

**ANALYSIS OF AMENDED BILL**

Author: Pavley Analyst: Deborah Barrett Bill Number: AB 1612

Related Bills: See Legislative History Telephone: 845-4301 Amended Date: January 4, 2006

Attorney: Patrick Kusiak Sponsor: \_\_\_\_\_

**SUBJECT:** Attorney Representation of Government Organizations

DEPARTMENT AMENDMENTS ACCEPTED. Amendments reflect suggestions of previous analysis of bill as introduced/amended \_\_\_\_\_.

AMENDMENTS IMPACT REVENUE. A new revenue estimate is provided.

AMENDMENTS DID NOT RESOLVE THE DEPARTMENTS CONCERNS stated in the previous analysis of bill as introduced/amended \_\_\_\_\_.

FURTHER AMENDMENTS NECESSARY.

DEPARTMENT POSITION CHANGED TO \_\_\_\_\_.

REMAINDER OF PREVIOUS ANALYSIS OF BILL AS INTRODUCED/AMENDED  
\_\_\_\_\_ STILL APPLIES.

OTHER – See comments below.

**SUMMARY**

This bill would allow attorneys representing governmental organizations to disclose instances of improper governmental activity without violating attorney-client confidentiality requirements.

**SUMMARY OF AMENDMENTS**

The January 4, 2006, amendments removed language imposing a fee on manufacturers of cigarettes and added the provisions discussed in this analysis. This is the department's first analysis of this bill.

**PURPOSE OF THE BILL**

According to the author's staff, the purpose of this bill is to allow attorneys who uncover improper governmental activity to report that activity to the appropriate authorities without violating professional ethical standards.

Board Position:	Department Director	Date
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## **EFFECTIVE/OPERATIVE DATE**

This bill would become effective and operative on January 1, 2007.

## **POSITION**

Pending

## **ANALYSIS**

### STATE LAW

Under current state law, attorneys admitted and licensed to practice law in the State of California are required to be members of the State Bar. The State Bar is the administrative arm of the California Supreme Court in matters involving the admission, regulation, and discipline of attorneys. Among other duties, current state law requires an attorney to maintain and preserve the confidence and secrets of his or her client. Failure to protect the client's confidences is generally cause for disciplinary action by the State Bar.

Under current state law, an attorney may, but is not required to, reveal confidential information relating to a client when the attorney reasonably believes the disclosure is necessary to prevent a criminal act that is likely to result in death of or substantial bodily harm to an individual. Disclosure without a client's permission is limited to information that would prevent the criminal act.

### THIS BILL

This bill would authorize an attorney who represents a governmental organization and learns of improper government activity to take one or both of the following actions:

- 1) Explain the likely consequences of the actions to the organization and urge reconsideration of the matter, or
- 2) Refer the matter to a higher authority within the organization, if warranted.

This bill would authorize the attorney to refer the matter to an outside law enforcement agency or to a regulatory agency having jurisdiction over the governmental organization if any of the following conditions are present:

- The attorney took the first actions permitted and was unable to resolve the issue,
- The attorney believes referring the action to a higher internal authority is not reasonable and would be futile, or
- The attorney believes the highest internal authority that can act on behalf of the organization has already directly or indirectly participated in the improper governmental activity.

Each of the following requirements would also need to be satisfied to justify disclosing the matter outside of the attorney-client relationship:

- The referral is warranted by the seriousness of the circumstances and is not otherwise prohibited by law.

- The improper government activity constitutes the use of the organization's official authority or influence to commit a crime or to perpetrate a fraud.
- Further action is required to prevent or rectify substantial harm to the public interest or the governmental organization resulting from the improper governmental activity.

This bill would provide that if an attorney has acted reasonably and in good faith and takes the action authorized by these provisions, that action may not be cause for disbarment, suspension, or other discipline.

This bill also would provide that an attorney has no affirmative duty to take the actions permitted under this bill.

This bill would define improper government activity as conduct by the government organization or by its agent that meets one or more of the following requirements:

- It constitutes the use of the organization's official authority or influence to commit a crime, fraud, or other serious and willful violation of law.
- It involves an agent's willful misuse of public funds, willful breach of fiduciary duty, or willful or corrupt misconduct in office, or
- Involves the agent's willful omission to perform his or her official duty.

#### IMPLEMENTATION CONSIDERATIONS

Implementation of this bill would not significantly impact the department's programs or operations.

#### **LEGISLATIVE HISTORY**

AB 2713 (Pavley, 2004) contained substantially similar language as this bill and was vetoed by Governor Schwarzenegger. In the veto message the Governor stated, "This bill will have a chilling effect on when government officials would have an attorney present when making decisions. It is an attorney's duty to advise the governmental officials when they are about to engage in illegal activity. This bill will ensure that advice is not conveyed in every situation and therefore it is too broad to affect the intended purposes."

AB 1101 (Steinberg, Chap. 765, Stats. 2003) provided an exception for the duty of an attorney to maintain the confidences of his or her client. This act allows disclosure of confidential information in instances where an attorney reasonably believes that disclosure is necessary to prevent a criminal act that is likely to result in death or substantial bodily harm.

AB 363 (Steinberg, 2002) contained similar provisions as this bill and was vetoed by Governor Davis. In his veto message, Governor Davis stated, "this bill chipped away at the attorney client confidentiality provisions that are necessary for effective operation of our legal system."

## **OTHER STATES' INFORMATION**

Laws from the states of *Florida, Illinois, Massachusetts, Michigan, Minnesota, and New York* were reviewed. These states were selected due to their similarities to California's economy, business entity types, and tax laws. All these states require lawyers to keep client confidences, unless authorized by the client to disclose, but do not have exceptions similar to the one proposed under this bill.

## **FISCAL IMPACT**

Implementation of this bill would not significantly impact the department's costs.

## **ECONOMIC IMPACT**

Implementation of this bill would not significantly impact the state's tax revenues.

## **LEGISLATIVE STAFF CONTACT**

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