



**MEMORANDUM**

**DATE:** November 3, 2016  
**TO:** Members of the Board's Regulation & Discipline Oversight Committee  
**FROM:** Randall Difuntorum, Director, Professional Competence Programs  
**SUBJECT:** RAD Meeting on November 17, 2016 – Status of the Professional Competence Unit

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This memorandum provides a report on the activities of the Professional Competence Unit through September 30, 2016. In addition to this memorandum, provided are the following: (Encl. 1) Ethics Hotline Activity Statistics; (Encl. 2) Ethics Hotline Satisfaction Survey Excerpts; and (Encl. 3) Professional Competence Budget Summary – Actuals vs. Authorized. Board members with questions may contact Randall Difuntorum at (415) 538-2161 or Lauren McCurdy at (415) 538-2107.

**1. ETHICS HOTLINE**

As of September 30, 2016, 9,789 member inquiries were received with a completion rate of 84%. This completion rate includes distribution of 111 copies of published ethics opinions and other written materials requested by inquirers and 2,195 referrals to information posted at the Bar's website. In addition, the staff made 67 courtesy follow-up calls to members who placed a call to the Hotline, received a call back from Hotline staff but were not available at that time to take the call from the Hotline staff person. These members received instructions on how to call-in and receive priority handling when they choose to return the Hotline's call at their convenience. However, when no return call is received, the Hotline initiates a courtesy follow-up call. (See Enclosure 1: Ethics Hotline Activity Statistics.)

Currently four paralegals have primary responsibility for the Ethics Hotline call work. As of September 30, 2016: (1) the monthly average number of total calls handled by one paralegal was 372; (2) the monthly average number of completed calls by one paralegal was 228; and (3) the monthly average number of left messages by one paralegal was 144.

From June - September, 2016, since the last Competence status report submitted for the Board Committee's July 21, 2016 meeting, six voluntary satisfaction surveys were received from members after using the Ethics Hotline service. Each survey asks for a rating on several specified categories of service, including: satisfaction with the system for handling the calls; helpfulness of receptionist; helpfulness of paralegal; usefulness of materials sent; whether the inquirer would recommend the Hotline to others; and whether they received the assistance they needed. All of the surveys received gave the Hotline top marks in all survey categories (copies of the surveys are available upon request). All but one of the six survey respondents added personal comments commending the staff for their assistance and describing the service as a valuable resource. Although praise was expressed for the paralegal who ultimately assisted a caller, one survey respondent expressed dissatisfaction with the receptionist and the system for receiving calls. Ethics Hotline supervisors have investigated these concerns. (See Enclosure 2: Ethics Hotline Satisfaction Survey Excerpts.)

Through September 30, 2016, the category of "Communications" was the most frequently raised issue category, which accounted for 20% of the total calls. This category encompasses questions concerning communications between the attorney and the client, the adverse party, a judge or judicial officer, jurors, opposing counsel, witnesses and others. Close behind were the categories of

“Fees and Costs” (18%) and “Conflicts” (14%). Historical data indicates that these categories often occupy the top three positions each year.

## 2. COPRAC

Since the last Professional Competence status report submitted for the Board Committee’s July 21, 2016 meeting, COPRAC met on August 12, 2016 in San Francisco, September 8, 2016 via conference call, and September 29, 2016 in San Diego.

### A. Meetings

At the August 12, 2016 meeting, COPRAC considered post-public comments received on Formal Opinion Interim No. 12-0006 (Attorney Blogging). COPRAC also continued pre-public comment work on the following draft opinions: 12-0002 (Revocation of Waivers); 12-0003 (Attorney Directory and Rating Websites); 12-0005 (Law Firm In-House Counsel); 13-0002 (Attorney with a Vulnerable Client); 13-0003 (Ethical Obligations When Departing Firm); 13-0004 (Collecting Unpaid Fees); 14-0001 (Colleague Impairment); 14-0002 (Alternative Litigation Funding); 14-0003 (Settling Before Withdrawal); 14-0004 (Witness Perjury); 16-0001 (Practice in Multiple Firms); 16-0002 (Lost or Stolen Laptop or Briefcase); and 16-0003 (Ancillary Business). The Committee also continued work on their draft public comment letters on several proposed rules of professional conduct. The Committee continued work on plans for four panel presentations for the State Bar Annual Meeting being held in September in San Diego.

