



# 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:** June 27, 2014

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

**FROM:** Randall Difuntorum, Director, Professional Competence Programs

**SUBJECT:** RAD Meeting on July 17, 2014 – Status of the Professional Competence Unit

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This memorandum provides a report on the activities of the Professional Competence Unit through May 31, 2014.<sup>1</sup> In addition to this memorandum, provided are the following: (Encl. 1) Ethics Hotline Activity Statistics; (Encl. 2) Ethics Hotline Satisfaction Survey Excerpts; and (Encl. 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, 2014, 6,092 member inquiries were received with a completion rate of 89%. This completion rate includes distribution of 118 copies of published ethics opinions and other written materials requested by inquirers and 2,128 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 695 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 Enclosure 1: Ethics Hotline Activity Statistics.)

Currently five paralegals have primary responsibility for the Ethics Hotline call work. As of May 31, 2014: (1) the monthly average number of total calls handled by one paralegal was 370; (2) the monthly average number of completed calls by one paralegal was 227; and (3) the monthly average number of left messages by one paralegal was 144.

Between March and May, 2014, 8 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. Most of the surveys received gave the Hotline top marks (copies of the surveys are available upon request), and each of the eight survey respondents added personal comments. Six commended the staff for being helpful, knowledgeable, and professional and described the service as a valuable resource. One of the survey respondents expressed dissatisfaction with the recorded message that must be played before a call can be answered by the Hotline receptionist. (Concerns about the system for reaching a Hotline paralegal were also expressed by one of the six survey respondents who commended the Hotline.) The administrative supervisor spoke with the attorney concerned about the recorded message and explained that an initial recorded message is a built-in feature of the

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<sup>1</sup> There are 13.5 authorized positions in the Professional Competence Unit and all positions are currently filled. A vacant paralegal position was recently filled and the new employee started on June 9, 2014.

State Bar's Call Center system and could not be eliminated. Another survey respondent stated that they believed the information provided to them was incorrect. For quality control purposes, a follow-up call was placed to this attorney after the survey was received. The follow-up call revealed that a miscommunication was the problem. This attorney also noted that he had used the Hotline in the past and found it to be helpful. (See Enclosure 2: Ethics Hotline Satisfaction Survey Excerpts.)

Through May, the category of "Fees and Costs" was the most frequently raised issue category by Hotline callers in 2014. 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 8, 2014 meeting, COPRAC met on May 16, 2014 in Los Angeles, and June 27, 2014 in San Francisco.

### **A. Published Opinions**

The following opinion was approved and published at the Bar's website:

Formal Opinion No. 2014-190 (formerly 11-0003):

**ISSUE:** Upon the dissolution of a law firm, what duties does an attorney affiliated with the firm owe to a client on whose behalf he or she provided legal services if the attorney no longer will be representing the client following the dissolution? How does the fulfillment of those duties differ if the attorney had no connection with or knowledge of the client prior to dissolution of the firm? Do the steps an attorney may be required to take depend on the nature of the attorney's position with the firm?

**DIGEST:** Rule 3-700(A)(2) of the California Rules of Professional Conduct, provides that a member may not withdraw from the representation of a client until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client. The requirements of rule 3-700(A)(2) apply when an attorney's withdrawal is prompted by the dissolution of the attorney's law firm. In the event of dissolution, all attorneys who are employed by or partners of a firm are required to comply with rule 3-700(A)(2) as to all clients of the firm, regardless of their connection to any specific client or the specific nature of their affiliation with the firm. What "reasonable steps" an attorney must take to protect a particular client's rights may vary considerably, however, depending on the circumstances, including the attorney's relationship to the client and its matter and the attorney's position within the firm.

### **B. Meetings**

At the May 16th meeting, COPRAC considered the public comments received on 12-0004 (In Rem Bankruptcy Conflicts) and continued the post-public comment work on Formal Opinion Interim No. 12-0001 (Disclosure of Confidences at Motion for Withdrawal). COPRAC also continued pre-public comment work on the following draft opinions: 12-0002 (Revocation of Waivers); 12-0003 (Attorney Directory and Rating Website); 12-0005 (Law Firm In-House Counsel); 12-0006 (Attorney Blogging); 13-0002 (Attorney with Incapacitated Client); 13-0003 (Ethical Obligations When Departing Firm); 13-0004 (Collecting Unpaid Fees); and 13-0005 (Publically Available Confidential Information). The

Committee discussed the status of the four CLE panels COPRAC will present at the 2014 Annual Meeting, as well as the two programs they will be presenting at the California Solo and Small Firm Summit. Finally, the Committee chose to consider four new opinion topics: 14-0001 (Colleague Impairment); 14-0002 (Alternative Litigation Funding); 14-0003 (Settling Before Withdrawal); and, 14-0004 (Witness Perjury).

