



By Mark L. Tuft

FOR YOUR EYES ONLY

California's duty of confidentiality is both more inclusive and more protective than the attorney-client privilege

Confidentiality is the central feature of the unique relationship between attorney and client. Confidentiality enables lawyers to function as lawyers, promotes client autonomy and dignity, and generally is viewed as essential to an effective and impartial system of justice. No other duty of professional responsibility is so important to the function of lawyering yet so misunderstood by commentators, the public, and lawyers themselves.

Jurisdictions throughout the country have varying rules on confidentiality. Considerable debate exists as to the parameters of the duty of confidentiality and the relationship of confidentiality as a principle of professional responsibility and the attorney-client privilege.

Unlike most states, California does not

have an ethics rule on confidentiality. Instead, California lawyers are obliged to follow a seemingly inflexible statute that has not been materially changed since 1872.¹ As a result, some commentators view California as being out of step with the rest of the country by not allowing or requiring lawyers to make disclosures in certain situations. Justification for strict confidentiality has been questioned, particularly in nonlitigation matters, and recent legislation has encroached on the duty of confidentiality. As California lawyers deal with the impact of terrorism, corporate scandals, and the more global practice of law, greater clarity on the duty of confidentiality is needed. (See "New Challenges to Confidentiality," page 28.)

The duty of confidentiality is related to the duty of loyalty, and together they define the primary role of the lawyer in his or her representative capacity.² In essence, the duty of confidentiality precludes an attorney from either disclosing confidential information about a client or using that information adversely to the client.

Business and Professions Code Section 6068(e) imposes on California attorneys the duty "[t]o maintain inviolate the confidence, and in every peril to himself or herself to preserve the secrets of his or her client." The statute obligates lawyers to preserve the client's trust and confidence in the attorney as well as protect information gained in the relationship that the client has requested to

Mark L. Tuft, a partner with Cooper, White & Cooper LLP in San Francisco, counsels lawyers on professional responsibility and liability issues. He is a vice chair of the State Bar of California Commission for the Revision of the California Rules of Professional Conduct, and he is a former chair of the State Bar Committee on Professional Responsibility and Conduct.

be held inviolate or the disclosure of which would be embarrassing or likely detrimental to the client's interests.³

The duty of confidentiality, therefore, covers much more than communications protected by the attorney-client privilege.⁴ The duty to protect client secrets may, depending on the circumstances, include all information relating to the representation, whatever its source,⁵ and even includes matters of public record that might cause a client or a former client public embarrassment.⁶ The duty of confidentiality extends to potential clients seeking the attorney's assistance with a view toward employing the attorney professionally even if no client-lawyer relationship ensues.⁷ Confidentiality also continues after the attorney-client relationship has ended and, with limited exception, survives the client's death.⁸

Although the statute that codifies California's duty of confidentiality is reputed to be the strictest in the country, the scope of the duty in California is actually not as broad as in states that follow the ABA Model Rules of Professional Conduct, which were originally adopted in 1983. ABA Model Rule 1.6(a) protects all "information relating to the representation of a client"—a protection that is even more sweeping than the earlier ABA Model Code of Professional Responsibility, which was adopted in 1969.⁹ In contrast, the California statute provides that the lawyer must preserve the client's "secrets," which may or may not include everything learned in the course of representing a client. Implicit in Section 6068(e) is the requirement of a reasonable expectation of confidentiality on the part of the client, which, depending on the circumstances, may narrow the scope of the attorney's duty as compared to the Model Rules.¹⁰

The ABA and California were more closely aligned on the concept of client secrets before the Model Rules superseded the Model Code. The ABA Model Code defined the scope of the duty of confidentiality as the sum of the information protected by the attorney-client privilege—in other words, a client's confidences—and information gained in the professional relationship that, although not protected by the privilege, would be embarrassing or detrimental to the client if revealed, or was information the client had expressly requested to be held inviolate—that is, the client's secrets.¹¹ ABA Model Rule 1.6(a) eliminates the Model Code's two-prong approach to the duty of confidentiality.¹²

Ethics Rules and the Attorney-Client Privilege

The law of confidentiality has its origins in two distinct but related sources: ethics rules and the attorney-client privilege. The original

ABA Canons of Ethics, adopted in 1908, did not directly address the issue of confidentiality. The only reference was in Canon 6 on conflicts of interest, which precluded a lawyer from accepting employment that might require the disclosure of the client's "secrets" or "confidences." Canon 37 was added in 1928 to impose on the lawyer a duty to preserve a client's confidences.

