



Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 41
Number 2 *Symposium: Comparative Judicial
Review*

Article 8

1-1-2008

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

Jessica Shpall

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

Jessica Shpall, *A Shakeup for the Duty of Confidentiality: The Competing Priorities of a Government Attorney in California*, 41 Loy. L.A. L. Rev. 701 (2008).

Available at: <https://digitalcommons.lmu.edu/llr/vol41/iss2/8>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

A SHAKEUP FOR THE DUTY OF CONFIDENTIALITY: THE COMPETING PRIORITIES OF A GOVERNMENT ATTORNEY IN CALIFORNIA

*Jessica Shpall**

I. INTRODUCTION

In the early hours of January 17, 1994, a 6.7 magnitude earthquake struck the Los Angeles area, killing 72 people and injuring 1,500.¹ 92 percent of the structural damage affected apartment buildings.² The Northridge quake was the most expensive disaster California had endured at that time, causing \$27 billion in 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 their claims.⁵

Consistent with its mission of protecting consumer interests,⁶ the California Department of Insurance (“CDI”) investigated how several insurance companies adjudicated these claims and concluded

* J.D. Candidate, May 2009, Loyola Law School, Los Angeles; B.A., Spanish Literature, June 2002, University of California, San Diego. Many thanks to Professor Gary Williams for recommending this topic and providing invaluable substantive guidance. Professor Sean Scott’s wisdom and helpful critique made the writing process an especially meaningful experience for me. I dedicate this Note to Ezra and my family, in appreciation of their patience and support.

1. ROBERTA ANN JOHNSON, *WHISTLEBLOWING: WHEN IT WORKS AND WHY* 40 (Lynne Rienner Publishers 2003) (2002).

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*, SACRAMENTO BEE, July 23, 2003, at 11.

6. See Cal. Dep’t of Ins., *About Us: An Introduction to CDI Operations*, <http://www.insurance.ca.gov/0500-about-us/0100-cdi-introduction/> (last visited Jan. 13, 2008).

that the companies had not complied with insurance regulations.⁷ Instead of fining the companies and forcing them to pay restitution to the wronged earthquake victims, however, Insurance Commissioner Charles Quackenbush settled with the companies by allowing them to make nominal, tax-exempt “donations” to nonprofit organizations.⁸

Then, a CDI employee named Cindy Ossias blew the whistle, exposing the truth about Quackenbush’s donation scheme.⁹ When the California State Assembly Committee on Insurance (“Insurance Committee”) asked Ossias about the dubious settlements, she handed over internal CDI 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, used the settlement funds for personal gain.¹¹ Quackenbush eventually resigned.¹²

If Ossias had been a CDI research analyst, secretary, or investigator, she would have quietly returned to work because California’s whistleblower statutes protect employees from employment retaliation.¹³ Because Ossias was a CDI attorney, however, she was far from off the hook. The State Bar of California¹⁴ began to investigate whether she had violated her duty of confidentiality by revealing the documents to the legislature.¹⁵ By favoring her duty to serve the public over whatever duty of

7. COMM. ON PROF’L RESPONSIBILITY & CONDUCT, STATE BAR OF CAL., REPORT AND RECOMMENDATION ON AB 363, AT 4 (2001), available at <http://calbar.ca.gov/calbar/pdfs/3cp0107c.pdf> [hereinafter COPRAC REPORT].

8. Ossias, *supra* note 5.

9. *Id.*

10. *Id.*

11. Iñiguez, *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*].

13. See CAL. GOV’T CODE §§ 8547.8, 53298 (West 2007).

14. All references to the legislature, state bar, or supreme court relate to California entities unless otherwise noted.

15. 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,”¹⁶ Ossias almost lost her ability to practice law.¹⁷

Government attorneys¹⁸ 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.¹⁹ On the other, as attorneys, they have sworn to maintain their clients’ confidentiality.²⁰ 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.

After the Ossias affair, both the legislature and the state bar recognized the need to clarify when and how a government attorney can safely blow the whistle on official misconduct without risking her ability to practice law. After several attempts, however, no new rules or laws have been passed.²¹ While ultimately no action was taken against Ossias, the bar prosecutor made it clear that his decision to drop the case was not precedential.²² 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 the wrongdoing, allowing the harm to continue. Who knows how many other government attorneys have chosen to remain silent to the detriment of the public good?

This Note explores the tension between the competing policies of government transparency and client confidentiality, ultimately proposing a way for the California Supreme Court to better address this issue. Part II will discuss the factual background of the Ossias affair. Part III will examine the current legal framework governing whistleblower protections and the duty of confidentiality. Part IV

16. See *infra* Part 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.

17. Telephone Interview with Cindy Ossias, Senior Staff Counsel, Cal. Dep’t of Ins. (Sept. 24, 2007).

18. The 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.

19. See CAL. GOV’T CODE §§ 8547.8, 53298 (West 2007).

20. CAL. BUS. & PROF. CODE § 6068(e) (West 2007).

21. See *infra* Part II.B.

22. Letter from Donald R. Steedman to Richard Alan Zitrin (Oct. 11, 2000), in ZITRIN & LANGFORD, *supra* note 15, at 551 [hereinafter Steedman Letter].

will consider how this framework fails to meet the ethical concerns of government attorneys. Part 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 CDI investigated how several insurance companies evaluated claims and concluded that the claim practices did not comply with insurance regulations.²³ CDI attorneys and examiners compiled grievances against the insurance companies into confidential internal reports called “market conduct examination reports” (“MCE Reports”).²⁴

CDI attorney Cindy Ossias participated in preparing the MCE Reports.²⁵ She and her colleagues found that the insurance companies had mistreated policyholders by conducting cursory damage inspections, making insufficient settlement offers to pay for repairs, unreasonably delaying payments, and then denying supplemental claims based on an alleged expiration of the statute of limitations.²⁶ As a result, CDI staff members recommended that the companies pay multimillion-dollar fines and restitution to claimants.²⁷

Instead of commencing legal action against the insurance companies, Insurance Commissioner Charles Quackenbush settled with the companies.²⁸ Quackenbush agreed not to impose fines or complete the MCE Reports if the insurers would make donations to

23. COPRAC REPORT, *supra* note 7, at 4.

24. Telephone Interview with Cindy Ossias, *supra* note 17.

25. *Id.*

26. Ossias, *supra* note 5.

27. See JOHNSON, *supra* note 1, at 42 (stating that CDI lawyers recommended a fine of \$119 million for State Farm alone, and that total fines against insurers for improper action in Northridge may have totaled as much \$3.7 billion). 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.

