

**REQUEST THAT THE SUPREME COURT OF CALIFORNIA  
APPROVE AMENDMENTS TO RULE 3-600 OF THE RULES OF PROFESSIONAL  
CONDUCT OF THE STATE BAR OF CALIFORNIA, AND MEMORANDUM AND  
SUPPORTING DOCUMENTS IN EXPLANATION**

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**180 Howard Street  
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**SUPPORTING DOCUMENTS**

The following enclosures are attached to this Memorandum for the Court's convenience:

- ENCLOSURE 1:** Proposed Amended Rule 3-600 of the Rules of Professional Conduct of the State Bar of California.
- ENCLOSURE 2:** Rule 3-600 Showing Proposed Amendments in Legislative Style.
- ENCLOSURE 3:** Resolution Adopted by the Board of Governors at its January 26, 2002 Meeting.
- ENCLOSURE 4:** Legislative Analysis of Assembly Bill No. 363 (April 30, 2001), as Prepared for Assembly Committee on Judiciary Hearing on May 2, 2001.
- ENCLOSURE 5:** Assembly Bill No. 363, as Introduced on February 20, 2001.
- ENCLOSURE 6:** Assembly Bill No. 363, as Amended on April 26, 2001.
- ENCLOSURE 7:** Copy of the Complete Bill History and Current Bill Status of Assembly Bill 363.
- ENCLOSURE 8:** Copy of October 11, 2000 letter from State Bar of California Deputy Trial Counsel Donald Steedman to Richard Zitrin, Attorney for Cindy Ossias.
- ENCLOSURE 9:** Opinion of the California Attorney General No. 00-1203 (May 23, 2001).

**ENCLOSURE 10:** Synopsis Chart and Text of Written Public Comment Received on Proposed Amended Rule 3-600.

**ENCLOSURE 11:** State Bar of California Internet Website Public Comment Notice of Proposed Amended Rule 3-600.

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**I**

**RECOMMENDATION**

The Board of Governors of the State Bar of California (hereinafter "Board") respectfully requests that this Court approve amendments to rule 3-600 (Organization as Client) of the Rules of Professional Conduct of the State Bar of California in the form set forth in Enclosure 1.<sup>1</sup> (A legislative style version of amended rule 3-600 showing proposed changes to the current rule is set forth in Enclosure 2.)

Rule 3-600, as proposed, was adopted by the Board at its January 26, 2002 meeting. (The resolution adopted by the Board at its January 26, 2002 meeting is set forth in Enclosure 3.) The proposed amendments are intended to provide guidance to attorneys who serve as attorneys for governmental organizations by clarifying and expanding permissive courses of conduct presently identified in the rule. This proposal was developed in response to the professional responsibility issues raised by Assembly Bill 363 (hereinafter "AB 363"), a pending two-year bill introduced in 2001 by Assembly Member Darrell Steinberg. If passed by the Legislature and approved by the Governor, the bill would enact "The Public Agency Attorney Accountability Act." This new law would require the State Bar to consider rule of professional conduct amendments that provide guidance to

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<sup>1</sup> Business and Professions Code section 6076 provides: "With the approval of the Supreme Court, the Board of Governors may formulate and enforce rules of professional conduct for all members of the bar of this State."

Rules of Professional Conduct adopted by the Board are binding upon members of the State Bar only when approved by this Court. (See Business and Professions Code section 6077.)

attorneys who represent government agencies in circumstances where they must consider reporting governmental misconduct. The attorney professional responsibility issue raised by AB 363 has been stated as whether an attorney representing a government agency may act as a "whistle-blower?" In cooperation with Assembly Member Steinberg, the State Bar has developed its proposal to amend the rules of professional conduct notwithstanding the pending status of AB 363. The State Bar is informed that the final action taken by this Court on the State Bar's proposal will be duly considered by Assembly Member Steinberg in determining whether, and to what extent, any legislation is needed to address the desired policy in this area. A history and summary of the proposed amendments follow.

## II

### **HISTORY OF THE FORMULATION OF PROPOSED AMENDMENTS TO RULE 3-600**

#### **A. Overview of Proposed Amended Rule 3-600**

Proposed amended rule 3-600 is intended to provide the guidance sought on the whistle-blower issue raised by AB 363 while balancing the fundamental ethical duty that client confidential information be preserved and the confidence reposed in an attorney be maintained. (See Bus. & Prof. Code § 6068, subdivision (e).) Conceptually, the proposal clarifies that an attorney representing a governmental agency may act as whistle-blower to report agency misconduct so long as the report is made within the framework of government and in a manner that does not violate an attorney's duty of confidentiality. The proposed amended rule provides that in certain circumstances it may be permissible for an attorney to report misconduct to a person or entity outside of the agency that the attorney represents so long as that person or entity is a governmental official or body with oversight authority or law enforcement authority over the particular matter. For example, where the misconduct is being committed by the highest internal authority of an agency, the attorney representing that agency would be permitted, but not required, to evaluate the law governing the specific matter and then decide whether a report to a law enforcement or oversight agency is appropriate.

Current rule 3-600 does not expressly identify this corrective action among the permissible options for an attorney who represents an organization. In adding this option, the proposed amended rule would continue to stress attorney-client confidentiality by prohibiting public disclosure of client information by an agency's attorney; however, the proposal does contemplate the possibility that an oversight or law enforcement agency

receiving an attorney's report, in turn, may make a decision or take action that results in public disclosure of some or all of the information reported by that attorney. Such decision or action would be a determination made by an authorized governmental official and not the decision of the reporting attorney.

## **B. Assembly Bill 363**

AB 363 was introduced in the 2000-2001 legislative session by Assembly Member Darrell Steinberg. In part, AB 363 was prompted by the Chuck Quackenbush Insurance Department matter and the subsequent State Bar investigation of government attorney and whistle-blower Cindy Ossias.<sup>2</sup> The bill reflects legislative concern about the appropriate response of government attorneys<sup>3</sup> when confronted with evidence of improper governmental activity.<sup>4</sup>

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<sup>2</sup> A summary of the Insurance Department matter involving former Insurance Commissioner Quackenbush and Cindy Ossias, and the State Bar investigation into Cindy Ossias's conduct in the matter, is set out below.

<sup>3</sup> One point of terminology calls for clarification. AB 363 refers to "government attorneys" or "public agency attorneys." As these terms may be construed to refer only to employees of government agencies, for purposes of this memorandum these terms are used to encompass 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. Indeed, one of the proposed amendments to rule 3-600 is intended to specifically clarify the application of the rule to all such attorneys.

<sup>4</sup> In the Legislative Analysis of AB 363 (April 30, 2001), Comments, the bill's author wrote of his concern that although the State Bar ultimately exonerated Cindy Ossias and she was reinstated to her position in the Department of Insurance, the rules of professional conduct lacked adequate guidance for government attorneys on the circumstances under which they can disclose confidential information in the face of improper governmental conduct. A copy of the Legislative Analysis of AB 363 (April 30, 2001), as prepared for a hearing before the Assembly Committee on Judiciary set on May 2, 2001 is provided as Enclosure 4.

As first introduced on February 20, 2001, the bill 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.<sup>5</sup> The statutory mechanism for providing that authorization would have been a new section of the Business & Professions Code, section 6068.5.

