

## RESOLUTION 2-11-03

### DIGEST

#### Attorney-Client Privilege: Lawyers Representing Governmental Organizations

Adds Business and Professions Code section 6068.1 to allow an attorney for a governmental organization to report his or her client to law enforcement in certain circumstances.

### RESOLUTION COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

Similar to 7-05-01, which was tabled.

#### Reasons:

This resolution adds Business and Professions Code section 6068.1 to allow an attorney for a governmental organization to report his or her client to law enforcement in certain circumstances. This resolution should be approved in principle because the harm to the public from undisclosed governmental corruption and the portion of the attorney's duty that flows to the public outweighs the attorney's duty to the government organization.

An attorney for a governmental organization has a special role. While case law is not fully developed on this point, the courts have consistently recognized that a government attorney's role is not the same as that of an attorney in private practice. (See, e.g., *In re Lee G.* (1991) 1 Cal.App.4th 17, 34; *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70, 84.) On balance, the public's interest is best served if the government attorney is acknowledged as having a duty toward both his/her immediate client, the government agency, and his/her more remote client, the state's citizens.

In certain circumstances, the public interest may require that an attorney be allowed to reveal the confidences of his or her governmental client regarding improper governmental activity, including crime, fraud, corrupt misconduct or willful breach of fiduciary duty. However, California case and statutory law and the Rules of Professional Conduct provide no guidance about when and how an attorney representing a governmental entity may seek to protect the public interest by disclosing improper governmental activity consistent with the attorney client privilege. For instance, when the State Bar declined to prosecute government attorney Cindy Ossias, who went public with secret settlements between former insurance commissioner Chuck Quackenbush and insurance companies following the 1994 Northridge earthquake, it had no legal or statutory basis for its decision. There is nothing to prevent a different State Bar judge from making a different decision. This resolution prevents the State Bar from prosecuting a "Cindy Ossias" in the future, and correctly balances protection of the public good and the attorney client privilege by specifying the situations in which a government attorney may disclose his or her client's confidences to protect the public interest and the steps that must be taken before the attorney can exercise the discretion to disclose.

### SECTION/COMITTEE REPORT

#### OFFICE OF PROFESSIONAL COMPETENCE OF THE STATE BAR OF CALIFORNIA

Recommendation: **DISAPPROVE**

#### Reasons:

The State Bar disapproves resolution 2-11-2003. This opposition is based on: (1) the Governor's veto of

the same proposal in 2002; and (2) the pending status of related legislative and American Bar Association proposals.

In 2002, the State Bar developed a proposal to amend rule 3-600 (Organization as Client) of the Rules of Professional Conduct. The proposal responded to legislative interest in a rule amendment clarifying the steps that may be taken by an attorney to address misconduct by a governmental client. Specifically, the proposal sought to clarify whether, and to what extent, an attorney representing a governmental client may act as a “whistle-blower.” On May 10, 2002, the Supreme Court issued an order denying the State Bar’s request for approval of proposed amendments to rule 3-600. In its order, the Court included the following notation:

The State Bar Board of Governors' request to adopt amendments to the Rules of Professional Conduct, rule 3-600, is denied because the proposed modifications conflict with B & P Code section 6068, (e) [the statutory duty of confidentiality].

In response to the Court’s action, the Legislature passed Assembly Bill 363 (“AB 363”) seeking to amend the B & P Code along the lines of the rejected rule amendment. Upon presentation to Governor Davis, AB 363 was vetoed. In part, the Governor’s vetoed message stated: “It is critical that clients know they can disclose in confidence. . . . The effective operation of our legal system depends on the fundamental duty of confidentiality.”

Conference Resolution 2-11-2003 would re\_introduce the proposal vetoed by the Governor. Staff believes that now is the wrong time to revisit this issue. The Governor’s veto message expressed a clear policy opposition to the merits of the proposal and insufficient time has passed to expect a change in that position.

In addition, there are pending legislative and American Bar Association (“ABA”) proposals (i.e., the March 31, 2003, Final Report of the ABA Task Force on Corporate Responsibility) that impact an attorney’s duty of confidentiality and require the immediate attention of California lawyers and the State Bar. Among the legislative proposals is AB 1101 (Steinberg), a bill that would address an attorney’s disclosure of confidential information to prevent a crime of death or serious bodily injury. State Bar staff has been authorized by the Board of Governors to work closely with Assemblymember Steinberg on AB 1101 and recently a letter affirming State Bar support was submitted following acceptance of State Bar recommended amendments. The Conference should take note that the reform sought by AB 1101 essentially implements last year’s Conference Resolution 4-08-2002.

Proposals affecting the duty of confidentiality pose complex substantive and policy issues and it would be imprudent to revisit the government attorney “whistle-blower” proposal while careful work is being coordinated on AB 1101 and while other related issues are being considered by the legislature and the ABA. Accordingly, State Bar staff recommends that Conference Resolution 2\_11\_2003 be disapproved. Notwithstanding this recommendation, State Bar staff recognizes that after the current wave of confidentiality initiatives are resolved, consideration of a legislative proposal on the government attorney “whistle-blower” issue may be appropriate.

This position is solely that of the State Bar's Office of Professional Competence and has not been adopted or endorsed by the State Bar's Board of Governors.

