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**ASSESSMENT OF PERFORMANCE
OF
THE STANDING COMMITTEE
ON PROFESSIONAL RESPONSIBILITY AND CONDUCT
OF THE STATE BAR OF CALIFORNIA
2009 Year End**

Chair: Carole J. Buckner

Staff Contact: Mark Taxy (415-538-2163)

Summary of Accomplishments

The Committee on Professional Responsibility and Conduct ("COPRAC" or "the Committee") is assigned to develop advisory ethics opinions, to conduct educational programs, and to assist the Board of Governors in matters pertaining to attorney professional responsibility. This report presents an assessment of the Committee's 2009 activities and accomplishments.

1. Conducted 8 one-day meetings.
2. Published 4 proposed opinions for public comment with 3 opinions formally published by the Board of Governors and 1 that ultimately was not formally published.
3. Published 2 Ethics Alert articles on the uncertain ethical requirements for attorney fee modifications and on legal services to distressed homeowners and foreclosure consultants on loan modifications.
4. Administered the 13th Annual Statewide Ethics Symposium.
5. Presented 4 ethics programs at the State Bar Annual Meeting, of which 3 were selected for videotaping for use as a self-study program offering ethics credit.
6. Issued 16 public comment letters to the Rules Revision Commission regarding proposed changes to the California Rules of Professional Conduct in response to the fourth and fifth public comment requests.
7. Issued a public comment letter on the State Bar's proposed Rule of Professional Conduct 1-650 regarding limited legal services programs.
8. Issued a public comment letter to the State Bar legislative counsel regarding the survival of the attorney-client privilege after the death of the client for submission to the CA Law Commission.
9. Submitted a comment letter to the State Bar's Trusts & Estates Section regarding the Section's Professional Responsibility Guidebook
10. Participated in 20 CLE outreach programs at the request of local and specialty bar associations.

Performance Indicators and Actual Performance

1. ***[Performance Indicator from 2009 Workplan]*** Meetings - To carry out its charge, 9-10 day-long meetings will be held in FY 2009. Most of these meetings will be held in-person at the State Bar facilities in San Francisco or Los Angeles, or at an airport hotel location. Meetings scheduled later in the fiscal year will be planned as video-conference meetings. However, the Committee hopes to realize budget savings and use these savings to convert these video-conference meetings into in-person meetings. Given the nature of the Committee's work, in-person member participation is the most productive meeting format.

[Actual Performance] In FY 2009, COPRAC held 8 one-day meetings.

2. ***[Performance Indicator from 2009 Workplan]*** Ethics Opinions - COPRAC plans to issue 3 – 5 formal ethics opinions. The Committee shall assist members of the State Bar in their desire to appreciate and adhere to ethical and professional standards of conduct, which assistance shall include, but is not limited to:
 1. Issuing to members of the bar advisory opinions on the ethical propriety of hypothetical attorney conduct at the request of members of the State Bar or on its own initiative;
 2. Responding to such inquiries from members of the bar; and
 3. Publishing its opinions.

[Actual Performance] In FY 2009, the Committee submitted 4 proposed opinions to RAD for final publication of which 3 were officially published as State Bar Formal Opinion Nos. 2009-176, 2009-177 and 2009-178. One of these opinions (Interim Op. No. 05-0001) was placed on RAD's March 5, 2009 agenda for action but was not formally published. The Committee also issued 1 additional opinion for public comment distribution (Interim Op. No. 08-0002) and having a public comment deadline of January 4, 2010 will consider the public comment received in early 2010. A summary of the published opinions and the opinion published for public comment are attached. (Attachment A).

3. ***[Performance Indicator from 2009 Workplan]*** Rules of Professional Conduct - COPRAC plans to work closely with the State Bar Commission for the Revision of the Rules of Professional Conduct in coordinating the Board's consideration of any Rule of Professional Conduct amendments. COPRAC will review and analyze proposals to amend the Rules of Professional Conduct and monitor and comment on the work of the State Bar's Commission for the Revision of the Rules of Professional Conduct.

[Actual Performance] The COPRAC Rules Revision Commission Subcommittee members served as Committee liaison to the Rules Revision Commission. A liaison attended and monitored each meeting of the Commission and reported to the Committee on the work of the Commission. The Subcommittee reviewed the 4th and 5th groups of 19 proposed rules submitted by the Commission for public comment and made recommendations to the Committee regarding the Committee's response to the request for public comment. In FY 2009, the Committee considered the recommendations of the Subcommittee and submitted 16 comment letters to the Commission commenting on 16 of the 19 proposed rules. Of the rules on which COPRAC commented, 5 comment letters supported adoption of the rule subject to COPRAC's comments, 9 comment letters supported adoption of the rule with comments provided, 1 comment letter supported the rule without comment, and 1 comment letter opposed the proposed rule with comments provided. (Attachment B).

4. ***[Planned Activity from 2009 Workplan]*** Legislation - As assigned by the Board, COPRAC will review and analyze bills that relate to attorney professional responsibility, serve as a technical resource to the State Bar's Office of Government Affairs. On an as needed basis, COPRAC may comment in its own name with a disclaimer indicating its comment does not reflect the view of the State Bar or the Board of Governors

[Activity Report] There was no legislation referred to the Committee by the Board in FY 2009. In FY 2009, the COPRAC California Law Revision Commission Subcommittee followed the California Law Revision Commission's Study No. K-350 (re "Attorney-Client Privilege After the Client's Death"). The California Law Revision Commission issued a tentative recommendation with a public comment deadline of January 23, 2009. COPRAC submitted a comment letter to the State Bar Legislative Counsel for transmission to the California Law Revision Commission. (Attachment C).

5. ***[Planned Activity from 2009 Workplan]*** Judicial Council - As assigned by the Board, COPRAC will review and analyze Rules of Court and other proposals or studies that relate to attorney professional responsibility, including proposed ethical rules for judges and arbitrators. On an as needed basis, COPRAC may comment in its own name with a disclaimer indicating its comment does not reflect the view of the State Bar or the Board of Governors.

[Activity Report] There were no Judicial Council referrals from the Board in FY 2009.

6. ***[Planned Activity from 2009 Workplan]*** Conference of Delegates of California Bar Associations - As assigned by the Board, the Committee will review and analyze Conference resolutions that relate to attorney professional responsibility.

[Activity Report] There were no resolutions referred to the Committee for consideration during FY 2009.

7. ***[Planned Activity from 2009 Workplan]*** American Bar Association House of Delegates - As assigned by the Board, the Committee will review and analyze ABA studies and proposals that relate to attorney professional responsibility (e.g., recent developments have included the ABA's study and revision of the Model Rules of Professional Conduct and the ABA's Report on Multidisciplinary Practice). On an as needed basis, COPRAC may comment in its own name with a disclaimer indicating its comment does not reflect the view of the State Bar or the Board of Governors.

[Activity Report] There were no referrals to the Committee by the Board in FY 2009.

8. ***[Planned Activity from 2009 Workplan]*** Annual Statewide Ethics Symposium - The Committee will plan and present a day-long statewide educational program offering a high level interactive discussion of key professional responsibility issues.

[Activity Report] COPRAC's 13th Annual Statewide Ethics Symposium was held on May 2, 2009 at the University of San Diego School of Law. The theme of the Symposium was "ATTORNEY RESPONSIBILITIES: The Client and Beyond." The panels presented included the following: "Drawing the Line – Where Does Zealous Representation End and Unethical Conduct Begin?"; "Trial Publicity: the Headlines – What Can You Ethically Say About Your Big Case?"; "Advance Absolution: 10 Deadly Sins in Attorney-Client Engagement Agreements, and How to Avoid Them"; and "Re-Forming the California Rules of Professional Conduct." State Bar President Holley Fujie and USD School of Law Dean Kevin Cole provided welcoming remarks. The keynote speaker was Professor Erwin Chemerinsky, Dean, UC Irvine School of Law. There were 113 attendees registered for the Symposium of which 68 were paid attendees. The Symposium received high marks in all categories from the attendees. A copy of the Symposium brochure and the Activity Evaluation Results are attached. (Attachment D).

9. **[Performance Indicator from 2009 Workplan] State Bar Annual Meeting Programs - COPRAC plans to conduct 3 – 5 CLE programs in connection with the State Bar Annual Meeting (identification and preparation of program topics and materials begin in Spring 2008 for programs presented at the Annual Meeting in the Fall of 2008).**

[Actual Performance] COPRAC conducted four programs at the State Bar Annual Meeting held in San Diego in September 2009. The four programs sponsored by COPRAC were entitled "Conflict for Lawyers: How to Get Yourself Disqualified, Sued and Disciplined;" "Ethics Update 2009: Significant Developments in the Law of Lawyering;" "Avoiding Involuntary Pro Bono Work: Forming the Attorney-Client Relationship and Collecting Fees;" and "People's Money: An Overview of Client Trust Accounting." Three of COPRAC's programs were selected for videotaping to be made available as part of the State Bar's online CLE resources. All COPRAC sponsored programs were well attended and received high marks in all categories from the attendees. A copy of the Activity Evaluation Results is attached. (Attachment E).

10. **[Planned Activity from 2009 Workplan] Local Bar Outreach Programs - As opportunities arise, the Committee will coordinate with local and specialty bar associations in developing professional responsibility CLE programs tailored to local/specialty interests.**

[Activity Report] During FY 2009, members of COPRAC participated in 21 continuing legal education programs in response to requests for speakers for CLE programs in legal ethics. Generally, at these programs the speakers' role as a member of COPRAC is to publicize the work of the Committee and to encourage members of the bar to submit opinion requests, to comment on proposed opinions and to apply to serve on the Committee. A table listing COPRAC member participation in outreach programs during FY 2009 is attached. (Attachment F).

During FY 2009, COPRAC also published 2 Ethics Alert articles. "The Uncertain Ethical Requirements for Attorney Fee Modifications" and "Legal Services To Distressed Homeowners and Foreclosure Consultants on Loan Modifications" informs and educates members of the bar on important and timely topics concerning attorneys' ethical duties and professional responsibilities. The Ethics Alerts were published on the State Bar website as a front page feature and copies are attached. (Attachment G). In 2009, the online posting of the Loan Modification Ethics Alert was downloaded more than 109,200 times.

11. **[Planned Activity from 2009 Workplan] Coordination with other State Bar Entities - On matters of mutual interest, COPRAC will coordinate with State Bar entities.**

[Activity Report] During FY 2009, members of the Committee's Rules Revision Commission Subcommittee served as liaisons to the State Bar Commission for the Revision of the Rules of Professional Conduct (see item #3, above). In response to a request for public comment, COPRAC submitted a comment letter to the State Bar regarding proposed rule 1-650 (limited legal services programs). (Attachment H). COPRAC also submitted an informal comment letter to the State Bar Trusts & Estates section regarding the Section's Professional Responsibility Guidebook. (Attachment I).

SUMMARY OF PUBLISHED OPINIONS (2009)

Officially Published Opinions

FORMAL OPINION NO. 2009-176

ISSUES: In a lawsuit prosecuted by Attorney A against Defendant, Client has a statutory right to seek an award of attorney's fees. Attorney B, Defendant's counsel, makes a settlement offer, conditioned on Client's waiver of his statutory right to attorney's fees, that is insufficient to compensate Attorney A for her fees. (1) May Attorney A bar the settlement notwithstanding Client's desire to accept it? (2) Does Attorney B violate any ethical obligation by recommending or conveying the fee-waiver settlement offer in this case? (3) Does Attorney B violate any ethical obligation by recommending or conveying fee-waiver settlement offers in cases generally?

DIGEST:

1. A lawyer must inform the client of a fee-waiver settlement offer and consummate the settlement in accordance with the client's wishes even if it reduces the likelihood of recovering some or all of his or her fees.
2. A lawyer does not violate any ethical obligation by recommending or conveying a fee-waiver settlement offer in a given case.
3. A lawyer does not violate any ethical obligation by recommending or conveying fee-waiver settlement offers in cases generally.

