.6(a) (1983) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation ... "). See generally C. Wolfram, Modern Legal Ethics § 6.7.7, at 306 (1986). This Section, following the ABA Model Rules, takes the position that adverse use or disclosure is permissible with client consent. Under § 60(1), benign use or disclosure is permissible and does not require client consent.

No decision seems to have considered the question addressed by the Section outside the context of consent to a lawyer's use or disclosure in the circumstances described in § 61 (using or revealing client information to advance a client's interests), §§ 78-80 (waiver of the attorney-client privilege), or § 122 (client consent to conflict of interest). See the Reporter's Notes thereto.

Comment c. Adequately informed client consent. The different effects of omitting full disclosure can be seen by contrasting the provisions of the lawyer codes cited in the Reporter's Note to Comment *b* hereto with the attorney-client privilege doctrine of waiver by subsequent disclosure by act of the lawyer, where no authority requires client consultation. See § 78(3) (waiver by defectively asserting the privilege); § 79, Comment *c* (waiver by lawyer's act of making subsequent disclosure of privileged client communication).

§ 63. Using or Disclosing Information When Required by Law

A lawyer may use or disclose confidential client information when required by law, after the lawyer takes reasonably appropriate steps to assert that the information is privileged or otherwise protected against disclosure.

Comment:

a. Scope and cross-references. A lawyer's general legal duty (see § 60) not to use or disclose confidential client information (see § 59) is superseded when the law specifically requires such use or disclosure. For example, a lawyer may be called as a witness and directed by the tribunal to testify to what the lawyer believes is confidential client information protected by the attorney-client privilege (see § 68), the work-product immunity (see § 87), or another evidentiary rule. The scope of the protection afforded by the attorney-client privilege and the work-product immunity may be debatable in various circumstances. Similar issues may arise in pretrial discovery or in supplying evidence to a legislative committee, grand jury, or administrative agency. A lawyer may be directly required to file reports, such as

registering as the agent for a foreign government or reporting cash transactions. Other laws may require lawyers to turn over certain evidence and instrumentalities of crime to governmental agencies (see § 69). In such situations, steps by the lawyer to assert a privilege would not be appropriate and are not required.

On the extent of a lawyer's duty to disclose wrongdoing of another lawyer, see § 5(3). On a lawyer's liability for failure to exercise due care to protect a nonclient, see § 51 and following. The rule of the Section is important in addressing the duties of a lawyer to make disclosure to co-clients under §§ 51(4) and 56 (see also §§ 66–67). See also, e.g., § 98.

b. A lawyer's obligation to invoke available protection. A lawyer generally is required to raise any reasonably tenable objection to another's attempt to obtain confidential client information (see § 59) from the lawyer if revealing the information would disadvantage the lawyer's client and the client has not consented (see § 62), unless disclosure would serve the client's interest (see § 61). The duty follows from the general requirement that the lawyer safeguard such information (see § 60) and act competently in advancing the client's objectives (see § 16(1)). The duty to object arises when a nonfrivolous argument (see § 110) can be made that the law does not require the lawyer to disclose such information. Such an argument could rest on the attorney-client privilege (see § 86(1)(b)), the work-product immunity (see § 87), or a ground such as the irrelevance of the information or its character as hearsay. When the client is represented by successor counsel, a predecessor lawyer's decision whether to invoke the privilege is appropriately directed by successor counsel or the client.

Whether a lawyer has a duty to appeal from an order requiring disclosure is determined under the general duties of competence (see § 16(2)). A lawyer may be instructed by a client to appeal (see § 21(2)). If a lawyer may obtain precompliance appellate review of a trial-court order directing disclosure only by being held in contempt of court (see § 105), the lawyer may take that extraordinary step but is generally not required to do so by the duty of competent representation. In any event, under § 20 the lawyer should inform the client of an attempt to obtain the client's confidential information if it poses a significant risk to the material interests of the client and when circumstances reasonably permit opportunity to inform the client.

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Comment a. Scope and cross-references. See ABA Model Code of Professional Responsibility, DR 4–101(C)(2) (1969) (lawyer "may reveal

... (2) [c]onfidences or secrets when ... required by law or court order."); ABA Model Rules of Professional Conduct, Rule 1.6, Comment ¶ [20] (1983) ("The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.... [A] lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession."). On the omission from the ABA Model Rules of an explicit required-by-law exception, see generally 1 G. Hazard & W. Hodes, Law of Lawyering § 1.9:402, at 312 (2d ed.1990 & Supp.1994). A number of states have restored the exception to the general confidentiality rule in their adopted version of the ABA Model Rules. 2 id. § AP4:101.

The exception is generally recognized or assumed by courts. E.g., Fellerman v. Bradley, 493 A.2d 1239, 1248 (N.J.1985); Seventh Elect Church in Israel v. Rogers, 688 P.2d 506, 510–11 (Wash.1984).

Comment b. A lawyer's obligation to invoke available protection. E.g., In re Advisory Opinion No. 544, 511 A.2d 609, 612 (N.J.1986). See also Comment *a* and Reporter's Note thereto, supra. On the permissibility of a lawyer's risking a final adjudication of contempt in order to obtain precompliance appellate review of the correctness of a lower-court order directing the lawyer to use or disclose client information that the lawyer contends is protected by a privilege, see, e.g., Maness v. Meyers, 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975); United States v. Ryan, 402 U.S. 530, 532–33, 91 S.Ct. 1580, 1581–1582, 29 L.Ed.2d 85 (1971); State v. Schmidt, 474 So.2d 899 (Fla.Dist.Ct. App.1985). See § 105, Reporter's Note.

§ 64. Using or Disclosing Information in a Lawyer's Self-Defense

A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes necessary to defend the lawyer or the lawyer's associate or agent against a charge or threatened charge by any person that the lawyer or such associate or agent acted wrongfully in the course of representing a client.

Comment:

a. Scope and cross-references. This Section states an exception to the general confidentiality duty (see § 60) that gives a lawyer limited permission to employ confidential client information to defend against a threatened accusation that the lawyer or an associate or agent (see Comment *d* hereto) acted wrongfully in the course of representing a client. On the related exception to the attorney-client privilege, see § 83. On the circumstances in which a lawyer has discretion to disclose a client's intended criminal or fraudulent act, see §§ 66–67. The exceptions in this Section and in § 65 may be relevant

in a fee dispute, in which the lawyer defends against a charge of the client that the fee was excessive.

b. Rationale. American law has long recognized the right of a lawyer to employ confidential client information in self-defense. A similar exception is found in general agency law. As provided in Restatement Second, Agency § 395, Comment *f*: "An agent is privileged to reveal information confidentially acquired by him in the course of his agency in the protection of a superior interest of himself or of a third person. Thus, if the confidential information is to the effect that the principal is committing or is about to commit a crime, the agent is under no duty not to reveal it. However, an attorney employed to represent a client in a criminal proceeding has no duty to reveal that the client has confessed his guilt."

The general definition of confidential client information (see § 59) is broad, and the prohibition against adverse use or disclosure (see § 60) is rigorous. Charges against lawyers will often involve circumstances of client-lawyer relationships that can be proved only by using confidential information. Thus, in the absence of the exception stated in the Section, lawyers accused of wrongdoing would be left defenseless against false charges in a way unlike that confronting any other occupational group.

Two additional considerations often justify a lawyer's use of confidential client information in self-defense. First, when a client charges a lawyer with wrongdoing in the course of a representation, the client thereby waives the attorney-client privilege by putting the lawyer's services into issue (see § 80). Second, some charges against a lawyer brought by nonclients involve a course of conduct in which the lawyer's client is implicated in crime or fraud. In such situations, the crime-fraud exception to the attorney-client privilege (see § 82) may independently permit the lawyer to defend based on otherwise confidential client information.

c. Kinds of charges within the exception. A lawyer may act in self-defense under this Section only to defend against charges that imminently threaten the lawyer or the lawyer's associate or agent with serious consequences, including criminal charges, claims of legal malpractice, and other civil actions such as suits to recover overpayment of fees, complaints in disciplinary proceedings, and the threat of disqualification (see Comment *h*). Imminent threat arises not only upon filing of such charges but also upon the manifestation of intent to initiate such proceedings by persons in an apparent position to do so, such as a prosecutor or an aggrieved potential litigant. On responding to informal, public accusations made by a client, see Comment *f* hereto.

Illustrations:

1. Lawyer was employed by a Firm of lawyers that represented Client in a pending public stock offering. Lawyer had unsuccessfully objected to other lawyers in Firm about a secret finder's fee that Client paid to Firm in connection with the stock offering, but which neither Client nor the other Firm lawyers proposed to disclose in the offering documents. The stock offering went forward without such disclosure. Purchaser bought some of the shares. Lawyer learns that a regulatory agency has begun to investigate the activities of Client, Firm, and Lawyer and contemplates a regulatory proceeding that, among other sanctions, will seek to bar Lawyer from participating in transactions within the regulatory jurisdiction of the agency. Lawyer also learns that lawyers for Purchaser are about to file suit seeking substantial damages and naming Lawyer as a codefendant. To the extent necessary to gain exoneration from or to mitigate the charges imminently threatened, Lawyer may disclose confidential information about Client to the regulatory agency and to the lawyers for Purchaser.