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

charitable foundations dedicated to earthquake education and relief.²⁹ These donations totaled \$12 million and were tax-deductible.³⁰

When Ossias and her colleagues noticed the large discrepancy between the penalties they recommended and the tax-deductible donations represented in the settlement agreements, they were “appalled.”³¹ Both the Los Angeles Times and the legislature also noticed the suspicious settlement terms and began investigating Quackenbush’s actions.³² In January 2000, when a consultant to the chairman of the Insurance Committee 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.”³³ Once Ossias turned over the reports, the Insurance Committee revealed them to the public by posting salient portions of them on the Internet.³⁴ In the course of a department-wide investigation that Quackenbush initiated,³⁵ Ossias admitted during an “interview/interrogation” that she was the whistleblower.³⁶ The next day, department management ordered her to “vacate the premises immediately” and take administrative leave.³⁷

Once the legislature and the California Attorney General began to investigate the matter, information about Quackenbush’s political and personal involvement with those charitable foundations receiving “donations” began to surface.³⁸ Testimony revealed that the “commissioner personally ordered his staff to collect \$4 million in settlements with title insurance companies for TV commercials

29. Telephone Interview with Cindy Ossias, *supra* note 17.

30. Iñiguez, *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 to a special fund to avoid further investigation, Allstate paid \$2 million to the California Research and Assistance Fund, and 20th Century Insurance and State Farm also donated to special foundations. *Id.*

31. Ossias, *supra* note 5; *see also* ZITRIN & LANGFORD, *supra* note 15, at 550.

32. ZITRIN & LANGFORD, *supra* note 15, at 550.

33. Ossias, *supra* note 5.

34. Ellis & Ingram, *supra* note 28.

35. Ellis, *Insurance Dept. Reinstates Whistle-Blower*, *supra* note 12.

36. Ossias, *supra* note 5.

37. *Id.*

38. Iñiguez, *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.*

featuring Quackenbush.”³⁹ Two days later, on June 28, 2000, Quackenbush announced his resignation.⁴⁰

Ossias was eventually reinstated by Quackenbush’s successor in August 2000⁴¹ and continues to work at the CDI today.⁴² Ossias was not fired as a result of her actions because California whistleblower laws protect government employees from retaliation.⁴³ However, Ossias’s status as an attorney was threatened when the California State Bar’s Office of Trial Counsel began investigating whether her disclosure of confidential material⁴⁴ merited disciplinary measures.⁴⁵ Eventually, the state bar discontinued the investigation without determining whether Ossias acted unethically.⁴⁶ In a letter to Ossias’s attorney,⁴⁷ the state bar prosecutor never specified who was Ossias’s client or whether she had breached her duty of confidentiality.⁴⁸

Ossias was forced to choose between her desire to report government wrongdoing and her binding ethical duty as an attorney to maintain client confidentiality. Because attorney conduct is governed both by statute⁴⁹ and Rules of Professional Conduct promulgated by the California Bar and approved by the California Supreme Court,⁵⁰ both the legislature and the state bar considered ways to clarify the relationship between the policy for government transparency and a government attorney’s duty of confidentiality.⁵¹

39. *Id.* 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.

40. Ellis, *Insurance Dept. Reinstates Whistle-Blower*, *supra* note 12.

41. *Id.*

42. See Telephone Interview with Cindy Ossias, *supra* note 17.

43. See CAL. GOV’T CODE §§ 8547.8, 53298 (West 2007).

44. The duty of confidentiality is codified in CAL. BUS. & PROF. CODE § 6068(e) (West 2007).

45. ZITRIN & LANGFORD, *supra* note 15, at 550.

46. *Id.* at 550–52.

47. Steedman Letter, *supra* note 22.

48. ZITRIN & LANGFORD, *supra* note 15. Instead, the state bar prosecutors “exonerated Ossias on whistleblowing and public policy grounds.” *Id.*; see *infra* Part IV.2.

49. CAL. BUS. & PROF. CODE §§ 6000–6238.

50. CAL. R. PROF’L CONDUCT 1-100(A).

51. COPRAC REPORT, *supra* note 7, at 2.

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

Soon after the Ossias investigation, Assemblyman Darrel Steinberg (D-Sacramento) proposed Assembly Bill 363 (“A.B. 363”), which would create an exception to the duty of confidentiality enumerated in section 6068(e) of the California Business and Professions Code.⁵² The bill was drafted to protect government lawyers in California from the threat of losing their bar licenses when they revealed confidential information to expose wrongdoing.⁵³ 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 state and local public entities supersede the statutes and rules governing the attorney-client privilege[.]”⁵⁴ The opinion concluded that the legislature, in passing the whistleblower statutes, did not intend to override the ethics provisions governing attorney-client privilege.⁵⁵

The assembly passed A.B. 363 and the California Senate’s Subcommittee on the Judiciary took it under submission.⁵⁶ Soon, the state bar became interested in the possibility of amending the Rules of Professional Conduct, instead of the Business and Professions Code.⁵⁷ On July 9, 2001, the senate suspended its hearings to allow the bar to conduct its own study of how A.B. 363 might impact government lawyers.⁵⁸

The California Bar’s Committee on Professional Responsibility and Conduct (“COPRAC”) determined that, instead of a statutory

52. Virginia Ellis, *Bill Proposes Protections for State Lawyers*, L.A. TIMES, Feb 22, 2001, at A3 [hereinafter Ellis, *Bill Proposes Protections*]; see CAL. BUS. & PROF. CODE § 6068(e).

53. Ellis, *Bill Proposes Protections*, *supra* note 52.

54. 84 Op. Cal. Att’y Gen. 71, 71 (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)*, 25 WHITTIER L. REV. 21, 38–39 (2003) [hereinafter Duskow, *Two-Year Journey to Nowhere*].

55. Attorney General, *supra* note 54, at 71; Duskow, *Two-Year Journey to Nowhere*, *supra* note 54, at 38 (characterizing the opinion as “fram[ing] the issue as one of precedence and legislative intent”).

56. COPRAC REPORT, *supra* note 7, at 2 n.4.

57. *Id.* at 2.

58. *Id.*

exception, it would be more effective for the California Supreme Court to amend Rule of Professional Conduct 3-600, titled "Organization as Client," to specifically address the needs of government attorneys.⁵⁹ The California State Bar's Board of Governors adopted the change and sent it to the California Supreme Court for approval.⁶⁰ 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)."⁶¹

After the supreme court denied the request to modify the Rules of Professional Conduct, the senate resumed its debate of A.B. 363 and eventually passed a bill containing a statutory exception to the duty of confidentiality for government attorneys.⁶² However, Governor Gray Davis vetoed the bill, fearing that the attorney-client relationship would be weakened by the exception.⁶³ After Governor Arnold Schwarzenegger took office, Assemblywoman Fran Pavley introduced a new incarnation of A.B. 363 that also passed both houses with bipartisan support.⁶⁴ 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.⁶⁵ In 2006, Pavley introduced

59. *Id.* at 2–3. Rule 3-600 identifies the "client" of an attorney representing an organization and a reporting scheme in the case of internal wrongdoing. CAL. R. PROF'L CONDUCT 3-600. COPRAC noted that the current focus of Rule 3-600 is limited to attorneys who represent private organizations. COPRAC REPORT *supra* note 7, at 3. Amending Rule 3-600 to address the needs of government attorneys was the preferred approach because the A.B. 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* Parts IV.C, V.B.

