

**A Shakeup for the Duty of Confidentiality: The Competing
Priorities of a California Government Attorney**

I. Introduction

In the early hours of January 17, 1994, a 6.7 magnitude earthquake struck the Los Angeles area, killing seventy-two people and injuring 1,500.¹ Ninety-two percent of the structural damage affected apartment buildings.² The Northridge quake was the most expensive disaster California had endured, causing \$27 billion of building damage.³ In its aftermath, victims filed more than 600,000 insurance claims.⁴ After having paid for earthquake insurance year after year, many of these policyholders were severely shortchanged when insurance companies mishandled their cases and denied them coverage.⁵

¹ **Roberta Ann Johnson, Whistleblowing: When it Works and Why** 40 (2003).

² Id.

³ Lorena Iñiguez, The Quackenbush Years, **L.A. Times**, June 29, 2000, at A24.

⁴ **Johnson**, supra note 1, at 41.

⁵ Cindy Ossias, Whistleblower's Tale, **The Sacramento Bee**, July 23, 2003, at I1.

Consistent with its mission of "protect[ing] the consumers' insurance interests,"⁶ the California Department of Insurance ("CDI") investigated how several insurance companies adjudicated these claims and concluded that the companies had not complied with insurance regulations.⁷ However, instead of fining the companies and forcing them to pay restitution to the wronged earthquake victims, the Insurance Commissioner, Charles Quackenbush, settled with the companies by allowing them to make nominal, tax-exempt "donations" to non-profit organizations.⁸

Then a CDI employee named Cindy Ossias blew the whistle, exposing the truth about Quackenbush's donation scheme.⁹ When the California Assembly Insurance Committee asked Ossias about the dubious settlements, she handed over internal CDI

⁶ About Us: An Introduction to CDI Operations, <http://www.insurance.ca.gov/0500-about-us/0100-cdi-introduction/> (last visited January 3, 2008).

⁷**Comm. on Prof'l Responsibility and Discipline, State Bar of Cal., Report and Recommendation on AB 363** 4 (2001), available at <http://calbar.ca.gov/calbar/pdfs/3cp0107c.pdf> [hereinafter **COPRAC Report**].

⁸ Ossias, supra note 5.

⁹Id.

documents.¹⁰ Partially as a result of her actions, testimony before lawmakers revealed that the Insurance Commissioner had failed to sufficiently discipline the insurance companies and, worse yet, that he had used the funds for personal gain.¹¹ Quackenbush eventually resigned.¹²

If the whistleblower had been a CDI economist, secretary, or case worker, she would have quietly returned to work because California's whistleblower statutes protect employees from retaliation.¹³ However, because Ossias was a CDI attorney, she was far from off the hook. The State Bar began to investigate whether she should be disciplined for violating the duty of confidentiality by revealing the documents to the Legislature.¹⁴ By favoring her duty to serve the public over whatever duty of

¹⁰Id.

¹¹Iñiguez, supra note 3.

¹² Virginia Ellis, State Insurance Dept. Reinstates Whistle-blower, **L.A. Times**, Aug. 13, 2000, at A33 [hereinafter Ellis, Insurance Dept. Reinstates Whistle-blower].

¹³See Cal. Gov't Code §§ 8547.8, 53298 (West 2007).

¹⁴**Richard A. Zitrin & Carol M. Langford, Legal Ethics in the Practice of Law** 550 (2d ed. 2001).

confidentiality she may have owed to her "client,"¹⁵ Ossias almost lost her ability to practice law.¹⁶

Government attorneys¹⁷ in California are caught between competing policies. On one hand, as government employees, they are encouraged by the whistleblower protection statutes to report misconduct in their departments.¹⁸ On the other, as attorneys, they have sworn to maintain their clients' confidentiality.¹⁹ This tension forces a government attorney who has witnessed wrongdoing to choose between her desire to serve the public and her ethical obligations as a lawyer.

¹⁵See infra, Section IV(C). The question of to whom a government attorney owes the duty of confidentiality is far from clear in California. Depending on how one defines the government "client," it is very possible that Ossias did not violate her duty of confidentiality.

¹⁶ Telephone Interview with Cindy Ossias, Senior Staff Counsel, Cal. Dep't of Ins. (September 24, 2007).

¹⁷The term "government attorney" may include both attorneys who work full-time as public servants and private counsel retained by the government. **COPRAC REPORT**, supra note 7 at 11 n.30.

¹⁸ See **Cal. Gov't Code** §§ 8547.8, 53298 (West 2007).

¹⁹**Cal. Bus. & Prof. Code** § 6068(e) (West 2007).

After the Ossias affair, both the California Legislature and the State Bar recognized the need to clarify when and how a potential government attorney could safely blow the whistle without risking her ability to practice law; however, after several attempts, no new rules or laws have been passed.²⁰ The way in which Ossias' case was handled was particular to her situation; the State Bar prosecutor made it clear that his decision to drop Ossias' case was not precedential.²¹ As a result, a government attorney contemplating whether to blow the whistle in the future would face the same uncertainty as Ossias but might instead decline to disclose wrongdoing to the detriment of the public interest. Who knows how many other government attorneys have chosen to remain silent to the detriment of the public good?

Section II will discuss the factual background of the Ossias case. Section III will explore the current legal framework governing whistleblower protections and the duty of confidentiality. Section IV will consider how this framework fails to meet the ethical concerns of government attorneys.

²⁰See infra, Section II(B).

²¹Letter from Donald R. Steedman to Richard Alan Zitrin (Oct. 11, 2000), in **Zitrin & Langford**, supra note , at 551 [hereinafter Steedman Letter].

Section V will propose solutions that reconcile these problems without compromising the traditional division of labor between the Legislature and the judiciary.

II. Factual Background

A. The Ground Shakes at the Department of Insurance

After the Northridge earthquake, the California Department of Insurance ("CDI") investigated how several insurance companies adjudicated claims, concluding that the claim practices were not in compliance with insurance regulations.²² CDI attorneys and examiners compiled grievances against the insurance companies into confidential internal reports called market conduct examinations.²³

CDI attorney Cindy Ossias had participated in preparing the market conduct examinations.²⁴ She and other staff members found that the insurance companies had mistreated policyholders by conducting cursory damage inspections, making insufficient settlement offers to pay for repairs, unreasonably delaying damage discovery and payments, and then denying supplemental claims based on an alleged expiration of the statute of

²²**COPRAC Report**, supra note 7.

²³Telephone Interview with Cindy Ossias, supra note 16.

²⁴Id.

limitations.²⁵ As a result, the market conduct examinations recommended that the companies pay millions of dollars in fines.²⁶

Instead of forcing the companies to make restitution for their behavior, Insurance Commissioner Charles Quackenbush settled with the insurance companies.²⁷ Quackenbush agreed not to impose fines or finalize the market condition examinations if the insurers would make donations to organizations dedicated to earthquake education.²⁸ These donations totaled \$12 million and were tax-deductible.²⁹

²⁵Cindy Ossias, Whistleblower's Tale, **The Sacramento Bee**, July 23, 2003, at I1.

²⁶Iñiguez, supra note 3. Ossias testified before the Assembly Insurance Committee that she had expected fines to range from \$20-40 million. **COPRAC Report**, supra note 7, at 4.

²⁷ Virginia Ellis & Carl Ingram, Whistleblower Emerges in Quackenbush Probe, **L.A. Times**, June 23, 2000, at A21.

²⁸Id.

²⁹Iñiguez, supra note 3. Quackenbush's California Research and Assistance Fund received 12.8 million in tax exempt "voluntary contributions" from insurance companies. Id. Firemen's Fund paid \$550,000.00 to a special fund to avoid further investigation, Allstate paid \$2 million to the California

When Ossias and her colleagues noticed the large discrepancy between the penalties they had recommended and the tax-deductible donations represented in the settlement agreements, they were "appalled."³⁰ Both the Los Angeles Times and the California Legislature noticed this irregularity and began investigating Quackenbush's actions.³¹ In January, 2000, when a consultant to the California Assembly Insurance Committee Chairman asked Ossias whether she knew anything about the settlements, she "put him off at first, grappled with [her] conscience and then offered him the [market conduct examination] reports."³² Once Ossias turned over the reports to the Legislature, the Senate judiciary subcommittee revealed them to the public by posting them on the Internet.³³ During a

Research and Assistance Fund, and 20th Century Insurance and state Farm also donated to special foundations. Id.

³⁰Ossias, supra note 5; see also **Zitrin & Langford**, supra note 14.

³¹Id.

³²Ossias, supra note 5. The Legislature began to focus on Quackenbush as a result of a *Los Angeles Times* investigation into the foundations. **Zitrin & Langford**, supra note 14.

³³Ellis & Ingram, supra note 27.

department-wide investigation that Quackenbush initiated,³⁴ Ossias admitted during an "interview/interrogation" that she was the whistleblower.³⁵ The next day, the department Chief Counsel ordered her to "vacate the premises immediately" and take administrative leave.³⁶

Once the Assembly Insurance Committee and the California Attorney General began to investigate the matter, information about the foundations' involvement with Quackenbush's political and personal interests began to surface.³⁷ The straw that broke the camel's back was testimony that the "commissioner personally ordered his staff to collect \$4 million in settlements with title insurance companies for TV commercials featuring

³⁴Ellis, Insurance Dept. Reinstates Whistle-blower, supra note 12.

³⁵Ossias, supra note 5.

³⁶Id.

³⁷Iñiguez, supra note 3. Instead of addressing earthquake-related issues, the foundations sponsored a poll about Commissioner Quackenbush's political reputation and funded a football training program that two of Quackenbush's children attended. Id.

Quackenbush.”³⁸ Two days later, Quackenbush announced his resignation.³⁹

Ossias was eventually reinstated by Quackenbush’s successor in August, 2000⁴⁰ and continues to work there today.⁴¹ Ossias was not fired as a result of her actions because California whistleblower laws protect government employees from retaliation.⁴² However, Ossias’ status as an attorney was threatened when the State Bar’s Office of Trial Counsel began investigating whether her disclosure of confidential material⁴³ merited disciplinary measures.⁴⁴ Eventually, the State Bar discontinued the investigation without determining whether

³⁸Id. Ossias also testified that “she and other insurance department lawyers had been ordered to shred documents containing their recommendations for fines against the companies.” Ellis, Insurance Dept. Reinstates Whistle-blower, supra note 12.