The origin of California's Section 6068(e) is the code of civil procedure developed by David Dudley Field for the New York legislature in 1849. The concepts in the Field code

is sought from the lawyer through compulsion of law.¹⁸ The duty of confidentiality is interpreted broadly and is designed primarily to protect the attorney-client relationship, while the attorney-client privilege, as a rule of evidence, is construed narrowly in judicial proceedings in which courts are concerned primarily with ascertaining the truth.¹⁹

The attorney-client privilege protects only confidential communications between the attorney and client or their agents. Information protected by the duty of confidentiality is much broader than information pro-



were brought to California, most likely by Steven J. Field, who was David Dudley Field's brother and who later served as a chief justice of the California Supreme Court.¹³ In 1872, Section 511 of the New York Code of Civil Procedure became Section 282 of the new California Code of Civil Procedure. In 1937, the statute became part of Business and Professions Code Section 6068.¹⁴

Codes of legal ethics dealing with confidentiality are relatively recent compared to the attorney-client privilege, which can be traced back to the time of Elizabeth I.¹⁵ The attorney-client privilege and confidentiality have the same roots and share similar goals; yet, there are also important distinctions between the two. The attorney-client privilege is codified in the Evidence Code followed by a list of exceptions.¹⁶ The duty of confidentiality is codified in the State Bar Act and is a substantive duty.¹⁷ The attorney-client privilege and the work product doctrine apply in judicial and other proceedings in which the attorney may be called as a witness or otherwise called to produce evidence concerning the client. The duty of confidentiality protects client information from disclosure in situations other than those in which evidence

is sought from the lawyer through compulsion of law.¹⁸ The duty of confidentiality is interpreted broadly and is designed primarily to protect the attorney-client relationship, while the attorney-client privilege, as a rule of evidence, is construed narrowly in judicial proceedings in which courts are concerned primarily with ascertaining the truth.¹⁹ The attorney-client privilege protects only confidential communications between the attorney and client or their agents. Information protected by the duty of confidentiality is much broader than information protected by the privilege and often includes all information relating to the representation that is obtained by the attorney from any source.²⁰ As a result, the ethical duty of confidentiality is more protective than the attorney-client privilege. For example, because the privilege interferes with the truth-finding function of the courts, the party seeking to invoke the privilege has the burden of establishing each of its elements.²¹ In contrast, an attorney has a fiduciary obligation to preserve client secrets "at every peril to himself or herself," which includes avoiding the representation of interests adverse to the client or former client when the attorney possesses confidential information material to the matter at issue.²²

Public Policy

The duty of confidentiality in California is often erroneously characterized as absolute. Although Section 6068(e) contains no express exceptions, limitations on the duty of confidentiality have long been recognized by case law, other rules, and ethics opinions. Consequently, disclosure of otherwise confidential information is permitted with the client's informed consent.²³ A lawyer may not sup-

press evidence under a claim of client confidentiality that the lawyer or the lawyer's client has a legal obligation to reveal or to produce.²⁴ It is also an established principle of professional responsibility that a lawyer may not counsel, assist, or advise a client regarding conduct that the lawyer knows is criminal or fraudulent.²⁵

A lawyer may be required by law to disclose information otherwise protected under Section 6068(e). Examples include reporting large cash transactions²⁶ and the right of courts to inquire of counsel regarding a client's competence in criminal proceedings.²⁷ Section 6068(e) does not permit attorneys to violate their duty of candor to the court.²⁸ For example, a lawyer is not required to stand idly by when the client insists on committing perjury, even in a criminal case; instead, the lawyer may advise the client that the lawyer will seek to withdraw from representing the client.²⁹ Information protected under Section 6068(e) may also be disclosed as necessary in responding to a client's claim against the attorney³⁰ and in pursuing a contested claim for fees.³¹ Finally, it is generally accepted that a lawyer cannot avoid complying with a final order of a court of competent jurisdiction based on Section 6068(e).³² The duty of con-

fidentiality, however, may obligate the attorney to seek appellate review of the order before making disclosure.³³

The interplay between the attorney-client privilege and confidentiality has been a source of confusion not only for lawyers but for judges and commentators as well. Both the testimonial privilege and the ethical obligation exist to protect the client as opposed to the interests of the lawyer or a third party. Preserving client confidences facilitates a full development of essential facts, encourages people to seek early assistance from lawyers about their legal problems regardless of how embarrassing or legally damaging the subject matter, and aids clients in making informed decisions about their affairs.³⁴ The law has become increasingly complicated, and clients require the assistance of competent counsel for meaningful access to the legal system to resolve their problems. As the California Supreme Court has stated, the duty of confidentiality is not simply a rule of professional conduct but reflects a public policy of paramount importance.³⁵

Ethical principles are generally based on the concept of client autonomy. This means that a fully informed and adequately represented client is able to make his or her own

decisions and is not required to be under the control of the lawyer. The traditional role of the lawyer, both as advocate and as a confidential counselor, is to competently advise the client about the law and its consequences. The right of the client to control information disclosed to the lawyer is consistent with this principle. Conversely, rules that allow lawyers to make disclosures of confidential client information over the client's objection in order to protect the interests of a third party tend to change the lawyer's role from the client's fiduciary to a law enforcement officer or free agent.

Broadly construed confidentiality has gained greater acceptance in the criminal context. The Sixth Amendment assures that criminal defendants receive the effective assistance of counsel, which necessarily includes a high degree of confidentiality.³⁶ The Fifth Amendment right against self-incrimination prohibits the government from requiring individual defendants or their attorneys to provide certain evidence.

However, the distinction between the application of confidentiality principles in the criminal and civil arenas is not always clear and not necessarily warranted. Many activities in which a client seeks a lawyer's advice involve

New Challenges to Confidentiality

Recent events have created more issues regarding the application of the duty of confidentiality. These legal developments could have a significant impact on several areas of practice.