60. Doskow, *Two-Year Journey to Nowhere*, *supra* note 54, at 42–43.

61. *In re* Adoption of Amendments to Rule 3-600 of the Rules of Prof'l Conduct, No. S104682 (Cal. 2002) (on file with the state bar); Don J. DeBenedictis, *Justices Reject Bar's Whistleblower Rule*, L.A. DAILY J. May 14, 2002, at 3.

62. Doskow, *Two Year Journey to Nowhere*, *supra* note 54, at 46.

63. *Id.* 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).

64. MANUEL VALENCIA, 1612 ASSEMBLY BILL ANALYSIS 3 (2006), available at http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_1601-1650/ab_1612_cfa_20060118_170017_asm_floor.html. The bill was officially called A.B. 2713. *Id.*

65. Letter from Arnold Schwarzenegger, Governor of the State of Cal., to the Members of the California State Assembly, Veto of Assembly Bill 2713 (Sept. 9, 2004), available at http://info.sen.ca.gov/pub/03-04/bill/asm/ab_2701-2750/ab_2713_vt_20040928.html.

another draft of the bill, A.B. 1612.⁶⁶ The Assembly approved the measure, but Pavley retracted her sponsorship when it became apparent that the governor would not allow the bill to become law.⁶⁷

Despite the strong political will to clarify the priorities of a government attorney, the momentum incited by Cindy Ossias' experience has reached an impasse. The next part of this Note will evaluate the existing legal framework that creates these conflicting messages of transparency and secrecy.

III. EXISTING LEGAL FRAMEWORK

Government attorneys in California are caught between two contradictory sets of laws. On one hand, whistleblower statutes promote transparency in government, while on the other, the rules and statutes governing legal ethics⁶⁸ require that attorneys keep client information confidential. The whistleblower statutes are not mandatory but rather encourage government workers to disclose "improper governmental activities"⁶⁹ by protecting them from retribution.⁷⁰ In contrast, all lawyers must comply with the provisions that address confidentiality, and any deviation could subject an attorney to discipline by the state bar.⁷¹ The only safe course of action for an attorney in Cindy Ossias's position is to maintain the government "client's"⁷² absolute confidentiality.⁷³ This situation, however, means that the whistleblower statutes effectively

66. Assem. B. 1612, 2005-06 Reg. 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.

67. Marisa Huber, *Ethics Year in Review*, 47 SANTA CLARA L. REV. 867, 905 (2007). The state bar firmly opposed this proposed 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, at 1.

68. Because California attorney regulation is jointly governed by statute and rules of professional conduct, this Note also refers to the entire system of regulation as "the ethics provisions."

69. CAL. GOV'T CODE, § 9149.21 (West 2007).

70. *Id.* § 8547.1.

71. RICHARD C. WYDICK, REX. R. PERSCHBACHER & DEBRA LYN BASSETT, CALIFORNIA LEGAL ETHICS 44-46 (5th ed. 2005) [hereinafter CALIFORNIA LEGAL ETHICS].

72. Defining the attorney's client is a challenging task and is therefore the source of much debate. *See, e.g.*, COPRAC REPORT, *supra* note 7, at 14; Wayne C. Witkowski, *Who is the Client of the Municipal Government Lawyer?*, in MUNICIPAL LAW INSTITUTE (SEVENTH ANNUAL) 117, 155-56 (2007).

73. *See* COPRAC REPORT, *supra* note 7, at 18.

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. In the following discussion, this Part will set forth the competing policies of government transparency and client confidentiality.

A. *The Whistleblower Statutes*

Whistleblowing is considered to be a form of internal dissent, whereby a member of an organization speaks out against wrongdoing.⁷⁴ Statutes that encourage whistleblowing are intended to promote a government employee's ethical duty to expose "waste, fraud, and abuse."⁷⁵ Whistleblowers are an integral part of the system of checks and balances; they sound the alarm when individuals or government entities threaten to overstep their authority.⁷⁶ Moreover, these statutes have a deterrent effect on misconduct.⁷⁷ 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,⁷⁸ officials have been concerned about public cynicism and distrust of the government since the 1960s.⁷⁹ Modern whistleblower protections are one way to improve the public's perception of the government.⁸⁰ The fact that many states and the federal government have enacted whistleblower statutes⁸¹ reflects a widespread commitment to this policy.⁸²

74. JOHNSON, *supra* note 1, at 3–4.

75. *Id.* at 6.

76. *Id.* at 11.

77. *Id.* at 75.

78. Jonathan 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).

79. JOHNSON, *supra* note 1, at 16.

80. *Id.*

81. *See, e.g.*, Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 32 (codified at 5 U.S.C. §§ 1211–19, 1221, 1222, 3352 (2000)); ARIZ. REV. STAT. ANN. § 38-532 (2007); COLO. REV. STAT. § 24-50.5-101 (2007).

82. *See* Macey, *supra* note 78, at 1901 ("[T]he 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.").

There are several provisions scattered throughout the California Government Code that provide guidance to whistleblowers. The California Whistleblower Protection Act⁸³ 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."⁸⁴ 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."⁸⁵ Upon receiving information about improper behavior, the state auditor⁸⁶ is empowered to investigate the issue and report to the appropriate oversight body.⁸⁷ The whistleblower often remains anonymous.⁸⁸ Moreover, the statutes expressly prohibit employees from intimidating or retaliating against the whistleblower.⁸⁹

The Whistleblower Protection Act applies to all individuals "appointed by the Governor or employed or holding office in a state agency,"⁹⁰ which includes attorneys.⁹¹ Local government employees are also protected by whistleblower provisions.⁹² Depending on which whistleblower statute applies, private counsel retained by the government may not always be protected from termination for speaking out against improper government activity.⁹³

In passing the statutes, the legislature intended to facilitate and encourage whistleblowing in order to promote integrity in government.⁹⁴ However, the language of the statute makes it clear

83. CAL. GOV'T CODE §§ 8547–48.5 (West 2007).

84. *Id.* § 8547.1.

85. *Id.* § 8547.2(b).

86. Although the statutes do not specifically limit to whom a whistleblower can report, they authorize the state auditor, state legislature, or a "local agency" to receive reports from government employees. *Id.* §§ 53297, 8547.5, 9149.23.

87. *Id.* §§ 8547.5 to .7.

88. *Id.* § 8547.5

89. *Id.* §§ 8547.8, 53298.

90. *Id.* § 8547.2(a).

91. Attorney General, *supra* note 54.

92. *See* CAL. GOV'T CODE §§ 53296–53299.

93. *See* 3 WITKIN SUMMARY OF CALIFORNIA LAW *Agency and Employment* § 258, at 337 (10th ed. 2005) (citing CAL. GOV'T CODE §§ 8547–8548.5, which is limited to protecting "state employees"). *Witkin* is widely used by California practitioners. *But see* CAL. GOV'T CODE § 9149.21 (West 2007) ("[S]tate employees and *other persons* should disclose . . . improper governmental activities." (emphasis added)).

