

M E M O R A N D U M

DATE: April 23, 2013

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

FROM: Randall Difuntorum, Director, Professional Competence Programs

SUBJECT: RAD Meeting on May 9, 2013 – Status of the Professional Competence Unit

This memorandum provides a report on the activities of the Professional Competence Unit through March 31, 2013.¹ In addition to this memorandum, provided are the following: (Att. 1) Ethics Hotline Activity Statistics; (Att. 2) Ethics Hotline Satisfaction Survey Excerpts; and (Att. 3) Professional Competence Budget Summary – Authorized vs. Actuals. 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, 2013, 3,533 member inquiries were received with a completion rate of 87%. This completion rate includes distribution of 50 copies of published ethics opinions and other written materials requested by inquirers and 1,293 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 323 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 Attachment 1: Ethics Hotline Activity Statistics.)

Five Ethics Hotline paralegals handled the majority of calls received. As of March 31, 2013: (1) the monthly average number of total calls handled by one paralegal was 359; (2) the monthly average number of completed calls by one paralegal was 220; and (3) the monthly average number of left messages by one paralegal was 139.

Between January and March, 2013, 12 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 paralegal; usefulness of materials sent; whether the inquirer would recommend the Hotline to others; and whether they received the assistance they needed. Nearly 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 eight of these surveys, and seven of the comments commended the staff for being helpful, knowledgeable and professional.

¹ There are 13.5 authorized positions in the Professional Competence Unit and one of the positions, a paralegal position, currently is vacant. Applicant interviews are in progress to fill this vacancy which was posted on December 31, 2012.

Survey feedback regarding the helpfulness of receptionist warrants special mention. Nine of the twelve surveys expressed satisfaction with the helpfulness of the receptionist, and two included personal comments commending the friendly and professional service received. Two other surveys expressed dissatisfaction with the receptionist, and these concerns have been discussed with the receptionist and coaching has been provided. (See Attachment 2: Ethics Hotline Satisfaction Survey Excerpts.)

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%	12%	13%	13%
Communications	17%	19%	14%	16%
Competence	3%	3%	2%	3%
Confidence and Secrets	10%	13%	11%	11%
Conflicts	15%	14%	15%	15%
Fees and Costs	17%	16%	18%	17%
Files	5%	5%	7%	6%
Forms of Practice	1%	0%	1%	1%
Misconduct/ Moral Turpitude	10%	9%	9%	10%
Unauthorized Practice of Law	6%	4%	5%	5%
Withdrawal from Employment/ Termination	3%	4%	4%	4%

Through March, the category of “Fees and Costs” was the most frequently raised issue category by Hotline callers in 2013. The “Fees and Costs” category encompasses questions concerning: client trust accounts; fee agreements; and costs (litigation expenses, advances of costs to client, loans to client, payment of third party expenses). Close behind are the categories of “Communications” and “Conflicts.” 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 March 6, 2013 meeting, COPRAC met on March 1, 2013 in San Francisco and on April 19, 2013 in Los Angeles.

A. Published Opinions

The following opinion was completed and published at the Bar’s website:

Formal Opinion No. 2013-187 (formerly 11-0001):

ISSUE: Who is entitled to the refund of remaining advanced fees at the end of a case where fees were paid by a non-client?

DIGEST: Where a third-party pays the attorney’s fees for a client and there are funds remaining after the representation is concluded, the attorney must return the balance to the payer, rather than to the client, unless the agreements with the client and the payor specify otherwise.

B. Meetings

At the March 1st meeting, COPRAC considered the public comments received on Formal Opinion Interim No. 11-0003 (Dissolving Firm and Moving to New Firm) and continued post-public comment consideration of 06-0004 (Confidential Information and Unsolicited E-Mail Correspondence). COPRAC also continued pre-public comment work on the following draft opinions: 11-0004 (ESI and Discovery Requests); 12-0001 (Disclosure of Confidences at Motions for Withdrawal); 12-0002 (Shifting Conflicts); 12-0003 (Attorney Ratings Descriptions); 12-0004 (In Rem Proceedings); 12-0005 (Law Firm Privilege); 12-0006 (Attorney Blogging) and 12-0007 (Puffing in Negotiations). The Committee discussed the status of plans for the 2013 Annual Statewide Ethics Symposium scheduled to be held at the UCLA School of Law on April 20, 2013. Finally, the Committee began planning for the COPRAC panels to be presented at the 2013 Annual Meeting.