Following its introduction, AB 363 was amended to be a study bill under which the State Bar would be authorized to study the issue of whistle-blowing by government attorneys and 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. . . .” (AB 363, as amended April 26, 2001.<sup>6</sup>)

At a meeting on May 17, 2001, which was called by Assembly Member Steinberg and his staff and attended by representatives of the State Bar, representatives of the State Bar’s Committee on Professional Responsibility and Conduct (hereinafter “COPRAC”) and other interested persons, including representatives of the Administrative Office of the Courts, Office of Governmental Affairs and the Office of the California Attorney General, COPRAC was requested to undertake the study of the professional responsibility issues implicit in AB 363. After this meeting, on July 9, 2001, action on AB 363 was suspended under Joint Rule 61(a)(9) of the California Legislature.<sup>7</sup>

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<sup>5</sup> A copy of AB 363, as originally introduced on February 20, 2001 is provided as Enclosure 5.

<sup>6</sup> A copy of AB 363, as amended on April 26, 2001 is provided as Enclosure 6.

<sup>7</sup> 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  
(continued...)

### **C. The Insurance Department Matter**

The Ossias/Quackenbush Insurance Department matter (hereinafter “Insurance Department matter”) grew out of the 1994 Northridge Earthquake.<sup>8</sup> The State of California Insurance Department investigated the claims handling practices of several insurance companies and concluded that the practices violated insurance regulations. These conclusions were contained in confidential internal departmental reports known as market conduct examinations.

Eventually, the Insurance Department settled its cases against three of the insurance companies. Under the settlement agreements, the Insurance Department agreed not to fine the companies or finalize the reports. In return, the insurance companies contributed a total of several million dollars to foundations that the then Insurance Commissioner, Chuck Quackenbush, had created. The foundation funds were then used 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.

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<sup>7</sup>(...continued)  
Committee hearings be cancelled. A copy of the Complete Bill History and Current Bill Status of AB 363 is provided as Enclosure 7.

<sup>8</sup> This summary of the events of the Insurance Department 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 (June 23, 2000); Virginia Ellis & Miguel Bustillo, Quackenbush Hearings Take Dramatic Turn, L.A. Times, Part A; Part 1; p. 1 (June 27, 2000); 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 (June 29, 2000); Virginia Ellis, State Insurance Dept. Reinstates Whistle-Blower, L.A. Times, Part A; Part 1; p. 33 August 13, 2000). Copies of these articles are on file at the State Bar’s Office of Professional Competence.

Attorney Cindy Ossias was part of a team of attorneys in the Insurance Department that had recommended to Commissioner Quackenbush that fines be levied against the insurance companies. Instead, Quackenbush directed that contributions should be made to the foundations. Cindy 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 the \$20-40 million range. She also testified that shortly after the settlement agreements were signed, she and other attorneys who had recommended fines had been instructed to shred their documents. She provided the Assembly Insurance Committee with copies of the market conduct examinations.

The Insurance Department placed Cindy Ossias on administrative leave. After her testimony before the Legislature and testimony by other Insurance Department employees, Commissioner Quackenbush resigned. Eventually, Cindy Ossias was reinstated to her position in the Insurance Department.

Although Cindy Ossias was reinstated to her position in August 2000, the State Bar investigated her conduct in the Insurance Department matter. On October 11, 2000, the State Bar closed its investigation. The State Bar concluded that "Ms. Ossias' conduct should not result in discipline because: (1) it was consistent with the spirit of the Whistleblower 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." (October 11, 2000 letter from State Bar of California Deputy Trial Counsel Donald Steedman to Cindy Ossias' attorney, Richard Zitrin.<sup>9</sup>) In reaching its conclusion, the State

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<sup>9</sup> A copy of the October 11, 2000 letter from State Bar of California Deputy Trial Counsel Donald Steedman to Richard Zitrin, attorney for Cindy Ossias is provided as Enclosure 8.

Bar also noted that Cindy Ossias had been reinstated and that the then Acting Commissioner of Insurance had commended her for her actions.

#### **D. California Whistle-blower Statutes**

California has enacted a number of statutes to afford protection to government employees 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) (hereinafter “CWPA”); the Whistle-blower Protection Act (Gov. Code §§ 9149.20-9149.23) (hereinafter “WPA”); and the Local Government Disclosure of Information Act (Gov. Code §§ 53296-53299) (hereinafter “LGDIA”).

Each of the whistle-blower statutes contain language to the effect that their protection applies only insofar as the disclosures do not violate other laws or duties.<sup>10</sup> As government attorneys must satisfy the duty to preserve confidential information of their clients, it is unlikely that any of California’s whistle-blower statutes could be interpreted to provide government attorneys with the kind of protection envisaged by the authors of AB 363. This is confirmed by a recent opinion of the California Attorney General finding that neither the whistle-blower statutes nor provisions relating to the False Claims Act (Gov.

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<sup>10</sup> 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).

Code §§ 12651-12655) supersede the statutes and rules governing the attorney-client privilege.<sup>11</sup>

Without the protections afforded by the whistle-blower statutes, and because they are subject to the duty of confidentiality contained in Business and Professions Code section 6068, subdivision (e), existing law limits the ability of attorneys who represent government agencies to report improper governmental activities.

#### **E. Public Comment on Proposed Amended Rule 3-600**

At its meeting on August 21, 2001, the State Bar Board of Governors Committee on Regulation and Discipline (hereinafter "CORD") authorized a 60-day public comment distribution of proposed amended rule 3-600 as recommended by COPRAC. The public comment period began on August 30, 2001 and ended on October 30, 2001. During this period, a total of 19 written comments were received.<sup>12</sup> Of these 19 comments, 8 generally

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<sup>11</sup> A copy of Cal. Atty. Gen. Opn. 00-1203 (May 23, 2001) is provided as Enclosure 9. Specifically, in response to Assembly Member Steinberg's inquiry, the Attorney General 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?"

(84 Ops.Cal.Atty.Gen. 71 at p. 71.)

<sup>12</sup> A chart summarizing the written comments and a copy of the full text of the comments are provided as Enclosure 10. A copy of the public comment proposal as posted on the State Bar's internet website, including COPRAC's initial report dated August 17, 2001, is provided as Enclosure 11.

opposed the proposal,<sup>13</sup> 5 generally supported the proposal,<sup>14</sup> 4 expressed support if recommended amendments were incorporated,<sup>15</sup> and 2 expressed neutral comments.<sup>16</sup>

Among the points raised in opposition to the original public comment proposal are the following: (1) the proposal would not achieve the goal of providing meaningful guidance; (2) the best way to deal with the issue is through legislation that specifies the person or agency to which misconduct should be reported; (3) in the event of a political disagreement, the proposed safe harbor could prompt a government attorney to act as a free agent; (4) the Supreme Court cannot modify statutorily imposed duties; (5) the proposal would undermine the confidence reposed in attorneys of governmental organizations; (6) a rule that is never invoked need not be amended; (7) confidentiality lies at the core of the fiduciary relationship; (8) compliance with the proposal might result in a waiver of the attorney-client privilege; and (9) the proposal fails to clarify what is the organization.

Among the points raised in support (or conditionally in support) are the following: (1) the ability to report to an oversight agency and a safe harbor are essential if corruption at the

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<sup>13</sup> These comments were from: the Bar Association of San Francisco; the Beverly Hills Bar Association; Phillip Feldman; John Plotz; the Alameda County Bar Association; the San Diego County Bar Association; the Embarcadero Municipal Improvement District, Goleta, California; and Richard Solomon.

<sup>14</sup> These comments were from: California State Assembly Member Darrell Steinberg; the Health Administration Responsibility Project; California Attorneys, Administrative Law Judges and Hearing Officers in State Employment; the California Newspaper Publishers Association; and Cindy Ossias.

