



# THE STATE BAR OF CALIFORNIA

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OFFICE OF PROFESSIONAL COMPETENCE

PLANNING, AND DEVELOPMENT

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## MEMORANDUM

**DATE:** July 11, 2016

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

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

**SUBJECT:** R&D Meeting on July 21, 2016 – 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, 2016.<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 – Actuals vs. Authorized. 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, 2016, 5,597 member inquiries were received with a completion rate of 83%. This completion rate includes distribution of 70 copies of published ethics opinions and other written materials requested by inquirers and 1,282 referrals to information posted at the Bar's website. In addition, the staff made 67 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 four paralegals have primary responsibility for the Ethics Hotline call work. As of May 31, 2016: (1) the monthly average number of total calls handled by one paralegal was 377; (2) the monthly average number of completed calls by one paralegal was 232; and (3) the monthly average number of left messages by one paralegal was 146.

From January – May, 2016, since the last Competence status report submitted for the Board Committee's May 12, 2016 meeting, three 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 all survey categories (copies of the surveys are available upon request). Two of the three survey respondents added personal comments commending the staff for their assistance and describing the service as a valuable resource. (See Enclosure 2: Ethics Hotline Satisfaction Survey Excerpts.)

Through May 31, 2016, the category of "Communications" was the most frequently raised issue category, which accounted for 19% of the total calls. This category encompasses questions concerning communications between the attorney and the client, the adverse party, a judge or

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<sup>1</sup> There are 13.5 authorized positions in the Professional Competence Unit and two paralegal positions are currently vacant. Recruitment efforts are currently underway to fill these vacancies.

judicial officer, jurors, opposing counsel, witnesses and others. Close behind were the categories of “Fees and Costs” (18%) and “Conflicts” (14%). 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 12, 2016 meeting, COPRAC met on May 20, 2016 in Los Angeles, and June 24, 2016 in San Francisco.

### **A. Meetings**

At the May 20, 2016 meeting, COPRAC considered post-public comments received on Formal Opinion Interim No. 12-0006 (Attorney Blogging) and Formal Opinion Interim No. 13-0005 (Publicly Available Confidential Information). COPRAC also continued pre-public comment work on the following draft opinions: 12-0002 (Revocation of Waivers); 12-0003 (Attorney Directory and Rating Websites); 12-0005 (Law Firm In-House Counsel); 13-0002 (Attorney with a Vulnerable Client); 13-0003 (Ethical Obligations When Departing Firm); 13-0004 (Collecting Unpaid Fees); 14-0001 (Colleague Impairment); 14-0002 (Alternative Litigation Funding); 14-0003 (Settling Before Withdrawal); and 14-0004 (Witness Perjury). In addition, the Committee discussed the actions taken during the Rule Revision Commission’s May 6<sup>th</sup> and 7<sup>th</sup> meeting. The Committee also continued work on their draft public comment letters on several proposed rules of professional conduct. The Committee continued work on plans for four panel presentations for the State Bar Annual Meeting being held in September in San Diego. Finally, the Committee elected Drew Dilworth as the Vice Chair for the 2016-2017 Committee year.

At the June 24, 2016 meeting, COPRAC continued post-public comment work on Formal Opinion Interim No. 12-0006 (Attorney Blogging) and Formal Opinion Interim No. 13-0005 (Publicly Available Confidential Information). COPRAC also continued pre-public comment work on the following draft opinions: 12-0002 (Revocation of Waivers); 12-0003 (Attorney Directory and Rating Websites); 12-0005 (Law Firm In-House Counsel); 13-0002 (Attorney with a Vulnerable Client); 13-0003 (Ethical Obligations When Departing Firm); 13-0004 (Collecting Unpaid Fees); 14-0001 (Colleague Impairment); 14-0002 (Alternative Litigation Funding); 14-0003 (Settling Before Withdrawal); 14-0004 (Witness Perjury); 16-0001 (Practice in Multiple Firms); 16-0002 (Lost or Stolen Laptop or Briefcase); and 16-0003 (Ancillary Business). The Committee discussed the actions taken during the Rules Revision Commission’s June 2<sup>nd</sup> and 3<sup>rd</sup> meeting. The Committee also continued work their draft public comment letters on several proposed rules of professional conduct. Finally, the Committee continued work on plans for four panel presentations for the State Bar Annual Meeting being held in September in San Diego.