2. Lawyers in a law firm of which Lawyer is a member file a charge with a lawyer-disciplinary agency that Lawyer has converted funds belonging to Client, whom Lawyer had represented. In order to defend against the charges, Lawyer reasonably believes that it is necessary to disclose confidential client information about Client to show that Client had consented to Lawyer's use of the funds. Client, however, refuses to discuss the charges, to testify, or to consent to Lawyer disclosing any matter about Client or Client's funds. The agency decides to file charges against Lawyer because it believes that it has sufficient evidence from other sources. To the extent reasonably necessary to obtain exoneration from or to mitigate the disciplinary charges, Lawyer may reveal otherwise confidential information about Client and the funds. Before doing so, Lawyer should inform Client of Lawyer's need to use the information and seek Client's consent to its use, unless Client has already made it clear that Client will not consent. In making the disclosure, Lawyer must limit the extent to which the information is disclosed (see Comment *e* hereto).

3. The same facts as in Illustration 2, except that Lawyer also wishes to defend against the disciplinary charges by offering as evidence confidential information concerning the law firm's treatment of funds of other clients. The affected clients refuse to consent. Unless the evidence can be offered without identifying the other clients involved, such disclosure is not warranted under

this Section because it does not concern the representation whose circumstances are in dispute.

4. Lawyer is discharged by Law Firm and files suit against it, alleging damages for wrongful discharge. Law Firm defends on the ground that Lawyer's work was incompetent. Law Firm may, to the extent reasonably necessary, employ confidential client information to support its defense of incompetence in defending against Lawyer's claim. Lawyer may, to the extent reasonably necessary, also employ confidential client information to respond to Law Firm's charges of incompetence.

There is a risk that a government agency or other complainant may assert unfounded charges against a lawyer to induce the lawyer to supply the complainant with information inculpating the lawyer's client. The risk of such abuse is to some extent unavoidable. The lawyer must minimize the risk by objecting to such abusive tactics and invoking the discretion to disclose only when it reasonably appears to the lawyer that the charge, although false, will in fact be pressed. Governmental interference with the client-lawyer relationship by unwarranted accusations, when established, should lead to severe sanctions against the governmental lawyers involved.

d. Charge against an associate or agent. This Section extends to charges against an associate or agent of a lawyer. Thus a lawyer may defend against charges of vicarious responsibility for the charged wrong, failure to exercise proper supervision of the person who allegedly perpetrated the wrong, or culpability on some other basis. The lawyer also may provide information in an effort to exonerate the associate or agent from charges against that person.

e. Proportionate and restrained use. Use or disclosure of confidential client information under this Section is warranted only if and to the extent that the disclosing lawyer reasonably believes it necessary. The concept of necessity precludes disclosure in responding to casual charges, such as comments not likely to be taken seriously by others. The disclosure is warranted only when it constitutes a proportionate and restrained response to the charges. The lawyer must reasonably believe that options short of use or disclosure have been exhausted or will be unavailing or that invoking them would substantially prejudice the lawyer's position in the controversy.

The lawyer may divulge confidential client information only to those persons with whom the lawyer must deal in order to obtain exoneration or mitigation of the charges. When feasible, the lawyer must also invoke protective orders, submissions under seal, and similar procedures to limit the extent to which the information is disseminat-

ed. A lawyer may not invoke or threaten to invoke the exception without a reasonable basis, nor for an extraneous purpose such as inducing a client to forgo a disciplinary complaint or a complaint for damages (see § 42). When a client has made a public charge of wrongdoing, a lawyer is warranted in making a proportionate and restrained public response.

Prior to making disclosure, a lawyer must if feasible inform the affected client that the lawyer contemplates doing so and call upon the client to authorize the disclosure or take other effective action to meet the charge.

f. Defense against a charge by a client. A client who files a charge of wrongdoing against a lawyer thereby waives the attorney-client privilege with respect to information relevant to the client's claim (see § 80, Comment *c*). This Section in effect recognizes a counterpart waiver for confidential client information (see § 59), including information not subject to the privilege. It also permits the accused lawyer to respond in ways other than defensive testimony, for example, by responding to a letter of grievance to a lawyer-disciplinary agency or discussing the charge with a disciplinary investigator (see Comment *c*, Illustration 1). A lawyer may decline to reveal confidential client information except in response to a formal client charge of wrongdoing.

g. Defense against a charge by a nonclient. If a person other than a client asserts that a lawyer engaged in wrongdoing in the course of representing a client, this Section permits the lawyer to disclose otherwise confidential client information in self-defense, despite the fact that the client involved has not waived confidentiality or had any role in threatening or making the charges. The analogous exception to the attorney-client privilege permits a lawyer to testify to otherwise privileged communications in self-defense against such charges (see § 83, Comment *d*).

h. Defense against a disqualification motion. A client or former client may challenge (see § 6, Comment *i*) a lawyer's representation of another client or other activities on the ground of conflict of interest (see Chapter 8). The rationale for permitting disclosure under this Section (see Comment *b*) applies as well to a such a charge. Adequate defense of such a charge may require use of otherwise confidential client information, and this Section permits the lawyer to do so. A lawyer so responding, as stated in Comment *e*, must make only proportionate and restrained disclosure. For example, in camera procedures or sealing a record may be appropriate.

REPORTER'S NOTE

Comment b. Rationale. See ABA Model Code of Professional Responsibility, DR 4–101(C)(4) (1969) ("A lawyer may reveal: ... (4) Confidences or secrets necessary ... to defend himself or his employees or associates against an accusation of wrongful conduct."); ABA Model Rules of Professional Conduct, Rule 1.6(b)(2) (1983) ("A lawyer may reveal [information relating to representation of a client] to the extent the lawyer reasonably believes necessary: ... (2) to establish a ... 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"). See also id. Rule 1.6, Comment ¶¶ [18]-[19]; § 83, infra, Reporter's Note.

See generally 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.6:305, at 174–79 (2d ed.1990 & Supp.1993); 2 J. Weinstein & M. Berger, Evidence ¶ 503(d)(3)[01] (1986); C. Wolfram, Modern Legal Ethics §§ 6.4.7, 6.7.8 (1986); 24 C. Wright & K. Graham, Federal Practice & Procedure § 5503 (1986).

Comment c. Kinds of charges within the exception. There is little authority in point. Illustration 1 is based on Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir.), cert. denied, 419 U.S. 998, 95 S.Ct. 314, 42 L.Ed.2d 272 (1974). Illustration 2 is based on the facts and result in In re Robeson, 652 P.2d 336 (Or.1982). For other decisions on the range of charges covered by this Section and referred to in Comment c, see the decisions cited in the Reporter's Note to Comment *g* hereto. See also Rule 1.6(b)(2) of the ABA Model Rules of Professional Conduct, quoted in the Reporter's Note to Comment *b*. The exception in the ABA Model Rules is probably not limited to formal proceedings. See 1 G. Hazard & W. Hodes, supra at 174.1–175. Illustrations 3 and 4 are based on ABA Model Rule 1.6; no cases in point are known. One decision has suggested that, at least with respect to a consultation (itself confidential) with a personal lawyer for advice about a disagreement with a client about the propriety of the client's actions, a lawyer has the right to reveal information when there is risk to the lawyer of personal consequences. See Jacobs v. Schiffer, 47 F.Supp.2d 16 (D.D.C.1999) (government lawyer could consult with personal counsel about rights and remedies under federal whistleblower statute without violation of confidentiality rule), rev'd on other grounds, 204 F.3d 259 (D.C.Cir.2000) (denial of court-awarded attorney fees to government lawyer reversed; government's position lacked substantial justification).

Comment d. Charge against an associate or agent. The reach of the exception to charges involving persons for whose conduct the lawyer is responsible is explicitly mentioned in DR 4–101(C)(4) of the 1969 Code, quoted in the Reporter's Note to Comment *b*. It is implied by the language in ABA Model Rules of Professional Conduct, Rule 1.6(b)(2) (1983), which refers, for example, to "a controversy between the lawyer and the client" without limitation, which is open to the interpretation that the lawyer's responsibility on a responde-

at superior basis comes within the exception. See the language quoted in the Reporter's Note to Comment *b*.

Comment c. Proportionate and restrained use. See generally ABA Model Rules of Professional Conduct, Rule 1.6, Comment ¶[18] (1983) (" ... Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable."). E.g., United States v. Sindona, 636 F.2d 792, 804 (2d Cir.1980) (self-defense exception inapplicable where communication did not tend to defend lawyer against charges or clear lawyer's name); First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 566–68 (S.D.N.Y.1986).