³⁹Id.

⁴⁰Id.

⁴¹See Telephone Interview with Cindy Ossias, supra note 16.

⁴²See **Cal. Gov’t Code** §§ 8547.8, 53298 (West 2007).

⁴³ The duty of confidentiality is codified in **Cal. Bus. & Prof. Code** § 6068(e) (West 2007).

⁴⁴See **Zitrin & Langford**, supra note 14.

Ossias had acted ethically.⁴⁵ In a letter to Ossias' attorney,⁴⁶ the Bar prosecutor never identified whom was Ossias' client and whether she had breached the duty of confidentiality.⁴⁷

Ossias was forced to choose between her desire as a public employee to report government wrongdoing and her binding ethical duty as an attorney to maintain client confidentiality. Because attorney conduct is governed both by statute⁴⁸ and Rules of Professional Conduct promulgated by the California Supreme Court and California State Bar,⁴⁹ both the Legislature and Bar considered ways clarify the relationship of government transparency policy and the duty of confidentiality.⁵⁰

B. The Legislature and State Bar Try to Pick Up the Pieces

Soon after the Ossias case, Assemblyman Darrel Steinberg (D-Sacramento) proposed Assembly Bill ("A.B.") 363, which would create an exception to the duty of confidentiality enumerated in

⁴⁵Id.

⁴⁶Steedman Letter, supra note 21.

⁴⁷**Zitrin & Langford**, supra note 14. Instead, the State Bar prosecutors "exonerated Ossias on whistleblowing and public policy grounds." Id.; see infra, Section IV(2).

⁴⁸**Cal. Bus. & Prof. Code** § 6000-6238 (West 2007).

⁴⁹**Cal. Rules of Prof'l Conduct** R 1-100(A) (2007).

⁵⁰See **COPRAC Report**, supra note 7, at 2.

section 6068(e) of the California Business and Professions Code.⁵¹ The exception was drafted to protect government lawyers in California from the threat of losing their bar licenses when they revealed confidential information to expose wrongdoing.⁵² While the Assembly was considering A.B. 363, Assemblyman Steinberg requested that the Attorney General's office comment on whether "'whistleblower' statutory protections applicable to employees of the state and local public entities supersede the statutes and rules governing the attorney-client privilege[.]"⁵³

⁵¹Virginia Ellis, Bill Proposes Protections for State Lawyers, **L.A. Times**, Feb 22, 2001 at 3 [hereinafter Ellis, Bill Proposes Protections]; see **Cal. Bus. & Prof. Code** § 6068(e) (West 2000).

⁵²Ellis, Bill Proposes Protections, supra note 51.

⁵³84 Op. Cal. Att'y Gen. 71, 74 (2001) [hereinafter Attorney General]. Although both the Steinberg query and the Attorney General's opinion seem to use the terms "attorney-client privilege" and "duty of confidentiality" interchangeably, the net result of the Attorney General's conclusion is that the whistleblower laws do not automatically override statutes that deal with attorney conduct. See Charles S. Duskow, The Government Attorney and the Right to Blow the Whistle: The Cindy Ossias Case and Its Aftermath (A Two-Year Journey to Nowhere),

The opinion concluded that the Legislature did not intend the whistleblower statutes to supersede the ethics provisions governing attorney-client privilege.⁵⁴

The Assembly passed A.B. 363 and the Senate Judiciary Committee took it under submission.⁵⁵ Soon, the State Bar became interested in the possibility of amending the Rules of Professional Conduct instead of the Business and Professions Code.⁵⁶ On July 9, 2001, the Senate suspended its hearings and permitted the State Bar to conduct its own study of how A.B. 363 might impact government lawyers.⁵⁷

The State Bar's Committee on Professional Responsibility and Discipline of ("COPRAC") determined that, instead of a statutory exception, it would be more effective for the Supreme Court amend Rule 3-600 to specifically address the needs of

25 **Whittier L. Rev.** at 38-39 (2003) [hereinafter Doskow, Two-Year Journey to Nowhere].

⁵⁴Attorney General, *supra* note 53; Doskow, Two-Year Journey to Nowhere, *supra* note 53, at 38. "The opinion frames the issue as one of precedence and legislative intent." Id.

⁵⁵**COPRAC Report**, *supra* note 7, at 2 n.4.

⁵⁶ **COPRAC Report**, *supra* note 7, at 2.

⁵⁷Id.

government attorneys.⁵⁸ The State Bar Board of Governors adopted the change and sent it to the Supreme Court for approval.⁵⁹ The Supreme Court, in a terse opinion, denied the request on the grounds that “the proposed modifications conflict with Business and Professions Code section 6068, subdivision(e).”⁶⁰

After the Supreme Court denied the request to modify the Rules of Professional Conduct, the Legislature resumed its

⁵⁸Id. at 3. Rule 3-600 identifies the “client” of an attorney representing an organization and a reporting scheme in the case of internal wrongdoing. **Cal. Rules of Prof’l Conduct** R. 3-600 (2007). COPRAC noted that the current focus of Rule 3-600 is limited to attorneys who represent private organizations. Id. Amending rule 3-600 to address the needs of government attorneys was the preferred approach because the AB 363 would “permit government attorneys to make disclosure to anyone based on the attorney’s unilateral judgment that a government official has engaged in misconduct.” Id. For an in-depth study of Rule 3-600 and the proposed changes, see infra, Sections IV(C), V(B).

⁵⁹Doskow, Two-Year Journey to Nowhere, supra note 54, at 42-43.

⁶⁰In Re Adoption of Amendments to Rule 3-600 of the Rules of Professional Conduct, No. S106482 (Cal. 2002) (on file with the State Bar of California); see also Don J. DeBenedictis, Justices Reject Bar’s Whistleblower Rule, **L.A. Daily J.** 3 (May 14, 2002).

debate of A.B. 363 and eventually passed a bill containing a statutory exception to the duty of confidentiality for government attorneys.⁶¹ However, Governor Grey Davis vetoed the bill, fearing that the attorney-client relationship would be weakened by the exception.⁶² Later, when Governor Arnold Schwarzenegger took office, Assemblywoman Fran Pavely introduced A.B. 2713, which also passed both houses with bipartisan support.⁶³ On September 28, 2004, Governor Schwarzenegger vetoed the bill, arguing that government officials would react to the new policy by leaving government attorneys out of the decision-making process.⁶⁴ In 2006, Pavely again introduced another draft

⁶¹Doskow, Two Year Journey to Nowhere, supra note 53, at 46.

⁶²Id. at 48 (citing Letter from Gray Davis, Governor of the State of Cal., to Members of the Cal. State Assembly, Veto of Assembly Bill 363 (Sept. 30, 2002), available at http://info.sen.ca.gov/pub/01-02/bill/asm/ab_0351-0400/ab_363_vt_20020930.html (last visited Jan. 12, 2008)).

⁶³Manuel Valencia, Bill Analysis, available at http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_1601-1650/ab_1612_cfa_20060118_170017_asm_floor.html (last visited Jan. 12, 2008).

⁶⁴Letter from Gov. Arnold Schwarzenegger to the Members of the California State Assembly, Veto of Assembly Bill 2713, (Sept. 9,

of the bill, A.B. 1612.⁶⁵ The Assembly voted for the measure, but Pavely retracted her sponsorship when it became apparent that the Governor would not pass the bill.⁶⁶ Despite the strong political will to clarify the priorities of a government attorney, after several failed attempted reforms, the momentum incited by Cindy Ossias' experience has hit an impasse. The next section will evaluate the existing legal framework that creates these conflicting messages of transparency and secrecy.

2004) , available at http://info.sen.ca.gov/pub/03-04/bill/asm/ab_2701-2750/ab_2713_vt_20040928.html (last visited Jan. 12, 2008).

⁶⁵Assemb. B. 1612, 2005-06 Regular Sess. (Cal. 2006), available at http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_1601-1650/ab_1612_bill_20060104_amended_asm.pdf (last visited Jan. 13, 2008).

⁶⁶Marisa Huber, Ethics Year in Review, 47 **Santa Clara L. Rev.** 867, 904 (2007). The State Bar firmly opposed an exception to the duty of confidentiality because it felt that the duty was being threatened by exceptions to the duty enacted under Federal law and in the American Bar Association's Model Rules of Professional Conduct . Id. (citing Nancy McCarthy, Bar Opposes Whistleblower Bill, **Cal. St. B.J.**, (Apr. 2006)).

III. Existing Legal Framework

Government attorneys in California are caught between two contradictory sets of laws; on one hand, the whistleblower statutes promote transparency in government, while on the other, the attorney ethics rules and statutes⁶⁷ require that attorneys keep all client communication confidential. The whistleblower statutes are not mandatory, but rather encourage government officials to speak out against "improper governmental activities"⁶⁸ by immunizing them from retribution.⁶⁹ In contrast, all lawyers must comply with the duty of confidentiality; any deviation from the rules or statutes that govern attorney behavior could subject an attorney to discipline by the State Bar.⁷⁰ The only safe course of action for an attorney in Cindy

⁶⁷Because California attorney regulation is jointly governed by statute and rules of professional conduct, I will also refer to the entire system of regulation as "the ethics provisions."

⁶⁸**Cal. Gov't Code**. § 9149.21 (West 2007).

⁶⁹Id. § 8547.1.

⁷⁰**Richard C. Wydick, Rex. R Perschbacher & Debra Lyn Bassett, California Legal Ethics** 44 (5th ed. 2005) [hereinafter **California Legal Ethics**].

Ossias' position is to maintain the government "client's"⁷¹ absolute confidentiality.⁷² This alternative, however, means that the whistleblower statutes effectively do not apply to government attorneys. As a result, the Legislature's goal of promoting transparency in government is consistently overshadowed by the duty of confidentiality. This section will set forth the competing policies of government transparency and client confidentiality.

A. The Whistleblower Statutes

Whistleblowing is considered a form of internal dissent, whereby a member of an organization speaks out against wrongdoing.⁷³ Statutes that encourage whistleblowing are intended to promote a government employee's ethical duty to expose "waste, fraud, and abuse."⁷⁴ Whistleblowers are an integral part of the system of checks and balances; they sound

⁷¹Defining the attorney's client is a challenging task and is therefore the source of much debate. See, e.g. See Wayne C. Witkowski, Who is the Client of the Municipal Government Lawyer, 209 **PLI/Crim** 117, 155-56 (2007); **COPRAC Report**, supra note 7, at 14.

