

Privilege and Confidentiality in California

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INTRODUCTION

Effective December 1, 1993, California amended its Evidence Code to eliminate the attorney-client privilege when disclosure of a lawyer-client communication is necessary to prevent a client from committing a dangerous crime.¹ The legislature left intact a statute governing attorney-client confidentiality that requires lawyers to "maintain inviolate" the confidence and secrets of her client.² At least one ethics committee has interpreted the confidentiality statute as forbidding disclosure of the precise information that the new privilege amendment covers.³ This article explores the interrelationship between California's privilege and confidentiality laws and considers the important question of how lawyers, courts, and the legislature should approach the apparent conflict in the two statutory schemes.

I. TRADITIONAL DISTINCTIONS BETWEEN PRIVILEGE AND CONFIDENTIALITY

Although lawyers often use "privilege" and "confidentiality" interchangeably, courts and commentators usually have taken care to distinguish the concepts. Privilege and confidentiality have the same roots.⁴ Their shared goals include encouraging clients to rely upon attorneys, enhancing lawyers' ability to operate effectively in the adversarial system, fostering client dignity and autonomy, and enabling lawyers to find out about and dis-

¹ CAL. EVID. CODE § 956.5 (West Supp. 1994).

² See CAL. BUS. & PROF. CODE § 6068(e) (West Supp. 1994) ("It is the duty of an attorney . . . [t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.").

To avoid confusion, I refer to the primary lawyer under discussion in the female gender. For balance, I treat the other actors in the process (*e.g.*, clients) as male.

³ See San Diego County Bar Ass'n Legal Ethics and Unlawful Practices Comm., Op. 1990-1, at 3 (1990) (holding that lawyer may not reveal client's threat to kill a codefendant); *cf.* Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1981-58, at 62 (1981) (holding that Business and Professions Code section 6068(e) forbids lawyer to disclose expert engineer's conclusion that structure occupied by third parties may be unstable in an earthquake).

⁴ See Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 355 n.18 (1989) (discussing history of privilege and confidentiality) and authorities cited therein; *cf.* Brian R. Hood, Note, *The Attorney-Client Privilege and a Revised Rule 1.6: Permitting Limited Disclosure after the Death of the Client*, 7 GEO. J. LEGAL ETHICS 741, 760-63 (1994) (listing justifications for privilege).

suade clients from engaging in misconduct.⁵ Traditionally, courts have administered the privilege, while lawyer organizations have determined the scope of confidentiality.⁶ Concerned with ascertaining truth and with the rights of adversaries, courts have construed privilege "narrowly."⁷ They have recognized the existence of numerous practical exceptions.⁸ In contrast, lawyers and bar organizations have been more interested in preserving attorney-client relationships. They have taken a broad and rigid view of confidentiality's scope.⁹

⁵ For discussions of these rationales, see Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1159-72 (1985) (evaluating rationale for confidentiality); Zacharias, *supra* note 4, at 358-61 and authorities cited therein (analyzing justifications for confidentiality).

⁶ Courts deal with privilege issues when information is sought in litigation from an adversary or witness through discovery or testimony at trial. Because most confidentiality rules allow lawyers to disclose information under court order, courts do not need to consider whether confidentiality should somehow exempt a lawyer from producing unprivileged information. Thus, confidentiality issues tend to arise outside of the litigation context—in situations in which a lawyer wishes or feels compelled to reveal information voluntarily. The lawyer may be guided by ethics opinions on the legitimacy of disclosure or may have to risk subjecting herself to discipline by bar association agencies that interpret the confidentiality rules.

⁷ *E.g.*, *Underwater Storage, Inc. v. United States Rubber Co.*, 314 F. Supp. 546, 547 (D.D.C. 1970) (noting that privilege "has such an effect on full disclosure of the truth that it must be narrowly construed"); *D.I. Chadbourne, Inc. v. Superior Court*, 388 P.2d 700, 711 (Cal. 1964) (holding that attorney-client privilege should be construed strictly); *Grover v. Superior Court*, 327 P.2d 212 (Cal. 1958) (holding that attorney-client privilege suppresses relevant facts and therefore should be construed strictly); *see also* *Weil v. Investment/Indicators Research & Management, Inc.*, 647 F.2d 18, 24 (9th Cir. 1981) (noting that attorney-client privilege hinders discovery of truth); *Diversified Indus. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977) (noting that privilege hinders discovery of truth and may be strictly construed); *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 323 (7th Cir. 1963), *cert. denied*, 375 U.S. 929 (1963).

⁸ *See* Zacharias, *supra* note 4, at 371, 371 n.91 and authorities cited therein (noting exceptions including "abandonment," extended "waiver" by client, and forfeiture through errors by client's attorney).

⁹ *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) [hereafter MODEL RULES] (stating that confidentiality covers all information "relating to the representation"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1986) [hereafter MODEL CODE] (applying confidentiality rule to all information gained in professional relationship); *see also* Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1981-58, at 2 (1981) ("the maintenance of the integrity of the legal profession demands at all times the protection of a client who depends upon and confides in the attorney"); Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1986-87, at 2 (1986) (holding that information regarding client's criminal record is not privileged, but is subject to Business and Professions Code section 6068(e)'s confidentiality requirements); Cal. State Bar Standing Comm. on Professional Responsibility and Conduct,

California has codified these separate approaches. The California Evidence Code notes the existence of attorney-client privilege,¹⁰ but provides a laundry list of exceptions that courts administer.¹¹ California's statutory attorney-client confidentiality rule — found in the Business and Professions Code — is interpreted by local and state bar committee opinions and enforced by a special Bar Court, rather than trial judges.¹² The Business and Professions Code's language demands absolute confidentiality.¹³ Bar committee opinions support the language.¹⁴

Formal Op. 1984-76, at 2-3 (1984) (distinguishing legal and ethical duties of attorney given physical evidence by her client); San Francisco Bar Ass'n Legal Ethics Comm., Formal Op. 1977-2, at 3-5 (1977) (holding that information falling within crime-fraud exception to privilege is confidential under § 6068(e)).

¹⁰ CAL. EVID. CODE § 954 (West Supp. 1994).

¹¹ See, e.g., CAL. EVID. CODE § 956 (West 1966) (creating crime-fraud exception); *id.* § 957 (creating exception for party claiming through deceased client); *id.* § 958 (creating exception for communication relating to breach of duty); *id.* § 959 (creating exception for lawyer as attesting witness); *id.* §§ 960-961 (creating exception for testimony regarding validity of writings); *id.* § 962 (creating joint-client exception).

¹² The jurisdiction of the State Bar Association and the State Bar Court to discipline attorneys is defined in the California State Bar Act, CAL. BUS. & PROF. CODE §§ 6000-6228, particularly in §§ 6075-6088 (West 1993 & Supp. 1994). Formal and informal opinions of the state and local bar associations are advisory. See State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1965-1 (describing effect of State Bar opinions). Bar Court decisions are binding and appealable to the California Supreme Court. Cal. Rules of Court, Rule 952 (1994). Since the Bar Court's recent reconfiguration, the Supreme Court has rarely disturbed Bar Court rulings.

¹³ See CAL. BUS. & PROF. CODE § 6068(e) ("It is the duty of an attorney . . . [t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.").

¹⁴ See, e.g., Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1993-133, at 4 (1993) ("attorney's duty to maintain client confidences and secrets inviolate is broader in scope than the privilege"); Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1988-96, at 1 (1988) (stating same); Los Angeles County Bar Ass'n, Formal Op. 436, at 2 (1985) (stating same); San Diego County Bar Ass'n Legal Ethics and Unlawful Practices Comm., Op. 1990-2, at 2 (concluding that duty of attorney as officer of the court is subordinate to duty to preserve client confidences). A series of opinions from the Los Angeles County Bar part company by recognizing public policy exceptions to confidentiality. See, e.g., Los Angeles County Bar Ass'n, Formal Op. 271 (1962) (finding future crime exception to confidentiality); *id.* Op. 305 (1968) (finding that attorney should withdraw representation during sentencing if she knows the client perjured himself); *id.* Op. 353 (1976) (finding that corporate attorney should avoid disclosure outside of client corporation unless dangerous crime is imminent); *id.* Op. 414 (1983); *id.* Op. 417 (1983); *id.* Op. 436 (1985); *id.* Op. 396 (1982) (finding lawyer self-defense exception to confidentiality).

California's approach to confidentiality ostensibly is the strictest in the United States.¹⁵ Most American jurisdictions follow the Model Rules of Professional Conduct (Model Rules) or the Model Code of Professional Responsibility (Model Code), which suggest exceptions to confidentiality when a client threatens to commit future crimes.¹⁶ California has rejected the American Bar Association (ABA) models.¹⁷ On two recent occasions, the California Supreme Court set aside free-standing proposals to adopt Rules of Professional Responsibility that would have created a confidentiality exception for situations in which a lawyer "reasonably believes [disclosure is] necessary to prevent the commission of a criminal act that the member believes is imminently likely to result in death or substantial bodily harm."¹⁸

¹⁵ See Fred C. Zacharias, *Fact and Fiction in the Restatement of the Law Governing Lawyers: Should the Confidentiality Provisions Restate the Law?*, 6 GEO. J. LEGAL ETHICS 903, 912-918, 929 (1993) [hereafter Zacharias, *Fact and Fiction*] (comparing California's approach to future crimes with that of other states). I say "ostensibly" because there is some question about whether the California confidentiality rule is as absolute as it appears. See Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. (forthcoming 1994) (discussing status of confidentiality in California).

¹⁶ See MODEL RULES, Rule 1.6(b) (allowing disclosure when necessary to prevent a criminal act likely to result in imminent death or substantial bodily harm); MODEL CODE, DR 4-101(C) (allowing disclosure of client's intent to commit crime). Approximately six states have adopted Model Rule 1.6(B) and 31 have adopted Model Code, DR 4-101(C). For further elaboration of how the fifty American jurisdictions have responded to the ABA models on confidentiality, see Zacharias, *Fact and Fiction*, *supra* note 15, at 913-14 (canvassing state rules concerning future harm exception to confidentiality); Fred C. Zacharias, *The Restatement and Confidentiality*, 46 OKLA. L. REV. 73, 76-77 (1993) (discussing same).

¹⁷ See Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1982-69, at 4 n.6 (1982) (discussing Model Code's future crime exception and California's decision not to adopt it); cf. San Francisco Bar Ass'n, Formal Op. 1977-1, at 2 (1977) (noting California's rejection of Model Code).

¹⁸ Proposed Rule 3-100 to Cal. Rules of Professional Conduct (1992) (on file with author). Currently, the California Rules of Professional Conduct do not address confidentiality, leaving the issue to California Business and Professions Code section 6068(e). The full text of the proposed 1992 rule provides:

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

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

(B) Definitions.

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

(2) As used in this rule, "secrets" means any information obtained by the member during the professional relationship, or relating to the repre-

Because California's confidentiality rule is statutory, the court concluded that adopting an exception in the professional rules would assume legislative prerogatives.¹⁹ Against this background, in 1993, the legislature considered the change to attorney-client secrecy that ultimately was codified in California Evidence Code section 956.5.

sentation, which the client has requested to be inviolate or the disclosure of which might be embarrassing or detrimental to the client.

(C) A member is not subject to discipline who reveals a confidence or secret:

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

Id. The 1987 proposal was identical, except that it also included exceptions for lawyers' self-defense and situations in which courts order lawyers to disclose. Proposed Rule 3-100 to Cal. Rules of Professional Conduct (1987) (on file with author).