<sup>15</sup> These comments were from: Public Employees for Environmental Responsibility; the City Attorneys Department of the League of California Cities/Executive Committee of the State Bar Public Law Section (joint comment); the California Association of Sanitation Agencies; and the County Counsels' Association of California.

<sup>16</sup> These comments were from: the Los Angeles County Bar Association; and the Ventura County District Attorney's Office.

highest levels of government is ever to be exposed; (2) the Department of Insurance matter highlighted the conundrum faced by government attorneys who want to expose wrongdoing but do so at the risk of losing their license to practice law; (3) the proposal strikes a balance between confidentiality and the public's right to know; (4) COPRAC should incorporate the changes suggested by the League of California Cities, adding language that carefully identifies the subject matter of outside reports and limits the agencies to which the reports can be made; (5) the proposal also should define what sorts of information is not confidential; and (6) the proposal should be adopted with few if any changes.

Among the points raised in the neutral comments are the following: (1) the proposed safe harbor provision presumes an articulated chain of command that is uncertain; (2) the proposal should describe the type of disclosure permitted; (3) a new rule on confidentiality should replace Business and Professions Code section 6068, subdivision (e); and (4) attorneys should report government corruption but the proposed rule might be misused.

Prior to, and after, the written public comment period, there were several other opportunities for direct input into the State Bar's rule development process. A COPRAC subcommittee took the lead in seeking out interested person participation. The subcommittee Chair was COPRAC's Vice-Chair Professor Kevin E. Mohr of Western State University College of Law in Fullerton. An outline of the key steps in COPRAC's and the Board's process is provided below.

7/10/01                      Letter sent to interested persons requesting input on a draft COPRAC subcommittee report and a possible rule amendment proposal

8/10-11/01 Open session COPRAC meeting to consider its subcommittee report and the preliminary input received from interested persons, and to finalize a public comment recommendation to CORD

8/21/01 CORD meets to consider COPRAC's request for authorization to distribute proposed amended rule 3-600 for a 60-day public comment period

10/30/01 Public comment deadline

11/27/01 Subcommittee distributes to interested persons a possible redraft of proposed amended rule 3-600 intended to respond to the written public comments received

11/30/01 Open session COPRAC meeting to consider written public comments and to receive any follow-up oral comments from interested persons in attendance

12/7/01 CORD receives a status report from COPRAC, including an initial discussion of the public comment received

12/21/01 Subcommittee distributes to interested persons a possible redraft of proposed amended rule 3-600 intended to address follow-up comments from interested persons presented at COPRAC's 11/30/01 open session meeting

1/11/02 Open session COPRAC meeting to finalize a report to CORD and a recommendation for action on proposed amended rule 3-600 following public comment

1/25-26/02 Board of Governors meet and adopt COPRAC's recommended proposed amended rule 3-600 for submission to the Supreme Court of California with a recommendation that the Supreme Court approve the proposed rule amendment

The following interested persons attended (in-person or by telephone or video conference) one or more of the above meetings:

Manuela Albuquerque (Berkeley City Attorney, on behalf of the City Attorneys Department of the League of California Cities and the Executive Committee of the State Bar of California's Public Law Section); Anthony Alperin (Los Angeles City Attorneys' Office); Joan Arneson (California Association of Sanitation Agencies); Burk Delventhal (Office of the San Francisco City Attorney); Taylor Carey (Office of the California Attorney General); Mark Cornelias (California Association of Sanitation Agencies); Frances Fort (Consultant to Assembly Member Darrell Steinberg); Judy Gilbert (former Co-Chair of CORD); Lisa Hammond (California Public Employees' Retirement System); Cindy Ossias; Jeff Ruch (Public Employees for Environmental Responsibility); Harry Sondheim; Mark Tuft; Paul Vapnek; and Richard Zitrin

As indicated by the above outline, the COPRAC meeting on January 11, 2002 was the final meeting where interested persons contributed drafting suggestions for modifying proposed amended rule 3-600. At this meeting, some of the visitors offered follow-up comments on previously submitted written comment. This included: Manuela Albuquerque, on behalf of the City Attorney's Department of the League of California Cities and the Executive Committee of the Public Law Section, who observed that COPRAC's revised draft had addressed most all of the suggestions and concerns previously raised; and Jeff Ruch, on behalf of Public Employees for Environmental Responsibility, who observed that prior concerns about the need for complementary statutory amendments persisted as to COPRAC's revised draft. At the end of the meeting, and in consideration of all of the input from the visitors present, COPRAC voted to approve a revised proposed amended rule 3-600 for submission to the Board.

At the Board's January 25-26, 2002 meetings, the Board received a presentation from COPRAC representative Professor Kevin Mohr who answered Board member questions about the written public comments received and the oral comments conveyed during open session meetings. Following discussion, the Board unanimously adopted proposed amended rule 3-600 for transmission to this Court with a recommendation that the proposed amended rule be approved. The next portion of this memorandum provides a detailed summary of proposed amended rule 3-600 which is explanatory of the State Bar's position on the various points raised by public commentators.

### III

#### **SUMMARY OF PROPOSED AMENDMENTS TO RULE 3-600**

As adopted by the Board, the concept of proposed amended rule 3-600 is to clarify that, in certain circumstances, an attorney representing a governmental agency may act as a whistle-blower to report agency misconduct so long as the report is made within the framework of government and in a manner that does not violate an attorney's duty of confidentiality.

#### **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* (1966) 18 Maine L. Rev. 155, 162.

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 attorney must advise the client of the risks the client faces and the alternatives that are available to the client. If the client disregards the attorney's advice, however, the attorney is not entitled

to take action on the client's behalf over the client's objection, no matter how well intentioned the attorney may be, nor may the attorney violate legitimate expectations of confidentiality, even if the attorney 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 attorney 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 provides standards and guidance to California attorneys in performing with organizational clients this obligation of full and candid disclosure and advice. It is important to note that rule 3-600, like case law,<sup>17</sup> appreciates the concept of a chain of command.

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<sup>17</sup> In *Insurance Company of North America v. Superior Court* (1980) 108 Cal.App.3d 758 [166 Cal.Rptr. 880], the Court of Appeal found that disclosure of a corporate subsidiary's counsel's legal opinion to its holding company and independent affiliated company officers was privileged under Evid. Code, § 962. The court's opinion recognized the common interest shared by separate parent and subsidiary corporate entities and quoted a federal court's observations concerning the chain of command concept:

'The chain of command in military, business, government, and private societies is an accepted pattern of modern civilization.' Such being the case, simultaneous delivery of legal advice to a subsidiary client and a controlling parent company, a delivery which facilitates. . . accurate determination of business policy by the parent, furthers the interest of the client. . . . Because in a pragmatic sense the parent company can be viewed as [the]. . . ultimate client. (*Id.* at p. 768.)

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. After reviewing rule 3-600 in light of AB 363, COPRAC concluded that the rule in its current form does not provide sufficient guidance to attorneys who represent governmental clients. In accordance with this conclusion, COPRAC proceeded to develop an approach that clarifies, and expands upon, the existing guidance and standards in rule 3-600.

## **B. The Centrality of an Attorney's Duty of Confidentiality**

An attorney cannot fulfill the role of counselor if he or she does not have the client's complete trust. It is only with absolute confidence of attorney confidentiality that clients are willing to reveal all information to their attorneys, even information that might be harmful or embarrassing to the client. Accordingly, a key concern in drafting the proposed amendments to rule 3-600 was the duty of confidentiality.