▼ **Monitoring Certain Attorney-Inmate Conversations.** The U.S. Bureau of Prisons has adopted regulations permitting the monitoring of attorney-client conversations under certain circumstances to prevent attorneys and/or their interpreters from being used by detainees, either willingly or unwillingly, to send messages to those outside of prison about committing future acts of terrorism.¹ The lawyer and inmate must be given advance written notice unless the Justice Department has received court permission to conduct secret monitoring. The regulations provide for a "privilege" team composed of persons not involved in the underlying investigation to review the monitored conversations for potentially privileged information.

▼ **Gatekeeper Regulation.** In response to the problem of international money laundering and its connection to terrorism, one of the options being considered by the Justice Department is the imposition of federal requirements on accountants and lawyers to file suspicious activity reports (SARs) if they learn of a known or suspected violation of federal law, especially in connection with money laundering and financial crime.²

▼ **ABA Task Force on Corporate Responsibility.** In its preliminary report, the ABA Task Force on Corporate Responsibility has recommended that Model Rule 1.6 of the ABA Model Rules of Professional Conduct be amended to permit disclosure of client confidential information if the client's conduct has resulted or is reasonably certain to result in substantial injury to the financial interests or property of another. The proposed amendment would also require lawyers to disclose the confidential information of clients to prevent felonies or other serious crimes, including violations of the federal securities laws, if lawyers have knowledge of this conduct.³

▼ **Sarbanes-Oxley Act of 2002.** The recent revelations of corporate accounting abuses led to congressional passage of the Sarbanes-Oxley Act of 2002, which President Bush signed into law on July 30.⁴ Section 307 of the act provides that the Securities and Exchange Commission must issue rules requiring private attorneys who represent public companies before the SEC to report evidence of violations of securities laws, breaches of fiduciary duties, or similar violations to the company's audit committee or board of directors. The act also mandates that the SEC create *federal* rules of professional conduct for attorneys who practice before the SEC.—**M.L.T.**

¹ 28 C.F.R. §501.3(d).

² R. Christian Bruce, *Justice Eyeing Attorneys, Accountants for Anti-Money Laundering Duties*, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, Vol. 18, No. 4, at 93.

³ Preliminary Report of the ABA Task Force on Corporate Responsibility, July 16, 2002, available at www.abanet.org/buslaw/corporateresponsibility.

⁴ The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.



You're successful. You're confident. You're informed.

With KeyCite® Alert, you're always on top of the law. This exclusive tracking service automatically notifies you of breaking developments in the law – via wireless device, e-mail or fax – so you always have the most current information to support your case. **Differences that matter.**

Call 1-800-REF-ATTY (1-800-733-2889) or visit westlaw.com/keycite.

KeyCite® **Alert**

© 2002 West Group W-105431/9-02 Trademarks shown are used under license.

THOMSON
WEST

West – part of Thomson since 1996,
bringing information solutions to the legal community.

both criminal as well as civil consequences. The law has become increasingly complex, and clients have a need to know the consequences of their actions before they become a suspect or are charged with an offense. A broadly construed rule on confidentiality in the civil context also promotes the privacy interests of individuals, which in states such as California is a constitutional right.³⁷

One of the problems in narrowly drawing a bright-line rule on confidentiality is the effect permissible disclosures would have on the predictability of the confidential nature of the client's information. To what extent would the client need to be given a *Miranda*-type warning prior to speaking with a lawyer? As the California Supreme Court has noted, "If a lawyer could not promise to maintain the confidentiality of his client's secrets, the only advice he or she could provide would be, 'don't talk to me.'"³⁸

It is important for a lawyer to explain to the client that the lawyer's duty of loyalty includes loyalty to the law as well as to the client. This is not so much a *Miranda*-style warning as it is sound advice regarding the limitations on the duty of confidentiality and the proper role of the lawyer in the professional relationship.

Preventing Physical Harm

Nevertheless, there is an inherent tension between confidentiality and the obligation to uphold the law and prevent harm to others. Two situations provoke the greatest controversy. One occurs when the lawyer believes the client intends to commit an act that could cause death or serious bodily harm to another, and the other involves the application of the crime-fraud exception to the duty of confidentiality.

Most lawyers accept the idea that confidentiality principles should not prevent them from taking steps to save a life or prevent serious harm to another. Indeed, there is no record of a California lawyer being disciplined for violating Section 6068(e) by disclosing client secrets to save a human life.

ABA Model Rule 1.6(b) was revised earlier this year to give lawyers substantially broader discretion to disclose confidential information to the extent a lawyer reasonably believes necessary to prevent "reasonably certain" death or substantial bodily harm.³⁹ The new rule is ABA Model Rule 1.6(b)(1). Under the former rule, permissive disclosure was limited to the client's commission of a criminal act and allowed disclosure only where the threat of harm was "imminent."⁴⁰

In California, the Evidence Code was amended in 1993 to provide that the attorney-client privilege does not apply when a lawyer reasonably believes that disclosure

of any confidential communication relating to the representation is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.⁴¹ This provision, which is found in Evidence Code Section 956.5, confines its application to the evidentiary privilege and is not a rule of professional conduct. The legislative history is murky,⁴² and the tension between Evidence Code Section 956.5 and Business and Professions Code Section 6068(e) remains unresolved.⁴³

The controversy over whether a lawyer should be permitted to disclose client confidences to prevent physical harm to another often revolves around a discussion of *Tarasoff v. Regents of the University of California*,⁴⁴ in which a psychotherapist was subject to tort liability for failing to disclose communications protected by the psychotherapist-patient privilege when the disclosure was reasonably necessary to prevent threatened danger. Although the application of *Tarasoff* to lawyers has been heavily debated, in the 25 years since the case was decided, no court has held a lawyer to a similar duty of disclosure, particularly to a person who is not the lawyer's client.⁴⁵ However, new ABA Model Rule 1.6(b)(1) and Evidence Code Section 956.5 could lead to an analogous liability for lawyers.