¹⁹ Upon committee recommendation and after public comment, the Board of Governors of the California State Bar Association originally forwarded a proposal to amend the California Rules of Professional Conduct to the California Supreme Court in December of 1987. 11 CAL. REG. L. REP. 182 (1991). The court returned the proposal to the Bar in June, 1988, with questions about the relationship between the proposal and the California attorney-client privilege statute. *Id.* In particular, the court asked:

[I]n what context does [the proposed rule] allow for disclosure of otherwise privileged information? To the extent it permits disclosure in judicial proceeding where no statutory exception to the privilege exists, it may be inconsistent with, or contravene the legislature's intent underlying Evidence Code section 950 et seq. Where the legislature has codified, and revised, or supplanted privileges previously available at common law, does the court have inherent authority to modify this statutory privilege?

Letter from the California Supreme Court to Terry Anderlini, State Bar President, *quoted in*, Memorandum from Board Committee on Education and Competence to Members of the Board of Governors, at 1 (June 23, 1992) (on file with author) (citations omitted).

In 1989, the Commission for the Revision of the Rules of Professional Conduct was asked to study the court's concerns. *Id.* It proposed adding a "discussion section" paragraph that would state: "The rule is not intended to create, augment, diminish, or eliminate any application of either the lawyer-client privilege or work product rule." *Id.* at 2. The Board of Governors circulated the new proposals several times for comments. *Id.* at 3. In 1992, noting the pros and cons of a future harm exception to confidentiality, the Board forwarded a slightly modified proposal to the California Supreme Court, including the discussion section paragraph. On June 3, 1993, the court rejected the amended proposal without comment. 13 CAL. REG. L. REP. 215 (1993).

II. THE 1993 AMENDMENT

Section 956.5 provides:

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

The wording of the amendment is striking. Its terms do not adopt an exception to attorney-client privilege, but rather redefine privilege to exclude information necessary to prevent the client from causing harm. In form, therefore, the amendment parts company from the similarly phrased confidentiality *exception* in the Model Rules.²⁰ It parallels the crime-fraud exclusion from attorney-client privilege (typically referred to as "the crime-fraud exception").²¹ The crime-fraud exclusion provides that when a client gives a lawyer otherwise privileged information, the information loses its privileged character if the information was mentioned for the purpose of using the lawyer to further a crime or fraud.²²

In other respects, however, the terms of the 1993 amendment track the Model Rules exception and the confidentiality exception considered and rejected by the California Supreme

²⁰ Model Rules, Rule 1.6(b) provides:

A lawyer may reveal [confidential] 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. . . .

MODEL RULES, Rule 1.6(b) (1983).

²¹ Although labelling the crime-fraud principle as an "exception" is misleading, that terminology is the norm. I refer to the principle as the "crime-fraud exclusion" throughout this article, to avoid confusion.

²² See CAL. EVID. CODE § 956 (West 1986) ("There is no privilege . . . if the services of the lawyer were sought or obtained to enable or aid anyone to commit a crime or fraud."). Traditional (*e.g.*, Model Code and Model Rules) exceptions to confidentiality allow disclosure in future crime situations because protecting third parties is more important than the systemic and client-protective justifications for confidentiality. The crime-fraud exclusion from privilege has a different theoretical justification; namely, that the client has not used the lawyer in a legal capacity and therefore cannot expect the lawyer to treat the conversation as a professional communication. See *infra* text accompanying note 95.

Court.²³ The choice of language provides two insights. First, the drafters were conscious of, and seemed to have considered, issues of confidentiality as well as privilege. Second, they were emphasizing the need to prevent harm rather than the intent of the client.²⁴ Had the drafters wished to focus on the misuse of lawyers (as in the crime-fraud exclusion from privilege), wording focused on the client's objective actions and the client's purpose in making the communication would have been more apt. One also might have expected the drafters to consolidate the new provision with the preexisting crime-fraud exclusion. Although the new amendment follows the crime-fraud provision in the Evidence Code, no effort to connect the two appears in the legislation or in the legislative history.

That said, what are the possible purposes of section 956.5? At first glance, the obvious goal seems to be to protect third parties from harm by allowing lawyers to act on relevant information provided by their clients. Yet if section 956.5 truly leaves the confidentiality statute intact, section 956.5 rarely will help prevent harm. In most instances, lawyers could not tell a threatened third party or the authorities of an impending danger, because the lawyers remain bound by confidentiality. By itself, section 956.5 permits (or requires) the lawyer to disclose the information only when it is sought specifically through discovery or as evidence in legal proceedings — an event that ordinarily cannot occur before a client carries out his threat to injure the third party.²⁵ Thus, in adopting section 956.5, the legislature either

²³ See *supra* notes 18-19 and accompanying text.

²⁴ See MODEL CODE, DR 4-101(C) ("A lawyer may reveal: . . . (3) The intention of his client to commit a crime and the information necessary to prevent the crime.").

²⁵ A litigation adversary rarely has reason to question the client about his future intent to commit crime. Even if the adversary suspects such intent, he must establish a *prima facie* case establishing that unprivileged communications exist before gaining access to them. See, e.g., *Dickerson v. Superior Court*, 185 Cal. Rptr. 97, 101 (Cal. Ct. App. 1982) (holding that mere allegation of fraud insufficient to invoke exception); *Geilim v. Superior Court*, 285 Cal. Rptr. 602, 607-08 (Cal. Ct. App. 1991) (requiring *prima facie* showing to trigger *in camera* review of evidence). This rarely is possible.

In contrast, once the client has committed a crime, a victim or prosecutor will often need to seek evidence of the client's intentions to prove malice or elements of the tort or crime. If the court allows discovery or grand jury inquiry, meeting the *prima facie* threshold should be relatively simple. Without inquiring into the contents of the communication, the adversary or prosecutor can ask the lawyer whether the client spoke to the lawyer about his intentions. Cf. Fred C. Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of*

must have meant to amend the confidentiality statute or to further a purpose other than direct harm prevention.

One possible purpose may have been to correct a loophole in the common law of privilege, to harmonize California's crime-fraud exclusion with that of other jurisdictions. As in most states, a client who seeks a California lawyer's assistance in furthering an ongoing or future crime (or fraud) forfeits the attorney-client privilege with respect to communications about the crime.²⁶ However, in *People v. Clark*,²⁷ the California Supreme Court preserved the privilege for clients who communicate with their lawyers about a future crime without seeking to enlist the lawyer's assistance.²⁸ The court's controversial holding²⁹ rested on the court's belief that the legislature that adopted the Evidence Code had not intended to extend the crime-fraud exclusion to simple future crime situations.³⁰ The record supporting section 956.5 makes clear that a desire to correct *Clark*'s interpretation of the legislature's goals provided the initial impetus for the Evidence Code amendment.³¹

Clark's facts highlight a second possible purpose of section 956.5. The government sought to introduce into evidence at a

Attorneys, 76 MINN. L. REV. 917, 919 (1992) (discussing use of grand jury subpoenas of attorneys seeking information subject to crime-fraud exclusion from attorney-client privilege).

²⁶ See CAL. EVID. CODE § 956 (West 1994) (stating that attorney-client privilege does not apply "if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud"); see also *BP Alaska Exploration, Inc. v. Superior Court*, 245 Cal. Rptr. 682, 687 (Cal. Ct. App. 1988); *Glade v. Superior Court*, 143 Cal. Rptr. 119, 125 (Cal. Ct. App. 1978) (affirming California crime-fraud exclusion).

²⁷ 789 P.2d 127 (Cal. 1990).

²⁸ *Id.* at 153.

²⁹ See *Abbott v. Superior Court*, 177 P.2d 317, 318 (Cal. Dist. Ct. App. 1947) (reaffirming a "continuous and unbroken stream of judicial reasoning and decision . . . to the effect that communications between attorney and client *having to do with* the client's contemplated acts, *or* in aid or furtherance thereof, are not covered by the cloak of this privilege") (emphasis added).

³⁰ *Clark*, 789 P.2d at 153.

³¹ The report accompanying the proposed amendment first states that the amendment "was suggested by a law student constituent of the author, for the purpose of resolving a current lack of clarity." Sen. Com. on Judiciary, Sen. Bill No. 645 (1993-1994 Reg. Sess.) Discipline, cmt 5 (May 18, 1993). The report then explains the "lack of clarity" by noting the problem *Clark* addressed. *Id.* The only concern the report raises is whether Evidence Code section 956.5's limited change in privilege signals an intent to treat as privileged a client's statement of intent to commit a non-physical crime. *Id.*; see also Legis. Counsel's Dig., Sen. Bill No. 645 (Reg. Sess.) (noting that amendment overrules *Clark*).

criminal trial the defendant's statements to his lawyer and psychiatric expert that he intended to murder the victim.³² Assuming *arguendo* that the conversations were confidential, the government claimed that the need for probative evidence in litigation justified the court in interpreting the attorney-client privilege narrowly and in extending the crime-fraud exclusion to cover statements of intent. Section 956.5 may have had the limited purpose of expanding the pool of evidence available to prosecutors of crimes, *ex post*, even if the information itself remains confidential, *ex ante*.

These arguments suggest yet another conceivable goal of section 956.5 — one that combines the evidentiary and crime-prevention rationales. Let us make three assumptions about the legislators: (1) they were aware that many unprivileged statements to lawyers are confidential;³³ (2) they believed, in accordance with confidentiality theory, that lawyer disclosure of clients' statements of intent might have a negative effect on clients' willingness to use and trust lawyers; and (3) they nevertheless wished to take some action to strengthen a lawyer's hand in preventing threatened harm of which she is aware. By maintaining strict confidentiality, but requiring a lawyer to provide evidence against the client after the client carries out his threat, section 956.5 provides a stick lawyers can use to dissuade clients from committing harm. The lawyer must keep the client's secret, thereby ensuring this and other clients' trust in her loyalty. At the same time, the lawyer may counsel the client that if he proceeds with the threat, the lawyer can not avoid being called to testify against the client.³⁴ This truthful advice is not "black-

³² The defendant in *Clark* was charged with rape, arson, and attempted murder. *Clark*, 789 P.2d at 134. At the penalty stage of trial, the government sought to admit conversations among defendant, his psychiatric expert, and his lawyer about defendant's plans to kill the victims. *Id.* at 149. The court concluded that the doctor-patient privilege no longer applied once third parties learned the information. *Id.* at 151. However, the Court upheld defendant's claim that the attorney-client privilege protected his statements of intent against admission into evidence. *Id.* at 153.

³³ A lawyer could not disclose unprivileged confidential information voluntarily but, if subpoenaed in litigation, could be forced to produce it.

³⁴ Before the adoption of section 956.5, lawyers already had this option with respect to clients seeking the lawyer's assistance in committing the crime. The communications of those clients fit within the crime-fraud exclusion from privilege. *See, e.g., United States v. Friedman*, 445 F.2d 1076, 1086 (requiring lawyers to testify against their clients regarding

mail" in the same sense as a lawyer's threat to prevent the harm if the client refuses to obey the lawyer's commands.³⁵ Yet it does provide significant incentive for the client to conform to the lawyer's advice. Enabling lawyers to obtain information about client plans so that they can dissuade clients from breaking the law has always been one of the strongest justifications for strict confidentiality rules.³⁶

The facial inconsistency between the new privilege amendment and the confidentiality statute, together with the existence of at least three possible rationales for the amendment, present lawyers with a serious quandary. Consider the scenario the legislature envisioned: a client tells a lawyer that he intends to kill a third party. What may and should the lawyer do? The terms of section 956.5 provide that, if subpoenaed, the lawyer must give evidence once the client shoots the third party. But may she take preventive measures in advance? The answer depends, in large measure, on whether the legislature's amendment of attorney-client privilege in section 956.5 implicitly amended section 6068(e) of the Business and Professions Code.

III. DOES SECTION 956.5 IMPLICITLY AMEND BUSINESS AND PROFESSIONS CODE SECTION 6068(e) TO ALLOW DISCLOSURES OF THREATENED HARM?