⁷²See **COPRAC Report**, supra note 7, at 18.

⁷³**Johnson**, supra note 1, at 3-4.

⁷⁴Id. at 6.

the alarm when individuals or government entities threaten to overstep their authority.⁷⁵ Moreover, the statutes have a deterrent effect on misconduct;⁷⁶ faced with the possibility of exposure, an official would be reticent to abuse his power because it would be harder to hide.

Although whistleblower-type protections trace back to the Civil War era,⁷⁷ since the 1960's officials have become concerned about public cynicism and distrust of the government.⁷⁸ Modern whistleblower protections are one way to improve the public's perception of the government.⁷⁹ That many states and the Federal government have enacted whistleblower statutes⁸⁰ reflects a widespread commitment to this policy.⁸¹

⁷⁵Id. at 11.

⁷⁶See id. at 75.

⁷⁷Jonathan Macey, Getting the Word Out About Fraud: A Theoretical Analysis of Whistleblowing and Insider Trading, 105 **Mich. L. Rev.** 1899, 1904 (2007) (discussing the Union government's policy of paying whistleblowers who exposed fraud related to the sale of munitions and war supplies).

⁷⁸**Johnson**, supra note 1, at 16.

⁷⁹Id. at 16.

⁸⁰See, e.g. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 32 (codified at 5 U.S.C. §§ 1211-1219, 1221,

There are several provisions scattered throughout the California Government Code that provide guidance to whistleblowers. The California Whistleblower Protection Act⁸² codifies the Legislature's finding that "public servants best serve the citizenry when they can be candid and honest without reservation in conducting the people's business."⁸³ An employee is authorized to disclose improper behavior that violates any law or regulation, or "is economically wasteful, or involves gross misconduct, incompetency, or inefficiency."⁸⁴ Upon receiving information about improper behavior, the State Auditor⁸⁵ is empowered to investigate the issue and report to the

1222, 3352 (2000); A.R.S. § 38-532 (2007); C.R.S.A. § 24-50.5-101 (2007).

⁸¹See Macey, supra note 77, at 1901. "But the recent positive publicity for whistleblowers suggests that whistleblowing is now viewed with less suspicion--and whistleblowers as less politically motivated and more altruistic--than was true in the past." Id.

⁸²Cal. Gov't Code §§ 8547-8548.5 (West 2007).

⁸³Id. § 8547.1.

⁸⁴Id. § 8547.2(b).

⁸⁵Although the statutes do not specifically limit to whom a whistleblower can report, they authorize the State Auditor,

appropriate oversight body.⁸⁶ The whistleblower remains anonymous in most circumstances;⁸⁷ moreover, the statutes expressly prohibit employees from intimidating or retaliating against the whistleblower.⁸⁸

The Act applies to all individuals "appointed by the Governor or employed or holding office in a state agency,"⁸⁹ which includes attorneys.⁹⁰ Local government employees are also protected by whistleblower provisions.⁹¹ Depending on which version of the whistleblower statutes applies, private counsel retained by the government may not always be protected from being fired for speaking out against improper government activity.⁹²

State Legislature, or a "local agency" to receive reports from government employees. *Id.* §§ 53297, 8547.5, 9149.23.

⁸⁶Id. §§ 8547.5-.7.

⁸⁷Id. § 8547.5

⁸⁸Id. §§ 8547.8, 53298.

⁸⁹Id. § 8547.2(a).

⁹⁰Attorney General, *supra* note 53.

⁹¹See **Cal. Gov't Code** §§ 53296-53299.

⁹²See **Witkin, California Procedure, Chapter IV, Agency and Employment**, § 258, p.337 (10th ed. 2005) (citing **Cal. Gov't Code** § 8547-8548.5, which is limited to protecting "state

The Legislature, in passing the statutes, intended to facilitate and encourage whistleblowing to promote integrity in government.⁹³ However, the language of the statute makes it clear that whistleblowing is optional.⁹⁴ Furthermore, employees are not authorized to reveal "information otherwise prohibited by or under law."⁹⁵

B. A California Attorney's Duty of Confidentiality

The above-discussed whistleblowing statutes encourage government employees, including attorneys, to act ethically by revealing waste and wrongdoing in the government. The competing

employees."). **Witkin** is widely used by California practitioners. But see **Cal. Gov' t Code** § 9149.21 (West 2007) ("state employees and other persons should disclose . . . improper governmental activities." (emphasis added)).

⁹³Attorney General, supra note 53; **Cal. Gov' t Code** § 9149.21 (West 2007).

⁹⁴See **Cal. Gov' t Code** § 9149.21 "It is the intent of the Legislature that state employees . . . should disclose . . . improper government activities." Id.

⁹⁵Id. § 8547.3(d). See also id. §§9149.21(d), 9149.23(c).

duty of client confidentiality⁹⁶ is one of the most important ethical duties of a lawyer.⁹⁷

Attorney behavior in California is governed by two bodies of law: California Business and Professions Code sections 6000-6238 and the California Rules of Professional Conduct ("Rules").⁹⁸ Members of the State Bar ("Bar") could be subject to discipline for a violation of either the Code or the Rules.⁹⁹

The duty of confidentiality is codified in California Business and Professions Code section 6068(e)(1), which mandates

⁹⁶The duty of confidentiality is broader in scope than the attorney-client privilege, which an attorney can assert before a Court when trying to protect a communication from being considered in evidence. See, e.g., In re Johnson, Cal. State Bar Standing Comm. on Prof'l Responsibility and Conduct, 4 Cal. State Bar Ct. Rptr. 179, (2000); Kevin E. Mohr, California's Duty of Confidentiality: Is It Time for a Life-Threatening Criminal Act Exception?, 39 **San Diego L. Rev.** 307, 317, n.28 (2002) (explaining that the attorney-client privilege also applies to discovery.).

⁹⁷1 **Witkin Cal. Procedure, Attorneys**, § 118, p.438 (4th ed. 1997) [hereinafter **Witkin, Attorneys**].

⁹⁸See California Legal Ethics, supra note 70, at 44.

⁹⁹Id.

that an attorney "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets,¹⁰⁰ of his or her client."¹⁰¹ Between 1880 and 2003, the only amendment to the language now embodied in Section 6068(e) made the pronouns gender-neutral.¹⁰² In 2003, the Legislature passed the sole statutory exception to the duty of confidentiality.¹⁰³ The exception allows an attorney to reveal confidential information where the attorney "reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably

¹⁰⁰The statute's use of the words "confidence" and "secrets" has been criticized for failing to adequately define the confidential information it seeks to protect. See, e.g. Proposed Cal. Rule of Prof'l Conduct 3-100 (1998) (on file with the California State Bar).

¹⁰¹**Cal. Bus. & Prof. Code** § 6068(e) (1) (West 2007).

¹⁰²Charles Duskow, Ethics Rules in Flux: Conscience, Clarity and Confidentiality in California, 15 NO. 1 Prof. Law. 22, 22 (2004) [hereinafter Duskow, Ethics Rules in Flux]. There were also a few judicially-imposed exceptions. **California Legal Ethics**, supra note 70, at 187.

¹⁰³Duskow, Ethics Rules in Flux, supra note 102, at 22-23.

believes is likely to result in death of, or substantial bodily harm to, an individual.”¹⁰⁴

The Rules of Professional Conduct merely supplement the statutory duty of confidentiality.¹⁰⁵ Rule 3-100 prohibits a Bar member from revealing confidential information under Section 6068(e)(1) unless an exception applies or the client gives informed consent.¹⁰⁶ The Rule then reiterates the exception mentioned in Section 6068(e)(2) and provides guidance about the steps a Bar member should take when revealing information to prevent a criminal act that could result in substantial injury or death.¹⁰⁷

The duty of confidentiality is one of the central tenets in the attorney-client fiduciary relationship.¹⁰⁸ It is “fundamental” to the existence of our legal system.¹⁰⁹ On an

¹⁰⁴**Cal. Bus. & Prof Code** § 6068(e)(2) (West 2007).

¹⁰⁵In fact, there was no Rule mentioning the duty until the Legislature passed the statutory exception to confidentiality in 2004. Duskow, Ethics Rules in Flux, supra note 102, at 22.

¹⁰⁶See **Cal. Rules of Prof'l Conduct** R. 3-100(a) (2007).

¹⁰⁷Id.

¹⁰⁸**Witkin**, Attorneys, supra note 97, § 118.

¹⁰⁹People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc., 980 P.2d 371, 378 (Cal. 1999).

individual level, confidentiality ensures that a client is completely free to trust her lawyer with sensitive information, thereby promoting open communication.¹¹⁰ This allows the attorney to provide sound advice either in a planning or litigation context. Confidentiality also enriches the entire legal system by encouraging potential clients to seek legal advice.¹¹¹ Such advice is beneficial both to the client and arguably to the larger society.¹¹² For attorneys, the duty of confidentiality is a reminder of the importance of undivided loyalty to one's client.¹¹³

¹¹⁰See, e.g., *General Dynamics Corp. v. Superior Court*, 876 P.2d 487, 500 (Cal. 1994) ("It is essential to the proper functioning of the lawyer's role that the client be assured that matters disclosed to counsel in confidence remain sacrosanct").

¹¹¹Roger C. Cramton, Proposed Legislation Concerning a Lawyer's Duty of Confidentiality, 22 **Pepp. L. Rev.** 1467, 1477 (1995).

¹¹²For example, if a company is contemplating how to dispose of waste, consulting an attorney might not only prevent litigation but could also protect the public from possible health risks.

¹¹³*Anderson v. Eaton*, 293 P. 788, 790 (Cal. 1930) (stating that confidentiality keeps "the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties . . . rather than to enforce to their full

As discussed, the existing framework results in tension between the policies of government openness and client confidentiality. Although the binding duty of confidentiality carries more weight than the statutes that merely recommend whistleblowing,¹¹⁴ there may be occasions where this dynamic could further empower an official to take advantage of the public trust by committing fraud, knowing full well that his attorney's lips are sealed.

