

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

**REPORT AND RECOMMENDATION
ON AB 363**

August 17, 2001

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MEMORANDUM

TO: Members of the Board Committee on Regulation and Discipline
FROM: Ellen R. Peck, Chair, Committee on Professional Responsibility and Discipline
SUBJECT: Report and Recommendation Regarding AB 363 Subcommittee
DATE: August 17, 2001

OVERVIEW

Assembly Bill 363 recognizes that lawyers who represent governmental organizations lack clear guidance on how to proceed when confronted by an official who insists on taking illegal actions. Although California has several whistle-blower statutes that cover government employees and others, lawyers representing the government do not come within their protections because the lawyers' duty of confidentiality prohibits them from acting as whistleblowers.

Following study, the Standing Committee on Professional Responsibility and Conduct ("COPRAC") proposes for public comment a possible amendment to rule 3-600 of the California Rules of Professional Conduct (the "Rules"). Rule 3-600 governs all attorneys in their representation of clients that are organizations rather than individuals. The suggested amendment to rule 3-600 is intended to provide needed guidance to government lawyers on how to proceed in the face of misconduct, while at the same time respecting the fundamental duty of confidentiality that is so essential to the proper functioning of the attorney-client relationship and, by extension, the legal system.

This proposed revision to rule 3-600 recognizes the extraordinary variety of governmental entities that exist in California. Although the governmental client generally is a specific agency, the revisions would provide that the client also can be a branch of government, such as the executive branch, for purposes of reporting governmental wrongdoing. Rather than identify a single authority to whom government lawyers may report, COPRAC's approach emphasizes the right currently possessed by each governmental entity, or a superior entity, to prescribe the method it desires for its attorneys to report governmental wrongdoing. A statute, ordinance, or other law or regulation enacted by the entity, or by any entity of superior authority can identify the person, board, or agency to which such a report should be made. In the absence of such specific direction, our proposal protects government lawyers who make a good faith decision about whether to report and to whom to report. This approach would provide the needed guidance to government lawyers on how to proceed, especially when faced with misconduct by the top official in the agency for which the lawyer is working. It protects the public interest in a corruption-free government without sacrificing the duty of confidentiality because permissible disclosures are limited to entities within the government.

I. INTRODUCTION

Assembly Bill 363 (“AB 363”), the “Public Agency Attorney Accountability Act,” was introduced in the 2000-2001 legislative session by Assembly Member Darrell Steinberg. AB 363 arose out of the Chuck Quackenbush Insurance Department matter and the subsequent State Bar investigation of government lawyer and whistle-blower Cindy Ossias.¹ It reflected legislative concern that government lawyers who obtain evidence of improper governmental activity have some authorized means of bringing such evidence to light without exposing such lawyers to possible disciplinary charges for violating the duty of confidentiality.² In its original form, AB 363 would have added a new section to the Business and Professions Code to provide an exception to the duty of confidentiality permitting government attorneys to reveal improper governmental activity.³

At a meeting on May 17, 2001, attended by Assembly Member Steinberg, his staff, representatives of the State Bar and COPRAC and others interested in the topic, COPRAC informally was requested to undertake the study of the governmental lawyer issues implicit in AB 363. On July 9, 2001, consideration of the bill was suspended under Joint Rule 61(a)(9) of the California Legislature.⁴

COPRAC agrees with Assembly Member Steinberg that the Rules of Professional Conduct should provide an avenue for a government attorney to report possible misconduct. COPRAC has concluded, however, that adopting an exception to the duty of confidentiality is not necessary or desirable to provide that mechanism. The better approach is to amend rule 3-600, which addresses the duties of

¹ Brief summaries of the Insurance Department matter involving former Commissioner Quackenbush and Attorney Ossias, and the State Bar investigation into Attorney Ossias’s conduct in the matter, are set out below.

² In the Legislative Analysis of AB 363 (4/30/2001), Comments, the bill’s author wrote of his concern that although the State Bar ultimately exonerated Ms. Ossias and she was reinstated to her position in the Department of Insurance, the California Rules of Professional Conduct lacked adequate guidance for government lawyers on the circumstances under which they can disclose confidential information in the face of improper governmental conduct. (The Legislative Analysis can be found at <http://www.leginfo.ca.gov/pub/bill/asm/ab_0351-0400/ab_363_cfa_20010430_115802_asm_comm.html>). It is also attached to this Report as **Exhibit 3**.

³ AB 363, introduced February 20, 2001, attached as **Exhibit 1**.

⁴ Prior to the suspension, the Assembly passed the bill and it was sent to the Senate, where it was referred to the Senate Judiciary Committee. On three separate occasions, June 5, July 3, and July 5, 2001, the bill’s author requested that Judiciary Committee hearings be canceled. (The status and history of consideration of AB 363 is posted at <http://www.leginfo.ca.gov/pub/bill/asm/ab_0351-0400/ab_363_bill_20010709_history.html>) A copy of that document is attached to this Report as **Exhibit 4**. A hearing is currently scheduled for August 21, 2001, before the Senate Judiciary Committee.

lawyers who represent organizations. That rule recognizes that a lawyer for an organization owes his or her duty to the organization itself, not to individuals who act on behalf of the organization. If an organization's attorney believes that a particular constituent of the organization is acting improperly in a manner that could cause harm to the organization, then the organization's attorney may bring the situation to the attention of higher officials within the organization. The attorney may not, however, breach confidentiality by informing persons outside the organization of the issue. COPRAC believes that altering the duty of confidentiality in that way would be unwise, because such a change would disrupt the attorney-client relationship.

COPRAC believes that the dilemma faced by government attorneys who become aware of misconduct is similar in many respects to the problem faced by an attorney for any other organization who discovers misconduct. Like attorneys for any other organization, government attorneys take instructions and directives from individuals, but the client is usually the government itself, not the particular individual who occupies government office. Thus government attorneys, like attorneys for private organizations, face a dilemma if an individual representative of the client proposes to take action that is illegal or harmful to the organization. Rule 3-600 addresses specifically how a lawyer for a private organization should resolve this dilemma. However, the current rule, although it applies in the governmental context, does not by its express language provide adequate guidance to attorneys who represent governmental clients.

Among other things, the amendments to rule 3-600 that we suggest for public comment would allow the government to designate the person, board or agency within the government to whom its lawyers should report in the event a government official proposes to take action that is illegal or harmful to the organization. The amended rule thus would provide government lawyers with an approved avenue, within which they may report official action that is illegal or harmful, that is broader than that available to lawyers who represent a private organization.

COPRAC believes strongly that amending rule 3-600, and not creating an exception to the duty of confidentiality, is the best way to approach the issues implicit in AB 363. An exception to confidentiality, which would permit government attorneys to make disclosure *to anyone* based on the attorney's unilateral judgment that a government official has engaged in misconduct, would create more problems than it would solve. Such a rule would permit government attorneys to act as free agents, untethered by the usual deference attorneys owe to their clients. Government attorneys who find themselves in the extraordinary and rare position of advising a government official who, despite advice by the attorney, insists on pursuing a course of illegal conduct, should have a specific protocol to follow, just as corporate attorneys in analogous situations now have. Nevertheless, for the attorney-client relationship to function effectively, attorneys must respect the right of the client to conduct its affairs and also be careful to preserve confidentiality so that clients feel free to consult them about difficult and sensitive matters. If attorneys have absolute freedom to make disclosure of alleged misconduct to the public generally or to the press, then government officials will become very reticent about consulting counsel. That will not serve the public interest, as we explain in some detail below.

II. THE CONTEXT FOR ADDRESSING ISSUES IMPLICIT IN AB 363

A. The Ossias/Quackenbush Insurance Department Matter

The Ossias/Quackenbush Insurance Department matter (“Quackenbush matter”) grew out of the 1994 Northridge Earthquake.⁵ The State of California Insurance Department investigated the claims handling practices of several insurance companies and concluded that the practices violated insurance regulations. The Department stated its conclusions in confidential internal reports known as market conduct examinations.

Eventually, the Insurance Department settled its cases against three of the insurance companies under investigation. Under the settlement agreements, the Insurance Department agreed not to fine the companies and not to finalize the market condition examinations.⁶ In return, the insurance companies together contributed several million dollars to foundations that then Insurance Commissioner, Chuck Quackenbush, had created.⁷ The foundation used those funds to pay for television commercials featuring Quackenbush, to provide contracts for Quackenbush advisors and to make contributions to charities designated by Quackenbush and his aides.⁸

Attorney Cindy Ossias was part of a team of lawyers in the Insurance Department that had recommended that Commissioner Quackenbush levy fines against the insurance companies.⁹ Quackenbush disregarded that recommendation when he entered into the settlements described above. Ossias later testified before the Assembly Insurance Committee that she was upset that no fines had been levied; based on the number of claims-handling violations, she had expected fines in \$20-40 million range.¹⁰ She also

⁵ This summary of the events of the Quackenbush matter are based on a series of Los Angeles Times articles. (Virginia Ellis & Carl Ingram, Whistle-blower Emerges in Quackenbush Probe; Scandal: Staffer Provided Documents, Saying She Could No Longer Tolerate Misconduct, L.A. Times, Part A; Part 1; p. 1(6/23/00) [“6/23/00 Article”]; Virginia Ellis & Miguel Bustillo, Quackenbush Hearings Take Dramatic Turn, L.A. Times, Part A; Part 1; p. 1 (6/27/00) [“6/27/00 Article”]; Virginia Ellis & Carl Ingram, Quackenbush Resigns; Probe Will Continue; Scandal: Facing Impeachment, Insurance Commissioner Quits the Day Before He Was to Testify at Assembly Hearing, L.A. Times, Part A; Part 1; p. 1(6/29/00) [“6/29/00 Article”]; Virginia Ellis, State Insurance Dept. Reinstates Whistle-Blower, L.A. Times, Part A; Part 1; p. 33 (8/13/00) [“8/13/00 Article”]. Copies of these articles are on file with State Bar staff and may be obtained by calling (415) 538-2161.