94. CAL. GOV'T CODE § 9149.21; Attorney General, *supra* note 54.

that whistleblowing is optional.⁹⁵ Furthermore, employees are not authorized to reveal “information otherwise prohibited by or under law.”⁹⁶

B. A California Attorney’s Duty of Confidentiality

The whistleblowing statutes encourage government employees, including attorneys, to act ethically by revealing waste and wrongdoing in the government. Yet, the competing duty to protect client confidentiality⁹⁷ is one of the most important ethical duties of a lawyer.⁹⁸

Attorney behavior in California is governed by two bodies of law: California Business and Professions Code sections 6000–6238 (“Code”) and the California Rules of Professional Conduct (“Rules”).⁹⁹ Members of the state bar could be subject to discipline for a violation of either the Code or the Rules.¹⁰⁰

The duty of confidentiality is codified in section 6068(e)(1) of the California Business and Professions Code, which mandates that an attorney “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets,¹⁰¹ of his or her client.”¹⁰² Between 1880 and 2003, the only amendment to the language of this provision made the pronouns gender-neutral.¹⁰³ In 2003, the legislature passed the sole statutory exception to the duty of

95. See CAL. GOV’T CODE § 9149.21.

96. *Id.* § 8547.3(d); see also *id.* §§ 9149.21, 9149.23(c).

97. The 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 & 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).

98. 1 WITKIN CALIFORNIA PROCEDURE *Attorneys* § 118 at 155–57 (4th ed. 1996) [hereinafter WITKIN, *Attorneys*].

99. See CALIFORNIA LEGAL ETHICS, *supra* note 71, at 44.

100. See *id.* at 44–46.

101. The 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 state bar).

102. CAL. BUS. & PROF. CODE § 6068(e)(1) (West 2007).

103. Charles Doskow, *Ethics Rules in Flux: Conscience, Clarity and Confidentiality in California*, PROF. LAW., Spring 2004, at 22 [hereinafter Doskow, *Ethics Rules in Flux*]. There were also a few judicially imposed exceptions. CALIFORNIA LEGAL ETHICS, *supra* note 71, at 187.

confidentiality.¹⁰⁴ 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 believes is likely to result in death of, or substantial bodily harm to, an individual.”¹⁰⁵

The Rules merely supplement this statutory duty of confidentiality.¹⁰⁶ Rule 3-100 prohibits a state bar member from revealing confidential information under section 6068(e)(1) unless an exception applies or the client gives informed consent.¹⁰⁷ Rule 3-100 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.¹⁰⁸

The duty of confidentiality is one of the key aspects of the attorney-client fiduciary relationship.¹⁰⁹ It is “fundamental” to the existence of our legal system.¹¹⁰ On an individual level, confidentiality ensures that a client is completely free to trust her lawyer with sensitive information, thereby promoting open communication.¹¹¹ This level of communication 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.¹¹² Such advice is beneficial both to the client and arguably to the larger society.¹¹³ For attorneys,

104. Doskow, *Ethics Rules in Flux*, *supra* note 103, at 22–23.

105. CAL. BUS. & PROF. CODE § 6068(e)(2).

106. In fact, there was no rule mentioning the duty until the legislature passed the statutory exception to confidentiality in 2004. Doskow, *Ethics Rules in Flux*, *supra* note 103, at 22.

107. See CAL. R. PROF'L CONDUCT 3-100(a).

108. *Id.*

109. WITKIN, *Attorneys*, *supra* note 98.

110. *People ex rel. Dep't of Corps. v. SpeeDee Oil Change Sys., Inc.*, 980 P.2d 371, 378 (Cal. 1999).

111. See, e.g., *Gen. 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 . . .”).

112. Roger C. Cramton, *Proposed Legislation Concerning a Lawyer’s Duty of Confidentiality*, 22 PEPP. L. REV. 1467, 1477 (1995).

113. For 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.

the duty of confidentiality is a reminder of the importance of undivided loyalty to one's client.¹¹⁴

As discussed, however, 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 protect whistleblowing,¹¹⁵ 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 these attorneys to listen to their conscience, the ethics provisions mandate that they ignore this awareness in favor of client confidentiality. The first problem with this system is that while the legislature and the supreme court have an interest in protecting the duty of confidentiality, the legislature ends up completely controlling the scope of this duty because it is enshrined in statute. 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 or ignoring the ethics provisions, resulting in inconsistent application of ethical rules. 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.

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

115. 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 (West 2005). Therefore, since the duty of confidentiality is also codified by statute, an attorney who discloses a client's confidential information would not be immune to retaliation under the whistleblower protection statutes.

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. As such, 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. In the following examination this issue, this Part 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 since this is one of the court's main duties under the California Constitution.¹¹⁶ In contrast, the legislature seeks to protect the public at large¹¹⁷ by preventing attorneys from abusing their positions of power. Therefore, the legislature is also allowed 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 those functions."¹¹⁸

The legislature has a long history of regulating attorney conduct. In 1927, the legislature formally adopted the Bar Act ("Act"),¹¹⁹ which is now a part of the California Business & Professions Code.¹²⁰ The Act created an integrated state bar.¹²¹ Prior to the passage of the Act, existing voluntary bar associations experienced difficulty in

116. See CAL. CONST. art. VI, § 1; *In re Attorney Discipline Sys.*, 967 P.2d 49, 54 (Cal. 1998).

117. *In re Attorney Discipline Sys.*, 967 P.2d at 61.

118. *Brydonjack v. State Bar*, 281 P. 1018, 1020 (Cal. 1929).

119. WITKIN, *Attorneys*, *supra* note 98, § 358.

120. See 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.

121. In an "integrated bar," all practicing attorneys in the state must be members. See *Keller v. State Bar*, 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 is and shall be a member of the State Bar." CAL. CONST. art. VI, § 9.

enforcing professional standards and assimilating the large waves of attorneys arriving in California.¹²² Moreover, laypersons posing as lawyers had created a fiercely competitive market for clients.¹²³

The Act officially recognized the supreme court's tradition of assuming jurisdiction over attorney discipline.¹²⁴ The Act also established the state bar as a "public corporation"¹²⁵ to help the supreme court carry out its disciplinary duties.¹²⁶ The state bar is merely an "administrative assistant to or adjunct of [the] court."¹²⁷ The supreme court is the ultimate arbiter of admittance to practice law, suspension, and disbarment.¹²⁸

Once the Act codified the California Supreme Court's disciplinary power over attorneys, the court in 1928 adopted its own Rules of Professional Conduct.¹²⁹ Today's Rules patch together aspects of the American Bar Association ("ABA") Model Rules, the old ABA Model Code, and earlier California legal ethics rules.¹³⁰ To amend a Rule of Professional Conduct, the California Bar's Board of Governors adopts a draft amendment and submits it to the supreme court for approval.¹³¹

In California, like in most states, the supreme court oversees the entire judicial system.¹³² "[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."¹³³ Despite the fact that

122. CORINNE LATHROP GILB, SELF-REGULATING PROFESSIONS AND THE PUBLIC WELFARE: A CASE STUDY OF THE CALIFORNIA BAR 36 (1956) (Ph.D. dissertation, Radcliffe College).