FORMAL OPINION NO. 2009-177

ISSUE: In what manner may an attorney maintain her rights in a charging lien when her former client demands that the attorney endorse a settlement check jointly payable to the client and his current and former attorneys without violating the requirement of rule 4-100 of the California Rules of Professional Conduct that the attorney promptly pay or deliver funds to which the client is entitled?

DIGEST: When responding to a request to endorse a settlement check made jointly payable to a client and his or her current and former attorneys where the former attorney has asserted a valid lien on the settlement proceeds, the former attorney must take prompt steps to find a reasonable method or methods of delivering the undisputed portion of the proceeds to which the client is entitled. The former attorney does not violate rule 4-100 by refusing to use a method that would extinguish the attorney's charging lien, but has a duty to consult governing legal authorities and make a reasonable determination of the amount to which he or she is entitled under the circumstances. If the client does not agree to proposed reasonable methods for delivering the undisputed portion or does not agree with the former attorney's determination of the amount of the proceeds that undisputedly belong to the client, the attorney must promptly seek resolution of the fee dispute through arbitration or judicial determination, as appropriate.

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FORMAL OPINION NO. 2009-178

ISSUES: Is it ethically proper for an attorney who is settling a fee dispute with a client to include a general release and a Civil Code section 1542 waiver in the settlement agreement? Does the existence of a legal malpractice claim against the attorney alter the ethical propriety of including a general release and section 1542 waiver in the settlement agreement?

DIGEST: An attorney must promptly disclose to the client the facts giving rise to any legal malpractice claim against the attorney. When an attorney contemplates entering into a settlement agreement with a current client that would limit the attorney's liability to the client for the lawyer's professional malpractice, the attorney must consider whether it is necessary or appropriate to withdraw from the representation. If the attorney does not withdraw, the attorney must:

1. Comply with rule 3-400(B) by advising the client of the right to seek independent counsel regarding the settlement and giving the client an opportunity to do so;
2. Advise the client that the lawyer is not representing or advising the client as to the settlement of the fee dispute or the legal malpractice claim; and
3. Fully disclose to the client the terms of the settlement agreement, in writing, including the possible effect of the provisions limiting the lawyer's liability to the client, unless the client is represented by independent counsel.

Opinions Published for Public Comment

FORMAL OPINION INTERIM NO. 05-0001

ISSUE: What are the ethical ramifications associated with a modification of an attorney fee agreement?

DIGEST: Rule 3-300 of the Rules of Professional Conduct does not apply to a modification of a fee agreement unless the agreement confers on the attorney an ownership, security, possessory, or other pecuniary interest adverse to the client. While rule 3-300 does not per se apply to a modification of a fee agreement after the attorney-client relationship has commenced, any modification of an existing fee agreement must be fair, reasonable, fully explained, and consented to by the client. A number of factors will determine whether modification of a fee agreement meets this standard.

FORMAL OPINION INTERIM NO. 08-0002

ISSUES: Does an attorney violate the duties of confidentiality and competence he or she owes to a client by: 1) using a computer to which the organization employing the attorney and its supervisors have access; 2) using computer software to which the software developer has access; or 3) using a public or home wireless connection?

DIGEST: To comply with his or her duties of confidentiality and competence, an attorney must take appropriate steps to evaluate: 1) the level of security attendant to the use of a particular technology in the course of representing a client; 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; 3) the degree of sensitivity of the information; 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; and 5) whether reasonable precautions may be taken when using the technology to increase the level of security. With regard to use of a computer to which the organization employing the attorney and its supervisors have access, the attorney must consider the purpose of, and limitations on, the access and whether the organization itself or an individual with access may have an interest in the information that is in conflict with the client's interest. The attorney may need to take precautions to ensure that any interested persons will not be able to access the information or, absent informed

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client consent, the attorney may need to consider whether he or she can competently represent the client without using the computer in connection with the representation. With regard to access to confidential information by a software developer, the attorney may use the software as long as the attorney does not have a reason to believe the information will be used improperly. However, he or she may need to discuss the issue with the client to determine appropriate methods of proceeding if the information at issue is highly sensitive or the software developer has an adverse interest in the matter. With regard to use of a public or home wireless connection, the attorney risks violating his or her duties of confidentiality and competence unless appropriate precautions are taken, such as using an adequate encryption device and a personal firewall. Depending on the situation, including if the information at issue is of a highly sensitive nature, the attorney may need to avoid using the wireless connection entirely, or notify the client of possible risks associated with use of the wireless connection and seek the client's informed consent to do so. Generally, the attorney should not use an unsecured public wireless connection that does not require a password for access.



THE STATE BAR OF CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

TELEPHONE: (415) 538-2107

September 10, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.8.6 – Payments Not From Client

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 1.8.6 – Payments Not From Client. COPRAC generally supports the adoption of proposed Rule 1.8.6. However, COPRAC is concerned about the application of the proposed rule to lawyers employed by non-profit organizations to provide legal services to low-income clients and to lawyers representing clients in certain commercial transactions. With respect to the former, COPRAC suggests that the rule itself be broadened to include other providers of legal assistance to low-income clients. With respect to transactional work, COPRAC suggests that Comment 4 be amended to identify the types of transactions where consent may be difficult to obtain before a fee agreement is signed.

COPRAC is concerned that the rule, as drafted, may inadvertently create unnecessary hurdles for lawyers employed by non-profit organizations who provide free legal services to low-income clients. In an effort to "enhance access to justice," the current draft provides that lawyers "rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public" do not need to disclose that fact nor obtain informed written consent. COPRAC supports this provision. The problem, however, is that many providers of free legal services are employed by nonprofit organizations, not "public agencies." By excepting public agencies but not other organizations that provide these services, the rule may create impediments to providing access to justice for the majority of those lawyers who assist low-income clients without charge in civil cases.

We believe this problem can be solved by adding language to the rule that is consistent with the language in recently-adopted Rule 1-650. That rule covers lawyers who provide legal services "under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization." Substitution of that language for "on behalf of a public agency" in the current draft should eliminate ambiguity and, we believe, satisfy the stated intent of the drafters. (It may be possible to correct the problem merely by adding "or nonprofit organization" after "public agency" in the draft, but we prefer the more expansive language since we are not familiar with the organizational structures of the many providers of legal services to the poor.)

COPRAC also suggests that the comments to the rule be amended to recognize the practicalities and common practice in commercial transactions where a company (typically a corporate issuer of equity or debt securities) commits to pay the legal fees and expenses of counsel for one or more investors in such securities. Such arrangements are especially common in connection with corporate debt restructurings, where the debtor often pays the fees of counsel for a group or committee of existing creditors. Similarly, companies often pay the fees of designated counsel for investors in a securities offering (whether prior to or after the issuance of such securities), and sometimes pay the fees of

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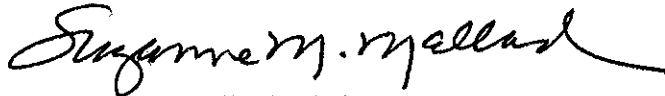
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designated counsel for shareholders party to a transaction where such company is being sold in a stock transaction or merger. In such circumstances, it is not uncommon for counsel to be designated and to enter into a fee agreement with the company and be paid a retainer before the prospective client-investors are even identified. As investors enter the group of represented clients, they do so with the understanding that counsel represents them solely in their capacity as members of the group and that none of them are responsible for payment. The larger the group of investors, and the more fluid that group is (with investors joining or leaving the group), the more impractical it is for counsel to secure the informed written consent of each investor at the onset of the representation. While the context is quite different, the impracticality of the situation is not dissimilar to the situation (referenced in Comment [4]) when a lawyer is paid by a family member on behalf of an incarcerated client. Because such fee arrangements are not uncommon in commercial transactions, COPRAC suggests that RAD consider adding a specific reference to such commercial transactions in Comment [4]. Accordingly, we suggest that RAD consider adding the language to the following effect to the end of Comment [4]:

“Similarly, in certain commercial transactions when the client is a lender or investor, or a group or committee consisting of several lenders or investors, the borrower or issuer of securities may agree to compensate the lawyer, and it may be impractical to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. In such transactions, it may not be reasonably practicable to obtain consent until the closing of the transaction or, if earlier, when the transaction-related documents are normally executed.”

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,



Suzanne Mellard, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



**THE STATE BAR
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180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
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TELEPHONE: (415) 538-2107

September 10, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.8.7 – Aggregate Settlements

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 1.8.7 on aggregate settlements. COPRAC supports the adoption of the proposed rule, but recommends that the language of Comment [4] be revised to clarify what the Comment is intended to convey when it is read without the benefit of the explanatory language that accompanies it in the materials circulated for public comment. As presently proposed, the language of Comment [4] could be read to suggest that additional disclosures and consents may need to be provided under the Rule with regard to any allocation agreement or arrangement between the jointly represented clients.

In this regard, COPRAC recommends that the last two sentences contained in the "Explanation of Changes to the ABA Model Rule" be inserted at the beginning of Comment [4]. This would provide an appropriate introduction to the examples that are included and place them in context. Comment [4] would then provide as follows (recommended additional text is italicized):

The aggregate settlement that is the topic of this Rule is the agreement with the adverse parties. The Rule itself does not address any process by which the jointly-represented clients determine how to share the benefits or burdens of that settlement. For example, this Rule does not prevent a lawyer in a civil matter from participating in making an aggregate settlement although the allocation of the benefits or burdens of the settlement is delayed for subsequent agreement among the lawyer's clients, so long as the lawyer complies with the written disclosure and consent requirements of the Rule. See Comment [3]. Also, provided a lawyer complies with those disclosure and consent requirements, it does not prevent the lawyer from assisting the jointly-represented clients from agreeing at any time to a procedure by which a third-party neutral would be

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authorized to determine what each of the clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them.

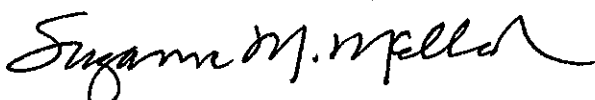
Alternatively, if the current proposed language of Comment [4] is intended to clarify that the Rule does not prohibit the specific circumstances identified, as opposed to providing examples of the types of allocation procedures among jointly represented clients that would not be precluded by the Rule, Comment [4] could be revised as follows:

This Rule applies to aggregate settlements, as defined in Comment 1, even if the allocation of the benefits or burdens of the settlement is delayed for subsequent agreements among the lawyer's clients or in matters where the jointly-represented clients agree to a procedure by which a third-party neutral would be authorized to determine what each of the clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them.

This revision would eliminate possible confusion that could result from references to the written disclosure and consent requirements in such circumstances.

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,

A handwritten signature in black ink, appearing to read "Suzanne M. Mellard", with a stylized, flowing script.

Suzanne Mellard, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



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September 10, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.15 – Handling Funds and Property of Clients and Other Persons

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 1.15 and offers the following comments.

First, we wish to commend the Commission for its work on this rule. For reasons explained by the Commission, to which we wholly subscribe, it was necessary and appropriate to deviate from the generalized approach of the Model Rules, both to comply with the State Bar Act but also to provide much needed guidance on the many unanswered questions arising from the Model Rules and the current Rule 4-100, as well as to create an updated rule that reflects technological advancements.

Among the unanswered questions before this proposed rule was the propriety of transferring disputed trust funds to court by way of interpleader. We support the Commission's recommendation in favor of this dispute resolution device. *We urge only that this provision, now resident in Comment [14], be included as part of the Rule itself.*

We also subscribe to the importance of establishing definitions of key terms, and we are in accord with the definitions developed by the Commission. *We urge only that these definitions be incorporated into the Rule itself.*

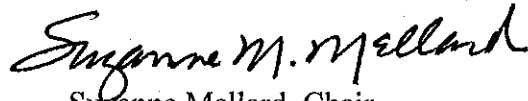
Finally, we ask the Commission to clarify the status of the "standards" heretofore promulgated by the Board of Governors for purpose of the existing Rule 4-100. More to the point, *we recommend that the proposed Rule 1.15 call for the continued efficacy of those standards pending Board of Governors review to determine whether changes are in order once proposed Rule 1.15 is adopted.*

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COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,

A handwritten signature in black ink, reading "Suzanne M. Mellard". The signature is fluid and cursive, with the first name "Suzanne" being more prominent and the last name "Mellard" following in a similar style.