Business and Professions Code section 6068, subdivision (e) sets forth the statutory duty of attorney-client confidentiality. This section is incorporated by reference in rule 3-600. The proposed amendments to rule 3-600 are not intended to establish any exceptions to the duty of confidentiality. Rather, the proposed amendments are intended to clarify the issue of 'who is the client' as it pertains to the representation of governmental organizations. As interpreted by the California Attorney General, any protection afforded to government attorneys for disclosing information under existing whistle-blower statutory schemes is subject to confidentiality standards applicable to all attorneys.<sup>18</sup> The proposed

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<sup>18</sup> See footnote no. 11 and discussion of California Whistle-blower Statutes, *supra*, at part II, D of this memorandum.

amendments are intended to be consistent with this interpretation by keeping governmental information within the framework of government, unless an authorized government official determines that information should be made public. The duty of confidentiality, as incorporated by rule 3-600, thus would continue under the proposed amendments. This acknowledges that the duty is central to the attorney-client relationship and the operation of the legal system.

In addressing the evidentiary attorney-client privilege aspect of confidentiality, courts have recognized the importance of the duty to the proper functioning of the legal system. The United States 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* (1998) 524 U.S. 399, 404 [118 S.Ct. 2081, 2084] (quoting *Upjohn Co. v. United States* (1981) 449 U.S. 383, 389 [101 S.Ct. 677, 682]).

This Court has expressed the same views. As to the policy, this Court has said: "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* (1984) 37 Cal.3d 591, 599 [208 Cal.Rptr. 866].

In the same opinion, this Court said that the privilege “has been a hallmark of Anglo-American jurisprudence for almost 400 years. . . . While it is perhaps somewhat of a hyperbole to refer to the attorney-client privilege as ‘sacred,’ it is clearly one which our judicial system has carefully safeguarded with only a few specific exceptions.” *Mitchell v. Superior Court, supra*, 37 Cal.3d 591, 599-600.

If unsure how the attorney would use the information, the agent or employee of an organizational client would likely view the safe course as keeping his or her own counsel. The result would be that the organization’s attorney, without the relevant facts, would not be able to fulfill his or her duty to the client or the legal system by giving the best and most complete possible advice and guidance to the client. In other words, this long-standing judicial goal of creating a relationship of trust between attorney and client recognizes that clients might choose not to use the services of lawyers and, to the extent attorneys are used, to withhold information from them. If this occurs, both the client and the legal system lose the benefit of the attorney’s advice.

In addition to fostering full and frank communication with the attorney, the proper handling of confidential information by attorneys creates greater respect for the courts and the legal system. Each of these ideas applies to the secrets of governmental as well as non-governmental clients, and to the benefits that accrue to both kinds of clients, and to the legal system itself, when clients receive the most complete possible advice and guidance from their attorneys.

In evaluating the specific amendments to proposed rule 3-600, it is important to bear in mind that the drafting objective was to maintain attorney-client confidentiality while adding

guidance on the concept of an expansive client venue in the case of misconduct by agents of governmental organizations.

### **C. Specific Proposed Changes to Rule 3-600**

Except for some minor clarifications and the addition of headings to the current Discussion section paragraphs, the State Bar is recommending approval of changes to rule 3-600 that are limited to the specific issues raised by AB 363. These recommendations include: (1) an amendment to the Discussion section of rule 3-600 to clarify the identity of the client when an attorney represents a governmental organization; (2) limitation of paragraph (B) to attorneys who represent non-governmental organizations, together with minor clarifying language; (3) a new paragraph (C) to provide guidance specifically to attorneys who represent governmental organizations on the kinds of situations in which the attorney representing an organizational client may take further action to advise and protect the organization; (4) a new paragraph (D) to provide guidance specifically to attorneys who represent governmental organizations on how to proceed in the face of serious official misconduct involving the highest internal authority of an agency; (5) language in new paragraph (D) that would create a safe harbor under the rules of professional conduct for an attorney representing a governmental organization when the attorney acts in good faith to perform his or her duties under rule 3-600; and (6) several miscellaneous revisions to bring current paragraphs of the rule in line with the proposed substantive revisions, and to provide clarification in the Discussion section of the rule.

#### ***Defining who the client is when an attorney represents a governmental organization.***

Although it is important for an attorney to understand precisely who or what is the client to determine how to pursue the remedies afforded by rule 3-600, proposed amended rule

3-600 does not make an attempt to define, within the rule itself, who the client is when an attorney represents a governmental organization. First, there is a wide variety of different government entities an attorney might represent. It would be beyond the scope of a disciplinary rule to identify each and every such entity. Second, by keeping paragraph (A) unchanged from the current rule, uniformity in disciplinary rules around the country is promoted, as the analogous American Bar Association (hereinafter “ABA”) Model Rule of Professional Conduct 1.13 (adopted by most other states) has nearly identical language to current paragraph (A). Nevertheless, without attempting to provide a comprehensive definition of who the client is within the government context, a proposed new eighth paragraph of the Discussion section does provide guidance to government attorneys in determining precisely who the client may be in their particular situations. This Discussion section language is based on a recommended modification submitted by the City Attorney’s Department of the League of California Cities and endorsed by other commentators.

***Limiting current paragraph (B) to attorneys who represent non-governmental organizations and revising paragraph (B) for clarification.*** As proposed, new language would be added to paragraph (B) that limits its application to attorneys who represent non-governmental organizations. 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 may be a violation of law reasonably imputable to the organization or (ii) that is likely to result in substantial injury to the organization. Current paragraph (B) suggests the kind of action an attorney might take when confronted with the conduct described in (i) and (ii). The kinds of suggested action, set out in (B)(1) and (2), remain unchanged from the current rule. Under the

language of those subparagraphs, the attorney may urge reconsideration, or refer the matter up the organization's chain of command.

In addition, a proposed new fifth paragraph of the Discussion section explains that the reference in paragraph (B) to "an act or refusal to act" includes the concept of remediation. 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. A proposed new fourth paragraph of the Discussion section explains that the rights and duties under rule 3-600 apply to attorneys 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. Finally, a proposed new sixth paragraph of the Discussion section emphasizes that rule 3-600 is permissive in nature and is not intended to create a duty on the part of any attorney to take any action that is allowed in paragraph (B), or in paragraphs (C) and (D), described below. The proposed fourth, fifth and sixth paragraphs of the Discussion section all apply to attorneys who represent governmental organizations as well as to attorneys who represent non-governmental organizations.

***Adding new paragraph (C) that applies only to attorneys who represent governmental organizations and identifies other situations in which the attorney representing a government organization may take further action to advise and protect the organization.*** Current paragraph (B) as drafted applies to attorneys in representing any client; the two situations identified in paragraph (B)(i) and (ii) could also be faced by attorneys in representing governmental clients. The State Bar believes, 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.

One approach considered during the drafting process was simply to add these other situations to paragraph (B). After considering input from the public, however, it was determined the better approach was to include these situations in a separate paragraph applicable only to government attorneys. The State Bar believes a separate paragraph applicable only to government attorneys provides the clarification and guidance contemplated by AB 363. In addition to the situations described in (B)(i) and (ii), paragraph (C) also identifies three other situations in which an attorney representing a government organization may take further action to advise and protect the organization. These are set out in (C)(iii) to (v), and include: (iii) the commission of a crime or fraud; (iv) the willful misuse of public funds or willful breach of fiduciary duty; and (v) willful omission of official duty. These three triggering events bridge the gap in the current rule's language to provide the necessary guidance to government attorneys 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, the State Bar believes that providing a separate single paragraph, with all of the triggering mechanisms applicable in the governmental context, adds to the clarity of the rule and provides better guidance to all attorneys.

