

# After the Whistle Blows

## THE STATE BAR INDEED SET NEW POLICY ON ATTORNEY CONFIDENTIALITY

By RICHARD ZITRIN

Earlier this year, Cindy Ossias, a staff attorney for the California Department of Insurance and a name now familiar to most who read this, took the courageous step of blowing the whistle on her boss, Chuck Quackenbush. Quackenbush, who soon resigned his position under a cloud of malfeasance, behaved with gross impropriety by settling Northridge earthquake claims in ways that benefited only insurers and Quackenbush himself, not the quake's actual victims.

This fall, I had the privilege of representing Cindy in connection with the investigation into the propriety of her conduct conducted by the State Bar's Office of Trial Counsel. There have been various reports about that investigation and the effect of the determination by senior trial counsel, made in an Oct. 11 letter to me, not to prosecute Ms. Ossias. I certainly don't have all the answers, especially as to why trial counsel spoke as it did. But I do know something more about the situation than has thus far been reported, whether in the recent front-page *Los Angeles Times* story, *Recorder* reporter Mike McKee's brief piece, or elsewhere.

Of interest to many is the issue of whether the State Bar "set policy" by its decision not to prosecute Ms. Ossias. *Los Angeles Times* reporter Virginia Ellis, who broke the Quackenbush story, wrote that the statements in the State Bar's letter could represent "an important breakthrough," possibly "the first [decision] of its kind in the nation." In reaction, however, the State Bar issued a memorandum to "members of the public and legal profession" stating that the Oct. 11 letter was not a "formal opinion," but merely an "exercise of the Chief Trial Counsel's prosecutorial discretion."

I believe that the truth lies somewhere in between these positions, though Ms. Ellis' piece in the *Times* hits closer to the mark. The actual letter is reprinted here, with Cindy's permission, so readers can judge for themselves.

Let me explain my perspective. First, as far as I am aware, the Office of Trial Counsel instigated the investigation of Ms. Ossias on its own, as indeed should happen in a situation of great public interest and importance. Second, individuals in that office, including two excellent senior staff attorneys and Acting Chief Trial Counsel Francis Bassios, familiarized

themselves thoroughly with the facts of Cindy's case. Third, everyone was clearly aware of the significant policy issues involved.

Fourth — and of more than passing significance — when trial counsel made its decision not to prosecute and orally informed me, I was asked whether Cindy would be publicizing the letter staff counsel was writing. I made it clear that she would. Trial counsel then asked for extra time before producing the letter. This gave those involved at the Bar, all lawyers of quality and intelligence, the opportunity to make sure the letter expressed their precise position. I can only conclude that every word in the Oct. 11 letter was carefully chosen — chosen knowing the letter would be made public.

Finally, simply put, the letter says what it says. Its plain meaning is clear, at least to me. Read it and see for yourself. Trial counsel says that "we have not found it necessary" to determine the easier issue — whether the Department of Insurance (as opposed to the State of California as embodied by a legislative committee) had a confidential relationship with Ms. Ossias. Had they wanted an easy way out, they could have said that Cindy's duties under existing California law were ambiguous. In fact, a reasonable argument can be made that under existing California case law, Cindy's client was the state. Instead, the Bar

expressly refused even to reach this issue, choosing to address the case's public importance head on.

Indeed, not only did trial counsel cite the state's Whistleblower Protection Act, but as a second, independent ground for its decision, they wrote that Cindy's actions "advanced important public policy considerations." In my view, this letter thus goes beyond mere whistleblower protection to an affirmative statement that under the right circumstances (though we don't know how broad these might be) public policy could be a defense for lawyers blowing the whistle whether or not the Whistleblower Act applies.

Note that I write "could be a defense" rather than "will be." We don't know what the future holds, and I am quite certain that senior State Bar staff, including trial counsel involved here, would like to see legislative clarification. But the fact remains that this decision, one I would characterize as courageous on the part of trial counsel, has implications beyond Cindy's individual case. What those implications are remain to be seen. But it denigrates the serious efforts of knowledgeable senior counsel, not to mention engages in revisionist history, to say that this letter is merely a one-time exercise of discretion.

Trial counsel stepped up to the plate in this case and hit a home run. That action, in the wake of Cindy Ossias' grand slam, advances the protection of all Californians. Neither Cindy nor the State Bar will chart the future on this issue, but both have played vital roles, roles for which they should both be proud. ■

### 'We Have Decided to Close Our Investigation'

Dear Mr. Zitrin:

We are sending this letter to you based on our understanding that you represent Ms. Ossias in this matter. Please let us know immediately if this understanding is incorrect.

We are writing to advise you that we have decided to close our investigation relating to whether Ms. Ossias violated the Rules of Professional Conduct or the State Bar Act when she disclosed materials from the Department of Insurance to legislative staff members. We have concluded that Ms. Ossias did not engage in conduct which warrants disciplinary prosecution.

In reviewing this matter, we found that the facts were not in serious dispute. Ms. Ossias, while employed as an attorney with the Department of Insurance, provided legislative committees with materials pertaining to the department's settlement of claims against insurance companies arising out of the Northridge Earthquake. We have carefully reviewed the question of whether Ms. Ossias violated client confidences (Bus. & Prof. Code §6068(e) and related case law), whether Ms. Ossias complied with the obligations of attorneys representing an organization (Rule of Prof. Cond. 3-600 and related case law), and whether Ms. Ossias' conduct was permissible under the California Whistleblower Protection Act (Gov. Code §9149.20 et seq.).

We have not found it necessary to decide whether the Department of Insurance could have asserted that the documents in question were confidential as to legislative committees. Rather, we have determined that Ms. Ossias' conduct should not result in discipline because: (1) It was consistent with the spirit of the Whistleblower Protection Act; (2) it advanced important public policy considerations bearing on the responsibilities of the office of insurance commissioner; and (3) it is not otherwise subject to prosecution under the guidelines set forth in this office's Statement of Disciplinary Priorities.

We note that the acting insurance commissioner, based on reports from the California Highway Patrol and the California attorney general's office, commended Ms. Ossias for her actions and reinstated her to active employment with the department.

We appreciate the cooperation that we have received from you and your client in this matter. Please feel free to contact us if you have any questions or concerns.

Sincerely,  
Donald Steedman  
Deputy Trial Counsel  
State Bar of California

*Richard Zitrin practices law in San Francisco and is director of the University of San Francisco's new Center for Applied Legal Ethics. His most recent book is The Moral Compass of the American Lawyer.*