During the September 8, 2016 meeting, COPRAC considered the remaining draft public comment letters on the proposed rules of professional conduct. COPRAC completed their work on these remaining rules during this meeting and formally submitted their comments for consideration by the Rules Revision Commission.

At the September 29, 2016 meeting, COPRAC continued post-public comment work on Formal Opinion Interim No. 12-0006 (Attorney Blogging). COPRAC also continued pre-public comment work on the following draft opinions: 12-0002 (Revocation of Waivers); 12-0003 (Attorney Directory and Rating Websites); 12-0005 (Law Firm In-House Counsel); 13-0002 (Attorney with a Vulnerable Client); 13-0003 (Ethical Obligations When Departing Firm); 13-0004 (Collecting Unpaid Fees); 14-0001 (Colleague Impairment); 14-0002 (Alternative Litigation Funding); 14-0003 (Settling Before Withdrawal); 14-0004 (Witness Perjury); 16-0001 (Practice in Multiple Firms); 16-0002 (Lost or Stolen Laptop or Briefcase); and 16-0003 (Ancillary Business). The Committee decided to pursue holding next year’s ethics symposium in April, 2017, at the Loyola Law School in Los Angeles.

Post-public comment consideration of proposed Formal Opinion Interim No. 12-0006 occurred at the Committee’s September 29, 2016 meeting, and the Committee approved this opinion for submission to the Committee on Regulation and Discipline for final approval. An agenda item requesting RAD’s approval of this opinion appears on RAD’s November 17, 2016 meeting agenda. The issue and digest of proposed Formal Opinion Interim No. 12-0006 is set forth below.

#### Formal Opinion No. 12-0006:

**Issue:** Under what circumstances is “blogging” by an attorney a “communication” subject to the requirements and restrictions of the Rules of Professional Conduct and related provisions of the State Bar Act regulating attorney advertising?

**Digest:** 1. Blogging by an attorney may be a communication subject to the requirements and restrictions of the Rules of Professional Conduct and the State Bar Act relating to lawyer advertising if the blog expresses the attorney’s availability for professional employment directly through words of invitation or offer to provide legal services, or implicitly through its description of the type and character of legal services offered by the attorney, detailed descriptions of case results, or both.

2. A blog that is an integrated part of an attorney's or law firm's professional website will be a communication subject to the rules and statutes regulating attorney advertising to the same extent as the website of which it is a part.
3. A stand-alone blog by an attorney, even if discussing legal topics within or outside the authoring attorney's area of practice, is not a communication subject to the requirements and restrictions of the Rules of Professional Conduct and the State Bar Act relating to lawyer advertising unless the blog directly or implicitly expresses the attorney's availability for professional employment.
4. A stand-alone blog by an attorney on a non-legal topic is not a communication subject to the rules and statutes regulating attorney advertising, and will not become subject thereto simply because the blog contains a link to the attorney or law firm's professional website. However, extensive and/or detailed professional identification information announcing the attorney's availability for professional employment will itself be a communication subject to the rules and statutes.

COPRAC's next meeting is scheduled for November 4, 2016, and will be held in Los Angeles. At this meeting, COPRAC will continue pre-public comment work on the following opinions: 12-0003 (Attorney Directory and Rating Websites); 12-0005 (Law Firm In-House Counsel); 13-0002 (Attorney with a Vulnerable Client); 13-0003 (Ethical Obligations When Departing Firm); 13-0004 (Collecting Unpaid Fees); 14-0001 (Colleague Impairment); 14-0002 (Alternative Litigation Funding); 14-0003 (Settling Before Withdrawal); 14-0004 (Witness Perjury); 16-0001 (Practice in Multiple Firms); 16-0002 (Lost or Stolen Laptop or Briefcase); and 16-0003 (Ancillary Business). The Committee will begin planning for the 2017 Annual Statewide Ethics Symposium.