Subparagraphs (C)(1) and (2) allow the attorney to pursue the same kinds of action as are provided in current (B)(1) and (B)(2): Urging reconsideration of the matter or going up the organizational ladder, even to the highest internal authority who can act on behalf of the organization.

In summary, although paragraph (C) identifies several additional situations that would trigger the concern of an attorney who represents a governmental organization, that attorney is, under paragraph (C), limited to the same internal reporting mechanisms that are available to an attorney representing a non-governmental organization. As proposed however, a separate new paragraph (D) would provide to government attorneys additional reporting options when they are confronted with serious governmental misconduct involving the highest internal authority.

***Adding new paragraph (D) that applies only to attorneys who represent governmental organizations and provides that the attorney may report serious official misconduct to an agency or official with oversight authority over the attorney's governmental client only after the attorney has pursued the actions permitted under (C)(1) and (2); paragraph (D) also provides a "safe harbor" from discipline for an attorney who acts in good faith in determining the appropriate government agency or official to whom to make a report.*** As noted, attorneys 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 internal chain of command, just as in the non-governmental context. It is possible, however, that the highest internal authority who can act on behalf of the governmental organization is a person who is engaging in the misconduct. To address that situation, the proposed amendments afford a third option for taking corrective action: paragraph (D). Proposed paragraph (D) would allow an attorney to refer a matter outside of the particular agency the attorney represents to "the law enforcement agency charged with responsibility over the matter or to any other governmental agency or official charged with overseeing or regulating the matter." While there is no provision permitting public disclosure of information, as previously indicated, an oversight or law enforcement agency receiving an attorney's report, in turn, may make a decision or take action that results in public

disclosure of some or all of the information reported by that attorney. That decision or action would be a determination made by an authorized governmental official and not the decision of the reporting attorney.

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. The State Bar cannot solve this problem directly, because defining the chain of command within government is beyond the scope and purview of the rules of professional conduct.<sup>19</sup> Accordingly, a proposed new eleventh paragraph of the Discussion section recognizes that

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<sup>19</sup> On this point, the State Bar agrees with the ABA's Ethics 2000 Commission. In its proposed amendment to Model Rule 1.13, the equivalent of 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 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.

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

Nevertheless, the proposed new eleventh paragraph of the Discussion section provides guidance to attorneys with three “principles” the attorney should follow in determining the course he or she should follow. In particular, to ensure that the attorney preserves the integrity of confidential information of the governmental client, this language cautions that the attorney should hew to “the principle that such referrals should be made within the government, and not publicly, in a way reasonably designed to “avoid violating Business & Professions Code section 6068, subdivision (e),” the duty to protect the client’s confidential information. Because much of the information with which attorneys representing governmental organizations deal is not confidential, COPRAC also proposes a new ninth Discussion section paragraph, which states that rule 3-600 is not intended to supersede such an attorney’s duties under other law such as the Brown Act, the California Public Records Act, local sunshine ordinances, and corresponding federal statutes.

***Limitations on paragraph (D)’s intra-governmental reporting.*** Because of concerns expressed by public sector attorneys that were elicited during the written public comment period and the open session meetings held by COPRAC, the ability of the attorney to go outside the particular organization or agency the attorney represents and report to a law enforcement agency or another government agency official with oversight authority is limited in two important ways:

I. Serious misconduct. Only serious misconduct on the part of a government official will allow an attorney to pursue the remedies afforded in paragraph (D). Although subparagraphs (C)(i) to (v) list five categories of governmental misconduct that permit an attorney to pursue the options of urging reconsideration and remediation,

and going up the organizational ladder as provided in (C)(1) and (2), the kinds of misconduct that would allow an attorney to pursue paragraph (D)'s reporting options fall within a narrower ambit. Under paragraph (D), an attorney may only report criminal or fraudulent misconduct, or a willful misuse of public funds or a willful breach of fiduciary duty to another governmental agency or official. A proposed new tenth paragraph of the Discussion section explains this dichotomy of remedies.

II. Exhaustion of remedies afforded in (C)(1) & (2). Paragraph (D) is phrased in a way ("Provided the member has . . .") to communicate that subparagraphs (C)(1) and (2) set forth actions that are a prerequisite that an attorney must pursue before the attorney avails himself or herself of the intra-governmental reporting options in paragraph (D). Nevertheless, if action under (C)(2) is futile (e.g., if the highest internal authority who can act on behalf of the organization is an agent who is committing the misconduct), then the attorney may also utilize the reporting options under paragraph (D) without first taking action under (C)(2). A proposed new twelfth paragraph of the Discussion section explains this exhaustion requirement. Public sector attorneys who attended open session meetings argued that this exhaustion provision would help ensure that only the most serious misconduct is reported outside of the government attorney's immediate agency.

***Safe harbor for acting in good faith.*** Proposed new paragraph (D), as clarified in a proposed new eleventh paragraph of the Discussion section, contemplates that a reporting authority under subparagraph (D) may be identified, for example, by "statute, ordinance, or other law or regulation enacted by the entity, or by any entity of superior authority. . . ." It is possible, however, that a reporting authority may not be readily identifiable.

To deal with situations where an appropriate law enforcement or oversight authority is not readily identifiable, proposed amended rule 3-600 includes, as the last sentence of new paragraph (D), a safe harbor for attorneys 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. A proposed new thirteenth paragraph of the Discussion section 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 this Court, provide an attorney who acts in good faith with complete protection. As explained, the focus of paragraph (D) is to provide an avenue to attorneys who represent a governmental organization to report improper governmental activity without violating their duty of confidentiality. The last sentence of paragraph (D), in essence, states that even if an attorney has violated an obligation under the rules of professional conduct, the attorney should not be subject to discipline so long as he or she has acted in good faith. The issue here 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 section 6068, subdivision (e). Although a rule of professional conduct amendment may offer a safe harbor from discipline for rule violations, there is a question whether it can provide a safe harbor for an attorney who violates a provision of the State Bar Act. As part of its AB 363 study, COPRAC considered the feasibility of proposing the transfer of the duty of confidentiality from Business & Professions Code section 6068, subdivision (e) to a new rule 3-100.<sup>20</sup> Although the

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<sup>20</sup> This Court has previously denied State Bar requests to approve proposals for a new rule 3-100, most recently in September of 1998 (Bar Misc. S070520). Unlike the previous proposals for a new rule 3-100, the instant proposal to amend rule 3-600 does not seek to restate, supplement or modify the statutory duty of confidentiality. Instead, the focus is on the issue of 'who is the client,' leaving the statutory duty and privilege fully intact. Note that proposed new paragraph nine of the Discussion section does address the public nature of some governmental information. This proposed addition

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apparent lessened protection in paragraph (D) might have supported such a transfer, COPRAC decided not to pursue that approach and determined not to recommend it to the Board, in part, because the State Bar had recently reinstated its Special Commission for the Revision of the Rules of Professional Conduct. The Special Commission is charged with developing comprehensive amendments to the entire rules of professional conduct and the task of revisiting another iteration of proposed new rule 3-100 is viewed as a task best suited for study by that group.