IV. Critique of the Current System

Government attorneys are torn between these competing values of transparency and secrecy. While the Whistleblower statutes encourage them to listen to their conscience, the rules and statutes governing attorney conduct mandate that they subordinate their ethical principles to promote the underlying

extent the rights of the interest which he should alone represent.").

¹¹⁴ In fact, the statutory duty of confidentiality overrides the effect of the whistleblower protections; the statutes do not apply to whistleblowing prohibited by law. **Cal. Gov't Code** § 9149.21. Therefore, since the duty of confidentiality is also in a statute, an attorney who discloses a client's confidential information would not be immune to retaliation under the whistleblower protection statutes.

values of client confidentiality. The first problem with this system is that both the Legislature and the Supreme Court have an interest in protecting the duty of confidentiality; however, in practice, because the duty is enshrined in the statute, the Legislature completely controls the duty. This power imbalance stymies debate in the legal community about possible exceptions to this duty. Second, the lack of an express exception to the duty of confidentiality forces the State Bar to choose between prosecuting an otherwise innocent attorney and ignoring the ethics provisions, resulting in inconsistent application of the ethics provisions. Finally, the Rule of Professional Conduct that governs organizational clients fails to take into account the unique position of a government attorney. This lack of guidance makes it difficult for these attorneys to identify their client for purposes of understanding to whom they owe the duty of confidentiality.

A. Legislative Control of the Duty of Confidentiality Prevents the Supreme Court from Participating in the Confidentiality Discussion

Although both the Legislature and Supreme Court theoretically have an interest in preserving the duty of confidentiality, in practice, the Legislature alone controls the

duty. This section will demonstrate that housing the duty of confidentiality in the Business and Professions Code impedes the Supreme Court from exercising its inherent power over the duty of confidentiality. This section will discuss the basis for each branch's control over confidentiality and explain the dynamics of the power-sharing between the two branches.

1. The Evolution of the California Legislature and Supreme Court's Shared Power over Attorney Conduct

The Legislature and the Supreme Court both have an interest in promoting good attorney conduct. The Supreme Court must ensure that the legal system functions properly; this is one of the Court's main duties under the California Constitution.¹¹⁵ In contrast, the Legislature seeks to protect the public at large¹¹⁶ by preventing attorneys from abusing their position of power. Therefore, the Legislature is also empowered to regulate attorney conduct; it "may put reasonable restrictions upon constitutional functions of the Courts provided they do not defeat or materially impair the exercise of these functions."¹¹⁷

¹¹⁵See **Cal. Const.** art. VI, § 1; In re Attorney Discipline System, 967 P.2d 49, 54 (Cal. 1998).

¹¹⁶In re Attorney Discipline System, 967 P.2d at 61.

¹¹⁷ Brydonjack v. State Bar of California, 281 P. 1018, 1020 (1929).

The California Legislature has a long history of regulating attorney conduct. In 1927, the California Legislature formally adopted the State Bar Act ("Act"),¹¹⁸ which is now a part of the California Business & Professions Code ("Code").¹¹⁹ The Act created an integrated bar.¹²⁰ Prior to the passage of the act, existing voluntary bar associations had experienced difficulty in enforcing professional standards and assimilating the large waves of recently settled attorneys.¹²¹ Moreover, laypersons

¹¹⁸Witkin, Attorneys supra note 97, § 358.

¹¹⁹See **Cal. Bus. & Prof. Code** § 6000-6428 (West 2007). This part of the Business and Professions Code "may be cited as the State Bar Act." Id. § 6000.

¹²⁰In an "integrated bar," all practicing attorneys in the state must be members. See Keller v. State Bar of California, 496 U.S. 1, 5 (1990). Additionally, the California Constitution now mandates that "[e]very person admitted and licensed to practice law in this State" be a member of the State Bar." **Cal. Const.** art. VI, § 9.

¹²¹**Corinne Lathrop Gilb, Self-Regulating Professions and The Public Welfare: A Case Study of the California Bar** 36 (1956) (Ph.D. dissertation, Radcliffe College).

posing as lawyers had created a fiercely competitive market for clients.¹²²

The Act officially recognized the Supreme Court's tradition of assuming jurisdiction over attorney discipline.¹²³ The Act also established the State Bar, a "public corporation"¹²⁴ that helps the Supreme Court carry out its disciplinary duties.¹²⁵ The State Bar is merely an "administrative assistant or adjunct of [the] Court;"¹²⁶ the Court is the ultimate arbiter of admittance to practice law, suspension, and disbarment.¹²⁷

¹²²Gilb, supra note 121, at 36-37. One observer noted that out of 6,000 attorneys working in San Francisco, only 600 were actually legally authorized to do so. Id.

¹²³ See In re Stevens, 241 P. 88, 92 (Cal. 1925) (holding that the Supreme Court has "original jurisdiction to determine applications for restoration to practice of attorneys and counselors at law after disbarment.").

¹²⁴ **Cal. Const.** art. VI, § 9.

¹²⁵ In re Attorney Discipline System, 967 P.2d 49, 58-59 (Cal. 1998).

¹²⁶ Id. at 59.

¹²⁷ See Keller v. State Bar of California, 496 U.S. 1, 11-12 (1990).

Once the State Bar Act codified the California Supreme Court's disciplinary power over attorneys, the California Supreme Court in 1928 adopted its own Rules of Professional Conduct.¹²⁸ Today's Rules of Professional Conduct patch together aspects of the American Bar Association ("ABA") Model Rules, the old ABA Model Code, and earlier California legal ethics rules.¹²⁹ To amend a Rule of Professional Conduct, the State Bar Board of Governors adopts a draft and submits it to the Supreme Court for approval.¹³⁰

In California, like in most states, the Supreme Court oversees the entire judicial system.¹³¹ "[T]he power to regulate the practice of law, including the power to admit and to discipline attorneys, has long been recognized to be among the inherent powers of the article VI [of the California Constitution] Courts."¹³² Despite the fact that this power

¹²⁸**Witkin**, Attorneys, supra note 97, § 476.

¹²⁹**California Legal Ethics**, supra note 70.

¹³⁰See **Cal. Bus. & Prof. Code** § 6077 (West 2007).

¹³¹In re Attorney Discipline System, 967 P.2d 49, 54 (Cal. 1998); see **Cal. Const.** art. VI, § 1.

¹³²In re Attorney Discipline System, 967 P.2d at 54. "Admission to the bar is a judicial function, and members of the bar are officers of the Court, subject to discipline by the Court.

belongs to the Supreme Court, some provisions of the State Bar Act directly affect attorney conduct.¹³³ One of the State Bar Act's functions is regulating behavior "which would constitute the unauthorized practice of law if performed by a layman."¹³⁴ The Act defines the duties of an attorney,¹³⁵ among them the duty of confidentiality.¹³⁶ Additionally, the Act includes provisions

Hence, under the constitutional doctrine of separation of powers, the Court has inherent and primary regulatory power [over admission to practice law]." (citations omitted) **Witkin, Attorneys**, *supra* note 97, § 356, p.438.

¹³³Doskow, Ethics Rules in Flux, *supra* note 63.

¹³⁴*Baron v. City of Los Angeles*, 469 P.2d 353, 358 (1970). Given the widespread abuse of the "attorney at law" title, it is logical that the 1927 Act sought to exclude laymen from practice. See **Gilb**, *supra* note 121, at 36-37.

¹³⁵**Cal. Bus. & Prof. Code** § 6068 (West 2007).

¹³⁶Id. § 6068(e). As noted, *infra* Section III(B), the duty of confidentiality is a key component of an attorney's fiduciary relationship to her client. Consistent with the State Bar Act's goals, confidentiality is one of the duties that sets a Bar member apart from other holders of Juris Doctor degrees. **Cal. Bus. & Prof. Code** § 6067. "Every person on his admission shall

that govern fee agreements and advertising, the violation of which could lead to discipline.¹³⁷ Sections like these equate to direct regulation of attorney conduct.¹³⁸

The State Bar Act provoked immediate controversy; however, in State Bar of California v. Superior Court of Los Angeles County,¹³⁹ the California Supreme Court upheld the Act.¹⁴⁰ The Court noted that attorneys constitute the largest and most influential group of professionals.¹⁴¹ As officers of the Courts, attorneys have a duty both to promote the administration of justice and to serve the public at large.¹⁴² However, because

take an oath . . . and faithfully to discharge the duties of any attorney at law” Id.

¹³⁷Doskow, Ethics Rules in Flux, supra note 102.

¹³⁸Id.

¹³⁹278 P. 432 (Cal. 1929).

¹⁴⁰Id. at 439.

¹⁴¹Id. at 435.

¹⁴²Id. at 435. Arguably, an attorney's duty to the public is greater than her duty to the Court. See Bradley R. Kirk, Note, Milking the New Sacred Cow: The Supreme Court Limits the Peremptory Challenge on Racial Grounds in Powers v. Ohio and Edmonson v. Leesville Concrete Co., 19 **Pepp. L. Rev.** 691, 722

being a lawyer is a prerequisite to becoming a judge, the Court implied that it was necessary to have another branch keep watch over the judiciary.¹⁴³ Society

is to be safeguarded against the ignorances or evil dispositions of those who may be masquerading beneath the cloak of the legal and supposedly learned and upright profession. It is to be noted also that from the body of the legal profession it is required . . . the justices and judges of all Courts of record and of certain other subordinate tribunals must be chosen.¹⁴⁴

In other words, fear of attorney omnipotence justified legislative oversight of professional conduct.¹⁴⁵ Consistent with this opinion, the California Supreme Court has never held

n.267 (1992) (discussing *State Bar of California v. Superior Court*, 278 P. at 435).

¹⁴³*State Bar of California v. Superior Court*, 278 P. at 435.

"From almost the inception of our state government statutory provision has been made for the admission, disbarment, suspension, or disciplining of members of the legal profession."

Id.

¹⁴⁴ See id. at 435.

¹⁴⁵ See *Hustedt v. Workers' Comp. Appeals Bd.*, 636 P.2d 1139, 1143 n.7, (Cal. 1981) .

that the State Bar Act's provisions that regulate attorney conduct are an unconstitutional exercise of legislative authority.¹⁴⁶

The California Legislature, out of a concern for the public welfare, is authorized under its police power to create laws that govern the practice of the law.¹⁴⁷ Similarly, the California Supreme Court, through overseeing the Rules of Professional Conduct and the disciplinary system, seeks to protect the public.¹⁴⁸ The Supreme Court enacts Rules of Professional Conduct to set standards based on the Court's

¹⁴⁶Ethics Rules in Flux, supra note 133; see, e.g. Lebbos v. State Bar, 806 P.2d 317, 323, (Cal. 1991) (indicating that the State Bar Act is not "an unconstitutional delegation of judicial power to the State Bar" because the California Supreme Court retains the ability to discipline attorneys).

