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BEFORE THE ARIZONA SUPREME COURT

PETITION TO AMEND SUPREME COURT RULE 42	Supreme Court No. R-_____

Pursuant to Rule 28, Ariz.R.Sup.Ct., the State Bar of Arizona petitions the Court to amend Ethical Rule (ER) 1.6, Rules of Professional Conduct, contained in Rule 42, Ariz.R.Sup.Ct., as set forth in the attached appendix.

I. Overview and Summary of Proposed Changes

The State Bar proposes that the Court adopt an addition to ER 1.6 that would broaden the circumstances under which a lawyer may reveal otherwise confidential client information. The proposed addition to ER 1.6 is the language contained in American Bar Association's Model Rule (MR) 1.6(b)(1).

The proposed addition would allow a lawyer to disclose information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm. Unlike Arizona's current ER, the proposed addition does not tie the disclosure to preventing the client from committing a crime.

II. Text of Proposed Rule Change

The full text of the proposed rule change is attached as the appendix.[1] At issue are two additions: the language of MR 1.6(b)(1) and the related paragraph in the comment to the Model Rule.

If the additional language were adopted as proposed, Arizona's ER 1.6 would provide:

> (d) A lawyer may reveal such information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> * * *
>
> (6) to prevent reasonably certain death or substantial bodily harm.

The Model Rule comment corresponding to MR 1.6(b)(1) would be added, with minor changes, to existing Comment 7 to ER 1.6:

> [7] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b) recognizes the overriding value of life and physical integrity, and requires the lawyer to make a disclosure in order to prevent homicide or serious bodily injury that the lawyer reasonably believes is intended by a client. In addition, under paragraph (c), the lawyer has discretion to make a disclosure of the client's intention to commit a crime and the information necessary to prevent it. It is very difficult for a lawyer to "know" when such unlawful purposes will actually be carried out, for the client may have

[1] The proposed additions are shown in legislative format, with additions shown by a double underline and deletions shown by strikethroughs. No substantive deletions are proposed.

a change of mind. Like Paragraph (b), Paragraph (d)(6) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm, but does not require that disclosure prevent a client's crime. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

III. Discussion

Arizona's ER 1.6 historically had been broader than MR 1.6. Now, with recent changes to MR 1.6, Arizona's ER 1.6 is more restrictive. The State Bar recommends that the Court adopt the broader language provided by the current version of MR 1.6. ER 1.6 will then continue to *require* disclosure in a specific situation – to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm – but also would *allow* a lawyer to disclose information to prevent death or substantial bodily harm even if disclosure would not be intended to prevent the client from committing a criminal act.

A. ER 1.6 and MR 1.6 prior to recent changes

The relevant portion of MR 1.6, as adopted by the ABA in 1983, provided:

> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> > (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm…

Arizona chose to require that lawyers reveal otherwise protected information to prevent the client from committing a criminal act that was likely to result in death or substantial bodily harm, rather than making the disclosure permissive:

> (b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

Arizona also included an additional permissive provision, similar to but still broader than the then-existing MR 1.6:

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

As a result, both the ABA and Arizona provisions linked disclosure to preventing the client from committing a crime.

B. Recent changes to MR 1.6

In 2001 and 2002, the American Bar Association adopted major changes to the Model Rules, including a significant change to MR 1.6(b)(1). The changes

resulted from a comprehensive review of the rules by the ABA's so-called Ethics 2000 Commission.

One of the Ethics 2000 Commission's recommended changes to ER 1.6 was to delete the requirement that disclosure under MR 1.6(b)(1) was linked to preventing the client from committing a crime:

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary...to prevent ~~the client from committing a criminal act that the lawyer believes is likely to result in imminent~~ reasonably certain death or substantial bodily harm...

The ABA approved this revision at its annual meeting in Chicago on August 7, 2001. The proposal passed the House of Delegates by a vote of 243 to 184. Kevin E. Mohr, "California's Duty of Confidentiality: Is It Time for a Life-Threatening Criminal Act Exception?" 39 San Diego L. Rev. 307 (2002).