Suzanne Mellard, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



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September 10, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 3.3 – Candor to Tribunal

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 3.3 and offers the following comments.

We approve of the majority of the proposed Rule. We have comments, however, on four areas.

First, regarding paragraph (c), we believe the minority position is the better one, regarding when a lawyer's obligations under paragraphs (a) and (c) should end. We are persuaded that a lawyer should not have a continuing obligation to oversee the course of a proceeding which the lawyer is no longer involved in, having been terminated or having withdrawn from representation. We believe a lawyer would lack standing to continue to be involved in proceedings regarding a former client and could potentially interfere with the relationship between the former client and his or her new lawyer. Accordingly, we believe the lawyer's duties should not continue to the conclusion of the proceeding, but to the conclusion of the representation, if such conclusion occurs earlier.

Second, in paragraph (d) regarding a lawyer's duty to inform the tribunal of necessary facts, we believe the language of the ABA Rule: "all material facts known to the lawyer that will enable the tribunal to make an informed decision," provides better guidance to practitioners than the Commission's proposed changes. We think it would be too difficult to opine on what facts a lawyer "reasonably should know are needed," as suggested by the Commission, particularly in retrospect, and the vagueness of this revised requirement could inure to the detriment of lawyers who are in good faith attempting to follow the Rule.

Third, in proposed Comment [7], we feel that using the term "criminal defendant" would make more sense than "criminal defense client." This is because there could be witnesses called by a lawyer that might be criminal defense clients in other cases, but the "narrative" approach is only available to the criminal defendant currently on trial.

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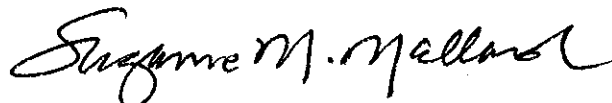
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Fourth, we disagree with proposed Comment [9], entitled Remedial Measures, to the extent that it is intended to provide that a lawyer has no obligation to take remedial measures when opposing counsel elicits testimony the lawyer knows to be false from the lawyer's client or a witness. We believe the better position is that a lawyer should have a duty to take remedial measures whenever the lawyer knows that the lawyer's client or witness has testified falsely, regardless of which side elicited the false testimony. To this end, we believe that the following phrase found in ABA Comment [10] that was deleted from proposed Comment [9], "either during the lawyer's direct examination or in response to cross examination by the opposing lawyer," should be reinserted in Comment 9.

We do not believe there is any legitimate rationale for the distinction established by the Comment [9], providing that a lawyer is obliged to take remedial measures if a client knowingly makes false statements during a deposition, but permitting a lawyer to forego such measures if a client makes false statements at trial. Most likely, opposing counsel would elicit the false statements elicited under either scenario. The proffered rationale, to avoid interference with trial strategy, is not compelling and could lead to gamesmanship, inconsistent with the statutory obligation to employ only such means as are consistent with the truth. In our view, the obligation of candor should prevail over an attorney's trial strategy where the client testifies falsely, whether in a deposition or at trial.

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,

A handwritten signature in black ink, reading "Suzanne M. Mellard". The signature is fluid and cursive, with the first name "Suzanne" being more prominent and the last name "Mellard" following in a similar style.

Suzanne Mellard, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2107

September 10, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 3.6 – Trial Publicity

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 3.6 and offers the following comments.

We support the adoption of the proposed Rule and would like to offer our suggestions for a substantive change in Comment [2] and the retention of Comment [5] from the ABA Model Rule.

First, regarding Comment [2], we have concerns about the statement that paragraph (a) "applies to statements made by or on behalf of the lawyer." This comment is not in the ABA Rule and we believe it may cause problems for lawyers who may unknowingly have people speaking "on their behalf." We agree with the rationale for the inclusion of this comment - to prevent lawyers from attempting to do indirectly what they cannot do directly under the proposed Rule. The problem with this language arises when non-lawyers are commenting on a lawyer's case without the lawyer's consent and often without his or her knowledge. This scenario comes up quite frequently in criminal cases, where it is not unusual for prosecutors to turn on the television and see a community spokesperson or a law enforcement official purporting to comment "on behalf of" the prosecutor. We would all agree it would be unfair to subject lawyers to potential discipline when they truly did not authorize or have knowledge of statements made purportedly "on their behalf." This concern could be cured by revising the proposed comment to state that paragraph (a) "applies to statements made, *authorized, or ratified* by the lawyer." (Proposed addition emphasized).

Our second suggestion is with respect to the Commission's decision to delete ABA Comment [5]. We believe this Comment provides important guidance for legal practitioners and therefore we recommend that the Commission retain Comment [5]. The Commission's explanation of

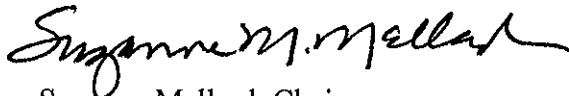
ATTACHMENT B

Mr. Sondheim
September 10, 2009
Page 2

changes section states that Comment [5] refers to subjects that “are more likely to have a material prejudicial effect on a proceeding.” ABA Model Rule Comment [5] uses the language “more likely *than not*” to describe a list of potentially prejudicial statements that we believe is instructive to practitioners, some of whom may not be familiar with the likely effects of the types of statements listed.

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,

A handwritten signature in black ink, appearing to read "Suzanne M. Mellard". The signature is fluid and cursive, with the first name being the most prominent.

Suzanne Mellard, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



**THE STATE BAR
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**COMMITTEE ON PROFESSIONAL
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TELEPHONE: (415) 538-2161

October 22, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 3.7

Dear Mr. Sondheim:

The State Bar Standing Committee on Professional Responsibility and Conduct ("COPRAC") appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight ("RAD") for public comment.

COPRAC has reviewed the provisions of proposed Rule 3.7 and offers the following comments.

COPRAC supports the proposed rule as written and does not suggest any changes to the text of the actual rule. COPRAC does suggest the addition of a definition of the word "trial" in a comment.

COPRAC has reviewed the explanation of certain minority views with respect to the rule. COPRAC agrees with the majority that the rule should apply to both bench and jury trials. COPRAC does not agree that bench officers would not be confused by a lawyer's dual role since practice background when taking the bench and length of time on the bench vary greatly, and both may impact how any given judge perceives an attorney who also acts as a witness.

COPRAC supports the majority view concerning proposed rule 3.7(a)(3). California has for many years considered the attorney-as-witness circumstance to pose an issue between the client and the attorney. The ABA rule provides to an opposing party the power to seek to disqualify its opponent's chosen counsel through misuse of the advocate-witness rule. See *Cottonwood Estates, Inc. v. Paradise Builders, Inc.* (Az. 1981) 128 Ariz. 99, 105; 624 P.2d 296, 302 (applying the ABA Code of Professional Responsibility); see also *McElroy v. Gaffney* (N.H. 1987) 129 N.H. 382, 390-91; 529 A.2d 889, 894 (applying ABA Model Rule 3.7). COPRAC is concerned that the ABA Model Rule version of rule 3.7 could encourage abusive, tactical/strategic disqualification motions.

Since willful violation of rules of professional conduct subjects an attorney to discipline, COPRAC favors drafting such rules as clearly as possible. For this reason, COPRAC suggests a

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comment be added that clarifies whether the term "trial" includes other trial-like evidentiary judicial and administrative proceedings. An appropriate definition would be "Any judicial or administrative proceeding over which a judicial or quasi-judicial officer presides where live testimony is offered from which facts will be found."

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,

A handwritten signature in cursive script that reads "Carole J. Buckner".

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



**THE STATE BAR
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September 10, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 6.3 – Membership in Legal Services Organization

Dear Mr. Sondheim:

The State Bar of California's Standing Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 6.3 – Membership in Legal Services Organization. COPRAC supports the adoption of proposed Rule 6.3 and the Comments to the Rule.

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,

A handwritten signature in cursive script, reading "Suzanne M. Mellard".

Suzanne Mellard, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



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ATTACHMENT B

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

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November 9, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.2

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 1.2 and offers the following comments.

As to paragraph (a), COPRAC agrees with the minority of the Commission and believes that it is difficult to differentiate between means and objectives. COPRAC also agrees with the minority that the language of section (a) of the rule might be read to conflict with a client's Constitutional and statutory duties to the lawyer's clients. COPRAC also notes that the last sentence of paragraph (a) raises the issue whether the lawyer can waive a jury trial on behalf of a client in a civil case.

As to paragraph (d), COPRAC objects to the inclusion in paragraph (d)(1) of the proposed rule (modifying paragraph (d) of the corresponding ABA Model Rule) of the phrase referring to "a violation of any law, rule, or ruling of a tribunal." Although this phrase is used in current Rule of Professional Conduct 3-210, these terms are not defined in the rules, appear to be very broad, and go well beyond the prohibition in the Model Rule on counseling or assisting with respect to criminal or fraudulent conduct by the client. We understand that the rationale for the provision is "greater protection of the public and the fair administration of justice." COPRAC believes, however, that such language may subject lawyers to an inappropriate and unnecessarily harsh disciplinary standard, where no such protections are realized. As an example, where lawyers routinely "assist" clients by making regulatory filings on their behalf, where such filings might not be in full compliance with all applicable rules (perhaps the deviation was deemed immaterial by the client, or because two rules conflict in their application preventing full compliance with both). Absent fraud or criminal conduct, COPRAC does not believe such assistance should subject lawyers to possible discipline.

Should the above phrase be included in the rule, we recommend a modification to Comment [9] to conform the references to this phrase. The phrase including the added scope is included in the first sentence of Comment [9]. A corresponding reference to the added scope should be included in the second sentence of Comment [9].

ATTACHMENT B

In addition, COPRAC wants to express its approval of the guidance that the proposed rule provides concerning limited scope representation, which we view as important to facilitate access to justice. We also believe that it is important to have a California rule of professional conduct that addresses lawyers' participation in crimes and frauds, particularly in the post-Enron environment.

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in black ink that reads "Carole J. Buckner". The signature is written in a cursive style with a large, stylized 'C' and 'B'.

Carole J. Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



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ATTACHMENT B

**COMMITTEE ON PROFESSIONAL
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November 9, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.6

Dear Mr. Sondheim:

The State Bar Standing Committee on Professional Responsibility and Conduct ("COPRAC") appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight ("RAD") for public comment.

COPRAC has reviewed the provisions of proposed Rule 1.6 and offers the following comments.

COPRAC agrees with the substantial minority position and believes the use of the phrase "relating to the representation" is too limited to conform to Business & Professions Code Section 6068(e)(1). This rule should extend the duty of confidentiality to the same extent delineated by Section 6068(e). Comment [3] to the proposed Rule should be revised to reference Section 6068(e).

COPRAC does not favor adoption of the so-called Enron exceptions permitting disclosure in certain situations involving financial harm.

COPRAC also agrees with the Commission that an exception for implied authority to disclose information is too broad, given the importance of protecting confidential information.

We further agree that compliance with a court order addressing disclosure of confidential information should be permitted by the proposed rule, with the proviso set forth in the comment that an appeal should be considered.

COPRAC members are divided on whether the compliance with "other law" should also be included as a scenario in which disclosure should be permitted. A majority of COPRAC members believe that this exception should not be included in the California rule.

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,

Carole J. Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



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**COMMITTEE ON PROFESSIONAL
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November 9, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.8.2

Dear Mr. Sondheim:

The State Bar Standing Committee on Professional Responsibility and Conduct ("COPRAC") appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight ("RAD") for public comment.

COPRAC has reviewed the provisions of proposed Rule 1.8.2 and offers the following comments.

COPRAC generally supports Proposed Rule 1.8.2 concerning use of confidential information.