Post-public comment consideration of proposed Formal Opinion Interim No. 13-0005 occurred at the Committee’s June 24, 2016 meeting, and the Committee approved this opinion for submission to the Committee on Regulation and Discipline for final approval. AN agenda item requesting RAD’s approval of this opinion has been placed on RAD’s agenda for the July 21, 2016 Board Meeting. The issue and digest of proposed Formal Opinion Interim No. 13-0005 is set forth below.

#### Formal Opinion No. 13-0005:

**Issue:** What duties does a lawyer owe to current and former clients to refrain from disclosing potentially embarrassing or detrimental information about the client, including publicly available information the lawyer learned during the course of his representation?

**Digest:** A lawyer may not disclose his client’s secrets, which include not only confidential information communicated between the client and the lawyer, but also publicly available information that the lawyer obtained during the professional relationship which the client has requested to be kept secret or the disclosure of which is likely to be embarrassing or detrimental to the client. Even

after termination of the attorney-client relationship, the lawyer may not disclose potentially embarrassing or detrimental information about the former client if that information was acquired by virtue of the lawyer's prior representation.

COPRAC's next meeting is scheduled for August 12, 2016, and will be held in San Francisco. At this meeting, COPRAC will consider post-public comments received on Formal Opinion Interim 12-0006 (Attorney Blogging). COPRAC will continue pre-public comment work on the following opinions: 12-0002 (Revocation of Waivers); 12-0003 (Attorney Directory and Rating Websites); 12-0005 (Law Firm In-House Counsel); 13-0002 (Attorney with a Vulnerable Client); 13-0003 (Ethical Obligations When Departing Firm); 13-0004 (Collecting Unpaid Fees); 14-0001 (Colleague Impairment); 14-0002 (Alternative Litigation Funding); 14-0003 (Settling Before Withdrawal); 14-0004 (Witness Perjury); 16-0001 (Practice in Multiple Firms); 16-0002 (Lost or Stolen Laptop or Briefcase); and 16-0003 (Ancillary Business). The Committee will finalize the drafting of their public comment letters on the proposed rules of professional conduct. Finally, the Committee will continue planning for the 2016 State Bar Annual Meeting programs.

## **B. Appointment Nominations**

On Monday, March 28, the Appointment Nominations Subcommittee met by conference call to rank and select applicants for interview. The Appointment Nominations Subcommittee selected eight individuals to interview out of fourteen total applicants. Three applicants were interviewed on Wednesday, May 11, 2016 in San Francisco and five applicants were interviewed on Thursday May 19, 2016 in Los Angeles. The Appointment Nominations Subcommittee recommended a slate of nominees that included new attorney and public member appointments. The Board Committee on Nominations and Appointments (NAC) met on July 6, 2016 and the Board is set to consider NAC's appointment recommendations at their July 22, 2016 meeting.

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

At a specially set meeting on June 23, 2016, the Board approved a comprehensive set of 68 proposed new and amended Rules of Professional Conduct for a 90-day public comment period. They also approved the circulation of an alternate draft of proposed Rule 8.4.1 (Prohibited Discrimination, Harassment and Retaliation) [current CA 2-400] for public comment circulation. The public comment period ends on September 27, 2016. The public comment posting and the Commission's proposed rules page has been updated and the text of the proposed rules and the executive summaries for each rule that were provided to the Board can also be found at both pages.

A public hearing to receive oral testimony on all rules currently circulating for public comment is scheduled for July 26, 2016 from 10 am – 3:00 pm, and can be attended from the Los Angeles and San Francisco offices of the State Bar, as well as by a tele-conference connection.