A lawyer facing the paradigm scenario initially would look to two sources for guidance: judicial decisions interpreting section 956.5 and bar association advisory opinions. The recent decision in *General Dynamics Corp. v. Superior Court*³⁷ provides some support for the proposition that section 956.5 amends the duty of

crime-fraud communications), *cert. denied*, 404 U.S. 958 (1971). The impact of section 956.5 is limited to clients' statements of intent that do not call for the lawyer's help.

³⁵ Compare William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1142 n.129 (1988) (arguing that allowing lawyers to disclose certain information would give lawyers leverage in convincing clients to act appropriately) with Monroe Freedman, *Ethical Ends and Ethical Means*, 41 J. LEGAL EDUC. 55, 57-58 (1991) (criticizing notion that lawyers should be able to "blackmail" clients into acting morally).

³⁶ See, e.g., American Bar Association, *Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information*, 31 BUS. LAW. 1709, 1710 (1976) (discussing dissuasion rationale); Zacharias, *supra* note 4, at 359, 369-70 ("in theory, confidentiality helps lawyers discover improprieties that the client plans, advise against them, and ultimately to stop the misconduct") and authorities cited therein.

³⁷ 7 Cal. 4th 1164 (1994).

confidentiality. The issue before the California Supreme Court was whether in-house corporate counsel retain the same right as non-lawyer employees to sue employers for "retaliatory discharge." In rejecting the defense that a retaliatory discharge cause of action might undermine attorney-client relationships between employer and counsel, the court limited corporate counsels' cause of action to situations in which an attorney's conduct is mandated by the professional code and those in which "some statute or ethical rule . . . specifically permits the attorney to depart from the usual requirement of confidentiality."³⁸ The court, in dicta, suggested that section 956.5 represents one situation in which there is a legislative judgment "that the principle of professional confidentiality does not apply."³⁹

General Dynamics sheds light on the court's inclinations. The Court seems to be interpreting section 956.5 broadly. However, *General Dynamics* does not decide that section 956.5 amends the Business and Professions Code. The retaliatory discharge claim before the court posed the question of whether lawyers who contest their employers' conduct have the same right as other employees to sue for retaliatory discharge, in light of the lawyers' special duties of loyalty and confidentiality. The California Supreme Court did not need to resolve the confidentiality issue, because the respondent apparently had not breached either privilege or confidentiality.⁴⁰ The court's dicta may have been an anticipatory attempt to carve out a middle ground — recognizing the possibility of a retaliatory discharge cause of action despite a breach of confidentiality, but only in circumstances in which the legislature has suggested that the benefits of secrecy are limited.

Whatever the ultimate outcome, it is clear that the *General Dynamics* court did not address the apparent conflict between the privilege and the confidentiality statutes. Its opinion was confined to the rights of in-house counsel, which the court

³⁸ *Id.* at 1189.

³⁹ *Id.* at 1189-90.

⁴⁰ Although the supreme court's opinion is not clear, the respondent apparently had protested the company's actions internally. *Id.* at 1170-71. The company apparently then alleged that it had fired him not for breaching confidences, but for exhibiting a lack of zeal regarding the company's interests. *Id.* The court ultimately remanded the case, directing the lower court to allow respondent to amend his complaint. *Id.* at 1192.

considered different than those of lawyers in private practice.⁴¹ The opinion did not consider whether reasons might exist for extending the protections of confidentiality to communications exempted under section 956.5. The decision therefore cannot be deemed to have resolved the issue.

In the absence of a definitive ruling, the lawyer deciding whether she may disclose her client's threats might seek guidance from the California Bar or her local bar association. All bar associations that provide advisory opinions take pains to state that their opinions are not binding and do not insulate the recipient from discipline or liability.⁴² Perhaps more importantly, advisory opinions typically take months — sometimes years — to issue. The lawyer faced with a dilemma under section 956.5 probably could not obtain an advisory opinion on whether disclosure is permissible in time to take meaningful crime-preventive steps. She would need to make her own decision regarding the collision of section 956.5 and California's strict confidentiality statute. In particular, the lawyer would have to consider both the background of section 956.5 and applicable rules of statutory construction, in order to assess whether courts and disciplinary agencies would interpret the new amendment as creating an implicit exception to confidentiality.

The California courts employ a strong presumption against inferring silent amendments to statutes.⁴³ One leading case, *Hays v. Wood*,⁴⁴ holds that a court may not infer an amendment except when it can find "undebatable evidence" of the legislature's intention to amend or when two statutes are irreconcilable in the absence of an implicit amendment.⁴⁵ However,

⁴¹ *Id.* at 1171-72, 1177-80.

⁴² *See, e.g.*, Cal. State Bar Comm. on Professional Responsibility and Conduct, Formal Op. 1965-1, at 2 (1994).

⁴³ *See, e.g.*, *Roberts v. City of Palmdale*, 853 P.2d 496, 505 (Cal. 1993) (rejecting implied exception to attorney-client privilege); *Droeger v. Friedman, Sloan & Ross*, 812 P.2d 931, 941 (Cal. 1991) (rejecting implied exception to community property statute absent clearly expressed legislative intention to create exception); *Fuentes v. Workers' Compensation Appeals Bd.*, 547 P.2d 449, 453 (Cal. 1976) (rejecting partial repeal of workers' compensation statute absent "express declaration"); *Stockton Theatres, Inc., v. Palermo*, 304 P.2d 7, 10 (Cal. 1956) ("a court is not authorized in the construction of a statute to create exceptions not specifically made"); *People v. Derby*, 2 Cal. Rptr. 401 (Cal. Ct. App. 1960) (relying on presumption against implied modifications).

⁴⁴ 603 P.2d 19 (Cal. 1979).

⁴⁵ *Id.* at 24 ("[Implied repeals] will occur only when the two acts are so inconsistent

the strong language in *Hays* and similar cases focuses on complete "repeals [of statutes] by implication," rather than partial modification of laws by later enactments.⁴⁶ When separate, ostensibly related laws are at issue, the cases note the courts' duty to "maintain the integrity of both statutes if they may stand together."⁴⁷ Thus, if inferring an exception to one statute helps maintain parallel provisions, the presumption against implicit amendments is not an absolute bar.⁴⁸

There are three possible arguments that section 956.5 satisfies the *Hays* prerequisites and, therefore, modifies the confidentiality statute: first, that the legislative history underlying section 956.5 expresses a clear intent to create an amendment; second, that previous legislative action illustrates a clearly implied legislative intent to amend; and third, that the statutes are so contradictory that an implicit exception must be found. Each argument is considered in turn below.

A. Intent as Disclosed in the Legislative History

California's presumption against implied amendments recognizes that when statutes conflict, courts will interpret them in the way that best effectuates the legislative intent.⁴⁹ At the

that there is no possibility of concurrent operation, or where the later provision gives undebatable evidence of an intent to supersede the earlier").

⁴⁶ *Id.* at 24; see also *Nickelsberg v. Workers' Compensation Appeals Bd.*, 814 P.2d 1328, 1334 (Cal. 1991) (rejecting implied repeal of Labor Code provision); *Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist.*, 777 P.2d 157, 163-64 (Cal. 1989) (following *Hays* and rejecting repeal of Health and Safety law); *Dew v. Appleberry*, 591 P.2d 509, 513 (Cal. 1979) (noting strength of presumption against repeals by implication); *In re White*, 460 P.2d 980, 983 (Cal. 1969) (rejecting repeal of Penal Code section); *Warne v. Harkness*, 387 P.2d 377, 383 (Cal. 1963) (rejecting repeal of Penal Code section); *Penziner v. West Am. Fin. Co.*, 74 P.2d 252, 260 (Cal. 1937) (employing presumption against repeals by implication).

⁴⁷ *People v. Manuel L.*, 865 P.2d 718, 722 (Cal. 1994) ("[W]e are bound to maintain the integrity of both statutory provisions if the two can stand together . . ."); see also *Dew*, 599 P.2d at 513 (quoting *White*, 460 P.2d at 983) (holding that implied repeals "are recognized only when there is no rational basis for harmonizing the two potentially conflicting statutes"); *Fuentes*, 547 P.2d at 453 (noting that court does not favor implied repeals, especially when it can reconcile two laws in question).

⁴⁸ See, e.g., *Prudential Reinsurance Co. v. Superior Court of Los Angeles County*, 842 P.2d 48, 53-56 (Cal. 1992) (holding that California Insurance Code section 1031 implicitly provides exception to contemporaneously enacted section 1033); *People v. Pieters*, 802 P.2d 420 (Cal. 1991) (finding implied exception to Health and Safety statute).

⁴⁹ *People v. Pieters* is instructive. The court considered whether a penal statute limiting

time the California legislature considered section 956.5, it confronted the issue of how lawyers should respond to client threats to harm third parties.⁵⁰ If the legislature anticipated that section 956.5's adoption would let lawyers prevent such harm by disclosing the clients' plans, arguably the legislature intended section 956.5 to create an exception to Business and Professions Code section 6068(e).

On the other hand, the cases also note a qualifying principle of statutory construction. Courts generally must refuse to infer exceptions to existing laws absent a clear legislative mandate creating the exception.⁵¹ Indeed, *Hays* carries the principle of construction a step further; in situations in which parallel statutes are at issue, it requires "undebatable evidence of an intent to supersede the earlier [statute]."⁵² At least some of the

consecutive sentencing contained an implicit exception by virtue of a separate sentence-enhancement statute for serious drug offenses. *Pieters*, 802 P.2d at 422. Neither the language nor the legislative histories of the two statutes referred to each other. *Id.* at 423. The court nevertheless found an implicit exception, reasoning that strict application of the limiting statute would undermine the legislature's intent to impose higher sentences on persons convicted of possessing large quantities of narcotics. *Id.* at 424; *see also* *American Friends Serv. Comm. v. Procunier*, 109 Cal. Rptr. 22, 28 (Cal. Ct. App. 1973) (stating that courts should construe apparently conflicting statutes "with a view to promoting rather than defeating its general purpose"); *Pesce v. Department of Alcoholic Beverage Control Bd.*, 333 P.2d 15, 17 (Cal. 1958) (suggesting that when inconsistencies appear in separate codes, courts should deem the codes to be a single statute for purposes of statutory construction); *cf.* *Dyna-Med, Inc. v. Fair Employment & Hous. Comm'n*, 743 P.2d 1323, 1330 (Cal. 1987) (discussing importance of interpreting statutes in "commonsense" manner to serve legislature's intentions).

⁵⁰ See Legis. Counsel's Dig., Sen. Bill No. 645 (Reg. Sess.), at 5 (Aug. 25, 1993) (discussing problem of lawyer confronted with dangerous client).

⁵¹ See, e.g., *People v. Siko*, 755 P.2d 294, 296 (Cal. 1988) (noting presumption against implied exceptions absent express legislative declaration of intent); *Fuentes*, 547 P.2d at 453 (requiring express declaration of intent); *Bruce v. Gregory*, 423 P.2d 193, 198 (Cal. 1967) ("[A] court may not insert qualifying provisions into a statute not intended by the Legislature and may not rewrite a statute to conform to an assumed legislative intent not apparent" (quoting *People v. One 1940 Ford V-8 Coupe*, 224 P.2d 677, 688 (Cal. 1950))); *People v. Ford V-8 Coupe*, 224 P.2d 677, 680 (Cal. 1950) ("[T]he court is limited to the [legislative] intent expressed.").

