

**RESOLUTION 08-02-2015 (as amended and adopted)**

**DIGEST**

Duty of Confidentiality: Permitting Disclosure to Prevent Wrongful Execution and Incarceration  
Amends Business and Professions Code section 6068 to allow an attorney discretion to reveal confidential information if it prevents execution or life imprisonment of a factually innocent person.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Association recommends that legislation be sponsored to amend California Business and Professions Code section 6068 to read as follows:

§6068

1           It is the duty of an attorney to do all of the following:

2           (a) To support the Constitution and laws of the United States and of this state.

3           (b) To maintain the respect due to the courts of justice and judicial officers.

4           (c) To counsel or maintain those actions, proceedings, or defenses only as appear to him  
5 or her legal or just, except the defense of a person charged with a public offense.

6           (d) To employ, for the purpose of maintaining the causes confided to him or her those  
7 means only as are consistent with truth, and never to seek to mislead the judge or any judicial  
8 officer by an artifice or false statement of fact or law.

9           (e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to  
10 preserve the secrets, of his or her client.

11           (2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal  
12 confidential information relating to the representation of a client to the extent that the attorney  
13 reasonably believes the disclosure is necessary to prevent (A) a criminal act that the attorney  
14 reasonably believes is likely to result in death of, or substantial bodily harm to, an individual,  
15 including the execution or life imprisonment of a factually innocent person, or (B) the  
16 incarceration of a factually innocent person if the client is deceased.

17           (f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless  
18 required by the justice of the cause with which he or she is charged.

19           (g) Not to encourage either the commencement or the continuance of an action or  
20 proceeding from any corrupt motive of passion or interest.

21           (h) Never to reject, for any consideration personal to himself or herself, the cause of the  
22 defenseless or the oppressed.

23           (i) To cooperate and participate in any disciplinary investigation or other regulatory or  
24 disciplinary proceeding pending against himself or herself. However, this subdivision shall not  
25 be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment to the  
26 Constitution of the United States, or any other constitutional or statutory privileges. This  
27 subdivision shall not be construed to require an attorney to cooperate with a request that requires  
28 him or her to waive any constitutional or statutory privilege or to comply with a request for  
29 information or other matters within an unreasonable period of time in light of the time  
30 constraints of the attorney's practice. Any exercise by an attorney of any constitutional or

31 statutory privilege shall not be used against the attorney in a regulatory or disciplinary  
32 proceeding against him or her.

33 (j) To comply with the requirements of Section 6002.1.

34 (k) To comply with all conditions attached to any disciplinary probation, including a  
35 probation imposed with the concurrence of the attorney.

36 (l) To keep all agreements made in lieu of disciplinary prosecution with the agency  
37 charged with attorney discipline.

38 (m) To respond promptly to reasonable status inquiries of clients and to keep clients  
39 reasonably informed of significant developments in matters with regard to which the attorney has  
40 agreed to provide legal services.

41 (n) To provide copies to the client of certain documents under time limits and as  
42 prescribed in a rule of professional conduct which the board shall adopt.

43 (o) To report to the agency charged with attorney discipline, in writing, within 30 days of  
44 the time the attorney has knowledge of any of the following:

45 (1) The filing of three or more lawsuits in a 12-month period against the attorney for  
46 malpractice or other wrongful conduct committed in a professional capacity.

47 (2) The entry of judgment against the attorney in a civil action for fraud,  
48 misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional  
49 capacity.

50 (3) The imposition of judicial sanctions against the attorney, except for sanctions for  
51 failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).

52 (4) The bringing of an indictment or information charging a felony against the attorney.

53 (5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or no  
54 contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in a  
55 manner in which a client of the attorney was the victim, or a necessary element of which, as  
56 determined by the statutory or common law definition of the misdemeanor, involves improper  
57 conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a  
58 conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.

59 (6) The imposition of discipline against the attorney by a professional or occupational  
60 disciplinary agency or licensing board, whether in California or elsewhere.

61 (7) Reversal of judgment in a proceeding based in whole or in part upon misconduct,  
62 grossly incompetent representation, or willful misrepresentation by an attorney.

63 (8) As used in this subdivision, "against the attorney" includes claims and proceedings  
64 against any firm of attorneys for the practice of law in which the attorney was a partner at the  
65 time of the conduct complained of and any law corporation in which the attorney was a  
66 shareholder at the time of the conduct complained of unless the matter has to the attorney's  
67 knowledge already been reported by the law firm or corporation.

68 (9) The State Bar may develop a prescribed form for the making of reports required by  
69 this section, usage of which it may require by rule or regulation.

70 (10) This subdivision is only intended to provide that the failure to report as required  
71 herein may serve as a basis of discipline.

