



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: January 23, 2012

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

FROM: Randall Difuntorum, Director, Professional Competence Programs

SUBJECT: RAD Meeting on February 9, 2012 – Status of the Professional Competence Unit

This memorandum provides a report on the activities of the Professional Competence Unit through November 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; (3) Ethics Hotline satisfaction survey excerpts; and (4) Synopsis of Annual Meeting program evaluation forms. Board members with questions may contact Randall Difuntorum at (415) 538-2161 or Lauren McCurdy at (415) 538-2107.

1. ETHICS HOTLINE

As of November 30, 2011, 13,695 member inquiries were received with a completion rate of 90%. This completion rate includes distribution of 345 copies of published ethics opinions and other written materials requested by inquirers and 5,610 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 1,503 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, sometimes these members do not return the call and in those situations the Hotline initiates a courtesy follow-up call to ascertain if the member still needs the Hotline's assistance.

Six Ethics Hotline paralegals handle the majority of calls received. As of November 30, 2011: (1) the monthly average number of total calls handled by one paralegal was 382; the monthly average number of completed calls by one paralegal was 212; and (3) the monthly average number of left messages by one paralegal was 142. Since the last status report for RAD's November 3, 2011 meeting, 4 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 the survey categories. Copies of the completed survey forms are available upon request. Comments from members were provided on each of the four surveys and were uniformly favorable. (The full text of these four member comments is provided in the attached excerpt from the survey forms.)

¹ There are 13.5 authorized positions in the Professional Competence Unit and one of the positions, a staff attorney position, currently is vacant. This vacancy was posted on December 26, 2011. Applications received are under review and a first round of interviews is anticipated in February.

Staff has begun to evaluate the Ethics Hotline data for the year 2011. The top issues raised in 2011 were: fees and costs (18%); conflicts of interest (13%); and communications (11%). Demographic data collected voluntarily from callers indicates that 59% of the Ethics Hotline users were first time callers and 41% were callers who had previously used the service. The table below presents the top issues in 2011 as compared to 2010 and 2009.

<i>Ethics Hotline: Primary Issues</i>	<i>2011</i>	<i>2010</i>	<i>2009</i>
<i>Fees and Costs for Legal Services</i>	18%	17%	18%
<i>Conflicts of Interest</i>	13%	11%	11%
<i>Communications with Clients, Adverse Party and Others</i>	11%	11%	10%
<i>Misconduct/Moral Turpitude/Trial Conduct</i>	10%	9%	9%
<i>Attorney Advertising and Solicitation</i>	10%	11%	13%
<i>Client Confidential Information</i>	8%	8%	7%
<i>Unauthorized Practice of Law</i>	6%	6%	7%

2. COPRAC

Since the last Professional Competence status report submitted for the Board Committee's November 3, 2011 meeting, COPRAC met on November 5, 2011 in Los Angeles and on January 6, 2012 in San Francisco.

At the November 5th meeting, the Committee held a new member orientation session and continued 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. Formal Opinion Interim No. 10-0003 (virtual law office) was approved unanimously by the committee for public comment distribution.

At the January 6th meeting, COPRAC continued post-public comment consideration of Formal Opinion Interim No. 06-0004 (confidential information and unsolicited e-mail correspondence) which will be reformulated as an article for the Ethics Hotliner online newsletter. COPRAC also continued pre-public comment work on the following draft opinions: 10-0001 (social networking); 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). The following opinion was tentatively approved by COPRAC for 90-day public comment circulation at COPRAC's September 5, 2011 meeting. The comment deadline is January 31, 2012. Post-public comment consideration of the opinion will occur at the Committee's February 9, 2012 meeting.

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.

The following opinion was tentatively approved by COPRAC for 90-day public comment circulation at its November 5, 2011 meeting. The public comment deadline is March 23, 2012. Post-public comment consideration of the following opinion will occur at the Committee's March 23, 2012 meeting.

Formal Opinion Interim No. 10-0003:

ISSUE: May an attorney maintain a virtual law office practice ("VLO") and still comply with her ethical obligations, if the communications with the client, and storage of and access to all information about the client's matter, are all conducted solely through the internet using the secure computer servers of a third-party vendor (i.e., "cloud computing").

DIGEST: As it pertains to the use of technology, the Business and Professions Code and the Rules of Professional Conduct do not impose greater or different duties upon a VLO practitioner operating in the cloud than they do upon an attorney practicing in a traditional law office. While an attorney may maintain a VLO in the cloud where communications with the client, and storage of and access to all information about the client's matter, are conducted solely via the internet using a third-party's secure servers, Attorney may be required to take additional steps to confirm that she is fulfilling her ethical obligations due to unique issues raised by the hypothetical VLO and its operation. Failure of Attorney to comply with all ethical obligations relevant to these issues will preclude the operation of a VLO in the cloud as described herein.