⁵² *Hays v. Wood*, 603 P.2d 19, 24 (Cal. 1979). The *Hays* language originally may have been intended to apply only to cases involving a complete repeal of a statute by implication. Most cases using the language concern complete repeals. See, e.g., *American Fed. of State, County & Mun. Employees, Local 330 v. County of San Diego*, 14 Cal. Rptr. 2d 51, 57-58 (Cal. Ct. App. 1992) (alleging by implication complete repeal of law governing Superior Court's control over employee benefits); *Department of Personnel Admin. v. Superior Court*, 6 Cal. Rptr. 2d 714, 735 (Cal. Ct. App. 1992) (discussing complete repeals); *Spencer v. G.A. MacDonald Constr. Co.*, 134 Cal. Rptr. 78, 86 (Cal. Ct. App. 1976)

legislators who favored section 956.5 must have been aware of the existence of California's strict confidentiality statute. Had they wished to amend the Business and Professions Code, changing the Evidence Code without a cross-reference to the confidentiality statute was hardly the clearest expression of that intent.⁵³

The legislative history itself is murky. The legislators were advised of the existence of Business and Professions Code section 6068(e), because that statute is quoted (though discussed just once) in an assembly committee report accompanying the proposal.⁵⁴ The report suggests that its authors believed crime-

(alleging complete repeal by implication of Labor Code provision).

However, some courts have applied *Hays'* language, perhaps indiscriminately, to partial repeals and implied modifications of statutes. *See, e.g.,* *Manufacturers Life Ins. Co. v. Superior Court*, 23 Cal. App. 4th 1629, 1640 (Cal. Ct. App.), *modified on reh'g*, 33 Cal. Rptr. 2d 424 (Cal. Ct. App. 1994) (rejecting implied partial repeal of antitrust law); *Frazer v. Dixon Unified Sch. Dist.*, 22 Cal. Rptr. 2d 641, 648, 648 n.10 (Cal. Ct. App. 1993) (applying undebatable evidence standard to claim that 1986 amendments to Education Code "qualify and clarify" existing provisions requiring open school board meetings); *Woolley v. Embassy Suites, Inc.*, 278 Cal. Rptr. 719 (Cal. Ct. App. 1991) (rejecting implied partial repeal of standards for injunctions); *People v. Trevisanut*, 207 Cal. Rptr. 921, 925 (Cal. Ct. App. 1984) (rejecting alleged modification of definitional section of prior law). These decisions suggest that the undebatable evidence standard now governs modification claims as well as claims of complete repeal.

A 1968 case illustrates the trend. *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 69 Cal. Rptr. 480 (Cal. Ct. App. 1968). A newspaper sought to limit the application of attorney-client privilege between government officials and the city counsel on the basis of a new law forbidding closed government meetings. *Id.* at 483. The paper conceded that the privilege statute applied to government lawyers, but urged the court to treat the open meeting law as a partial amendment for nontestimonial situations. *Id.* at 489. The court concluded that evidence of legislative intent to limit the privilege was "far too thin." *Id.* at 491. The court stated the principle that repeals or substantial modifications by implication must be supported by "undebatable evidence" of an intent to supersede the earlier law. *Id.* at 492; *see also* *Western Oil and Gas Ass'n v. Monterey Unified Air Pollution Control Dist.*, 777 P.2d 157, 162, 165 (Cal. 1989) (discussing only repeals by implication, but in effect rejecting both repeal and modification claim through single holding that evidence of legislative intent was not "undebatable").

⁵³ *See Siko*, 755 P.2d at 296 (stating that had legislature intended new statute to modify a century-old ban on multiple punishments for same acts, "it would have made that purpose explicit"); *Lambert v. Conrad*, 8 Cal. Rptr. 56, 61 (Cal. Ct. App. 1960) (noting that implied amendment should not be based on court's belief that legislature was unaware of or confused about need for amendment to reconcile two statutes); *First Methodist Episcopal Church of Santa Monica v. Los Angeles County*, 267 P.2d 703, 704 (Cal. 1928) (holding that court will not presume intent to legislate by implication).

⁵⁴ *Legis. Counsel's Dig., Sen. Bill No. 645 (Reg. Sess.)*, at 5 (Aug. 25, 1993), at 4-5 (Aug. 25, 1993) [hereafter the Report]. Other documents refer to and restate the language of the proposed legislation, but the Report contains the only legislative analysis or

prevention to be the primary purpose of the Evidence Code amendment and that adoption of section 956.5 would enable lawyers to disclose information in situations in which the Business and Professions Code previously forbade disclosure. For example, immediately after quoting the confidentiality statute, the report lists several issues raised by the privilege amendment, including whether disclosure should be mandatory, to whom disclosure should be made, and whether the amendment should be limited to physical crimes.⁵⁵ Without expressly stating the authors' understanding, the report's syllogism implies that the amendment would affect confidentiality as well as privilege.

Perhaps more telling is the report's reliance upon an incident in Los Angeles in which a law firm felt precluded by the *confidentiality* statute from revealing a client's threat to a judge. The report concludes that that incident "supported the need for an express exception to the *privilege*."⁵⁶

The reference to the Los Angeles case illustrates that the sponsors of the legislation not only were concerned with crime prevention, but that they themselves did not understand the difference between confidentiality and privilege. Other evidence of this misunderstanding exists.⁵⁷ Early in the report, the authors refer to the Bar's previous attempts to persuade the California Supreme Court to adopt a confidentiality exception in the California Rules of Professional Conduct as "a proposed rule

discussion of the privilege amendment. *Id.*

⁵⁵ *Id.* The Report states:

Business and Professions Code Section 6068(e) requires attorneys to "maintain inviolate the confidence, at every peril to himself or herself, of his or her client." The proposed statutory exception to the privilege raises the following issues:

- (a) There is no requirement that the attorney reveal the imminent criminal conduct of a client. The provision is entirely permissive.
- (b) The proposed provision does not state to whom the disclosure may, or shall, be made. There is no requirement that law enforcement be informed.
- (c) Should the exception to the privilege be limited to instances of death or substantial bodily harm. . . .

⁵⁶ *Id.* at 5 (emphasis added).

⁵⁷ In most instances, the Report speaks only of "privilege." The only mentions of confidentiality are the cross-reference to Business and Professions Code § 6068 and the terms of Evidence Code § 956.5 itself. *Id.*

on attorney-client privilege.”⁵⁸ The misapprehension carries over to the terms of section 956.5 itself, for the amendment refers to a lawyer’s belief that “disclosure of any *confidential* information” is necessary, rather than her belief that “disclosure of any *privileged* information” is necessary.⁵⁹

Let us return now to the lawyer, disciplinary agency, or court faced with the task of interpreting section 956.5. If the assignment were simply to make the best possible guess as to the legislative intent, one reasonably might conclude that the legislature confused its terms, thought it was enabling lawyers to disclose threats in advance, and (to the extent necessary) implicitly amended the Business and Professions Code. However, when one considers the presumption against implied modification — the notion that implied amendments must be based on “clear” or “undebatable” expressions of legislative intent — that interpretation becomes problematic.

Quite apart from the logical difficulty in inferring an unambiguous expression of intent from the confused state of the record, there are specific indications that the legislature actually did not intend to amend the confidentiality statute. Section 956.5 was one part of broader legislation that made five explicit changes to the Business and Professions Code.⁶⁰ Because the accompanying report highlighted the confidentiality section of the Business and Professions Code for the legislators, one would have expected them to change the confidentiality section, as well as the others, had they intended an amendment. Moreover, even assuming that the legislators mistakenly exaggerated the similarity between privilege and confidentiality, the terms of section 956.5 expressly confine the amendment to the privilege discussed in the Evidence Code; the section begins by stating that “there is no privilege under this article.”

Perhaps more importantly, as the above discussion illustrates, the sole stated purpose of the amendment was to overrule

⁵⁸ *Id.* at 4.

⁵⁹ CAL. EVID. CODE § 956.5 (West Supp. 1994). The same confusion is evident in the definitional section of the privilege statute. *See id.* § 952 (defining privilege in terms of “confidential communications between client and lawyer”).

⁶⁰ In particular, the legislation amended Business and Professions Code sections 6079.1 and 6068(11) and added new sections 6086.14, 6147, and 6148. *See* Legis. Counsel’s Dig., Sen. Bill No. 645 (Reg. Sess.), at 5 (Aug. 25, 1993) (summarizing changes).

Clark.⁶¹ At least some of the legislators probably relied on that rationale, rather than crime-prevention, in voting for the bill. It thus would be less than candid to conclude that the legislative record itself demonstrates a "clear" intention to amend the Business and Professions Code.⁶²

*B. Implied Intent — Have the California Authorities Always
Equated Privilege With Confidentiality?*

Although proponents of an implicit statutory exception carry the burden of establishing a clear legislative intention to create the exception, the cases do not require that the intent be expressly stated.⁶³ It therefore is appropriate to consider alternative indicators of legislative purpose, including the history of privilege and confidentiality in California.⁶⁴ One's view of the

⁶¹ See *supra* text accompanying notes 26-31.

⁶² A 1989 case involved similarly conflicting evidence of legislative intent. *Western Oil & Gas Ass'n v. Monterey Bay Unified Air Control Dist.*, 777 P.2d 157, 163-66 (Cal. 1989). At issue was whether a new environmental statute modified or repealed an earlier delegation of authority to localities to regulate pollution. *Id.* at 158. The legislative history expressed the legislature's plan to "complement" existing environmental laws, but also contained a statement suggesting a desire for a consistent statewide pollution control program. *Id.* at 164. The court rejected the claimed statutory modification, concluding that the ambiguous legislative record did not constitute "undebatable evidence" of an intent to supersede the earlier law. *Id.* at 165.

⁶³ See, e.g., *People v. Pieters*, 802 P.2d 420, 425 (Cal. 1991) (examining likely effect of two inconsistent statutes and inferring exception where purpose of second statute was "unambiguous" and could not be given effect without an exception); see also *People v. Siko*, 755 P.2d 294, 296-97 (Cal. 1988) (rejecting implicit repeal or modification of existing statute, but only after canvassing all evidence of purpose of second law); *Warne v. Harkness*, 387 P.2d 377, 382-86 (Cal. 1963) (rejecting repeal or modification of existing statute, but only after canvassing all evidence of purpose of second law); *Sacramento Newspaper Guild v. Sacramento Bd. of Supervisors*, 69 Cal. Rptr. 480, 489-92 (Cal. Ct. App. 1968) (rejecting repeal or modification of existing statute, but only after canvassing all evidence of purpose of second law).

Of course, express legislative statements are the best evidence of an intent to amend. A few courts have relied on the absence of express statements in the legislative history to support their conclusion that the legislature did not intend any exception. See, e.g., *Droeger v. Friedman, Sloan & Ross*, 812 P.2d 931, 942 (Cal. 1991) (emphasizing absence of reference in legislative history to allegedly modified statute); *Nickelsberg v. Workers' Compensation Appeals Bd.*, 814 P.2d 1328, 1337 (Cal. 1991) (emphasizing same); *Fuentes v. Workers' Compensation Appeals Bd.*, 547 P.2d 449, 453 (Cal. 1976) (discussing importance of "express declaration").

⁶⁴ Cf. *Dyna-Med, Inc. v. Fair Employment & Housing Comm'n*, 743 P.2d 1323, 1332 (Cal. 1987) (considering history and background of statute to determine underlying legislative intent).

legislature's adoption of section 956.5 may depend upon whether the California courts and Legislature always have treated the scope of confidentiality in the Business and Professions Code as limited to communications privileged under the Evidence Code. If so, section 956.5 reasonably can be interpreted as circumscribing confidentiality even in the absence of statements to that effect in the legislative history.