COPRAC's Appointment Nominations Subcommittee met on May 7th in San Francisco and May 15<sup>th</sup> in Los Angeles to interview applicants for appointment for the 2014/2015 committee year. At the May 16<sup>th</sup> meeting, the Appointment Nominations Subcommittee's full slate of recommended candidates was approved by COPRAC for submission to the Board Committee on Nominations and Appointments (NAC) and the Board for final approval at the Board's July 17<sup>th</sup> and 18<sup>th</sup> meeting.

The following opinion was tentatively approved by COPRAC for an additional 90-day public comment period at its May 16, 2014 meeting, with a public comment deadline of September 4, 2014. Post-public comment consideration of the opinion will occur at the Committee's September 11, 2014 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 communications 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. To the extent the court orders an attorney to disclose confidential information, the attorney faces a dilemma in that she may not be able to comply with both the duty to maintain client confidences and the duty to obey court orders. Once an attorney has exhausted reasonable avenues of appeal or other further review of such an order, the attorney must evaluate for herself the relevant legal authorities and the particular circumstances, including the potential prejudice to the client, and reach her own conclusion on how to proceed. Although this Committee cannot categorically opine on whether or not it is acceptable to disclose client confidences even when faced with an order compelling disclosure, this Committee does opine that, whatever choice the attorney makes, she must take reasonable steps to minimize the impact of that choice on the client.

At the June 27, 2014 meeting, COPRAC considered the public comments received on Formal Opinion No. 11-0004 (ESI and Discovery Requests) and 12-0007 (Puffing in Negotiations) and continued the post-public comment work on Formal Opinion Interim No. 12-0004 (In Rem Bankruptcy Conflicts). COPRAC also continued pre-public comment work on the following draft opinions: 12-0002 (Revocation of Waivers); 12-0003 (Attorney Directory and Rating Website); 12-0005 (Law Firm In-House Counsel); 12-0006 (Attorney Blogging); 13-0002 (Attorney with Incapacitated Client); 13-0003 (Ethical Obligations When Departing Firm); 13-0004 (Collecting Unpaid Fees); 13-0005 (Publicly Available Confidential Information). In addition, the Committee considered four possible new opinion topics: 14-0001 (Colleague Impairment); 14-0002 (Alternative Litigation Funding); 14-0003 (Settling Before Withdrawal); and 14-0004 (Witness Perjury). Finally, the Committee continued to work on plans for the COPRAC CLE panels to be offered at the 2014 Annual Meeting and began brainstorming on possible locations for the 2015 Annual Ethics Symposium.

The following opinion was tentatively approved by COPRAC for an additional 60-day public comment period at its June 27, 2014 meeting. Post-public comment consideration of the opinion will occur at the Committee's September 11, 2014 meeting.

Formal Opinion Interim No. 12-0004:

**ISSUE:** If an attorney represents an individual as a debtor in a single, no-asset Chapter 7 bankruptcy filing, while simultaneously representing one or more of the individual's creditors in unrelated matters, is the attorney required by rule 3-310(C)(3) to obtain the informed written consent of both parties?

**DIGEST:** Simultaneous representation of a debtor in a simple, no-asset Chapter 7 bankruptcy filing and that debtor's creditors in unrelated matters does not create adversity triggering the informed written consent requirement of rule 3-310(C)(3), provided that the engagement is limited and certain intake procedures are employed to ensure that the Chapter 7 proceeding in which the attorney is involved is an *in rem* proceeding that focuses on the orderly distribution of the debtor's assets and the discharge of debts.

COPRAC's next meeting is scheduled for August 1, 2014 in Los Angeles.

### **3. PROPOSED NEW AND AMENDED RULES OF PROFESSIONAL CONDUCT**

The State Bar of California has submitted 15 proposed Rules of Professional Conduct to the California Supreme Court. Since the last report to RAD, proposed Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers) was submitted to the Court on June 16, 2014. An online docket posting (case #S206125) is available at the California Courts website: <http://www.courts.ca.gov/home.htm>.

### **4. 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. Senate Bill No. 1186 also requires the State Bar to submit an annual report to the legislature on July 31 of each year. The 2013/2014 report is currently underway and will be filed with the legislature on July 31, 2014.

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, by month.

**ADA Letters Received-Referred to Enforcement in 2014**

Month	Letters Received	Letters Referred To Enforcement
Jan.	34	3
Feb.	29	5
Mar.	9	1
Apr.	6	1
May	12	0
<b>TOTAL</b>	<b>90</b>	<b>10</b>

The table below lists the possible compliance issues and shows the numbers of issues referred to Enforcement in 2014.

