



THE STATE BAR OF CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

OFFICE OF PROFESSIONAL COMPETENCE

PLANNING, AND DEVELOPMENT

TELEPHONE: (415) 538-2167

MEMORANDUM

DATE: October 11, 2011

TO: Members of the Board's Regulation, Admissions & Discipline Oversight Committee

FROM: Randall Difuntorum, Director, Professional Competence Programs

SUBJECT: RAD Meeting on November 3, 2011 – Status of the Professional Competence Unit

This memorandum provides a report on the activities of the Professional Competence Unit through September 30, 2011.¹ In addition to this memorandum, provided are the following: (1) Ethics Hotline Activity Statistics, (2) Professional Competence Budget Summary – Authorized vs. Actuals, and (3) Ethics Hotline satisfaction survey excerpts. 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, 2011, 11,508 member inquiries were received with a completion rate of 91%. This completion rate includes distribution of 294 copies of published ethics opinions and other written materials requested by inquirers and 4,795 referrals to information posted at the Bar's website. (Due to the availability of State Bar Formal Opinions at the Ethics Information area of the website, there is a decreasing need for distribution of this information by mail.) In addition, the staff made 1,432 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.

Six Ethics Hotline paralegals handle the majority of calls received. As of September 30, 2011: (1) the monthly average number of total calls handled by one paralegal was 369; the monthly average number of completed calls by one paralegal was 222; and (3) the monthly average number of left messages by one paralegal was 147. Between June and September, since the last status report for RAD's July 22nd meeting, 13 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 most survey categories (Copies of the surveys are available upon request). Comments from members were provided on eleven of these surveys and were uniformly favorable. (An excerpt from these 11 surveys with the full text of the member comments is attached.)

¹ There are 13.5 authorized positions in the Professional Competence Unit and all of these positions are currently filled. These authorized positions include a Program/Court Systems Analyst position that is shared with the Office of General Counsel. In addition, a temporary law clerk is assigned to the Office of Professional Competence.

2. COPRAC

Since the last Professional Competence status report submitted for the Board Committee's July 22, 2011 meeting, COPRAC met on July 15 & 16 in Los Angeles and on September 15 in Long Beach.

At the July meeting, COPRAC continued post-public comment consideration of Formal Opinion Interim No. 06-0004 (confidentiality and unsolicited e-mail correspondence) which had been circulating for a 60-day second public comment period ending on April 4, 2011 and Formal Opinion Interim No. 10-0002 (communications with attorney's implied consent) which had been circulating for a 90-day public comment period ending on June 28, 2011. Formal Opinion Interim No. 10-0002 was approved unanimously by the committee for submission to RAD for publication approval.

At the September meeting, COPRAC continued post-public comment consideration of Formal Opinion Interim No. 06-0004 (confidential information and unsolicited e-mail correspondence), and began post-public comment consideration of Formal Opinion Interim No. 08-0003 (serving subpoenas on existing clients of a law firm) which had been circulating for a 90-day public comment period ending on August 10, 2011. Formal Opinion Interim No. 09-0001A was approved unanimously by the committee for public comment distribution.

At the July and September meeting, COPRAC also continued pre-public comment consideration of 09-0001B (duty of confidentiality and seeking legal advice), 10-0001 (social networking), and 10-0003 (virtual law practice). COPRAC also began discussion of a new opinion topic regarding third party payors (11-0001), and selected and assigned drafting teams for an additional three opinion topics for discussion at their September meeting (11-0002 re duties to opposing side, 11-0003 re dissolving firm and moving to new firm, and 11-0004 re ESI and discovery requests). COPRAC also discussed the Board's proposal to offer free online MCLE in legal ethics and new committee initiatives including new outreach programs directed to local, county and specialty bar associations.

The following opinion was tentatively approved by COPRAC for 90-day public comment circulation. Post-public comment consideration of the following opinion will occur at the Committee's February meeting. This opinion will be posted for a 90-day public comment period, with an anticipated public comment deadline of mid-January 2012.