The best indication of a symbiotic relationship between California's privilege and confidentiality are explicit references in the attorney-client privilege sections of the Evidence Code to "confidential materials." The majority of American jurisdictions define attorney-client privilege using some form of Wigmore's definition:

- (1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.⁶⁵

California's Evidence Code, in contrast, defines the privilege as a right "to refuse to disclose . . . a confidential communication between client and lawyer."⁶⁶ "Confidential communications," in turn, are defined in section 952 as "information transmitted between a lawyer and client . . . [that] includes a legal opinion formed and the advice given by the lawyer."⁶⁷ Section 956.5

⁶⁵ 8 J. WIGMORE, EVIDENCE § 2292, at 554 (J. McNaughton rev. 1961 and Supp. 1994). Another commonly cited definition is found in *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950):

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

⁶⁶ CAL. EVID. CODE § 954 (West Supp. 1994).

⁶⁷ *Id.* § 952. On its face, the Evidence Code appears overly limited. However, the courts have interpreted the privilege, like Wigmore's definition, to encompass all information given by the client to the lawyer for the purpose of obtaining legal advice. *Cf. Himmelfarb v. United States*, 175 F.2d 924, 939 (9th Cir.) (extending privilege to most communications

again refers to disclosure of confidential rather than privileged communications.

Most codes of professional responsibility take a broad view of which communications are "confidential." The Model Rules refer to "information relating to representation of a client."⁶⁸ The Model Code defines confidential information as "information protected by the attorney-client privilege . . . and other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."⁶⁹ Traditionally, California ethics committees have assumed that the confidentiality referred to in the Business and Professions Code is equally far-reaching.⁷⁰

Curiously, however, the California Business and Professions Code includes no definition of confidentiality. It merely instructs lawyers to "maintain the confidence" of clients and "preserve their secrets." On occasion, the California Bar has parsed this two-part concept: "maintaining confidence" means the lawyer "may not do anything to breach the trust reposed in him or her by the client;"⁷¹ "preserving secrets," as in the ABA Model Code, means not revealing any "information gained in the professional relationships . . . the disclosure of which would be embarrassing and would be likely to be detrimental to the client."⁷² Perhaps the ethics committees have interpreted the total package of confidentiality too broadly; arguably the legislature

from client to his lawyer), *cert. denied*, 338 U.S. 860 (1949); *Roberts v. City of Palmdale*, 853 P.2d 496, 500 (Cal. 1993) (defining privilege broadly); *Ex parte Ochse*, 238 P.2d 561, 562 (Cal. 1951) (defining privilege broadly).

⁶⁸ MODEL RULES, Rule 1.6(a).

⁶⁹ MODEL CODE, DR 4-101(A).

⁷⁰ See, e.g., Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1993-133, at 4 (1993) (describing broad duty of confidentiality); Los Angeles County Bar Ass'n, Formal Op. 386, at 2 (1981) (defining confidentiality with reference to Model Code, DR 4-101(A)'s definition).

⁷¹ Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1986-87, at 2 (1986); Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1988-96, at 2 (1988).

⁷² Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1986-87, at 2 (1986); see also Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1981-58, at 2 (1958) (explaining difference between "confidence" and "secrets"); Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1988-96, at 2 (1988) (explaining same).

intended to limit it to the definition of confidential communications in the Evidence Code.⁷³

To make matters more confusing, both legislators and ethics committees have tended to use the terms privilege and confidentiality interchangeably. When ethics opinions do so, they often assume that the privilege is as broad as the committees' view of confidentiality.⁷⁴ When legislators refer to confidentiality, as in the legislative history of section 956.5, they tend to assume that confidentiality is as limited as the statutory privilege. Courts, too, seem to confuse the two principles of professional secrecy.⁷⁵

⁷³ The California Standing Committee on Professional Responsibility and Conduct has suggested that "client confidences" for purposes of Business and Professions Code section 6068(e) are the same as the "confidential information" defined in Evidence Code section 952. Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1993-133, at 4 (1993). However, the Committee suggested that the term "secrets" extends confidentiality to all information gained in the professional relationship.

⁷⁴ See, e.g., Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1981-58, at 2 (1981) (noting that both "confidences" and "secrets" are privileged information); see also Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1984-84, at 1, 1 n.3, 2 (1984) (noting that confidentiality and privilege are not coterminous, but looking "for guidance to that body of law developed under the lawyer-client privilege," and then asserting that law of privilege protects confidential communications and declining to distinguish "secrets" from "confidential information"); Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1984-76, at 3 (1984) (distinguishing ethical and legal obligations of lawyer given physical evidence by client, but then discussing issues only in terms of privilege); San Diego County Bar Ass'n Legal Ethics and Unlawful Practices Comm., Op. 1990-2, at 2 (1990) (assuming that lawyer's duty of candor to court gives way to confidentiality, even though information in question is unprivileged); Los Angeles County Bar Ass'n, Formal Op. 329 at 2 (1972) (equating privilege and confidentiality); *id.* Op. 353 at 1 (1976) (holding same); *id.* Op. 386 (1981) (holding same); *cf.* Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1988-96 (1989) (assuming that unprivileged information is confidential when lawyer may have fiduciary relationship to person who might be harmed by nondisclosure); San Diego County Bar Ass'n Legal Ethics and Unlawful Practices Comm., Op. 1983-10, at 1 (1983) (assuming same). For a discussion of how the legal profession has tried to trump privilege notions through bar interpretations of confidentiality, see Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1437-41 (1992).

⁷⁵ See, e.g., *People v. Tamborino*, 263 Cal. Rptr. 731, 742-43 (Cal. Ct. App. 1989) (Johnson, J., dissenting) (disagreeing with majority finding that attorney-client privilege had been waived in circumstances in which attorney-client confidentiality was implicated); *Vela v. Superior Court*, 255 Cal. Rptr. 921 (Cal. Ct. App. 1989) (treating claim of confidentiality as equivalent to claim of privilege for purposes of judicial review); *Insurance Co. of North Am. v. Superior Court*, 166 Cal. Rptr. 880, 884 (Cal. Ct. App. 1980) (applying attorney-client privilege "waiver" and "abandonment" exceptions to attorney-client confidentiality).

Of course, because litigation tends to involve privilege issues rather than confidentiality issues, judges rarely have occasion to express their opinions regarding confidentiality.

What, then, is the lawyer interpreting section 956.5 to conclude? She might focus on the 1988 and 1993 California Supreme Court decisions to reject Rules of Professional Conduct that would have created a future crimes exception.⁷⁶ The supreme court stated its view that the legislature should determine the scope of both privilege and confidentiality.⁷⁷ Aware of the court's deference, the legislature produced a report equating privilege with confidentiality and adopted a provision that refers to both.⁷⁸ This process reinforces the conclusion that the legislature, indeed, envisioned confidentiality and privilege as coextensive — with the result that a limitation of privilege should represent a limitation of confidentiality.

Yet the legislature's knowledge of the supreme court's action may cut the other way. An important principle of statutory construction cautions courts to adhere to the terms of a law. Courts are not supposed to rewrite statutory language, even to harmonize the statute with the presumed legislative intent, if the language itself is clear.⁷⁹ Section 956.5 expressly confines its applicability to evidentiary privilege.⁸⁰ The legislature's awareness of policy issues relating to the confidentiality provisions of the Business and Professions Code supports the conclusion that the

When they do, they often exhibit confusion about confidentiality's distinct status. *See, e.g.*, *General Dynamics Corp. v. Superior Court*, 876 P.2d 487, 503 (Cal. 1994) (assuming legislative restriction of attorney-client privilege applies to confidentiality as well); *In re Young*, 776 P.2d 1021, 1025 (Cal. 1989) (disagreeing, in part, with state bar court finding that lawyer had obligation to disclose fact that client gave false name to police, bail bondsman, and court officials under circumstances in which crime-fraud exclusion from privilege rendered that information unprivileged); *People v. Godlewski*, 21 Cal. Rptr. 2d 796, 799 (Cal. Ct. App. 1993) (applying mandate of Business and Professions Code section 6068(e) to attorney-client privilege); *cf. Schwinner v. United States*, 232 F.2d 855, 863 (8th Cir. 1956), (referring to "privilege" as concept of professional responsibility), *cert. denied*, 353 U.S. 833 (1956); *People v. Singh*, 11 P.2d 73, 75 (Cal. Ct. App. 1932) (deciding same); *Colman v. Heidenreich*, 381 N.E.2d 866, 868-69 (Ind. 1978) (deciding scope of privilege by referring to confidentiality rules).

⁷⁶ *See supra* notes 18-19 and accompanying text.

⁷⁷ *See supra* note 19 and accompanying text.

⁷⁸ *See supra* notes 20-24, 54-59 and accompanying text.

⁷⁹ *See United States v. Turkette*, 452 U.S. 576, 580 (1981) (holding that courts should honor statute's unambiguous language, unless legislature intended different result); *see also* *People v. Hansel*, 824 P.2d 694, 697 (Cal. 1992); *Regional Bank v. Wozab*, 806 P.2d 557, 567 (Cal. 1990) (holding same); *People v. Weidert*, 705 P.2d 380, 383 (Cal. 1985) (holding same); *People v. Boyd*, 594 P.2d 484, 489-90 (Cal. 1979) (holding same); *Earl Ranch, Ltd. v. Industrial Accident Comm'n*, 53 P.2d 154, 155 (Cal. 1935) (holding same).

⁸⁰ *See supra* note 60 and accompanying text.

internal limitation of the new amendment was designed to have meaning.⁸¹

One reason to believe courts would follow the latter approach in interpreting section 956.5 is a special limitation on active judicial interpretation of the Evidence Code in the code itself. Section 911 restricts evidentiary privileges to those created by statute.⁸² The California Law Revision Committee comments to section 911 describe the section as “preclud[ing] the courts from elaborating upon the statutory scheme.”⁸³ Although this directive simply appears to prevent the court from interpreting the code to create new privileges, the California Supreme Court has interpreted it as strictly forbidding judges to “imply unwritten exceptions to existing statutory privileges.”⁸⁴ So interpreted, section 911 signals that language in the Evidence Code should be taken seriously. The language of section 956.5 provides that

⁸¹ The only alternative interpretation of § 956.5 is that the terms “under this article” constitute meaningless verbiage. *See* *Palos Verdes Faculty Ass’n v. Palos Verdes Peninsula Unified Sch. Dist.*, 580 P.2d 1155, 1159 (Cal. 1978) (“significance should be given to every word, phrase, sentence and part of an act. . . . A construction making some words surplusage is to be avoided” (quoting *Select Base Materials v. Board of Equalization*, 335 P.2d 672, 673 (Cal. 1959))); *California Mfrs. Ass’n v. Public Utils. Comm’n*, 598 P.2d 836, 840 (Cal. 1979) (holding same); *cf.* *Roberts v. City of Palmdale*, 853 P.2d 496, 499 (Cal. 1993) (enforcing literal language of new statute); *West Covina Hosp. v. Superior Court of Los Angeles County*, 718 P.2d 119, 122 (Cal. 1986) (en banc) (holding that courts must assume that legislature meant what it said).

⁸² CAL. EVID. CODE § 911 (West 1994) provides:

Except as otherwise provided by statute:

- (a) No person has a privilege to refuse to be a witness.
- (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing.
- (c) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object, or other thing.

⁸³ Law Revision Commission comments to Cal. Evid. Code § 911, in 29B WEST’S ANNOTATED CAL. CODE § 911 (1987).