**Compliance Issues Referred to Enforcement\***  
**(1/1/14 through 5/31/14)**

<b><u>Compliance Issue</u></b>	<b><u>No. of Issues</u></b>
Failure to Copy the State Bar within 5 Business Days	6
Failure to Include Mandatory Advisory	4
Failure to Copy the CCDA within 5 Business Days	6
Possible Prohibited Request/Demand for Money or Offer/Agreement to Accept Money	2
Possible Prohibited Statement of Recipient's Specific Monetary Liability	2

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

## **5. COMPETENCE PUBLICATIONS**

Handbook on Client Trust Accounting for California Attorneys: The online Trust Accounting Handbook html webpage was visited 3,969 times between January – May, 2014.

California Compendium on Professional Responsibility: Four hundred and fifty-three 2013 Compendium updates and earlier updates have been processed to date. The 2014 Compendium update is anticipated to be released in the third quarter.

California Rules of Professional Conduct & State Bar (a.k.a Publication No. 250): As of May 31, 2014, 1,300 copies of the 2013 Pub. 250 have been sold. The 2014 Publication 250 will be available for sale in early July.

An e-Reader version of Publication 250<sup>2</sup> is available at the Amazon Kindle store. A total of two hundred and two e-books have been purchased to date. One hundred thirty-five copies of the 2011 e-book have been purchased since posting in September 2011. Thirty-eight copies of the 2012 e-book have been purchased since posting in June 2012. The 2013 e-Reader version of Publication 250 was posted on June 12, 2013 and twenty-nine copies have been purchased since that time. The 2014 e-Reader version of Publication 250 was uploaded to Amazon.com on June 4, 2014.

## **6. PROFESSIONAL COMPETENCE EDUCATIONAL PROGRAMS & OTHER OUTREACH ACTIVITIES**

A Professional Competence resource table was staffed at the June 4<sup>th</sup> new admittee swearing-in ceremony in Oakland. In addition to offering a complimentary copy of a booklet with the Rules of Professional Conduct and selected State Bar Act sections, there was information available on the Ethics Hotline, COPRAC's ethics opinions, and other legal ethics resources. A similar resource table was provided at the June 19 – 21 Solo & Small Firm Summit in Newport Beach.

<sup>2</sup> The e-Reader version of Publication 250 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 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.

## 7. COMPETENCE RESOURCES AT CALBAR.CA.GOV

Senior Lawyer Ethics Resources Page: This 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 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 were launched in May 2013 and have been visited approximately 13,680 times, through May 31, 2014.

Judicial Campaign Ethics Page: Lawyer candidates for judicial office are subject to Rule 1-700 of the Rules of Professional Conduct. In part, this rule provides that a lawyer who is a candidate for judicial office in California shall comply with Canon 5 of the Code of Judicial Ethics. An online educational course on Judicial Campaign Ethics by the Administrative Offices of the Courts, Center for Judicial Education and Research (CJER) is available and is a mandatory requirement for all candidates for judicial office. The Judicial Campaign Ethics web page was launched in October 2013 and has been visited approximately 710 times, through May 31, 2014.

Web Activity: The State Bar tracks the web activity for all html website pages accessed.<sup>3</sup> The chart below lists selected web pages administered by Professional Competence and the 2014 activity in terms of visits.

Professional Competence Web Resources – Activity Detail January – May, 2014	
Webpage	Approx. Number of Visits
Rules of Professional Conduct html web pages	252,320
The State Bar Act html web pages	13,130
Ethics Opinions html web pages	18,340
Ethics Information html web pages	90,350
Ethics & Technology html web pages	8,840

Since the last Professional Competence status report submitted for the Board Committee's May 8, 2014 meeting, the following website updates have been made:

1. Formal Opinion No. 2014-190 (Interim No. 11-0003) was published on April 28<sup>th</sup> and posted at the Opinions subpage of the Ethics Information page of the Bar's website.
2. 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 for an additional public comment circulation with a deadline of September 4, 2014.
3. The Ethics Information pages include an annually updated topical index to the *California Compendium on Professional Responsibility*. Although published in hard copy as part of the three volume Compendium set, the index is also made available as a standalone online research tool. The index is searchable and can be used for finding rules, statutes, cases and ethics opinions on professional responsibility topics such as, confidentiality, conflicts of interests and advertising. The 2014 update of the index recently was posted on the website and is found at: Ethics Information > Publications > Compendium on Professional Responsibility.
4. The Ethics & Technology web page was updated to add links to the following resources: a Bar Association of San Francisco ethics opinion concerning negative online reviews and confidential client information; a Bloomberg BNA article on social media networks; and, a New York State Bar Commercial and Federal Litigation Section article on social media.

cc: Robert A. Hawley

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<sup>3</sup> Web download statistics are not available for web content posted as Adobe PDF documents.