Ethics opinions of local bar associations are in conflict on the extent to which California lawyers can ethically make disclosures to save life and limb.⁴⁶ The State Bar has on three occasions proposed a rule of professional conduct on confidentiality that defined the duty and included permission to disclose information reasonably necessary to prevent death or substantial bodily harm.⁴⁷ Despite the rejection of these proposals, the California Supreme Court has the inherent authority to resolve the dilemma created by the legislature and to clarify the duty of confidentiality in California.

The Crime-Fraud Exception

The crime-fraud exception is another matter. In California, the exception applies to the attorney-client privilege and is recognized as such by federal courts, among other jurisdictions. The exception is based on the rationale that the attorney-client privilege belongs to the client, and that a client who obtains the lawyer's assistance in committing a crime or fraud has not consulted the lawyer in the lawyer's representative capacity.⁴⁸ As U.S. Supreme Court Justice Cardozo explained, "The privilege takes flight if the relationship is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law."⁴⁹ In this sense, the crime-fraud test is

This Los Angeles Lawyer MCLE self-study test is sponsored by WEST.



MCLE Test No. 111

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education legal ethics credit by the State Bar of California in the amount of 1 hour.

- The duty of confidentiality is:
 - A rule of professional conduct.
 - A section in the State Bar Act.
 - Both A and B.
- Under the duty of confidentiality, an attorney is precluded from:
 - Disclosing confidential information about a client.
 - Using confidential information adverse to the client.
 - Both A and B.
- The duty of confidentiality does not apply unless there is an attorney-client relationship.
 - True.
 - False.
- The duty of confidentiality was codified in California in:
 - 1975.
 - 1928.
 - 1872.
 - 1850.
- The duty of confidentiality and the attorney-client privilege are construed narrowly.
 - True.
 - False.
- The duty of confidentiality may apply even when the attorney-client privilege does not.
 - True.
 - False.



FOR YOUR EYES ONLY
Sponsored by WEST

Name _____

Law Firm/Organization _____

Address _____

City _____

State/Zip _____

E-mail _____

Phone _____

State Bar # _____

Instructions for Obtaining MCLE Credits

1. Study the MCLE article in this issue.
2. Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.
3. Mail the answer sheet and the \$15 testing fee (\$20 for non-LACBA members) to:

Los Angeles Lawyer
MCLE Test
P.O. Box 55020
Los Angeles, CA 90055

Make checks payable to Los Angeles Lawyer.

4. Within six weeks, Los Angeles Lawyer will return your test with the correct answers, a rationale for the correct answers, and a certificate verifying the MCLE credit you earned through this self-assessment activity.
5. For future reference, please retain the MCLE test materials returned to you.

Answers

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1. A B C
2. A B C
3. True False
4. A B C D
5. True False
6. True False
7. True False
8. True False
9. A B C
10. True False
11. A B C
12. A B C
13. True False
14. True False
15. True False
16. A B C
17. True False
18. A B C D E
19. True False
20. True False

7. The duty of confidentiality permits a lawyer to suppress evidence even when the lawyer or the lawyer's client has a legal obligation to reveal or to produce that evidence.

- True.
- False.

8. Business and Professions Code Section 6068(e) does not permit an attorney to violate his or her duty of candor to the court.

- True.
- False.

9. Information protected under Business and Professions Code Section 6068(e) may be disclosed:

- A. In responding to a client's claim of legal malpractice against the attorney.
- B. In pursuing a contested claim against the client for the attorney's fees.
- C. Both A and B.

10. The attorney-client privilege and the duty of confidentiality share a common purpose in helping clients make informed decisions about their affairs.

- True.
- False.

11. ABA Model Rule 1.6 was revised in 2002 to give a lawyer the discretion to disclose confidential information to the extent the lawyer reasonably believes necessary when:

- A. The client intends to commit an act that is likely to result in reasonably certain death or substantial bodily harm.
- B. The client intends to commit a criminal act that is likely to result in reasonably certain death or substantial bodily harm.
- C. The client intends to commit an act that is likely to result in imminent death or substantial bodily harm.

12. The attorney-client privilege does not apply in California if a lawyer reasonably believes that disclosure of confidential information relating to the representation of the client is necessary to:

- A. Prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.
- B. Prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.
- C. Prevent the client from committing an act that the lawyer believes is likely to result in reasonably certain death or substantial bodily harm.

13. The court in *People v. Dang* held that Evidence Code Section 956.5 is an exception to the duty of confidentiality under Business and Professions

Code Section 6068(e).

- True.
- False.

14. A party asserting the attorney-client privilege has a right to notice and an opportunity to be heard before disclosure of information protected by the attorney-client privilege can be ordered in a civil proceeding.

- True.
- False.