⁶ 6/23/00 Article.

⁷ Id.

⁸ Id.

⁹ 6/27/00 Article.

¹⁰ Id.

testified that shortly after the settlement agreements were signed, she and other Insurance Department lawyers who had recommended that the insurers be fined were instructed to shred documents related to that recommendation.¹¹ Ossias said that her outrage over the settlements led her to become a whistle-blower, and she provided the Assembly Insurance Committee with copies of the confidential market conduct examinations.¹²

Soon after Ossias's identity as the whistle-blower was disclosed in late June 2000, the Insurance Department placed Ossias on administrative leave.¹³ After Ossias testified before the Legislature along with other Insurance Department employees, Commissioner Quackenbush resigned.¹⁴ Eventually, Attorney Ossias was reinstated to her position in the Department.¹⁵

B. The State Bar Investigation of Attorney Ossias's Conduct

The State Bar opened an investigation of Ossias's conduct in the Quackenbush matter. On October 11, 2000, the State Bar Office of Chief Trial Counsel closed its investigation and issued a letter to Ossias's attorney explaining its decision.¹⁶ The State Bar did not address the Insurance Department's earlier assertion that the market conduct examinations were confidential. Instead, the State Bar concluded that "Ms. Ossias' conduct should not result in discipline because: (1) it was consistent with the spirit of the Whistle-blower Protection Act; (2) it advanced important public policy considerations bearing on the office of Insurance Commissioner; and (3) it is not otherwise subject to prosecution under the guidelines set forth in this office's Statement of Disciplinary Priorities." In reaching its conclusion, the State Bar also noted that Ossias had been reinstated and that Commissioner Quackenbush's successor, the then Acting Commissioner of Insurance, had commended Ossias for her actions.¹⁷

¹¹ Id.

¹² Id.

¹³ 6/23/00 Article.

¹⁴ 6/29/00 Article.

¹⁵ 8/13/00 Article.

¹⁶ October 11, 2000 letter from Donald R. Steedman, Deputy Trial Counsel, State Bar of California, to Richard A. Zitrin, counsel for Cindy Ossias in discipline matter, attached as **Exhibit 5**.

¹⁷ Id.

The State Bar has maintained that the decision to terminate its investigation of Ossias did not establish a new rule or precedent: “There is no formal ‘opinion’ of the State Bar that ‘whistle-blower’ protections apply to attorneys.”¹⁸

C. AB 363

As first introduced on February 20, 2001, AB 363 sought to “authorize an attorney employed by a state or federal government agency to report information that he or she reasonably believes is necessary to prevent a government official or agency from engaging in improper governmental activity”¹⁹ The statutory mechanism for providing that authorization would have been a new section of the Business & Professions Code, section 6068.5.

AB 363 was then amended to authorize the State Bar to study the issue of whistle blowing by government attorneys and to propose “a carefully balanced new rule of professional conduct” that would provide to public agency attorneys in California “adequate guidance to reasonably determine the circumstances under which he or she may properly seek to protect the public interest even at the risk of disclosing client confidences”²⁰

D. California Whistle-blower Statutes

California has enacted a number of statutes to afford protections to government employees and others who report or disclose information about illegal conduct, waste, fraud or other improper conduct. These statutes include the California Whistle-blower Protection Act (Gov. Code §§ 8547-8547.12) (“CWPA”); the Whistle-blower Protection Act (Gov. Code §§ 9149.20-9149.23) (“WPA”); and the Local Government Disclosure of Information Act (Gov. Code §§ 53296-53299) (“LGDISA”). In response to an inquiry by Assembly Member Steinberg, the Attorney General recently opined that attorneys who represent governmental agencies are not within the protections of those statutes.²¹ The Attorney General’s opinion notes that all of the whistle-blower statutes contain language

¹⁸ Memorandum by Robert Hawley, Deputy Executive Director of the State Bar, quoted in Mike McKee, Lawyer Who Blew Whistle on Quackenbush Exonerated, Daily Recorder, p. 3 (12/1/2000).

¹⁹ AB 363, original, 2/20/01, Legislative Counsel’s Digest, **Exhibit 1**, attached.

²⁰ AB 363, as amended April 26, 2001, attached as **Exhibit 2**. As already noted, consideration of AB 363 has been suspended. See section I., Introduction.

²¹ Cal. Atty. Gen. Opn. 00-1203 (May 23, 2001) (the opinion can be found at the following web address: <<http://caag.state.ca.us/opinions/published/00-1203.pdf>>). It is also attached to this Report as **Exhibit 6**.

to the effect that their protections apply only insofar as the disclosures do not violate other laws or duties.²² Thus, the Attorney General reasons, the whistle-blower statutes were not intended to override attorney-client confidentiality.

We agree in principle with the Attorney General's analysis with one technical exception. The Attorney General's opinion focuses on the whistle-blower statute's relationship to the attorney-client privilege,²³ an evidentiary rule which comes into play when a lawyer or client is called to testify. The more pertinent issue in our opinion is the lawyer's ethical duty of confidentiality, which governs the lawyer in all contexts except when the lawyer is compelled by legal process to provide evidence.²⁴ We agree with the central premise of the Attorney General's opinion that California's whistle-blower statutes do not constitute an exception for government lawyers from the duty of confidentiality.

E. The Task Undertaken by COPRAC

Without the protections afforded by the whistle-blower statutes, and because they are subject to the duty of confidentiality contained in Business & Professions Code section 6068(e), attorneys who represent the government are limited in their ability to report improper governmental activities. It is

²² The CWPA provides that: "Nothing in this section shall be construed to authorize an individual to disclose information otherwise prohibited by or under law." Gov. Code § 8547.3(d). Thus, a government official can insist that a government attorney not do anything that would upset the government's right to confidentiality. In addition, the WPA provides that state employees should disclose "to the extent not expressly prohibited by law" improper governmental activities. Gov. Code, § 9149.21. Moreover, the LGDIA does not prohibit a local agency from taking action against an employee where the agency believes that the action is justified because of evidence showing "the employee's complaint has disclosed information which is confidential under any other provision of law." Gov. Code, § 53298, subd. (b)(3).

²³ Specifically, the Attorney General's opinion answered each of the following inquiries in the negative:

"1. Do the "whistle-blower" statutory protections applicable to employees of state and local public entities supersede the statutes and rules governing the attorney-client privilege?"

2. Do the statutory provisions relating to the disclosure of false claims actions, communications with the Legislature, and the filing of complaints or claims or the institution of proceedings pertaining to the rights of employment by employees of state and local public entities supersede the statutes and rules governing the attorney-client privilege?"

²⁴ For a discussion concerning the relationship of the duty of confidentiality to the attorney-client privilege, see section V.A., below.

necessary to rectify this situation without jeopardizing fundamental ethical duties essential to the effective operation of the legal system.²⁵ COPRAC believes that it has reached a solution that attains the goals implicit in AB 363, while at the same time circumventing the problems inherent in altering the duty of confidentiality itself.

F. The Procedure COPRAC Followed To Arrive At Its Recommendation

As already noted, at a meeting on May 17, 2001 attended by Assembly Member Steinberg, his staff, representatives of the State Bar and COPRAC and others interested in the topic, COPRAC was requested to undertake the study of the governmental lawyer issues implicit in AB 363 without formal action by the Legislature. COPRAC designated a subcommittee made up of some of its members (“the Subcommittee”), to study the problem. After an initial period of research to identify the ethical issues implicated by AB 363, the Subcommittee focused its efforts on a possible approach that in part involved amending rule 3-600 (Organization as Client). At COPRAC’s June 15, 2001 open session meeting, attended by several interested parties, COPRAC authorized the Subcommittee to continue its investigation of this approach. On July 10, 2001, COPRAC’s subcommittee sought preliminary input from interested parties on the possible approach to amending the Rules of Professional Conduct. The memorandum soliciting this preliminary input also invited interested parties to participate in COPRAC’s August 10, 2001 open session meeting on AB 363.

Following consideration of preliminary comments received from: Stephen Eckis, City Attorney, City of Poway; Jeff Ruch, Executive Director, Public Employees for Environmental Responsibility; attorney Cindy Ossias; Roberta Larson, Director, Legal & Regulatory Affairs, California Association of Sanitation Agencies; and Kara Ueda, Staff Attorney, League of California Cities,²⁶ COPRAC’s subcommittee prepared a draft of this report and distributed it to interested parties on July 30, 2001.²⁷ The draft report evaluated a variety of options for action, including the subcommittee’s recommended proposal for amending rule 3-600.

At COPRAC’s August 10, 2001 open session, COPRAC considered the subcommittee’s draft report and recommendation and worked closely with the following interested parties who participated

²⁵ The study requested of COPRAC at the May 17 meeting with Assembly Member Steinberg and others is somewhat complicated by a fact unique to California: it is the only state that regulates its lawyers under both statutes enacted by the legislature and disciplinary Rules of Professional Conduct issued by the Supreme Court. The Rules are issued as an order binding on all members of the State Bar and on lawyers from other jurisdictions while engaged in certain activities in California (under rule 1-100(D)(2)).