Comment f. Defense against a charge by a client. E.g., 2 J. Weinstein & M. Berger, Evidence ¶ 503(d)(3)[01], at 503–72 to 503–73 (1986); 8 J. Wigmore, Evidence § 2327, at 638 (J. McNaughton rev. 1961); 24 C. Wright & K. Graham, Federal Practice & Procedure § 5503, at 540 (1986).

Comment g. Defense against a charge by a nonclient. The principal case is Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir.), cert. denied, 419 U.S. 998, 95 S.Ct. 314, 42 L.Ed.2d 272 (1974). See Reporter's Note to Comment *c*. See also, e.g., Apex Mun. Fund v. N–Group Secs., 841 F.Supp. 1423, 1430 (S.D.Tex.1993) (lawyer can use privileged information in defending against nonclient's accusations even though client does not agree to waiver); Stirum v. Whalen, 811 F.Supp. 78 (N.D.N.Y.1993) (protective order permitting disclosure by codefendant lawyer to defend selves against charge in complaint of assisting defendants in perpetrating fraud); United States v. Omni Int'l Corp., 634 F.Supp. 1414, 1422 (D.Md.1986) (approving "proffer" arrangement under which lawyer disclosed material "that ordinarily would be protected by the [attorney-client] privilege" in unsuccessful attempt to extricate himself from prospective criminal charge involving complicity with client); First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 566–68 (S.D.N.Y.1986) (general counsel of now-bankrupt client entitled to make judicially supervised disclosure of otherwise privileged client information in self-defense against creditor suits); In re Friend, 411 F.Supp. 776 (S.D.N.Y.1975) (lawyer entitled to disclose confidential client information to grand jury investigating charges of criminal activities of both lawyer and client); United States v. Amrep Corp., 418 F.Supp. 473, 474 (S.D.N.Y 1976) (lawyer and client involved in *In re Friend* convicted; court rejects client's attack on conviction on ground, inter alia, that lawyer's testimony was impermissible under attorney-client privilege). Compare United States v. Weger, 709 F.2d 1151 (7th Cir.1983) (client secretly took blank piece of lawyer's stationery and used it to obtain fraudulent loan from bank based on forged title to collateral; in prosecution of client for fraud, prosecutor may introduce earlier client letter, otherwise

privileged, in order to permit expert to testify to handwriting similarities in two letters because client's use of lawyer's stationery falsely implicated lawyer in forged-title wrong).

§ 65. Using or Disclosing Information in a Compensation Dispute

A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes necessary to permit the lawyer to resolve a dispute with the client concerning compensation or reimbursement that the lawyer reasonably claims the client owes the lawyer.

Comment:

a. Scope and cross-references. Under the exception in this Section, as with other exceptions (e.g., § 64 (lawyer self-defense)), the lawyer must reasonably believe it necessary to disclose the information (see Comment *d* hereto). On the analogous exception to the attorney-client privilege, see § 83. On the rule prohibiting a lawyer from using abusive methods in resolving a fee dispute, such as unnecessary disclosure of confidential client information, see § 41. This Section applies both to claims by a lawyer for fees and disbursements, including collecting a judgment for such charges, and to defenses by a lawyer against a claim by a client that a lawyer has overcharged.

b. Rationale. Without this exception, a lawyer could be deprived of important evidence to prove a rightful claim. Clients would thus sometimes be immune from honest claims for legal fees. Moreover, at least some disclosures necessary to establish a fee will not involve information that a client would find embarrassing or prejudicial, other than in defeating the client's position in the dispute.

c. Extent of the exception. A lawyer may use confidential client information in asserting or supporting a claim for a fee or an unpaid advance of costs, expenses, or the like, and in other steps, such as asserting a lawful lien or attachment (see § 43) against the client's property. The information may be used defensively, as in resisting a client's claim that a fee already paid was unreasonable.

The exception applies regardless of the lawyer's employment relationship. Thus the exception applies to a claim by an inside legal counsel for a salary or similar financial benefits that represent payment for legal services.

d. Proportionate and restrained use or disclosure. Use or disclosure of confidential client information is permitted only to the extent that the lawyer reasonably believes necessary. The limitations on use

or disclosure for purposes of self-defense also apply under this Section (see § 64, Comment *e*). For example, use or disclosure of information that is not relevant to the dispute is unwarranted. See also § 42.

e. A claim for compensation against a third person. Claims asserted by a lawyer against a nonclient for compensation will typically be asserted on behalf of a client. Because § 61 permits use of confidential client information to advance the client's interests, it is reasonable to employ such information in establishing the client's claim for lawyer's fees, for example, a claim against a third person under a fee-shifting statute or contract (see § 38, Comment *f*).

If the claim for fees against a third person is that of the lawyer and not the client, client consent to use or disclose confidential client information to press such a claim can normally be inferred from the fact that the client retained the lawyer, unless it was agreed that the lawyer would serve without compensation. If, however, use or disclosure of the information would adversely affect a material interest of the client (see § 60(1)), it would not be reasonable to infer such consent, and explicit client consent (see § 62) is required.

REPORTER'S NOTE

Comment b. Rationale. Both the ABA Model Code of Professional Responsibility (1969) and the ABA Model Rules of Professional Conduct (1983) permit lawyers to employ confidential client information to collect a fee from the lawyer's client. See ABA Model Code, DR 4–101(C)(4) ("A lawyer may reveal ... (4) Confidences or secrets necessary to establish or collect his fee.... "); ABA Model Rule 1.6(b)(2) ("A lawyer may reveal such information to the extent the lawyer reasonably believes necessary ... (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.... "); id., Comment ¶ [19]. The evidence codes and the few extant decisions agree. See § 83, Reporter's Note.

A rationale sometimes asserted in support of the exception is that any other result would permit a client to cheat a lawyer by imparting confidences to the lawyer, an unlikely strategy. See, e.g., Doe v. A Corp., 709 F.2d 1043, 1050 (5th Cir.1983). Another rationale, not adopted in this Restatement, is that information about fees is categorically not within the attorney-client privilege and, by extension, the confidentiality rule. Compare authority cited at § 69, Reporter's Note to Comment *g*. A more appealing rationale is that, if lawyers were generally prohibited from using confidential client information to establish their fees, they would certainly be motivated to negotiate to contract around the prohibition. Clients, most of whom presumably intend to pay their bills, would have little reason to resist. Thus, the Section can be regarded as the result that would often be reached by agreement in the absence of the exception here recognized. Conversely, lawyer and client are free to negotiate restrictions on the lawyer's use of confidential infor-

mation for the purposes of fee collection that are more stringent than those of this Section.

Lawyer use of confidential client information to collect fees is controversial. The exception has been criticized as "scandalously self-serving." See A. Goldman, The Moral Foundations of Professional Ethics 101 (1980). A discussion draft of one ethics code for lawyers would have eliminated it. See Roscoe Pound–American Trial Lawyer's Ass'n, The American Lawyer's Code of Conduct, Rule 1.4 (Discussion Draft, June 1980). The exception is, however, justifiable. In the absence of such an exception, clients could refuse to pay just compensation to lawyers with impunity. Moreover, lawyers would be uniquely burdened, as no other professional privilege extends or is so relevant to compensation claims. Finally, restrained disclosure would not often result in revelation of information that, for other purposes, the client would not wish disclosed. See, e.g., C. Wolfram, Modern Legal Ethics § 6.7.8, at 308–309 (1986). One scholar has urged that judicial approval be required before a fee-collection disclosure is made. See Levine, Self-Interest or Self-Defense: Lawyer Disregard of the Attorney Client Privilege for Profit and Protection, 5 Hofstra L. Rev. 783, 825–26 (1977). Although theoretically appealing, such a procedure would encumber informal methods of resolving fee conflicts, such as fee arbitration, and would require a two-stage proceeding in order to file a fee suit or counterclaim against a client.

Comment c. Extent of the exception. On the use of confidential client information to attach client property in connection with a fee claim, see, e.g., Nakasian v. Incontrade, Inc., 409 F.Supp. 1220, 1224 (S.D.N.Y.1976). The exception does not extend to collateral proceedings, even if there is some economic point to the lawyer's collateral search for payment or the means thereof. See In re Rindlisbacher, 225 B.R. 180 (9th Cir. Bank.App. 1998) (lawyer may not employ confidential client information in attempt to defeat effort of client to obtain bankruptcy discharge).

Comment d. Proportionate and restrained use or disclosure. The claim for a fee must be advanced in good faith. See In re Jordan, 712 P.2d 97, 99 (Or.1985) (fee claim merely incidental to suit for damages filed by lawyer for one client against another not within allowance of DR 4–101(C)(4)). On limiting the use of confidential client information in a compensation claim, see, e.g., Doe v. A Corp., 709 F.2d 1043, 1044 n.1 (5th Cir.1983) (apparently approving action of trial court, in class-action suit by former inside legal counsel against former employer-client on pension claim, in ordering record be sealed, suit to be prosecuted without disclosing name of either party, and lawyer to be enjoined from filing any similar suits on behalf of any other client, inducing any other person to file suit, or otherwise disclosing or using information gained in employment); Florida Bar v. Ball, 406 So.2d 459 (Fla. 1981) (discipline of lawyer who attempted to pressure clients to pay fee in adoption matter by informing adoption agency that clients might be financially unstable because of inability to pay lawyer's fee).