#### **B. Education and Outreach Programs**

See section 6 of this report for a discussion of the programs conducted by COPRAC at the State Bar Annual Meeting in San Diego.

#### **C. Board Appointments to COPRAC**

The Board considered NAC's appointment recommendations at their July 22, 2016 meeting, and approved the appointment of three new attorney members and one new public member, as well as the reappointment of one attorney member who previously served an interim appointment of less than one year. The new members will attend an orientation session prior to COPRAC's next scheduled meeting on November 4, 2016.

### **3. PROPOSED NEW AND AMENDED RULES OF PROFESSIONAL CONDUCT**

Since the last Professional Competence status report submitted for the Board Committee's July 21, 2016, a public hearing to receive oral testimony on all rules circulating for public comment was held on July 26, 2016 from 10 am – 3:00 pm, at the Los Angeles and San Francisco offices of the State Bar, as well as by a tele-conference connection. There were ten speakers who provided twenty-one individual comments on discrete rule topics as most speakers addressed more than one proposed rule.

The 90-day comment circulation for the comprehensive set of rules ended on September 27, 2016 and approximately 520 comments on discrete rule topics from 135 public comment submissions were received and logged. The Commission met on August 26, 2016 in San Francisco, September 30, 2016 in San Diego and October 21 & 22, 2016 in Los Angeles to consider the comments and public hearing testimony received on the proposed rules circulated for public comment. At the Board of Trustees'

November 17 & 18, 2016 meeting, the Commission is requesting that some proposed rules be approved for transmittal to the Supreme Court for adoption, and that other proposed rules be circulated for an additional 45-day comment period (see Board agenda items 701 NOV 2016 and 702 NOV 2016). All proposed rules approved by the Board must be transmitted to the Supreme Court as a comprehensive set of amendments by the March 31, 2017 deadline.

The additional 45-day public comment period for proposed amendments to Rules 5-110 and 5-220 ended on July 1, 2016 and the post public comment consideration of those rules took place at the Commission's August 26, 2016 meeting. These rules are being studied on an expedited basis and separately from the Commission's comprehensive proposed rules. On October 1, 2016 the Board of Trustees adopted proposed amended Rules 5-110 and 5-220 for transmittal to the Supreme Court for final approval. Nine visitors attended this meeting and provided oral comments to the Board concerning these rule proposals, eight comments in support and one comment in opposition. The Supreme Court petition requesting approval of the proposed rules on an expedited basis is being prepared by staff and is anticipated to be filed with the Court by the end of the year.

The Commission's final two meetings are scheduled for January 20 & 21, 2017 at the State Bar Office in San Francisco and February 2 & 3, 2017 at the State Bar Office in Los Angeles. The focus of these meetings will be consideration of public comments received during the additional 45-day comment period on select rules that were further revised in response to the comments received during the initial 90-day comment circulation.

Articles concerning the rule revision project, including the expedited amendments to Rule 5-110 regarding the duties of prosecutors, have been published. Examples include the following: 1) *Comment on Proposed Rule Revisions Before Time is Up*, Heather Rosing, Daily Journal, September 23, 2016; and 2) *High Court Weighs New Prosecutor Rules*, Wendy Chang, Daily Journal, October 14, 2016.