The Ethics 2000 Commission explained why it recommended the changes to MR 1.6(b)(1):

> The Commission recommends that the exception currently recognized for client crimes threatening imminent death or substantial bodily harm be replaced with a broader exception for disclosures to prevent reasonably certain death or substantial bodily harm, *with no requirement of client criminality.* This change is in accord with Section 66 of the American Law Institute's Restatement of the Law Governing Lawyers. The Rule replaces "imminent" with "reasonably certain," to include a present and substantial threat that a person will suffer such injury at a later date, as in some instances involving toxic torts.

A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 at 124 (ABA 2006) (emphasis added).

Because MR 1.6(b)(1) no longer links disclosure to preventing a client's criminal act, it applies in a wide range of non-criminal circumstances. The ABA's comment to MR 1.6 explains:

> Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. *Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.*

MR 1.6 cmt 6 (emphasis added).

Perhaps because other proposed changes to MR 1.6 were more controversial[2], the minutes of the Ethics 2000 Commission and the written testimony submitted do not show substantial dispute over MR 1.6(b)(1)'s adoption. In fact, in a law review article, the chairman of the Ethics 2000 Commission (and

[2] In particular what eventually became MR 1.6(b)(2) and (3), which deal with disclosing information to prevent the client from using a lawyer's services to commit financial crime or fraud. The Ethics 2000 Commission proposed these additions. The ABA House of Delegates initially rejected them 2002, but in 2003 reversed course after a task force on corporate responsibility made new recommendations. Ronald D. Rotunda & John S. Dzienkowski, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY at 212 (ABA/Thomson West 2007).

then Delaware Supreme Court Chief Justice, now retired) E. Norman Veasey, wrote only this about the commission's adoption of the changes to MR 1.6(b)(1):

> There has always been a tension between the goal of keeping inviolate the client's confidences and the need to provide the lawyer with the ability to deal with situations where the lawyer reasonably believes it necessary to make some disclosure to protect third parties or the legal system from substantial harm. The Commission's proposals would broaden, in carefully circumscribed situations, the grounds for discretionary disclosure of client information.
>
> As approved by the House, new Rule 1.6(b)(1) provides the lawyer with discretion to reveal a client confidence if the lawyer reasonably believes it "necessary to prevent reasonably certain death or substantial bodily harm." The result of this new rule is to change "imminent" to "reasonably certain" and to eliminate the requirement that a client's crime be the cause of the problem. Disclosure is permissible whether or not the act in question is a crime or is the act of the lawyer's client. An example given in Comment [6] hypothesizes an accidental discharge into a town's water supply of toxic waste that has a substantial risk of becoming life-threatening over time, not necessarily imminently.

E. Norman Veasey, "Ethics 2000: Thoughts and Comments on Key Issues of Professional Responsibility in the Twenty-First Century," 5 Del.L.Rev. 1, 8-9 (2002). Veasey then proceeded to examine, in detail, the other controversial changes the commission recommended to MR 1.6 but not MR 1.6(b)(1).

About two dozen states now have, in their ethics rules, some version of the language used in MR 1.6(b)(1), without linking the allowed disclosure to preventing a client's intended criminal conduct.[3] A handful of those states[4] have

[3] Alaska, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana,

taken the MR 1.6(b)(1) sentiment even further and *require* lawyers to disclose confidential information to prevent death or bodily harm.[5]

C. Recent changes to ER 1.6

Arizona has not adopted MR 1.6 verbatim.

In December 2000, the State Bar's Board of Governors appointed the Ethical Rules Review Group (ERRG) to consider the ABA Ethics 2000 Commission's recommendations as well as proposals by Arizona lawyers to amend the Arizona Ethical Rules.