## ETHICS HOTLINE ACTIVITY STATISTICS - 2014

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	1293	1108	185	86%	14%	21	424
February	19	1163	1037	126	89%	11%	36	382
March	20	1221	1141	80	93%	7%	17	452
April	22	1245	1110	135	89%	11%	24	412
May	21	1170	1055	115	90%	10%	20	458
Cumulative Totals	103	6,092	5,451	641	89%	11%	118	2,128

### **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

<b>Daily:</b>	Incoming Calls:	59
	Completed Calls:	53
<b>Monthly:</b>	Incoming Calls:	1,218
	Completed Calls:	1,090

### Aggregate Outgoing Calls

<b>Current Month:</b>	1,783*
<b>Cumulative to Date:</b>	9,261*

\*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.



ENCLOSURE 2 – Ethics Hotline Satisfaction Survey Excerpts

Excerpt from Ethics Hotline Customer Satisfaction Surveys  
Additional Comments  
(Surveys Received for March – May 2014)

1. Received March 25, 2014

COMMENTS/SUGGESTIONS:

Spoke with Elbert. He knew the issue well, and went right to it.

2. Received April 9, 2014

COMMENTS/SUGGESTIONS:

Pamela Hill helped me at first. There were no cases or opinions directly on point to my question, that she knew of, so she referred my question to Andrew Tuft. He called me soon after. He again confirmed there are no cases or opinions directly on point, but he gave references to two other opinions that, while not directly on point, provide useful analysis that can be analogized to my issue. The ethics hotline is an incredibly valuable resource and Pamela and Andrew were excellent in doing all they could to provide me the resources I needed. Thank you!

3. Received April 17, 2014

COMMENTS / SUGGESTIONS:

Hotline gave clearly wrong information. I read the code section before calling, hotline staff gave an answer of "you can't do that" then after I pointed to the statutes language, was told "i guess it is ok" but I should consult with an ethics attorney first. waste of time.

4. Received May 9, 2014

COMMENTS / SUGGESTIONS:

Ricardo was very knowledgeable and experienced. Very helpful.

5. Received May 9, 2014

COMMENTS / SUGGESTIONS:

At the moment I am awaiting a callback, but I want to STRONGLY COMPLIMENT DAVID JASPER your intake receptionist for his cheerful and warm VERY PROFESSIONAL manner and attitude. He is a gem to work with. I have called in over the years, often with serious and "disturbing" matters on my mind, and his willingness to listen carefully, respond generously, find the right person for the response and engage me has always uplifted my spirits. He has a great sense of humor and propriety and makes the call an exceptional experience . REWARD HIM WELL. He makes your service look exceptional. I cannot rate the paralegal this time since I await his/her callback.

## ENCLOSURE 2 – Ethics Hotline Satisfaction Survey Excerpts

6. Received May 12, 2014

### COMMENTS / SUGGESTIONS:

Ricardo Patino was well informed, very professional and of great help. Thanks. He complements your excellent intake receptionist, David Japer who has no equals!

7. Received May 19, 2014

### COMMENTS / SUGGESTIONS:

Calling the Ethics Hotline now is not a quick prospect. First of all I have to listen to a recorded message (about 1 min) explaining the process to me. I am an experienced lawyer and know how it works I do not need to be told in a message to which I am forced to listen. Next I am on hold just waiting for the receptionist to take my information so that I can be called back sometime in the future. The only people who call this line are practicing attorneys. Although you may not believe this, our time is valuable. We do not have time to go through your waiting process just to get a call back. I have used this service in the past and it has only gotten worse. I used to get a person on the phone not a recording. Just finding the number is not easy. It used to be on the home page and easy to see. It seems like you are filling your website with a load of information (too much) in the hope that we will not call you. I expect more. I expect not to have to encounter a wall of recordings and process just to ask an ethics question. How can you improve your service? Get rid of the recordings. Hire enough people to answer the phones when we call.

8. Received May 19, 2014

### COMMENTS / SUGGESTIONS:

Although I am very dissatisfied with the difficulty getting to Pamela Hill, I am very satisfied with the information and help which Pamela provided. She quickly understood what my question was and was able to give me the information I needed without having to call me back. Thanks Pamela!

## **Professional Competence Budget Summary\***

### **Authorized vs. Actual**

**Year-to-Date as of May 31, 2014**

<b>Budget (Actual)</b>	\$586,266
<b>Budget (Authorized)</b>	\$753,998
<b>Variance</b>	\$167,732

**Monthly (January – May 31, 2014)**

	<b>January</b>	<b>February</b>	<b>March</b>	<b>April</b>	<b>May</b>
<b>Budget (Actual)</b>	\$131,518	\$113,898	\$99,468	\$140,660	\$100,722
<b>Budget (Authorized)</b>	\$195,139	\$139,411	\$139,654	\$139,897	\$139,897
<b>Variance</b>	\$63,621	\$25,513	\$40,186	-\$763	\$39,175

\* The total annual 2014 operating budget for the Office of Professional Competence is \$1,797,785.