COPRAC believes that written consent should be required, given the seriousness of the issue addressed by this rule, which involves a lawyer using confidential information of a client to the disadvantage of a client.

COPRAC encourages the Commission to address in the rules, perhaps in the definitions, whether informed written consent includes an email from the client. A majority of the members of COPRAC believe that an email should be sufficient.

Finally, COPRAC recommends one minor change to Comment [1]. In the third sentence, the phrase "in competition with the client" should be moved to the end of the sentence. Recommending that another client make a purchase would not violate the rule unless such a purchase disadvantaged the client.

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,

Carole J. Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



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**COMMITTEE ON PROFESSIONAL
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November 9, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.9

Dear Mr. Sondheim:

The State Bar Standing Committee on Professional Responsibility and Conduct ("COPRAC") appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight ("RAD") for public comment. COPRAC has reviewed the provisions of proposed Rule 1.9 and offers the following comments.

COPRAC supports the proposed rule. We believe that the language of sub-section (b) is unclear as to what is required to be known.

We also agree with the minority as to the issue involving Business and Professions Code section 6068(e) and proposed Rule 1.6, in that it appears to COPRAC that the definition of confidential information set forth in proposed rule 1.6 is narrower than the scope of Section 6068(e).

The proposed rule references the State Bar Act; Comment [3] references Rule 1.6; Comment [7] then refers to both section 6068(e) and Rule 1.6; and finally Comment [10] then references yet a further iteration, a duty to preserve confidential information "about a client." COPRAC suggests that uniformity of reference would assist practitioners in applying the rule. Reference to section 6068(e) and Rule 1.6 (assuming that rule is re-crafted to address the concerns of the minority) would be appropriate.

In light of these concerns, COPRAC proposes that section (b) be rewritten as follows:

- (b) A lawyer shall not represent a person in a matter which the lawyer knows to be the same or substantially related to a matter in which a law firm with which the lawyer formerly was associated had represented a client:
 - (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer, while at the former law firm, had acquired information that is protected by Business and Professions Code section 6068(e) and Rule 1.6 and 1.9(c) that is material to the matter;

ATTACHMENT B

unless the former client gives informed written consent.

For grammatical purposes, we changed the word “knowingly” to “knows.” In addition, we dropped the word “previously” as unnecessary and confusing.

Comment [3] appears to have an incorrect reference to the type of work being performed by the lawyer who is the subject of the second example in this comment. The lawyer’s previous representation in a land use matter is compared, first, with a zoning matter (considered to be substantially related) and, second, with an eviction matter (considered to not be substantially related). The example incorrectly concludes by stating “there is no substantial relationship between the *zoning* and eviction matters.” [italics added] The word “zoning” in this phrase should be replaced with the words “land use” in order for the proper comparison to be made.

The last sentence of Comment [5] is confusing and unhelpful as drafted. It should be revised to state “The evidentiary presumption created for disqualification purposes should not apply in a disciplinary context.”

Finally, we note that the rule uses the terms “firm” and “law firm.” COPRAC recommends that a uniform term be used throughout.

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,

A handwritten signature in black ink that reads "Carole J. Buckner". The signature is written in a cursive, flowing style.

Carole J. Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



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OF CALIFORNIA**

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COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

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November 9, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.10

Dear Mr. Sondheim:

The State Bar Standing Committee on Professional Responsibility and Conduct ("COPRAC") appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight ("RAD") for public comment. COPRAC has reviewed the provisions of proposed Rule 1.10 and offers the following comments.

A majority of COPRAC members believes that California should not adopt a rule requiring imputation of conflicts of interest. The predominant view is that this issue is adequately addressed by case law in California and should not be the subject of discipline. COPRAC believes that the existing regime, which addresses imputation in the context of disqualification, along with the discipline that is available for actual disclosure of confidential information, is adequate to protect client confidences. COPRAC believes that because imputation rests on a legal fiction, it is not an appropriate subject for discipline.

Acknowledging that the RRC has concluded that imputation is an appropriate subject for discipline, as reflected in proposed Rule 1.10, COPRAC believes that if an imputation rule is adopted, such a rule should permit non-consensual screening for private lawyers. While COPRAC members have a difference of opinion regarding the appropriate scope of screening, there is a broad consensus among COPRAC members that screening is appropriate for lawyers who were peripherally involved in the prior representation. Those COPRAC members who favor screening in such circumstances believe it is a reasonable approach to accommodate lawyer mobility. Many other jurisdictions nationwide have permitted screening for some time without reported incidents of serious problems involving disclosure violations. Given this, COPRAC believes that the risk of adverse impact on the lawyer's duty of confidentiality to the client is negligible, and that this risk is particularly low when the lawyer being screened had minimal or peripheral involvement in the prior matter.

California's case law permits screening for government lawyers, with limited exceptions. COPRAC does not agree with the distinctions that have been drawn between government lawyers and private lawyers. COPRAC does not believe that there is empirical support for the

ATTACHMENT B

proposition that government lawyers are inherently more trustworthy than private lawyers. This too supports COPRAC's view that screening should be permitted.

Again assuming that an imputation rule is adopted, a slight majority of COPRAC members favor significantly broader screening for private lawyers. These COPRAC members favor a screening regimen similar to that set forth in current ABA Model Rule 1.10. There is a significant difference of opinion, however, and no consensus among COPRAC members, regarding whether certain specific provisions from the ABA Model Rule should be included, particularly the specific notification and certification requirements.

Very truly yours,

A handwritten signature in black ink that reads "Carole J. Buckner". The signature is written in a cursive, flowing style.

Carole J. Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



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COMMITTEE ON PROFESSIONAL
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November 9, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.14

Dear Mr. Sondheim:

The State Bar Standing Committee on Professional Responsibility and Conduct ("COPRAC") appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight ("RAD") for public comment. COPRAC has reviewed the provisions of proposed Rule 1.14 and offers the following comments.

COPRAC supports the proposed rule. We are cognizant of California's longstanding commitment to confidentiality. But COPRAC is concerned that the rule does not go far enough in real world terms to effectively permit lawyers to address the needs of clients with diminished capacity. COPRAC believes that seeking the appointment of a guardian ad litem may be appropriate in certain circumstances to protect clients with diminished capacity.

Contacting family members of a client with diminished capacity is often not appropriate, particularly for clients with financial problems that often involve family members. In addition, budget strapped public agencies rarely have the resources to act quickly to assist, and are often especially reluctant to intervene when a legal action is pending. Given such practical considerations, the appointment of a guardian ad litem is sometimes the most realistic alternative to protect the interests of the client with diminished capacity.

COPRAC also recommends that Comments [9] and [10] from the ABA Model Rule be retained, in order to allow a lawyer to take limited action in extreme, emergency situations.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



**THE STATE BAR
OF CALIFORNIA**

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November 9, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 2.1

Dear Mr. Sondheim:

The State Bar Standing Committee on Professional Responsibility and Conduct ("COPRAC") appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight ("RAD") for public comment.

COPRAC has reviewed the provisions of proposed Rule 2.1 and offers the following comments.

COPRAC does not support the proposed rule, because we do not believe that it is appropriate as a disciplinary rule.

While we agree with the commentary in the Introduction as to "the importance of this Rule as guidance to lawyers and clients on a lawyer's duty to exercise independent professional judgment," we do not believe that such guidance – in the form of a Rule of Professional Conduct – should be imposed upon lawyers as a disciplinary rule. Further, we recognize that the Introduction itself acknowledges that "it is anticipated that the terms of the Rule may not be frequently applied as a lawyer disciplinary standard," however, we do not believe the proposed rule should ever be applied as a disciplinary standard.

Should the proposed rule be adopted in some form, notwithstanding the concerns expressed above, we would recommend removing the second sentence of the proposed rule. We are generally in agreement with the concern expressed as the Minority position. We have no objection to the second sentence being included in a Comment to the rule, nor do we object to the disclaimer recommended by the Minority, but we do not believe that this sentence should be included in the rule itself.

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,

Carole J. Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



**THE STATE BAR
OF CALIFORNIA**

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**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

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November 9, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 3.8

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 3.8 and offers the following comments.

We approve of the majority of the proposed Rule and would like to offer our suggestions in several areas:

First, some members of the Committee prefer the adoption of paragraph (a) of ABA Model Rule 3.8 rather than proposed Rule 3.8(a). They are concerned that it would be difficult to fairly judge whether, given all of the facts and circumstances relating to the case, the prosecutor reasonably should have known about the evidence.

Second, paragraph (f) should be revised to read "not use investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case to make an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6." Prosecutors often have cooperation with other agencies, but usually do not have the control implied by this proposed rule, given that law enforcement officials answer to their own chain of command. We also recommend the deletion of the last two sentences of Comment [9] (in the clean draft) for the same reason.

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in black ink, appearing to read "Shawn Harpen".

Shawn Harpen, Vice-Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



**THE STATE BAR
OF CALIFORNIA**

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180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

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November 9, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 8.5

Dear Mr. Sondheim:

The State Bar Standing Committee on Professional Responsibility and Conduct ("COPRAC") appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight ("RAD") for public comment.

COPRAC has reviewed the provisions of proposed Rule 8.5 and offers the following comments.

COPRAC has considered proposed Rule 8.5, and supports the rule as drafted. COPRAC agrees with the deletion of the ABA Model Rule test involving the determination of where the lawyer's conduct has a predominant effect. That concept is ambiguous and subject to misapplication. COPRAC favors the bright line test proposed by the Commission.

COPRAC thanks the Commission for its consideration of COPRAC's comments.

Very truly yours,

Carole J. Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



**THE STATE BAR
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**COMMITTEE ON PROFESSIONAL
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TELEPHONE: (415) 538-2161

January 23, 2009

Saul Bercovitch
Legislative Counsel
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: California Law Revision Commission's Tentative Recommendation Regarding the
Attorney-Client Privilege After Client's Death

Dear Mr. Bercovitch:

The State Bar's Standing Committee on Professional Responsibility and Conduct (COPRAC) appreciates this opportunity to comment on the Commission's Tentative Recommendation regarding the above subject.¹ We have been following the Commission's study with interest, and have been impressed with the scope and depth of the analysis of the attorney-client privilege, especially with respect to the application of the privilege after the death of the client. We were also pleased to see that the Commission has recognized that an attorney's duty of confidentiality is broader than the attorney-client privilege and survives the death of the client. (Tentative Recommendation, n. 5, pp.1-2.)

We have reviewed the Tentative Recommendations and generally support those recommendations. We agree that clarification of the 2007 amendments to the Probate Code is necessary and that the clarifying language in Evidence Code section 953(c) accomplishes the Commission's purpose. We also support the proposed amendment to Evidence Code section 957 to confirm that the Evidence Code exception to the privilege when "parties . . . claim through a deceased client" should apply in non-probate transfers as well.

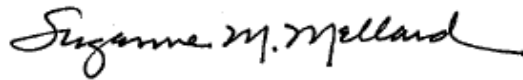
In 2006, COPRAC supported amendments to the Evidence and Probate Codes that were intended to prevent situations in which the right of a client to continued protection of confidential communications was dependent on the technicalities of the client's estate plan. We continue to support changes in the law to meet that objective. We note that the Commission has deferred

¹ This position is only that of the State Bar of California's Standing Committee on Professional Responsibility and Conduct. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California.

consideration of a generalized rule on survival of the privilege after death so that it would survive not only during probate, but also with respect to assets transferred on death outside of probate. COPRAC encourages the Commission to continue with its consideration of this important topic.

On behalf of the members of COPRAC, I thank you for your consideration of our comments.

