



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: June 28, 2013

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

FROM: Randall Difuntorum, Director, Professional Competence Programs

SUBJECT: RAD Meeting on July 18, 2013 – Status of the Professional Competence Unit

This memorandum provides a report on the activities of the Professional Competence Unit through May 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 May 31, 2013, 5,847 member inquiries were received with a completion rate of 89%. This completion rate includes distribution of 85 copies of published ethics opinions and other written materials requested by inquirers and 2,142 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 778 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 May 31, 2013: (1) the monthly average number of total calls handled by one paralegal was 365; (2) the monthly average number of completed calls by one paralegal was 223; and (3) the monthly average number of left messages by one paralegal was 142.

Between January and May, 2013, 7 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. 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 six of these surveys commending the staff for being helpful, knowledgeable and professional. (See Attachment 2: Ethics Hotline Satisfaction Survey Excerpts.)

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.

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	Apr	May	Avg. % to date
Advertising	14%	12%	13%	11%	11%	12%
Communications	17%	19%	14%	15%	18%	16%
Competence	3%	3%	2%	3%	2%	3%
Confidence and Secrets	10%	13%	11%	12%	8%	11%
Conflicts	15%	14%	15%	15%	15%	15%
Fees and Costs	17%	16%	18%	15%	20%	17%
Files	5%	5%	7%	6%	5%	6%
Forms of Practice	1%	0%	1%	1%	1%	1%
Misconduct/ Moral Turpitude	10%	9%	9%	11%	10%	10%
Unauthorized Practice of Law	6%	4%	5%	7%	5%	5%
Withdrawal from Employment/ Termination	3%	4%	4%	4%	5%	4%

Through May, 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 May 9, 2013 meeting, COPRAC met on May 31, 2013 in Los Angeles.

A. Published Opinions

The following opinions were approved and published at the Bar’s website:

Formal Opinion No. 2013-188 (formerly 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 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.

Formal Opinion No. 2013-189 (formerly 11-0002):

ISSUE: Has an attorney engaged in deceitful conduct by not alerting opposing counsel of: (A) an apparent material error made by opposing counsel in contract language; or (B) a material change made by the attorney in contract language?

DIGEST: When an attorney has engaged in no conduct or activity that induced an apparent material error by opposing counsel, the attorney has no obligation to alert the opposing counsel of the apparent error. However, where the attorney had made a material change in contract language in such a manner that his conduct constitutes deceit, active concealment or fraud, the failure of the attorney to alert opposing counsel of the change would be a violation of his ethical obligations.

B. Meetings

At the May 31st meeting, COPRAC considered the public comments received on Formal Opinion Interim No. 11-0003 (Dissolving Firm and Moving to New Firm). 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 (Advance 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 discussed the status of the five CLE panels COPRAC will present at the 2013 Annual Meeting. Finally, the Committee began discussing four new opinion topics.

COPRAC's Appointment Nominations Subcommittee met on May 21st in San Francisco and May 30th in Los Angeles to interview applicants for appointment for the 2013/2014 committee year. At the May 31st meeting, the Appointment Nominations Subcommittee's full slate of recommended candidates was approved by COPRAC for conveyance to the Board Committee on Nominations and Appointments (NAC) and the Board for final approval at the Board's July 18th and 19th meeting.

The following opinion was tentatively approved by COPRAC for a 90-day public comment period at its May 31st meeting, with a public comment deadline of September 9, 2013. Post-public comment consideration of the opinion will occur at the Committee's October 10, 2013 meeting.

Formal Opinion Interim No. 12-0001:

ISSUE: What information may an attorney ethically disclose to the court to explain her need to withdraw from a representation – particularly in the face of an order to submit to the court, in camera or otherwise, the substance of the attorney-client communication leading to the need to withdraw?

DIGEST: An attorney may disclose to the court only as much as is reasonably necessary to demonstrate her need to withdraw, and ordinarily it will be sufficient to say only words to the effect that ethical considerations require withdrawal or that there has been an irreconcilable breakdown in the

attorney-client relationship. In attempting to demonstrate to the court her need to withdraw, an attorney may not disclose confidential communications with the client, either in open court or in camera, absent an express court order compelling such disclosure. In the face of such a court order, however, and only after exhausting other options, an attorney may disclose confidential communications rather than disobey the court order, but should take reasonable steps to minimize prejudice to the client.