¹⁴⁷In re Attorney Discipline System, 967 P.2d 49, 61 (Cal. 1998); Hustedt, 636 P.2d at 1143.

¹⁴⁸**Cal. Rules of Prof'l Conduct** R. 1-100 (2007); see Howard v. Babcock, 863 P.2d 150, 162 (Cal. 1993) (quoting Ames v. State Bar, 506 P.2d 625, 629 (Cal. 1973)).

perception of what constitutes appropriate legal practice.¹⁴⁹ When these standards are not met, members of the public can vindicate their rights by reporting their attorney's misconduct to the State Bar.¹⁵⁰ Therefore, the Supreme Court's and the Legislature's goals dovetail with respect to attorney discipline. While the Legislature must protect the public welfare,¹⁵¹ the Court must be vigilant to ensure the reliability of the system it oversees.¹⁵²

¹⁴⁹See Cal. Rules of Prof'l Conduct R. 1-100 (2007). The Rules are designed "to protect the public and to promote respect and confidence in the legal profession." Id.

¹⁵⁰See, e.g., State Bar of California, The State Bar of California: What Does It Do? How Does it Work?, <http://www.calbar.ca.gov/calbar/pdfs/whowhat1.pdf> (last visited Jan. 13, 2008).

¹⁵¹In re Attorney Discipline System, 967 P.2d 49, 61 (Cal. 1998).

¹⁵²See In re Lavine, 41 P.2d 161, 162 (Cal. 1935).

[T]he right to practice law not only presupposes in its possessor integrity, legal standing, and attainment, but also the exercise of a special privilege, highly personal and partaking of the nature of a public trust, the granting of which privilege to an individual is everywhere conceded

2. The Practical Effect of This Shared Power

Although in theory the Legislature and the Supreme Court both enjoy power over the duty of confidentiality, in practice, the Legislature's role overshadows that of the Supreme Court because the duty has always been enshrined in a statute.¹⁵³ An example of this dynamic is the story of how the Rule of Professional Conduct 3-100 came into existence. Before 1987, there was no mention of the duty of confidentiality in the Rules of Professional Conduct.¹⁵⁴ In 1987, the State Bar first proposed that the Supreme Court adopt Rule 3-100, which would borrow section 6068(e)'s concept of confidentiality and include five express exceptions to the duty.¹⁵⁵ The proposed Rule

to be the exercise of a judicial function (citations omitted). Id.

¹⁵³See Mohr, supra note 96, at 366.

¹⁵⁴See **Cal. Rules of Prof'l Conduct** Ch. 3 (1989-1992), available at http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10158&id=3502. Until 2003, when Rule 3-100 was enacted, the Rules did not mention the duty of confidentiality. See Doskow, Ethics Rules In Flux, supra note 102.

¹⁵⁵Mohr, supra note 96, at 369-70.

defined the terms "confidence" and "secrets" to clarify the potentially ambiguous language in section 6068(e).¹⁵⁶

In deciding to decline adopting this new Rule, the Court did not provide its reasons.¹⁵⁷ However, the Court, in a letter to the President of the State Bar, "suggested that if the rule was intended to permit disclosure in a proceeding where the attorney-client evidentiary privilege attached, the Supreme Court might not have the authority to approve such a rule."¹⁵⁸ In other words, the Court feared intruding on the Legislature's jurisdiction by creating an exception to the duty of confidentiality without a corresponding Evidence Code exception to the attorney-client privilege.¹⁵⁹

In 1992, the State Bar again submitted a proposed rule to the Supreme Court that defined the duty of confidentiality and

¹⁵⁶Id. at 369 n.240.

¹⁵⁷Id. at 372.

¹⁵⁸Id. at 370 n.241.

¹⁵⁹Id. at 374. Note that the attorney-client privilege is narrower than the duty of confidentiality, so to create an exception to the larger duty of confidentiality would undermine the Legislature's power over the attorney-client privilege. See supra, Section III(B).

proposed on one exception to the duty.¹⁶⁰ The exception was limited to preventing criminal acts that could result in serious bodily injury.¹⁶¹ This version also included a "safe harbor," whereby a lawyer who disclosed client information under the applicable exception would not be subject to discipline by the State Bar.¹⁶² The Supreme Court again rejected this suggestion without explanation.¹⁶³

In 1998, the State Bar proposed another version of rule 3-100 that included the exception for the criminal acts that might result in substantial bodily harm.¹⁶⁴ This version abandoned the "safe harbor" provision;¹⁶⁵ however, it suffered the same fate as its predecessors, receiving another curt denial.¹⁶⁶

A few years later, in response to the Ossias case, the State Bar tried to provide guidance for future whistleblowers by clarifying the relationship of a government attorney to her

¹⁶⁰ Mohr, supra note 96 at 370-71.

¹⁶¹ Id.

¹⁶² Id.

¹⁶³ Id.

¹⁶⁴ Id. at 371.

¹⁶⁵ Id. n.246.

¹⁶⁶ Id. at 371-72.

client.¹⁶⁷ In deciding to deny the Bar's request, the Court became slightly more generous when it provided a one-sentence reason for rejecting the Rule, citing a conflict with the provisions of section 6068(e) of the Business and Professions Code.¹⁶⁸

It was only after the Legislature passed California Business and Professions Code section 6068(e)(2),¹⁶⁹ the criminal act exception to the duty of confidentiality, that the Supreme Court was willing to approve a Rule that mentioned the duty of confidentiality. The current version of Rule 3-100 merely refers to the duty mentioned in section 6068(e)(1) and explains how to implement the exception in section 6068(e)(2).¹⁷⁰

¹⁶⁷See infra, Section II(B).

¹⁶⁸In re Adoption of Amendments to Rule 3-600 of the Rules of Professional Conduct, No. S104682, (Cal. May 10, 2002) (the request to amend Rule 3-600 "is denied because the proposed modifications conflict with Business and Professions Code section 6068, subdivision (e).") (on file with the California State Bar); see also Don J. DeBenedictis, Justices Reject Bar's Whistleblower Rule, **L.A. Daily J.** 3 (May 14, 2002).

¹⁶⁹**Cal. Bus. & Prof. Code** § 6068(e)(2) (West 2007).

¹⁷⁰**Cal. Rules of Prof'l Conduct** R. 3-100 (2007)

With the help of the State Bar's input and proposals, the Court has had ample opportunities to clarify the scope of the duty and adopt appropriate exceptions. However, the Court has rebuffed the legal community's repeated attempts to refine the duty of confidentiality. In the future, the Supreme Court should at least provide its reasons for declining to adopt Rules, if for no other reason than to inform the State Bar of which modifications might be acceptable.

Taking together the Supreme Court's reference to 6068(e) when rejecting proposed Rule 3-600¹⁷¹ and the fact that the Court changed the Rules only after the Legislature had enacted the statutory exception to the duty of confidentiality, it appears that the Supreme Court has been hesitant to even consider modifying the duty for fear of stepping on the Legislature's toes.¹⁷² However, as noted, the duty of confidentiality is

¹⁷¹In Re Adoption of Amendments to Rule 3-600 of the Rules of Professional Conduct, No. S106482 (Cal. 2002) (on file with the State Bar of California).

¹⁷²Id. at 379. "These rejections probably do not reflect a deep-seated antipathy . . . on the Court's part to exceptions to the duty of confidentiality. Rather, they more likely evince the Court's belief that it does not have the authority to upend the absolute language" of section 6068(e), in spite of the

central to the existence of the legal system, and therefore falls within the Supreme Court's jurisdiction. The Supreme Court's deferential approach to adopting rules that deal with confidentiality has allowed the Legislature to "defeat or materially impair the exercise of [the Supreme Court's] functions."¹⁷³ Therefore, keeping the duty of confidentiality in the Business and Professions Code would further prevent the Supreme Court from exercising its due power over the duty of confidentiality.

B. If Immunity Is Uncertain, Few Will Dare to Speak Out

When there is a conflict between the mandatory duty of confidentiality and the optional whistleblower statutes, the State Bar is forced to bring disciplinary action against a government attorney who blows the whistle.¹⁷⁴ However, if the State Bar chooses to favor transparency policies by not following the plain language of the ethics provisions, its enforcement procedure appears subjective and arbitrary. On one hand, any appearance of inconsistent application of the rules

exceptions to attorney-client privilege in the Evidence Code.

Id.

¹⁷³Brydonjack v. State Bar of California, 281 P. 1018, 1020 (1929).

¹⁷⁴Attorney General, supra note 53.

undermines the credibility of the State Bar. On the other, otherwise innocent attorneys who perform a valuable public service might lose their livelihoods, despite statutory language that encourages them to speak out.

The way in which the State Bar Trial Counsel handled the Ossias case illustrates the community's inclination to reward government attorney whistleblowing in spite of the clear statutory language to the contrary.¹⁷⁵ After initiating an investigation into Ossias' disclosures, the State Bar's Office of Trial Counsel communicated to Ossias' attorney its decision to discontinue the investigation.¹⁷⁶ The Deputy Trial Counsel declined to analyze whether the Department of Insurance was Ossias' client and whether she had breached her duty of confidentiality by providing documents to the legislative committees.¹⁷⁷ Instead, Ossias was not disciplined because her conduct "(1) [] was consistent with the spirit of the Whistleblower Protection Act; (2) [] advanced important public policy considerations bearing on the responsibilities of the office of insurance commissioner; and (3) [was] not otherwise

¹⁷⁵Steedman Letter, supra note 21.

¹⁷⁶Id.

