



THE STATE BAR OF CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

OFFICE OF PROFESSIONAL COMPETENCE

PLANNING, AND DEVELOPMENT

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MEMORANDUM

DATE: April 26, 2012

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

FROM: Randall Difuntorum, Director, Professional Competence Programs

SUBJECT: RAD Meeting on May 10, 2012 – Status of the Professional Competence Unit

This memorandum provides a report on the activities of the Professional Competence Unit through March 31, 2012.¹ 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 March 31, 2012, 3,857 member inquiries were received with a completion rate of 86%. This completion rate includes distribution of 120 copies of published ethics opinions and other written materials requested by inquirers and 1,618 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 649 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.

Five Ethics Hotline paralegals are currently handling the majority of calls received. As of March 31, 2012: (1) the monthly average number of total calls handled by one paralegal was 404; the monthly average number of completed calls by one paralegal was 238; and (3) the monthly average number of left messages by one paralegal was 166. Between January and March, since the last status report for RAD's March 1st meeting, 10 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 nine of the surveys and were generally favorable. On the survey question concerning how satisfied they were with our system for receiving calls, one survey gave a rating of

¹ There are 13.5 authorized positions in the Professional Competence Unit. The authorized positions include a Program/Court Systems Analyst position that is shared with the Office of General Counsel. In addition, although it is currently unfilled, a temporary law clerk is assigned to the Office of Professional Competence. One of the paralegal staff was recently promoted to fill a staff attorney position vacated at the close of 2011, and recruiting is now underway to fill the vacant paralegal position.

“dissatisfied” without offering additional comments, with all responses for the other survey categories being favorable. Another survey gave a “neutral” rating for this same question and offered the following comment: “Maybe it would streamline things to direct attorneys to request a call via email. Substantive responses by email would also be an interesting possibility to consider. Although I tend to prefer the closed-ended give-and-take of a phone call.” (An excerpt from these 9 surveys with the full text of the member comments is attached.)

ETHICS HOTLINE ISSUES PERCENTAGES BY MONTH

(Shading Indicates the Top Issue(s) for Each Month and for the Overall Average to Date)

	Jan.	Feb.	Mar.	Avg. % to date
Advertising	14%	15%	15%	15%
Communications	16%	18%	16%	17%
Competence	9%	9%	9%	9%
Confidence and Secrets	10%	10%	12%	11%
Conflicts	11%	10%	11%	10%
Fees and Costs	16%	16%	17%	16%
Files	5%	5%	6%	5%
Forms of Practice	1%	1%	1%	1%
Misconduct/ Moral Turpitude	9%	9%	8%	9%
Unauthorized Practice of Law	4%	4%	4%	4%
Withdrawal from Employment/ Termination	3%	3%	3%	3%

Through March, the most frequently raised issue category by Hotline callers in 2012 is the category of “Communications.” This category encompasses questions concerning: a lawyer’s duty to communicate with clients; the prohibition on contacts with a represented party absent the consent of the party’s attorney; and restrictions on communications with judges and jurors. Close behind “Communications” are the categories of “Fees and Costs” and “Advertising.” Historical data indicates that these three categories often occupy the top three positions each year.

2. COPRAC

Since the last Professional Competence status report submitted for the Board Committee’s March 1, 2012 meeting, COPRAC met on March 23, 2012 in Los Angeles.

At the March 23rd meeting, COPRAC considered the public comment received on Formal Opinion Interim No. 10-0003 (Virtual Law Office); and continued post-public comment consideration of 09-0001A (State Bar Complaint Threats). COPRAC continued pre-public comment work on the following 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). COPRAC began initial consideration of the following new opinions: 12-0001 (re disclosure of confidences in motion for withdrawal); 12-0002 (re shifting conflicts); and 12-0003 (re attorney ratings descriptions). There was also continued discussion on the development of a CBeJ article on the topic of confidential information and unsolicited email correspondence. The committee continued to work on plans for the 2012 Annual Statewide Ethics Symposium and the COPRAC MCLE programs to be offered at the 2012 Annual Meeting.

The following opinion was tentatively approved by COPRAC for 90-day public comment circulation at its November 5, 2011 meeting. The public comment deadline was March 23, 2012. Since the public comment deadline coincided the Committee's meeting date, and several comments were received on the afternoon of the deadline, additional post-public comment consideration of the opinion will occur at the Committee's May 18, 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.

The following opinion was tentatively approved by COPRAC for 90-day public comment circulation at its November 5, 2011 meeting, with a public comment deadline of April 30, 2012. Post-public comment consideration of the opinion will occur at the Committee's May 18, 2012 meeting.

Formal Opinion Interim No. 09-0001B:

ISSUE: May an attorney disclose client confidences to her own attorney to evaluate a wrongful discharge action against her former firm and, in pursuing her claim, may she or her attorney publicly disclose those client confidences?

