

**Assembly Bill No. 2713**

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Passed the Assembly August 25, 2004

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*Chief Clerk of the Assembly*

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Passed the Senate August 24, 2004

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*Secretary of the Senate*

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This bill was received by the Governor this \_\_\_\_\_ day of  
\_\_\_\_\_, 2004, at \_\_\_\_\_ o'clock \_\_M.

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*Private Secretary of the Governor*

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## CHAPTER \_\_\_\_\_

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

## LEGISLATIVE COUNSEL'S DIGEST

AB 2713, Pavley. Representation of governmental organizations.

Existing law, the State Bar Act, specifies the duties of an attorney, which include the obligation to maintain the confidentiality of information disclosed by a client.

This bill would authorize an attorney who, in the course of representing a governmental organization, learns of improper governmental activity, as defined, to urge reconsideration of the matter and to refer it to a higher authority in the organization. The bill would also authorize the attorney, in specified circumstances, to refer the matter to a law enforcement agency or to another governmental agency and would exempt the attorney from disciplinary action for making a referral of the matter.

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

SECTION 1. (a) The Legislature hereby finds and declares the following:

(1) The California Rules of Professional Conduct appropriately underscore the importance in our justice system of protecting attorney-client confidential information. However, in the representation of governmental organizations, circumstances may arise where the interests of the public may justify an attorney reporting client information that is otherwise confidential. The commission of a crime or fraud that may justify the breach of the attorney-client privilege covers a broad spectrum and includes, but is not limited to, a conflict of interest in violation of Section 1090 of the Government Code, misuse or misappropriation of public funds in violation of Section 424 of the Penal Code, embezzlement of property by a public official in violation of Section 504 of the Penal Code, falsifying government records in violation of Section 6200 of the Government Code, and conspiracy to obstruct justice



in violation of paragraph (5) of subdivision (a) of Section 182 of the Penal Code.

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

(3) Generally, the governmental organization itself is the client of the attorney, and not any official or entity within the client organization, notwithstanding the ability of the official or entity to exercise exclusive power over any given subject on behalf of the client organization. The specific governmental organization that is the client of the attorney is defined by applicable law.

(b) The California Supreme Court did not approve amendments to the California Rules of Professional Conduct proposed by the State Bar, stating that the proposed modifications conflict with subdivision (e) of Section 6068 of the Business and Professions Code. Accordingly, the Legislature hereby finds and declares that statutory changes are necessary to address this issue.

SEC. 2. Section 6068.1 is added to the Business and Professions Code, to read:

6068.1. (a) If, in the course of representing a governmental organization, an attorney learns of improper governmental activity, the attorney may take one or both of the following actions:

(1) Urge reconsideration of the matter while explaining its likely consequences to the organization.

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

(b) (1) Notwithstanding subdivision (e) of Section 6068, the attorney may refer the matter to the law enforcement agency charged with responsibility over the matter or to any other governmental agency or official charged with overseeing or regulating the matter if the attorney meets one of the following conditions and all of the requirements described in paragraph (2) are satisfied:

(A) He or she has taken both actions described in subdivision (a) without the matter being resolved.



(B) He or she reasonably believes that taking the actions described in paragraph (1) of subdivision (a) is not reasonable under the circumstances and that taking the actions described in paragraph (2) of subdivision (a) is futile.

(C) He or she reasonably believes that the highest internal authority that can act on behalf of the organization has already, directly or indirectly, participated in the improper governmental activity.

(2) (A) The referral is warranted by the seriousness of the circumstances and is not otherwise prohibited by law.

(B) The improper governmental activity constitutes the use of the organization's official authority or influence to commit a crime or to perpetrate fraud.

(C) Further action is required in order to prevent or rectify substantial harm to the public interest or to the governmental organization resulting from the improper governmental activity.

(c) An attorney's conduct in making a referral under subdivision (b) shall not be a cause for disbarment, suspension, or other discipline if the attorney has acted reasonably and in good faith to determine the propriety of making a referral and to identify the appropriate governmental agency or official as described in subdivision (b). In addition, an attorney's conduct shall not be cause for disbarment, suspension, or other discipline if the attorney acted reasonably and in good faith in choosing to cooperate with the agency or official in the execution of the oversight or regulatory responsibilities of the agency or official regarding the referral. Once an attorney has made the referral, this subdivision shall not apply to any further affirmative conduct outside of the scope of subdivision (b) or this subdivision that is initiated by the attorney to address the improper governmental activity.

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

(e) As used in this section, "improper governmental activity" means conduct by the governmental organization or by its agent that meets one or more of the following requirements:

(1) It constitutes the use of the organization's official authority or influence by the agent to commit a crime, fraud, or other serious and willful violation of law.



(2) It involves the agent's willful misuse of public funds, willful breach of fiduciary duty, or willful or corrupt misconduct in office.

(3) It involves the agent's willful omission to perform his or her official duty.

(f) This section shall not be construed to require that the improper governmental activity subject to its provisions be related, directly or indirectly, to the matter for which the attorney was engaged as outside counsel by the governmental organization.



Approved \_\_\_\_\_, 2004

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*Governor*