²⁶ Copies of these written comments were previously forwarded to C.O.R.D. as Enclosure 2 with proposed revised rule 3-600, on August 14, 2001.

²⁷ A copy of this draft report was previously forwarded to C.O.R.D. as Enclosure 3 with the proposed revised rule 3-600, on August 14, 2001.

in the meeting in person or by telephone: Manuela Albuquerque, Berkeley City Attorney, on behalf of the City Attorneys' Department of the California League of Cities; Taylor Carey from the Office of the California Attorney General; Frances Fort, on behalf of Assemblymember Steinberg's office; Lisa Hammond from the Public Employees Retirement Service; Daniel Pone, Senior Attorney, Judicial Council of California, Office of Governmental Affairs; and Jeff Ruch, on behalf of Public Employees for Environmental Responsibility. The August 10, 2001 open session was carried over to the morning of August 11, 2001, with Manuela Albuquerque, Frances Fort and Jeff Ruch in attendance in person or by telephone.

Prior to COPRAC's August 10 and 11, 2001 open session, COPRAC's subcommittee prepared a further draft of rule 3-600 to address comments that legislative staff had communicated to State Bar staff. At the open session meeting, COPRAC worked closely with interested parties in revising rule amendment language. COPRAC and the interested parties worked off the Subcommittee's further draft of rule 3-600 and a draft developed by the City Attorneys' Department of the League of California Cities.²⁸ In this manner, COPRAC approved proposed amended rule 3-600 for submission to CORD for public comment authorization.

G. A Brief Description of the Topics Covered In This Report

Section III of this Report is an overview of the ethical concepts that informed the approach the Subcommittee took. Section IV describes the approach that COPRAC has settled upon – revising current rule 3-600 – and discusses the advantages of this approach: providing more guidance to government lawyers, and protecting the public interest in a corruption-free government while simultaneously preserving the core duty of confidentiality. Section V discusses the other approaches the Subcommittee and COPRAC considered but ultimately did not pursue.

III. AN INTRODUCTION TO THE UNDERLYING ETHICAL CONCEPTS

The effective operation of our legal system depends to a large degree on fundamental duties owed by lawyers to their clients. Core legal duties include respecting the client's right of confidentiality, giving each and every client the lawyer's undivided loyalty, and providing clients with advice free of a third party's interference with the lawyer's judgment. These duties are owed all clients. When lawyers properly perform these duties and do not overreach their authority, both their clients and the legal system benefit.

A. The Duty of Confidentiality is Central to Clients and the Legal System

²⁸ Copies of the comment letter and revised draft rule 3-600 developed by the City Attorneys' Department of the League of California Cities written comments were previously forwarded to C.O.R.D. as Enclosure 4 with proposed revised rule 3-600, on August 14, 2001. For convenience, they are also attached as **Exhibit 7**.

Lawyers have two sets of obligations and relationships: to their clients, on the one hand, and to the courts and the rule of law, on the other. In some instances, a duty can be understood as being owed primarily to the client. An example of this is lawyers' duty to represent their clients competently. In other instances, the duty primarily is to the legal system, such as lawyers' duty not to mislead the courts. Regardless of whether a duty is owed primarily to the client or primarily to the system, however, the performance of a lawyer's duty generally redounds to the benefit of the legal system. The duty of confidentiality is a prime example of a duty of lawyers that, when honored, benefits both the client and the legal system by fostering a strong relationship between client and lawyer.

This relationship of trust benefits both client and legal system because the legal system seeks to have lawyers guide their clients toward the performance of their legal duties. This in turn leads to the resolution or avoidance of disputes and to conduct that conforms to legal requirements. Lawyers can fulfill this role in the legal system only by having the complete trust of their clients and the access to all of a client's information that can result from this relationship of trust. A lawyer cannot fulfill this role if his or her client does not have absolute confidence that the lawyer will not reveal or use any confidential information to the disadvantage of the client.

Our courts have recognized the importance of lawyers preserving clients' confidential information to the proper functioning of the legal system. The U.S. Supreme Court recently restated: "The attorney-client privilege is one of the oldest recognized privileges for confidential communications. [citations omitted] The privilege is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" Swidler & Berlin v. United States, 524 U.S. 399, 118 S. Ct. 2081, 2084 (1998) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S.Ct. 677, 682 (1981)).

Our own Supreme Court has expressed the same views: "Clearly, the fundamental purpose behind the privilege is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters. (Citation omitted) In other words, the public policy fostered by the privilege seeks to insure 'the right of every person to freely and fully confer and confide in one having knowledge of the law and skilled in its practice, in order that the former may have adequate advice and a proper defense.' (citation omitted)." Mitchell v. Superior Court, 37 Cal.3d 591, 599 (1984).

The courts thus recognize that clients might choose not to use the services of lawyers, or to withhold information from them, without strong confidentiality protection. When clients do not consult counsel, or hold back information from their counsel, both the client and the legal system lose the benefit of the lawyer's advice.

It has been suggested that there is no confidentiality problem for attorneys who represent government clients because the public is their client. Thus, the argument goes, government lawyers may freely disclose information which otherwise would be confidential. We address this theory in more detail

below.²⁹ For now, with regard to confidentiality and its centrality to the relationship of trust between lawyer and client, it is sufficient to note that the argument creates the following problems: (i) government lawyers would be left without any guidance as to when they must or may reveal confidential information, creating the likelihood of liability for failing to do so; (ii) governmental clients would be deprived of the ability to control the attorney-client privilege; and (iii) governmental clients would be deprived of the ability to control the deliberative process privilege.

B. Lawyers Owe All of Their Clients the Same Fundamental Duties

The common law imposes certain key duties on attorneys, and these duties are fundamental to the role of attorneys in representing clients and acting competently within the legal system. Those duties therefore are not shaped by the size, wealth, legal status, respectability, organizational nature, purpose, interests, responsibilities, or identity of the particular client for whom or for which the attorney is acting at the moment. See, e.g., Truck Insurance Exchange v. Fireman's Fund Ins. Co., 6 Cal.App.4th 1050, 1056, 8 Cal.Rptr.2d 228, 232 (1992) (relying on the lawyer's duty of undivided loyalty to each client, the court held that "a law firm that knowingly undertakes adverse concurrent representation may not avoid disqualification by withdrawing from the representation of the less favored client")

For this reason, we reject the notion that lawyers representing governmental agencies owe a different or lesser duty to their clients than do lawyers representing private clients. We do not believe that there should be a substantive distinction between in-house counsel and outside counsel concerning their fundamental duties. See People ex rel. Deukmejian v. Brown, 29 Cal.3d 150, 157 (1981) (rejecting Attorney General's argument that he is not bound by the rules of legal ethics); accord In re Gatti, 330 Or. 517, 8 P.3d 966 (2000) (there is only one set of ethical rules, which are applicable equally to governmental and private attorneys).³⁰

²⁹ See Section V.B.3., below.

³⁰ Indeed, much of the discussion of the issues implicit in AB 363 has assumed that "government attorneys" or "public agency attorneys" are full-time government employees. However, we believe that any rule we recommend must apply equally to any attorney in his or her representation of governmental clients, whether the attorney is an employee of the government or is a private attorney retained by a government agency. We believe that significant adverse consequences would flow from a rule that distinguishes between employee and other attorneys who represent governmental clients. Imposing a less stringent duty on in-house government attorneys than on outside attorneys retained by the government would tend to imply that employee-lawyers provide a different type of service, of fulfill a different role, than outside counsel. In addition, a rule giving less protection to the confidentiality of information held by employee-attorneys could encourage governmental agencies to use outside counsel simply because outside counsel would owe a more stringent duty of confidentiality than an in-house governmental attorney. Hence, rather than referring to "government attorneys" or "public agency attorneys," we discuss the rule which should govern attorneys while they "represent" governmental clients.

C. Lawyers May Not Make Substantive Decisions for Their Clients

An effective attorney-client relationship also depends on the appropriate allocation of responsibility between lawyer and client. The role of the lawyer is to advise the client on alternatives and risks. While the lawyer may recommend a particular course, it is the client's right to make the final decision regarding matters that affect its substantive rights. Blanton v. Womancare, Inc., 38 Cal.3d 396, 410, 696 P.2d 645, 654, 212 Cal.Rptr. 151, 160 (1985).

Although government lawyers in some instances may be legally authorized to make decisions on behalf of their governmental clients,³¹ when the decision-making authority remains vested in another employee or agent of the government whom the lawyer is advising, then the lawyer must respect that person's role as the ultimate decisionmaker. Permitting the lawyer to decide whether to disclose confidential information usurps the authority properly allocated by the government to a particular individual or agency. In other words, lawyers in the governmental context must be cautious not to usurp power that is not properly theirs, just as lawyers representing private clients must respect their clients' autonomy.

Put another way, because of the fundamental concept that all attorneys owe to each client the same essential duties, the duties do not vary based on any judgment about the client. The model of the lawyer-client relationship is one of control by the client no matter who the client is. As a result, even if the lawyer is skilled and experienced in regard to a particular matter, and even if the lawyer is selfless and well-meaning, and even if, by any objective measure, the client would be better served by allowing the lawyer to control the matter, the lawyer has no more authority to act on behalf of the client than the client has granted to the lawyer.