As indicated in the Professional Competence status report submitted for the RAD's November 3, 2011 meeting, COPRAC conducted four educational programs at the State Bar Annual Meeting held in Long Beach and the Office of Professional Competence also sponsored one additional program moderated by former RAD co-chair Judy Gilbert. The program evaluation forms submitted by the attendees of these programs recently became available and a synopsis of the forms is attached. The full text of the evaluation forms is available upon request.

COPRAC's next meeting is scheduled for February 9, 2012 and will be held in Los Angeles. At this meeting, COPRAC will consider the public comment received on Formal Opinion Interim No. 09-0001A (State Bar complaint threats). COPRAC will also continue pre-public comment work on several opinions and will continue planning for the 2012 Annual Statewide Ethics Symposium scheduled to be held in San Francisco on May 19, 2012.

3. RULES REVISION COMMISSION

Preparation of a comprehensive petition for all of the sixty-seven proposed new and amended Rules of Professional Conduct is in process with Professional Competence and General Counsel staff. 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, 297 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 917 orders have been received and processed through November 30, 2011. In September, at the State Bar Annual Meeting in Long Beach, the Office of Professional Competence introduced 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 own Kindle Reader device, including the new Kindle Fire. The e-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. So far, 89 copies of the e-Reader version of the Bar's rule book have been sold.

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 – November, 2011	
Webpage	Approx. Number of Visits
Rules of Professional Conduct html webpages	433,394
The State Bar Act html webpages	22,832
Ethics Opinions html webpages	38,591
Ethics Information html webpages	216,799

*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. In 2011, an article entitled "A 'Charging Lien' as an Adverse Interest Under Rule 3-300 of the Rules of Professional Conduct" was used by 2731 members and another article addressing the topic of the Proposed New and Amended Rules of Professional Conduct has been used by 3554 members.

As previously reported, one of the panels from the Annual Statewide Ethics Symposium held in 2011 at UC Irvine is posted at the Bar's MCLE website and offers 1.5 hours of free 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 viewed 542 times.

The new Ethics and Technology area of the Ethics Information page was updated to include additional links, including links to recent articles on internet scams and social networking and links to COPRAC's proposed opinion on virtual law offices (Interim No. 10-0003) which is currently out for public comment. The main portal and its subpages have been accessed 6,690 times since this area was established in September.

COPRAC's Formal Opinion No. 2011-182 (serving subpoenas on existing clients of a law firm) was added to the Ethics Opinions area of the Ethics Information page following RAD approval in December.

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
October	21	1147	1000	147	87%	13%	26	421
November	19	1040	858	182	83%	18%	25	394
December								
Cumulative Totals	229	13,695	12,325	1,370	90%	10%	345	5,610

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:	60
	Completed Calls:	54
Monthly:	Incoming Calls:	1,245
	Completed Calls:	1,120

Aggregate Outgoing Calls

Current Month:	1,528*
Cumulative to Date:	20,894*

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 November 30, 2011

Budget (Actual)	\$1,975,386
Budget (Authorized)	\$2,178,505
Savings	\$203,119

Monthly (January-June)

	January	February	March	April	May	June
Budget (Actual)	\$160,273	\$159,732	\$171,727	\$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	\$13,068	\$30,513	\$12,824	\$24,643

Monthly (July-December)

	July	August	September	October	November	December
Budget (Actual)	\$104,291	\$158,556	\$227,973	\$203,717	\$233,344	
Budget (Authorized)	\$186,213	\$186,213	\$254,873	\$186,213	\$186,213	
Variance	\$81,922	\$27,657	\$26,900	-\$17,504	-\$47,131	

Excerpt from Ethics Hotline Customer Satisfaction Surveys
Additional Comments

(Surveys Received October - November, 2011)

1. Received October 14, 2011

COMMENTS / SUGGESTIONS:

Susan quickly steered me to very helpful citations about my disclosure/conflict question. She was very personable and well-versed.

2. Received October 18, 2011

COMMENTS/SUGGESTIONS:

In helping me to work through a difficult and complicated set of facts, Andrew quickly recognized the ethical considerations involved and was particularly helpful in guiding me to statutes, CA RPCs and CSB and local county bar ass'n ethics opinions that spoke to the competing considerations presented by my situation. It is, and was clear before, during and after our conversation, that I did not receive any legal advice. Instead, what I received was information, which is what I requested, that will assist me to make difficult choices in a very difficult situation. Andrew's guidance to authorities that do or may bear on the complex and competing issues was helpful during our conversation and will be of continued assistance as I work my way through analyzing and deciding what to do. Andrew's insightful suggestion that I consider retaining ethics counsel for advice was not lost on me.