Comment e. A claim for compensation against a third person. No authority directly in point has been found for the Comment.

§ 66. Using or Disclosing Information to Prevent Death or Serious Bodily Harm

(1) 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.

(2) Before using or disclosing information under this Section, the lawyer must, if feasible, make a good-faith effort to persuade the client not to act. If the client or another person has already acted, the lawyer must, if feasible, advise the client to warn the victim or to take other action to prevent the harm and advise the client of the lawyer's ability to use or disclose information as provided in this Section and the consequences thereof.

(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.

Comment:

a. Scope and cross-references. This Section states an exception to the general duty of confidentiality in § 60(1), recognizing discretion in a lawyer to prevent the consequences of threats to life or personal safety. The rule stated in this Section is distinguishable from financial-harm disclosure under § 67 in three principal ways. First, the threat here need not be the product of a client act (see Comment *c* hereto). Second, the threat need not be created by a criminal or otherwise unlawful act (see id.). Third, the lawyer's services need not have been used to bring about the threatened death or serious bodily harm. As with § 67, a lawyer has discretion under this Section even if the use or disclosure threatens harm to the lawyer's client (see id.).

On cross-references to other Sections, see § 67, Comment *a*.

b. Rationale. The exception recognized by this Section is based on the overriding value of life and physical integrity. Threats to life or body encompassed within this Section may be the product of an act of the client or a nonclient and may be created by wrongful acts, by accident, or by circumstances. See Comment *c*. In all such events, the ultimate threat is the same, and its existence suffices to warrant a lawyer's taking corrective steps to prevent the threatened death or serious bodily harm.

No lawyer code explicitly permits disclosure, as broadly as permitted by Subsection (1), solely on the justification that death or serious bodily harm is threatened, such as where a lawyer becomes aware that a person's life is at risk because of a noncriminal act of a client. There are no reported judicial decisions on the issue. On the other hand, it seems highly unlikely that a court would impose discipline or other liability on a lawyer in an instance within Subsection (1), should the lawyer act reasonably, even in a way that prejudices the client, to remove the threat to life or body. Moreover, seven states do permit (indeed require) disclosure of a client's wrongful violent act to prevent harm.

c. Use or disclosure to prevent death or serious bodily harm. Subsection (1) applies whenever a lawyer has a reasonable basis for believing that use or disclosure of a client's confidential information is necessary to prevent reasonably certain death or serious bodily harm to a person. On what constitutes reasonable belief, see § 67, Comment *h*. A threat within Subsection (1) need not be the product of a client act; an act of a nonclient threatening life or personal safety is also included, as is a threat created through accident or natural causes. It follows that if such a threat is created by a person, whether a client or a nonclient, there is no requirement that the act be criminal or otherwise unlawful.

Illustration:

1. Lawyer is representing Defendant, a responding party in a suit by Plaintiff seeking damages for personal injuries arising out of a vehicle accident. Lawyer asks Doctor, as a consulting expert, to conduct an evaluation of medical evidence submitted by Plaintiff in support of a claim of personal injury. Following the examination, Doctor reports to Lawyer that Plaintiff has an undiagnosed aortal aneurism, which is serious and life-threatening but which can readily be repaired through surgery. Lawyer knows from work on the case that Plaintiff, as well as Plaintiff's treating physician, lawyer, and medical experts, are unaware of the condition. Lawyer is also aware that, if notified of the condition, Plaintiff will likely claim significant additional damages following corrective surgery. Despite Lawyer's urging, Defendant refuses to permit revelation of the condition to Plaintiff. Under this Section, Lawyer has discretion under Subsection (1) to reveal the condition to Plaintiff.

So long as the predicate threat to life or body exists, discretion under Subsection (1) exists notwithstanding that the threat is created by the completed act of a person (including a client) or that the lawyer's information comes from otherwise privileged conversations.

Illustrations:

2. Client seeks legal advice from Lawyer about his dismissal from a maintenance position by Landlord and eviction from his apartment. In expressing his anger about Landlord, Client reveals that Client has set a mechanical device to ignite and burn down the building. Lawyer has reason to believe that there are people living in the building. Despite Lawyer's remonstration, Client refuses to take any action to prevent the fire or to warn others. Despite the risk that calling the fire department or police may result in serious criminal charges against Client, Lawyer has discretion under Subsection (1) to do so.

3. As the result of confidential disclosures at a meeting with engineers employed by Client Corporation, Lawyer reasonably believes that one of the engineers released a toxic substance into a city's water-supply system. Lawyer reasonably believes that the discharge will cause reasonably certain death or serious bodily harm to elderly or ill persons within a short period and that Lawyer's disclosure of the discharge is necessary to permit authorities to remove that threat or lessen the number of its victims. Lawyer's efforts to persuade responsible Client Corporation personnel to take corrective action have been unavailing. Although the act creating the threat has already occurred, Lawyer has discretion to disclose under Subsection (1) for the purpose of preventing the consequences of the act.

In circumstances such as those in Illustration 3, the Section applies even if the act creating the threat of death or serious bodily harm was not a crime or fraud. In other situations, the likelihood that other actors know about and will eliminate the risk may be relevant. Most situations will be intensely fact-sensitive. For example, the character of a threatened act as a crime or fraud suggests a state of mind on the part of the perpetrator that is more threatening to the intended victim than an act that is merely negligent or not wrongful, and thus may more readily warrant the lawyer's conclusion that the risk of harm is great.

Serious bodily harm within the meaning of the Section includes life-threatening illness and injuries and the consequences of events

such as imprisonment for a substantial period and child sexual abuse. It also includes a client's threat of suicide.

Illustration:

4. Lawyer advises Manufacturer on product-liability matters. Lawyer had previously advised Manufacturer that use of Component A in a consumer product did not create an unreasonable risk of harm and was in compliance with consumer-protection and other law. Lawyer has now learned that Supplier, unknown to Manufacturer, provided Component A in a form not in compliance with Manufacturer's specifications. Manufacturer promptly altered its production methods so as to avoid any significant risk of harm in products manufactured in the future. There is a slight statistical chance that a consumer using the prior version of the product containing the noncomplying version of Component A might suffer serious bodily harm, but only in a highly unlikely combination of circumstances. Manufacturer's responsible officers have decided not to issue a public notice of the slightly increased risk of harm. Lawyer does not have discretion under this Section to use or disclose Manufacturer's confidential information to make a public warning of the slightly increased risk of harm.

d. A lawyer's reasonable belief. A lawyer's discretion to take appropriate action to prevent death or serious bodily harm under this Section is predicated on the lawyer's reasonable belief that the action is necessary to prevent reasonably certain death or serious bodily harm to a person. Some factors stated in Comment *f* as relevant to a lawyer's choice of appropriate action will also be relevant to the lawyer in assessing whether a situation warranting action exists. Some facts, particularly concerning future acts and probabilities and a client's or third person's subjective state of mind, may be unlikely or difficult for the lawyer to ascertain. Before making disclosure where such facts are ambiguous, the lawyer must make a reasonable effort to determine the relevant facts, taking into account the risks inherent in either action or inaction by the lawyer. As with other matters affecting a lawyer's responsibilities that may arise in the course of representing a client, a lawyer may consult with another lawyer about whether to proceed under this Section.

The Section refers (as does § 67) to a lawyer's reasonable belief that use or disclosure is "necessary" to prevent "reasonably certain" death or serious bodily harm, while ABA Model Rules of Professional Conduct, Rule 1.6(b)(1) (1983) (in its exception dealing with threats of

death or bodily harm) refers to "imminent" death or serious bodily harm. The concept of imminence is included in the meaning of the terms "necessary" and "reasonably certain" death or bodily harm in that the need to act must be reasonably believed to exist in view of a present threat of probable death or bodily harm. The concept of imminence is susceptible of an overly narrow interpretation, under which use or disclosure would be precluded until immediately before the threatened death or bodily harm would occur. While such occasions are included within the Section, a lawyer is also permitted to act under the Section whenever the lawyer reasonably believes that intervention is necessary in response to a present threat, even if the death or serious bodily harm appears likely to occur some time in the future. ABA Model Rules of Professional Conduct, Rule 1.6(b)(1) (1983) can be similarly interpreted.

e. Counseling a client. As does § 67(3), Subsection (2) requires counseling with the client, if feasible. The interest protected by such counseling is the client's interest in limiting use or disclosure of confidential information and in taking responsible action to deal with situations that may be of the client's own making or attributable to the client. If a client, whether in response to a lawyer's counseling or otherwise, takes corrective action—such as by ceasing the threatened act before harm is caused—use or disclosure by the lawyer would not be necessary and therefore would not be permissible under this Section. Particularly when the actor is a nonclient or when the act is deliberate or malicious, a lawyer making adverse use or disclosure under this Section may, in the circumstances, reasonably conclude that superior interests of the lawyer or others in their own personal safety preclude personal contact with the actor.

f. Appropriate action. A lawyer's use or disclosure under this Section is a last resort when no other available action is reasonably likely to prevent the threatened death or serious bodily harm. Use or disclosure, when made, should be no more extensive than the lawyer reasonably believes necessary to accomplish the relevant purpose.