¹⁷⁷Doskow, Two-Year Journey to Nowhere), supra note 53, at 42-43 (2003); see Steedman Letter, supra note 21.

subject to prosecution under the guidelines set forth in this office's Statement of Disciplinary Priorities."¹⁷⁸

The Trial Counsel's letter does not adequately explain its decision because there is no discussion of how Ossias' actions apply to the legal framework governing attorney discipline. Instead of directly attacking the issues, the letter presented flimsy reasons for ending the investigation. Although this approach was beneficial to Ossias, it cannot be used as any indication of how the State Bar will approach future whistleblowers.¹⁷⁹

The first reason for exonerating Ossias--that she acted in the "spirit" of the act--was not at issue;¹⁸⁰ rather, the Trial Counsel was tasked with deciding whether she had violated her duty under the provisions regulating attorney conduct.¹⁸¹ The second reason, that her behavior promoted the Department's public policy considerations, essentially means that her "conduct assisted her client, the Department of Insurance, in

¹⁷⁸Steedman Letter, supra note 21.

¹⁷⁹**Zitrin and Langford**, supra note 14, at 552.

¹⁸⁰ Indeed, the whistleblower laws make no mention of immunity from State Bar disciplinary action. See, e.g. Cal. Gov't Code §§ 8547-8548.5 (West 2007).

¹⁸¹Doskow, Two Year Journey to Nowhere, supra note 53, at 41.

doing its job.”¹⁸² Public policy is not an excuse for violating an attorney’s ethical obligations.¹⁸³ The third and final reason, that the behavior was “not otherwise subject to prosecution,”¹⁸⁴ was actually an exercise in prosecutorial discretion.¹⁸⁵ In reality, the Bar was attempting to appease the majority of the bar members, public and Legislature, all of whom firmly supported Ossias’ actions.¹⁸⁶

Since Ossias was a likeable whistleblower, her actions were widely publicized, and Quackenbush’s behavior was so egregious, the Trial Counsel had little choice but to bow the pressures of public opinion and discontinue the investigation.¹⁸⁷ Perhaps in failing to discuss whether Ossias had complied with the statutes, the Office of Trial Counsel recognized that it was not in a position to fashion its own exception to the duty of confidentiality. The letter is of little use to future attorneys in Ossias’ position.¹⁸⁸ Furthermore, the Bar

¹⁸²Id.

¹⁸³See id.

¹⁸⁴Steedman Letter, supra note 21.

¹⁸⁵Journey to Nowhere, supra note 131, at 41.

¹⁸⁶Id. at 40-41.

¹⁸⁷Id.

¹⁸⁸**Zitrin and Langford**, supra note 13, at 552.

explicitly stated that the letter contained no public policy implications.¹⁸⁹

At the very least, in Ossias' case, the State Bar was reluctant to allow the stringent duty of confidentiality to override the whistleblower policies, meaning that the duty of confidentiality may not be as absolute as it seems. In other words, depending on the egregiousness and public policy implications of the act that the whistleblower reveals, the disciplinary arm of the State Bar might be willing to look the other way.¹⁹⁰ The consequence of this ad-hoc approach creates uncertainty for government attorneys; they are unable to realistically assess the risks and benefits of disclosure because they do not know whether they will be disciplined, and if so, to what extent.¹⁹¹ If an attorney is not sure whether it is safe to speak out, she will choose to be silent. There is a public cost to silence: a watered-down approach to government transparency.

Some might argue that the duty of confidentiality should always be favored over transparency policies, even in the case of government attorneys. After all, it is a duty that sets Bar

¹⁸⁹Steedman Letter, *supra* note 26.

¹⁹⁰See Duskow, Ethics Rules in Flux, *supra* note --, at 23.

¹⁹¹Id.

members apart from other non-accredited attorneys.¹⁹² Although this is true, government attorneys are in a unique position. They, like their fellow civil servants, are repositories of the public trust and are paid out of tax money to serve the public. To allow civil servants to use a government attorney's services to commit a fraud on the public does little to enrich society. Public officials cannot expect the same level of confidentiality as a private client.¹⁹³

In sum, the combination of ethics provisions and whistleblower statutes does little to support the important public policy of transparency. However, where the conditions are right, there may be future cases that warrant breaching the duty of confidentiality. Creating a narrowly tailored standard to guide future government attorney whistleblowers will not erode all confidentiality. The provisions of a possible exception to the duty of confidentiality for government attorneys are beyond the scope of this article; however, in the interim, a change in the structure of the duty of confidentiality could make the system more amenable to adopting important policies.¹⁹⁴

¹⁹²See supra, Section III(B).

¹⁹³See In re Lindsey, 158 F.3d 1263, 1266 (D.C. Cir. 1998).

¹⁹⁴See infra, Section V(A)(1).

C. "Government as Client" Is Not the Same As "Organization as Client"¹⁹⁵

The tension between the competing obligations of whistleblowing and confidentiality is exacerbated by the fact that the government attorney is representing an organizational client with a non-traditional power structure. Rule 3-600 defines the "client" of an attorney that represents an organization; however, the type of client the Rule contemplates does not include the government. There are two main ways in which the Rule fails to take into account the unique situation of government attorneys. First, and most importantly, it is not clear to whom a public attorney owes the duty of confidentiality.¹⁹⁶ Second, the Rule's reporting scheme for non-governmental organizations does not take into account the concerns of a governmental agency.¹⁹⁷

1. The Structure and Content of Rule 3-600

¹⁹⁵ **Cal. Rules of Prof'l Conduct** R. 3-600 (2007). "Organization as Client" is the heading of this Rule. Id.

¹⁹⁶ **COPRAC Report**, supra note 7 at 14.

¹⁹⁷ See Richard C. Solomon, Wearing Many Hats: Confidentiality and Conflicts of Interest Issues for the California Public Lawyer, 25 **Sw. U. L. Rev** 265, 295-96 (1996).

Rule 3-600 defines an organizational client as the entity itself, acting through the highest authorized agent.¹⁹⁸ Where an employee acts in a manner that could injure the organization, the attorney is prohibited from breaching her duty of confidentiality under California Business and Professions Code Section 6068(e).¹⁹⁹ In this situation, the attorney has the option to 1. urge reconsideration;²⁰⁰ 2. report the deviant behavior to a higher internal authority, or if necessary, to the highest person who is authorized to represent the organization;²⁰¹ or 3. discontinue representation in accordance with the mandatory resignation procedures listed in 3-700.²⁰²

Furthermore, where the officers, directors, shareholders or employees' interests conflict with the organization's interests, the attorney is expected to explain that she is representing the entire organization, not them as individuals.²⁰³ The lawyer "should not be influenced by the personal desires of any person

¹⁹⁸ **Cal. Rules of Prof'l Conduct** R. 3-600(A) (2007).

¹⁹⁹ Id. R. 3-600(B).

²⁰⁰ Id. R. 3-600(B)(1).

²⁰¹ Id. R. 3-600(B)(2).

²⁰² Id. R. 3-600(C).

²⁰³ See R. 3-600(D); Cal. State Bar Comm. Prof'l Responsibility, Op. 1989-113 (1989).

or organization”²⁰⁴ because the only client is the “corporate entity actually represented.”²⁰⁵

2. The Rule’s Definition of “Client” Does Not Apply to Government Entities.

The central problem with this Rule is that the concept of “client” does not apply to government attorneys.²⁰⁶ If the government client were the “entity itself, acting through the highest authorized agent,”²⁰⁷ then the public servants in a government organization would be working for a head official with absolute power. However, unlike in a corporation,²⁰⁸ the head official of a government agency does not have complete

²⁰⁴Cal. State Bar Comm. Prof’l Responsibility, Op. 1989-113 (1989) (citing **Model Code of Prof’l Responsibility**, EC 5-18).

²⁰⁵Id.

²⁰⁶See **COPRAC Report**, supra note 7, at 4.

²⁰⁷**Cal. Rules of Prof’l Conduct** R. 3-600 (2007).

²⁰⁸Id. “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.” Id.

managerial power over the agency. The "client"²⁰⁹ of a traditional corporation allocates resources, passes bylaws, and authorizes transactions.

In contrast, in the case of a government entity, the Legislature may allocate funding and regulate the organizational structure while the executive branch appoints an agency director.²¹⁰ This multi-layered approach to administering a governmental organization makes it unclear who has the ultimate responsibility for the organization.²¹¹ Without that information, the attorney has no notice about to whom she owes the duty of confidentiality.

3. The Rule's Contemplated Reporting Scheme Does Not Apply to Government Organizations.

²⁰⁹ The "highest authorized officer, employee, body, or constituent overseeing the particular engagement." Id.

²¹⁰ See generally Cal. Bus. & Prof. Code (West 2007).

²¹¹ Attorney General, supra note 53, at 2. (speculating about who is the "client" of an attorney representing the Medical Board of California: "the board itself, its executive director, the Department of Consumer Affairs of which the board is a part, the State and Consumer Services Agency in which the department is situated, or possibly someone else such as the Governor?").

Rule 3-600 describes the steps an attorney can take to report wrongdoing within the organization to the "highest internal authority that can act on behalf of the organization."²¹² However, this scheme does not make sense in the government context. First, the organizational harm described in the rule does not reflect the concerns of a governmental organization. Second, the lack of a definition of the "client" means that the attorney does not know to whom she is authorized to report this harm.

The type of harm a governmental organization may suffer is different from Rule's designated harms.²¹³ For this reason, a government attorney might not be able to determine which types of activities merit reporting. The Rule recognizes two types of harm: "a violation of law reasonably imputable to the organization" and behavior "which is likely to cause substantial injury to the organization."²¹⁴ Since government organizations are not motivated to earn a profit, the types of "injury" a government organization could suffer are inherently different from those of a regular corporation. While corporations risk

²¹² Rule 3-600(B) (2).

²¹³ See Solomon, supra note 197, at 295; see also **COPRAC Report** at 15.

²¹⁴ **Cal. Rule of Prof'l Conduct** R. 3-600(B) (2007).

lost profits, civil liability, or bankruptcy if an agent acts maliciously, a government organization will not be shut down because of a few bad eggs.²¹⁵ The government entity may risk public distrust; however, its existence will not be threatened in the same way as a corporation.²¹⁶ In turn, because this concept of "harm" to a government organization is so ambiguous, it is also subjective and difficult to identify. Therefore, the current language of Rule 3-600 that authorizes an attorney to report on "harmful" activities does not provide sufficient guidance to government attorneys.

Moreover, if a government attorney feels compelled to report wrongdoing, Rule 3-600's reporting scheme would be ineffective. Determining who is the "highest internal authority"²¹⁷ to whom the attorney may report is difficult in the government context because "highest" and "internal" are open to interpretation unless they are specifically defined in the Rules. For example, Cindy Ossias believed that the public was her client, in particular because the mission of the CDI is to

²¹⁵ See Solomon, supra note 197, at 296.