⁸⁴ *See* *Roberts v. City of Palmdale*, 853 P.2d 496, 501 (Cal. 1993) (noting that limitation on courts’ authority to modify privileges is especially important in interpretations of the attorney-client privilege); *see also* *Holland v. Thacher*, 245 Cal. Rptr. 247, 251 (Cal. Ct. App. 1988) (declining to infer exception to attorney-client privilege to permit cross-complaints among lawyers); *County of Alameda v. Superior Court*, 239 Cal. Rptr. 400, 403-04 (Cal. Ct. App. 1987) (limiting prior judicially-created privilege pursuant to section 911); *Hoiles v. Superior Court*, 204 Cal. Rptr. 111, 115 (Cal. Ct. App. 1984) (refusing to infer exception to attorney-client privilege in corporate context); *Dickerson v. Superior Court*, 185 Cal. Rptr. 97, 100 (Cal. Ct. App. 1982) (refusing to infer exception to attorney-client privilege in corporate context).

section 956.5's exception extends exclusively to "privilege under this article," without mentioning the Business and Professions Code.

At root, the principles of construction discussed above reflect a common sense approach to interpreting statutes that applies well in the case of section 956.5. The legislature knew of the confused nature of the relationship between privilege and confidentiality and chose not to clarify it.⁸⁵ Arguably, a court would not, and should not, take the liberty of reading into the statute the precise clarification the legislature avoided.

*C. Should the Courts Correct Inconsistencies in the Law Even
in the Absence of a Legislative Intention to Do So?*

At this point, it appears that one cannot discern any clearly expressed or clearly implied legislative intent to limit attorney-client confidentiality. Yet the tension between the new privilege amendment and the absolute terms of the confidentiality statute remains. *Hays* recognizes that sometimes statutes are "so inconsistent that there is no possibility of concurrent operation," thereby justifying a court in inferring an exception.⁸⁶ Other cases are even more forgiving, finding implicit exceptions where literal interpretation simply would reduce the operation or effectiveness of one of the statutes.⁸⁷ Should our hypothetical lawyer assume that a court would reconcile the privilege and confidentiality statutes in the most logical way — by inferring a confidentiality exception?

⁸⁵ In construing statutes, courts traditionally have presumed that the legislature is aware of preexisting laws. *E.g.*, *Nickelsberg v. Workers' Compensation Appeals Bd.*, 814 P.2d 1328, 1335 (Cal. 1991); *People v. Overstreet*, 726 P.2d 1288, 1290 (Cal. 1986); *Bailey v. Superior Court*, 568 P.2d 394, 398 (Cal. 1977); *Stafford v. Realty Bond Serv. Corp.*, 249 P.2d 241, 246 (Cal. 1952); *American Friends Serv. Comm. v. Procunier*, 109 Cal. Rptr. 22, 27 (Cal. Ct. App. 1973).

⁸⁶ *Hays v. Wood*, 603 P.2d 19, 24 (Cal. 1979); *see also In re Thierry*, 566 P.2d 610, 619 (Cal. 1977) (finding implied repeal in directly contradictory statute); *Governing Bd. of Rialto Unified Sch. Dist. v. Mann*, 558 P.2d 1, 6 (Cal. 1977) (finding same).

⁸⁷ *See Prudential Reinsurance Co. v. Superior Court*, 842 P.2d 48, 56 (Cal. 1992) (finding implicit exception despite fact that aspects of "inconsistent" statute would be effective without incorporating an exception); *People v. Pieters*, 802 P.2d 420, 424 (Cal. 1991) (finding implied exception to statute to avoid undermining legislative purpose).

Courts will try to make the best sense of seemingly contradictory laws.⁸⁸ The courts tend to give weight to legislative policies that are expressed in the more recent of two conflicting statutes⁸⁹ and to favor specific over general statutes covering the same subject matter.⁹⁰ Here, in section 956.5, a recent legislature codified a very specific desire to enable lawyers

⁸⁸ Cf. *Dyna-Med, Inc. v. Fair Employment & Hous. Comm'n*, 743 P.2d 1323, 1330 (Cal. 1987) (holding that courts should give statutes common sense interpretations, consistent with legislative intent, to achieve "wise policy"); *Clean Air Constituency v. California State Air Resources Bd.*, 523 P.2d 617, 624 (Cal. 1974) (holding same); *People v. Davis*, 439 P.2d 651, 651 (Cal. 1968) (holding that statutes should receive common sense constructions that will render them valid and operative); *American Serv. Comm'n v. Proconier*, 109 Cal. Rptr. 22, 28 (Cal. Ct. App. 1973) (interpreting seemingly inconsistent laws to promote general purposes of each).

Reconciling statutes may entail either acknowledging an exception or giving the statutes independent operation. Sometimes, inferring an exception is the best way to effectuate the legislature's purposes and to maintain both laws. See, e.g., *Prudential Reinsurance*, 842 P.2d at 53-56 (inferring exception to long-standing general statute); *Pieters*, 802 P.2d at 424 (finding implicit exception in order to effectuate legislative purpose of new statute). In other instances, narrowly construing one statute leads to the more reasonable effectuation of the legislative policies. See, e.g., *Roberts v. City of Palmdale*, 853 P.2d 496, 505 (Cal. 1993) (harmonizing statutes by limiting new statute and relegating both statutes to independent spheres of operation); *Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist.*, 777 P.2d 157, 164 (Cal. 1989) (narrowly construing new statute to effectuate legislature's desire to "complement" existing statutory scheme); see also authorities cited *infra* note 91.

⁸⁹ See *Prudential Reinsurance*, 842 P.2d at 65 (Kline, J., dissenting) ("the more recent enactment prevails as the latest expression of the legislative will" (quoting 2B SUTHERLAND, STATUTORY CONSTRUCTION § 51.02 at 122 (5th ed. 1992))); *In re Michael G.*, 747 P.2d 1152, 1158 (Cal. 1988) (suggesting that recent statute should be deemed to overrule contradictory earlier law); cf. *Fuentes v. Workers' Compensation Appeals Bd.*, 547 P.2d 449, 453 (Cal. 1976) (the "rule giving precedence to the later statute . . . [should be] invoked only if the two cannot be harmonized").

⁹⁰ More precisely, courts will consider a specific statute to be an exception to a more general statute when the general statute standing alone would include the same subject matter as the specific statute and conflicts with it. See *Woods v. Young*, 807 P.2d 455, 460 (Cal. 1991) (en banc) (treating specific provision requiring waiting period in malpractice actions as governing general statute of limitations tolling provision); *County of Placer v. Aetna Casualty & Sur.*, 323 P.2d 753, 757 (Cal. 1958) (treating later specific provision as exception to earlier general provision); *In re Williamson*, 276 P.2d 593, 594 (Cal. 1954) (treating later specific provision as exception to earlier general provision).

This principle does not dispose of the conflict between Evidence Code § 956.5 and Business and Professions Code § 6068(e) because the two statutes do not necessarily cover the same subject. Indeed, whether privilege and confidentiality involve the same type of attorney-client secrecy is the precise issue that needs to be determined. A court that finds the concepts coextensive would not need a principle of construction to determine which statute governs; the court would simply conclude that the legislature intended the new exception to apply to all forms of secrecy.

to prevent third-party harm by disclosing information. Interpreting the preexisting Business and Professions Code as requiring lawyers to maintain confidentiality would frustrate that policy.

In reconciling statutes, however, most courts have taken the position that the statutes should be interpreted, if possible, so that both can stand as written.⁹¹ We have seen that there are several interpretations of section 956.5 which allow it to be harmonized even with *absolute* attorney-client confidentiality. The amendment could be limited to overruling *Clark*;⁹² it could be viewed as providing litigants — the victim or a prosecutor — with access to probative evidence after the occurrence of third-party harm.⁹³

Moreover, close examination of section 956.5 suggests that the “most logical” harmonization follows the interpretation of section 956.5 under which lawyers may warn clients of eventual disclosure in order to dissuade client misconduct, but may not use the information against the client unless the client commits the third-party crime.⁹⁴ That interpretation is consistent with the theory underlying the crime-fraud exclusion from attorney-client privilege — the “exception” which the new amendment follows in the Evidence Code. Under the crime-fraud exclusion, a client’s otherwise privileged communication loses its privilege when the client provides the information to obtain the lawyer’s assistance in committing a crime. The exclusion’s rationale is that the client has acted wrongfully. Because the client has misused the lawyer — indeed, has not actually consulted the lawyer in her representative capacity — the lawyer does not come cloaked with representative protections.⁹⁵ The exclusion is

⁹¹ See, e.g., *People v. Manuel L.*, 865 P.2d 718, 722 (Cal. 1994) (stating that two apparently conflicting statutes should be harmonized if at all possible); *Nickelsberg v. Worker’s Compensation Appeals Bd.*, 814 P.2d 1328, 1334 (Cal. 1991) (stating same); *Dew v. Appleberry*, 591 P.2d 509, 513 (Cal. 1979) (requiring harmonization of statutes if there is any “rational basis” for it); *Fuentes*, 547 P.2d at 453 (harmonizing two laws by finding complementary objectives); *Warne v. Harkness*, 387 P.2d 377, 382-83 (Cal. 1963) (harmonizing two sentencing statutes); *California Drive-in Restaurant Ass’n v. Clark*, 140 P.2d 657 (Cal. 1943) (stretching meaning of preexisting law to avoid conflict with administrative order).

⁹² See *supra* notes 26-31 and accompanying text.

⁹³ See *supra* note 32 and accompanying text.

⁹⁴ See *supra* notes 24-36 and accompanying text.

⁹⁵ MCCORMICK ON EVIDENCE § 95, at 350 (Strong ed. 1992) (concluding that advice

not an "exception" in the sense of the Model Rules and Model Code exceptions to confidentiality; rather than deeming the prevention of crime or fraud more important than the policies favoring secrecy, it assumes that the client is not entitled to secrecy at all.⁹⁶

Section 956.5 adopts similar logic. It treats communications about harmful future crimes as unprivileged, rather than "privileged but so important that they should be disclosed." Presumably, the drafters of the provision believed that a client making these communications, even when not enlisting the lawyer's assistance, does not deserve free access to the lawyer's ear.

Let us evaluate under what circumstances that conclusion follows. Consider the client who anticipates committing a dangerous crime, discusses it with the lawyer, and then is dissuaded. Could the legislators reasonably have concluded that that the client has misused the lawyer and that the policies underlying privilege and confidentiality do not warrant extending secrecy to the client? As a policy matter, society would hope that such clients will feel secure enough in their lawyers' discretion to talk to the lawyers.⁹⁷ Only once a lawyer has pointed out the illegality and danger and her client insists on going forward might one lose sympathy for the client; from that moment on, the client knowingly embarks on a wrongful course of conduct and should not be entitled to expect further help from his lawyer. In other words, the legislature's decision to withdraw the privilege makes sense only if section 956.5 avoids penalizing the client who desists from the crime, while requiring a client who persists to accept the consequences of his act.⁹⁸ In

given to advance crime or fraud would not be professional service); 8 WIGMORE, *supra* note 65, § 2298, at 572 (enterprise does not fall "within the just scope of the relation between legal adviser and client"); James A. Gardner, *The Crime or Fraud Exception to the Attorney-Client Privilege*, 47 A.B.A. J. 708, 709 (1961) (discussing rationale for crime-fraud exclusion).

⁹⁶ See *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950) (including crime fraud exception within definition of privilege).

⁹⁷ See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981) (stating that primary reason for attorney-client privilege is need to assure clients that they can speak frankly with their lawyers so that lawyers can advise clients and encourage clients' compliance with the law).

⁹⁸ Consider, in contrast, the consequences of inferring an exception to confidentiality even when the client does not persist in the misconduct. Because § 956.5 deems the

essence, that is the compromise struck by preserving confidentiality with respect to the communications, but allowing forced disclosure when the wrongful client is sued or prosecuted.⁹⁹

Maintaining the protections of confidentiality but eliminating privilege, therefore, is a reasonable policy choice. The harmonization of section 956.5 with the Business and Professions Code flows naturally from the theory underlying attorney-client privilege. As a consequence, there is ample reason to believe a court would not infer an exception to confidentiality from the mere adoption of section 956.5.