(Proposed new language underlined; language to be deleted stricken)

**PROPONENT:** Michael Fern, Joseph Goldstein, Charles Wake, Michele Hanisee, Garrett Gorfitsky, Lisa Berger, John Van de Kamp, Alan Ramos, Gerald C. Benezra, James Secord

## **STATEMENT OF REASONS**

The Problem: Alton Logan spent 26 years in prison, serving a life sentence for a murder that he did not commit. In 2008, two lawyers revealed that back in 1982 they represented a client who had confessed to the killing attributed to Logan. The client was later convicted of murdering two police officers and was sentenced to a life term. However, he refused to permit any disclosure of his confession until after his death. Despite their misgivings, the two lawyers were duty-bound to remain silent until their client's death in prison in 2007. A year after Logan's release, Illinois revised its rules of professional conduct to mandate disclosure when necessary to prevent "death or substantial bodily harm."

The duty of confidentiality is not absolute. Under existing law, an attorney may disclose a client's secrets to prevent a "criminal" act likely to result in "death or substantial bodily harm," such as a plan to kill a witness or set off a bomb. However, a "criminal" act does not include the execution or life imprisonment of a factually innocent person who was afforded due process.

The Solution: This resolution would extend the existing "death or substantial bodily harm" exception to non-criminal acts and also permit disclosure to prevent the wrongful incarceration of a factually innocent person when the client is deceased. No attorney should be subject to disciplinary action by the State Bar for making a disclosure that prevents a wrongful execution.

The resolution is based on ABA Model Rule 1.6, subdivision (b)(1), which permits disclosure to prevent "death or substantial bodily harm" without limitation. Thirty-eight states have adopted this formulation, including New York in 2009, including three that have a rule of mandatory disclosure (Florida, Illinois, Washington). Also, at least two states expressly permit disclosure to prevent wrongful incarceration (Alaska, Massachusetts)

There is no evidence from any jurisdiction that adopting ABA Model Rule 1.6 will impair effective advocacy. Because disclosure is not mandatory, a lawyer is free to maintain a practice of never disclosing under any circumstance. In addition, a disclosure involving a factually innocent person cannot be introduced as evidence to prosecute a client, because this resolution does not create an evidentiary exception to attorney-client privilege (*see, e.g.*, Evid. Code, §§ 956-961). As Blackstone wrote: "[T]he law holds it better that ten guilty persons escape, than that one innocent party suffer."

(Note: The author of this resolution will consider alternative amendments to address the Alton Logan problem that would balance competing interests differently.)

## **IMPACT STATEMENT**

This resolution would affect Rule 3-100(B) of the Rules of Professional Conduct by expanding the existing exception to confidentiality.

## **CURRENT OR PRIOR RELATED LEGISLATION**

Not known.

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**RESPONSIBLE FLOOR DELEGATE:** Michael Fern

## **RESOLUTIONS COMMITTEE RECOMMENDATIONS**

APPROVE IN PRINCIPLE

### History:

Similar to Resolution 04-08-2002, which was approved in principle and Resolution 10-03-2004, which was withdrawn.

### Reasons:

This resolution amends Business and Professions Code section 6068 to allow an attorney discretion to reveal confidential information if it prevents execution or life imprisonment of a factually innocent person. This resolution should be approved in principle because it leaves the decision to reveal confidential information to the discretion of the attorney and it does not create an absolute obligation to reveal the information.

The proposed resolution takes the difficult task of balancing a client's need for confidentiality and effective representation against society's desire to only incarcerate or execute those guilty of the underlying offense. This proposal puts a stronger emphasis on the personal liberty, freedom, and wholeness of the factually innocent person facing life imprisonment and/or execution over the client's desire for confidentiality. However, that emphasis is tempered by allowing the final decision to be made by the attorney. The attorney is not required to disclose this information, the attorney MAY disclose the information.

The American Bar Association's Model Rules of Professional Conduct state that the public interest is *usually* best served by a strict rule requiring lawyers to preserve the confidentiality of their clients. There are, however, limited exceptions such as preventing reasonably certain death or substantial bodily harm, committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another, or to secure legal advice about the lawyer's compliance with these rules. This proposal would expand those exceptions to include a narrow exception when a factually innocent third party is facing life execution or life imprisonment. This exception is written in the spirit of the previous exception in which disclosure is at the attorney's discretion to prevent great bodily harm or death.

This resolution is related to Resolution 02-01-2015.

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## COUNTERARGUMENTS TO RESOLUTION 08-02-2015

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### **SAN DIEGO COUNTY BAR ASSOCIATION**

The SDCBA Delegation urges disapproval of Resolution 08-02-2015. This resolution would allow a licensed attorney to reveal confidential information if the attorney reasonably believes the disclosure is necessary to prevent (A) an act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, including the execution or life imprisonment of a factually innocent person or (B) the incarceration of a factually innocent person if the client is deceased. This resolution should be disapproved because it allows too much latitude to speculate on the possible outcome where the facts are only “reasonably believed,” not known to any degree of certainty.