Preventive steps that a lawyer may appropriately take include consulting with relatives or friends of the person likely to cause the death or serious bodily harm and with other advisers to that person. (The lawyer may also seek the assistance of such persons in efforts to persuade the person not to act or to warn the threatened victim (see Comment *e* hereto).) A lawyer may also consult with law-enforcement authorities or agencies with jurisdiction over the type of conduct involved in order to prevent it and warn a threatened victim.

What particular measures are reasonable depends on the circumstances known to the lawyer. Relevant circumstances include the

degree to which it appears likely that the threatened death or serious bodily harm will actually result, the irreversibility of its consequences once the act has taken place, the time available, whether victims might be unaware of the threat or might rely on the lawyer to protect them, the lawyer's prior course of dealings with the client, and the extent of adverse effect on the client that may result from disclosure contemplated by the lawyer. The lawyer must reasonably believe that the measures are appropriate and that they will entail no more adverse consequences to the client than necessary (see also § 64, Comment *e*).

When a lawyer has taken action under the Section, in all but extraordinary cases the relationship between lawyer and client would have so far deteriorated as to make the lawyer's effective representation of the client impossible. Generally, therefore, the lawyer is required to withdraw from the representation (see § 32(2)(a) & Comment *f* thereto), unless the client gives informed consent to the lawyer's continued representation notwithstanding the lawyer's adverse use or disclosure of information. In any event, the lawyer generally must inform the client of the fact of the lawyer's use or disclosure (see § 20(1)), unless the lawyer has a superior interest in not informing the client, such as to protect the lawyer from wrongful retaliation by the client, to effectuate permissible measures that are not yet complete, or to prevent the client from inflicting further harms on third persons.

g. Effects of a lawyer taking or not taking discretionary remedial action. A lawyer's decision to take action to disclose or not to disclose under this Section is discretionary with the lawyer (compare § 63 (disclosure required by law)). Such action would inevitably conflict to a significant degree with the lawyer's customary role of protecting client interests. Critical facts may be unclear, emotions may be high, and little time may be available in which the lawyer must decide on an appropriate course of action. Subsequent re-examination of the reasonableness of a lawyer's action in the light of later developments would be unwarranted; reasonableness of the lawyer's belief at the time and in the circumstances in which the lawyer acts is alone controlling.

As stated in Subsection (3) and in the corresponding § 67(4), a lawyer who takes action or decides not to take action in a situation described in and consistent with the rule of the Section and § 67 is not, by reason of such action or inaction alone, liable for professional discipline or liable for damages to the client or any third person injured by the client's action. Similarly, a client may not assert as an affirmative defense in a fee or similar suit that the lawyer has or has not taken steps permitted under the Section (see § 37). The same results apply with respect to questions of the vicarious liability (see

§ 58) of the firm in which the lawyer practices. That is precluded both because of the absence of any violation of duty by the individual lawyer (see § 58(1)) and because vicarious liability would be equally inconsistent with the reasons, stated above, for treating the lawyer's action or inaction as discretionary. Apart from this Section or § 67(4), a lawyer would of course remain liable for otherwise actionable wrongs, such as by participating with a client as a co-principal or accessory in the client's wrongful act (see § 8, Comment *e*).

Because the interests protected by the rule are those of the public and third persons, the discretion of a lawyer to take action consistent with the Section may not be contracted away by agreement between the lawyer and the client or the lawyer and a third person (compare § 23(1)).

REPORTER'S NOTE

Comment b. Rationale. ABA Model Rules of Professional Conduct, Rule 1.6(b)(1) (1983) is substantially more limited than the Section, providing for discretion to reveal confidential client information only when the lawyer reasonably believes it 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." On the more permissive rule in many jurisdictions and as recommended by the Kutak Commission, see § 67, Comment *b*, and Reporter's Note thereto. As indicated in this Comment, seven states require a lawyer to reveal the intention of a client to commit a serious violent crime. See also, e.g., Russell, Cries and Whispers: Environmental Hazards, Model Rule 1.6, and the Attorney's Conflicting Duties to Clients and Others, 72 Wash. L. Rev. 409, 444–48 (1997) (state-by-state description of disclosure rule in death and serious bodily harm situations). Three states have rules in accord with the Section, although each state (unlike this Section) requires disclosure. See Fl. R. Prof. Conduct, Rule 1.6(b)(2) (lawyer must reveal information lawyer believes "necessary to prevent death or substantial bodily harm to another"); Ill. R. Prof. Conduct, Rule 1.6(b) ("A lawyer shall reveal information about a client to the extent it appears necessary to prevent client from committing an act that would result in death or serious bodily harm"); N.D. R. Prof. Conduct, Rule 1.6 (revelation or use of client information "required 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").

Comment c. Seriously harmful acts. On threats of physical harm, see, e.g., People v. Cox, 809 P.2d 351, 369 (Cal.1991), cert. denied, 502 U.S. 1062, 112 S.Ct. 945, 117 L.Ed.2d 114 (1992) (requirement of ABA Model Rule 3.3(a)(2) to disclose material fact to tribunal when necessary to avoid assisting criminal or fraudulent act by client includes alerting court to otherwise unidentified "matters that might threaten the security of the proceedings"); In re Gonnella, 570 A.2d 53 (N.J.Super.Ct.Law Div.1989)

(permissible for criminal-defense lawyer to convey client's threat to have lawyer for codefendant killed if lawyer not removed from representation); see generally Russell, Cries and Whispers: Environmental Hazards, Model Rule 1.6, and the Attorney's Conflicting Duties to Clients and Others, 72 Wash. L. Rev. 409 (1997). See also, e.g., People v. Fentress, 425 N.Y.S.2d 485 (N.Y.Cty.Ct.1980) (discussion of disclosure of situation to police, against client's expressed wishes, when lawyer learned from client over telephone that client's victim may be still alive and client had threatened suicide).

In the only reported case on a duty to act, a court refused to permit a suit against a lawyer brought by a former client and the client's mother, rejecting an argument that the lawyer had a duty to disclose the client's mental state at a bail hearing, where the client was released and suffered personal injuries in an ensuing suicide attempt, because the plaintiffs had been aware of the danger. Hawkins v. King County, 602 P.2d 361 (Wash.Ct.App.1979).

Illustration 1 is based on the facts in Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn.1962) (no abuse of discretion for trial court to reopen judgment after plaintiff, in military examination, discovered previously undiagnosed aortal aneurism). Illustration 2 is based on the facts in Purcell v. District Attorney, 676 N.E.2d 436 (Mass.1997), which in dicta approved the lawyer's report to authorities.

Comment d. A lawyer's reasonable belief. See ABA Model Rules of Professional Conduct, Rule 1.6(b)(1) (1983), quoted in Reporter's Note to Comment *b* hereto; id., Terminology ¶ [8] (definition of reasonable belief). See also § 67, Comment *h*, and Reporter's Note thereto.

Comment e. Counseling a client. See § 67, Comment *i*, and Reporter's Note thereto.

Comment f. Appropriate action. See § 67, Comment *j*, and Reporter's Note thereto.

Comment g. Effects of a lawyer taking or not taking discretionary remedial action. See ABA Model Rules of Professional Conduct, Rule 1.6, Comment ¶ [13] (1983) (" . . . A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule."); id., Scope ¶ [8] ("The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination."). On ABA Model Rule 1.6(b)(1), see Reporter's Note to Comment *b* hereto. On the general question of liability to third persons, see § 51. See also § 67, Comment *k*, and Reporter's Note thereto.

§ 67. Using or Disclosing Information to Prevent, Rectify, or Mitigate Substantial Financial Loss

(1) A lawyer may use or disclose confidential client information when the lawyer reasonably believes that its use or disclosure is necessary to prevent a crime or fraud, and:

(a) the crime or fraud threatens substantial financial loss;

(b) the loss has not yet occurred;

(c) the lawyer's client intends to commit the crime or fraud either personally or through a third person; and

(d) the client has employed or is employing the lawyer's services in the matter in which the crime or fraud is committed.

(2) If a crime or fraud described in Subsection (1) has already occurred, a lawyer may use or disclose confidential client information when the lawyer reasonably believes its use or disclosure is necessary to prevent, rectify, or mitigate the loss.

(3) Before using or disclosing information under this Section, the lawyer must, if feasible, make a good-faith effort to persuade the client not to act. If the client or another person has already acted, the lawyer must, if feasible, advise the client to warn the victim or to take other action to prevent, rectify, or mitigate the loss. The lawyer must, if feasible, also advise the client of the lawyer's ability to use or disclose information as provided in this Section and the consequences thereof.