If any client, or the employees and agents of an organizational client, were to believe that the client's lawyers were free to make an independent judgment about their conduct, and then act on it, then the lawyers would shift from being advisers to being adversaries. If governmental agencies, uniquely among clients, were not permitted by the rules applicable alone to their attorneys, to have the complete trust in their attorneys that the law seeks to foster, then these governmental agencies would find themselves without lawyers when lawyers are most needed – when the agencies' employees or agents need the advice and guidance of independent-minded attorneys able to articulate potential improprieties and their alternatives. The problem is exacerbated, as discussed below, when the client is the government and the

³¹ See, e.g., ABA Model Rules of Professional Conduct, Scope 16, which provides in part:

“Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers.”

agent or employee the lawyer is obligated to advise is entrusted with the authority to make decisions on behalf of the government.

With the foregoing ethical concepts in mind, COPRAC, through its subcommittee, attempted to resolve the issues raised by AB 363.

IV. THE COPRAC APPROACH: REVISE CALIFORNIA RULE OF PROFESSIONAL CONDUCT 3-600

A. Rule 3-600 Is the Starting Point for Analysis of the AB 363 Issues

Among the fiduciary duties of an attorney is the obligation to provide to the client a full and unbiased account of all facts known to the attorney, and all the attorney's professional opinions, that are needed by the client to protect its rights and interests, to achieve its goals and fulfill its responsibilities, and to direct and control the attorney's activities on behalf of the client. This obligation includes the responsibility to say to the client what it might not want to hear. One noted scholar and judge put it this way: "As in private practice, the attorney must tell his client when he is wrong. The attorney is never the mere hireling of government or of anyone else. He is an independent professional and must stand on what he thinks is right." Weinstein, Some Ethical and Political Problems of a Government Attorney, 18 Maine L. Rev.155, 162 (1966).

When an attorney represents a client with regard to a matter on which the client has acted or intends to act in a way that might be illegal or risky to the client, the lawyer must fulfill his or her duty of competent representation by advising the client of the risks it faces and the alternatives that are available to it. If the client disregards the lawyer's advice, however, the lawyer is not entitled to take action on the client's behalf over the client's objection, no matter how well intentioned the lawyer may be, nor may the lawyer violate confidentiality, even if the lawyer believes a breach of confidentiality would serve the client's interests.

The problem becomes more complex when the client is an organization, whether private or governmental, rather than an individual. The attorney cannot deal directly with the organization itself. Instead, the attorney deals with the organization through its human representatives or contact persons. When that contact either does not appropriately respond to the attorney's advice and thus places the organization at risk, or when the lawyer learns that the individual has acted or intends to act in a way that is illegal or risky to the organization, the attorney's course of action may not be so obvious as when the client is an individual. To deal with this practical difference between individual and organizational clients, rule 3-600 of provides standards and guidance to California attorneys in performing with organizational clients this obligation of full and candid disclosure and advice.

Rule 3-600 and the principles underlying it form the logical starting point for providing guidance to an attorney who, in representing a governmental client, comes to believe that an officer or employee of the governmental client is committing an illegal act. In reviewing rule 3-600 in light of AB 363,

we have concluded that the rule in its current form does not provide sufficient guidance to attorneys who represent governmental clients. We therefore recommend the modifications to the current rule and its accompanying Discussion that are included in the proposed amended rule that is attached as **Exhibit 8**, and that are highlighted in the marked version attached as **Exhibit 9**.

B. Proposed Changes to Rule 3-600

Except for some minor clarifications, we are proposing changes to rule 3-600 that are limited to the specific issues raised by AB 363. We leave to the Commission for the Revision of the Rules of Professional Conduct (“Commission”) any broader reexamination of rule 3-600. We recommend obtaining public comment on several possible amendments to rule 3-600. These amendments, with corresponding clarifications in the Discussion of the rule, include: (1) An amendment to paragraph (A) of rule 3-600 to clarify the identity of the client when a lawyer represents a governmental organization; (2) a new paragraph (C) to provide guidance specifically to lawyers who represent governmental organizations on how to proceed in the face of official misconduct; (3) a new paragraph (D), which would create a safe harbor under the California Rules of Professional Conduct for a lawyer representing a governmental organization when the lawyer acts in good faith to perform his or her duties under rule 3-600; and (4) several miscellaneous revisions to bring current paragraphs of the rule in line with the proposed substantive revisions.

1. *Addition of language covering situations peculiar to governmental organizations: Amendments to paragraph (A), together with clarification in paragraph 5 of the Discussion.* Current paragraph (A) provides that in representing an organization, an attorney must remember that the client is the organization itself, which acts through its human constituents. This is true for both governmental and non-governmental clients. Nevertheless, given the vast array of governmental entities, it is often difficult for an attorney representing a governmental organization to identify precisely whom the client is. Identifying the client is critical to the attorney’s maintaining the client’s trust by not disclosing confidential information outside of the client itself. It is also crucial to preserving the attorney-client privilege.

We propose additional language for paragraph (A) to emphasize that in the representation of a governmental organization, the client generally is the parent governmental organization or entity. New **paragraph 5** of the Discussion clarifies this statement by recognizing that a lawyer can represent a great variety of governmental organizations. For example, when representing a state agency, the agency and not the entire state government will usually be the client, although different circumstances can lead to different results. On the other hand, when representing a municipality, the municipal government as a whole is generally viewed as the client. Again, under certain circumstances, the result will be different. COPRAC circulates the proposed changes to paragraph (A) based on the strong recommendation of the League of Cities for the purpose of eliciting public comment concerning whether Rule 3-600 should clarify the identity of the “client” in the governmental organization context and, if so, how the Rule should accomplish that task.

2. *Addition of language covering situations peculiar to governmental organizations: Limiting current paragraph (B) to non-governmental clients and adding new paragraph (C) to apply only to governmental organizations, together with clarification in paragraphs 4, and 6 through 9 of the Discussion.* Current paragraph (B) identifies two situations in which the attorney representing an organizational client may take further action to advise and protect the organization. These situations arise when an agent of the organization is involved in a course of conduct (i) that is or might be a violation of law reasonably imputable to the organization *or* (ii) that is likely to result in significant injury to the organization.

Current paragraph (B) applies to attorneys in representing any client; these two situations could also be faced by attorneys in representing governmental clients. We believe, however, that in representing a governmental client an attorney might face situations that are within the purpose and spirit of rule 3-600, but might not fit the language of the current (B)(i) or (ii). This potential gap in the language of the current rule creates the possibility that an attorney representing a governmental organization would not find the guidance in rule 3-600 that it should provide.

To address this problem, we propose several revisions to paragraph (B) and the addition of a new paragraph (C), the latter being intended to cover additional situations that are specific to the representation of governmental organizations, including the misuse of, or the improper refusal to use, the official position of a governmental officer or employee.

First, we propose that *current paragraph (B)* be amended to limit its application to non-governmental organizations. The types of misconduct that trigger the lawyer's right to take corrective action would remain the same as in the current rule: action or a refusal to act that is a violation of law or is likely to significantly harm the organization. Although paragraph (B) as currently written also applies to lawyers representing governmental organizations, we believe that placing in separate paragraphs attorneys' duties and rights concerning private and governmental organizations helps to clarify the options available under both scenarios, and thus provides better guidance to all attorneys.

Current paragraph (B) identifies two kinds of corrective action the lawyer may pursue: (1) urging reconsideration of the matter; and (2) referring the matter up the organization's chain of command. We propose that these remain substantially the same. In addition to urging reconsideration of the matter, however, we propose that the lawyer also be allowed to urge remediation as well. Proposed new **paragraph 9** of the Discussion clarifies this addition. An act or refusal to act by an organization's agent may involve past conduct and, although reconsideration of the matter may no longer be possible, the agent may still be in a position to mitigate or remedy the effects of those past actions. Finally, proposed new **paragraph 4** explains that the rights and duties under 3-600 apply to lawyers who provide legal services to any organizational client, whether governmental or non-governmental, and regardless of whether they do so as an employee or an independent contractor.

Second, we propose a *new paragraph (C)*, to be applicable only to governmental organizations. In addition to the two "triggering" mechanisms in paragraph (B) that are outlined above, the lawyer's right to take action in the face of official misconduct would also be triggered by a government

official's misuse of authority to commit a crime or fraud, or the official's willful omission to perform his or her official duty. These latter two triggering events bridge the gap in the current rule's language to provide the necessary guidance to government lawyers on when they are permitted to take action. Again, although the first two mechanisms are the same in both the non-governmental and governmental contexts, we believe that providing in a single paragraph all of the triggering mechanisms applicable in the governmental context adds to the clarity of the rule and provides better guidance to all lawyers.

When any of the forgoing triggering events occurs, lawyers representing a governmental organization would, under subparagraphs (C)(1) and (2), be able to urge reconsideration or remediation, or refer the matter up the organization's chain of command, just as in the non-governmental context. It is possible, however, that the highest authority who act on behalf of governmental organization is the person who is engaging in the misconduct. To address that situation, we propose that lawyers representing governmental clients be afforded a third option for taking corrective action: subparagraph (C)(3). Proposed subparagraph (C)(3) would allow such a lawyer to refer the matter outside of the particular agency the lawyer represents to "the governmental agency that is charged with responsibility over the matter or to any other governmental agency or official charged with overseeing or regulating the matter." There is no provision for public disclosure of information.