On Thursday, March 28th, the Appointment Nominations Subcommittee met by conference call to rank and select applicants for interview. The Subcommittee selected thirteen individuals to interview out of twenty-three total applicants. Eight applicants will be interviewed on Tuesday, May 21st in San Francisco and five applicants will be interviewed on Thursday, May 30th in Los Angeles.

Post-public comment consideration of the following opinion occurred at the Committee's March 1, 2013 meeting, and the Committee revised the opinion in accordance with the Committee's discussion following consideration of public comments and approved the opinion as revised for submission to the Board Committee on Regulation, Admissions and Discipline (RAD). The draft opinion is currently circulating before RAD for a 30-day approval period with a deadline of May 6, 2013.

Formal Opinion Interim No. 06-0004:

ISSUE: If an attorney receives from a non-party a confidential written communication between opposing counsel and opposing counsel's client, what should the attorney do if the attorney reasonably believes that the communication may not be privileged because of the crime-fraud exception to the attorney-client privilege?

DIGEST: If an attorney receives an unsolicited intentionally transmitted written communication between opposing counsel and opposing counsel's client under circumstances reasonably suggesting that it is a confidential communication apparently sent without the consent of its owner, the attorney may not ethically read the communication, even if she suspects the crime-fraud exception might vitiate the privilege. The attorney must notify opposing counsel as soon as possible that the attorney has possession of the communication. The two attorneys should try to resolve the privilege issue or, if that fails, obtain the assistance of a court. Attorney may not read, disseminate, or otherwise use the communication or its contents absent court approval or consent of its owner.

At the April 19, 2013 meeting, COPRAC considered the public comment received on Formal Opinion Interim No. 11-0002 (Deceitful Conduct), and continued post-public comment consideration of 11-0003 (Dissolving Firm and Moving to New Firm). COPRAC continued pre-public comment work on the following opinions: 11-0004 (ESI and Discovery Requests); 12-0001 (Disclosure of Confidences at Motions for Withdrawal); 12-0002 (Advanced Waivers); 12-0003 (Attorney Ratings Descriptions); 12-0004 (In Rem Proceedings); 12-0005 (Law Firm In-House Counsel); 12-0006 (Attorney Blogging) and 12-0007 (Puffing in Negotiations). The committee also continued work on plans for the COPRAC CLE panels to be offered at the 2013 Annual Meeting.

COPRAC's next meeting is scheduled for May 31, 2013 in Los Angeles.

C. Ethics Symposium

On Saturday, April 20, COPRAC held the 2013 Annual Statewide Ethics Symposium at the UCLA School of Law. This day-long program provided 6 hours of continuing legal education credit in legal ethics. State Bar President Patrick Kelly attended and presented the 2013 Harry B. Sondheim California Professional Responsibility Award to Paul W. Vapnek, this year's award recipient. Mr. Vapnek also delivered the Symposium's keynote address. There were approximately 100 attendees present and the program was well-received.

3. PROPOSED NEW AND AMENDED RULES OF PROFESSIONAL CONDUCT

On October 22, 2012, the State Bar submitted to the Supreme Court for approval proposed rule 1.1 (re competence) and proposed rule 1.8.10 (re sexual relations with clients), as adopted by the Board. This submission included a transmittal memorandum providing an overview of the State Bar's rule revision project. Proposed Rules of Professional Conduct do not become binding unless and until they are approved by the Supreme Court. This submission is a part of the State Bar's work with Supreme Court staff to facilitate the most effective way for the Supreme Court and its staff to penetrate the large amount of data presented by the State Bar's comprehensive proposed new and amended rules.

4. IMPLEMENTATION OF 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.

The table below reflects 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, by month. Collection of data began in January of 2013.

ADA Letters Received-Referred to Enforcement

Month	Letters Received	Letters Referred To Enforcement
Jan.	27	14
Feb.	12	3
Mar.	17	4
TOTAL	56	21

The table below summarizes the possible compliance issues and numbers of matters referred to Enforcement.

