

AMENDED IN SENATE JUNE 19, 2002

AMENDED IN ASSEMBLY APRIL 26, 2001

CALIFORNIA LEGISLATURE—2001–02 REGULAR SESSION

ASSEMBLY BILL

No. 363

**Introduced by Assembly Member Steinberg
(Coauthors: Assembly Members Aroner, Diaz, Koretz, and
Washington)**

(Coauthors: Senators Escutia, Kuehl, and Romero)

February 20, 2001

An act to add Section ~~6068.5~~ *6068.1* to the Business and Professions Code, relating to attorneys.

LEGISLATIVE COUNSEL'S DIGEST

AB 363, as amended, Steinberg. Attorneys.

Existing law, the State Bar Act, ~~provides that the State Bar is governed by the Board of Governors that is authorized to formulate rules of professional conduct for persons licensed to practice law in this state. Under existing law, the rules recognize that those persons are also subject to other laws regulating the conduct of attorneys, including *specifies the duties of an attorney that include* the obligation under the State Bar Act to maintain the confidentiality of information disclosed by a client.~~

This bill would enact the Public Agency Attorney Accountability Act. The bill would ~~make a finding and declaration by the Legislature of the competing obligations of public agency attorneys to protect the interests of the public and to protect the confidences of their client and that a rule of professional conduct be adopted on or before January 31,~~

~~2002, to clarify the circumstances under which public agency attorneys may act to protect the public interest when that conduct may disclose client confidences authorize an attorney who learns in the course of representing a governmental organization of improper governmental activity, as defined, to take those actions that appear to be in the best, lawful interest of the organization. The bill would also authorize the attorney in specified circumstances to refer the matter to law enforcement or to another governmental agency and would exempt the attorney from disciplinary action for making a referral of the matter.~~

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. This act shall be known and may be cited as the
2 Public Agency Attorney Accountability Act.

3 ~~SEC. 2. Section 6068.5 is added to the Business and~~
4 ~~Professions Code, to read:~~

5 ~~6068.5.—(a) The Legislature hereby declares that the Rules of~~
6 ~~Professional Conduct adopted by the Board of Governors of the~~
7 ~~State Bar appropriately reference the importance in our justice~~
8 ~~system of protecting attorney-client confidential communications.~~
9 ~~However, these rules do not yet adequately acknowledge some~~
10 ~~important differences that exist between the duties of public~~
11 ~~agency attorneys and private sector attorneys. Unlike private~~
12 ~~sector attorneys, public attorneys owe a duty not only to their~~
13 ~~public agency clients but also to the public at large.~~

14 ~~(b) The Legislature further finds and declares that the~~
15 ~~competing obligations of public agency attorneys to protect the~~
16 ~~interests of the public and to protect the confidences of their public~~
17 ~~agency client may occasionally conflict. There is growing~~
18 ~~consensus in the legal community and the State Bar that the current~~
19 ~~Rules of Professional Conduct do not provide adequate guidance~~
20 ~~and clarity for public agency attorneys reasonably to determine the~~
21 ~~circumstances under which they may properly seek to protect the~~
22 ~~public interest even at the risk of disclosing client confidences.~~

23 ~~(c) The Legislature finds and declares that there are~~
24 ~~circumstances under which a public attorney should be free to~~
25 ~~protect the public interest even if that means disclosing~~
26 ~~attorney-client confidences. The Legislature therefore finds and~~



1 ~~declares that the Rules of Professional Conduct should be~~
2 ~~amended to clarify the right of public agency attorneys to strive to~~
3 ~~protect the interests of the public under appropriately specified~~
4 ~~circumstances even when that protection may unavoidably risk the~~
5 ~~disclosure of client confidences. Every public agency attorney in~~
6 ~~the state who is a member of the State Bar, whether employed on~~
7 ~~the local, state, or federal level, should be provided adequate~~
8 ~~guidance to reasonably determine the circumstances under which~~
9 ~~he or she may properly seek to protect the public interest even at~~
10 ~~the risk of disclosing client confidences, through the adoption, on~~
11 ~~or before January 31, 2002, of a carefully balanced new rule of~~
12 ~~professional conduct.~~