Respectfully submitted,

A handwritten signature in black ink, reading "Suzanne M. Mellard". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Suzanne M. Mellard, Chair
Committee on Professional
Responsibility and Conduct

Cc: Members, COPRAC

THIRTEENTH ANNUAL STATEWIDE ETHICS SYMPOSIUM

UNIVERSITY OF SAN DIEGO SCHOOL OF
LAW

Attorney Responsibilities: The Client and Beyond

Presented by

**The State Bar of California Committee on
Professional Responsibility and Conduct**

**Saturday, May 2, 2009
9:30 am to 5:15 pm**



**Mother Rosalie Hill Hall
Warren Auditorium – Room 116
5998 Alcala Park
San Diego, CA 92110**

*We gratefully acknowledge the University of San Diego School of Law
for the contribution of its facility and generous support for this event.*

REGISTER ONLINE

www.calbar.org/ethics-symposium

6 Hours of MCLE Credit in Legal Ethics

THIRTEENTH ANNUAL STATEWIDE ETHICS SYMPOSIUM ***Attorney Responsibilities: The Client and Beyond***

8:30 – 9:30 am REGISTRATION

9:30 – 9:45 am

WELCOMING REMARKS

Suzanne Mellard, Chair, Committee on Professional Responsibility and Conduct

Dean Kevin Cole, University of San Diego, School of Law

Holly Fujie, President, State Bar of California

9:45 – 11:15 am

DRAWING THE LINE – WHERE DOES ZEALOUS REPRESENTATION END AND UNETHICAL CONDUCT BEGIN?

Dealing with demanding clients and difficult matters within the ethical boundaries of the practice of law can present certain challenges for attorneys. How do you handle a client who demands that you take certain positions or actions that may be considered improper or impact your credibility? How do you address less than desirable factual situations, such as when it appears documents have been destroyed? Are some lawyers so worried about maintaining client relationships that they may not push back when the client insists on a questionable approach? This panel will consider these issues from private practice, judicial and disciplinary perspectives.

Shawn Harpen: Moderator; Member, Committee on Professional Responsibility and Conduct; Partner, Jones Day, Irvine

Dennis Peter Maio: Advisor, Committee on Professional Responsibility and Conduct; Counsel, Reed Smith LLP, San Francisco

Honorable Kevin A. Enright: Assistant Presiding Judge of the San Diego Superior Court, San Diego

Scott Drexel: Chief Trial Counsel, State Bar of California, San Francisco

11:15 – 11:30 am BREAK

11:30 – 1:00 pm

TRIAL PUBLICITY: BEYOND THE HEADLINES -- WHAT CAN YOU ETHICALLY SAY ABOUT YOUR BIG CASE?

High profile cases highlight the evening news and the headlines of the morning paper. Lawyers handling such cases must be aware of the unique issues generated by media attention, and often must be prepared to speak to the media on a moment's notice. This program will address the specific legal and ethical rules that govern what lawyers can legally and ethically say to the press about their big case. It will cover permissible statements in and out of the courtroom, and how you may respond to unfair adverse publicity. Our all star panel of presenters will discuss the issues through the perspective of both the lawyers, and the media.

Wendy Mazarella: Moderator; Member, Committee on Professional Responsibility and Conduct; Office of the District Attorney, San Diego

Mark Geragos: Geragos & Geragos, P.C., Los Angeles

Laurie Levenson: Professor, Fellow, and Director, Center for Ethical Advocacy, Loyola Law School, Los Angeles

Linda Deutsch: Associated Press Special Correspondent, Los Angeles

LUNCH & KEYNOTE ADDRESS

Lunch 1:00 – 2:00 pm

Keynote Address 1:30 – 1:50 pm

**Professor Erwin Chemerinsky,
Dean, UC Irvine, School of Law**

2:00 – 3:30 pm

ADVANCE ABSOLUTION: 10 DEADLY SINS IN ATTORNEY-CLIENT ENGAGEMENT AGREEMENTS, AND HOW TO AVOID THEM

Form legal engagement letters abound, but are they suited to every representation? Should an attorney delegate to a non-attorney negotiation and preparation of engagement agreements? Do attorneys repeatedly make errors in engagement agreements that could come back to haunt them, yet are avoidable? What provisions should be in every engagement letter? Even if an attorney can include certain things in an engagement agreement (such as arbitration, interest, or attorney fee clauses), should such provisions always be included? Four experienced private practitioners will provide advice and analysis concerning these and other questions so that those attending may go forth and sin no more.

David Parker: Moderator; Member, Committee on Professional Responsibility and Conduct; Partner, Parker Mills LLP, Los Angeles

Dan Carroll: Member, Committee on Professional Responsibility and Conduct; Partner and General Counsel, Downey Brand LLP, Sacramento

Heather Rosing: Shareholder and CFO, Klinedinst PC, San Diego

David Carr: Law Office of David Cameron Carr, San Diego

3:30 – 3:45 pm BREAK

3:45 – 5:15 pm

RE-FORMING THE CALIFORNIA RULES OF PROFESSIONAL CONDUCT

Join members of the Rules Revision Commission for a spirited discussion of some of the most controversial issues facing the Commission, including proposed rules on attorneys' fees, confidentiality (and its exceptions), the scope of screening, the duty of candor, duties of prosecutors, and whether lawyers should be required to report the misconduct of other lawyers.

Carole Buckner: Moderator; Vice-Chair, Committee on Professional Responsibility and Conduct; Special Assistant United States Attorney, United States Postal Service, Office of Inspector General

Harry Sondheim: Chair, State Bar's Commission for the Revision of the Rules of Professional Conduct, Pacific Palisades

Robert Kehr: Member, State Bar's Commission for the Revision of the Rules of Professional Conduct; Partner, Kehr, Schiff & Crane LLP, Los Angeles

Jerome Sapiro, Jr.: Member, State Bar's Commission for the Revision of the Rules of Professional Conduct; The Sapiro Law Firm, San Francisco

REGISTRATION AND TRAVEL INFORMATION

MCLE CREDIT

This program offers up to 6 hours of MCLE credit in legal ethics. The State Bar of California and the Committee on Professional Responsibility and Conduct are approved State Bar of California MCLE providers.

ON-SITE REGISTRATION is limited and subject to availability. Please register in advance.

QUESTIONS

For registration questions, please call 415.538.2508.

SPECIAL ASSISTANCE

Please call 415.538.2167.

HOTEL INFORMATION

Although no special block of rooms have been arranged for this one-day event, the following is a list of possible lodging options located near University of San Diego. As such you are encouraged to make your reservations early. Doubletree Hotel Mission Valley – 619.297.5466; Courtyard by Marriott – 619.260.8500; Comfort Inn & Suites – 619.881.6800.

DIRECTIONS TO CAMPUS

From the North: Use I-5 South, exit Sea World Dr. & Tecolote Rd. and proceed left at stoplight toward Morena Blvd. Turn right on Morena, left on Napa, and left on Linda Vista Rd. Travel to the second stoplight to USD's East entrance, turn left and enter campus.

From the South: (or the Airport): Use I-5 North, exit Morena Blvd. (signs will say: Morena Blvd. use I-8 East) Stay to the right and follow the signs for Morena Blvd.

Take the first right onto Linda Vista Rd. Travel to the third stoplight to USD's East entrance, turn left and enter campus.

From the East: Use I-8 West, exit at Morena Blvd., go right onto Linda Vista Rd. and travel to the third stoplight to USD's East entrance, turn left and enter campus.

From the Airport: The campus is a ten minute cab ride (approximately \$15.00).

IMPORTANT NOTE: Once you have entered the campus (from any direction): From the West entrance – Kiosk 1st entrance from Linda Vista Road, the Mother Rosalie Hill Hall is located on Alcalá Park Way. Parking structure is under the building across from the tennis courts.

VISITOR PARKING

Complimentary parking is available in the parking structure under the Mother Rosalie Hill Hall building across from the tennis court.

REGISTRATION FORM
THIRTEENTH ANNUAL STATEWIDE ETHICS SYMPOSIUM

Presented by
The State Bar of California Committee on
Professional Responsibility and Conduct

Saturday, May 2, 2009

Note: One Registrant per form. Photocopies may be used.

State Bar Number _____
Name _____
Firm _____
Address _____
City, State _____ Zip Code _____
Phone _____
Fax _____
E-Mail _____

Required for email confirmation

Your Name and Address may be disclosed.

☐ Check here if you do not want your information released.

REGISTRATION FEES (Check the appropriate box)

- ☐ \$125 Program Package includes: 6 hours of MCLE credit, resource book, and lunch
- ☐ Student Fee: \$50 Program Package includes: resource book and lunch
- ☐ Free of charge: No MCLE credit, resource book or lunch (registration for free attendance is offered on a space available basis) MAIL OR FAX FORM ONLY.

CREDIT CARD INFORMATION

I authorize the State Bar of California to charge my program registration to my Visa/MasterCard account. (No other credit card will be accepted.)

Account Number _____ Exp Date _____

VISA or MasterCard Only

Cardholder's Name _____

Cardholder's Signature _____

PRE-REGISTRATION DEADLINE In order to pre-register, your form and check, payable to the State Bar of California, or credit card information, must be received by **April 24, 2009**. Please register early as space is limited.

REGISTER ONLINE at www.calbar.org/ethics-symposium.

MAIL TO Program Registrations, State Bar of California, 180 Howard Street, San Francisco, CA 94105.

FAX TO Program Registration at 415.538.2368. In order to fax your registration credit card information is MANDATORY. (Photocopies of checks will not be accepted).

CANCELLATION/REFUND POLICY All requests for refunds must be received in writing no later than April 24th. Refunds will not be made for requests received after April 27, 2009.

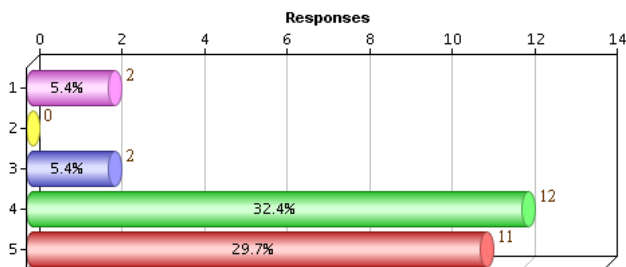
ATTACHMENT D GENERAL SYMPOSIUM EVALUATIONS

We are committed to presenting topics of interest that will be valued by our audience. Please provide your suggestions for future symposium topics below.

- Elder law and ethics - Elder abuse and the attorney's duty to protect the elderly
- I would like an in-depth panel on screening
- A lecture on the ethical rules of lawyers advertising on the internet or utilizing a web-based internet address would be very interesting and helpful.
- Topics: 401k/ 403b plans. Arbitration--- Needs complete revision of current oppressive mandatory signing agreement practice. Slight inroads to consumer right of legal access, by recent case.
- 401 k /403b plans; another item = Arbitration---needs complete visibility of current circumvention of legal protection. small inroads have recently occurred for permitting single person recourse to over sided arbitrator's allegiance
- Insurance issues; identifying the client issues; complex conflicts questions. Multijurisdictional practice issues.
- Panel Segment on voir dire strategies impacted by ethics and codified boundaries. One panelist with jury selection consulting expertise, a prosecuting DA or DDA, and a judge.
- B&P 6068(a) and conduct warranting discipline that does not constitute moral turpitude.

To what extent were your personal objectives satisfied?

Comments

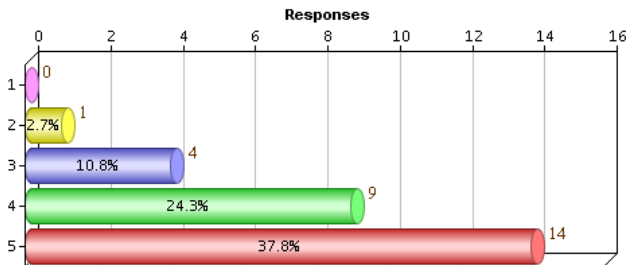


- No hard copies of hypothetical chart. Too hard to understand text, so fast. Dennis Maio was very well understood for matters about appellate writing to be precise in meaning of words used
- Very helpful.
- The reformulation of rules was a little esoteric and left me more confused than when the day started.
- Appreciate opportunity to acquire MCLE at reasonable price in enjoyable company and classy location [USD hilltop campus] . Alerted me to professional matters that I had not recognized.