15. The ABA adopted the ABA Ethics 2000 Commission's recommended changes to Model Rule 1.6 that allow a lawyer the discretion to disclose confidential information of the client to the extent the lawyer reasonably believes necessary to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another and involves the use by the client of the lawyer's services in the furtherance of the crime or fraud.

- True.
- False.

16. The State Bar proposed a rule of professional conduct on confidentiality to the California Supreme Court on:

- A. Three occasions.
- B. Two occasions.
- C. Four occasions.

17. The Sarbanes-Oxley Act of 2002 requires the SEC to issue rules requiring private attorneys representing public companies before the SEC to report evidence of securities laws violations to the company's audit committee or board of directors.

- True.
- False.

18. The crime-fraud exception applies to:

- A. Future crimes and frauds.
- B. Past crimes and frauds.
- C. Ongoing crimes and frauds.
- D. All of the above.
- E. Both A and C.

19. Attorneys are required to preserve confidential client information in seeking to withdraw as counsel of record in proceedings before a court or other tribunal.

- True.
- False.

20. Lawyers in California must comply with Business and Professions Code Section 6068(e) in protecting a corporate client from the wrongful acts of its agents.

- True.
- False.

actually an exclusion rather than an exception to the privilege.⁵⁰

The lawyer's duty of confidentiality and the attorney-client privilege are not the same. A party claiming that the evidentiary shield against compelled disclosure of a confidential client communication does not apply bears the burden of proving the elements of the crime-fraud exception in a judicial proceeding. The court, and not the lawyer, is the decision maker and must invoke procedural safeguards in deciding whether the exception applies.⁵¹ Even in civil proceedings, a party asserting the privilege has a right to proper notice and an opportunity to be heard before disclosure of privileged information can be ordered.⁵²

The ABA has not been a model of consistency on the issue of disclosing client crime or fraud as an exception to the duty of confidentiality. Early versions of the ABA rules permitted discretion to disclose confidential information to protect third parties from being victims of a crime.⁵³ The ABA Model Code obligated a lawyer to rectify client fraud by, if necessary, revealing the fraud to third parties.⁵⁴ However, after the SEC's reliance on ABA Model Code DR 7-102(B)(1) in a highly publicized investigation that led to *SEC v. National Student Marketing Corporation*,⁵⁵ the ABA amended its rule to preclude disclosure of client fraud "when the information is protected as a privileged communication."⁵⁶ The next year the ABA changed its rule to define "privileged communication" as including all "confidences and secrets" learned during the attorney-client relationship.⁵⁷

The controversy over the application of the crime-fraud exception to the duty of confidentiality was played out again in 1983 with the adoption of the ABA Model Rules and the rejection of the Kutak Commission proposal that Model Rule 1.6 permit disclosures to prevent or rectify client crime or fraud. Another proposal to restore much of the Kutak recommendation was again rejected in 1991.

Most states have not adopted Model Rule 1.6 as recommended by the ABA. As a result, there is substantial disagreement among the states on the scope of a lawyer's duty of confidentiality as it relates to client crime or fraud.⁵⁸

The ABA Ethics 2000 Commission recommended changes to Model Rule 1.6 in 2001 that would allow a lawyer the discretion to disclose confidential information of the client to the extent the lawyer reasonably believes necessary to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and involves the use by the client of the lawyer's services in the furtherance of the

crime or fraud. The rule would also allow disclosure to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud that involves the client's use of the lawyer's services. The ABA House of Delegates rejected these proposed revisions by approximately 2 to 1. However, more recently, the ABA Task Force on Corporate Responsibility has recommended, in a preliminary report filed July 16, 2002, that Model Rule 1.6 be amended to expand permissive disclosures to prevent or rectify the consequences of client crime or fraud that are reasonably certain to result, or have resulted, in substantial injury to the financial interests or property of another and involve the client's use of the lawyer's services. The ABA Task Force further recommended that Rule 1.6 be amended to make disclosure mandatory, rather than permissive, in order to prevent client conduct known to the lawyer to involve a crime—including violations of federal securities laws and regulations—in furtherance of which the client has used or is using the lawyer's services and which is reasonably certain to result in substantial injury to the financial interests or property of another.⁵⁹

The rationale for these proposals is that a client who uses a lawyer's services to perpetrate a crime or fraud forfeits the protections afforded by the client-lawyer relationship. It is also argued that a lawyer will be better able to persuade the client to refrain from wrongdoing by threatening to disclose the client's secrets. However, applying the crime-fraud exception to the lawyer's duty of confidentiality changes the traditional role of the lawyer as client fiduciary and imposes on the lawyer the function of judicial decision maker. Even the crime-fraud exception to the attorney-client privilege does not allow an attorney to act as the sole arbiter on whether to become a whistle-blower regarding client misconduct. Without judicial intervention, the client risks the loss of rights without due process at the hands of the lawyer in whom the client has been encouraged by the law to repose trust and confidence.

The crime-fraud exception applies only to communications that are in furtherance of the crime or fraud.⁶⁰ Communications regarding past crimes and frauds remain protected under the privilege. The crime-fraud test—whether the crime or fraud occurred in the past, is ongoing, or will occur in the future—may be useful in a judicial determination of the crime-fraud exception to the attorney-client privilege, but it is not a very practical tool for attorneys in actual practice.