IV. WHAT IS THE STATUS QUO?

Our hypothetical lawyer still needs counsel. She confronts seemingly contradictory statutes, a suspicion that the legislature wishes her to prevent the third-party harm, and conflicting principles of statutory construction that would make it difficult for a court or disciplinary agency to find an implicit amendment to the Business and Professions Code. Sadly, the institutions that are authorized to interpret the law are unlikely to provide guidance. Unless some lawyer risks a lawsuit by disclosing potentially confidential information, courts and disciplinary agencies will not deal with the issue.¹⁰⁰ The statutes are in place; at present, there is no reason to expect legislative clarification. The hypothetical lawyer might proceed on the belief that the legislature

communications unprivileged in character, the lawyer representing a famous client would be entitled to use the communication for his own purposes, perhaps even against the client's interests. The lawyer could, for example, tell the media of the client's statements or write a book about the client's character.

⁹⁹ There are two aspects to the compromise. First, although enabling lawyers to warn clients of their eventual obligation to disclose may have some crime-preventive effect, the effect is limited; lawyers cannot do anything to stop clients who persist. Second, even though lawyers may testify if subpoenaed after the fact, the client's complicity in the crime may never be discovered and so the lawyer may not be subpoenaed.

These restrictions on the lawyer's ability to prevent and remedy (or punish) crime serve society's interests in maintaining clients' trust in their lawyers, also in compromise fashion. Clients can know that lawyers will not control their decisions; the clients' autonomy is kept intact. However, clients must accept responsibility for exercises of their autonomy. They no longer can feel secure that their lawyer always will act in their interests.

¹⁰⁰ *Cf. State v. Hansen*, 862 P.2d 117 (Wash. 1993) (en banc) (lawyer disclosed threat to kill a judge on basis that no attorney-client relationship existed between himself and speaker).

by now would have clarified its desire for crime-preventive action if it intended an exception to confidentiality, but that assumes the legislature perceives the confused state of the law.

A lawyer who recognizes the uncertain status of the law has reason to censor her disclosures. Interpreting section 956.5 as authority to reveal a potential crime might subject the lawyer to a lawsuit and disciplinary action if her interpretation is wrong. On the other hand, preserving the client's secrets is relatively safe. Affected third parties are unlikely to learn of her knowledge, so they will not sue or file complaints. Even if the lawyer's knowledge comes to light, her reasonable belief that Business and Professions Code section 6068(e) required her to keep silent probably provides a defense to, or at least solid mitigation of, sanctions.¹⁰¹ These incentives to self-censor may be appropriate in light of California's historically strong policy favoring confidentiality; arguably, California wishes its lawyers to hesitate before revealing client secrets. Yet where, as here, the issue of disclosure is a policy choice rather than an issue requiring case-by-case factual evaluation, it makes little sense to leave the matter to a lawyer's individual sense of the law.

The law's uncertainty, combined with the practical incentives the uncertainty produces, may have the effect of frustrating the legislature's actual intentions in adopting section 956.5. That is something we cannot know. But we can predict that the status quo will create a vacuum in authority that local ethics committees must fill. The track record of California's different bar associations in interpreting attorney-client confidentiality is poor, for their opinions regarding the contours of confidentiality have long been at odds.

The San Diego County and San Francisco Bar Associations seem to adhere to a strict view of attorney-client confidentiality, even when the lawyer knows of future crimes.¹⁰² In contrast,

¹⁰¹ See AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW GOVERNING LAWYERS § 72 cmt. e, at 11 (Tentative Draft No. 7, April 7, 1994) (stating that lawyer is not civilly liable to clients or non-clients for performing or refusing to perform act when she reasonably believes professional rules require her to perform or refuse).

¹⁰² See San Diego County Bar Ass'n Legal Ethics and Unlawful Practices Comm., Op. 1990-1, at 2 (stating that lawyer must keep secret a client's threat to harm others); San Francisco Bar Ass'n, Formal Op. 1977-2, at 5 (implying that lawyer must keep secret unprivileged information relating to client's intent to commit criminal fraud on court and

the Los Angeles County Bar Association has recognized an exception in the future crime situation, and others.¹⁰³ Initially, the Los Angeles Bar simply applied the common-law crime-fraud exclusion as a confidentiality exception.¹⁰⁴ Over time, however, the Los Angeles Bar turned the confidentiality exception into a narrower "balancing test."¹⁰⁵ Most recently, it has taken the liberty, *sua sponte*, of adopting the Model Rules' future crime exception.¹⁰⁶ The opinions of the various local bar associations therefore stand in clear conflict.

Moreover, lawyer-dominated ethics committees are likely to adopt a vision of the lawyer's role that emphasizes attorney-client relationships more than courts, the legislature, or society might wish.¹⁰⁷ Like legislatures, bar committees tend to confuse the terms "privilege" and "confidentiality" in their opinions. Yet they ordinarily do so in a way that expands lawyers' rights and obligations to keep secrets.

For example, the San Diego County Bar Association Legal Ethics and Unlawful Practices Committee, perhaps unthinkingly, has recently applied the principle that attorney-client privilege

third parties).

¹⁰³ See, e.g., Los Angeles County Bar Ass'n, Formal Op. 396 (1982) (recognizing self-defense exception to confidentiality).

¹⁰⁴ See Los Angeles County Bar Ass'n, Comm. on Legal Ethics, Informal Op. 2 (1947) (recognizing future crime exception).

¹⁰⁵ The ethics committee first used the balancing test to determine whether an ongoing or future fraud rose to the level of a "crime" and thereby would be subject to the Los Angeles future crime exception to confidentiality. Los Angeles County Bar Ass'n, Formal Op. 264 (1959). Subsequently, the committee interpreted that balancing test to apply to the question of whether attorneys should disclose ongoing or future crime. See, e.g., Los Angeles County Bar Ass'n, Formal Op. 305 (1968). Opinion 305 held that disclosure is only permitted when "the intended acts by the client are of a nature so serious that the benefit flowing from their prevention outweighs the important policy requiring protection and preservation of the client's secrets." *Id.* (citing Los Angeles County Bar Ass'n, Formal Op. 264 (1959)); accord Los Angeles County Bar Ass'n, Formal Op. 329 (1972); *Id.* Op. 353 (1976); *Id.* Op. 417 (1983); Los Angeles County Bar Ass'n, Formal Op. 271 (1962).

¹⁰⁶ See Los Angeles County Bar Ass'n, Formal Op. 436 (1985) (adopting ABA Model Rules of Professional Conduct, Rule 1.6).

¹⁰⁷ Susan Koniak has described the phenomenon in which bar associations, through lawyer regulation and ethics opinions, promote a vision of law and lawyering that diverges from those of the courts and legislatures. See Koniak, *supra* note 74. Koniak suggests that the bar places lawyer ethics—especially the aspects of ethics emphasizing attorney-client relationships—high within the "hierarchy of law," while courts tend to rank "ethics" lower. *Id.* at 1411. Koniak notes the "centrality of confidentiality" to the bar's "nomos." *Id.* at 1427-47.

survives the client's death to the attorney-client confidentiality context.¹⁰⁸ The committee's opinion did not take into consideration confidentiality's broader scope nor the fact that attorney-client privilege is limited by exceptions inapplicable to confidentiality.¹⁰⁹ To exacerbate matters, the same committee previously had ruled that confidentiality should be deemed absolute.¹¹⁰ Extending the post-mortem principle to confidentiality thus significantly expanded the body of information that must remain secret.¹¹¹

The Los Angeles County Bar Association similarly has mixed and matched privilege and confidentiality principles. In Formal Opinion 329, for example, the Association assumed that the

¹⁰⁸ San Diego County Bar Ass'n Legal Ethics and Unlawful Practices Comm., Op. 1994-1 (1994) (forbidding lawyer from representing murder suspect after representing victim in extraneous matter because confidentiality survives victim's death); accord Los Angeles County Bar Ass'n, Formal Op. 414 (1983) (holding that confidentiality survives death).

¹⁰⁹ Privileged information protected after death is a narrow category consisting of communications between the client and lawyer. Special statutes except the most frequently needed communications within this category. See CAL. EVID. CODE § 957 (West 1966) (creating privilege exception for persons claiming rights through decedent); *id.* § 960 (creating privilege exception for communications bearing on testator's intent concerning writings affecting property); *id.* § 961 (creating privilege exception for communications bearing on validity of writings affecting property). In contrast, the San Diego opinion protects against disclosure, with virtually no exceptions, an unlimited body of information about the decedent, including his personality and the lawyer's impressions of him. See San Diego County Bar Ass'n Legal Ethics and Unlawful Practices Comm., Op. 1994-1 (1994) (forbidding lawyer from representing murder suspect after representing victim in extraneous matter because confidentiality survives victim's death).

Moreover, attorney-client privilege issues arise only in the context of lawsuits. When a decedent's interests are involved in a lawsuit, there usually is an executor for the estate who can waive the privilege. That is not as likely to be true when a lawyer seeks to use or disclose a dead client's confidences voluntarily. Often, no one will be in a position to consider waiving confidentiality even though, as in the San Diego case, the client himself may have had no particular reason to insist on it. (In the San Diego case, the former client arguably would not want the second client, his alleged murderer, to be falsely convicted). By asserting that confidentiality, like privilege, survives death, the committee unnecessarily may have foreclosed access to a broad range of information. Cf. ABA Comm. on Ethics and Prof. Responsibility, Informal Op. 1293 (1974) (assuming that confidentiality survives death, but noting that exception may exist where client probably would have waived confidentiality if he were alive).

¹¹⁰ San Diego County Bar Ass'n Legal Ethics and Unlawful Practices Comm., Op. 1990-1 (1990) (characterizing California Business and Professions Code § 6068(e) as exception-free).

¹¹¹ I do not claim that the San Diego opinion is necessarily wrong. I simply offer it as another example of a committee's hasty decision to equate privilege with confidentiality and to assume that the legal principles governing one cover the other.

common law crime-fraud exclusion controlled confidentiality under section 6068, but then relied on the justifications for strict confidentiality to limit the exception.¹¹² This reasoning invited courts to interpret the crime-fraud exclusion narrowly and to excuse nondisclosure where the future harm likely to be caused is not "serious enough to outweigh policies favoring disclosure."¹¹³

The upshot of relying on bar committees to interpret confidentiality's scope in light of section 956.5 is that a vision of highly client-oriented lawyering may become more dominant than the legislature intends. That has been the case in other areas in which the bar has confined the application of statutory limits on lawyer behavior.¹¹⁴ The bar's vision of the appropriate role for lawyers may be optimal. Yet one cannot feel confident that it accurately reflects legislative policy.¹¹⁵

¹¹² Los Angeles County Bar Ass'n, Formal Op. 329 (1972); *see also* Los Angeles County Bar Ass'n, Formal Op. 386 (1981) (applying California Evidence Code § 956 to Business and Professions Code § 6068(e), but creating limitations on exception for situations in which past crimes are implicated).

¹¹³ Los Angeles County Bar Ass'n, Formal Op. 329 (1972); *see also* Los Angeles County Bar Ass'n, Formal Op. 414 (1983) (citing Evidence Code § 956 as "major exception" to confidentiality, but then incorporating element of "imminence" of future crime before attorney may reveal information).