Total Number of Responses for this Item: 27

To what extent did the environment contribute to the learning experience?

Comments

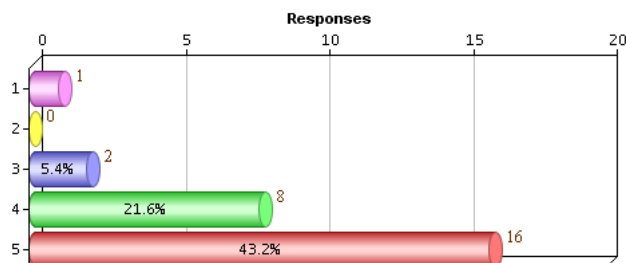


- Needed better signs to direct us to parking and the hall
- Lovely
- Beautiful campus but difficult to find location and would have preferred a lecture hall with desk space.
- Very comfortable lecture hall.
- The environment was great. Well lit and seats were comfortable.
- Much easy access and close safe parking. Food and lobby snack service was clean and plentiful. Luncheon excellent snack. But Luncheon speaker theme that Cal Bar should increase dues to compensate down-sized lawyers did not receive my concurrence. World economically has own recourse, as was in Aerospace Industry earlier downsize. and re-formed. Same outcome may occur with non-productive or misfocused lawyers.
- USD was an outstanding venue.
- Room got stuffy in the afternoon.
- Great venue; should do more programs there

Total Number of Responses for this Item: 28

To what extent were the objectives stated in the promotional literature or those stated at the beginning of the activity satisfied?

Comments



- The information and ideas became a 3-dimensional reward from my attendance and paying attention, thereat.

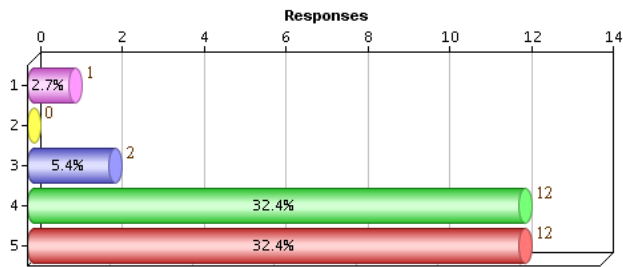
Total Number of Responses for this Item: 27

ATTACHMENT D

GENERAL SYMPOSIUM EVALUATIONS

To what extent did the activity contain significant current intellectual or practical content?

Comments

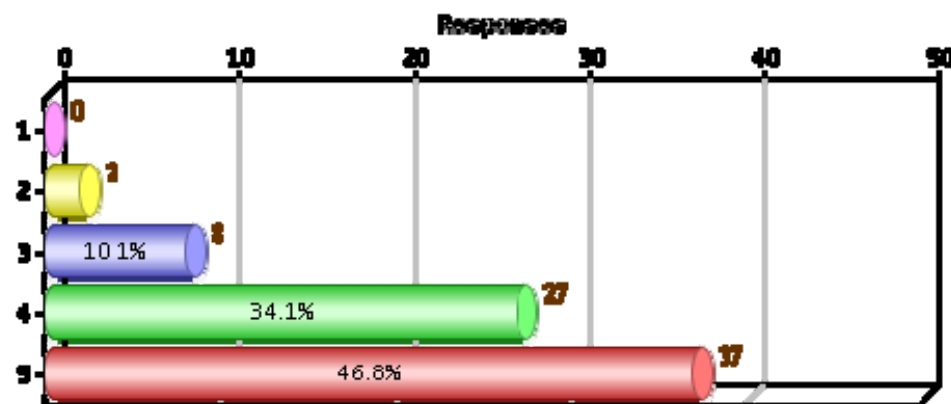


Total Number of Responses for this Item: 27

- Much practical content and much "food for thought"
- The discussions on publicity strayed into areas that involved more personality of speakers than general applicability. Re-formulation of rules became very technical, but in a manner that left more questions because the topics were not ready for meaningful public discussions.
- Please send me info on more of these events. Thanks
- i was given a wealth of subjects that I had not recognized from earlier days of attending Law school. The interest and participation by attendees also alerted me to excellence within the ranks of lawyers, today.

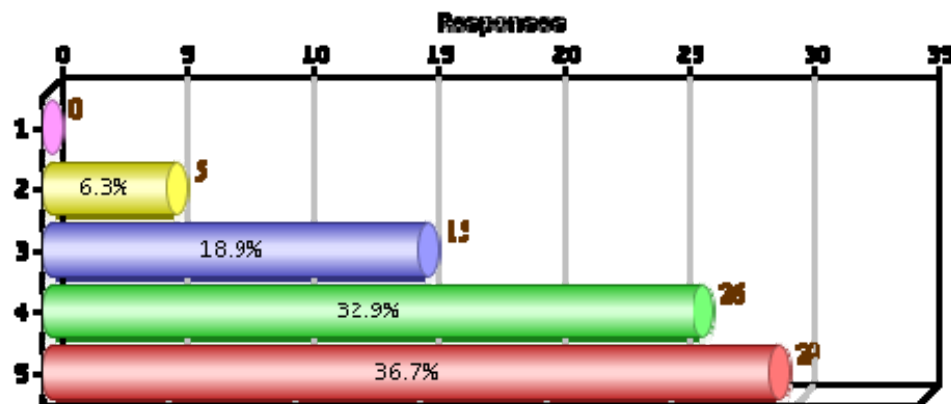
ATTACHMENT E

PANEL #38: Conflict for Lawyers: How to Get Yourself Disqualified, Sued and Disciplined.



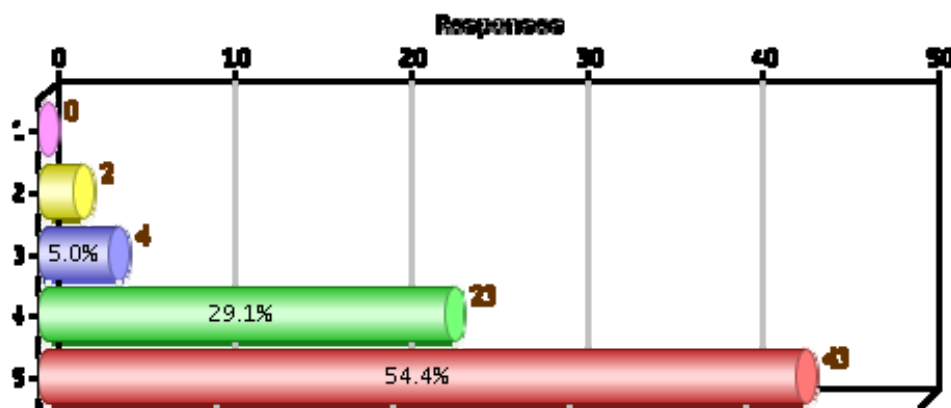
To what extent were your personal objectives satisfied?

- Written paper was useful, but too dense to be used as a tool in an oral presentation. Hard to follow.
- More practical examples should be illustrated.
- For an 8:30 am class that covers a dry subject, should have had more animated speakers and perhaps a mixed media presentation.
- Good presentation overall and great written materials but oral presentation could be improved with real life examples (not just cases) of how to get in trouble and practice tips on how to avoid and address conflicts.
- Would have been great to have more solo or small firm examples.
- Best outline and speakers.



To what extent did the environment contribute to the learning experience?

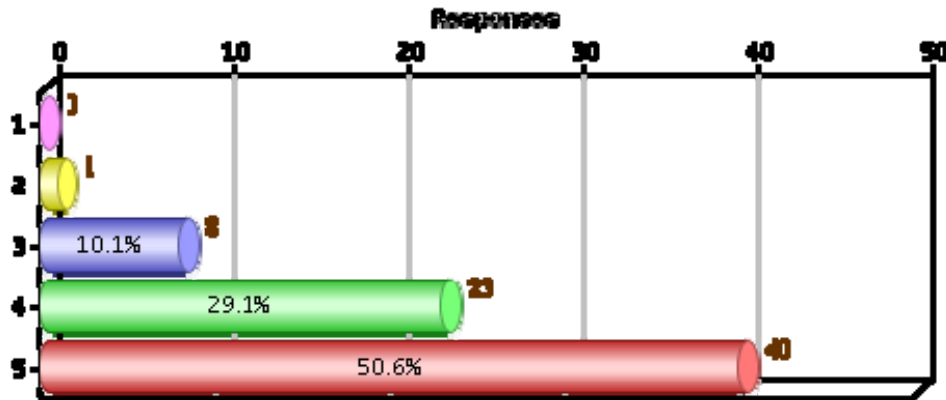
- Cold, sound low but room beautiful.
- Too cold.
- Took an hour to find a parking space in hotel's lot.
- A little cold.
- Little cold in this room.
- P.A. sound not adequate.
- All hard to hear.



To what extent did the materials contribute to the learning experience?

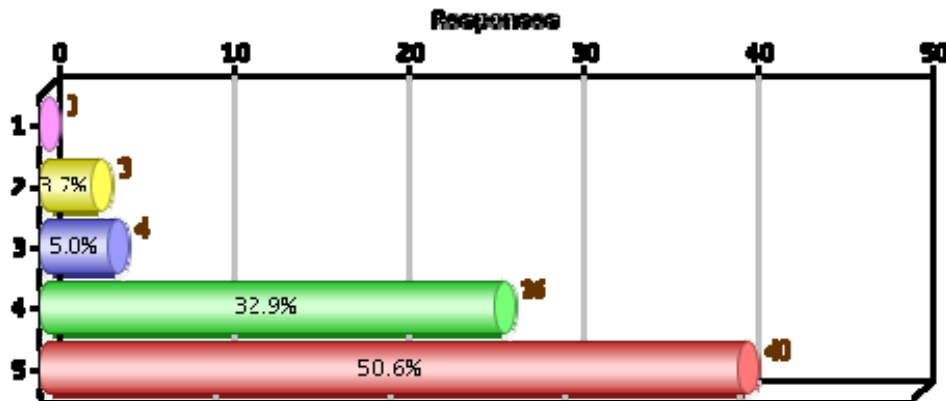
- Need more examples, discussion of cases
- Certain source info missing, i.e. quoted material on p. 2; and entire section 3,4
- Unable to read before or during section.
- Good materials.
- Did not really follow the presentation.
- Excellent materials – valuable outline.
- Good materials.
- Very much. Good outline.

ATTACHMENT E



To what extent were the objectives stated in the promotional literature or those stated at the beginning of the program satisfied?

NO COMMENTS

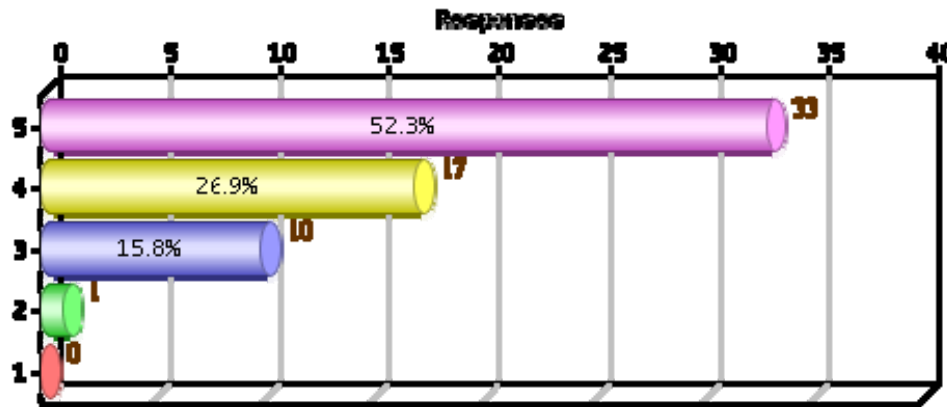


To what extent did the program contain significant current intellectual or practical content?

- Not enough Q & A time.
- Dry topic. Handled well; good materials.
- Good handout.
- Dry subject – you handled it as well as could be expected.
- They scared us to death which I am sure was their purpose.
- Good overview of potential conflicts.
- Very good.