Formal Opinion Interim No. 09-0001A:

ISSUES: In settling a dispute with a former client, may an attorney seek: (1) the former client's written representations that no State Bar complaint has been filed; (2) the former client's representation that he or she has no present intention to file a State Bar complaint; (3) the former client's written contractual agreement not to file a State Bar complaint against the attorney based on matters relating to or arising out of the representation; or (4) the former client's oral agreement not to file a State Bar complaint against the attorney based on matters relating to or arising out of the representation?

DIGEST: Business and Professions Code section 6090.5 prohibits an attorney from seeking a client's written or oral agreement not to file a State Bar complaint against that attorney. "Seeking" an agreement includes any attorney communication to a client proposing or suggesting a prohibited agreement. "Seeking" also may encompass factual recitations in the settlement agreement that the client has not filed a State Bar complaint, or concerning the client's future intentions regarding filing a State Bar complaint. Section 6090.5 might prohibit these types of recitations because they could produce an impermissible chilling effect on the client's future filing of a State Bar complaint. If a lawyer seeks an oral or written agreement to not file a State Bar complaint, withdrawal of that request does not cure the ethical violation.

COPRAC's next meeting is scheduled for November 4 & 5, 2011 and will be held in San Diego. At this meeting, the Committee will hold a new member orientation session and continue work on the following matters: post-public comment consideration of Formal Opinion Interim No. 06-0004 (confidential information and unsolicited e-mail correspondence), and 10-0002 (communications with opposing counsel's implied consent under the "no contact" rule); pre-public comment consideration of Formal Opinion Interim Nos. 09-0001B (client confidentiality and seeking legal advice), 10-0001 (social networking), 10-0003 (virtual law practice), 11-0001 (third party payors); 11-0002 (duties to opposing side), 11-0003 (dissolving firm and moving to new firm), and 11-0004 (ESI and discovery requests); continued planning for the 2012 State Bar Annual Ethics Symposium; and continued discussion of the new Committee CLE initiatives and outreach programs.

COPRAC conducted four educational programs at the State Bar Annual Meeting held in Long Beach. The COPRAC sponsored programs were entitled "Ethics Update 2011: Significant Developments in the Law of Lawyering," "People's Money: An Overview of Client Trust Accounting," "Ethical Screens in California," and "Dealing with Difficult Clients While Maintaining Your Professional Responsibility." The Office of Professional Competence also sponsored one additional program. This program was entitled "Social Networking and Professional Responsibility: Can They Co-Exist?," and was moderated by former RAD co-chair Judy Gilbert, and presented by COPRAC's current Advisor, and then-chair Shawn Harpen, Kevin Mohr, Wesley Hsu, and Antone Johnson. A summary of the program evaluation forms for these programs will be provided with the next RAD status report. The foregoing programs were all selected by Annual Meeting staff for videotaping to be offered as online CLE following the Annual Meeting.

3. RULES REVISION COMMISSION

On July 20, 2011, the State Bar of California submitted a petition to the Supreme Court of California seeking approval of proposed new and amended Rules of Professional Conduct adopted by the Board of Governors pursuant to Business and Professions Code sections 6076 and 6077. This petition presented six of sixty-seven proposed rules for the Court's consideration (Supreme Court case no. S 194947). By letter dated September 29, 2011, the State Bar withdrew this petition in order to submit all of the proposed rules in a single comprehensive petition. This comprehensive petition is anticipated to be unprecedented in scope and in volume of supporting materials. It will also be formatted in a manner that has not been used for previous rule filings. An oral report will be provided at the RAD meeting.

4. COMPETENCE PUBLICATIONS

Handbook on Client Trust Accounting for CA Attorneys: A revised 2011 online version of the handbook is now available at the Bar's website. The updated book provides revised information concerning FDIC coverage for IOLTA client trust accounts.

California Compendium on Professional Responsibility: Sales of the 2011 Compendium update began in August. To date, 60 updates have been sold.