Rule 3-600 thus provides for the possibility that in certain circumstances an attorney may choose to work his or her way up the organizational ladder to obtain reconsideration of an individual's act or refusal to act described in paragraphs (B) and (C). Due to the complexity of governmental organizations, attorneys who represent such organizations may have difficulty determining to whom to report concerns under Rule 3-600. We cannot solve this problem directly, because defining the chain of command within government is beyond our purview.³² Accordingly, proposed new **paragraph 7** of the

³² On this point, we agree with the ABA's Ethics 2000 Commission. In its proposed amendment to Model Rule 1.13, the equivalent of California Rule 3-600, the Commission states as follows in the proposed revised official discussion to Model Rule 1.13: [the parts of the comment that are struck through represent the portions of the current rule that would be deleted; portions underlined represent proposed additions to the comment]:

[6] The duty defined in this Rule applies to governmental organizations. ~~However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining~~ Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it ~~is generally~~ may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government as a

Discussion recognizes that because of the broad variety of governmental organizations, rule 3-600 cannot set forth every avenue available to all lawyers who represent government organizations.

Nevertheless, **paragraph 7** provides guidance to attorneys with three “principles” the lawyer should follow in determining the course he or she should follow. In particular, to ensure that the lawyer preserves the integrity of confidential information of the governmental client, proposed **paragraph 7** cautions that the member should hew to “the principle that such referrals should be made within the government, and not publicly, in a way reasonably designed to minimize the disclosure of” the organization’s confidential information. Because much of the information with which lawyers representing governmental organizations deal is not confidential, we also propose new **paragraph 6**, which states rule 3-600 is not intended to supersede such a lawyer’s duties under other law such as the Brown Act, the California Public Records Act, local sunshine ordinances, and corresponding federal statutes.

Third, language of paragraph (C)(3) [i.e., “If, after the member has taken action as described in subparagraphs (C)(1) and (2), above, the matter is still not resolved”] suggests that the lawyer representing a governmental organization should first proceed under (C)(1) and (2) before proceeding to the corrective action available under subparagraph (C)(3). That is what is intended, but we emphasize that it may not be necessary for a lawyer to pursue both avenues before proceeding under (C)(3). **Paragraph 8** of the Discussion explains that the lawyer need not pursue the (C)(2) course of action [going up the chain of command to the highest authority who can act on behalf of the organization] if such action would not be feasible or would be futile, for example, if the highest authority within the organization is the very official who is engaging in the misconduct.

Finally, because of the addition of new paragraph (C), we also propose a corresponding change in current paragraph (C) [now re-lettered paragraph (E)] for completeness and consistency. Newly re-lettered paragraph (E), which sets out the options for the attorney for the organization when the highest authority that can act on behalf of the organization insists upon the course of conduct that raised the attorney’s concern, now also contains a specific reference to new paragraph (C).

3. *Addition of language covering situations peculiar to governmental organizations: Adding new paragraph (D) creating a safe harbor for lawyers representing governmental organizations who act in good faith, with clarification in new Discussion paragraph 10.* Proposed new subparagraph (C)(3), as clarified in new paragraph 7 of the Discussion, contemplates

~~whole~~ may be the client for ~~purpose~~ purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See ~~note on~~ Scope.

that a reporting authority under subparagraph (C)(3) will be designated, for example, “by statute, regulation or the internal guidelines of the organization itself” It is possible, however, that a reporting authority may not have been designated at all.

To deal with situations where such a designation has not been made, we propose new paragraph (D), which would provide a safe harbor for lawyers who act in good faith (1) to determine the propriety of making the referral in the first place; and (2) to identify an appropriate governmental agency or official to whom to make the referral. Proposed new **paragraph 10** of the Discussion explains new paragraph (D).

It should be noted, however, that paragraph (D) may not, by virtue of its being part of a rule adopted by the Supreme Court, provide a lawyer who acts in good faith with complete protection. As explained, the focus of paragraph (C)(3) is to provide an avenue to lawyers who represent a governmental organization to report improper governmental activity without violating their duty of confidentiality. Paragraph (D) in essence states that even if a lawyer has violated a duty under the Rules of Professional Conduct, the lawyer cannot be subject to discipline so long as he or she has acted in good faith. The problem is that the duty of confidentiality in California resides not in a Rule of Professional Conduct but in a provision of the legislatively-enacted State Bar Act, Business & Professions Code § 6068(e). Although the Supreme Court can provide a safe harbor from discipline for violation of the rules it has adopted, there is a question whether it can provide a safe harbor for a lawyer who violates a provision of the State Bar Act. As part of our study of AB 363, we considered the feasibility of proposing the transfer of the duty of confidentiality from section 6068(e) to a new rule 3-100. Although the apparent lessened protection in paragraph (D) might support such a transfer, we have decided not to recommend a new rule 3-100 at present. This is discussed more fully below, in section V.A. COPRAC anticipates that circulation of paragraph (D) and the corresponding Discussion paragraph for public comment should elicit additional views on the preferred scope and extent of a safe harbor provision.

4. *Miscellaneous proposed revisions to 3-600: Amendment to paragraph (C) [re-lettered “(E)”] and paragraphs 11 and 12 of the Discussion.* In addition to the foregoing proposed revisions to rule 3-600, all of which address situations peculiar to governmental organizations, we also propose a revision of current paragraph (C) [now re-lettered paragraph (E)] to include a cross-reference to new paragraph (C). We also propose new **paragraph 11** of the Discussion to clarify that paragraph (E)’s limitation on the response available to a lawyer in either the non-governmental or governmental context (i.e., resignation in accordance with rule 3-700) also applies to the situation where a (C)(3) oversight agency or official has determined that the official accused of misconduct has acted properly but the lawyer believes the oversight agency or official’s determination is erroneous.

We propose new **paragraph 12** of the Discussion to emphasize that in dealing with the constituents within a governmental organization the lawyer represents, the lawyer’s duty under current paragraph (D) [now re-lettered paragraph (F)] not to mislead a constituent as to the identity of the client applies even if the constituent is an elected official or an appointee of the official.

C. Advantages of the Proposed Revisions to Rule 3-600

Our proposed amendments to rule 3-600 provide a number of advantages.

First, as contemplated under AB 363, revised rule 3-600 will provide additional guidance to attorneys on how to proceed when, in their representation of governmental clients, they are placed in a position where a government official insists on a course of action that is illegal or harmful to the organization.

Second, revised rule 3-600, particularly new subparagraph (C)(3) and new paragraph 7 of the Discussion, will also provide guidance to governmental entities regarding their right to implement a framework to direct their attorneys' disclosure. Because of the extraordinary variety in the structure, size and responsibilities of federal, state, and local governmental entities, and in the nature and sensitivity of the information with which they deal, we believe each governmental entity should continue to have the flexibility to create its own internal reporting mechanism in light of its own circumstances and needs. We do not believe the State Bar should attempt to set out the particulars of an internal reporting mechanism for general application to governmental organizations. The Discussion, however, notes that "it may be permissible for the member to report misconduct to any other governmental agency or official with oversight authority over the matter." Such a reporting framework would allow a government lawyer to address the apparently intractable situation that exists when it is an agency head who insists on the wrongful course of action, without jeopardizing the core duty of confidentiality.

Third, even if the precise path a lawyer should take when confronted with official misconduct has not been laid out, new paragraph (D) would allow the lawyer to go outside the agency he or she represents so long as the lawyer acts in good faith to determine the propriety of making the referral and to identify an appropriate government body to take the referral.

Taken together, the proposed amendments to rule 3-600 will fulfill the concern expressed in AB 363 that government lawyers be provided with sufficient guidance on how to proceed when confronted with improper governmental conduct, without unduly jeopardizing the trust the client reposes in the lawyer, implicating the duty of confidentiality or threatening the integrity of the attorney-client privilege.

V. ALTERNATIVES THAT COPRAC STUDIED BUT DID NOT PURSUE

The Subcommittee identified and studied alternative or supplemental approaches to provide guidance to lawyers who, in their representation of governmental organizations, learn of improper governmental activity. The possible approaches studied in addition to the proposed revision of rule 3-600 and adoption of new rule 3-100 included:

1. As a supplement to the proposed amendments to rule 3-600, transferring the duty of confidentiality, now set forth in Business & Professions Code section 6068(e), to a new Rule of Professional Conduct 3-100, with section 6068(e) to be repealed upon the

Supreme Court's adoption of new rule 3-100. New rule 3-100 would retain the identical language of section 6068(e).

2. Amending the duty of confidentiality to create an express exception that would permit government lawyers to disclose confidential information to prevent or rectify improper governmental activity, either with or without an accompanying revision to rule 3-600. Hawaii has taken both approaches by amending its confidentiality rule and its equivalent of rule 3-600.
3. Amending the California whistleblower statutes to expressly allow government lawyers to disclose confidential information to prevent or rectify improper governmental activity, notwithstanding other laws to the contrary (statute, case law or rule). An example of this approach is the proposal by Professor Clark Kelso, the Acting Insurance Commissioner after Commissioner Quackenbush resigned, to revise the California Whistleblower Protection Act.³³

After considering these alternatives, we have rejected them in favor of our own proposal regarding rule 3-600. We have already stated our reasons in support of that proposal. What follows is a discussion of the advantages and disadvantages of each of the foregoing alternatives and our reasons for rejecting them.