Compliance Issues Referred to Enforcement*
(1/1/13 through 3/31/13)

<u>Compliance Issue</u>	<u>No. of Issues</u>
Failure to Copy the State Bar within 5 Business Days	5
Failure to Include Mandatory Advisory	17
Failure to Copy the CCDA within 5 Business Days	4
Possible Prohibited Request/Demand for Money or Offer/Agreement to Accept Money	0
Possible Prohibited Statement of Recipient's Specific Monetary Liability	1

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

5. COMPETENCE PUBLICATIONS

Handbook on Client Trust Accounting for CA Attorneys: The revised 2013 online version of the handbook available at the Bar's website provides updated information concerning FDIC coverage for IOLTA accounts that results from the expiration (on December 31, 2012) of the temporary full insurance coverage provisions in the Dodd-Frank Act. The online Trust Accounting Handbook html webpage, where the book is posted, was visited 2,416 times between January — March, 2013.

California Compendium on Professional Responsibility: Sales of the 2012 Compendium update began in November 2012 and 354 orders for the 2012 update and past updates were received and processed through March 31, 2013. Production of the 2013 Compendium update is progressing, with an anticipated release date in the second quarter of the year.

CA Rules of Professional Conduct & State Bar (a.k.a Publication No. 250): Sales of the 2012 Publication 250 began in late July 2012, and 1,600 orders have been received and processed through March 31, 2013. The 2013 Pub. 250 has been completed and sales are anticipated to begin in May.

Regarding the e-Reader version of the Bar's rule book², a total of 161 e-books have been purchased to date. One hundred thirty-three copies of the 2011 e-book have been purchased since posting in September 2011. Twenty-eight copies of the 2012 e-book have been purchased since posting in June 2012. The 2013 e-Reader version of Pub. 250 is in the works and anticipated to be available in the second quarter of the year, at which time publication notices will be circulated and other outreach will be conducted.

6. COMPETENCE RESOURCES AT CALBAR.CA.GOV

New Senior Lawyer Ethics Resources Page: This new page recognizes that many attorneys reach their senior years with questions about what to do if they faced health problems that might affect how long they can work. They may be thinking of closing their practice or how to handle their business if they suddenly become ill or pass away. The new Senior Lawyers Ethics Resources page is a collection of resources addressing attorney professional responsibility issues that arise in connection with retirement, disability, and death of attorneys. The resources include rules, advisory ethics opinions, articles, publications, and MCLE programs. Most of the links are to internal resources found on other State Bar pages. Others are external links to the ABA's website, or to local, or out-of-state bar associations. The Senior Lawyers Task Force will review the page in May.

The State Bar tracks the web activity for all html website pages accessed.³ 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, 2013	
Webpage	Approx. Number of Visits
Rules of Professional Conduct html web pages	146,850
The State Bar Act html web pages	9,250
Ethics Opinions html web pages	11,400
Ethics Information html web pages	62,350
Ethics & Technology html web pages	5,050

² 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.

³ 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 March 6, 2013 meeting, the following website updates have been made:

1. New web pages for Senior Lawyer Ethics Resources, described above, posted.
2. Ethics & Technology web pages updated to add links to 2012 Annual Meeting CLE programs relating to the use of technology.
3. Formal Ethics Opinion No. CAL 2013-187 (Third Party Payors) was published at the Bar's website.
4. April 20, 2013 Ethics Symposium program details posted and online registration activated at Ethics Symposium web page.

cc: Robert A. Hawley

Attachment 1: Ethics Hotline Activity Statistics

ETHICS HOTLINE ACTIVITY STATISTICS - 2013

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	21	1,244	1,071	173	86%	14%	8	453
February	19	1,186	1,019	167	86%	14%	15	405
March	21	1,103	983	120	89%	11%	27	435
Cumulative Totals	247	3,533	3,073	460	87%	13%	50	1,293

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.

Attachment 1: Ethics Hotline Activity Statistics

Key Hotline Activity Averaged by Day and Month

Daily:	Incoming Calls:	58
	Completed Calls:	51
Monthly:	Incoming Calls:	1,211
	Completed Calls:	1,061

Aggregate Outgoing Calls

Current Month:	1,364*
Cumulative to Date:	22,656*

*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.