***Miscellaneous Changes.*** In addition to the foregoing proposed revisions to rule 3-600, all of which address situations peculiar to governmental organizations, the following modifications also are proposed:

A revision of current paragraph (C) is proposed to include a cross-reference to new paragraphs (C) and (D). Also proposed is a new fourteenth paragraph of the Discussion section to clarify that paragraph (E)'s limitation on the response available to an attorney in either the non-governmental or governmental context (i.e., resignation in accordance with rule 3-700) also generally applies to the situation where a paragraph (D) oversight agency or official has determined that the official accused of misconduct has acted properly but the attorney believes the oversight agency or official's determination is erroneous. At the urging of public sector attorneys who attended COPRAC's open session meetings, however, the phrase "or to act as otherwise authorized by law" was added to encompass those situations where applicable law may permit an attorney representing a governmental client to take further action. For example, as noted in the fourteenth

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<sup>20</sup>(...continued)  
responds to input from public sector attorneys and the intent is to guide attorneys to existing statutory law applicable to governmental information.

paragraph of the Discussion section, “a city charter may give the city attorney a right to act independently of the city council or other city officers in specified matters.”

A new fifteenth paragraph of the Discussion section is proposed to emphasize that in dealing with the constituents within a governmental organization the attorney represents, the attorney’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.

No changes are proposed for the current first, second and third paragraphs of the Discussion section, except to add headings to describe the substance of the paragraphs. Headings for each of the Discussion section paragraphs have been added to render the content of proposed rule 3-600 more accessible and easier to understand by providing a shorthand reference to readers of what each Discussion section paragraph contains.

**D. Advantages of Proposed Amended Rule 3-600 over Other Considered Alternatives for Action**

A variety of other approaches, in addition to the eventual proposal to amend rule 3-600, were considered. These other approaches included:

1. Amending the statutory duty of confidentiality to create an express exception permitting government attorneys to disclose confidential information to prevent or rectify improper governmental activity, either with or without an accompanying complementary revision to rule 3-600; and

2. Amending the California whistle-blower statutes to expressly allow government attorneys to disclose confidential information to prevent or rectify improper governmental activity, notwithstanding other laws to the contrary (statute, case law or rule).

Regarding the first approach, amending the duty of confidentiality was an alternative characterized by COPRAC as the “Hawaii approach” because Hawaii’s Rule of Professional Conduct 1.6, which is derived from the ABA’s Model Rule 1.6, provides that government attorneys 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).) COPRAC recommended against this approach for several reasons, including: the fact that Hawaii is the only jurisdiction that has taken this approach;<sup>21</sup> the previously discussed central role

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<sup>21</sup> On this point, COPRAC noted the ABA Ethics 2000 Commission’s proposed revisions to current Model Rule 1.6. COPRAC made the following observations:

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 attorneys. Rather, as explained by the Commission’s Reporter: “Given that Rule 1.6 contains no

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that the fundamental duty of confidentiality plays in the attorney-client relationship; and the belief that abrogation of confidentiality is neither a necessary, nor a proper response to the issues raised by the Insurance Department matter. COPRAC understood that prosecutorial discretion played an important role in the resolution of the State Bar investigation of Cindy Ossias. The proposal to amend rule 3-600 would help clarify the boundaries of attorney conduct and facilitate the exercise of such discretion. In contrast, an approach that abrogates confidentiality outright would completely foreclose the exercise of any State Bar prosecutorial discretion, unnecessarily limiting public protection in an area of attorney conduct where each matter would tend to be unique. Put another way, although the Insurance Department matter was a real-world example of government attorney whistle-blowing, it should not to be regarded as the paradigm of all prospective government attorney whistle-blower scenarios.

Regarding the second approach, amending the existing whistle-blower statutory schemes, COPRAC essentially found that the landscape of these statutory schemes rendered it problematic for any amendments, short of a complete overhaul, to address the complete

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<sup>21</sup>(...continued)

suggestion that there might be an exception for government attorneys 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 attorneys 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 attorneys. Rather, the

focus is on the rule concerning organizational clients and providing guidance there for the attorney on how to proceed. That is precisely the approach that COPRAC recommends. (COPRAC’s August 17, 2001 report at p. 29. A copy of this report is provided as a part of Enclosure 11.)

variety of governmental whistle-blowing settings that may occur in California. In California, whistle-blower issues can arise at the city, county, state and federal level and may involve attorneys who may or may not be members of the State Bar of California. However, the statutorily identified recipients of whistle-blower reports, the State Auditor and/or the Legislature, may not be the appropriate oversight authority for every governmental organization present in California. The question arose as to whether an attorney for an agency of the United States government situated in California should be guided by California statutes to whistle-blow to the State Auditor. Rule 3-600, however, applies to all members of the State Bar of California and also governs the activities of attorneys from other jurisdictions while engaged in the performance of lawyer functions in California. (Rule 1-100(D) (Geographic Scope of Rules) of the Rules of Professional Conduct.) Consequently, as a matter of guidance to attorneys, the broader reach of a rule 3-600 approach was favored over possible legislative modification of the existing whistle-blower statutory schemes.

Given the other possible alternatives, the proposed amendments to rule 3-600 are a balanced response to a difficult area of attorney conduct. First, as contemplated by AB 363, proposed amended rule 3-600 would 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, while the precise path an attorney should take when confronted with serious official misconduct has not been laid out, new paragraph (D) would allow the attorney to go outside the immediate agency he or she represents so long as the attorney acts in good

faith to determine the propriety of making the referral and to identify an appropriate government body to receive the referral.

In short, the proposed amendments to rule 3-600 would provide sufficient guidance on how to proceed when confronted with improper governmental conduct, without unduly jeopardizing the trust the client reposes in the attorney, implicating the duty of confidentiality or threatening the integrity of the attorney-client privilege.

## IV

### **CONCLUSION**

The Board of Governors of the State Bar of California respectfully requests that this Court approve the proposed amendments to rule 3-600 (Organization as Client) of the Rules of Professional Conduct of the State Bar of California in the form set forth in Enclosure 1.

**ENCLOSURE 1:**

**Proposed Amended Rule 3-600 of the Rules of Professional Conduct of the  
State Bar of California**

### **Rule 3-600. Organization as Client**

(A) In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.

(B) If, in the course of representing a non-governmental organization, a member learns that an act or refusal to act of an actual or apparent agent of the organization (i) is or may be a violation of law reasonably imputable to the organization, or (ii) is likely to result in substantial injury to the organization, then the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:

(1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or

(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.

(C) If, in the course of representing a governmental organization, a member learns that an act or refusal to act of an actual or apparent agent of the organization (i) is or may be a violation of law reasonably imputable to the organization, (ii) is likely to result in substantial injury to the organization, (iii) constitutes the use of the organization's official authority or influence by the agent to commit a crime, fraud or other violation of law, (iv) involves the agent's willful misuse of public funds or willful breach of fiduciary duty, or (v) involves the agent's willful omission to perform his or her official duty, then the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:

(1) Urging reconsideration of the matter while explaining its likely consequences to the organization; and

(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.

(D) Provided the member has taken action as described in subparagraphs (C)(1) and (2) without the matter being resolved, or, if the highest internal authority that can act on behalf of the organization is an agent whose conduct is described in paragraph (C), then the member would act consistently with his or her duty of protecting any confidential information as provided in Business and Professions Code section 6068, subdivision (e) by referring the matter to the law enforcement agency charged with responsibility over the matter or to any other governmental agency or official charged with overseeing or regulating the matter, if:

(1) The referral is warranted by the seriousness of the circumstances and not otherwise prohibited by law; and

(2) The agent's act or refusal to act constitutes the use of the organization's official authority or influence to commit a crime or fraud, or a willful misuse of public funds or a willful breach of fiduciary duty.