¹¹⁴ Consider California Business and Professions Code § 6068(d), which requires lawyers to "employ, for the purpose of maintaining the causes confided to him or her such means only as are consistent with truth, and never seek to mislead the judge or any judicial officer by an artifice or false statement of law." CAL. BUS. & PROF. CODE § 6068(d) (West 1990). California's lawyers and ethics committees have interpreted this prohibition to allow the use of those tactics that American society has come to expect of lawyers; for example, withholding "confidential" information from judges who misapprehend the facts and employing trial tactics that cast doubt on truthful evidence. *See, e.g.*, Los Angeles County Bar Ass'n, Formal Op. 394 (1982) (holding that lawyer need not advise court of third party's violation of court order with which lawyer's client may be involved); Los Angeles County Bar Ass'n, Formal Op. 380 (1979) (holding that lawyer has no duty to inform adversary of mistake of law that was key to settlement); *see also* Fred C. Zacharias, *Professionalism and Role-differentiation* (1994) (publication pending) (discussing arguably dishonest, but common, lawyer tactics); *cf.* San Francisco Bar Ass'n, Formal Op. 1967-11 (noting that there is general duty of candor and fairness that trumps advocacy in extreme cases).

¹¹⁵ *See generally* Koniak, *supra* note 74, at 1478-87 (criticizing bar's furthering of its own vision in "resistance" to legislation and judge-made law).

V. OPTIONS FOR CHANGING THE STATUS QUO

This Article has concluded that, in the status quo, lawyers probably — but not certainly or confidently — will refrain from preventing third-party harm. Other than finding that section 956.5 implicitly modified Business and Professions Code section 6068(e), are there alternative avenues for imposing upon lawyers some duty to take harm-preventive steps?

We have alluded to one option. A lawyer, court, or disciplinary agency might interpret, or reinterpret, section 6068(e) as already including a public policy exception for situations in which third parties are endangered.¹¹⁶ In other words, the interpreter might conclude that ethics opinions that have treated confidentiality as exception-free simply are wrong.

The Los Angeles County Bar Association already has assumed the existence of public policy exceptions that parallel the ABA codes' exceptions.¹¹⁷ Its interpretation of section 6068(e) now can draw additional support from the adoption of Evidence Code section 956.5. Although the legislature may not have modified Business and Professions Code section 6068(e), section 956.5 nevertheless can be understood to signal that the legislature interprets section 6068(e) as containing inherent public policy exceptions. Because the ABA's future crime exceptions and the Los Angeles opinions relying on such exceptions sanction *permissive* disclosure, the legislature's adoption of section 956.5 would represent a meaningful supplement; it *requires* disclosure, upon subpoena, once the client finds himself in litigation concerning the crime.

Reinterpretation of section 6068(e) may represent the most sensible means for changing lawyer conduct (or clarifying the scope of confidentiality), but no ready vehicle exists for achieving a reinterpretation. Local ethics committees have already spoken; their opinions conflict. Courts are unlikely to get involved, because that would require an actual case in which a lawyer has violated the confidentiality rules and has been sanctioned for it. A formal opinion issued by the California Bar

¹¹⁶ See *supra* notes 103-06 and accompanying text.

¹¹⁷ See Los Angeles County Bar Ass'n, Formal Op. 436 (1985) (adopting Model Rule 1.6's future-crime standard); see also Los Angeles County Bar Ass'n, Formal Op. 396 (1982) (adopting self-defense exception).

Association could help resolve the uncertainty, but the California Bar issues such opinions rarely — and even these are only advisory.¹¹⁸ The probability of a lawyer finding herself in a position to raise the issue with time to await a response is minimal.

Perhaps the sole alternative mechanism for changing the status quo is judicial consideration of tort liability for lawyers who fail to disclose their clients' threats to harm third persons. *Tarasoff* liability for psychiatrists and other psychotherapists by now is well established in California.¹¹⁹ Yet courts have avoided imposing similar liability on lawyers.¹²⁰ Presumably, judges have assumed that when confidentiality rules require lawyers to remain silent, lawyers should not be held liable for their silence.¹²¹

¹¹⁸ See Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1984-84, at 2 ("[T]his Committee . . . will decline to issue opinions when the activities, the propriety of which are in question, depend principally on questions of law rather than ethics.").

¹¹⁹ *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) (holding psychiatrist liable for not disclosing patient's threat to kill third party); see also *Peck v. Counseling Serv. of Addison County, Inc.*, 499 A.2d 422 (Vt. 1985) (imposing liability on counselor); *Petersen v. State*, 671 P.2d 230 (Wash. 1983) (addressing psychiatrist liability).

¹²⁰ See Vanessa Merton, *Confidentiality and the "Dangerous" Patient: Implications of Tarasoff for Psychiatrists and Lawyers*, 31 EMORY L. REV. 263, 276-83, 329-40 (1982) (discussing possibility and pitfalls of lawyer liability); Marc L. Sands, *The Attorney's Affirmative Duty to Warn Foreseeable Victims of a Client's Intended Violent Assault*, 21 TORT & INS. L.J. 355 (1986) (assuming that *Tarasoff* liability will be extended to lawyers); Shelly S. Watson, *Keeping Secrets that Harm Others: Medical Standards Illuminate Lawyer's Dilemma*, 71 NEB. L. REV. 1123 (1992) (analogizing lawyer and psychotherapist liability); cf. *Hawkins v. Kings County Dep't of Rehabilitation Serv.*, 602 P.2d 361 (Wash. App. 1979) (distinguishing *Tarasoff*, but suggesting that attorney liability is possible); *Seibel v. City and County of Honolulu*, 602 P.2d 532 (Haw. 1979) (holding that prosecutor was not liable for murder by released defendant). The reporters to the Restatement of the Law Governing Lawyers recently proposed liability for lawyers who fail to prevent certain dangerous crimes, but the American Law Institute Council deleted the proposal. See AMERICAN LAW INSTITUTE, RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS § 73(4)(a), at 23 n.2 (Tentative Draft No. 7, April 7, 1994). The reporters' notes identify no cases holding lawyers liable for failing to prevent third-party harm. *Id.* at 33.

¹²¹ This seems to be the position of the Restatement of the Law Governing Lawyers. The most recent draft proposes that a lawyer's reasonable attempt to adhere to a professional rule should immunize the lawyer from civil liability for her acts. See AMERICAN LAW INSTITUTE, RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS § 72 cmt. e, at 11 (Tentative Draft No. 7, April 7, 1994); see also San Diego County Bar Ass'n Legal Ethics and Unlawful Practices Comm., Op. 1990-1, at 3 (1991) (assuming that legislative rules relating to privilege and confidentiality exempt lawyers from *Tarasoff* liability for failure to prevent harm).

The *Tarasoff* decision to impose liability on psychiatrists rested on the California Supreme Court's view that a public policy favoring crime prevention required an exception to psychotherapist-patient confidentiality.¹²² In reaching this conclusion, the court relied on the existence of a California statute that eliminated psychotherapist-patient privilege when the psychotherapist finds himself in the situation section 956.5 covers for lawyers.¹²³ The Court also relied on the American Medical Association's Principles of Medical Ethics, which contained an exception for doctor-patient confidentiality where necessary to "protect . . . the community."¹²⁴

To reject attorney liability, the California courts must conclude that the combination of section 956.5 and Business and Professions Code section 6068(e) do not create a similar public policy favoring disclosure by attorneys. The new privilege amendment, at the very least, makes the attorney-client scenario more closely analogous to the psychotherapist situation. The amendment may give the courts reason to relax their assumptions about confidentiality's absolute nature and, implicitly, the need for absolute confidentiality to maintain meaningful attorney-client relationships. On the other hand, unlike in the psychiatric context the *Tarasoff* court considered, the terms of California's attorney-client confidentiality statute remain absolute.

Is judicial activism likely to result in *Tarasoff* liability of lawyers? *Tarasoff* was decided nearly twenty years ago and has been heavily publicized.¹²⁵ The fact that no American court has yet

¹²² *Tarasoff*, 551 P.2d at 346.

¹²³ *Id.* at 347. CAL. EVID. CODE § 1024 (West 1966) states:

There is no privilege . . . if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.

¹²⁴ *Tarasoff*, 551 P.2d at 347. The court assumed that psychiatrists conform to the same standards. *Id.* at 347 n.15.

¹²⁵ See, e.g., Daniel J. Givelber et al., *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443 (1984); Thomas J. Murphy, Note, *Affirmative Duties in Tort Following Tarasoff*, 58 ST. JOHN'S L. REV. 492 (1984); Ginger Mayer McClarren, *The Psychiatric Duty to Warn: Walking a Tightrope of Uncertainty*, 56 U. CIN. L. REV. 269 (1987); Michael J. Perlin, *Tarasoff and the Dilemma of the Dangerous Patient: New Directions for the 1990's*, 16 LAW & PSYCH. REV. 29 (1992); Dianne S. Salter, Note, *The Duty to Warn Third Parties: A Retrospective on Tarasoff*, 18 RUTGERS L.J. 145 (1986); Shlomo Twerski, Note, *Affir-*

seen fit to extend it to the lawyer context strongly suggests that judges are not receptive to the claim.¹²⁶ Moreover, in attempting to use section 956.5 to determine public policy, the California courts would confront the same confused legislative record that we have analyzed. The record supports the notion that public policy requires the maintenance of strict confidentiality (*ex ante*) at least as well as it supports the contrary. In the end, section 956.5 alone provides no clear mandate that is likely to persuade the courts to change the status quo.

CONCLUSION

Whatever course the legislature thought it was pursuing with section 956.5, the status quo is uncomfortable. Lawyers interpreting section 956.5 probably will err on the side of maintaining confidentiality, but they will do so hesitantly and, perhaps, erratically. If the legislature intended the opposite result, the present confusion will frustrate its plans. But even if the legislators wished lawyers to remain silent, they cannot be satisfied with the effect of the new statute. At a minimum, the uncertainty engendered by the wording of the statute increases the likelihood of misinterpretation and litigation.¹²⁷ No external source of interpretation is likely to provide lawyers, disciplinary agencies, and courts with guidance.

Of course, it is common for statutes to leave details for judicial construction. Here, however, the very core of the legislation is unclear. Courts have no reliable way to identify the statute's thrust. The tendency of local bar committees to conflate confidentiality and privilege issues and to reach contradictory results means that those committees also are unlikely to resolve the key areas of confusion.

mative Duty after Tarasoff, 11 HOFSTRA L. REV. 1013 (1983).

¹²⁶ The absence of reported decisions suggests that *Tarasoff* claims against lawyers have been dismissed, or settled early by litigants who perceive judges' hostility to the claims. Indeed, the courts have hesitated to apply *Tarasoff* to any professionals other than psychotherapists. See *Davidson v. City of Westminster*, 649 P.2d 894 (Cal. 1982) (declining to apply *Tarasoff* to police); see also *Sands*, *supra* note 120, at 368-9 (noting courts' reluctance to apply *Tarasoff* to clergy).

¹²⁷ Litigation engendered by the uncertainty of the meaning of § 956.5 may include, for example, *Tarasoff* suits prompted by victims' perceptions that courts now will be more receptive to tort claims against lawyers.

Sloppiness in the original legislation produced this muddle. The legislature owes clarification to the bar, clients, and potential victims. It can best address the problem by considering an explicit exception to Business and Professions Code section 6068(e) allowing lawyers to disclose confidential information when necessary to prevent clients from committing crimes that would harm third parties. Adopting an amendment is the easiest way for the legislators to highlight their intention to let lawyers prevent harm outside the litigation context. Conversely, rejecting the amendment would provide at least some signal that the legislators do not desire an exception to confidentiality. Either approach is defensible.¹²⁸ In contrast, as the United States Supreme Court has stated, "an uncertain privilege [or confidentiality rule], or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."¹²⁹ The status quo inevitably puts predictable and meaningful lawyer-client relationships at risk.

¹²⁸ Not every refusal to adopt legislation proves that the legislators oppose it on the merits. If, however, a narrow piece of legislation, such as amendment to § 956.5, is proposed and rejected after a substantive debate that focuses exclusively on the merits, it can provide a clear signal of the legislative intent.

¹²⁹ *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