Attachment 2: Ethics Hotline Satisfaction Survey Excerpts

Excerpt from Ethics Hotline Customer Satisfaction Surveys Additional Comments (Surveys Received for January – March, 2013)

1. Received January 14, 2013

COMMENTS/SUGGESTIONS:

I have called the hotline before, and dealt with the receptionist (David) each time that I call. I have found him to be responsive, professional, and enjoyable. He is a good person for the Bar to have in this position because he is quick and efficient, and I appreciate the opportunity to work with him when I have ethical questions. Ricardo is the paralegal who handled the substance of my call, and he was also excellent. He understood my factual scenario immediately and was on-point and responsive to my specific question. Great experience all around - thank you!

2. Received January 31, 2013

COMMENTS/SUGGESTIONS:

Ms. Cobb was extremely helpful and significantly aided my research. The ethics hotline is an extremely valuable resource. As an aside: one of the problems with prevention programs (which is what the ethics hotline can partially be described as), is that it can be difficult to justify funding because you often never see the bad results that prevention programs avoid. Yet, we know that the relatively modest cost of prevention programs far outweighs the dramatic costs that are associated with remediating problems after they flower. Bottom line: this is a great program, and I urge expanded funding. The ethics hotline benefits both attorneys and the general public by raising the bar (no pun intended) of professional legal practice.

3. Received February 1, 2013

COMMENTS/SUGGESTIONS:

After moving to a new jurisdiction after 18 years of being a State Bar of California member, I called the new state's ethics hotline regarding a question about designation of my status as a lawyer in the new jurisdiction (i.e., Esq vs. JD when not licensed in the new location yet). After leaving a message with the new jurisdiction and hearing a response 3 days later in a voicemail with little more than a generic 'look at our ethics guidelines,' I finally called California Ethics hotline for some guidance. Not only was the receptionist David incredibly helpful in letting me know exactly what the process would be for a response but he was also very friendly and had a "we are here to help you" attitude. The Lynn from your office called me the day after, leaving a message and welcoming a call back. During my return call, David again was very friendly and Lynn returned my call within 30 minutes. More importantly, Lynn listened to my question, asked me questions to understand the nuances of my situation and then gave me resources – talking me through the website which was very helpful and also citing cases and describing their distinction -- all indicating it was not advice in a legal sense but just the resources that might give me more information so I could determine how I wanted to proceed. Lynn was knowledgeable, thoughtful, patient and thorough. During the entire process, I didn't feel like I was being a burden on strained resources (and I have no doubt that many state bars including my new locale and California's are quite strained) but rather that there was a commitment from the receptionist to the researcher to provide help. For a lawyer who is trying to do the right thing, it makes an incredible difference to have your questions answered efficiently, effectively and with a welcoming attitude. Kudos to your office and to the California Bar Board of Trustees for this commitment to your ethics division.

Attachment 2: Ethics Hotline Satisfaction Survey Excerpts

4. Received February 6, 2013

COMMENTS / SUGGESTIONS:

Lynn promptly returned my call. She is exceptionally knowledgeable and provided very helpful information. She is pleasant on the phone and quickly provided reference to the code section and RPC applicable to my question. Thanks!

5. Received February 7, 2013

COMMENTS / SUGGESTIONS:

Elbert Lee was immensely helpful. Thank you for making him a staff member.

6. Received February 8, 2013

COMMENTS/SUGGESTIONS:

Lynn Cobb was great. It would be great if the opinions were searchable. That would really make the service much better and possibly even eliminate some of your call volume.

7. Received February 27, 2013

COMMENTS/SUGGESTIONS:

Gentleman who answered phone to obtain call-back info is very flippant. Especially when there can be some stress associated with an attorney contacting an ethics hotline. Attitude not appropriate for this venue.

8. Received March 25, 2013

COMMENTS/SUGGESTIONS:

Lynn Cobb helped me. She was incredibly knowledgeable and pleasant. I called about 3 p.m. and didn't expect a call until the next day. It was a wonderful surprise to hear from her at 5:30 pm. Please say thank you. It would have taken me hours to do what she did.

Professional Competence Budget Summary

Authorized vs. Actual

Year-to-Date as of March 31, 2013

Budget (Actual)	\$370,878
Budget (Authorized)	\$453,036
Variance	\$82,158

Monthly (January thru March)

	January	February	March
Budget (Actual)	\$102,695	\$114,081	\$154,102
Budget (Authorized)	\$130,691	\$134,103	\$188,242
Variance	\$27,996	\$20,022	\$34,140