123. *Id.* 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.*

124. *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").

125. CAL. CONST. art. VI, § 9.

126. *In re Attorney Discipline Sys.*, 967 P.2d 49, 58–59 (Cal. 1998).

127. *Id.* at 59.

128. *See Keller v. State Bar*, 496 U.S. 1, 11–12 (1990).

129. WITKIN, *Attorneys*, *supra* note 98, § 476.

130. CALIFORNIA LEGAL ETHICS, *supra* note 71.

131. *See* CAL. BUS. & PROF. CODE § 6076.5 (West 2007).

132. *In re Attorney Discipline Sys.*, 967 P.2d 49, 54 (Cal. 1998); *see* CAL. CONST. art. VI, § 1.

133. *In re Attorney Discipline Sys.*, 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.

this power belongs to the supreme court, the legislature manages attorney conduct through the Act.¹³⁴ One of the Act's functions is regulating behavior "which would constitute the unauthorized practice of law if performed by a layman."¹³⁵ The Act defines the duties of an attorney,¹³⁶ among them the duty of confidentiality.¹³⁷ Additionally, the Act includes provisions that govern fee agreements and advertising, the violation of which could lead to discipline.¹³⁸ Sections like these equate to direct regulation of attorney conduct by the legislature.¹³⁹

While the Act provoked immediate controversy, the California Supreme Court upheld it in *State Bar of California v. Superior Court of Los Angeles County*.¹⁴⁰ The court noted that attorneys constitute the largest and most influential group of professionals in California.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 Because being a lawyer is a prerequisite to becoming a judge, however, the court implied that it was necessary to have another branch keep watch over the judiciary.¹⁴³

Hence, under the constitutional doctrine of separation of powers, the court has inherent and primary regulatory power [over admission to practice law]." *Id.* (citations omitted); WITKIN, *Attorneys*, *supra* note 98, § 356, at 438.

134. Doskow, *Ethics Rules in Flux*, *supra* note 103.

135. *Baron v. City of L.A.*, 469 P.2d 353, 358 (Cal. 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 122, at 36–37.

136. CAL. BUS. & PROF. CODE § 6068 (West 2007).

137. *Id.* § 6068(e). As noted *infra* Part 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 take an oath . . . and faithfully to discharge the duties of any attorney at law . . ." *Id.*

138. Doskow, *Ethics Rules in Flux*, *supra* note 103.

139. *Id.*

140. *State Bar v. Superior Court*, 278 P. 432, 439 (Cal. 1929).

141. *Id.* at 435.

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

143. *State Bar 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.*

[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 the court's opinion, fear of attorney omnipotence justified legislative oversight of professional conduct.¹⁴⁵ Consistent with this decision, the California Supreme Court has never held that the Act's provisions regulating attorney conduct are an unconstitutional exercise of legislative authority.¹⁴⁶

To protect the public, the legislature is authorized under its police power to create laws that govern the practice of law.¹⁴⁷ Similarly, the California Supreme Court seeks to protect the public through the Rules of Professional Conduct and its own disciplinary authority.¹⁴⁸ The supreme court enacts the Rules to set standards based on the court's perception of what constitutes appropriate legal practice.¹⁴⁹ When attorneys fail to comply with these standards, members of the public can vindicate their rights by reporting the 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

144. *Id.* at 435.

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

146. *Ethics Rules in Flux*, *supra* note 103; *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).

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

148. CAL. R. PROF'L CONDUCT 1-100; *see Howard v. Babcock*, 863 P.2d 150, 162 (Cal. 1993) (quoting *Ames v. State Bar*, 506 P.2d 625, 629 (Cal. 1973)).

149. *See* CAL. R. PROF'L CONDUCT 1-100 (stating that the Rules are designed "to protect the public and to promote respect and confidence in the legal profession").

150. *See, 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).

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

152. *See 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

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 statute.¹⁵³ An example of this dynamic is the story of how Rule of Professional Conduct 3-100 came into existence.

Before 1987, there was no mention of the duty of confidentiality in the Rules.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 defined the terms "confidence" and "secrets" to clarify potentially ambiguous language in section 6068(e).¹⁵⁶

In declining to adopt this new Rule, the court did not provide its reasons.¹⁵⁷ In a letter to the president of the state bar, however, the court "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 As such, it appears that the court feared intruding on the legislature's jurisdiction by creating an exception to the duty of confidentiality without a corresponding evidentiary 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 but proposed only one exception to it.¹⁶⁰ The exception was limited to preventing

of a public trust, the granting of which privilege to an individual is everywhere conceded to be the exercise of a judicial function (citations omitted). *Id.*

153. *See* Mohr, *supra* note 97, at 366.

154. *See* CAL. R. PROF'L CONDUCT ch. 3, 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 103 (discussing other characteristics particular to California's system of attorney regulation).

155. Mohr, *supra* note 97, at 369–70.

156. *Id.* at 369 n.240.

157. *Id.* at 372.

158. *Id.* at 370 n.241.

159. *Id.* at 374–75. 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* Part III.B.

160. Mohr, *supra* note 97, at 370–71.

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 bar.¹⁶² The supreme court again rejected this suggestion without explanation.¹⁶³

In 1998, the state bar proposed a third version of rule 3-100 that again included an exception for criminal acts that might result in substantial bodily harm.¹⁶⁴ This version abandoned the “safe harbor” provision¹⁶⁵ but suffered the same fate as its predecessors, receiving another curt denial.¹⁶⁶

A few years later, in response to the Ossias affair, the bar tried to provide guidance for future whistleblowers by clarifying the relationship of a government attorney to her client.¹⁶⁷ In denying the bar’s request, the court became slightly more generous by providing 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 in 2003 passed 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.¹⁷⁰ 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).¹⁷¹

With the help of the bar’s input and proposals, the court has had ample opportunities to clarify the scope of the duty and adopt

161. *Id.*

162. *Id.* at 371.

163. *Id.* at 370–71.

164. *Id.* at 371.

165. *Id.* at 371 n.246.

166. *Id.* at 371–72.

167. *See supra* Part II.B.

168. *In re* Adoption of Amendments to Rule 3-600 of the Rules of Prof’l Conduct, No. S104682, (Cal. May 10, 2002) (on file with the state bar) (“[The request to amend Rule 3-600] is denied because the proposed modifications conflict with Business and Professions Code section 6068, subdivision (e).”); *see also* DeBenedictis, *supra* note 61.

169. CAL. BUS. & PROF. CODE § 6068(e)(2) (West 2007).

170. *See* John W. Amberg & Jon L. Rewinski, 2004 *Ethics Roundup*, L.A. LAW., June 2005, at 27–28.

171. CAL. R. PROF’L CONDUCT 3-100.

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 proposed modifications might be acceptable.