(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.

Comment:

a. Scope and cross-references. This Section states exceptions to the general confidentiality rule of § 60(1) and recognizes discretion in a lawyer to prevent, mitigate, or rectify the described types of financial loss to another person even if the use or disclosure threatens risk to the lawyer's client. The exception applies when a client intends to commit a criminal or fraudulent act and permits a lawyer, in taking reasonable preventive or corrective measures, to use or disclose confidential client information to prevent the act or to rectify or mitigate it.

Unless this Section or § 66 applies, a lawyer may use or disclose confidential client information only if the client consents (see § 62), if other law so requires (see § 63), or if reasonably necessary in a lawyer's self-defense (see § 64) or in a compensation dispute (see § 65).

On the crime-fraud exception to the attorney-client privilege, see § 82. For a comparison of the Sections, see Comment *c* hereto. On the rule that disclosure under this Section (or § 66) does not constitute waiver by subsequent disclosure for purposes of the attorney-client privilege, see Comment *c* hereto and § 79, Comment *c*.

On a lawyer's nonliability for action or inaction under this Section, see Comment *k* hereto. On a lawyer's liability for certain client harms to described third persons, see §§ 51 and 56.

On a lawyer's general responsibilities with respect to counseling or assisting a client concerning illegal acts, see § 94. See also Comment *i* hereto. On providing information to a client, see generally § 20. On advising an organizational client, see § 96; on advising a governmental client, see § 97. With respect to a lawyer's duties and discretion when dealing with perjury by a client or other witness or with other false evidence, see § 120. A lawyer has the right to withdraw when the lawyer reasonably believes the client is employing the lawyer's assistance to aid wrongful acts, including breaches of fiduciary duty (see § 32(3)(d) & (e)). On a lawyer's duty to withdraw after using or disclosing confidential client information under the Section, see Comment *j* hereto.

b. Rationale. The exceptions recognized in this Section reflect a balance between the competing considerations of protecting interests in client confidentiality and lawyer loyalty to clients, on the one hand, and protecting the interests of society and third persons in avoiding substantial financial consequences of crimes or frauds, on the other. The integrity, professional reputation, and financial interests of the lawyer can also be implicated under Subsections (1) and (2) in view of the requirement that the lawyer's services have been employed in commission of the crime or fraud. The exceptions are also justified on the ground that the client is not entitled to the protection of confidentiality when the client knowingly causes substantial financial harm through a crime or fraud and when, as required under Subsections (1) and (2), the client has in effect misused the client-lawyer relationship for that purpose. In most instances of unlawful client acts that threaten such consequences to others, it may be hoped that the client's own sober reflection and the lawyer's counseling (see Comment *i* hereto) will lead the client to refrain from the act or to prevent or mitigate its consequences.

The issues addressed in this Section are variously treated in American jurisdictions. The 1983 ABA Model Rules of Professional Conduct (1983), in Rule 1.6(b), recommended a narrow rule that would permit use or disclosure only in the case of a client's "criminal act that the lawyer believes is likely to result in imminent death or substantial

bodily harm ... " (compare § 66). Some sponsors of that formulation asserted that, despite the absence of explicit permission to act to prevent client fraud, Rule 1.6(b) nonetheless permitted a lawyer to act to prevent a client's crime or fraud as long as the lawyer did not disclose as such the explicit content of communications from the client. In any event, only a small minority of jurisdictions have adopted the apparently restrictive formulation of ABA Model Rule 1.6(b). As indicated in the Reporter's Note, over 40 jurisdictions have rejected the recommended model rule and have broadened the rule so as to permit use or disclosure to prevent substantial financial injury. Seventeen states also permit use or disclosure to rectify past and completed client fraud, which Subsection (2) also permits (see Comment *f* hereto). Lawyer codes in seven states mandate disclosure in at least some circumstances of client fraud; there is no similar requirement in this Section.

The exceptions stated in this Section permit a lawyer to exercise discretion to prevent the described loss to third persons, even though adverse effects might befall the client as a result. The exceptions are extraordinary. The only acts covered under the Section are the described crimes or frauds that threaten substantial financial loss to others. Clients remain protected in consulting a lawyer concerning the legal consequences of any such act in which the lawyer's services were not employed, including acts constituting crimes or frauds.

The discretion recognized in this Section may to an unknowable extent lessen some clients' willingness to consult freely with their lawyers. In this respect, the Section has an effect similar to that of the crime-fraud exception to the attorney-client privilege (see § 82; see also Comment *d* hereto). The social benefits of allowing a lawyer to prevent, mitigate, or rectify substantial financial loss to intended victims of criminal or fraudulent client acts under the described circumstances warrant incurring that additional risk.

Not all crimes and frauds are covered by this Section, but only those that involve a risk of substantial financial loss. The Section applies when a client intends to commit a crime or fraud either personally or through a third person (see Subsection (1)(c)). What constitutes a crime or a fraud is determined under otherwise applicable law. The distinction between acts entailing risks of such loss and other acts that may also be criminal or fraudulent reflects a balance between client confidentiality (see § 60, Comment *b*) and protection of third persons. It could be argued that a lawyer's discretion should be constrained in another manner, for example through case-by-case balancing of those competing interests, perhaps including as a factor the extent to which exercise of the lawyer's discretion would harm the client. Lawyers can be expected to take into account that and other

relevant considerations in determining whether to exercise the professional discretion that the Section recognizes. However, the Section does not require that the lawyer exercise discretion only after explicitly making such an evaluation or in any other particular manner.

c. Comparison with the crime-fraud exception to the attorney-client privilege. This Section generally corresponds to the crime-fraud exception to the attorney-client privilege (see § 82, Comment *d*). Somewhat different considerations underlie the two rules and they operate in different settings, testimonial and nontestimonial. This Section and § 82 both apply to client crimes or frauds. Both apply to acts that a client intends to commit and to acts by a third person whom the client intends to aid.

This Section applies only when the likelihood of financial loss is great and the lawyer reasonably believes that use or revelation is necessary to prevent the crime or fraud or to prevent, rectify, or mitigate the loss it causes (see Comment *f* hereto). In contrast, the crime-fraud exception to the attorney-client privilege stated in § 82 applies without regard to the consequences of the intended act so long as the act itself is a crime or fraud. That exception to the attorney-client privilege applies only when a client consults a lawyer with intention to obtain assistance to commit a crime or fraud or so uses the lawyer's services, whereas the Section applies regardless of the client's intention at the time of consultation (see Comment *g* hereto). The crime-fraud exception to the attorney-client privilege is administered by a tribunal and applies only when a lawyer or another person is called upon to give evidence, whereas the Section concerns action that a lawyer may take on the basis of a reasonable belief and outside of any proceeding and thus without direction from a judicial officer. Finally, this Section is limited to client acts in which a lawyer's services are employed; the crime-fraud exception applies whether or not the lawyer's services are so employed. Due to the several differences in the requirements for this Section and § 82, a finding that a lawyer permissibly used or disclosed confidential client information under this Section and a determination whether § 82 applies must be made independently.

Lawyer disclosure under this Section is taken in the lawyer's personal capacity and not as agent. Accordingly, such disclosure would not constitute disclosure by an agent of the client for purposes of subject-matter waiver of other confidential communications under § 79 (see § 79, Comment *c*).

d. Client crime or fraud. As with the corresponding crime-fraud exception to the attorney-client privilege (see § 82), this Section is limited to acts that under applicable law constitute crimes and frauds.

"Fraud" as employed in this Section has the same limited meaning stated in § 82, Comment *d*. As there stated, inaction (through nondisclosure) as well as action may constitute fraud under applicable law. Many acts that will have seriously harmful financial consequences are denominated as crimes or frauds in the law. However, some acts causing financial loss to third persons constitute breaches of other legal obligations, such as intentional torts, breaches of contract, violation of property rights, or violations of statutory, regulatory, or other legal duties that are not crimes or frauds. Some of those acts may be particularly opprobrious in specific instances. However, society has traditionally defined seriously wrongful conduct in terms of crime and fraud. Limiting the exceptions in this Section to crime and fraud is also a matter of practicality, because no other categorical description of harmful acts provides an equally definite limitation on these exceptions to a lawyer's duty of confidentiality.

e. Employment of the lawyer's services in the client's act. Use or disclosure under either Subsection (1) or (2) requires that the lawyer's services are being or were employed in commission of a criminal or fraudulent act. The lawyer's involvement need not be known to or discoverable by the victim or other person. Subsections (1) and (2) apply without regard either to the lawyer's prior knowledge of the client's intended use of the lawyer's services or to when the lawyer forms a reasonable basis for a belief concerning the nature of the client's act. Such employment may occur, for example, when a client has a document prepared by the lawyer for use in a criminal or fraudulent scheme, receives the lawyer's advice concerning the act to assist in carrying it out, asks the lawyer to appear before a court or administrative agency as part of a transaction, or obtains advice that will assist the client in avoiding detection or apprehension for the crime or fraud. It is not necessary that the lawyer's services have been critical to success of the client's act or that the services were specifically requested by the client. It suffices if the services were or are being employed in the commission of the act.