ERRG's proposal, as approved by the Board of Governors and reflected in the rule-change petition filed in December 2002, recommended adopting what is now ER 1.6(d), following some of the Ethics 2000 Commission's recommended changes.[6]

ERRG did not recommend adopting MR 1.6(b)(1). The minutes of its April 5, 2001, and June 5, 2001, meetings – the two meetings at which it appears ERRG

Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Dakota, Oregon, Pennsylvania, Tennessee, Utah and Washington.

[4] Florida, Illinois, Iowa, North Dakota, Tennessee and Washington.

[5] While not adopting the broad language of MR 1.6(b)(1), Massachusetts specifically requires lawyers to reveal "such information…to prevent the wrongful execution or incarceration of another." Supreme Judicial Court Rule 3:07, Massachusetts Rules of Professional Conduct Rule 1.6(b)(1).

[6] As noted *infra* n. 2, the ABA House of Delegates initially rejected the commission's recommendations for permissive disclosure to prevent, mitigate or rectify financial injury caused by a client's use of a lawyer's services, but eventually adopted the provisions in 2003.

acted on ER 1.6 -- do not show discussion or a vote on MR 1.6(b)(1). The minutes reflect that ERRG voted to retain ER 1.6(b) and (c) and discussed "modifying existing paragraph (d) to incorporate some of the additional permissive disclosures set forth in the ABA redraft." Those "additional permissive disclosures" are not itemized. At the later meeting, ERRG adopted what eventually became ER 1.6(d)(5).

The December 2002 rule-change petition that resulted from ERRG's efforts explained ERRG's decisions on ER 1.6 this way:

> The changes to this Rule are less significant than the ABA revisions because the existing Arizona Rule led the nation in requiring disclosure of information to prevent a criminal act likely to result in death or substantial bodily harm. The existing Arizona Rule also already permits disclosure to prevent a crime....

The petition does not address why the committee chose not to adopt MR 1.6(b)(1) as an additional permissive disclosure.[7]

This Court adopted the changes to ER 1.6 proposed by that petition.

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[7]Nor do the September 30, 2001, executive summary of ERRG's recommendations to the State Bar Board of Governors or the reporter's notes to the proposed amendments. The executive summary, which described the ERRG proposals that "affect most attorneys much of the time," explained that the ER 1.6 change permitted disclosure to mitigate or rectify substantial injury to another's financial interests if the client has used the lawyer's services to commit a crime or fraud. These are the provisions adopted as ER 1.6(d)(1) and (2). In explaining the proposed changes to ER 1.6, the reporter's notes – as did the later rule-change petition – stated, "The changes to this Rule are less significant than the ABA provisions because the existing Arizona Rule led the nation in requiring disclosure of information to prevent a criminal act likely to result in death or substantial bodily harm." The notes then describe how new paragraph (d) would expand the grounds for permissive disclosure. Those grounds for permissive disclosure are now contained in ER 1.6(d).

D. Arizona should adopt MR 1.6(b)(1) language

The 2002 rule-change petition's explanation of Arizona's rule on confidentiality shows the weakness the State Bar now proposes to remedy. As discussed above, ER 1.6 has historically linked the required and permissive disclosure to preventing the client from committing a criminal act, whereas MR 1.6(b)(1) now does not. It was indeed accurate to say that before the changes to MR 1.6, Arizona's confidentiality provision was broader than the Model Rule because it *required* -- not simply *allowed* -- disclosure under certain circumstances. Now it is also accurate to describe the Arizona rule as more restrictive, because while it requires disclosure under certain circumstances, it does not allow disclosure under wider circumstances.

This difference is exemplified in a recent criminal case reported in the *New York Times*. Adam Liptak, *Lawyer Reveals Secret, Toppling Death Sentence*, N.Y. TIMES, January 19, 2008. A Virginia lawyer disclosed that prosecutors had coached his now-dead client during the prosecution of that client and a co-defendant for murder. According to the article, only the triggerman was eligible for the death penalty, so which of the two defendants actually pulled the trigger was a critical fact. The co-defendant was convicted of being the triggerman, and was sentenced to death. The Virginia lawyer had, 10 years earlier, asked the Virginia State Bar whether he could disclose that prosecutors had coaxed his now-dead client into

giving evidence against the co-defendant and had been told he could not disclose the information. In 2007, he asked again, and was told he could disclose. His disclosure resulted in the co-defendant's death sentence being commuted as the result of prosecutorial misconduct.