**Rules Revision Action Timeline**

Nov. 17 & 18, 2016	BOT: return from 90-day public comment, request for final adoption, and authorization to re-distribute certain proposed rules for additional public comment
Nov. 21, 2016 – Jan. 9, 2016	Anticipated 45-day public comment period for proposed rule that were materially revised after the initial 90-day public comment period.
March 9 & 10, 2017	BOT: return from 45-day public comment, adoption of remaining rules for submission to the Supreme Court for approval
March 31, 2017	Deadline to submit entire set of proposed new and amended rules to the Supreme Court for approval

**4. SENATE BILL NO. 1186**

Enacted in September 2012, Senate Bill No. 1186 made significant changes to the law governing construction-related disability access claims. In accordance with Senate Bill No. 1186, Professional Competence staff receives and reviews copies of demand letters to screen for matters that may give rise to a disciplinary investigation. Any identified compliance issues are forwarded to the Office of Enforcement. Senate Bill No. 1186 also requires the State Bar to submit an annual report to the legislature on July 31 of each year. The 2016 report was timely submitted.

Pursuant to AB 1521, Civ. Code sec. 55.3(b) was amended to require an attorney to provide a verified answer form developed by the Judicial Council on or before July 1, 2016, with each demand letter. The verified answer form, Judicial Council Form DAL-002, was available on the Judicial Council website on July 1, 2016.

The table below shows the number of demand letters received and reviewed by the Office of Professional Competence, as well as the number of matters referred to Enforcement for possible violations of the statute (year to date by month).

**ADA Letters Received-Referred to Enforcement  
(1/1/16 through 9/30/16)**

Month	Letters Received	Letters Referred To Enforcement
Jan.	6	6
Feb.	40	12
Mar.	68	4
Apr.	29	3
May	11	1
June	37	0
July	30	6
Aug.	37	31
Sept.	46	44
<b>TOTAL</b>	<b>304</b>	<b>107</b>

The table below lists the possible compliance issues and shows the numbers of issues referred to Enforcement.

**Compliance Issues Referred to Enforcement\*  
(1/1/16 through 9/30/16)**

Compliance Issue	No. of Issues
Failure to Copy the State Bar within 5 Business Days	3
Failure to Include Mandatory Advisory	25
Failure to Include Verified Answer Form (new requirement effective on July 1, 2016.	41
Failure to Copy the CCDA within 5 Business Days	3
Possible Prohibited Request/Demand for Money or Offer/Agreement to Accept Money	1
Possible Prohibited Statement of Recipient's Specific Monetary Liability	8

(\*Note: A single letter may have more than one compliance issue.)

**5. COMPETENCE PUBLICATIONS**

Handbook on Client Trust Accounting for California Attorneys: The online Trust Accounting Handbook html webpage was visited approximately 7,630 times between January – September, 2016.

California Compendium on Professional Responsibility: Work on the 2016 update is underway and is anticipated to be completed in the 4th quarter.

California Rules of Professional Conduct & State Bar Act (a.k.a Publication No. 250): Work on the 2016 Publication 250 has been completed and issuance of the publication is anticipated by the end of the 4<sup>th</sup> quarter.

An e-Reader version of Publication 250<sup>1</sup> is available at the Amazon Kindle store. A total of two hundred eighty e-books have been purchased to date. The 2016 e-Reader version of Publication 250 was posted in September.

<sup>1</sup> The e-Reader version of Publication 250 is compatible with the Kindle Reader App which is a free e-Reader application available for iPads, iPhones, Blackberry Phones, Android Phones, Macbooks, and PC laptops. The book also works on all versions of Amazon.com's own Kindle Reader device, including the Kindle Fire. The e-

## 6. PROFESSIONAL COMPETENCE EDUCATIONAL PROGRAMS & OTHER OUTREACH ACTIVITIES

COPRAC members presented four CLE programs at the Annual Meeting. The programs were entitled: (1) Ethics Update 2016: Significant Developments in the Law of Lawyering (240 attendees); (2) Huffing, Puffing and Bluffing: The Bounds of Legal Ethics in Negotiations (202 attendees); (3) My Lips Are Sealed: Client Secrets, Confidences and the Attorney-Client Privilege (188 attendees); and (4) Difficult Personalities Confronted by Lawyers (127 attendees); Each of these programs was approved for ethics credit and legal specialization credit for legal malpractice specialization. They were all also selected for webcasting and will be available at the State Bar CLE store online following the Annual Meeting. The ratings and comments received on the attendee evaluation forms for these programs were generally favorable. A summary of the evaluation responses will be provided with the next status report.