## **TEXT OF RESOLUTION**

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be adopted to add Business and Professions Code section 6068.1 to read as follows:

1 §6068.1  
2 (a) If in the course of representing a governmental organization, an attorney learns of  
3 improper governmental activity, the attorney may take one or both of the following actions:  
4 (1) Urge reconsideration of the matter while explaining its likely consequences to the  
5 organization.  
6 (2) Refer the matter to a higher authority in the organization, including, if warranted by the  
7 seriousness of the matter, referral to the highest internal authority that can act on behalf of the  
8 organization.  
9 (b) Notwithstanding subdivision (e) of Section 6068, if the attorney has taken both actions as  
10 described in paragraphs (1) and (2) of subdivision (a) without the matter being resolved, or if the  
11 attorney reasonably believes that the highest internal authority that can act on behalf of the  
12 organization has directly or indirectly participated in the improper governmental activity, or if the  
13 attorney reasonably believes that taking the actions described in subdivision (a) are futile, the  
14 attorney may refer the matter to the law enforcement agency charged with responsibility over the  
15 matter or to any other governmental agency or official charged with overseeing or regulating the  
16 matter if all of the following exist:  
17 (1) The referral is warranted by the seriousness of the circumstances and is not otherwise  
18 prohibited by law.  
19 (2) The improper governmental activity constitutes the use of the organization's official  
20 authority or influence to commit a crime or to perpetrate fraud.  
21 (3) Further action is required in order to prevent or rectify substantial harm to the public  
22 interest or to the governmental organization resulting from the improper governmental activity.  
23 (c) An attorney's conduct in making a referral under subdivision (b) shall not be a cause for  
24 disbarment, suspension, or other discipline if the attorney has acted reasonably and in good faith to  
25 determine the propriety of making a referral and to identify the appropriate governmental agency or  
26 official as described in subdivision (b) and to cooperate with the agency or official in the execution  
27 of the oversight or regulatory responsibilities of the agency or official regarding the referral.  
28 However, once an attorney has made the referral, this subdivision shall not apply to any further  
29 affirmative conduct outside of the scope of subdivision (b) or this subdivision that is initiated by the  
30 attorney to address the improper governmental activity.  
31 (d) An attorney may, but has no affirmative duty to, take action pursuant to this section.  
32 (e) As used in this section, "improper governmental activity" means conduct by the  
33 governmental organization or by its agent that comes within one or more of the following:  
34 (1) Constitutes the use of the organization's official authority or influence by the agent to  
35 commit a crime, fraud, or other serious and willful violation of law.  
36 (2) Involves the agent's willful misuse of public funds, willful breach of fiduciary duty, or  
37 willful or corrupt misconduct in office.  
38 (3) Involves the agent's willful omission to perform his or her official duty.  
39 (f) This section shall not be construed to require that the improper governmental activity  
40 subject to its provisions be related, directly or indirectly, to the matter for which the attorney was  
41 engaged as outside counsel by the governmental organization.

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

PROPONENT: National Lawyers Guild, San Francisco Bay Area Chapter

#### STATEMENT OF REASONS

Existing Law: Imposes on every California attorney the obligation to maintain the confidences of her client. It authorizes an attorney, who in the course of representing an organization learns that an agent of

the organization acts, intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization or in a manner which is likely to result in substantial injury to the organization, to urge reconsideration of the matter and refer it to higher authorities in the organization. If the attorney is unsuccessful, she has the right, and where appropriate the duty, to resign.

This Resolution: Authorizes such an attorney, instead of resigning, to refer the matter under specified circumstances to law enforcement or to another governmental agency with oversight authority, and would exempt the attorney from State Bar discipline for making the referral if the attorney acted reasonably and in good faith.

The Problem: Rules of Professional Conduct, rule 3-600, and Business and Professions Code section 6068 subdivision (e), underscore the importance of protecting attorney-client confidences. In representing governmental organizations, however, an attorney may encounter circumstances in which the public interest may justify her reporting otherwise confidential client information. The commission of a crime or fraud that may justify the breach of the attorney-client privilege includes conflict of interest, misappropriation of public funds, embezzlement of property, falsifying government records, and conspiracy to obstruct justice (among others).

Generally, the governmental organization itself is the client of the attorney, not any official within the organization, notwithstanding the ability of the official to exercise exclusive power over any given subject on the organization's behalf. Current law does not provide guidance for attorneys to determine the circumstances under which they properly may seek to protect the public interest by reporting improper governmental activity to appropriate outside entities.

The California Supreme Court rejected amendments to rule 3-600 proposed last year by the State Bar to provide such guidance, stating that the proposed modifications conflict with section 6068(e). Accordingly, in the 2001-2002 legislative session, Assembly Bill 363—reproduced verbatim above—passed the Assembly 51-27, passed the Senate 23-14, was enrolled, and went to the Governor, who vetoed the bill, stating, “[w]hile this bill is well intended, it chips away at the attorney-client relationship which is intended to foster candor between an attorney and client. It is critical that clients know they can disclose in confidence so they can receive appropriate advice from counsel. The effective operation of our legal system depends on the fundamental duty of confidentiality owed by lawyers to their clients.”

This resolution does not compromise the attorney-client privilege. It maintains the obligation to counsel the client's agents, preserving the integrity of the relationship between the attorney and her governmental-entity client when the entity's public mission has been compromised by the conduct of the highest officials in the organization, threatening or resulting in substantial injury to the public interest or the organization.

Former Assembly Bill 363 should be reintroduced, adopted, and signed into law.

#### IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

**AUTHOR AND/OR PERMANENT CONTACT:** Cindy Ossias, 1261 Dolores Street, San Francisco, CA 94110-3614, voice 415-538-4124, fax 415-282-5838, e-mail [ossiasc@insurance.ca.gov](mailto:ossiasc@insurance.ca.gov)

**RESPONSIBLE FLOOR DELEGATE:** Cindy Ossias