COPRAC will be meeting on June 28, 2013 in San Francisco. At this meeting they are scheduled to consider the public comment received on Formal Opinion Interim No. 12-0001 (Disclosure of Confidences at Motions for Withdrawal), and continue post-public comment consideration of 11-0003 (Dissolving Firm and Moving to New Firm). COPRAC will continue pre-public comment work on the following opinions: 11-0004 (ESI and Discovery Requests); 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). In addition, the committee will consider five possible new opinion topics: 13-0001 (Intentionally Conflicting-Out Experts); 13-0002 (Releasing File to New Counsel); 13-0003 (Ethical Obligations When Departing Firm); 13-0004 (Collecting Unpaid Fees); and 13-0005 (Publicly Available Confidential Information). Finally, the committee will also continue work on plans for the COPRAC CLE panels to be offered at the 2013 Annual Meeting and begin brainstorming on possible locations for the 2014 Annual Ethics Symposium.

COPRAC's following meeting is scheduled for August 23 & 24, 2013 in Los Angeles.

C. Outreach Programs

COPRAC members presented ethics related CLE programs for the Nevada County Bar Association on April 11th and the Sonoma County Women Lawyers Association on May 23rd. COPRAC also presented an ethics program at the State Bar Solo & Small Firm Summit on Saturday, June 22nd, entitled "Ethical Implications for Lawyers in Cyberspace and Social Media."

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 shows the number of demand letters received and reviewed by the Office of Professional Competence, as well as the number of matters referred to Enforcement for possible violations of the statute. Collection of data began in January, 2013 and the information shown in the table is current through the month of May.

ADA Letters Received-Referred to Enforcement

Month	Letters Received	Letters Referred To Enforcement
Jan.	27	14
Feb.	12	3
Mar.	17	4
Apr.	19	2
May	25	7
TOTAL	100	30

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

Compliance Issues Referred to Enforcement* (1/1/13 through 5/31/13)

<u>Compliance Issue</u>	<u>No. of Issues</u>
Failure to Copy the State Bar within 5 Business Days	8
Failure to Include Mandatory Advisory	19
Failure to Copy the CCDA within 5 Business Days	8
Possible Prohibited Request/Demand for Money or Offer/Agreement to Accept Money	2
Possible Prohibited Statement of Recipient's Specific Monetary Liability	3

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

5. COMPETENCE PUBLICATIONS

Handbook on Client Trust Accounting for CA Attorneys: The online Trust Accounting Handbook html webpage, where the book is posted, was visited 3,911 times between January — May, 2013.

California Compendium on Professional Responsibility: Sales of the 2012 Compendium update began in November 2012 and 365 orders for the 2012 update and past updates were received and processed through May 31, 2013. Production of the 2013 Compendium update is progressing, with an anticipated release date in the third quarter of the year.

CA Rules of Professional Conduct & State Bar (a.k.a Publication No. 250): Sales of the 2013 Publication 250 began in early June 2013, and initial orders are being processed for mailing.

Regarding the e-Reader version of the Bar's rule book², a total of 166 e-books have been purchased to date. One hundred thirty-three copies of the 2011 e-book have been purchased

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

since posting in September 2011. Thirty-three copies of the 2012 e-book have been purchased since posting in June 2012. The 2013 e-Reader version of Pub. 250 was posted on June 12, 2013 and is now available at the Amazon Kindle store.

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 Lawyer web pages have been visited 2,059 times since they became available in early 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 2013 activity in terms of visits.