A member representing a governmental organization shall not be subject to discipline under these rules for making a referral under this paragraph if the member has acted in good faith to determine the propriety of making a referral and to identify the appropriate governmental agency or official as described in this paragraph.

(E) If, despite the member's actions in accordance with paragraph (B), (C) or (D), the organization insists upon action or a refusal to act that is described in paragraph (B), (C) or (D), then the member's response is limited to the member's right and, where appropriate, duty to resign in accordance with rule 3-700, or to act as otherwise authorized by law.

(F) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.

(G) A member representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 3-310. If the organization's consent to the dual representation is required by rule 3-310, the consent shall be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented, or by the shareholder(s) or organization members.

## DISCUSSION

*Organization as an entity.* Rule 3-600 is not intended to enmesh members in the intricacies of the entity and aggregate theories of partnership.

*Multiple Representation.* Rule 3-600 is not intended to prohibit members from representing both an organization and other parties connected with it, as for instance (as simply one example) in establishing employee benefit packages for closely held corporations or professional partnerships.

*Institutional relationships and loyalties.* Rule 3-600 is not intended to create or to validate artificial distinctions between entities and their officers, employees, or members, and it is not the purpose of the rule to deny the existence or importance of such formal distinctions. In dealing with a close corporation or small association, members commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, members are faced with complex decisions involving personal and institutional relationships and loyalties and have frequently had difficulty in perceiving their correct duty. (See *People ex rel Deukmejian v. Brown* (1981) 29 Cal.3d 150 [172 Cal.Rptr. 478]; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *In re Banks* (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) In resolving such multiple relationships, members must rely on case law.

*Members as employees and independent contractors.* Rule 3-600 applies equally to a member who provides legal services to the organization as an independent contractor as it does to a member who provides legal services to the organization as a full-time or part-time employee of the organization.

*Remediation under paragraphs (B) and (C).* Both paragraph (B) and (C) refer to “an act or refusal to act of an actual or apparent agent of the organization.” The language “act or refusal to act” is intended to include the concept of “remediation,” that is, an act or refusal to act by an agent of an organization may include past conduct. While reconsideration of the matter may no longer be possible, a member still may urge the agent acting on behalf of the organization to mitigate or remedy the effects of the past actions where such refusal amounts to further violations of law or additional prospective injury to the organizational client. Neither paragraph (B) or (C) is intended to authorize the member to disclose confidential information of past conduct outside of the organization.

*Permissive nature of rule 3-600.* Rule 3-600 is not intended to create a duty on the part of the member to take any action that is permitted under paragraphs (B), (C) or (D). (See rule 1-100(A).)

*Employment actions.* Rule 3-600 is not intended to limit a member's rights when bringing or defending an employment action. In particular, rule 3-600 is not intended to abrogate the law established by the California Supreme Court's decision in *General Dynamics v. Superior Court* (1994) 7 Cal.4th 1164 [32 Cal.Rptr.2d 1]. (See also *Santa Clara County Counsel Attorneys Ass'n v. Woodside* (1994) 7 Cal.4th 525 [28 Cal.Rptr.2d 617]; *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167 [164 Cal.Rptr. 839]; *Solin v. O'Melveny & Myers, LLP* (2001) 89 Cal.App.4th 451 [107 Cal.Rptr.2d 456]; *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294 [106 Cal.Rptr.2d 906].)

*Governmental organization as client.* Paragraph (A) does not identify with specificity who the client is when a member represents a governmental organization. Depending upon the circumstances, members may represent a variety of governmental organizations whose power and jurisdiction may originate from different enabling legal authority. Generally, a constituent body or official of the governmental organization will be part of such governmental organization and not an independent client of the member representing the parent governmental organization, even if the constituent body or official has authority to exercise exclusive power within the governmental organization over any particular subject or subjects. (See *Ward v. Superior Court (County of Los Angeles)* (1977) 70 Cal.App.3d 23 [138 Cal.Rptr. 532]; *Civil Service Commission v. Superior Court (County of San Diego)* (1984) 163 Cal.App.3d 70, [209 Cal.Rptr. 159].) On the other hand, when a member represents a state agency, the client generally will be the agency itself, but under certain circumstances, it may also be a branch of government, such as the executive branch, or the government as a whole. Rule 3-600 also contemplates that in some instances, the highest internal authority that can act on behalf of the governmental organization may be the government branch, department or official with constitutional or statutory oversight authority of the organization.

*Public nature of some governmental information.* Rule 3-600 is not intended to supersede the duty of a member who represents a governmental organization to publicly use or disclose information as may be required or allowed by law or by the administrative or business practices of the governmental organization the member represents. See, e.g., Government Code sections 6250-6277 (California Public Records Act); Government Code sections 54950-54962 (The Brown Act); Government Code sections 81000-91014 (The Political Reform Act of 1974); Government Code section 11120-11132 (the Bagley-Keene Open Meeting Act). Paragraph (C)'s requirement that a "member shall not violate his or her duty of protecting all confidential information as provided in Business & Professions Code section 6068, subdivision (e)" would not, for example, preclude a member representing a governmental organization from disclosing information where authorized by law, or from providing the organization with legal advice in public where governing law otherwise permits such conduct.

*Response to misconduct by a governmental client.* Under rule 3-600, members representing governmental organizations have several options they may pursue when confronted with official misconduct. The particular remedial action they may take will depend on the kind of misconduct they encounter. Subparagraphs (C)(i) to (v) provide for a relatively broad range of misconduct that permits a member representing a governmental organization to pursue the corrective action set out in subparagraphs (C)(1) and (2). The types of misconduct that permit a member to avail himself or herself of the remedies provided in paragraph (D), however, fall within a narrower ambit. Under paragraph (D), a member may only report criminal or fraudulent misconduct, or a willful misuse of public funds or a willful breach of fiduciary duty to another governmental agency or official.

*Paragraph (D); referrals within government.* Paragraph (D) recognizes that the member has a duty to protect the confidential information of the organization. Nevertheless, paragraph (D) is not intended to limit a member to referring a matter only within the particular governmental organization that the member represents. As noted in paragraph 8 of this Discussion, the client generally will be the governmental organization itself. Rule 3-600, however, also recognizes that a member representing a governmental organization may represent any of a variety of governmental entities, including a political subdivision, branch, bureau, or instrumentality of a local, state, federal, or other government. The reference to “organization” in paragraph (A) includes any such governmental client. Because of this wide variety of governmental entities a member may represent, Rule 3-600 does not specify precisely how a member should report misconduct by a government employee when the member learns of conduct as described in paragraph (D). Paragraph (D) thus provides only that the government agency or official to whom the member may report could be the law enforcement agency charged with responsibility over the matter, or it could be any other governmental agency or official charged with overseeing or regulating the matter. In determining how to identify a governmental agency or official charged with overseeing or regulating the matter, the member should be guided by: (1) any statute, ordinance, or other law or regulation enacted by the entity, or by any entity of superior authority, that identifies the person, board, or agency to which such a referral should be made; (2) applicable case law; and (3) the principle that such referrals should be made within the government, and not publicly, in a way reasonably designed to avoid violating Business and Professions Code section 6068, subdivision (e). Depending upon the circumstances, the law enforcement agency charged with responsibility over the matter could be, for example, a city prosecutor, district attorney, attorney general or United States attorney.