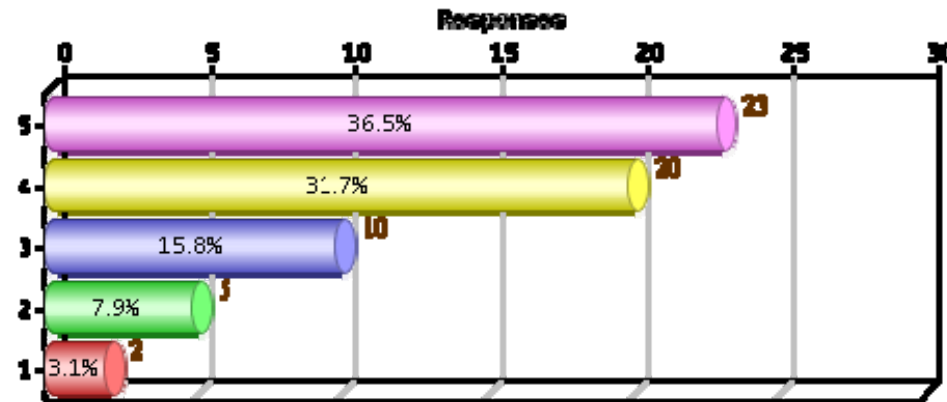
ATTACHMENT E

PANEL #51: Ethics Update 2009: Significant Developments in the Law of Lawyering



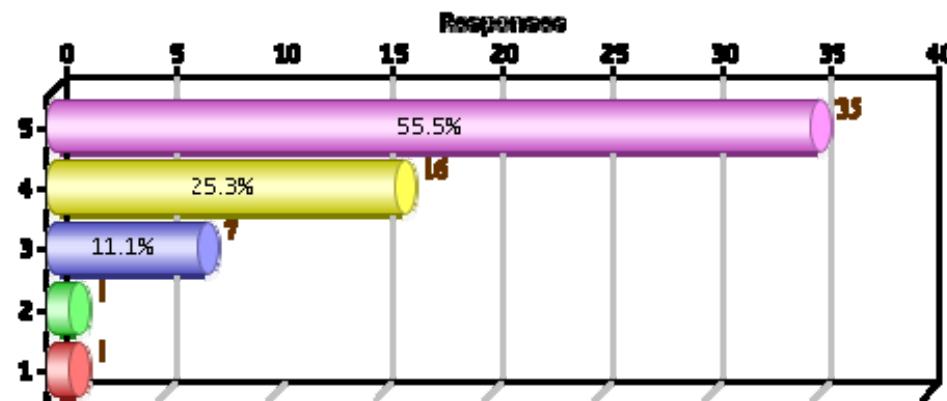
To what extent were your personal objectives satisfied?

- Started out great – then they just read stuff. Too hard to follow.
- Intensely boring, but it did provide MCLE credit.



To what extent did the environment contribute to the learning experience?

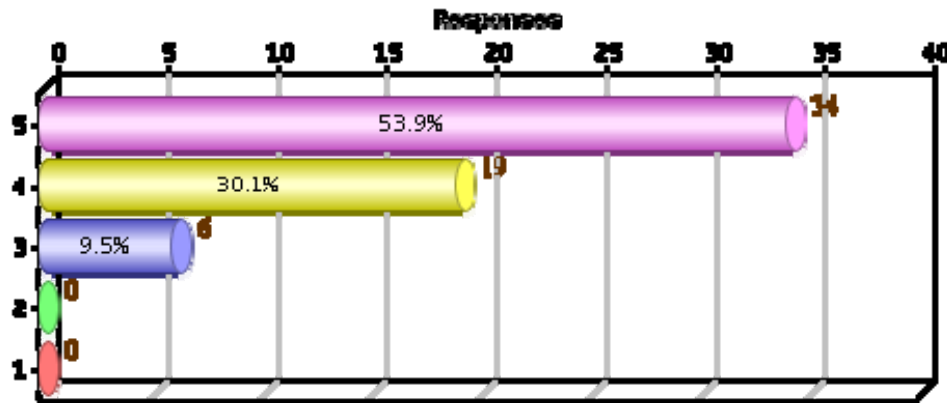
- Do not support Manchester Hyatt
- Too cold.
- Cold in room.
- Interference was audible from the adjacent room.
- Uncomfortable chairs.
- Difficult to see screen – dark background slides.
- Coffee would be helpful – lines too long at hotel coffee shops.
- Cold! Room a bit large – Mics working better



To what extent did the materials contribute to the learning experience?

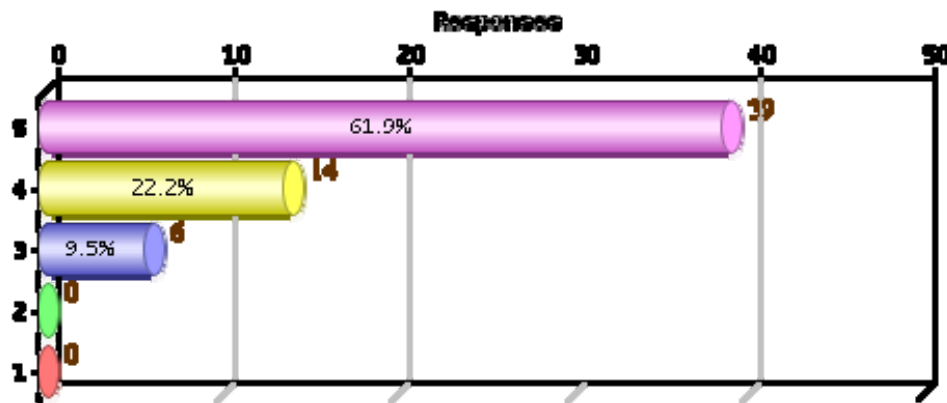
- Certainly you could have found a different case than Shopoff & Cavallo to teach ethics. Lost me after 5 minutes.
- Dark blue background on powerpoint was very hard to read.
- Would have been nice if speakers referred to page numbers of cases they discussed.
- Did not directly follow the presentation.
- They were good and often made panelists comments unnecessary.
- Would have been nice to have a copy of the powerpoint.
- Good cases discussed.

ATTACHMENT E



To what extent were the objectives stated in the promotional literature or those stated at the beginning of the program satisfied?

- Excellent knowledgeable articulate panel.

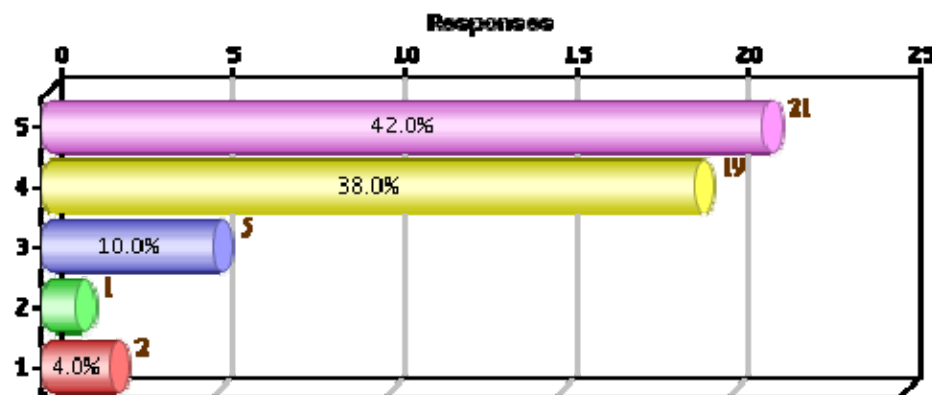


To what extent did the program contain significant current intellectual or practical content?

- Should have called this class "Watch Me Read My Case Briefs"
- It would have been nice to cover a few more cases rather than go into so much detail on a small number of cases.
- They spent too much time on too few cases; focus more on practice tips than delving into facts.
- All the speakers were very knowledgeable, but I wish they could have covered more cases in the 1 1/2 hours. I think they covered 5 cases in 90 minutes. The written materials covered all and they will be very useful.
- They were all okay – no one stood out in particular.

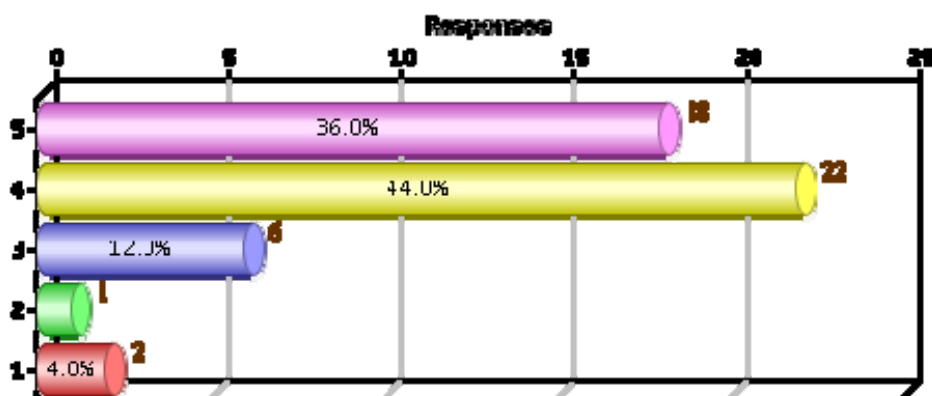
ATTACHMENT E

PANEL #63: Avoiding Involuntary Pro Bono Work: Forming the Attorney-Client Relationship and Collecting Fees



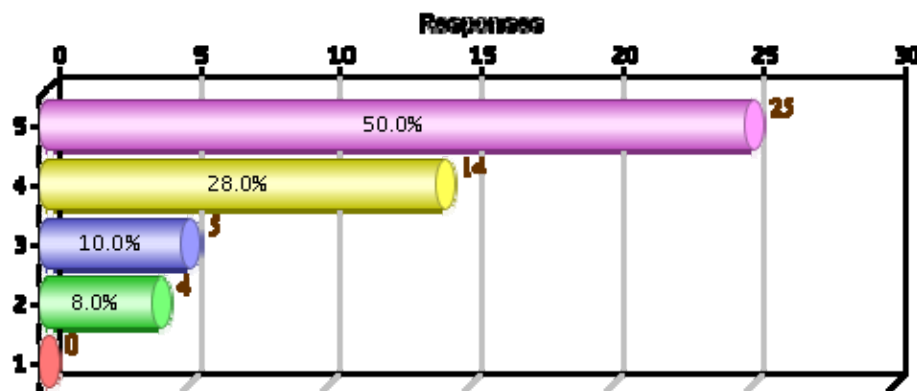
To what extent were your personal objectives satisfied?

- Please discuss billing and collections.
- Very detailed.
- Very good, practical review.
- Very helpful overview.
- Good info on representation and fee agreements but didn't really seem like "avoiding involuntary pro bono."
- I did not realize I would not be taught how to collect fees or how to form a relationship.



To what extent did the environment contribute to the learning experience?

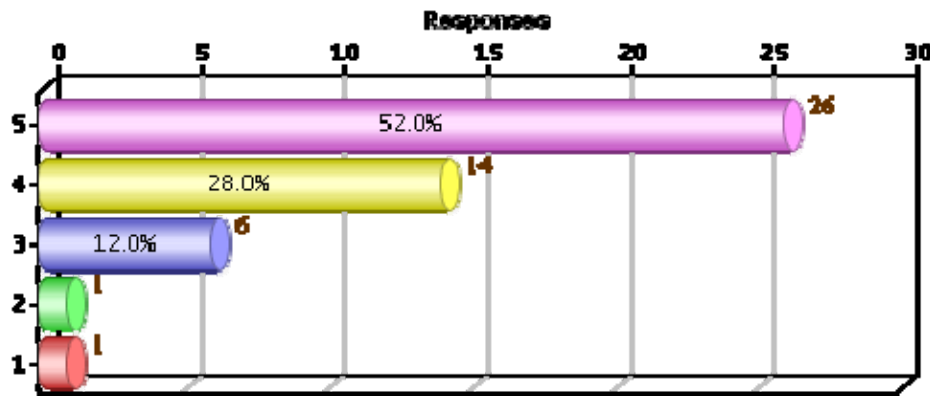
- Too much about agreements.
- Chairs uncomfortable.
- Room too dark.
- Do not support Manchester Hyatt.
- Geez – not even any water???