Illustrations:

1. As part of a business transaction, Lawyer on behalf of Client prepares and sends to Victim an opinion letter helpful to Client in completing an aspect of the transaction. At the time of preparing and sending the opinion letter, Lawyer had no reason to believe that the transaction was other than proper, but Lawyer thereafter receives information giving reason to believe the transaction constitutes a crime or fraud by Client within this Section. If the other conditions of the Section are present, Lawyer's opinion

letter will have been employed in commission of Client's act, and Lawyer accordingly has discretion to use or disclose confidential information of Client as provided in the Section.

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

Legal assistance provided only after the client's crime or fraud has already been committed is not within this Section, whether or not loss to the victim has already occurred, if the lawyer's services are not employed for the purposes of a further crime or fraud, such as the crime of obstruction of justice or other unlawful attempt to cover up the prior wrongful act. While applicable law may provide that a completed act is regarded for some purposes as a continuing offense, the limitation of Subsection (1)(d) applies with attention to the time at which the client's acts actually occurred.

Illustrations:

3. Client has been charged by a regulatory agency with participation in a scheme to defraud Victim. Client seeks the assistance of Lawyer in defending against the charges. The loss to Victim has already occurred. During the initial interview and thereafter, Lawyer is provided with ample reason to believe that Client's acts were fraudulent and caused substantial financial loss to Victim. Because Lawyer's services were not employed by Client in committing the fraud, Lawyer does not have discretion under this Section to use or disclose Client's confidential information.

4. The same facts as in Illustration 3, except that the law of the applicable jurisdiction provides that each day during which a wrongdoer in the position of Client fails to make restitution to Victim constitutes a separate offense of the same type as the original wrong. Notwithstanding the continuing-offense law, commission of the fraudulent act of Client has already occurred without use of Lawyer's services. As in Illustration 3, Lawyer does not have discretion under this Section to use or disclose Client's confidential information.

f. Use or disclosure to prevent (Subsection (1)) or to rectify or mitigate (Subsection (2)) a client wrongful act. A lawyer has discretion to use or disclose under this Section when necessary to achieve either of two different purposes—to prevent the act from occurring (Subsection (1)) or to prevent, rectify, or mitigate loss caused by the act (Subsection (2)). Under Subsection (1), a lawyer may take preventive measures even though some act has already occurred, if some material part of the crime or fraud has not yet occurred or has not yet been inflicted on a victim. For example, in a criminal or fraudulent transaction involving more than one step, a lawyer would have discretion to take preventive action under Subsection (1) if some acts remained to be accomplished. Further, if all steps in a transaction to be taken by the client have already occurred, but the intended victim has not taken a final step, such as dispatching funds to the client, action to warn the victim not to take final steps is permissible preventive action within Subsection (1).

Action by the lawyer to prevent, rectify, or mitigate loss under Subsection (2) is in addition to and goes beyond that permitted for preventive purposes under Subsection (1). Actions to prevent, rectify, or mitigate the loss caused by the client's act include correcting or preventing the effects of the client's criminal or fraudulent act, even if the client's crime or fraud has already occurred and regardless of whether its impact has been visited upon the victim. Thus, a lawyer who acquires information from which the lawyer reasonably believes that a client has already defrauded a victim in a scheme in which the lawyer's services were employed may disclose the fraud to the victim when necessary to permit the victim to take possible corrective action, such as to initiate proceedings promptly in order to seize or recover assets fraudulently obtained by the client.

Once use or disclosure of information has been made to prevent, rectify, or mitigate loss under Subsection (2), the lawyer is not further warranted in actively assisting the victim on an ongoing basis in pursuing a remedy against the lawyer's client or in any similar manner aiding the victim or harming the client. Thus, a lawyer is not warranted under this Section in serving as legal counsel for a victim (see also § 132), volunteering to serve as witness in a proceeding by the victim, or cooperating with an administrative agency in obtaining compensation for victims. The lawyer also may not use or disclose information for the purpose of voluntarily assisting a law-enforcement agency to apprehend and prosecute the client, unless the lawyer reasonably believes that such disclosure would be necessary to prevent, rectify, or mitigate the victim's loss. On the rule that disclosure of confidential

client information does not constitute waiver of the client's privilege due to subsequent disclosure by an agent, see Comment *c* hereto.

Illustrations:

5. Lawyer has assisted Client in preparing documents by means of which Client will obtain a $5,000,000 loan from Bank. The loan closing occurred on Monday and Bank will make the funds available for Client's use on Wednesday. On Tuesday Client reveals to Lawyer for the first time that Client knowingly obtained the loan by means of a materially false statement of Client's assets. Assuming that the other conditions for application of Subsection (2) are present, while Client's fraudulent act of obtaining the loan has, in large part, already occurred, Lawyer has discretion under the Subsection to use or disclose Client's confidential information to prevent the consequences of the fraud (final release of the funds from Bank) from occurring.

6. The same facts as in Illustration 5, except that Lawyer learned of the fraud on Wednesday after Bank had already released the funds to Client. Under Subsection (2), Lawyer's use or disclosure would be permissible if necessary for the purpose, for example, of enabling Bank to seize assets of Client in its possession or control as an offset against the fraudulently obtained loan or to prevent Client from sending the funds overseas and thereby making it difficult or impossible to trace them.

g. Client's intent. It is not required that the client's requisite intent existed at the time the client consulted the lawyer. For example, the client may form a plan to employ the lawyer's former services in drafting documents in a scheme that the client devises after the lawyer's services have ended. The client need not be aware specifically that the contemplated act was a crime or fraud (see also § 82, Comment *c*). As stated in Subsection (1)(c), the client may act either directly or through a third person. The Section does not apply if the lawyer is aware that the client's purpose had been abandoned, because in that situation disclosure is no longer necessary as required by the Section.

h. A lawyer's reasonable belief. A lawyer's discretion to take appropriate measures to prevent financial loss under this Section or to rectify or mitigate it is predicated on the lawyer's reasonable belief that the client intends to engage in the described crime or fraud and that the lawyer's use or disclosure is necessary to prevent the loss or to rectify or mitigate it. Some facts, particularly concerning future acts

and probabilities and a client's subjective state of mind, may be difficult to ascertain. Before making disclosure in such circumstances, the lawyer must make a reasonable effort to determine the relevant facts. As with other matters affecting a lawyer's responsibilities that may arise in the course of representing a client, a lawyer may consult with another lawyer about whether to proceed under the Section. See also § 66, Comment *d*.

i. Counseling a client. When a lawyer becomes aware of a client's intent to pursue a course of action that is criminal or fraudulent, the lawyer may be able, through appeal to the good judgment and moral sense of the client, to persuade the client to abandon the intended course or to make whole any victim of a fraudulent or criminal act (see § 94). Such counseling may avoid difficulties for the client and others. Accordingly, before a lawyer may take remedial action under the Section, the lawyer must consult with the affected client as stated in Subsection (3), if consultation is feasible in view of the imminence of the threatened loss and similar time considerations, the likelihood of the threatened activity and its consequences and the apparent firmness of the client's intentions, any risk to the lawyer or others that may be reasonably apprehended, and other constraints. In the course of consulting with the client, the lawyer must ordinarily inform the client of the lawyer's ability to act pursuant to this Section if the client fails to take corrective action (see § 20), unless the lawyer has a superior interest in not informing the client, such as to protect the lawyer from reasonably apprehended and wrongful retaliation by the client, to effectuate permissible measures that are not yet complete, or to prevent the client from inflicting further financial loss on third persons. If a client, whether in response to a lawyer's counseling or otherwise, takes corrective action—such as by ceasing the threatened act before loss is caused—use or disclosure by the lawyer would not be necessary and therefore would not be permissible under this Section.

j. Appropriate action. A lawyer's use or disclosure of information under the Section is a last resort when no other available action is reasonably likely to prevent the threatened financial loss or to rectify or mitigate it. Use or disclosure, when made, should be no more extensive than the lawyer reasonably believes necessary to accomplish the relevant purpose. On consulting with suitable advisers to a client, the importance of the circumstances known to the lawyer in determining the reasonableness of measures taken, withdrawal by the lawyer, and informing the client after use or disclosure, see § 66, Comment *f*.

In using or disclosing under this Section, the lawyer may also withdraw or disaffirm opinion letters, affidavits, and other legal documents that had been prepared for the client or others that might be

employed or that might have been employed in furthering the crime or fraud or contributed to its consequences. In addition, under § 64, a lawyer may take steps that are justified as reasonably appropriate to defend the lawyer and the lawyer's associates against a charge of wrongdoing arising from the representation. Other law may require a lawyer to use or disclose confidential client information in such circumstances (see § 63).

