

RESOLUTION 06-06-05

DIGEST

Government Attorneys: Limited Disclosure of Improper Activities

Adds Business and Professions Code section 6068.1 allowing public attorneys to report another government employee's willful illegal conduct.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

A similar proposal, AB 363 (Steinberg) was enacted by the Legislature in 2002, but vetoed by the governor. At about the same time, the State Bar proposed a similar change to Rule for Professional Conduct 3-600, but the Supreme Court declined.

Reasons:

This resolution adds Business and Professions Code section 6068.1 allowing public attorneys to report another government employee's willful illegal conduct.

This resolution should be disapproved because this code addition would not free public attorneys to report alleged violations with confidence that they are protected from prosecution by the State Bar.

This issue was first raised in 2000 when Cindy Ossias, an attorney employed by the California Insurance Department, reported confidential information to two legislative committees. As a result, the insurance commissioner, Mr. Quackenbush, resigned. Ms. Ossias was referred to the State Bar Court for prosecution, but it declined. (Doskow, *The Government Attorney and The Right to Blow the Whistle: The Cindy Ossias Case and Its Aftermath (A Two-Year Journey to Nowhere)* (2003) 21 Whittier L. Rev. 21, 24-25 (Doskow).) In 2001, the Attorney General opined that a government attorney was not at liberty to disclose confidential information based on the "Whistleblower Statutes" (Government Code sections 8547, et seq., 9149.20, et seq. and 53296-53299). (84 Ops. Cal. Atty. Gen. 71, at 2001 WL 577741, *4.)

This resolution would amend the Business and Professions Code to exempt public attorneys from confidentiality restrictions to allow them to report another government employee's willful violation of the law, misuse of public funds or willful failure to perform an official duty. The problem is that Rule of Professional Conduct 3-600 (Rule 3-600) imposes strict confidentiality on any employee attorney working for an organization, public or private. Under the California Constitution, the Supreme Court has the "exclusive power to control the admission, discipline and disbarment of persons entitled to practice before them." (84 Ops. Cal. Atty. Gen., *supra*, at 2001 WL 577741, *6.) No public attorney could confidently report an alleged violation until Rule 3-600 is changed or an exception created by the Supreme Court.

This resolution would be better directed to the Supreme Court. Until it changes its mind, California will continue to have one of the strongest confidentiality rules in the United States.

SECTION/COMMITTEE REPORT

STATE BAR PROFESSIONAL COMPETENCE UNIT

DISAPPROVE

The general concept embodied in Resolution 6-6-2005 has been the subject of recent consideration. In 2002, a "whistle-blower" reform 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 can evaluate the concerns and may be able to offer a fresh approach to achieving 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 sponsored to add Business and Professions Code section 6068.1 to read as follows:

- 1 § 6068.1
- 2 (a) Definitions.
- 3 (1) "Improper governmental activity" defined. As used in this section, "improper governmental
- 4 activity" means conduct by the governmental organization or by its agent that comes within one or
- 5 more of the following:
- 6 (a) Constitutes the use of the organization's official authority or influence by the agent to commit a
- 7 crime, fraud, or other serious and willful violation of law.
- 8 (b) Involves the agent's willful misuse of public funds, willful breach of fiduciary duty, or willful or
- 9 corrupt misconduct in office.
- 10 (c) Involves the agent's willful omission to perform his or her official duty.
- 11 (2) "Referral" defined. For purposes of this section a "referral" includes notification, whether verbally,
- 12 in writing, via electronic mail, or by any other medium, whether given formally or informally, given by
- 13 the attorney to the law enforcement agency charged with responsibility over the matter or to any
- 14 other governmental agency or official charged with overseeing or regulating the matter. A "referral"
- 15 likewise includes any necessary supporting documentation or other materials provided in connection
- 16 therewith.
- 17 (b) "Internal" referrals. If in the course of representing a governmental organization, an attorney
- 18 learns of improper governmental activity, the attorney may take one or both of the following actions:
- 19 (1) Urge reconsideration of the matter while explaining its likely consequences to the organization.
- 20 (2) Refer the matter to a higher authority in the organization, including, if warranted by the
- 21 seriousness of the matter, referral to the highest internal authority that can act on behalf of the
- 22 organization.
- 23 (c) "External" referrals. Notwithstanding subdivision (e) of Section 6068, if the attorney has taken
- 24 both actions as described in paragraphs (1) and (2) of subdivision (b) without the matter being
- 25 resolved, or if the attorney reasonably believes that the highest internal authority that can act on
- 26 behalf of the organization has directly or indirectly participated in the improper governmental activity,
- 27 or if the attorney reasonably believes that taking the actions described in subdivision (a) are futile,
- 28 the attorney may refer the matter to the law enforcement agency charged with responsibility over the
- 29 matter or to any other governmental agency or official charged with overseeing or regulating the
- 30 matter if all of the following exist:
- 31 (1) The referral is warranted by the seriousness of the circumstances and is not otherwise prohibited
- 32 by law.

