

RESOLUTION 06-04-05

DIGEST

Attorney-Client Privilege: Representation of Government Organizations

Amends Business and Professions Code section 6068.1 to allow public attorneys to report wrongdoing by public agencies.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Similar to 02-11-03, which was approved in principle.

Reasons:

This resolution amends Business and Professions Code section 6068.1 to allow public attorneys to report wrongdoing by public agencies. This resolution should be approved in principle because it would address problems faced by attorneys representing government agencies who discover criminal wrongdoing in their own agencies.

This issue was brought to light in 2000 when the author, an attorney with the Department of Insurance, blew the whistle on wrongdoing in the department. As a result of that report, a disciplinary complaint was filed against the attorney with the State Bar. Although the State Bar did not pursue disciplinary charges, the issue of balancing the public interest against the disclosure of privileged information arose. The incident brought to light the fact that existing law (e.g., Gov. Code, § 8547 et seq. [whistleblower statute]; Cal. Rules Prof. Cond., Rule 3-600 [governing organizational attorneys]) does not protect or even address the disclosure of governmental wrongdoing by public agency attorneys.

As the proponent notes, several unsuccessful attempts have been made to provide for the relief sought by this resolution. On May 10, 2002, the California Supreme Court issued an order rejecting the State Bar's recommendation to amend Rule 3-600 for the stated reason that "the proposed modifications conflict with Business and Professions Code section 6068, subdivision (e)." At least two measures have been introduced to resolve that conflict. (Assembly Bill No. 363 (2001-2002 Reg. Sess.); Assembly Bill No. 2713 (2003-2004 Reg. Sess.)) Both were vetoed by Governors Davis (A.B. No. 363) and Schwarzenegger (A.B. No. 2713).

A concrete measure should be put in place to address the conundrum faced by public attorneys who uncover wrongdoing in their agencies. Such attorneys are not mere advocates for a client, but also carry a public trust in ensuring the government's lawful operation. It is in the public's interest to allow public attorneys to report illegal activity without facing drastic professional discipline.

SECTION/COMMITTEE REPORTS

STATE BAR PROFESSIONAL COMPETENCE UNIT

DISAPPROVE

As indicated by the proponent, in 2002 the substantive change in the law sought by Resolution 6-4-2005 was considered by the Supreme Court as a Rule of Professional Conduct amendment but not approved. Later that same year, a statutory change was considered in Assembly Bill No. 363 and this bill was vetoed by then Governor Gray Davis. Last year, another attempt was made to enact a statutory change in Assembly Bill No. 2713. Again, the bill was vetoed, this time by current Governor Arnold Schwarzenegger.

In each instance the desired reform was rejected due to concerns about attorney-client confidentiality and the need for a trust relationship that facilitates candor and the best possible legal advice. At this time, the Competence Unit believes that any further effort to enact a substantially similar initiative is not productive.

The State Bar is considering amendments to the Rules of Professional Conduct through the work of its Special Commission for the Revision of the Rules of Professional Conduct ("Rules Revision Commission"). The Rules Revision Commission is charged with conducting a cover-to-cover review of the California rules and proposing comprehensive amendments for consideration by the State Bar Board of Governors. In the interest of national uniformity, the Rules Revision Commission's charter also includes the task of studying the amendments to the American Bar Association's Model Rules of Professional Conduct developed by the American Bar Association's Ethics 2000 Commission.

The Competence Unit believes that the proponents should consider presenting its policy concerns to the Rules Revision Commission. The Rules Revision Commission is in a position to evaluate the concerns and to potentially offer a fresh approach to possible reform.

This position is solely that of the State Bar's Professional Competence Unit ("Competence Unit") 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 improper
3 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 organization.
5 (2) Refer the matter to a higher authority in the organization, including, if warranted by the
6 seriousness of the matter, referral to the highest internal authority that can act on behalf of the
7 organization.
8 (b) (1) Notwithstanding subdivision (e) of Section 6068, the attorney may refer the matter to the law
9 enforcement agency charged with responsibility over the matter or to any other governmental agency
10 or official charged with overseeing or regulating the matter if the attorney meets one of the following
11 conditions and all of the requirements described in paragraph (2) are satisfied:
12 (A) He or she has taken both actions described in subdivision (a) without the matter being resolved.
13 (B) He or she reasonably believes that taking the actions described in paragraph (1) of subdivision (a)
14 is not reasonable under the circumstances and that taking the actions described in paragraph (2) of
15 subdivision (a) is futile.
16 (C) He or she reasonably believes that the highest internal authority that can act on behalf of the
17 organization has already, directly or indirectly, participated in the improper governmental activity.
18 (2) (A) The referral is warranted by the seriousness of the circumstances and is not otherwise
19 prohibited by law.
20 (B) The improper governmental activity constitutes the use of the organization's official authority or
21 influence to commit a crime or to perpetrate fraud.
22 (C) Further action is required in order to prevent or rectify substantial harm to the public interest or to
23 the governmental organization resulting from the improper governmental activity.
24 (c) An attorney's conduct in making a referral under subdivision (b) shall not be a cause for
25 disbarment, suspension, or other discipline if the attorney has acted reasonably and in good faith to
26 determine the propriety of making a referral and to identify the appropriate governmental agency or
27 official as described in subdivision (b). In addition, an attorney's conduct shall not be
28 cause for disbarment, suspension, or other discipline if the attorney acted reasonably and in good
29 faith in choosing to cooperate with the agency or official in the execution of the oversight or regulatory
30 responsibilities of the agency or official regarding the referral. Once an attorney has made the
31 referral, this subdivision shall not apply to any further affirmative conduct outside of the scope of
32 subdivision (b) or this subdivision that is initiated by the attorney to address the improper
33 governmental activity.
34 (d) An attorney may, but has no affirmative duty to, take action pursuant to this section.
35 (e) As used in this section, "improper governmental activity" means conduct by the governmental

36 organization or by its agent that meets one or more of the following requirements:
37 (1) It constitutes the use of the organization's official authority or influence by the agent to commit a
38 crime, fraud, or other serious and willful violation of law.
39 (2) It involves the agent's willful misuse of public funds, willful breach of fiduciary duty, or willful or
40 corrupt misconduct in office.
41 (3) It involves the agent's willful omission to perform his or her official duty.
42 (f) This section shall not be construed to require that the improper governmental activity subject to its
43 provisions be related, directly or indirectly, to the matter for which the attorney was engaged as
44 outside counsel by the governmental organization.

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

PROPOSER: 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: Would authorize 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 '6068(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 by the State Bar to provide such guidance, stating that the proposed modifications conflict with '6068(e). Accordingly, in the 2001-2002 legislative session, AB 363, passed easily through the legislature, was enrolled, and went to Governor Davis, who vetoed the bill.

The bill was reintroduced in the 2003-2004 session as AB 2713 B reproduced verbatim above B again passed easily through the legislature, and was vetoed by Governor Schwarzenegger.

The bill 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. The bill should be reintroduced, adopted, and signed into law.

IMPACT STATEMENT

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

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COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

While this resolution is premised on the noble premise that attorneys representing public/governmental entities should be allowed to disclose confidential information received by them in representing the public entities when the government entities actions or refusals to act are contradictory to the public's interest. The reality, however, is attorneys representing public entities do in fact have an ethical duty to their client not to disclose confidential information. As is the case in the private sector, any encroachment on the confidential relationship between an attorney and their client, whether an individual or a corporate entity, would have a chilling effect on such client's willingness to disclose information to their attorney necessary to facilitate thorough and effective representation.