- A. Alternative 1: As a supplement to the amendment of rule 3-600, transfer the duty of confidentiality from Business & Professions Code section 6068(e) to a new Rule of Professional Conduct 3-100, together with legislation revoking section 6068(e) upon the Supreme Court's adoption of new rule 3-100

Besides studying the revisions to rule 3-600, we also studied the feasibility of transferring the duty of confidentiality from Business & Professions Code § 6068(e) to a new rule 3-100.³⁴ In addition

³³ See Clark Kelso, California Whistleblower Protection Act Amendments (10/25/00), **Exhibit 10**, attached (<http://12.2.169.205/government_law_and_policy/publications/ccglp_pubs_whistleblower_report.htm>). Professor Kelso recommended that the CWPA be amended to state explicitly that every state employee, including a lawyer who works for the government, has the right to disclose to the State Auditor privileged and confidential information. Professor Kelso's focus was to change the statute to explicitly state that employees have a right to make a disclosure to the State Auditor, but by inclusion of language referring to confidential information and expressly noting it applied to attorney-client privileged information, Professor Kelso's proposed changes would provide guidance to government lawyers. The Kelso approach is discussed below in Section IV.C.

³⁴ The Subcommittee prepared an early draft of a proposed new rule 3-100, which would have transferred the language of Business & Professions Code section 6068(e) into the rule, and defined "confidential information." A copy of the draft the Subcommittee considered initially is attached as **Exhibit 11**.

to allowing the Commission an opportunity to assess changes to the duty of confidentiality, a new rule 3-100 would, as already noted, have strengthened the proposed safe harbor provision of rule 3-600, which is necessarily limited by its being a rule to providing assurance that a lawyer acting in good faith will not be subject to discipline “under these rules.” Again, it is unclear whether a rule of professional conduct, adopted by the Supreme Court, can provide a safe harbor from discipline pursuant to a legislatively-enacted statutory provision such as section 6068(e).

Nevertheless, despite a new rule 3-100’s apparent advantages of allowing study by the Commission and providing a broader safe harbor, we decided not to recommend its adoption at this time. In reaching this decision we were influenced by the short time frame in which to coordinate not only a rule’s public commentary, but also the legislation providing for the repeal of section 6068(e). This concern, combined with the history of past failed attempts to add a rule 3-100 to the Rules of Professional Conduct, persuaded us to focus our efforts on changes to rule 3-600. We never viewed a new rule 3-100 as necessary to adopt our recommended changes to rule 3-600. Rather, we believed that transferring the duty of confidentiality to a rule of professional conduct would have allowed the aforementioned Commission for the Revision of the Rules of Professional Conduct (“Commission”) to consider the appropriateness of any exceptions to the duty of confidentiality, including an exception for government attorneys. The Commission is charged with studying possible revisions to all the rules of professional conduct and would have been in a better position to assess the interaction of any changes to the duty of confidentiality with other rules of professional conduct.

A brief discussion of confidentiality in California and previous attempts to add a rule 3-100 follows.

The duty of confidentiality in California is set out in Business & Professions Code § 6068(e), which provides that it is the duty of every California lawyer to “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” The attorney’s ethical duty of confidentiality under § 6068(e) is broader than the attorney-client privilege found in Evidence Code Sections 950 et seq. The duty of confidentiality governs the behavior of an attorney in all contexts, whereas the privilege only governs testimony by the attorney.³⁵ The duty of confidentiality extends to all information gained in the professional relationship that the client has requested be kept secret or the disclosure of which would likely be harmful or embarrassing to the client. See, Cal. State Bar Formal Opns. 1993-133, 1986-87, 1981-58, and 1976-37; LACBA Formal Opns. 456, 436, and 386; and In re Jordan (1972) 7 Cal.3d 930, 940-41.

³⁵ By contrast, the attorney-client privilege is evidentiary and permits the holder of the privilege to prevent testimony, including testimony by the attorney, as to communications that are subject to the privilege. (Evidence Code sections 952-955).

Unlike the American Bar Association's Model Rule of Professional Conduct 1.6, section 6068(e) contains no express exceptions.³⁶ Although there appear to be implied exceptions to 6068(e) created by case law,³⁷ California remains the only state without any express exceptions to its statutory duty of confidentiality.³⁸ And because the duty of confidentiality on its face is absolute, it remains unclear whether there are any exceptions to it. For example, would it be a violation of the duty of confidentiality for a governmental or other attorney to report to the police or a possible victim that a client, or an agent of a client, plans to commit an act that would be likely to result in death or substantial bodily harm?³⁹

The State Bar, on three occasions beginning in 1987, has recommended to the California Supreme Court that it adopt a rule 3-100 to create an express exception to the duty of confidentiality.⁴⁰

³⁶ Model Rule 1.6(a) prohibits a lawyer from disclosing "information relating to the representation." Subsection (b) of rule 1.6 provides:

(b) A lawyer may reveal such 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; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

³⁷ See, e.g., Arden v. State Bar, 52 Cal.2d 310, 320, 341 P.2d 6 (1959) (lawyer's use of confidential client information in disciplinary proceeding to defend himself against allegations by client); Carlson Collins v. Banducci, 257 Cal.App.2d 212, 227-28, 64 Cal.Rptr. 915 (1967) (use of confidential client information in protecting attorney's rights, in this case the right to attorney's fees).

³⁸ See Attorneys' Liability Assurance Society, Ethics Rules on Client Confidences (Feb. 2000), reprinted in Thomas D. Morgan & Ronald D. Rotunda, 2001 Selected Standards of Professional Responsibility 134-151 app. A (showing that every state except California has adopted either the Model Rules or the ABA Model Code of Professional Responsibility and thus have express exceptions to the duty of confidentiality.)

³⁹ This is not a serious question in most other jurisdictions in the United States. For example, recently the House of Delegates of the American Bar Association reaffirmed the ABA Model Rule's life-threatening harm exception to the duty of confidentiality when it voted to approve the revisions loosening the exception's scope. See, e.g., Jonathan D. Glater, Lawyers Open Door to Telling Clients' Secrets, N.Y. Times (8/8/2001). As noted, over forty jurisdictions have adopted some form of the Model Rules and the other jurisdictions all have rules of professional conduct that would allow lawyers to disclose confidential client information to prevent death or serious bodily injury.

⁴⁰ The proposals were submitted to the Supreme Court in 1987, 1992 and 1998.

While the different versions of the rule submitted to the Court for adoption varied somewhat in their approach and in the number of proposed exceptions, they all contained an exception for life-threatening criminal activity. All three would have provided that a lawyer may disclose confidential client information if the lawyer reasonably believed it was necessary to prevent the client from committing a criminal act that would like result in death of substantial bodily injury.⁴¹

The California Supreme Court rejected the State Bar's proposal each time. After considering the 1987 proposal, the Court, in a June 9, 1998 letter to the then-President of the State Bar, suggested that if the rule also permitted disclosure in a proceeding where the attorney-client privilege attached, the Supreme Court might not have the authority to modify a statutory privilege codified by the legislature.⁴² Following that initial rejection, the Supreme Court rejected the two subsequent submissions without comment. The Supreme Court's refusals do not necessarily mean that it would not consider any exception to the duty of confidentiality in the right circumstances. Rather, the Court's 1988 letter suggests instead a concern with passing a rule that would conflict with a legislative act, Business & Professions Code § 6068(e). It thus appears that so long as section 6068(e) exists, any attempt to deal with confidentiality in a rule of professional conduct must be coordinated with a corresponding amendment or repeal of section 6068(e).

Although the uncertainty inherent in the California's unique division between the Rules of Professional Conduct and the legislatively imposed duties is a cause for potential confusion by attorneys governmental clients, and arguably warrants moving the duty of confidentiality to the Rules of Professional Conduct, we believe that the proposed changes to rule 3-600, without any further modifications to the

⁴¹ California, having not adopted either the Model Rules or the ABA Code, is the only state in the country that does not have a life-threatening criminal activity exception to its duty of confidentiality.

⁴² The Supreme Court wrote:

“Regarding proposed Rule 3-100(C)(3) (Duty to Maintain Client Confidence and Secrets Inviolable), in what context does it allow for disclosure of otherwise privileged attorney-client information? To the extent it permits disclosure in a 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. (Cf. Pitchess v. Superior Court (1974) 11 Cal.3d 531, 539-540.) 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?”

June 9, 1988 letter from Supreme Court to State Bar President Terry Andelini. The Andelini letter is quoted in the State Bar's 1998 submission to Supreme Court. *See* Office of Professional Competence, Request That the Supreme Court of California Approve Proposed Rule 3-100 of the Rules of Professional Conduct of the State Bar of California and Memorandum and Supporting Documents in Explanation, at 10-11 (May 1998).

rules, provide the type of guidance AB 363 contemplates. By putting aside 3-100 for the time being, the State Bar can focus its energies on going forward with the proposed amendments to 3-600.