MR 1.6(b)(1) would allow the Virginia lawyer to disclose information relating to his deceased client, because disclosure would prevent the execution of the client's co-defendant. ER 1.6(b) as currently written, however, does not provide a mechanism for disclosure, because disclosure would not be intended to prevent the deceased client from committed a criminal act.

On what basis Virginia State Bar ethics counsel advised the lawyer he could disclose has not been made public. According to the *New York Times* article, the Virginia lawyer asked for advice in writing but was given only telephone advice. Virginia's rule on confidentiality is substantially different from MR 1.6.

Disclosure under the Ethical Rules is a separate issue from whether the disclosed attorney-client privileged information could in fact be used as evidence. *See, e.g.* Ariz. Ethics Op. 97-05 ("While it is not uncommon for the two concepts to be discussed as if they are interchangeable, they are entirely separate legal concepts"). This Court, in dealing more than three decades ago with a case similar to the Virginia situation, held that the attorney-client privilege prevented the use of the disclosed information at trial. *State v. Macumber*, 112 Ariz. 569, 544 P.2d 1084

(1976). The Court did not address the ethical propriety of two attorneys disclosing that their deceased client had confessed to murders for which Macumber was charged.[8]

Adopting MR 1.6(b)(1) language (as new ER 1.6(d)(6)) would not change the mandatory nature of ER 1.6(b). An Arizona lawyer still would be required to disclose information to prevent his or her client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm. Adopting MR 1.6(b)(1) language simply would give a lawyer permission to disclose otherwise confidential information to prevent reasonably certain death or substantial bodily harm in situations other than those in which the lawyer is disclosing to prevent the client from committing a qualifying criminal act.

Because disclosure under ER 1.6(d) is permissive, a lawyer's decision not to disclose would not violate the rule. ER 1.6 cmt 17.

The permissive nature of the proposed ER 1.6(d)(6) justifies a higher standard than that contained in ER 1.6(b). The existing ER 1.6(b) directs a lawyer to disclose if the lawyer reasonably believes the client's criminal conduct is "likely to result" in death or substantial bodily harm. "Likely" means "probable." BLACK'S LAW DICTIONARY 925 (6th ed. 1990). The proposed new ER 1.6(d)(6), on the other

[8] The concurring opinion, however, explained that the attorneys who disclosed their deceased client's confession had obtained "an informal opinion" from the State Bar that had advised them that "the privilege of the attorney-client did not apply to prevent them from disclosing the information to the defense, prosecution and court." 112 Ariz. at 572, 544 P.2d at 1087.

hand, uses the phrase "reasonably certain" death or substantial bodily harm. Definitions for "certain" include "clearly known" and "free from doubt." *Id.* at 225. "Reasonably certain" thus establishes a higher bar than "likely to result." A lawyer should be permitted to disclose, especially in circumstances not tied to the client's intended criminal act, only if "reasonably certain" death or substantial bodily harm would result.

IV. Conclusion

Arizona's ER 1.6 currently is in some ways both broader and more restrictive than MR 1.6. It is broader because, under certain circumstances, it *requires* a lawyer to disclose confidential information, while the Model Rule does not require disclosure. On the other hand, ER 1.6 currently does not allow a lawyer to disclose in as broad of circumstances as does MR 1.6.

Adopting the language of MR 1.6(b)(1) would give lawyers more discretion to disclose otherwise confidential information. In some circumstances, such as the Virginia lawyer's dilemma described above, "the overriding value of life and physical integrity" (as the MR 1.6 comment states) may tip the balance against keeping client information confidential. A lawyer thus would have the option, in appropriate circumstances, to disclose client information to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.