CA Rules of Professional Conduct & State Bar (a.k.a Publication No. 250): Sales of the 2011 Publication 250 began in April, and 670 orders have been received and processed through September 30, 2011. In September, at the State Bar Annual Meeting in Long Beach, the Office of Professional Competence debuted a new e-reader version of Publication No. 250. The e-Reader version of the rule book 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 Kindle Reader device. For a limited time, the e Reader version of the Bar's rule book can be purchased at Amazon.com for \$4.99, which is a quarter of the price of the hardcopy book. The e-Reader version of the book 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. So far, 27 copies of the e-Reader version of the Bar's rule book have been sold. In addition, one Amazon.com purchaser has posted a favorable review of the book, giving it 4 out of 5 stars.

5. COMPETENCE RESOURCES AT CALBAR.CA.GOV

The State Bar tracks the web activity for all website pages accessed. The chart below lists selected web pages administered by Professional Competence and the 2011 activity in terms of visits (a.k.a. "hits").

2011 Professional Competence Web Resources – Activity Detail* January – September, 2011	
Webpage	Approx. Number of Visits
Trust Accounting Handbook html webpage	3,787
Rules of Professional Conduct html webpages	352,345
The State Bar Act html webpages	17,439
Ethics Opinions html webpages	30,019
Ethics Information html webpages	175,012

*NOTE: Since the transition to the new website in June, 2010 web download statistics are no longer available for Adobe PDF documents.

Two free online MCLE self-study articles produced by the Office of Professional Competence have been used by thousands of lawyers to obtain free MCLE credit in ethics. So far in 2011, an article entitled "A 'Charging Lien' as an Adverse Interest Under Rule 3-300 of the Rules of Professional Conduct" has been used by 2,075 members and another article addressing the topic of the Proposed New and Amended Rules of Professional Conduct has been used by 2,790. The total usage for both MCLE self-study articles since posting in 2010 is 9,506.

New this year, the following four panels offered at the Statewide Ethics Symposium held at UC Irvine on April 9, 2011, were webcast and are posted at the Bar's MCLE website for 1.5 hours each of online participatory credit in ethics. The panel entitled "Ethics in Limbo: Practical Issues for Lawyers as Changes in the Law Regulating Lawyers Continue" has been offered for free since the date of the live event.

Ethics Programs Offered for Online Participatory Credit – Activity Details April - September 30, 2011	
Title	No. of Views
Ethics in Limbo: Practical Issues for Lawyers as Changes in the Law Regulating Lawyers Continue	197
Ethics on the Inside	6
Ethics on the Outside: Electronic Communication and Professional Responsibility - Can They Coexist?	19
Ethics, Innocence and Prosecutorial Misconduct	6

A new area dedicated to Ethics and Technology (found under a new tab on the Ethics Information page) was created to provide a collection of resources addressing attorney professional responsibility issues that arise in connection with the use of Internet websites, e-mail, chat rooms and other technologies. The resources include advisory ethics opinions, articles, and MCLE programs. Most of the links to these resources are internal links to other pages at the State Bar website. Some are external links to local or specialty bar association websites and other websites. The new page is organized both by the type of resource (ethics opinion, article, etc.) and by subject matter (law firm websites, electronic files, social networking, etc.).

The online version of the index to the *California Compendium on Professional Responsibility* posted at the Ethics Information page of the Bar's website was replaced with an enhanced version in September. The Compendium index permits members to research rules and ethics opinions. The enhanced version of the index now provides direct links to the California Rules of Professional Conduct and the State Bar Formal Ethics Opinions cited in the index.

cc: Robert A. Hawley

ETHICS HOTLINE ACTIVITY STATISTICS - 2011

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	20	1325	1283	42	97%	3%	54	531
February	19	1155	1044	111	90%	10%	23	507
March	22	1421	1273	148	90%	10%	30	610
April	21	1263	1152	111	91%	9%	38	556
May	21	1269	1148	121	90%	10%	47	543
June	22	1288	1210	78	94%	6%	19	527
July	20	1148	1014	134	88%	12%	27	441
August	23	1376	1231	145	89%	11%	29	569
September	21	1263	1112	151	88%	12%	27	517
Cumulative Totals	189	11508	10467	1041	91%	9%	294	4795

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.