**Targeted Outreach:** The Professional Competence staff hosted a booth in the exhibit hall of the State Bar's Annual Meeting in San Diego to conduct outreach, distribute items promoting the Ethics Hotline service, and to provide free competence resources, including copies of a booklet containing the Rules of Professional Conduct and selected State Bar Act sections. Visitors were encouraged to play a computer game that helped self-assess the player's knowledge of California legal ethics, including recent developments.

In addition, in late October, approximately 4,000 copies of a State Bar ethics resources flyer will be included in a mailing with other materials to the new admittees to the State Bar. The flyers highlight the following resources: the Ethics Hotline service; ethics related publications; online ethics resources including the advisory ethics opinions; the Ethics & Technology web page; the new Client Trust Accounting web page; and the e-Reader version of the California Rules of Professional Conduct and State Bar Act book.

## 7. COMPETENCE RESOURCES AT CALBAR.CA.GOV

Web Activity: The State Bar tracks the web activity for all html website pages accessed.<sup>2</sup> The chart below lists selected web pages administered by Professional Competence and the 2016 activity in terms of visits.

Professional Competence Web Resources – Activity Detail* January – September, 2016	
Webpage	Approx. Number of Visits
Rules of Professional Conduct html web pages	411,160
The State Bar Act html web pages	19,080
Ethics Opinions html web pages	26,860
Ethics Information html web pages	154,400
Ethics & Technology html web pages	14,790
Client Trust Accounting Resources web pages	7,630
Senior Lawyer Ethics Resources web pages	8,830
Judicial Ethics web pages	2,010

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Reader version of the book can be purchased at Amazon.com and has several useful features including: a search function; bookmarking; highlighting and annotating. In addition, once downloaded to a tablet, smartphone or other compatible device, the book can be accessed at any time, even if there is no Internet or cellular data signal.

<sup>2</sup> Web download statistics are not available for web content posted as Adobe PDF documents.

Since the last Professional Competence status report submitted for the Board Committee's July 21, 2016 meeting, the following website updates were made:

1. The Commission for the Revision of the Rules of Professional Conduct web pages and State Bar Board of Trustees meeting page were updated as follows: (1) posting of the August 26, September 30, and October 21 & 22 meeting agendas and materials; (2) and posting of Board agenda materials for the post public comment consideration of proposed Rules 5-110 and 5-220 for the Board's October 1, 2016 meeting.
2. The Senior Lawyers page was updated to add a link to a September 2016 ABA Journal article entitled *What are partners' duties when a colleague is impaired?*



## ENCLOSURE 1

### ETHICS HOTLINE ACTIVITY STATISTICS - 2016

Month	Work Days	Incoming Calls	Completed Calls	Left Messages	Percentage of Incoming Calls that are Completed Calls	Percentage of Incoming Calls that are Left Messages	Resources Mailed/Faxed	Internet Resource Referrals
January	19	1,111	954	157	86%	14%	14	264
February	20	1,134	944	190	83%	17%	20	240
March	22	1,097	885	212	81%	19%	20	263
April	21	1,135	946	189	83%	17%	4	242
May	21	1,120	939	181	84%	16%	12	273
June	22	1088	907	181	83%	17%	14	232
July	20	955	790	165	83%	17%	7	208
August	23	1101	967	134	88%	12%	8	243
September	21	1048	893	155	85%	15%	12	230
Cumulative Totals	189	9,789	8,225	1,564	84%	16%	111	2,195

#### EXPLANATIONS

**Incoming Calls:** Total member inquiries to the Hotline received during that month.

**Completed Calls:** Member inquiries received in that month that were handled and resolved by staff during that month.

**Left Messages:** Member inquiries received in that month where staff left an initial message or courtesy follow-up message, but did not reach the member to resolve the inquiry.