The additional 45-day public comment period for proposed amendments to Rules 5-110 and 5-220 ended on July 1, 2016 and the post public comment consideration of those rules will take place at the Commission's August 26, 2016 meeting. These rules are being studied on an expedited basis and separately from the Commission's comprehensive proposed rules. If in August the Commission approves proposed amended Rules 5-110 and 5-220 for submission to the Board, then it is anticipated that the Board action to adopt the rules for transmittal to the Supreme Court for final approval will be scheduled for the Board's October 1, 2016 meeting in San Diego.

The Commission's next meetings are scheduled for August 26, 2016 at the State Bar office in San Francisco, September 30, 2016 in San Diego, and October 21 & 22, 2016 at the State Bar office in Los Angeles. The focus of these meetings will be consideration of public hearing testimony and any public comments received.

### Rules Revision Action Timeline

June 27 – Sept. 27, 2016	90-day public comment period
July 26, 2016	Commission public hearing to receive public comment on proposed rule amendments
Oct. 1, 2016	RAD/BOT: Proposed amended Rules 5-110 and 5-220 - return from 45-day public comment
Nov. 17 & 18, 2016	RAD/BOT: return from 90-day public comment, request for final adoption, and, if necessary, authorization to re-distribute certain proposed rules for additional public comment
Nov. 21, 2016 – Jan. 9, 2016	Additional 45-day public comment period, for some rules, if needed.
March 9 & 10, 2017	RAD/BOT: return from 45-day public comment, adoption of remaining rules for submission to the Supreme Court for approval
March 31, 2017	Deadline to submit entire set of proposed new and amended rules to the Supreme Court for approval

#### 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. Preparations for the 2016 report are underway.

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 (year to date by month).

**ADA Letters Received-Referred to Enforcement  
(1/1/16 through 5/31/16)**

Month	Letters Received	Letters Referred To Enforcement
Jan.	6	6
Feb.	40	12
Mar.	68	4
<b>Apr.</b>	<b>29</b>	<b>3</b>
<b>May</b>	<b>11</b>	<b>1</b>
<b>TOTAL</b>	<b>154</b>	<b>26</b>

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

**Compliance Issues Referred to Enforcement\***  
**(1/1/16 through 5/31/16)**

<b><u>Compliance Issue</u></b>	<b><u>No. of Issues</u></b>
Failure to Copy the State Bar within 5 Business Days	0
Failure to Include Mandatory Advisory	25
Failure to Copy the CCDA within 5 Business Days	0
Possible Prohibited Request/Demand for Money or Offer/Agreement to Accept Money	1
Possible Prohibited Statement of Recipient's Specific Monetary Liability	0

(\*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 approximately 4,810 times between January – May, 2016.

California Compendium on Professional Responsibility: Work on the 2016 update is underway and is anticipated to be completed in the 3<sup>rd</sup> quarter.

California Rules of Professional Conduct & State Bar Act (a.k.a Publication No. 250): Work on the 2016 Publication 250 is underway and anticipated to be completed by the end of the 2<sup>nd</sup> quarter.

An e-Reader version of Publication 250<sup>2</sup> is available at the Amazon Kindle store. A total of two hundred sixty-nine e-books have been purchased to date. The 2016 e-Reader version of Publication 250 is anticipated to be posted by the end of July.

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

Targeted Outreach: In June, 2016, Professional Competence sent a paralegal representative to the Solo Summit in Newport Beach to promote awareness of State Bar legal ethics resources available to members and to field ethics questions from attendees in-person. Copies of “mini” booklets with the current California Rules of Professional Conduct and other select duties of members, as well as State Bar ethics resources flyers, were provided to conference attendees.

Client Trust Accounting Survey and Education: In follow-up to the discussion at the Board's January planning meeting, Professional Competence assumed a lead role in coordinating State Bar staff's development of a member survey on client trust accounting. At a March 10, 2016 joint session meeting of the Admissions & Education Committee and the Regulation & Discipline Committee, staff presented an initial report and recommendations for education and outreach of the staff working group assigned to consider the data collected on a survey concerning client trust accounting practices. Further consideration of the working group's initial report is scheduled for the Board Committee on Regulation and Discipline's July 20, 2016 meeting (see July 21, 2016 RAD meeting agenda item III.I. for more information).