In light of the supreme court's reference to 6068(e) when rejecting proposed Rule 3-600 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, the duty of confidentiality is an important component of the legal system and therefore falls within the supreme court's jurisdiction. The supreme court's reluctant 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 an attorney's mandatory duty of confidentiality and optional whistleblower statutes, the state bar is forced to bring disciplinary action against a government attorney who blows the whistle.¹⁷⁴ If the bar instead chooses to favor transparency policies by ignoring the plain language of the ethics provisions, its enforcement procedures appear subjective and arbitrary. On one hand, any appearance of inconsistent application of the rules undermines the credibility of the 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.

172. Mohr, *supra* note 97, at 379. "Those 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), independent of the existence of the exceptions to the attorney-client privilege in the Evidence Code. *Id.* at 378-79.

173. *Brydonjack v. State Bar*, 281 P. 1018, 1020 (Cal. 1929).

174. Attorney General, *supra* note 54.

The way in which the bar handled the Ossias investigation illustrates the community's inclination to protect government attorney whistleblowing in spite of clear statutory language to the contrary.¹⁷⁵ After initiating an investigation into Ossias's disclosures, the California Bar's Office of Trial Counsel communicated to Ossias's attorney its decision to discontinue the investigation.¹⁷⁶ The deputy trial counsel declined to analyze whether the Department of Insurance was Ossias's client or whether she had breached her duty of confidentiality by providing documents to 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 subject to prosecution under the guidelines set forth in this office's Statement of Disciplinary Priorities."¹⁷⁸

The bar's letter does not adequately explain its decision because there is no discussion of how Ossias's 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 provides no indication of how the bar will approach future whistleblowers.¹⁷⁹

The first reason for exonerating Ossias—that she acted in the "spirit" of the Whistleblower Act—was not at issue.¹⁸⁰ Rather, the bar 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

175. Steedman Letter, *supra* note 22.

176. *Id.*

177. Doskow, *Two-Year Journey to Nowhere*, *supra* note 54, at 42–43 (2003); *see* Steedman Letter, *supra* note 22.

178. Steedman Letter, *supra* note 22.

179. ZITRIN AND LANGFORD, *supra* note 15, 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); Doskow, *Two Year Journey to Nowhere*, *supra* note 54, at 41.

181. *See* Doskow, *Two Year Journey to Nowhere*, *supra* note 54, at 41.

client, the Department of Insurance, in 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 state bar was attempting to appease the many bar members, public, and legislature who firmly supported Ossias’ actions.¹⁸⁶

Since Ossias was a likeable whistleblower, her actions were widely publicized, and Quackenbush’s behavior was so egregious, the bar had little choice but to bow to the pressures of public opinion and discontinue the investigation.¹⁸⁷ In failing to discuss whether Ossias had complied with the statutes, the bar perhaps 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 attorneys faced with a similar situation.¹⁸⁸ Furthermore, the bar explicitly stated that the letter contained no public policy implications.¹⁸⁹

At the very least, in Ossias’s case, the 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. Depending on the egregiousness of the act that the whistleblower reveals, the disciplinary arm of the bar might be willing to look the other way.¹⁹⁰ 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 or if so, to what extent.¹⁹¹ If an attorney is not sure whether it is safe to speak out, she will likely choose to be silent. There is a public cost to silence: a watered-down approach to government transparency.

182. *Id.*

183. *See id.*

184. Steedman Letter, *supra* note 22.

185. Doskow, *Two-Year Journey to Nowhere*, *supra* note 54, at 41.

186. *Id.* at 40–41.

187. *Id.*

188. ZITRIN AND LANGFORD, *supra* note 15, at 552.

189. Steedman Letter, *supra* note 22.

190. *See* Doskow, *Ethics Rules in Flux*, *supra* note 103, at 23.

191. *Id.*

Some might argue that the duty of confidentiality should always be favored over transparency policies, even in the case of government attorneys. A stringent duty of confidentiality is an essential aspect of the legal system.¹⁹² Although this is true, government attorneys are in a unique position. Like their fellow civil servants, they are repositories of 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 not 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. 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 would not erode all confidentiality. While the provisions of a possible exception to the duty of confidentiality for government attorneys are beyond the scope of this Note, a change in the structure of the duty of confidentiality could make the system more amenable to adopting important policy proposals.¹⁹⁴

C. "Government as Client" Is Not Equivalent to "Organization As Client"

The tension between the competing obligations of transparency and confidentiality is exacerbated by the fact that the government attorney is representing an organizational client with a non-traditional power structure. Rule of Professional Conduct 3-600 defines the "client" of an attorney that represents an organization.¹⁹⁵ The rule, however, 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 a duty of confidentiality.¹⁹⁶ Second, the rule's procedure for reporting harmful behavior is unhelpful to a

192. *People ex rel. Dep't of Corps. v. SpeeDee Oil Change Sys., Inc.*, 980 P.2d 371, 378 (Cal. 1999).

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

194. *See infra* Part V.A.1.

195. CAL. R. PROF'L CONDUCT 3-600 ("Organization as Client").

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

government attorney because a public entity has different goals and a more complex organizational structure than a private company.¹⁹⁷

1. The Structure and Content of Rule 3-600

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 three possible options: (1) to urge reconsideration,²⁰⁰ (2) to report the issue to a higher internal authority, or if necessary, to the highest person who is authorized to represent the organization,²⁰¹ or (3) to discontinue the representation in accordance with the mandatory resignation procedures listed in Rule 3-700.²⁰²

Furthermore, when 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 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 it fails to take into account the unique nature of a government "client."²⁰⁶ The rule designates "client" as "the organization itself, acting through the

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).

198. CAL. R. PROF'L CONDUCT 3-600(A).

199. *Id.* 3-600(B).

200. *Id.* 3-600(B)(1).

201. *Id.* 3-600(B)(2).

202. *Id.* 3-600(C).

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

204. Cal. State Bar Comm. Prof'l Responsibility, Op. 1989-113 (1989) (citing MODEL CODE PROF'L RESPONSIBILITY, EC 5-18).

205. *Id.*

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

highest authorized officer, employee, body, or constituent overseeing the particular engagement.”²⁰⁷ In a non-governmental corporation, this “client” is clearly identifiable because there is often a hierarchy of power and a formal procedure for decision making. In the government context, however, this concept of “highest authorized officer”²⁰⁸ is ambiguous because there are many potential stakeholders who have “authority” to make decisions for the organization, and it may be difficult to prioritize who is the “highest” in command.²⁰⁹ For example, 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 cannot know to whom she owes the duty of confidentiality.

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

Rule 3-600 describes the steps an attorney can take to report wrongdoing 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 the rule’s contemplated harms.²¹³ For this reason, a government attorney might not be able to determine which types of

207. CAL. R. PROF’L CONDUCT 3-600(A).

208. *Id.*

209. *See generally* Witkowski, *supra* note 72 (describing the role of government lawyers).

210. *See generally* CAL. BUS. & PROF. CODE (West 2007) (illustrating ways in which the legislature controls organizational structure).