*Exhaustion requirement and exception when reporting governmental client misconduct.* Subparagraphs (C)(1) and (2) set forth actions that the member must pursue as a prerequisite to availing himself or herself of the reporting options contained in paragraph (D). Paragraph (D) recognizes, however, that action under paragraph (C)(2) may be futile. Consequently, if the action, refusal to act, or willful omission of duty involves the highest

internal authority that can act on behalf of the organization, the member may take steps under Paragraph (D) without first pursuing the remedy provided in subparagraph (C)(2).

*“Safe Harbor” when reporting governmental client misconduct.* Paragraph (D) contemplates that, in the event the highest authority within the governmental entity is responsible for the action, refusal to act, or willful omission of duty, the member may believe that referral of the matter to the law enforcement agency charged with responsibility over the matter, or to any other agency or official with regulatory or oversight authority is necessary. Under those circumstances, the member should make the referral accordingly. However, if the member has difficulty in determining which law enforcement agency, or oversight agency or official, has responsibility, paragraph (D) provides a safe harbor for a member who acts in good faith both to determine the propriety of making a referral and to identify a proper agency or official to whom to make a referral in the face of such uncertainty.

*Option to withdraw from representation when a client organization is engaged in misconduct.* Paragraph (E) sets forth the limits on a member’s response after he or she has exhausted the actions permitted under paragraphs (B), (C) or (D). Generally, these limits also apply to a member who represents a governmental organization. For example, if the law enforcement agency and governmental agency or official with oversight authority over the matter as described in subparagraph (D) has determined that the agent of the governmental organization accused of misconduct has acted properly, then the member is limited to resigning in accordance with rule 3-700, even where the member believes that the law enforcement agency, oversight agency or official’s determination is erroneous. In some circumstances, however, a member representing a governmental organization may take action in accordance with applicable law. For example, a city charter may give the city attorney a right to act independently of the city council or other city officers in specified matters.

*Elected officials.* Paragraph (F) applies even if the employee is a publicly elected official or is appointed by an elected official.

**ENCLOSURE 2:**

**Rule 3-600 Showing Proposed Amendments in Legislative Style**

### Rule 3-600. Organization as Client

(A) In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.

(B) ~~If a member acting on behalf of an organization knows that~~, in the course of representing a non-governmental organization, a member learns that an act or refusal to act of an actual or apparent agent of the organization ~~acts or intends or refuses to act in a manner that~~(i) is or may be a violation of law reasonably imputable to the organization, or ~~in a manner which~~(ii) is likely to result in substantial injury to the organization, ~~then~~ the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:

(1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or

(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.

(C) If, in the course of representing a governmental organization, a member learns that an act or refusal to act of an actual or apparent agent of the organization (i) is or may be a violation of law reasonably imputable to the organization, (ii) is likely to result in substantial injury to the organization, (iii) constitutes the use of the organization's official authority or influence by the agent to commit a crime, fraud or other violation of law, (iv) involves the agent's willful misuse of public funds or willful breach of fiduciary duty, or (v) involves the agent's willful omission to perform his or her official duty, then the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:

(1) Urging reconsideration of the matter while explaining its likely consequences to the organization; and

(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.

(E) Provided the member has taken action as described in subparagraphs (C)(1) and (2) without the matter being resolved, or, if the highest internal authority that can act on behalf of the organization is an agent whose conduct is described in paragraph (C), then the member would act consistently with his or her duty of protecting any confidential information as provided in Business and Professions Code section 6068, subdivision (e) by referring the matter to the law enforcement agency charged with responsibility over the matter or to any other governmental agency or official charged with overseeing or regulating the matter, if:

(1) The referral is warranted by the seriousness of the circumstances and not otherwise prohibited by law; and

(2) The agent's act or refusal to act constitutes the use of the organization's official authority or influence to commit a crime or fraud, or a willful misuse of public funds or a willful breach of fiduciary duty.

A member representing a governmental organization shall not be subject to discipline under these rules for making a referral under this paragraph if the member has acted in good faith to determine the propriety of making a referral and to identify the appropriate governmental agency or official as described in this paragraph.

(E) If, despite the member's actions in accordance with paragraph (B), ~~the highest authority that can act on behalf of~~(C) or (D), the organization insists upon action or a refusal to act that is ~~a violation of law and is likely to result in substantial injury to the organization, the member's~~ described in paragraph (B), (C) or (D), then the member's response is limited to the member's right; and, where appropriate, duty to resign in accordance with rule 3-700, or to act as otherwise authorized by law.

(E) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.

(EG) A member representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 3-310. If the organization's consent to the dual representation is required by rule 3-310, the consent shall be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented, or by the shareholder(s) or organization members.

## DISCUSSION

Organization as an entity. Rule 3-600 is not intended to enmesh members in the intricacies of the entity and aggregate theories of partnership.

Multiple Representation. Rule 3-600 is not intended to prohibit members from representing both an organization and other parties connected with it, as for instance (as simply one example) in establishing employee benefit packages for closely held corporations or professional partnerships.

Institutional relationships and loyalties. Rule 3-600 is not intended to create or to validate artificial distinctions between entities and their officers, employees, or members, ~~nor~~ and it is ~~it~~not the purpose of the rule to deny the existence or importance of such formal distinctions. In dealing with a close corporation or small association, members commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, members are faced with complex decisions involving personal and institutional relationships and loyalties and have frequently had difficulty in perceiving their correct duty. (See *People ex rel Deukmejian v. Brown* (1981) 29 Cal.3d 150 [172 Cal.Rptr. 478]; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *In re Banks* (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) In resolving such multiple relationships, members must rely on case law.

Members as employees and independent contractors. Rule 3-600 applies equally to a member who provides legal services to the organization as an independent contractor as it does to a member who provides legal services to the organization as a full-time or part-time employee of the organization.

Remediation under paragraphs (B) and (C). Both paragraph (B) and (C) refer to "an act or refusal to act of an actual or apparent agent of the organization." The language "act or refusal to act" is intended to include the concept of "remediation," that is, an act or refusal to act by an agent of an organization may include past conduct. While reconsideration of the matter may no longer be possible, a member still may urge the agent acting on behalf of the organization to mitigate or remedy the effects of the past actions where such refusal amounts to further violations of law or additional prospective injury to the organizational

client. Neither paragraph (B) or (C) is intended to authorize the member to disclose confidential information of past conduct outside of the organization.

Permissive nature of rule 3-600. Rule 3-600 is not intended to create a duty on the part of the member to take any action that is permitted under paragraphs (B), (C) or (D). (See rule 1-100(A).)

Employment actions. Rule 3-600 is not intended to limit a member's rights when bringing or defending an employment action. In particular, rule 3-600 is not intended to abrogate the law established by the California Supreme Court's decision in *General Dynamics v. Superior Court* (1994) 7 Cal.4th 1164 [32 Cal.Rptr.2d 1]. (See also *Santa Clara County Counsel Attorneys Ass'n v. Woodside* (1994) 7 Cal.4th 525, [28 Cal.Rptr.2d 617]; *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167 [164 Cal.Rptr. 839]; *Solin v. O'Melveny & Myers, LLP* (2001) 89 Cal.App.4th 451 [107 Cal.Rptr.2d 456]; *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294 [106 Cal.Rptr.2d 906].)

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her duty of protecting all confidential information as provided in Business & Professions Code section 6068, subdivision (e)” would not, for example, preclude a member representing a governmental organization from disclosing information where authorized by law, or from providing the organization with legal advice in public where governing law otherwise permits such conduct.

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