²¹⁶ Id. at 297.

²¹⁷ **Cal. Rules of Prof'l Conduct** R. 3-600(B)(2) (2007).

protect consumers.²¹⁸ Depending on how one chooses to identify the government client, the "highest internal authority" could be the director of the agency, the legislative sub-committee that oversees the agency, the speaker of the Assembly, or the Governor.²¹⁹ Since government attorneys currently have no guidance on the identity of their "client," they do not know to whom they owe the duty of confidentiality, and therefore, must guess to how they can safely report organizational wrongdoing.

V. Proposal

As illustrated above, the current legal framework makes it difficult for government attorneys to reconcile these competing policies. This article proposes two solutions to the challenges discussed above. First, the Bar should propose that the duty of confidentiality be moved from the California Business and Professions Code to the Rules of Professional Conduct. Second, the State Bar should identify the client of an attorney representing a governmental organization and incorporate this

²¹⁸ E-mail from Cindy Ossias, Senior Staff Counsel, California Department of Insurance, to Jessica Shpall, Loyola Law School (Jan. 14, 2008, 10:54:00 PST) (on file with author).

²¹⁹ See Witkowski, supra note 71.

new definition into a separate Rule of Professional Conduct.²²⁰ These solutions are independent of one another; both should be adopted, but if that is not possible, implementing either alternative could significantly improve the current situation. This section will explain how the proposals address the problems with the current legal framework, consider limitations to the proposals, and explore how to overcome these limitations.

A. Transfer the Duty of Confidentiality to the Rules of Professional Conduct

1. Proposal

The duty of confidentiality should be moved from the California Business and Professions Code to the Rules of Professional Conduct because doing so would strike the appropriate constitutional balance between the Supreme Court's concern for the legal system and the Legislature's desire to protect the public. As noted, the Supreme Court has rebuffed all efforts by the Bar to modify the duty of confidentiality, apparently because the Court believes that it is powerless to do so as long as the duty is codified.²²¹ This does a disservice to

²²⁰Another option is to change the language of Rule 3-600 to reflect the needs of government attorneys; however, adopting a new Rule would be more user-friendly.

²²¹See supra, Section IV(A) (2).

the legal system because the State Bar and the Supreme Court are in the best position to shape the duty of confidentiality.

First, the Supreme Court has inherent power to regulate attorneys.²²² As noted above, the Legislature is allowed to share this power subject to certain limits.²²³ In the past, when the Supreme Court has perceived that the Legislature is preventing it from exercising this power over the legal system, the Supreme Court has re-asserted its right to act unilaterally.²²⁴ For example, although the State Bar functions

²²² See, e.g. In Re Discipline System, 967 P.2d 49, 55 (Cal. 1998).

²²³ See Id. at 55-56.

²²⁴ See, e.g., Id. at 49. (upholding the Court's power to set bar dues after the Legislature had failed to do so); Hustedt v. Workers' Compensation Appeals Board, 636 P.2d 1139 (1981) (holding that the Legislature, in authorizing the Workers' Compensation Appeals Board to discipline an attorney, had undermined the Court's jurisdiction over disciplinary proceedings); Merco Construction Engineers, Inc. v. Municipal Court, 581 P.2d 636 (1978) (holding that the Legislature, by allowing a corporate officer who was not an attorney to appear in a civil action, usurped the Court's power to authorize admission to practice law).

as an arm of the Supreme Court, the Legislature typically designates how much the Bar can collect in dues.²²⁵ In 1998, however, then-governor Wilson vetoed a bill enabling the State Bar to collect yearly dues of \$458.00 and the Bar's disciplinary system became severely backlogged due to lack of funding.²²⁶ Since the disciplinary system is the Court's mechanism for ensuring good attorney conduct and keeping the legal system running, the Court held that it was necessary to impose the fees.²²⁷

Likewise, the Court's reticence to change the Rules of Professional Conduct for fear of affecting the statutory duty of confidentiality²²⁸ has allowed the Legislature to "defeat or materially impair the exercise of these functions."²²⁹ The duty of confidentiality primarily exists²³⁰ to enable the legal system

²²⁵In Re Discipline System, 967 P.2d at 52.

²²⁶Id. at 54.

²²⁷Id. at 52.

²²⁸Supra, section IV(A) (2).

²²⁹Brydonjack v. State Bar of California, 281 P. 1018, 1020 (1929).

²³⁰Although the duty also seeks to protect the public from harm, the main purpose is to enable clients to rely on their

to function,²³¹ and therefore is an essential aspect of the Court's power to regulate attorney conduct.²³² Therefore, the Court should follow its reasoning from In Re Discipline System²³³ by reasserting its due power over the duty of confidentiality.

Second, the State Bar and its respective committees are in the best position to study the dynamics of the duty of confidentiality. Because the Bar²³⁴ spends the bulk of its time and energy adjudicating issues that evaluate whether a particular attorney's behavior complies with the disciplinary rules,²³⁵ it is familiar with the pitfalls of the current ethics provisions and therefore is in a position to suggest potential revisions. Furthermore, the Bar has subcommittees staffed with ethics experts who are tasked with researching the Rules of

attorneys, thereby ensuring that clients make use of the legal system. See supra, Section III(B).

²³¹See supra, Section IV(2).

²³² People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc., 980 P.2d 371, 378 (Cal. 1999).

²³³967 P.2d 49, 55 (Cal. 1998)

²³⁴And, to a lesser degree, the Court.

²³⁵In re Attorney Discipline System, 967 P.2d 49, 58-59 (Cal. 1998) (noting that the State Bar assists the Court in disciplining attorneys).

Professional Conduct.²³⁶ For example, the principal purpose of the Bar's Commission for the Revision of the Rules of Professional Conduct is to strengthen the Rules of Professional Conduct by staying abreast of developments in the field of professional responsibility.²³⁷ By placing the duty of confidentiality within the Rules, the Commission's contributions would not fall on deaf ears, as they sometimes have in the past, but might have a better chance of being implemented. This would mean that any changes to the duty of confidentiality would be grounded in a careful study of the current trends in legal ethics.

Third, housing the duty of confidentiality in the Rules of Professional Conduct would provide greater flexibility for

²³⁶Comm. on Prof'l Responsibility and Discipline, http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10130&id=1104 (last visited Jan. 13, 2008).

²³⁷See Charter of the Comm. for the Revision of the Rules of Prof'l Conduct, available at http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10129 (last visited Nov. 16, 2007). Among the Committees goals are "eliminating ambiguities" and "fostering the evolution of a national standard with respect to professional responsibility issues." Id.

modification without eroding the duty. This is because the Court is less swayed by political currents and can act independently of other branches²³⁸ while still remaining accountable to the public. Because the legislative process requires continuous negotiation between political parties, the Legislature is "probably more susceptible than the Court to the pressures of various interested parties, and the compromises that would likely ensue might weaken the proposed legislation."²³⁹ Although such negotiations might be appropriate for other issues such as education and transportation, the duty of confidentiality is vital to the attorney-client relationship and the broader legal system.²⁴⁰ The Supreme Court, therefore, is best positioned to oversee the duty because it would be able to independently evaluate the merits of a proposed change.

Although the Court does not face the same political pressure as the Legislature, there are important checks on its power to regulate attorney conduct. First, unlike Federal judges, California Supreme Court Justices do not enjoy life tenure; rather, they are re-elected every twelve years.²⁴¹

²³⁸Mohr, supra note 96, at 383.

²³⁹Id. at 383.

²⁴⁰Id.

²⁴¹**Cal. Const.** art. VI, § 16; Mohr, supra note 96, at 383.

Although twelve years may be a long time for a constituent to remember a Justice's controversial decision, the Justices are still subject to some degree of accountability. Moreover, the Court and the State Bar are both "sensitive to the concerns of their constituents"²⁴² and therefore are unlikely to make any drastic changes to the duty of confidentiality. The policy of collecting public comments on proposed rules seeks to incorporate the views of the public at large and the many stakeholders within the Bar.²⁴³ As a result of public comments, the State Bar has even revised and withdrawn proposed rules.²⁴⁴ This respect for the legal community's input, as well as the fact that the Justices have to earn their re-election, will keep the Court from unduly modifying the duty of confidentiality.

Finally, moving the duty to the Rules of Professional Conduct would not undermine the long history of strict confidentiality in California.²⁴⁵ The Court has a strong record of protecting the attorney-client relationship.²⁴⁶ Moreover, the

²⁴² Mohr, supra note 96 at 383.

²⁴³ Id.

²⁴⁴ Id.

²⁴⁵ Id.

²⁴⁶ Id. (citing Gen. Dynamics Corp. v. Superior Court, 876 P.2d 487, 503 (cal. 1994); see also People ex rel. Department of

State Bar is unlikely to bow to peer pressure when considering exceptions to the duty of confidentiality. For example, the State Bar opposed Assemblywoman Pavely's 2006 bill because it feared that the duty of confidentiality was being threatened.²⁴⁷ The Court and State Bar's combined commitment to confidentiality is grounded in a desire and responsibility to ensure the integrity of the legal system;²⁴⁸ moving the duty of confidentiality to the Rules would therefore not decrease its effectiveness because the Court understands that it is essential that clients trust their attorneys with sensitive information.²⁴⁹

Corporations v. Speedee Oil Change Systems, Inc., 980 P.2d 371, 378 (Cal. 1999).

²⁴⁷Huber, supra note 66. Additionally, the California Bar has aggressively opposed the Sarbanes-Oxley rules that create new exceptions to the duty of confidentiality. Thomas G. Bost, Corporate Lawyers After the Big Quake: The Conceptual Fault Line in the Professional Duty of Confidentiality, 19 **Geo. J. Legal Ethics** 1089, 1126-1136 (2006).

²⁴⁸See supra, Section IV(A) (1).

²⁴⁹People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc., 980 P.2d 371, 378, (Cal. 1999). "The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar." Id.

2. Addressing the Limitations of this Proposal

A limitation to this proposal is that the Legislature has presided over the duty of confidentiality for more than 130 years.²⁵⁰ This proposal would require all three branches of government to agree that this long-held tradition is worth changing.²⁵¹ Although the statutory duty is deeply entrenched in California's legal history, transferring the duty to the Rules of Professional Conduct would strengthen the attorney-client relationship by allowing the Legislature and the Supreme Court to share power over communications issues.

