

# AGENDA ITEM

## JULY 2016

**DATE:** June 30, 2016

**TO:** Members, Regulation and Discipline Committee

**FROM:** Andrew Tuft, Staff Attorney, Office of Professional Competence

**SUBJECT:** Formal Advisory Ethics Opinion Interim No. 13-0005, Request for Approval for Publication

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### EXECUTIVE SUMMARY

This agenda item seeks Board Committee on Regulation, Admissions and Discipline (“RAD”) approval for the publication of proposed Formal Opinion Interim No. 13-0005 developed by the Committee on Professional Responsibility and Conduct (“COPRAC” or “Committee”).

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### BACKGROUND

COPRAC is charged with developing the State Bar’s non-binding, advisory ethics opinions.<sup>1</sup> Authority to approve the issuance of an ethics opinion is exercised by RAD in accordance with applicable State Bar procedure State Bar Board Book Tab 19, Article 2, section 6(j), which provides: “If within thirty days of circulation, no member of the Board Committee objects to publication, the formal opinion shall be published as hereinafter provided. If within thirty (30) days of circulation, any member of the Board Committee does object, the issue of whether the formal opinion shall be published shall be placed on the agenda of the next succeeding meeting of the Board Committee for decision.” However, in compliance with the obligations of Bagley-Keene, effective April 1, 2016, the proposed decision must be considered at a public and properly noticed meeting, and a motion and vote would be required to approve the opinion.

### DISCUSSION

Proposed Formal Opinion Interim No. 13-0005 was drafted by COPRAC, and at its April 24, 2015 meeting, in accordance with COPRAC’s Rules of Procedure, the Committee approved the opinion for an initial 90-day public comment distribution. Subsequently, at its February 26, 2016 meeting, COPRAC revised the opinion in response to public comments received and, in further accordance with its Rules of Procedure, approved the opinion for an additional 60-day public

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<sup>1</sup> Although non-binding, State Bar formal ethics opinions have been cited by the California courts in analyzing issues of attorney professional responsibility.

comment distribution. At its June 24, 2016 meeting, following consideration of the public comments received, COPRAC approved the opinion for submission to RAD for formal publication.

The full text of the proposed opinion, in the form distributed to RAD for approval, is provided as Attachment A. The question addressed in the proposed opinion is: "What duties does a lawyer owe to current and former clients to refrain from disclosing potentially embarrassing or detrimental information about the client, including publicly available information the lawyer learned during the course of his representation?" The opinion digest states:

A lawyer may not disclose his client's secrets, which include not only confidential information communicated between the client and the lawyer, but also publicly available information that the lawyer obtained during the professional relationship which the client has requested to be kept secret or the disclosure of which is likely to be embarrassing or detrimental to the client. Even after termination of the attorney-client relationship, the lawyer may not disclose potentially embarrassing or detrimental information about the former client if that information was acquired by virtue of the lawyer's prior relationship.

In compliance with the obligations of Bagley-Keene, the proposed decision must be considered at a public and properly noticed meeting, and a motion and vote would be required to approve the opinion.

#### **FISCAL/PERSONNEL IMPACT**

None.

#### **RULE AMENDMENTS**

None.

#### **BOARD BOOK IMPACT**

None.

#### **BOARD COMMITTEE RECOMMENDATIONS**

The State Bar Standing Committee on Professional Responsibility and Conduct recommends that the Regulation and Discipline Committee of the Board of Trustees approve the following resolution:

**RESOLVED**, following the publication for public comment and consideration of the comments received, the Board Committee on Regulation and Discipline Oversight approves the publication of proposed Formal Opinion Interim No. 13-0005, in the form attached.

#### **ATTACHMENT(S) LIST**

- A. Formal Opinion Interim No. 13-0005 (Disclosure of Publicly Available Information)