Professional Competence Web Resources – Activity Detail January – May, 2013	
Webpage	Approx. Number of Visits
Rules of Professional Conduct html web pages	246,050
The State Bar Act html web pages	14,700
Ethics Opinions html web pages	18,250
Ethics Information html web pages	101,350
Ethics & Technology html web pages	7,750

Since the last Professional Competence status report submitted for the Board Committee's May 9, 2013 meeting, the following website updates have been made:

1. Ethics Information home page links reorganized by adding resource type headings/groupings, for ease of use.
2. Senior Lawyer Ethics Resources web pages were updated with the following new resources: Lawyers Assistance Program Wellness Guide; MCLE self-study article concerning selling a law practice written by current COPRAC member Richard Egger; ABA ethics opinion on mentally impaired lawyer in a law firm; and, New York Law Journal article re firms planning for succession.
3. Ethics & Technology web pages were updated with the following new resources: Formal Opinion No. 2013-188 (Confidential Information and Unsolicited Email Correspondence); Ohio opinion 2013-2 re direct contact with prospective client via text messages; ABA/BNA article re soliciting clients by text messages; and, Blumberg BNA article re Internet marketing.

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.

4. Formal Ethics Opinion Nos. CAL 2013-188 (Confidential Information and Unsolicited Email Correspondence) and CAL 2013-189 (Deceitful Conduct) were published at the Bar's website.
5. Draft Formal Ethics Opinion Interim No. 12-0001 (Disclosure of Confidences at Motion for Withdrawal) was posted at the public comment page of the Bar's website with a public comment deadline of September 9, 2013.

cc: Robert A. Hawley

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
April	21	1,148	1,064	84	93%	7%	24	397
May	22	1,166	1,089	77	93%	7%	11	452
Cumulative Totals	104	5,847	5,226	621	89%	11%	85	2,142

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:	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.

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

1. Received April 11, 2013

COMMENTS/SUGGESTIONS:

David Jasper and Elbert were exceptionally helpful in addressing questions regarding a situation that arose with a client of our firm. I sincerely appreciate the time and attention they extended to me. In addition, they were an absolute pleasure to speak to. In a day when interaction with most people seems like they are being burdened, David and Elbert seemed to be genuinely happy to help. Thank you.

2. Received April 25, 2013

COMMENTS/SUGGESTIONS:

Lynn was knowledgeable, concerned, and very helpful. She should be commended for providing excellent information. Thank you.

3. Received May 14, 2013

COMMENTS/SUGGESTIONS:

Both the staff paralegal and David were helpful. Very professional.

4. Received May 15, 2013

COMMENTS / SUGGESTIONS:

I couldn't practice law without the Ethics Hotline. Over the years I have utilized it frequently, probably at least once a year. Even though the paralegals who man the Hotline do not give advice or legal opinions, the authorities they have at their fingertips are always of great use. Lynn Cobb fielded my call on this occasion. I have a can-of-worms situation where I feel I am between a rock and a hard place and needed authorities to guide me as to which way to turn. She patiently listened to my shaggy dog story (there actually is a dog involved in this case). She recognized the issues and right away suggested a number of ethics opinions and case authorities that might be helpful. From my vantage point, this is the most valuable function that the State Bar performs. THANK YOU!

5. Received May 23, 2013

COMMENTS / SUGGESTIONS:

David, the receptionist, was fantastic. Love the service, very professional, thorough and helpful. The paralegal, Pamela Hill, was extremely well informed and even provided useful information beyond my question. I couldn't speak more highly of these two people.

6. Received May 31, 2013

COMMENTS/SUGGESTIONS:

The service I received today (5/31/2013) from the State Bar Ethics Hotline was excellent in every respect. David, the receptionist who took my contact information, was professional, efficient and very pleasant. The same was true of Pamela Hill, the staff paralegal who returned my call. In addition, Ms. Hill immediately grasped the issues I raised and gave me precisely the information I needed to answer my questions. Both David and Ms. Hill reflect well upon the State Bar; the organization should be proud and pleased to have them as employees.

Professional Competence Budget Summary

Authorized vs. Actual

Year-to-Date as of May 31, 2013

Budget (Actual)	\$604,080
Budget (Authorized)	\$722,786
Variance	\$118,706

Monthly (January thru May 31, 2013)

	January	February	March	April	May
Budget (Actual)	\$102,695	\$114,081	\$154,102	\$108,534	\$124,668
Budget (Authorized)	\$130,691	\$134,103	\$188,242	\$134,840	\$134,910
Variance	\$27,996	\$20,022	\$34,140	\$26,306	\$10,242