211. Attorney General, *supra* note 54, at 73 (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?”).

212. CAL. R. PROF’L CONDUCT 3-600(B)(2).

213. *See* Solomon, *supra* note 197, at 295; *see also* COPRAC REPORT *supra* note 7, at 15.

activities merit reporting. The rule recognizes two types of harm: (1) “a violation of law reasonably imputable to the organization;” and (2) behavior “which is likely to result in substantial injury to the organization.”²¹⁴ Since government organizations are not motivated by profit, the types of “injury” a government organization could suffer are inherently different from those of a regular corporation. While corporations are vulnerable to losing profitability or customer good-will if an employee is corrupt, a government organization will not be shut down because of a few bad eggs.²¹⁵ The government entity may risk public distrust; however, its ability to exist will not be threatened in the same way that a corporation would.²¹⁶ 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 “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. For example, Cindy Ossias believed that the public was her client, in particular because the mission of the CDI is to 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 subcommittee 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 a duty of confidentiality and, therefore, must guess as to how they can safely report organizational wrongdoing.

214. CAL. R. PROF’L CONDUCT 3-600(B).

215. See Solomon, *supra* note 197, at 296.

216. *Id.* at 296–97.

217. CAL. R. PROF’L CONDUCT 3-600(B)(2).

218. E-mail from Cindy Ossias, Senior Staff Counsel, Cal. Dep’t of Ins., to Jessica Shpall, Loyola Law Sch. (Jan. 14, 2008, 10:54:00 PST) (on file with author).

219. See Witkowski, *supra* note 72.

V. PROPOSAL

As illustrated above, the current legal framework makes it difficult for government attorneys to reconcile these competing policies. This Note proposes two solutions to the challenges discussed above. First, the bar should propose that the regulations outlining an attorney's duty of confidentiality be moved from the California Business and Professions Code to the Rules of Professional Conduct. Second, the bar should identify the client of an attorney representing a governmental organization and incorporate this new definition into a separate rule.²²⁰ While these solutions are independent of each other, both should be adopted. If that is not possible, however, implementing either alternative could significantly improve the current situation. In outlining the benefits of these potential changes, this Part 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 regulations outlining an attorney's 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 it is powerless to do so as long as the duty is codified.²²¹ This stance by the court does a disservice to the legal system because the bar and the supreme court are in the best position to shape the duty of confidentiality.

First, the supreme court has the inherent power to regulate attorneys.²²² As noted above, the legislature is allowed to share this

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

221. See *supra* Part IV.A.2.

222. See, e.g., *In re Attorney Discipline Sys.*, 967 P.2d 49, 55 (Cal. 1998).

power subject to certain limits.²²³ In the past, when the supreme court perceived that the legislature was preventing it from exercising this power over the legal system, the court reasserted its right to act unilaterally.²²⁴ For example, the legislature typically designates how much the bar can collect in dues, although the bar functions as an arm of the supreme court.²²⁵ In 1997, however, Governor Pete Wilson vetoed a bill which would have enabled the 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, the court held that it was necessary to impose the fees.²²⁷

Similarly, 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 primary purpose²³⁰ of the duty of confidentiality is to strengthen the legal system²³¹ and the duty is an essential component of the court's power to regulate attorney conduct.²³² Therefore, the court should follow its reasoning from *In Re Attorney Discipline System*²³³ by reasserting its power over the duty of confidentiality.

Second, the bar and its respective committees are in the best position to study the dynamics of the duty of confidentiality.

223. *See id.* at 56 (discussing the legislature's authority to collect and appropriate the revenue of the State).

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' Comp. Appeals Bd.*, 636 P.2d 1139 (Cal. 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 Const. Eng'rs, 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).

225. *In re Attorney Discipline Sys.*, 967 P.2d at 52.

226. *Id.* at 53.

227. *Id.* at 52.

228. *See supra* Part IV.A.2.

229. *Brydonjack v. State Bar*, 281 P. 1018, 1020 (Cal. 1929).

230. Although the duty also seeks to protect the public from harm, its main purpose is to enable clients to rely on their attorneys, thereby ensuring that clients make use of the legal system. *See supra* Part III.B.

231. *See supra* Part IV.2.

232. *People ex rel. Dep't of Corps. v. SpeeDee Oil Change Sys., Inc.*, 980 P.2d 371, 378 (Cal. 1999).

233. *In re Attorney Discipline Sys.*, 967 P.2d 49, 55 (Cal. 1998).

Because the bar²³⁴ spends the bulk of its time and energy evaluating whether a particular attorney's behavior complies with the disciplinary rules,²³⁵ it is familiar with the pitfalls of the current ethics provisions and 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 Professional Conduct.²³⁶ For example, the principal focus of the bar's Commission for the Revision of the Rules is to stay abreast of developments in the field of professional responsibility.²³⁷ If the duty of confidentiality were exclusively in the Rules, the bar's recommended modifications to the duty would not fall on deaf ears, as they sometimes have in the past. Instead, the bar's suggested changes would have a better chance of being implemented. Further, 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 modification without eroding the duty because the court is less swayed by political currents and can act independently of other branches.²³⁸ Since 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 likely would ensue might weaken the proposed legislation."²³⁹ Although such negotiations might be appropriate for other matters, such as fee arrangements and advertising regulations, the duty of confidentiality is essential to the attorney-client relationship.²⁴⁰ The supreme court, therefore, is best

234. And, to a lesser degree, the court.

235. *In re Attorney Discipline Sys.*, 967 P.2d at 58-59 (noting that the state bar assists the court in disciplining attorneys).

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

237. See 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 Jan. 13, 2008). Among the Committees goals are "eliminating ambiguities" and "fostering the evolution of a national standard with respect to professional responsibility issues." *Id.*

238. Mohr, *supra* note 97, at 383.

239. *Id.*

240. *Id.*

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 Supreme Court justices, California Supreme Court justices do not enjoy life tenure; rather, they are re-elected every twelve years.²⁴¹ 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 bar are both "sensitive to the concerns of their constituents"²⁴² and therefore unlikely to make any drastic changes to the duty of confidentiality. The bar's policy of soliciting public comment 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 this process, the 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 erode California's strict duty of confidentiality.²⁴⁵ The court has a strong record of protecting the attorney-client relationship.²⁴⁶ Moreover, the bar carefully guards its own interests with respect to the duty of confidentiality. For example, the bar opposed Assemblywoman Pavley's 2006 bill because it feared that the duty of confidentiality was being threatened.²⁴⁷ The court and bar's combined commitment to confidentiality is grounded in a

241. CAL. CONST. art. VI, § 16; Mohr, *supra* note 97, at 383.

242. Mohr, *supra* note 97, at 383.

243. *Id.*

244. *Id.* at 384.

245. *Id.*

246. *Id.* (citing *Gen. Dynamics Corp. v. Superior Court*, 876 P.2d 487, 503 (Cal. 1994); *see also People ex rel. Dep't of Corps. v. Speedee Oil Change Sys., Inc.*, 980 P.2d 371, 378 (Cal. 1999).