DIGEST: While an attorney may disclose client confidences to her own attorney to evaluate a potential wrongful discharge claim against her former firm, neither she nor her attorney may publicly disclose those confidences except in the narrowest of circumstances.

The following opinion was tentatively approved by COPRAC for an additional 30-day public comment circulation at its March 23, 2012 meeting, with a public comment deadline of May 2, 2012. Post-public comment consideration of the opinion will occur at the Committee's May 18, 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 March 23, 2012 meeting, with a public comment deadline of July 2, 2012. Post-public comment consideration of the opinion will occur at the Committee's August 10-11, 2012 meeting.

Formal Opinion Interim No. 10-0001:

ISSUE: Under what circumstances would an attorney's postings on social media websites be subject to professional responsibility rules and standards governing attorney advertising?

DIGEST: Material posted by an attorney on a social media website will be subject to professional responsibility rules and standards governing attorney advertising if that material constitutes a "communication" within the meaning of rule 1-400 (Advertising and Solicitation) of the Rules of Professional Conduct of the State Bar of California; or (2) "advertising by electronic media" within the meaning of Article 9.5 (Legal Advertising) of the State Bar Act. The restrictions imposed by the professional responsibility rules and standards governing attorney advertising are not relaxed merely because such compliance might be more difficult or awkward in a social media setting.

COPRAC's next meeting is scheduled for May 18, 2012 and will be held in San Francisco. At this meeting, COPRAC will consider the public comments received on Formal Opinion Interim No. 10-0003 (Virtual Law Office), and 09-0001B (Duty of Confidentiality and Seeking Legal Advice), and the additional public comments received on 09-0001A (State Bar Complaint Threats). COPRAC will continue pre-public comment work on the following opinions: 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). COPRAC will consider initial opinion drafts for the following new opinions: 12-0001 (re disclosure of confidences in motion for withdrawal); 12-0002 (re shifting conflicts); and 12-0003 (re attorney ratings descriptions). Continued development of a CBeJ article on the topic of confidential information and unsolicited email correspondence is also planned. On Saturday, May 19th, COPRAC will conduct the 2012 Annual Statewide Ethics Symposium at UC Hastings in San Francisco, a day-long program providing 6 hours of continuing legal education credit in legal ethics. State Bar President Jon Streeter will attend and provide opening remarks. The keynote address will be delivered by UC Hastings' Chancellor and Dean Frank Wu.

COPRAC's Appointment Nominations Subcommittee will meet on May 31st in Los Angeles and June 1st in San Francisco to interview applicants for appointment for the 2012/2013 committee year. At a specially set meeting scheduled for June 6, 2012 at

9:30 am, the full slate of recommended candidates, along with the vice-chair position, will be considered by the full committee, for conveyance to the Board Committee on Nominations and Appointments (NAC) and the Board for final approval.

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 available at the Bar's website. The online Trust Accounting Handbook html webpage has been visited 1,748 times between January – March, 2012.

California Compendium on Professional Responsibility: The *Compendium* is an annually updated reference manual that contains a comprehensive collection of various ethics authorities that includes: 1) the ethics opinions of the State Bar of California; 2) a comprehensive subject matter index; 3) the California Rules of Professional Conduct and the State Bar Act; and, 4) the Code of Judicial Ethics. Most of the components of the Compendium are posted at the Bar's website. The *Compendium* html webpage with links to the various content has been visited 1,628 times between January – March, 2012. Updated content for the online ethics opinions, Rules of Professional Conduct and the State Bar Act are posted at the website, and the updated *Compendium* index is expected to be posted by the time of RAD's May meeting. A hardcopy of the 2012 *Compendium* Update is also available for sale to a regular subscriber base. This hardcopy update is in progress and anticipated to be distributed in the 3rd quarter of 2012.

CA Rules of Professional Conduct & State Bar (a.k.a Publication No. 250): The annual update of the Publication 250 has been completed for the 2012 hardcopy edition and procurement of the printer is in progress with distribution of the books anticipated in early June. Since its debut at the 2011 State Bar Annual Meeting, 115 copies of the e-Reader version of the Publication 250 have been sold. Production of the 2012 e-reader version of Pub. 250 is in progress and anticipated to be posted for sale at Amazon.com in the second quarter of the year.

5. COMPETENCE RESOURCES AT CALBAR.CA.GOV

The State Bar tracks the web activity for all html website pages accessed.² The chart below lists selected web pages administered by Professional Competence and the 2012 activity in terms of visits.

Professional Competence Web Resources – Activity Detail January – March, 2012	
Webpage	Approx. Number of Visits
Trust Accounting Handbook html webpage	1,748
Rules of Professional Conduct html webpages	139,889
The State Bar Act html webpages	10,070
Ethics Opinions html webpages	11,251
Ethics Information html webpages	66,480

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

The new Ethics and Technology webpage and its subpages have been accessed approximately 5,300 times in 2012 and 12,800 times since this area was established in September 2011.