I imagine others, including staff counsel, may have assisted in sorting through the letter I sent as background for my conversation with Andrew and, if so, thank you to them for their assistance. Most of all, I wish to thank Andrew for his time, patience and thoughtful approach to helping me to locate sources of information likely to be of great value to me.

3. Received October 20, 2011

COMMENTS / SUGGESTIONS:

I spoke with Ricardo. He was amazing and helped me greatly. It really made my day being able to be assisted by him.

4. Received November 9, 2011

COMMENTS/SUGGESTIONS:

My paralegal was Susan, my receptionist was David. I've only called the hotline maybe three times since I started practicing law in 1977, but I regard this as the most important service the Bar renders.

#66 ETHICS UPDATE 2011: SIGNIFICANT DEVELOPMENTS IN THE LAW OF LAWYERING

To what extent were your personal objectives satisfied?

- "Very good, quick 1 1/2 hours. Thanks"
- "Excellent"
- "Terrific program!"
- "All presenters are excellent, interesting, entertaining; excellent content of written materials and presentations"
- "Some materials are in other ethics seminar"
- "Good and informative session. Wendy could do it alone."
- **Average Rating on a Scale of 1-5: 4.5**

To what extent did the environment contribute to the learning experience?

- "Room temp was comfortable"
- "Cold"
- **Average Rating on a Scale of 1-5: 4.3**

To what extent did the materials contribute to the learning experience?

- "Liked Powerpoint"
- "Very comprehensive"
- "Colors/contrast of powerpoint was difficult to read"
- **Average Rating on a Scale of 1-5: 4.4**

To what extent were the objectives stated in the promotional literature or those stated at the beginning of the activity satisfied?

- "Except it was so dry in presentation that it was hard to stay engaged"
- **Average Rating on a Scale of 1-5: 4.4**

To what extent did the program contain significant current intellectual or practical content?

- "Good informative program. Appreciate in-depth materials."
- "Don't care for presentation where presenter just reads from Powerpoint."
- "Social networking"
- "Thanks for including social networking info."
- **Average Rating on a Scale of 1-5: 4.6**

Instructor: Carole Buckner

- **Average Rating on a Scale of 1-5: 4.4**

Instructor: Shawn Harpen

- **Average Rating on a Scale of 1-5: 4.4**

Instructor: Wendy Patrick

- **Average Rating on a Scale of 1-5: 4.8**

Instructor: William Woods

- **Average Rating on a Scale of 1-5: 4.7**

#79 ETHICAL SCREENS IN CALIFORNIA: TO BE OR NOT TO BE?

To what extent were your personal objectives satisfied?

- “1 case discussed - expected more, although course description clear”
- “Terrific! Sophisticated!”
- “Was not a good use of program centered only on one case. Limited learning experience for solo practitioner.”
- “As a superior court research attorney, this program gave me a useful analytical structure I will use when presented with motions for disqualification.”
- **Average Rating on a Scale of 1-5: 4.2**

To what extent did the environment contribute to the learning experience?

- “Significant distracting noise from next door.”
- **Average Rating on a Scale of 1-5: 4.2**

To what extent did the materials contribute to the learning experience?

- “Thanks for handout ~ needed for notes!!”
- “Liked the panel”
- **Average Rating on a Scale of 1-5: 4.2**

To what extent were the objectives stated in the promotional literature or those stated at the beginning of the activity satisfied?

- “Conversation style.”
- **Average Rating on a Scale of 1-5: 4.1**

To what extent did the program contain significant current intellectual or practical content?

- “Very informative.”
- **Average Rating on a Scale of 1-5: 4.6**

Instructor: Dan Carroll

- **Average Rating on a Scale of 1-5: 4.3**

Instructor: James Friedhofer

- **Average Rating on a Scale of 1-5: 4.3**

Instructor: Scott Garner

- **Average Rating on a Scale of 1-5: 4.4**

Instructor: Barbara McAuliffe

- **Average Rating on a Scale of 1-5: 4.3**

**#105 DEALING WITH DIFFICULT CLIENTS WHILE MAINTAINING
YOUR PROFESSIONAL RESPONSIBILITIES**

To what extent were your personal objectives satisfied?

- “This was an excellent presentation.”
- “All instructors did a great job - worked together well and kept me engaged the whole time.”
- **Average Rating on a Scale of 1-5: 4.6**

To what extent did the environment contribute to the learning experience?