Key Hotline Activity Averaged by Day and Month

Daily:	Incoming Calls:	61
	Completed Calls:	55
Monthly:	Incoming Calls:	1,279
	Completed Calls:	1,163

Aggregate Outgoing Calls

Current Month:	1,913*
Cumulative to Date:	17,756*

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.

Professional Competence Budget Summary

Authorized vs. Actual

Year-to-Date as of September 30, 2011

Budget (Actual)	\$1,307,305
Budget (Authorized)	\$1,806,079
Savings	\$498,774

Monthly (January-June)

	January	February	March	April	May	June
Budget (Actual)	\$160,273	\$159,732	\$46,638	\$222,232	\$171,971	\$161,570
Budget (Authorized)	\$185,116	\$185,116	\$184,795	\$252,745	\$184,795	\$186,213
Variance	\$24,843	\$25,384	\$138,157	\$30,513	\$12,824	\$24,643

Monthly (July-December)

	July	August	September	October	November	December
Budget (Actual)	\$107,291	\$158,556	\$119,042			
Budget (Authorized)	\$186,213	\$186,213	\$254,873			
Variance	\$78,922	\$27,657	\$135,831			

Excerpt from Ethics Hotline Customer Satisfaction Surveys
Additional Comments

(Surveys Received June - September, 2011)

1. Received June 24, 2011

COMMENTS / SUGGESTIONS:

I had numerous questions regarding an opposing attorney's conduct. Susan was helpful beyond what I had expected. Great service to us! thanks

2. Received June 27, 2011

COMMENTS / SUGGESTIONS:

It would be really helpful if the ethics hotline person could send their notes via email since it is hard to take through notes while also interacting and listening on the phone.

3. Received June 28, 2011

COMMENTS / SUGGESTIONS:

David (receptionist/intakes) has done a great job every time I call in. He has a great sense a humor.

4. Received July 27, 2011

COMMENTS/SUGGESTIONS:

I have been calling the CA Bar Ethics Hotline for years (started practicing in 1987), both from the large law firm where I used to practice and now from my solo shop. In all cases I have received prompt and helpful advice, including cites to cases I had not located on my own, which made it much easier for me to answer my question. This was especially useful back in the old days, when it was harder to find cases. But even now that the internet has put much legal research at our fingertips, it is still helpful to have access to what is essentially an expert law librarian who knows this particular area inside and out. Great service. Thank you for providing it. I recommend it to other lawyers all the time!

5. Received August 4, 2011

COMMENTS/SUGGESTIONS:

I am a Washington attorney who called your Ethics Hotline on Thursday morning, August 4, 2011 with an ethics-related question related to California practice and got a callback from Lynn that afternoon. I was greatly impressed with the speed of the response (since your receptionist told me about the large backlog of calls your staff was working slogging through that day), the breadth and depth of legal research and citation to legal source materials provided to me in answer to my question and the professional courtesy, efficiency, knowledge and insight displayed by Lynn in answering my question. As I told her at the end of the call, I wish we had such a wonderfully helpful service in Washington! Thank you so much for your help.

6. Received August 10, 2011

COMMENTS/SUGGESTIONS:

Pamela was the one who helped me, and she was respectful, understanding and very helpful!

7. Received August 24, 2011

COMMENTS/SUGGESTIONS:

Ricardo was excellent in the code and case. When uncertain, he got the assistance of his supervisor. Thank-you for having this line available!!

8. Received September 22, 2011

COMMENTS/SUGGESTIONS:

Ricardo was very courteous and had answers at his disposal. very impressive.

9. Received September 22, 2011

COMMENTS/SUGGESTIONS:

My paralegal was extremely helpful! I was extremely impressed with her ability to grasp the situation and lead me to resources. Thank you!

10. Received September 27, 2011

COMMENTS/SUGGESTIONS:

Very helpful. Lynn was very patient, and spent quite some time with me, and gave thoughtful responses to my inquiry.

11. Received September 29, 2011

COMMENTS/SUGGESTIONS:

Great source of information; wonderful resource