<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

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 2016 activity in terms of visits.

Professional Competence Web Resources – Activity Detail* January – May, 2016	
Webpage	Approx. Number of Visits
Rules of Professional Conduct html web pages	241,220
The State Bar Act html web pages	11,200
Ethics Opinions html web pages	15,170
Ethics Information html web pages	86,700
Ethics & Technology html web pages	10,380
Client Trust Accounting Resources web pages	3,640
Senior Lawyer Ethics Resources web pages	4,860
Judicial Ethics web pages	1,180

Since the last Professional Competence status report submitted for the Board Committee's March 12, 2016 meeting, the following website updates were made:

1. The Commission for the Revision of the Rules of Professional Conduct web pages and State Bar Board of Trustees meeting page were updated as follows: (1) posting of the June 2 & 3, 2016 meeting agenda and materials; (2) posting of agenda and materials for the Board's June 23, 2016 meeting; (3) posting of public comment notice for comprehensive set of proposed new and amended Rules of Professional Conduct and related notices and links; and (4) posting of the public hearing notice and registration form.
2. The Attorney Civility and Professionalism page was updated to add a links to the CalBar Journal self-study MCLE article *Attorney Civility: When zealous advocacy crosses the line* and two Los Angeles Lawyer articles *Litigation, Civility, and How Nice Guys Can Finish First* and *Overview of the Guidelines of Civility and Professionalism*.
3. The Ethics and Technology page was updated to add links to two CalBar Journal articles *Scammers use real attorney IDs to cheat consumers* and *Scammers continue to target attorneys with check fraud*.
4. The Senior Lawyers page was updated to add a link to the CalBar Journal self-study MCLE article *A closer look at depression and cognitive decline in senior attorneys*.
5. The Client Trust Accounting page was updated to add a link to the CalBar Journal article *Troubling Survey Results*.

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

## ENCLOSURE 1

### ETHICS HOTLINE ACTIVITY STATISTICS - 2016

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	19	1,111	954	157	86%	14%	14	264
February	20	1,134	944	190	83%	17%	20	240
March	22	1,097	885	212	81%	19%	20	263
April	21	1,135	946	189	83%	17%	4	242
May	21	1,120	939	181	84%	16%	12	273
Cumulative Totals	103	5,597	4,668	929	83%	17%	70	1,282

#### **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.

#### 2016 Key Hotline Activity Averaged by Day and Month

<b>Daily:</b>	Incoming Calls:	54
	Completed Calls:	45
<b>Monthly:</b>	Incoming Calls:	1,119
	Completed Calls:	934

#### 2016 Aggregate Outgoing Calls

<b>Average Monthly Aggregate:</b>	1,521*
<b>Cumulative to Date:</b>	7,700*

\*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**

### **Excerpt from Ethics Hotline Customer Satisfaction Surveys**

(Surveys Received for April, 2016 - May, 2016)

1. Received April 26, 2016

#### **COMMENTS / SUGGESTIONS:**

I love the ethics hotline and I recommend it to colleagues all the time. Thank you for your great assistance, again and again!

2. Received May 5, 2016

#### **COMMENTS/SUGGESTIONS:**

Receptionist David was excellent in helping me get through to a paralegal, Ricardo, who directed me to the best answer for my ethical concern – ethics opinion 1994-154. The service serves a definite need for lawyers

## ENCLOSURE 3

### Professional Competence Budget Summary Authorized vs. Actual

Year-to-Date as of May 2016

<b>Budget (Actual)</b>	\$633,975
<b>Budget (Authorized)</b>	\$715,130
<b>Variance</b>	\$81,155

Monthly (January thru May 2016)

	<b>January</b>	<b>February</b>	<b>March</b>	<b>April</b>	<b>May</b>
<b>Budget (Actual)</b>	\$118,736	\$125,139	\$139,508	\$114,732	\$135,860
<b>Budget (Authorized)</b>	\$143,026	\$143,026	\$143,026	\$143,026	\$143,026
<b>Variance</b>	\$24,290	\$17,887	\$3,518	\$28,294	\$7,166