Comment k. Effects of a lawyer taking or not taking discretionary remedial action. The rule of Subsection (4) corresponds to that of § 66(3). See also § 66, Comment *g*.

REPORTER'S NOTE

Comment b. Rationale. The law on the issues considered in this Section is found largely in the lawyer codes and academic and professional literature; very few decisions have discussed the matter. The subject was the chief disputed issue in considering adoption of the proposed ABA Model Rules of Professional Conduct (1983). See generally 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.6:109 et seq. (2d ed.1990); C. Wolfram, Modern Legal Ethics § 12.6 (1986); Hazard, Rectification of Client Fraud: Death and Revival of a Professional Norm, 33 Emory L. J. 271 (1984); Sabin, The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm, 70 Iowa L. Rev. 1091 (1985); Pizzimenti, The Lawyer's Duty to Warn Clients About the Limits of Confidentiality, 39 Cath. U. L. Rev. 441 (1990); see also ABA Center for Prof. Resp., Legislative History of the Model Rules of Professional Conduct 47–55 (1987).

The ABA Model Code of Professional Responsibility (1969) contained two sections that bear on the subject. In DR 4–101(C)(3), the following exception was provided to the broad definition of confidential client information stated in DR 4–101(A):

> (c) A lawyer may reveal: . . .
>
> (3) The intention of his client to commit a crime and the information necessary to prevent the crime.

Second, DR 7–102(B)(1) contained the following mandatory-disclosure provision:

> (B) A lawyer who receives information clearly establishing that:
>
> (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

The "except" clause at the end of DR 7–102(B)(1), added by amendment by the ABA House of Delegates in 1974, was adopted by fewer than half the states. The exception was given a broad reading in ABA Formal Opin. 341 (1975). For references to critiques of the amendment, see C. Wolfram, Modern Legal Ethics § 12.6.4, at 669–70 (1986).

As finally adopted, the ABA Model Rules provided in Rule 1.6(b):

> (b) A lawyer may reveal [information relating to representation of a client] 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....

For a critique of the position ultimately taken in ABA Model Rule 1.6(b)(1) and an argument in support of a rejected Proposed Final Draft of the ABA Model Rules that also would have permitted disclosure in the case of substantial financial injury to others, see 1 G. Hazard & W. Hodes, supra at §§ 1.6:109–:110; see also id. § 1.6:314 (argument in support of Kutak Commission's rejected permission for disclosure to "rectify harm").

The most significant difference between ABA Model Rule 1.6(b)(1) and the present Section is that the ABA Model Rule does not extend the exception to crimes or frauds causing substantial financial loss. The ABA Model Rule requires that the lawyer reasonably believe that disclosure is "necessary," the standard employed in the Section. As stated in Comment *j* hereto, the necessity concept requires a lawyer to recognize that use or disclosure is a last resort.

The notion of client complicity in illegal and harmful acts of third persons, which is included within the Section (see Comment *g* hereto), is probably implicit in the ABA Model Rule. Finally, operation of both the ABA Model Rule and the Section depends upon the reasonable belief of a lawyer.

The states have taken several conflicting approaches on the subjects of the Section in the process of adopting new lawyer codes after the ABA suggested the ABA Model Rules in 1983. See generally 2 G. Hazard & W. Hodes, supra at § AP4:103–:105. A small minority of the states adopted the ABA Model Rules' approach, strictly limiting disclosure, substantially as recommended by the ABA. However, most jurisdictions—currently 42—have more nearly followed the proposed position of the drafters of the ABA Model Rules (rejected by the ABA House of Delegates) and included substantial financial injury (or variant, but similar, language) as a ground for permissible disclosure, in addition to substantial bodily harm. For a current description of state-by-state variations prepared by the Attorneys' Liability Assurance Society, Inc., see Morgan & Rotunda, Selected Standards on Professional Responsibility (appendix A, following reprinting of ABA Model Rules of Professional Conduct).

Several states permit disclosure in any instance of crime or fraud, thus going significantly beyond the Section. For example, the following is the rule in Texas Disciplinary Rules of Professional Conduct, Rule 1.05(c)(7) and (8):

> (c) A lawyer may reveal confidential information:....
>
> (7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.
>
> (8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act

in the commission of which the lawyer's services had been used.

Ten or more states *require* disclosure to save human life; four states require disclosure to prevent serious financial loss. The broadest rule is New Jersey's N.J. Rules of Professional Conduct, Rule 1.6(b)(1), which provides as follows:

> (b) [a] lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client
>
> (1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interests of another.

Florida, as an example of the next group of states, also mandates disclosure to prevent any crime (apparently without regard to its magnitude). Fla. Rules of Professional Conduct, Rule 4–1.6(b)(2). E.g., United States v. Del Carpio–Cotrina, 733 F.Supp. 95, 97–98 (S.D.Fla.1990) (duty of lawyer for criminal defendant to inform court of knowledge that defendant had jumped bail). More typical are provisions in states that permit disclosure beyond that allowed in the ABA Model Rules of Professional Conduct (1983). E.g., N.Y. Disciplinary Rules of the Code of Professional Responsibility, DR 4–101(C)(2), (3), and (5):

> C. A lawyer may reveal: . . .
>
> 2. Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
>
> 3. The intention of a client to commit a crime and the information necessary to prevent the crime. . . .
>
> 5. Confidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.

The present Section generally comports with the majority of states with respect to a lawyer's use or disclosure to prevent a client crime or fraud, and it comports with the position of 17 states and the position of the drafters of the ABA Model Rules with respect to rectification. It does not accept either the apparently strict limitation of permissive disclosure in ABA Model Rules of Professional Conduct, Rule 1.6 (1983) to situations of threatened death and bodily injury or, at the other extreme, the strict rule of some states requiring disclosure in certain instances. The law in a particular jurisdiction will, of course, determine the appropriate action of a lawyer subject to that law. This Section, nonetheless, may be useful to a jurisdiction in construing its own lawyer code and other law.

Substantially the same scope of discretion provided for in the Section is in effect conferred by the exceptions, approved in the ABA version of the ABA Model Rules, for self-defensive disclosures by a lawyer, for disclosures required by other law, and for disclosures in the course of making "noisy withdrawal" pursuant to the ABA Model Rules. See 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.6:110 (2d ed.1990) (several inter-

pretations of ABA Model Rule 1.6(b)(2) on exception for self-defensive disclosure would allow disclosures to rectify much client harm); Rotunda, The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Flag, 63 Or. L. Rev. 455 (1984).

In August 1991, the ABA House of Delegates rejected an amendment to ABA Model Rule 1.6(b) proposed by the ABA Standing Committee on Ethics and Professional Responsibility. The amendment would have added a subsection permitting a lawyer to reveal confidential client information "to the extent the lawyer reasonably believes necessary ... to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.... " See 7 ABA/BNA Law. Manual Prof. Conduct (Current Reports) 256, 258–59 (1991). The rejected exception would have been narrower than the present Section provides; it would have warranted disclosure only to rectify, but not to prevent, fraud. In Formal Opinion 92–366 (1992), the ABA Standing Committee on Ethics and Professional Responsibility construed broadly the "noisy withdrawal" provision of the Comment to ABA Model Rule 1.6, and posited a duty to do so when necessary to avoid assisting a client in a fraud under ABA Model Rule 1.2(d).

Comment c. Comparison with the crime-fraud exception to the attorney-client privilege. See generally 1 G. Hazard & W. Hodes, supra § 1.6:103; Purcell v. District Attorney, 676 N.E.2d 436 (Mass.1997) (lawyer's disclosure to prevent client crime is not necessarily waiver of attorney-client privilege in later prosecution of client for the attempted crime).

Comment d. Client crime or fraud. See lawyer code provisions cited supra Reporter's Note to Comment *b*.

Comment e. Employment of the lawyer's services in the client's act. The limitation is found in many of the lawyer-code provisions permitting disclosure, cited supra Reporter's Note to Comment *b*.

Comment f. Use or disclosure to prevent (Subsection (1)) or to rectify or mitigate (Subsection (2)) a client wrongful act. See § 64, Reporter's Note and §§ 82–83, Reporter's Notes.

Comment g. Client's intent. See § 82 Comment *c*, and Reporter's Note thereto; § 93, Comment *c*.

Comment h. A lawyer's reasonable belief. See § 66, Comment *d*, and Reporter's Note thereto. Compare also ABA Model Rules of Professional Conduct, Rule 3.3(a)(4) (1983) ("A lawyer shall not knowingly: ... (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."). On the disclosure of a client's perjury in trials, see § 120(2) and Comment *h* thereto.

Comment i. Counseling a client. See ABA Model Rules of Professional Conduct, Rule 1.6, Comment ¶ [13] (1983) (" ... Where practical, the lawyer should seek to persuade the client to take suitable action.... ").

Comment j. Appropriate action. See ABA Model Rules of Professional Conduct, Rule 1.6, Comment ¶ [13] (1983) (" ... In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the pur-