First, the Legislature would retain some degree of control over confidentiality.²⁵² The attorney-client privilege, an important subset of client confidentiality, would remain under the Legislature's control.²⁵³ The Supreme Court has consistently upheld the Legislature's role in this respect.²⁵⁴

Second, the Legislature's goal in regulating the duty of confidentiality is to protect the public under its police

²⁵⁰Mohr, supra note 96, at 385.

²⁵¹Id.

²⁵²Id.

²⁵³Id. (citing **Cal. Evid. Code** § 911 (2000)).

²⁵⁴Id. (citing *General Dynamics v. Superior Court*, 876 P.2d 487, 504 (1994)).

power.²⁵⁵ However, since the Supreme Court shares this desire to protect the public, transferring the duty to the Rules would not minimize this concern. Rather, making this proposed change would ensure that the Supreme Court's interests are also being addressed.

Finally, this idea is neither radical nor novel. The state bars and supreme courts of every state other than California oversee the duty of confidentiality.²⁵⁶ In joining the rest of the country, California would not be relinquishing or watering down its unique views on confidentiality;²⁵⁷ rather, the Bar would be able to freely debate the issue without having to worry about persuading the Legislature of its views.²⁵⁸ Moreover, it is possible that the State Bar would support this transfer. In the wake of the Ossias case, COPRAC considered transferring the section 6068(e) duty of confidentiality to a new rule but abandoned the idea due to time constraints and other

²⁵⁵Supra, Section IV(A) (1).

²⁵⁶**Thomas D. Morgan & Ronald D. Rotunda, 2004 Selected Standards on Professional Responsibility**, Appendix A, 144-155 (2004).

²⁵⁷Bost, supra note 247.

²⁵⁸See Huber, supra note 66 (discussing the Bar's efforts to lobby the Assembly).

priorities.²⁵⁹ Now that the Court has denied COPRAC's request to change rule 3-600 and history has shown the political challenges of modifying the statutory duty,²⁶⁰ the State Bar should propose that the duty of confidentiality be transferred to the Rules of Professional Conduct.

B. Create a New Rule of Professional Conduct that Identifies Whom the Government Attorney Is Representing and When to Report Wrongdoing to This "Client"

1. Proposal

This proposal calls on the California State Bar to promulgate a new Rule of Professional Conduct that addresses the attorney-client relationship in the government context. As noted, the language of Rule 3-600 does not apply to the unique situation of government attorneys.²⁶¹ Most importantly, the State Bar should identify the government attorney's client and delineate an appropriate reporting scheme for informing that "client" of wrongdoing in the organization. Because changes to the language of Rule 3-600 would be comprehensive, the State Bar

²⁵⁹**COPRAC Report**, supra note 7, at 20-21. In the wake of the Quackenbush scandal, COPRAC considered transferring the duty of confidentiality from section 6068(e) to a new rule 3-100. Id.

²⁶⁰Supra, Section IV(A) (2).

²⁶¹See supra, Section IV(C) (2).

should adopt a new Rule that specifically addresses attorney-client issues in the government. This proposal should be implemented regardless of whether the duty of confidentiality is transferred to the Rules of Professional Conduct.²⁶²

a. Identify Whom a Government Attorney Represents

Rule 3-600 identifies the nature of the relationship between an attorney and her client.²⁶³ Where a client is an organization, the Rule identifies to whom the attorney owes allegiance.²⁶⁴ The State Bar and Supreme Court are the only entities who should have the power to define the attorney-client relationship. The Court has the inherent power to regulate attorney conduct.²⁶⁵ The Bar has expertise in understanding the issues that affect attorneys and clients in conflict.²⁶⁶ The fact that there is no equivalent statute in the Business and Professions Code reflects the Court and Bar's traditional roles as the appropriate entities to define this relationship.

²⁶²See id. at 21. "We never viewed a new rule 3-100 as necessary to adopt our recommended changes to rule 3-600." Id.

²⁶³See Cal. Rules of Prof'l Conduct R. 3-600 (2007).

²⁶⁴See id. R. 3-600(D).

²⁶⁵See, e.g. In Re Discipline System, 967 P.2d 49, 55 (Cal. 1998).

²⁶⁶Cal. Bus. & Prof. Code § 6013.5.

This proposal differs significantly from COPRAC's unsuccessful attempt to modify Rule 3-600, in 2002.²⁶⁷ First, COPRAC's proposed Rule, although it purported to clarify "who is" the government attorney's client, did not specifically identify the governmental client because COPRAC recognized that an attorney's client may vary from case to case.²⁶⁸ In other words, COPRAC noted the complexity of deciding who the client is but declined to answer the question.

Second, COPRAC's suggestion in reality seemed to override the statutory duty of confidentiality, or at least, call it into question by creating a proposed safe-harbor provision.²⁶⁹ The Proposed Rule contemplated a system for reporting within the agency.²⁷⁰ If such a reporting scheme failed and certain conditions were met, a government attorney

²⁶⁷See supra, Section II(B).

²⁶⁸**COPRAC Report**, Exh. 1 (Proposed Rule 3-600, Discussion, at 4). "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." *Id.*

²⁶⁹Id.

²⁷⁰Id.

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.²⁷¹

In other words, COPRAC tried provide a safe harbor to protect government attorney whistleblowers from Bar prosecution. Because COPRAC did not specify exactly whom a government attorney represents, reporting to a "law enforcement agency" or other agency with oversight" could arguably break one's duty of confidentiality. Had COPRAC defined "client" as broadly as "the government" or "the executive branch," reporting to another agency or law enforcement would not violate the duty. COPRAC itself recognized that the proposed rule might not be capable of immunizing an attorney from violating the statutory duty of confidentiality; "[a]lthough the Supreme Court can provide a safe harbor from discipline for violation of the rules it has adopted, there is a question whether it can provide a safe harbor for a lawyer who violates a provision of the State Bar

²⁷¹Id.

Act.”²⁷² Consequently, the Supreme Court perceived that the proposed rule unduly intervened with the Legislature’s jurisdiction and denied the request.²⁷³

In contrast, the present proposal is limited to requesting that the State Bar propose a rule that truly identifies the government “client,” and the proper means of reporting wrongdoing within the client entity. Instead of trying to provide a safe harbor, which could again be perceived as interfering with the statute, the Bar should focus on defining the attorney-client relationship to alert attorneys of the limits of their representation of the government client.

To determine whom a government attorney represents, the State Bar will need to evaluate the existing theories and determine which best applies. Designating which model the State Bar should choose is beyond the scope of this article; however, numerous scholars have contributed to the debate on the identity of a government client.²⁷⁴ Given that there are so many

²⁷² **COPRAC Report**, supra note 7, at 18.

²⁷³ In Re Adoption of Amendments to Rule 3-600 of the Rules of Professional Conduct, No. S106482 (Cal. 2002) (on file with the State Bar of California).

²⁷⁴ See, e.g. Roger C. Cramton, The Lawyer as Whistleblower: Confidentiality and the Government Lawyer, 5 **Geo. J. Legal**

permutations of the government attorney-client relationship within the structure of the government,²⁷⁵ the Bar may have to adopt a complex Rule with instructions for how to approach a less-traditional representation model.

b. Create a Separate Rule of Professional Conduct That Incorporates This New Description of the Attorney-Government Client Relationship.

Ethics 291, 296 (1991); Robert P. Lawry, *Confidences and the Government Lawyer*, 57 N.C. L. Rev. 625 (1979); Solomon, *supra* note 197, at 298-312; Witkowski, *supra* note 71, at 154-68.

²⁷⁵ See Witkowski, *supra* note 71, at 124-26. Witkowski identifies three examples where the question of “who is the client” arises. First, where an Assistant Attorney General is tasked with litigating an issue for another government agency, yet believes the case should be settled. Second, where several agencies within the same branch of government participate in negotiations and the attorneys are working together despite potentially adverse interests. Third, where a city attorney is assigned to represent the mayor charged with corruption and feels that there is a conflict of interest because she is “obligated to represent the interests of the government and the public.” *Id.*

The State Bar should create a new Rule that would specifically address the nuances of the attorney-client relationship in the government context.²⁷⁶ First, because the current rule fails to consider not only whom a government attorney represents but also how to report wrongdoing to that "client,"²⁷⁷ adopting a new Rule would be more less confusing than separating each sub-section of Rule 3-600 into "governmental organization" and "non-governmental organization." Moreover, if the State Bar decides to designate several models for different government attorneys to identify their the client, it might be simpler to just have a separate Rule. However, although this is the preferred method, if the Bar chooses not to adopt a new Rule, it should at least change the language of Rule 3-600 as discussed above.

2. Addressing the Limitations of This Proposal

As noted above, identifying who exactly is the government client will be a challenging task for the State Bar. However, leaving this inquiry unanswered would keep government attorneys unsure of the nature of their relationship with their "client." Without clear guidance, an attorney who witnesses wrongdoing

²⁷⁶This new Rule could be entitled "Governmental Organization as Client."

²⁷⁷See supra, Section IV(C).

would be placed in the uncomfortable position of trying to figure out to whom she owes the duty of confidentiality.²⁷⁸ The State Bar, with its many resources, should be able to answer this question. Finding the right approach to the issue of the identity of a government client may even require several attempts and extensive input from the community; however, this is an essential task. A government attorney who does not know the identity of her client could be exposed to scrutiny from the State Bar if she chooses to report wrongdoing. Worse yet, she might decide not to report it at all, to the detriment of the citizens of California.

VI. Conclusion

Government attorneys in California are forced to choose between their position as public servants and counselors of law. Moving the duty of confidentiality to the Rules of Professional Conduct would enable the Supreme Court to better manage this important duty, and this in turn would ensure that the changing needs of the legal system are being met. The Supreme Court could then consider the merits of creating an exception to duty for government attorneys. Regardless of whether this occurs, the State Bar should adopt a new Rule of Professional Conduct and, within it, define who, exactly, is the client of a

²⁷⁸ Doskow, Ethics Rules in Flux, supra note 102..

government attorney. Adopting one or both of these proposals would provide clarity to attorneys who are currently forced to choose between the legal system's requirements and their own ethical concerns.