There is uncertainty in California whether

the exceptions to the attorney-client privilege apply equally to the duty of confidentiality. In *General Dynamics v. Superior Court*, the California Supreme Court suggested in dicta that Evidence Code Section 956.5 represents a situation in which the legislature decided that "the principle of professional confidentiality does not apply."⁶¹ More recently, the court of appeal in *Fox Searchlight Pictures, Inc. v. Paladino*⁶² found that Business and Professions Code Section 6068(e) must be read in conjunction with other statutes and ethics rules that permit the attorney to depart from strict confidentiality requirements, including Evidence Code Section 958, which applies to communications that are relevant to an issue of breach, by the lawyer or client, of a duty arising out of the attorney-client relationship. Relying on *In the Matter of Lilly*,⁶³ the *Fox Searchlight* court found that the State Bar Court has determined that the duty of confidentiality under Section 6068(e) is modified by the exceptions to the attorney-client privilege contained in the Evidence Code.⁶⁴ This assertion was repeated in *People v. Dang*.⁶⁵ However, the *In the Matter of Lilly* opinion does not support the conclusion that Section 6068(e) is modified by the Evidence Code.⁶⁶

Certainty and Predictability

Lawyers often experience problems in applying the law of confidentiality. For example, attorneys are required to preserve client confidences in seeking to be relieved as counsel.⁶⁷ At the same time, confidential information can be disclosed as necessary to pursue a contested action for fees following withdrawal.⁶⁸ If the duty of confidentiality precludes an attorney from representing another client, it may or may not lead to the vicarious disqualification of the attorney's law firm.⁶⁹

Also, lawyers must abide by Section 6068(e) in protecting a corporate client from the wrongful acts of its agents.⁷⁰ At the same time, lawyers must meet the standard of care in protecting the interests of the corporate client.⁷¹ Circumstances may arise in the representation of a government client when disclosure of otherwise confidential information may be in the public interest.⁷²

Confidentiality pervades the field of professional responsibility. Yet there is no national ethical standard on confidentiality today among the states. Instead, there is confusion—some would say chaos—on the duty of confidentiality. California, therefore, is not out of step with the rest of the country and could take the lead in clarifying the law of confidentiality through a rule of professional conduct that will provide adequate guidance for lawyers to follow in the increasingly complex practice of law.

Clients and the public are entitled to certainty and predictability with respect to confidential information shared with lawyers. As the U.S. Supreme Court has stated, “[A]n uncertain privilege [or confidentiality rule], or one that purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”⁷³ ■

¹ BUS. & PROF. CODE §6068(e).

² *Flatt v. Superior Court*, 9 Cal. 4th 275, 289 (1994) (“One of the principal obligations which binds an attorney is that of fidelity, the maintaining inviolate of the confidence reposed in him by those who employ him, and at every peril to himself to preserve the secrets of his client.... [T]his obligation is a very high and stringent one.”).

³ *In re Soale*, 31 Cal. App. 144, 153 (1916); State Bar of California Formal Op. 1993-133.

⁴ *Goldstein v. Lees*, 46 Cal. App. 3d 614, 621, n.5. (1975).

⁵ See Los Angeles County Bar Association Prof'l Responsibility and Ethics Committee Formal Op. 436 (1985).

⁶ *Matter of Johnson*, 4 Cal. State Bar Ct. Rptr. 179, 189 (Rev. Dept. 2000).

⁷ State Bar of California Formal Op. 1984-84; Los Angeles County Bar Association Prof'l Responsibility and Ethics Committee Formal Op. 366 (1977); see ABA MODEL RULES OF PROF'L CONDUCT R. 1.18 (2002).

⁸ Los Angeles County Bar Association Prof'l Responsibility and Ethics Committee Formal Op. 414 (1983).

⁹ GEOFFREY C. HAZARD JR., *THE LAW OF LAWYERING* §9.15 (ABA Model Rule 1.6(a) creates a presumption of confidentiality that operates automatically in all cases without any signal from the client.).

¹⁰ The interpretation of “secrets” in Business and Professions Code §6068(e) generally has followed the definition under the ABA Model Code of Professional Responsibility DR 4-101(a), in which “secrets” is defined as information the client requested to be held inviolate or information that would be embarrassing or likely to be detrimental if revealed. See also *Forrest v. Baeza*, 58 Cal. App. 4th 65, 82 (1997) (disqualification of attorney for two of three officers/shareholders denied when confidential information attorney received while representing corporation was not conceivably different from information attorney received from officers/shareholders) and *Christiansen v. U.S.D. Court for Cent. D. of Cal.*, 884 F. 2d 694, 698-99 (9th Cir. 1988) (substantial relationship test inapplicable when former client had no reason to believe that the information given to attorney would not be disclosed to attorney's current client).

¹¹ ABA MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101.

¹² See ABA MODEL RULES OF PROF'L CONDUCT R. 1.6(a) and cmt. 3 (2002).

¹³ Justice Field also served as an associate justice on the U.S. Supreme Court.

¹⁴ *Patterson, Legal Ethics and the Duty of Loyalty*, 29 EMORY L.J. 909, 941-42 (1980).

¹⁵ See 8 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* §2290, at 3194 (1905); see also *Hazard, An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1069-91 (1978).