33 (2) The improper governmental activity constitutes the use of the organization's official authority or
34 influence to commit a crime or to perpetrate fraud.
35 (3) Further action is required in order to prevent or rectify substantial harm to the public interest or to
36 the governmental organization resulting from the improper governmental activity.
37 (d) Good-faith disclosure not cause for discipline. An attorney's conduct in making a referral under
38 subdivision (c) shall not be a cause for disbarment, suspension, or other discipline if the attorney
39 has acted reasonably and in good faith to determine the propriety of making a referral and to identify
40 the appropriate governmental agency or official as described in subdivision (c) and to cooperate with
41 the agency or official in the execution of the oversight or regulatory responsibilities of the agency or
42 official regarding the referral. However, once an attorney has made the referral, this subdivision
43 shall not apply to any further affirmative conduct outside of the scope of subdivision (c) or this
44 subdivision that is initiated by the attorney to address the improper governmental activity.
45 (e) Retaliation against attorneys prohibited; penalties.
46 (1) No governmental organization shall make, adopt, or enforce any rule, regulation, or policy,
47 whether official or de facto, preventing an attorney from making a referral to a government or law
48 enforcement agency pursuant to this section or from otherwise acting in furtherance this section.
49 (2) No governmental organization shall discharge, demote, suspend, threaten, harass, deny
50 promotion to, terminate a contract with, or in any other manner discriminate against, an attorney in
51 the terms and conditions of employment or contractual relations because of lawful acts done by the
52 attorney in connection with a referral to a government or law enforcement agency pursuant to this
53 section, or otherwise done in furtherance of this section.
54 (3) A governmental organization that violates subdivision (2) shall be liable for all relief necessary to
55 make the attorney whole, including reinstatement with the same seniority status that the employee
56 would have had but for the discrimination, two times the amount of back pay, interest on the back
57 pay, compensation for any special damage sustained as a result of the discrimination, and, where
58 appropriate, punitive damages. In addition, the governmental organization shall be required to pay
59 litigation costs and reasonable attorneys' fees. An attorney may bring an action in the appropriate
60 superior court of the state for the relief provided in this subdivision.
61 (f) Action permitted, not required. An attorney may, but has no affirmative duty to, take action
62 pursuant to this section.
63 (g) Scope. This section shall not be construed to require that the improper governmental activity
64 subject to its provisions be related, directly or indirectly, to the matter for which the attorney was
65 engaged as outside counsel by the governmental organization.

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

PROPOSERS: Larry Liebenbaum, Jeremy March, , Andi Liebenbaum, Jack Fine, Carol Scott, Jerry Benezra, Valerie Merritt, Jennifer Kim, Ralph Perry, Shirley Deutch, Jacqueline Fabe

STATEMENT OF REASONS:

Existing law: The duty of confidentiality, as codified in Business and Professions Code section 6068, subdivision (e), generally requires an attorney to maintain "inviolable" the confidentiality of information disclosed by a client. An exception exists for information the disclosure of which the attorney reasonably believes is necessary to prevent a criminal act that likely to result in death of, or substantial bodily harm to, an individual.

This Resolution: Would clarify that an attorney who, in the course of representing a governmental organization, learns of improper governmental activity, may, in specified circumstances, refer the matter to a law enforcement agency or to another governmental agency; would exempt the attorney from disciplinary action for making a referral of the matter; and would protect the attorney from discrimination or retaliation by the agency for any such referral.

The Problem: Many attorneys representing public agencies – which are funded by taxpayers' money and ostensibly serve the public interest – feel they have ethical and professional obligations not just to the particular agency for which they work, but also the general public. Unfortunately, California law is

currently unclear as to when attorneys representing governmental agencies may report unlawful conduct by their clients where such disclosures would protect public funds or safety. Business and Professions Code section 6068, subdivision (e)—requiring attorneys to keep "inviolable" client confidences and secrets "at every peril"—suggests that government lawyers may have to keep silent even in the face of crimes or frauds, committed at public expense, by public servants, that could be easily stopped by timely disclosures to law enforcement or other public agencies. California law also recognizes a "crime-fraud" exception to the duty of confidentiality and to the attorney-client privilege, but it is not clear exactly when or how this exception applies. A governmental agency attorney who learns that his or her client is engaged in unlawful activity may thus be forced to choose between remaining silent in the face of harm to the public, or risking retaliation, sanctions or disbarment for disclosing the illegal activity.

IMPACT STATEMENT

This resolution would clarify Business and Professions Code section 6068, subdivision (e).

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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 in the public's sector, any legislative encroachment on the confidential relationship between an attorney and their client, whether an individual or a corporate entity, would have a chilling effect in any such client disclosing information to their attorney necessary to facilitate the thorough and effective representation by the public entity's attorney.