The following online MCLE offerings are offered to members free of charge. These offerings were produced by COPRAC, or by Professional Competence staff, and provide an opportunity to obtain both participatory and self-study credit in legal ethics.

MCLE Participatory Credit (date posted)	Jan. – Mar. 2012	Aggregate Use Since Posting
<i>Ethics in Limbo: Practical Issues for Lawyers as Changes in the Law Regulating Lawyers Continue (6/2011)</i>	952	1,496
<i>Ethics Update 2011: Significant Developments in the Law of Lawyering (12/2011)</i>	790	856

MCLE Self-Study Articles	Jan. – Mar. 2012	Aggregate Use Since Posting
<i>The Proposed New and Amended Rules of Professional Conduct (8/2010)</i>	1,833	5,387
<i>A "Charging Lien" as an Adverse Interest Under Rule 3-300 of the Rules of Professional Conduct (11/2010)</i>	1,512	4,243

Since the last Professional Competence status report submitted for the Board Committee's March 1, 2012 meeting, the following website updates have been made:

1. The following draft opinions were posted at the public comment page of the Bar's website: a 90-day public comment circulation for 10-0001 (Social Networking), and an additional 30-day public comment circulation for 09-0001A (State Bar Complaint Threats).
2. The online registration page for the May 19, 2012 Ethics Symposium at UC Hastings in San Francisco was posted at the COPRAC Education page of the Bar's website, with links to it from the Ethics Information page, COPRAC's education page, and the Bar's homepage. A notice linking to this page also ran in the April issue of the CBeJ, and will run again in the May issue.
3. Four new articles and one new self-study CLE article on the topic of ethics and technology were added to the Ethics and Technology webpage.

cc: Robert A. Hawley

ETHICS HOTLINE ACTIVITY STATISTICS - 2012

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	22	1316	1113	203	85%	15%	41	519
February	20	1227	1053	174	86%	14%	44	557
March	21	1314	1166	148	89%	11%	35	542
Cumulative Totals	63	3,857	3,332	525	86%	14%	120	1,618

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:	53
Monthly:	Incoming Calls:	1,286
	Completed Calls:	1,111

Aggregate Outgoing Calls

Current Month:	1,965*
Cumulative to Date:	6,063*

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 March 31, 2012

Budget (Actual)	\$379,910
Budget (Authorized)	\$455,641
Variance	\$75,731

Monthly (January-June)

	January	February	March	April	May	June
Budget (Actual)	\$145,141	\$80,120	\$154,649			
Budget (Authorized)	\$131,450	\$135,113	\$189,078			
Variance	\$-13,691	\$54,993	\$34,429			

Excerpt from Ethics Hotline Customer Satisfaction Surveys
Additional Comments
(Surveys Received for January, 2012 - March, 2012)

1. Received January 17, 2012

COMMENTS / SUGGESTIONS:

Lynn was very helpful and made sure I had all the information she could think of.

2. Received February 14, 2012

COMMENTS/SUGGESTIONS:

Maybe it would streamline things to direct attorneys to request a call via email. Substantive responses by email would also be an interesting possibility to consider. Although I tend to prefer the closed-ended give-and-take of a phone call.

3. Received February 28, 2012

COMMENTS / SUGGESTIONS:

Thanks to Lynn for her quick response and information!

4. Received February 29, 2012

COMMENTS/SUGGESTIONS:

This was excellent. I spoke with Ricardo, and he was most helpful and polite. Thank you very much!

5. Received March 7, 2012

COMMENTS/SUGGESTIONS:

Thank you thank you Lynn Cobb. Your time, knowledge and enthusiastic assistance blew me away. You cruelly raise the bar for your colleagues in the Unit and my expectations for the next inquiry in another 10 years. :)

Thank you again and keep up the outstanding work. A pleasure indeed.

6. Received March 8, 2012

COMMENTS/SUGGESTIONS:

As a new attorney, I use the ethics hotline frequently for ethics questions that many seasoned attorneys are familiar with. The hotline is an excellent resource that informs me of what my ethical duties are and what are actual conflicts and not. I recommend this resource to everyone I know who has run into these types of issues, from newly barred attorneys to lawyers who have practiced for years.

7. Received March 23, 2012

COMMENTS/SUGGESTIONS:

Always good service.

8. Received March 27, 2012

COMMENTS/SUGGESTIONS:

The paralegal I spoke with was incredibly helpful and knowledgeable about the complicated issue I called about. Thank you!

9. Received March 27, 2012

COMMENTS/SUGGESTIONS:

Thank you for the pleasant and helpful pointers.