13 *SEC. 2. (a) The Legislature hereby finds and declares the*
14 *following:*

15 *(1) The California Rules of Professional Conduct*
16 *appropriately underscore the importance in our justice system of*
17 *protecting attorney-client confidential communications. However,*
18 *in the representation of governmental organizations,*
19 *circumstances may arise where the interests of the public may*
20 *justify an attorney to reveal client communications that are*
21 *otherwise confidential.*

22 *(2) Current law and the California Rules of Professional*
23 *Conduct do not provide adequate guidance and clarity for*
24 *attorneys representing governmental organizations to determine*
25 *the circumstances under which they may properly seek to protect*
26 *the public interest by reporting improper governmental activity to*
27 *appropriate enforcement, regulatory, and oversight bodies.*

28 *(3) Generally, the governmental organization itself is the client*
29 *of the attorney and not any official or entity within the*
30 *organization, notwithstanding the ability of the official or entity to*
31 *exercise exclusive power over any given subject on behalf of the*
32 *organization.*

33 *(b) The California Supreme Court rejected amendments to the*
34 *California Rules of Professional Conduct proposed by the State*
35 *Bar, stating that the proposed modifications conflict with*
36 *subdivision (e) of Section 6068 of the Business and Professions*
37 *Code. Accordingly, the Legislature hereby finds and declares that*
38 *statutory changes are necessary to address this issue.*

39 *SEC. 3. Section 6068.1 is added to the Business and*
40 *Professions Code, to read:*



1 6068.1. (a) This section shall apply to an attorney who
2 obtains confidential information from his or her client while acting
3 in the course of representing any governmental organization.

4 (b) Notwithstanding subdivision (e) of Section 6068, if, in the
5 course of representing a governmental organization, an attorney
6 learns of improper governmental activity, the attorney may take
7 those actions that appear to the attorney to be in the best, lawful
8 interest of the organization. Those actions may include, but are not
9 limited to, the following:

10 (1) Urging reconsideration of the matter while explaining its
11 likely consequences to the organization.

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

16 (c) If the attorney has taken action as described in paragraphs
17 (1) and (2) of subdivision (b) without the matter being resolved, or
18 if the highest internal authority that can act on behalf of the
19 organization is an actual or apparent agent of the governmental
20 organization who has committed any conduct described in
21 subdivision (f), or the attorney reasonably believes that taking the
22 action described in subdivision (b) is futile and further action is
23 required because of the seriousness of the circumstances, the
24 attorney may refer the matter to the law enforcement agency
25 charged with responsibility over the matter or to any other
26 governmental agency or official charged with overseeing or
27 regulating the matter if both of the following exist:

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

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

34 (d) An attorney representing a governmental organization
35 shall not be subject to discipline for making a referral under
36 subdivision (c) if the attorney has acted in good faith to determine
37 the propriety of making a referral and to identify the appropriate
38 governmental agency or official as described in subdivision (c).

39 (e) An attorney may, but has no affirmative duty to, take action
40 pursuant to this section.



1 (f) As used in this section, “improper governmental activity”
2 means conduct by an actual or apparent agent of the governmental
3 organization that comes within one or more of the following:

4 (1) Is or may be a violation of law reasonably imputable to the
5 organization.

6 (2) Is likely to result in substantial injury to the organization.

7 (3) Constitutes the use of the organization’s official authority
8 or influence by the agent to commit a crime, fraud, or other
9 violation of law.

10 (4) Involves the agent’s willful misuse of public funds or willful
11 breach of fiduciary duty.

12 (5) Involves the agent’s willful omission to perform his or her
13 official duty.