247. Huber, *supra* note 67. Additionally, the California State Bar has aggressively opposed the Sarbanes-Oxley rules that create new exceptions to the duty of confidentiality. *See generally* 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, 1126-36 (2006) (discussing the duty of confidentiality and the bar's reaction to amendments to the Rules and the Sarbanes-Oxley Act).

desire and responsibility to ensure the integrity of the legal system.²⁴⁸ Moving the duty of confidentiality to the rules would not decrease its effectiveness because the court understands that it is essential for clients to trust their attorneys with sensitive information.²⁴⁹

2. Addressing the Limitations of This Proposal

A limitation of this proposal is the fact 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 this issue.

First, the legislature would retain some degree of control over attorney confidentiality.²⁵² The attorney-client privilege, an important subset of the concept of client confidentiality, would remain under the legislature's control.²⁵³ The supreme court has consistently upheld the legislature's role in this evidentiary context.²⁵⁴

Second, the legislature's goal in regulating the duty of confidentiality is to protect the public through its police powers.²⁵⁵ Since the supreme court shares this desire to protect the public, however, 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

248. See *supra* Part IV.A.1.

249. *SpeeDee Oil*, 980 P.2d at 378. "The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar." *Id.*

250. *Mohr*, *supra* note 97, at 366, 385.

251. *Id.* at 385.

252. *Id.*

253. *Id.* (citing CAL. EVID. CODE § 911 (1995)).

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

255. See *supra* Part IV.A.1.

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.²⁵⁸ Moreover, it is possible that the bar would support this transfer. In the wake of the Ossias affair, COPRAC considered transferring the section 6068(e) duty of confidentiality to a new rule but abandoned the idea due to time constraints and other 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 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 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 bar should identify the government attorney's client and delineate an appropriate reporting scheme for informing that "client" of wrongdoing within the organization. Because changes to the language of Rule 3-600 would be comprehensive, the bar should adopt a new rule that specifically addresses attorney-client issues in the government. This proposal should be

256. See THOMAS D. MORGAN & RONALD D. ROTUNDA, MODEL RULES OF PROFESSIONAL CONDUCT AND OTHER SELECTED STANDARDS, INCLUDING CALIFORNIA AND NEW YORK RULES ON PROFESSIONAL RESPONSIBILITY, App. A (2004).

257. Bost, *supra* note 247, at 1126-36 (discussing California's unique approach to rules of confidentiality).

258. See Huber, *supra* note 67, at 904-05 (discussing the bar's efforts to lobby the assembly).

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.*

260. See *supra* Part IV.A.2.

261. See *supra* Part IV.C.2.

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 bar and supreme court are the only entities that should have the power to define the attorney-client relationship. The court has the constitutional 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 traditional roles of the court and bar as the appropriate entities to define this relationship.

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

262. See COPRAC REPORT, *supra* note 7, at 21. "We never viewed a new rule 3-100 as necessary to adopt our recommended changes to rule 3-600." *Id.*

263. See CAL. R. PROF'L CONDUCT 3-600.

264. See *id.* 3-600(D).

265. See, e.g., *In re Attorney Discipline Sys.*, 967 P.2d 49, 55 (Cal. 1998).

266. See COPRAC Introduction, *supra* note 236.

267. See *supra* Part II.B.

268. COPRAC REPORT, *supra* note 7, at 30–32. "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." OFFICES OF PROF'L COMPETENCE & GEN. COUNSEL OF THE STATE BAR OF CAL., 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, enclosure 1 (2002), available at <http://www.calbar.ca.gov/calbar/pdfs/rule3-600request.pdf> (discussing proposed Rule 3-600).

269. OFFICES OF PROF'L COMPETENCE & GEN. COUNSEL, *supra* note 268, at Enclosure 1.

contemplated a system for reporting within the agency.²⁷⁰ If such a reporting scheme failed and certain conditions were met, a government attorney:

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 matter²⁷¹

Accordingly, the proposed rule purported to interpret section 6068(e) as allowing government attorneys to report wrongdoing to oversight agencies. If this rule had defined “client” as a law enforcement or oversight agency, then this reporting scheme would have complied with the requirements of the statutory duty of confidentiality. Without a specific description of the “client,” however, the proposed rule potentially allowed an attorney to breach the statutory duty of confidentiality. COPRAC itself recognized that “[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 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 bar propose a rule that truly identifies the government “client” and the proper means of reporting wrongdoing *within* the client entity. Instead of taking the drastic step of providing a safe harbor for attorneys to report wrongdoing *outside of* the client entity, which could again be perceived as interfering with the statute, the bar should instead focus on defining the attorney-client relationship to notify attorneys of the boundaries of their representation of the government client.

270. *Id.*

271. *Id.*

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

273. *In re* Adoption of Amendments to Rule 3-600 of the Rules of Prof'l Conduct, No. S106482 (Cal. 2002) (on file with the state bar).

To determine whom a government attorney represents, the bar will need to evaluate the existing theories and determine which best applies. Designating which model the bar should choose is beyond the scope of this Note. However, numerous scholars have contributed to the debate on the identity of a government client.²⁷⁴ Given that there are so many permutations of the government attorney-client relationship within the structure of the government,²⁷⁵ the bar may have to identify several models of representation and create a catchall category for attorneys in non-traditional roles.

b. Create a separate rule of professional conduct that incorporates this new description of the attorney-government client relationship

The bar should create a new rule specifically addressing the nuances of the attorney-client relationship in the government context.²⁷⁶ 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 less confusing than separating each sub-section of Rule 3-600 into “governmental organization” and “non-governmental organization.” Moreover, if the bar decides to designate several models for different government attorneys to identify their client, it might be simpler just to have a separate rule. While this is the preferred method, the bar should at least change the language of Rule 3-600, as discussed above, if it chooses not to adopt a new rule.

274. See, e.g., Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL 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 72, at 154–68.

275. See Witkowski, *supra* note 72, at 124–26. Witkowski identifies three examples where the question of “who is the client” arises. *Id.* First, where an Assistant Attorney General is tasked with litigating an issue for another government agency, yet believes the case should be settled. *Id.* Second, where several agencies within the same branch of government participate in negotiations and the attorneys are working together despite potentially adverse interests. *Id.* 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.*

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

277. See *supra* Part IV.C.

2. Addressing the Limitations of This Proposal

Identifying who exactly is the government client will be a challenging task for the bar. However, leaving this inquiry unanswered will keep government attorneys unsure of the nature of their relationship with their "client." Without clear guidance, an attorney who witnesses wrongdoing will be placed in the uncomfortable position of trying to determine to whom she owes a duty of confidentiality.²⁷⁸ The 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 require several attempts and extensive input from the community; however, this inquiry is an essential task. Currently, a government attorney who does know whom she represents could be exposed to investigation by the 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 positions 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, ensuring in turn that the changing needs of the legal system are met. The supreme court could then consider the merits of creating an exception to duty for government attorneys. Regardless of whether this occurs, the bar should adopt a new Rule of Professional Conduct and identify who exactly is the client of a 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 personal ethical concerns.

278. Doskow, *Ethics Rules in Flux*, *supra* note 103, at 36.