B. *Alternative 2: Amending the Duty of Confidentiality to Create an Express Exception in California That Would Permit Government Lawyers to Disclose Confidential Information to Prevent or Rectify Improper Governmental Activity*

1. *The Hawaii Approach: Specific Exception for Government Lawyers to the Duty of Confidentiality*

Hawaii has taken the approach of modifying the duty of confidentiality to create an express exception for government lawyers. Hawaii's rule 1.6, which is derived from the ABA's Model Rule 1.6, provides that government lawyers may reveal confidential client information ("information relating to the representation"): "to prevent a public official or public agency from committing a criminal or illegal act that a government lawyer reasonably believes is likely to result in harm to the public good" or "to rectify the consequences of a public official's or a public agency's act which the government lawyer reasonably believes to have been criminal or illegal and harmful to the public good." Hawaii R.P.C. 1.6(c)(4),(5).⁴³ Our review of rules of professional conduct in other jurisdictions has revealed that Hawaii is the only state that has carved out an exception to the duty of confidentiality that applies exclusively to government lawyers. Even the District of Columbia, which has a particular focus on the representation of governmental clients, has not pursued the same path as Hawaii.⁴⁴

⁴³ Hawaii has also revised Hawaii Rule Prof. Cond. 1.13 (its organizational client rule that is the analog of California's rule 3-600) to add a section (F), which allows lawyers for the government to take steps similar to those lawyer for a private organization would take when a constituent of the organization insists on a course of action that the lawyer believes is harmful to the organization (i.e., request reconsideration or a separate legal opinion, and refer the matter to the highest authority within the organization). Hawaii's rule 1.13(F), however, also allows the lawyer to "divulg[e] information to persons outside the government pursuant to the limitations provided in Rule 1.6." As Hawaii's rule 1.6 allows lawyers representing the government to disclose confidential information to prevent or rectify official actions that the lawyer believes likely will harm or have harmed the public, the government lawyer may go outside of government in disclosing the information.

⁴⁴ Indeed, the District of Columbia, while permitting a government lawyer to use or reveal confidential client information "when permitted or authorized by law," D.C.R.P.C. 1.6(d)(2)(B), takes pains to remind government lawyers that "[t]he client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order." D.C.R.P.C. 1.6(j). The drafters explain their use the term "agency" in paragraph (j):

[37] The term "agency" in paragraph (j) includes, inter alia, executive and independent departments and agencies, special commissions, committees of the legislature, agencies of the legislative branch such as the General Accounting Office, and the courts to the extent that they employ lawyers (e.g., staff counsel) to counsel them. The employing agency has been

After studying Hawaii's approach, we have decided to recommend strongly that its unique approach not be followed. We believe that Hawaii's confidentiality exception for government lawyers is neither a necessary, nor a proper response to the issues raised by the Quackenbush matter.⁴⁵ We have already discussed the central role that the fundamental duty of confidentiality plays in our legal system. In addition, there are other reasons why California should not follow Hawaii's approach.

2. *That Public Lawyers Serve the Public Interest Does Not Provide Grounds for Creating an Exception to Confidentiality for Lawyers Who Represent Governmental Clients.*

It has been suggested that there is no duty of confidentiality for attorneys in their representation of government clients because the client is the public. We do not question that attorneys who represent governmental clients properly may be mindful of the public interest. This fact, however, does not support a confidentiality rule that differentiates between the representation of public and private clients for the following principal reasons: (1) it is the responsibility of elected representatives, and not any single attorney acting independently of the representational process, to determine what is in the "public interest"; (2) concerns with the "public interest" are not exclusively the province of government; (3) if the client were deemed to be the public, lawyers who represent governmental agencies would have liability risks to their "public clients;" (4) the distinction would threaten legitimate governmental confidentiality concerns and duties; and (5) the distinction would threaten governmental efficiency and reputation.

designated the client under this rule to provide a commonly understood and easily determinable point for identifying the government client. D.C.R.P.C. 1.6, cmt. 37.

Unlike the Hawaii rule, there is no language in the D.C. rule to the effect that a government lawyer represents the public or has a duty to protect the public interest. The express exception to confidentiality for government lawyers in D.C. rule 1.6(d)(2)(B) is explained as applying to disclosures that government lawyers are authorized by law to make:

[36] Subparagraph (d)(2)(A) applies to both private and government attorney-client relationships. Subparagraph (d)(2)(B) applies to government lawyers only. It is designed to permit disclosures which are not required by law or court order under Rule 1.6(d)(2)(A), but which the government authorizes its attorneys to make in connection with their professional services to the government. Such disclosures may be authorized or required by statute, executive order or regulation, depending on the constitutional or statutory powers of the authorizing entity. If so authorized or required, subparagraph (d)(2)(B) governs. D.C.R.P.C. 1.6, cmt. 36.

⁴⁵ We also note that Hawaii appears to apply only to attorneys who are government employees, creating a different rule for other attorneys who represent government agencies. We strongly recommend against this distinction. See footnote 28, above.

- a. Lawyers who represent governmental clients should not be allowed to override the decisions of elected officials or their designated delegates regarding what is in the best interests of the public

The idea that attorneys should be free to reveal confidential information of their governmental clients is based on the idea that the legitimate activities of government are those directed to serving the public interest, and that all those who work for the government, including attorneys, should seek to accomplish this end. This statement, however, presupposes that we can agree on what the public interest is. It is our representative government itself that attempts to determine what the public interest is. It is to make that determination that public officials are elected and then engage in the consultative and deliberative processes that make up the activities of government. No one attorney has the ability or the right to determine what the public interest is simply because he or she represents a governmental client, and that attorney also should not have the independent power to override the decisions of the attorney's superiors in the organization. In a republic, the authority of the people is exercised by elected officials; we do not have a government of lawyers. In this regard, governmental attorneys are in the same position as private attorneys, who have neither the ability nor right to determine what is in the best interests of the owners of the client or of those who are affected by its activities.

It is of interest in this regard that the ABA's Ethics 2000 Commission has recommended deleting from the Scope section of the current Model Rules a sentence which states that: "They [i.e., government lawyers] also may have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so."⁴⁶ The Commission's Reporter explains that:

"The Commission believes that the deleted sentence is an inaccurate statement of the responsibilities of government lawyers, who do not ordinarily represent "the public interest" at large. The Commission believes that the identity of a government client is more accurately described in the ABA Standing Committee on Ethics and Professional Responsibility's Formal Opinion 97-405, which relies on the reasonable understandings

⁴⁶ In its entirety, Scope Comment 16 states:

"[16] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

of the lawyer and responsible government officials. The Commission intends to incorporate the principles underlying Opinion 97-405 in revisions to Comment [6] to Rule 1.13.” Preamble & Scope, Reporter’s Explanation of Changes.⁴⁷

We do not dispute that the public interest should be a concern of every government lawyer. We agree, however, with the Ethics 2000 Commission that government lawyers do not represent “‘the public interest’ at large.” Identifying the client as “the public interest” does little to provide lawyers with guidance on how to proceed in situations AB 363 contemplates.

b. Concern with the public interest is not unique to governmental clients

It has also been suggested that there is a fundamental difference between governmental and other clients because the former exist only to serve the public interest while the latter exist to serve the selfish interests of the owners. While the former description often is true,⁴⁸ the latter is not, and no such clear distinction can be drawn between governmental and other clients. First, there are many non-governmental entities that exist solely to serve the public interest and not for private gain, including countless non-profit and charitable organizations. Second, there also are non-governmental organizations that, although formed and operated for private gain, provide essential services to the public. These services include, for example, insurance, health services, public transportation, and water, power, and electricity. In each of these instances, the services are to some extent also provided by public agencies, further blurring the distinction between the public interest in the activities of public and private entities.

Finally, there are other organizations, organized and operated for private gain, that provide goods or services that do not involve public necessity, but whose activities involve some special public concern because of the public risks that either are inherent in the organizations’ goods or services, or arise if the goods are defective or the services are deficient. There are few things of greater public importance than the design, construction, and operation of nuclear power plants, the design and construction of a model of automobile purchased by hundreds of thousands of customers, and so on. Surely these activities are as publicly significant as much of what is done by governmental organization.

Again, there is no clear distinction that can be drawn between the public interest in the activities of government and the activities of many private companies. Even with private organizations that have none of these public activity or public interest attributes, the welfare of the company is tied up with the welfare of others, including employees, customers, and suppliers.

c. There is a threat of new liabilities for lawyers

⁴⁷ The entire May 2001 Final Report and Recommendations of the Ethics 2000 Commission may be found at: <http://www.abanet.org/cpr/e2k-whole_report_home.html>

⁴⁸ But there are situations in which this might not be true. Consider, for example, attorneys who are retained to defend government officers or employees who are defendants in civil or criminal actions and public defenders.

If the public at large were deemed to be a lawyer's client, this would imply that the lawyer has not just the *right* to disclose information publicly but also the *duties* that lawyers owe to their clients. What would occur, for example, if a lawyer were to decide not to disclose confidential information because of his or her private balancing of the public interest and the decision to not disclose causes injury to some of the public? So far as we know there is no answer to this because, so far as we know, Anglo-American jurisprudence does not recognize the idea that the public at large can be the client instead of the governmental agency for which the attorney provides legal services.

d. There is a threat to important governmental confidentiality interests and duties

The Quackenbush matter is one in which the governmental agency itself had no confidentiality concern. Secrecy benefitted only the individual who is alleged to have misused his office, and it appears full disclosure ultimately was made. This will not always be true. Government has many extremely serious and legitimate concerns about maintaining the secrecy of a significant amount of information. These legitimate interests include, for example:

- (i) law enforcement plans, procedures, and activities;
- (ii) national security matters;
- (iii) contemplated and existing litigation to which a governmental agency is a party;
- (iv) for attorneys who are court employees, the work of the court; and
- (v) confidential information of individuals that is in the possession of a government agency and for which the agency might have affirmative duties of confidentiality.

e. There is a threat to governmental efficiency and reputation

Perhaps many people would think it obvious in some situations that any governmental or other attorney should reveal confidential information, such as in the death or serious bodily harm situation for which §6068(e) currently has no express exception.⁴⁹ But not every case of governmental waste is illegal and not every illegal act is criminal. Indeed, governmental agencies are parties to numerous law suits in which it is alleged they did not fulfill their legal obligations, that is, that they acted illegally. If the attorneys for governmental agencies were free to report illegal acts, most every governmental act or failure to act would be within their whistle-blower rights.⁵⁰

⁴⁹ See Section V.A., above.