¹⁶ EVID. CODE §§950-962.

¹⁷ The State Bar Act, BUS. & PROF. CODE §§6000 *et seq.* The act includes BUS. & PROF. CODE §6068(e).

¹⁸ See CALIFORNIA PRACTICE GUIDE: PROFESSIONAL RESPONSIBILITY §7:9 (2002); ABA MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 3.

¹⁹ *Trammel v. United States*, 445 U.S. 40, 50-51 (1980) (Privileges should be construed strictly because they

contravene the fundamental principle that the public has “a right to every man's evidence.”).

²⁰ Los Angeles County Bar Association Prof'l Responsibility and Ethics Committee Formal Op. 436 (1985).

²¹ *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 347, 358-59 (D. Mass. 1950); *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal. 2d 213 (1964).

²² CAL. RULES OF PROF'L CONDUCT R. 3-310(E).

²³ *Commercial Standard Title Co. v. Superior Court*, 92 Cal. App. 3d 934, 945 (1979); Los Angeles County Bar Association Prof'l Responsibility and Ethics Committee Formal Op. 456 (1990).

²⁴ CAL. RULES OF PROF'L CONDUCT R. 5-220.

²⁵ BUS. & PROF. CODE §6068(d); see ABA MODEL RULES OF PROF'L CONDUCT R. 1.2(d).

²⁶ I.R.C. §6050I (returns relating to cash received in trade or business).

²⁷ PENAL CODE §§1367.1, 1368.

²⁸ BUS. & PROF. CODE §6068(d); CAL. RULES OF PROF'L CONDUCT R. 5-200.

²⁹ *Nix v. Whiteside*, 475 U.S. 157, 172-73 (1986).

³⁰ See Los Angeles County Bar Association Prof'l Responsibility and Ethics Committee Formal Op. 396 (1982).

³¹ Los Angeles County Bar Association Prof'l Responsibility and Ethics Committee Formal Op. 452 (1988).

³² BUS. & PROF. CODE §6068(a); see BUS. & PROF. CODE §6103.

³³ See, e.g., *People v. Kor*, 129 Cal. App. 2d 436, 446-47 (1954) (concurring opinion).

³⁴ *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981); *Jeffry v. Pounds*, 67 Cal. App. 3d 6, 9 (1977).

³⁵ *In re Jordan*, 7 Cal. 3d 930, 940-41 (1972).

³⁶ See *United States v. Henry*, 447 U.S. 264, 295 (1980)

WINDOWS RESTAURANT



■ Contemporary Cuisine in Opulent Comfort

■ World Class Wine & Famous Martini Menu



TREAT YOURSELF AND YOUR GUESTS TO WINDOWS RESTAURANT.

WINDOWS is located on top of the Transamerica building on the corner of 12th and Olive Streets above the Los Angeles basin, overlooking beautiful sunsets, spectacular views, and glimmering city lights.

Members of the Los Angeles County Bar Association receive a 10% discount!

LUNCH 11:00 a.m. - 2:00 p.m. Lunch Monday-Friday
DINNER 5:00 p.m.-10:00 p.m. Tuesday-Saturday
HAPPY HOUR 4:00 p.m.-7:00 p.m. Tuesday-Friday

Private rooms available for Special Events from 12-150 guests for a sit-down dinner and 300-400 for a cocktail reception.

RICHARD BONHAMA, GENERAL MANAGER
CARLOS ANDRADE, EXECUTIVE CHEF

SPECIAL EVENTS & RESERVATIONS 213.746.1554 • FAX 213.742.4593

(dissenting opinion).

³⁷ CAL. CONST. art. I, §1.

³⁸ Southern Cal. Gas Co. v. Public Utils. Comm'n, 50 Cal. 3d 31, 37 (1990).

³⁹ ABA MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (1) (2002).

⁴⁰ ABA MODEL RULES OF PROF'L CONDUCT former R. 1.6(b) (1983).

⁴¹ EVID. CODE §956.5.

⁴² It is likely the legislature intended to overrule *People v. Clark*, a decision by the California Supreme Court. *People v. Clark*, 50 Cal. 3d 583 (1990) (testimony during penalty phase of murder case about client's threats protected by the attorney-client privilege).

⁴³ See *People v. Dang*, 93 Cal. App. 4th 1293, 1298 (2001) (conflict between EVID. CODE §956.5 and BUS. & PROF. CODE §6068(e) not raised by the parties and decision therefore was limited to the admissibility of lawyer's testimony at trial).

⁴⁴ *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425 (1976).

⁴⁵ See *Hawkins v. King County Dep't of Rehab. Servs.*, 24 Wash. App. 338, 602 P. 2d 361 (1979) (distinguishing *Tarasoff* but suggesting that attorney liability is possible under extraordinary circumstances).

⁴⁶ Compare Los Angeles County Bar Association Prof'l Responsibility and Ethics Committee Formal Op. 436 (1985) (following ABA MODEL RULES OF PROF'L CONDUCT R. 1.6) with San Diego County Bar Association Formal Op. 1990-1 (1990) (BUS. & PROF. CODE §6068(e) leaves "no discretion for disclosure or other warning of a client's intent to inflict serious bodily harm or death upon another person.").