RESPECTFULLY SUBMITTED this 6th day of May, 2008.

STATE BAR OF ARIZONA

Robert B. Van Wyck,
Chief Bar Counsel

Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this 6th day of May, 2008.

by: Kathleen A. Lundgren

APPENDIX

Proposed rule change

ER 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

(c) A lawyer may reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime.

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

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

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

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; ~~or~~

(5) to comply with other law or a final order of a court or tribunal of competent jurisdiction directing the lawyer to disclose such information~~.~~ , or

(6) to prevent reasonably certain death or substantial bodily harm.

COMMENT

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See ER 1.18

for the lawyer's duties with respect to information provided to the lawyer by a prospective client. ER 1. 9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and ERs 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that. in the absence of the client's informed consent. the lawyer must not reveal information relating to the representation. See ER 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The public is better protected if full and open communication by the client is encouraged than if it is inhibited. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

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

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

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer

may be impliedly authorized to admit a fact that cannot properly be disputed or, to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[6] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Disclosure Adverse to Client

[7] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b) recognizes the overriding value of life and physical integrity, and requires the lawyer to make a disclosure in order to prevent homicide or serious bodily injury that the lawyer reasonably believes is intended by a client. In addition, under paragraph (c), the lawyer has discretion to make a disclosure of the client's intention to commit a crime and the information necessary to prevent it. It is very difficult for a lawyer to "know" when such unlawful purposes will actually be carried out, for the client may have a change of mind. Like Paragraph (b), Paragraph (d)(6) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm, but does not require that disclosure prevent a client's crime. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[8] Paragraph (c) permits the lawyer to reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime. Paragraph (c) does not require the lawyer to reveal the intention of a client to commit wrongful conduct, but the lawyer may not counsel or assist a client in conduct the lawyer knows is criminal or fraudulent. See ER 1.2(d): see also ER 1.16 with respect to the lawyer's obligation or right to withdraw from the representation from the client in such circumstances. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct, in connection with this Rule, the lawyer may make inquiry within the organization as indicated in ER 1.13(b).

[9] The range of situations where disclosure is permitted by paragraph (d)(1) of the Rule is both broader and narrower than those encompassed by paragraph (c). Paragraph (c) permits disclosure only of a client's intent to commit a future crime, but is not limited to instances where the client seeks to use the lawyer's services in doing so. Paragraph (d)(1), on the other hand, applies to both crimes and frauds on the part of the client, and applies to both on-going conduct as well as that contemplated for the future. The instances in which paragraph (d)(1) would permit disclosure, however, are limited to those where the lawyer's services are or were involved, and where the resulting injury is to the financial interests or property of others. In addition to this Rule, a lawyer has a duty under ER 3.3 not to use false evidence.

[10] Paragraph (d)(2) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (d)(2) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[11] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (d)(3) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[12] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (d)(4) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[13] A lawyer entitled to a fee is permitted by paragraph (d)(4) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[14] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes ER 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by ER 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (d)(5) permits the lawyer to make such disclosures as are necessary to comply with the law.

[15] Paragraph (d)(5) also permits compliance with a court order requiring a lawyer to disclose information relating to a client's representation. If a lawyer is called as a witness to give testimony concerning a client or is otherwise ordered to reveal information relating to the client's representation, however, the lawyer must, absent informed consent of the client to do otherwise and except for permissive disclosure under paragraphs (c) or (d), assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by this Rule, the attorney-client privilege, the work product doctrine, or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal. See ER 1.4. Unless review is sought, however, paragraph (d)(5) permits the lawyer to comply with the court's order.

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

[17] Paragraph (d) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (d)(1) through (d)(5). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (d) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by this Rule. See ERs 1.2(d), 4.1(b), 8.1 and 8.3. ER 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See ER 3.3(b).

Withdrawal

[18] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in ER 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in ER 1.6. Neither this Rule nor ER 1.8(b) nor ER 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Acting Competently to Preserve Confidentiality

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

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

Former Client

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