**Percentage of Incoming Calls that are Completed Calls:** Proportion of Incoming Calls that were Completed Calls handled and resolved by the staff.

**Percentage of Incoming Calls that are Left Messages:** Proportion of Incoming Calls where staff left a message but the member did not return the call.

### 2016 Key Hotline Activity Averaged by Day and Month

<b>Daily:</b>	Incoming Calls:	52
	Completed Calls:	44
<b>Monthly:</b>	Incoming Calls:	1,088
	Completed Calls:	914

### 2016 Aggregate Outgoing Calls

<b>Average Monthly Aggregate:</b>	1,466*
<b>Cumulative to Date:</b>	13,535*

\*These figures account for all calls placed by staff, including: Completed Calls; Left Messages; and, courtesy follow-up calls. Due to "telephone tag" with members, staff may place multiple calls and leave multiple messages prior to completing a call.

## ENCLOSURE 2

### Excerpt from Ethics Hotline Customer Satisfaction Surveys (Surveys Received for June, 2016 - September, 2016)

1. Received July 29, 2016

COMMENTS / SUGGESTIONS:

Pam Hill listened carefully and provided excellent resources for the concerns that a client brought to me concerning another lawyer's conduct in purporting to represent their corporation and accepting their funds as retainer payments. It was a great resource.

2. Received August 15, 2016

COMMENTS/SUGGESTIONS:

Pam was on-point and her reference to cases/opinions was very helpful. She clearly and quickly understood the fact pattern and the concerns that I expressed to her.

3. Received August 15, 2016

COMMENTS / SUGGESTIONS:

Ms. Hill was very helpful

4. Received September 21, 2016

COMMENTS/SUGGESTIONS:

My inquiry was a mixed question of ethics law, and Ms. Hill's pointers (i.e. towards Bar opinions) on the ethical issues were invaluable in my attempt to resolve the issues I was dealing with.

5. Received September 28, 2016

COMMENTS/SUGGESTIONS:

You need more money. I am a big proponent about the ethics hotline and have recommended it to many fellow attorneys. Years ago, the call back was the same day, or within a few hours. These days the call back is 24 hours later. You need more money to hire more paralegals. Perhaps an initiative on the annual State Bar billing would help. Pamela, like most of your paralegals, are excellent, informative, and appear to go out of their way to look up information relevant to the issue raised.

The only negative with the hotline is the initial call. The receptionist sounds like he hates his job and can barely tolerate having to take yet another name for call back. I can understand the monotony of the job, but it would be nice if I/we did not have to hear that tone and terseness from the receptionist when we call about what we believe to be important questions of complying with California ethical conduct.

**ENCLOSURE 3**

**Professional Competence Budget Summary  
Authorized vs. Actual**

**Year-to-Date as of September 2016**

<b>Budget (Actual)</b>	\$1,187,695
<b>Budget (Authorized)</b>	\$1,347,098
<b>Variance</b>	\$159,463

**Monthly (January thru September 2016)**

	<b>January</b>	<b>February</b>	<b>March</b>	<b>April</b>
<b>Budget (Actual)</b>	\$118,736	\$125,139	\$139,508	\$114,732
<b>Budget (Authorized)</b>	\$143,026	\$143,026	\$143,026	\$143,026
<b>Variance</b>	\$24,290	\$17,887	\$3,518	\$28,294

	<b>May</b>	<b>June</b>	<b>July</b>	<b>August</b>	<b>September</b>
<b>Budget (Actual)</b>	\$135,860	\$128,927	\$185,860	\$117,249	\$121,624
<b>Budget (Authorized)</b>	\$143,026	\$143,026	\$202,890	\$143,026	\$143,026
<b>Variance</b>	\$7,166	\$14,099	\$17,030	\$25,777	\$21,402