⁴⁷ Proposed R. 3-100 (1987) ("A member may reveal a confidence or secret...to the extent the member reasonably believes necessary to prevent the commission of a criminal act the member believes is likely to result

in death or substantial bodily harm."); Proposed R. 3-100 (1992) (same, except the word "imminently" added before "likely..."); Proposed R. 3-100 (1998) (same and tracks EVID. CODE §956.5).

⁴⁸ *United States v. Hodge & Zweig*, 548 F. 2d 1347 (9th Cir. 1977); EVID. CODE §956.

⁴⁹ *Clark v. United States*, 289 U.S. 1, 15 (1933).

⁵⁰ The traditional definition of the attorney-client privilege excludes client crime or fraud. See *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950).

⁵¹ *United States v. Zolin*, 491 U.S. 554, 574-75 (1989).

⁵² *Titmus v. Superior Court (Lavarone)*, 87 Cal. App. 4th 738, 740 (2001).

⁵³ ABA Canon 37 (1928) provided that "the announced intention of the client to commit a crime is not included within the confidences which he is bound to respect." See also ABA CANON 41 (1928).

⁵⁴ ABA MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(B) (1).

⁵⁵ *SEC v. National Student Marketing Corp.*, 457 F. Supp. 682 (D. D.C. 1978) (counsel for merging corporation violated antifraud provisions of the federal securities laws by failing to delay closing pending disclosure of materially false financial information regarding the surviving corporation).

⁵⁶ ABA MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(B) (1) (1974).

⁵⁷ ABA MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(B) (1) (1975).

⁵⁸ See *Attorneys' Liability Assurance Society, Inc. Ethics Rules on Client Confidences* (2001), reprinted in MORGAN & ROTUNDA, SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 134-144 app. A (2002).

⁵⁹ Preliminary Report of the ABA Task Force on Corporate Responsibility (July 16, 2002), available at www.abanet.org/buslaw/corporateresponsibility.

⁶⁰ EVID. CODE §956 ("There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.")

⁶¹ *General Dynamics v. Superior Court*, 7 Cal. 4th 1164, 1189-90 (1994).

⁶² *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294, 313-14 (2001).

⁶³ *In the Matter of Lilly*, 2 Cal State Bar Ct. Rptr. 473, 478 (1993).

⁶⁴ *Fox Searchlight*, 89 Cal. App. 4th at 314.

⁶⁵ *People v. Dang*, 93 Cal. App. 4th 1293, 1298-99 (2001). See note 43, *infra*.

⁶⁶ *In the Matter of Lilly* addressed whether the summary disbarment procedure under Business and Professions Code §6102(c) applied in circumstances involving a deceased former client whose estate was handled by an attorney acting as executor and not as an attorney. In holding that §6102(c) does not expressly limit its scope to the victimization of current clients, the court found that both Business and Professions Code §6068(e) and Evidence Code §950 define the term "client" broadly.

⁶⁷ See CAL. R. OF CT. R. 376(c) (attorney's declaration in support of withdrawal motion cannot compromise confidentiality).

⁶⁸ *In re Rindlisbacher*, 225 B.R. 180, 193 (9th Cir B.A.P. 1998).

⁶⁹ See *People v. Speedee Oil Change Sys., Inc.*, 20 Cal. 4th 1135, 1150-52 (1999) and ABA Formal Op. 99-415, n. 19.

⁷⁰ CAL. RULES OF PROF'L CONDUCT R. 3-600(B).

⁷¹ See *FDIC v. O'Melveny & Myers*, 969 F. 2d 744 (9th Cir. 1992).

⁷² See, e.g., AB 363 (2002). This bill, vetoed by Governor Davis, sought to add Business and Professions Code §6068.1 authorizing lawyers for government agencies to act as whistle-blowers in certain situations.

⁷³ *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

■ IMMIGRATION LAW ■

■ CONSULAR PROCESSING

■ EMPLOYER SANCTIONS (I-9)

■ DESIGN CORPORATE IMMIGRATION POLICIES

■ EXPERT TESTIMONIAL SERVICES

■ TEMPORARY WORK VISAS

■ Intra-Company Transfers

■ Entertainers & Sports Professionals

■ NAFTA (North American Free Trade Agreement) Visas

■ Professionals & Investors

■ Blue/White Collar Employee Immigration Assistance

■ LABOR CERTIFICATIONS

■ FAMILY RELATED PETITIONS

■ OUTBOUND VISA CAPABILITY

GLOBAL BUSINESS REQUIRES GLOBAL KNOWLEDGE

Newport Beach
4685 MacArthur Court, Suite 400
Newport Beach, CA 92660
phone 949-251-8844
fax 949-251-1545
email hirson@hirson.com



AV Rated

HIRSON WEXLER PERL

ATTORNEYS AT LAW

Los Angeles
6310 San Vicente Blvd., Suite 415
Los Angeles, CA 90048
phone 323-936-0200
fax 323-936-4488
email hirson-la@hirson.com

www.hirson.com • also in San Diego, CA • Phoenix, AZ • Las Vegas, NV • New York, NY • Wilton, CT • Toronto, Canada

David Hirson and Mitchell L. Wexler are certified by the State Bar of California Board of Legal Specialization as specialists in Immigration and Nationality Law.

All matters of California state law are provided by active members and/or under the supervision of active members of the California State Bar.