⁵⁰ See Miller, Government Lawyers' Ethics in a System of Checks and Balances, 54 U. Chi. L. Rev. 1293 (1987), which hypothesizes a governmental activity that is politically and constitutionally questionable, and that is potentially illegal, but not criminal. Professor Miller points out the administrative consequences of allowing an attorney to act independently of his or her governmental client: "If attorneys could freely sabotage the actions of their agencies out of a subjective sense of the public interest, the result would be a disorganized, inefficient bureaucracy, and a public distrustful of its

3. *Neither the Current ABA Model Rules nor the Revisions to the Model Rules Proposed by the ABA Ethics2000 Commission Contemplate a Confidentiality Exception for Government Lawyers.*

As already noted, Hawaii is alone in creating a confidentiality exception for government lawyers. This by itself does is not persuasive in rejecting such an exception. More telling, however, is the language found in the current Model Rule 1.6 and the revisions to it that the Ethics 2000 Commission has proposed.

Model Rule 1.6, “Confidentiality of Information,” contains no exception in its black letter rule for government lawyers. Comment 6 to the rule, however, provides that “The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.” This comment rings as a cautionary note to government lawyers that they have the same duty of confidentiality as other lawyers. Looked at from a slightly different viewpoint, governmental clients are entitled to have the same expectation of confidentiality as other clients.

The Ethics 2000 Commission has proposed that this sentence be deleted. This does not mean that the drafters now feel that the duty of confidentiality does not apply to government lawyers. Rather, as explained by the Commission’s Reporter: “Given that Rule 1.6 contains no suggestion that there might be an exception for government lawyers who disagree with government policy, the Commission recommends the deletion of current Comment [6] as unnecessary.” Model Rule 1.6, Reporter’s Explanation of Changes. In other words, having recognized that there is no exception for government lawyers within the rule, the Commission now acknowledges the sentence for what it is: surplusage.

In summary, neither the current Model Rule that addresses the duty of confidentiality nor the proposed revisions to that rule contemplate an exception to the confidentiality duty for government lawyers. Rather, the focus is on the rule concerning organizational clients and providing guidance there for the lawyer on how to proceed.⁵¹ That is precisely the approach that COPRAC recommends.

C. *Alternative 3: Amending the California Whistle-blower Statutes to Expressly Allow Government Lawyers to Disclose Confidential Information to the State Auditor*

Another alternative to resolving AB 363’s concerns is to amend the whistleblower statutes to expressly allow government lawyers to disclose confidential information to prevent or rectify improper governmental activity. Professor Clark Kelso, who succeeded Mr. Quackenbush as the Acting Insurance Commissioner, has made such a proposal that we believe follows the same underlying logic as our recommendation for revision of rule 3-600: to provide better guidance to governmental attorneys on how

own government.” Id. at 1295.

⁵¹ See discussion concerning the Ethics2000 Commission’s proposed revisions to the Scope section of the Model Rules at IV.A.2.a., above.

to disclose information within the government to prevent or rectify improper governmental activity. Professor Kelso's proposal ("Kelso proposal") is attached as **Exhibit 10**.⁵²

The Kelso proposal involves revisions to the California Whistleblower Protection Act ("CWPA"), (Gov. Code §§ 8547-8547.12), in concert with a repeal of the Whistleblower Protection Act ("WPA"), (Gov. Code §§ 9149.20-9149.23), which would be rendered moot by the revisions. The key section of the Kelso proposal would be a new subsection of the CWPA, Gov. Code § 8547.3(a), which would provide:

"Notwithstanding any other provision of law or contract, and irrespective of whether any of the information disclosed is privileged, confidential or a trade secret, an employee has the right to make a protected disclosure to the State Auditor, and an employee of the University of California has the additional right to make a protected disclosure to a University of California official, designated for that purpose by the regents."⁵³

Section 8547.3(a) would create a right for government employees to make disclosures to the State Auditor, notwithstanding the fact that the disclosed information is privileged or confidential. Moreover, section 8547.3(d), which now prohibits disclosure of information "otherwise prohibited by or under law," would

⁵² See Clark Kelso, California Whistleblower Protection Act Amendments (10/25/00). (<http://12.2.169.205/government_law_and_policy/publications/ccglp_pubs_whistleblower_report.htm>). Professor Kelso's primary focus in proposing the changes to the statute was to ensure that it provided to government employees an unequivocal right to make a disclosure to the State Auditor. Nevertheless, by including language that refers to confidential information and expressly states that the statute applies to attorney-client privileged information, Professor Kelso's proposed changes would necessarily provide guidance to government lawyers.

⁵³ Section 8547.2(d) defines "protected disclosure" as "any good faith communication that discloses or demonstrates an intention to disclose information that may evidence (1) an improper governmental activity or (2) any condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition."

New subsection 8547.3(b) would provide the same right of disclosure to any other person besides a state employee. Specifically, it would provide:

"(b) Any person other than an employee has the right to make a protected disclosure to a member or employee of the Legislature or to the State Auditor or, when the disclosure relates to a matter of concern to the University of California, to a University of California official, designated for that purpose by the regents; provided, however, that the right granted by this subdivision does not extend to a disclosure that is otherwise prohibited by or under law or contract, including but not limited to a disclosure of information that is privileged, confidential or constitutes a trade secret."

be repealed. Thus, section 8547.3(a) would appear to allow even government lawyers, who also are government employees, to disclose confidential information concerning improper governmental activities to the State Auditor.⁵⁴

Given the foregoing, the Kelso proposal seeks to accomplish what COPRAC's rule 3-600 proposal would, that is, provide for disclosure of confidential information *within* the government.⁵⁵ We have, however, a fundamental disagreement with the mechanics of the Kelso approach.

Professor Kelso proposes a definition of "employee" that includes employees of the State, of the California State University, of the University of California, and of "any agency of local government."⁵⁶ Among other things, this would make the State Auditor the person with the authority to determine whether to assert the attorney-client privilege for independent legal entities—even when those entities are in dispute

⁵⁴ The Kelso proposal would also include new language that would protect the attorney-client privilege notwithstanding the disclosure of confidential information under the protection of the CWPA. New subsection 8547.7(e) would provide:

"(e) A disclosure to the State Auditor of privileged or confidential information or of a trade secret shall not affect the validity of the privilege, confidence or trade secret. The State Auditor shall not disclose privileged or confidential information or a trade secret without giving the holder of the privilege, the person to whom the duty to maintain confidentiality is owing, or the owner of the trade secret notice of the State Auditor's intention to make a disclosure and an opportunity to seek a judicial order preventing the State Auditor's disclosure or conditioning the disclosure upon such terms as the court deems appropriate."

⁵⁵ Professor Kelso explains:

"New subdivision (a) makes it clear that government employees may always make a protected disclosure to the State Auditor This provision gives crystal clear guidance to government employees who otherwise may be unsure to whom a protected disclosure should be made. * * * Subdivision (a) is amended to make it clear that government employees who seek the protection of the whistleblower act must make the disclosure to the State Auditor. It is appropriate to identify for government employees a single point of contact for whistleblower disclosures." Kelso proposal, Comment to Revisions to Section 8547.3.

⁵⁶ Prof. Kelso's proposed definition for "employee" is "any individual appointed by the Governor or employed or holding office in a state agency as defined by Section 11000, including, for purposes of *this article* Sections 8547.3 to 8547.7, inclusive, any employee of the California State University and the University of California, or any public entity as defined by Section 7260, or any agency of local government, as defined in subdivision (d) of Section 8 of Article XIII B of the California Constitution."

or in litigation with one another.⁵⁷ We believe the changes we propose to rule 3-600 and its Discussion better serves the concerns manifested in AB 363 while recognizing that different governmental agencies can have legal independence. Rather than identify a single reporting authority, we instead would emphasize the right currently possessed by each governmental entity, or its superior entity, to express the method it desires for its attorneys to seek internally to prevent or rectify governmental wrongdoing.⁵⁸

CONCLUSION

At present, a government lawyer has no clear solution to the confusing question of how to take her concerns up the organizational ladder as rule 3-600 permits. This is an inherent problem for every attorney who represents governmental clients in light of the seemingly endless variety of governmental structures at the local, state and federal level. Government attorneys who act in accordance with our proposed Rule 3-600 would enjoy the protection of the existing California whistle-blower statutes. Our recommendation would thus resolve the problems sought to be addressed by AB 363 without altering the duty of confidentiality, the continued integrity of which is essential to the operation of our legal system. Our recommendation would also respect the complex structure of our government, which collectively operates as the means by which the people determine what is in the public interest.

⁵⁷ Civil Service Commission of County of San Diego v. Superior Court, 163 Cal.App.3d 70, 209 Cal.Rptr. 159 (1984).

⁵⁸ Our approach will also provide guidance to federal government entities and federal government lawyers as contemplated under AB 363. Federal lawyers are subject to the ethics rules of the state in which they practice. 28 U.S.C. § 530B (“An attorney for the [United States] Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.”) Simply identifying a single point within the state government for reporting governmental misconduct will provide federal government lawyers with no guidance on how to proceed.