- “Finally someone printed the materials!”
- “Room was cold.”
- “Hard to hear at times.”
- **Average Rating on a Scale of 1-5: 4.5**

To what extent did the materials contribute to the learning experience?

- “Clear, concise and in a great format to take back to my firm and share”
- “Very helpful.”
- “Presentation printout was useful.”
- “Thanks for making paper handouts.”
- **Average Rating on a Scale of 1-5: 4.8**

To what extent were the objectives stated in the promotional literature or those stated at the beginning of the activity satisfied?

- **Average Rating on a Scale of 1-5: 4.6**

To what extent did the program contain significant current intellectual or practical content?

- “I like the stories and examples.”
- **Average Rating on a Scale of 1-5: 4.7**

Instructor: Wendy Chang

- **Average Rating on a Scale of 1-5: 4.6**

Instructor: Risa Morris

- **Average Rating on a Scale of 1-5: 4.7**

Instructor: Toby Rothschild

- **Average Rating on a Scale of 1-5: 4.6**

Instructor: Neil Wertlieb

- **Average Rating on a Scale of 1-5: 4.7**

**#113 SOCIAL NETWORKING AND PROFESSIONAL RESPONSIBILITY:
CAN THEY CO-EXIST**

To what extent were your personal objectives satisfied?

- “Yes, good program!!”
- “I was looking for more info about marketing firms and organizations via social networks. But they are very good on their chosen subject matter.”
- **Average Rating on a Scale of 1-5: 4.5**

To what extent did the environment contribute to the learning experience?

- “Too much noise from staff movement of carts through inner hallway”
- “I found a seat with good view of screen. Room was too cold for me even with sweater on.”
- “Big trash cans at front of room were unsightly. Room was cold.”
- “Noise and cold.”
- “So cold in this room!”
- “Too cold in room.”
- **Average Rating on a Scale of 1-5: 4.1**

To what extent did the materials contribute to the learning experience?

- “Have not yet printed out from USB drive.”
- “Reading to us took up time. Let us read hypo and just discuss questions/analysis.”
- “Very relevant and helpful.”
- “Good format for organizing the info.”
- **Average Rating on a Scale of 1-5: 4.2**

To what extent were the objectives stated in the promotional literature or those stated at the beginning of the activity satisfied?

- **Average Rating on a Scale of 1-5: 4.6**

To what extent did the program contain significant current intellectual or practical content?

- “Good structure with hypotheticals. Great mix on panel-progessor, in-house, civil and criminal counsels. Good diversity on panel both gender and ethnic.”
- “Very practical. Really appreciated insight/considerations on cloud.”
- “Really interesting but some material was definitely intended for a non-tech audience.”
- **Average Rating on a Scale of 1-5: 4.6**

Instructor: Judith Gilbert

- **Average Rating on a Scale of 1-5: 4.3**

Instructor: Shawn Harpen

- **Average Rating on a Scale of 1-5: 4.6**

Instructor: Wesley Hsu

- **Average Rating on a Scale of 1-5: 4.6**

Instructor: Antone Johnson

- **Average Rating on a Scale of 1-5: 4.6**

Instructor: Kevin Mohr

- **Average Rating on a Scale of 1-5: 4.8**

#118 CLIENT TRUST ACCOUNTING

To what extent were your personal objectives satisfied?

- “Childish panel members/poor speaking skills”
- **Average Rating on a Scale of 1-5: 4.3**

To what extent did the environment contribute to the learning experience?

- “Worst program presentation -- ever!!!”
- “Some noise that was very distracting. Overheads did not work properly”
- “Powerpoint snafu detracted but presenters dealt with it”
- “Projector not working -- no slides”
- “Powerpoint presentation had technical difficulties”
- “Presentation didn’t work”
- “Powerpoint didn’t work”
- **Average Rating on a Scale of 1-5: 4.0**

To what extent did the materials contribute to the learning experience?

- “Excellent outline! Would have been even better if PPTs were online but outline is thorough and great”
- “Distraction never ended”
- “Completely different from what we saw from the presentation”
- **Average Rating on a Scale of 1-5: 3.8**

To what extent were the objectives stated in the promotional literature or those stated at the beginning of the activity satisfied?

- **Average Rating on a Scale of 1-5: 4.3**

To what extent did the program contain significant current intellectual or practical content?

- **Average Rating on a Scale of 1-5: 4.4**

Instructor: Natalie Bocanegra

- **Average Rating on a Scale of 1-5: 4.4**

Instructor: Fred Kipperman

- **Average Rating on a Scale of 1-5: 4.3**

Instructor: Risa Morris

- **Average Rating on a Scale of 1-5: 4.5**