To what extent did the materials contribute to the learning experience?

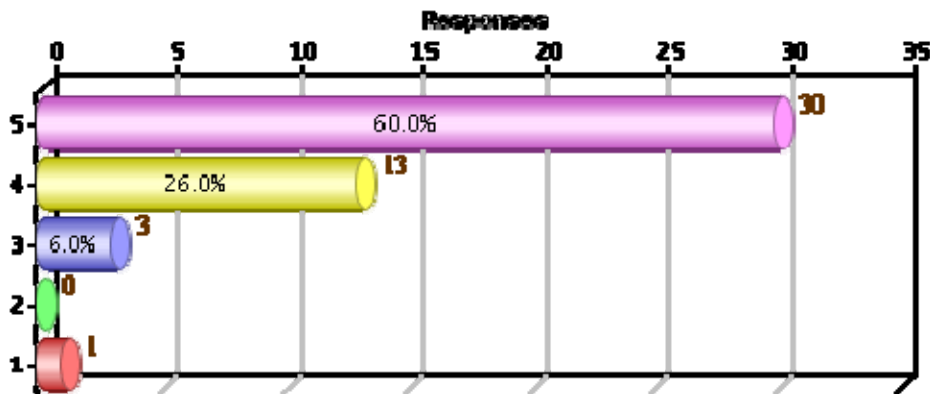
- Failed to relate materials to lecture – hard to follow
- More about billing and collections / 1 hour on billing and collections, books and resources
- Good materials.
- Handouts not incorporated – presentation used was good.
- Excellent materials.
- They will be a helpful resource.
- Used powerpoint but did not put in handout.
- Written materials hard to follow in this fast paced environment but helpful for future.

ATTACHMENT E



To what extent were the objectives stated in the promotional literature or those stated at the beginning of the program satisfied?

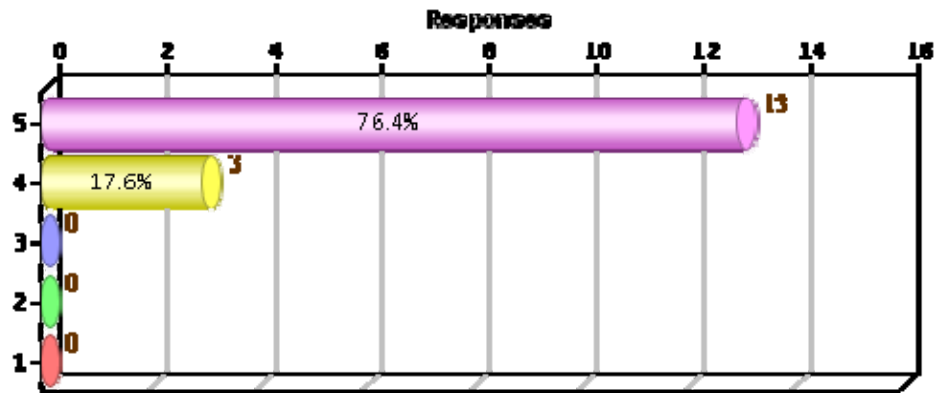
- I expected a form or checklist platform. This would be much more effective than talking heads. E.G. "You need to address this issue" as opposed to "This is how you would address this issue."
- I felt like I received exactly what was promised.



To what extent did the program contain significant current intellectual or practical content?

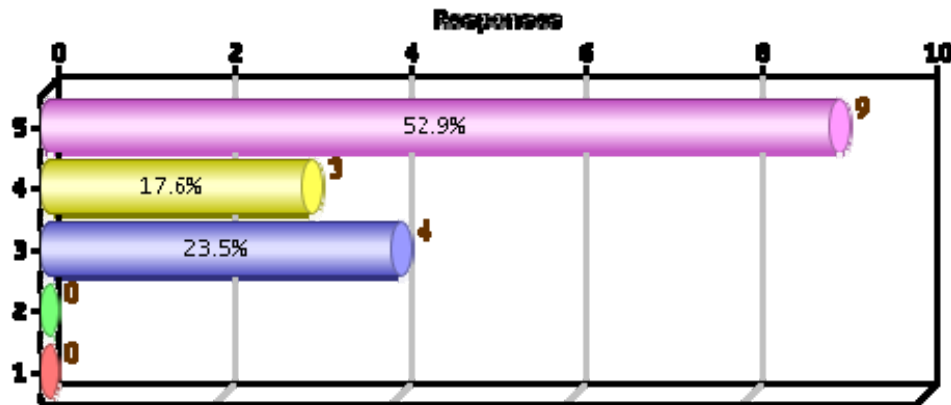
- Mislabeled seminar.
- Very practical info.

ATTACHMENT E
PANEL #97: People's Money: An Overview of Client Trust Accounting



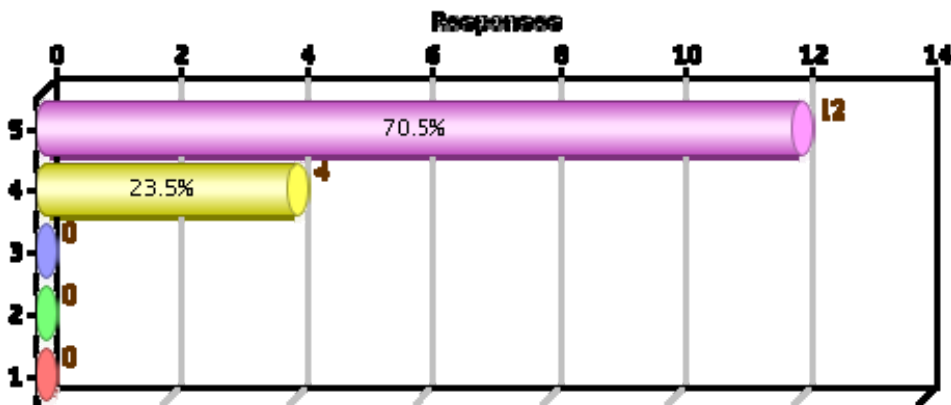
To what extent were your personal objectives satisfied?

NO COMMENTS



To what extent did the environment contribute to the learning experience?

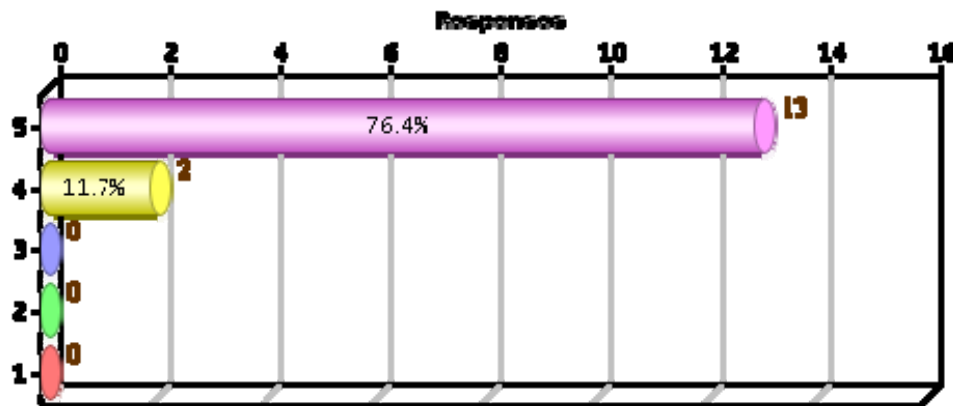
- Very cold!



To what extent did the materials contribute to the learning experience?

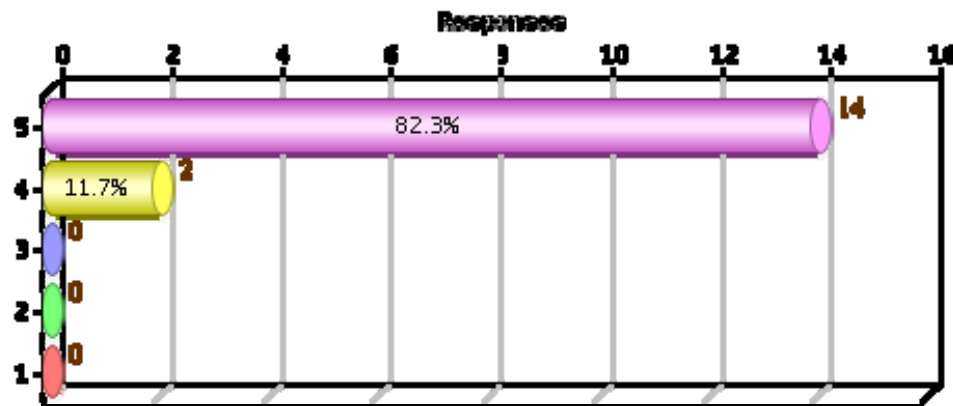
NO COMMENTS

ATTACHMENT E



To what extent were the objectives stated in the promotional literature or those stated at the beginning of the program satisfied?

NO COMMENTS



To what extent did the program contain significant current intellectual or practical content?

- I really liked the Q & A period

ATTACHMENT F
COPRAC - 2009 Accomplishments Report
Member Outreach Programs

	Date	Name	Sponsor	Location
1.	01-17-09	Wendy Mazzearella	State Bar Section Education Institute	Berkeley, CA
2.	01-17-09	Dianne McLean	State Bar Section Education Institute	Berkeley, CA
3.	01-22-09	Wendy Mazzearella Brian Forbes	San Diego County Bar Association	San Diego, CA
4.	01-29-09	Wendy Mazzearella	San Diego County Bar Association	San Diego, CA
5.	02-09-09	Wendy Mazzearella	American Publ. Transportation Legal Affairs	Santa Monica, CA
6.	03-26-09	Dan Carroll Ed McIntyre	CA Municipal Utilities Association	Ranch Mirage, CA
7.	04-19-09	Brian Forbes	American Farm Bureau Federation	Coronado, CA
8.	04-25-09	Wendy Mazzearella	CSHA	Coronado, CA
9.	06-02-09	Wendy Mazzearella	CDAA Environmental Enforcement Conference	Monterey, CA
10.	06-13-09	Brian Forbes	San Diego Legal Secretaries Association	San Diego, CA
11.	06-18-09	Carole Buckner Shawn Harpen	PLI	San Francisco, CA
12.	07-26-09	Wendy Mazzearella	American Trucking Assoc. Litigation Center	Vancouver, BC
13.	09-26-09	Wendy Mazzearella	California Western School of Law	San Diego, CA
14.	10-06-09	Dan Carroll	Conference of CA Public Utilities Counsel	Monterey, CA
15.	10-08-09	Brian Forbes	American Inn of Court	San Diego, CA
16.	10-09-09	Dan Carroll Robert Stalker	Sacramento County Counsel Health Care Group	Sacramento, CA
17.	10-16-09	David Parker	ABA General Practice, solo & Small Firm Division	Los Angeles, CA
18.	10-17-09	David Parker Carole Buckner	USC Gould School of Law & Beverly Hills Bar Association's Institute of Entertainment Law and Business	Los Angeles, CA
19.	10-23-09	Wendy Mazzearella	Consumer Attorneys of San Diego	San Diego, CA
20.	11-19-09	David Parker	Orange County Bar Association	Santa Ana, CA
21.	12-11-09	Brian Forbes	Foothills Bar Association	El Cajon, CA



ETHICS ALERT

Legal Services to Distressed Homeowners and Foreclosure Consultants on Loan Modifications

*Committee on Professional Responsibility and Conduct
(February 2, 2009)*

You have all read and heard about the residential mortgage crisis in California. In 2007, roughly 84,000 California homeowners lost their homes in foreclosure.¹ Through the first three quarters of 2008 alone, that number increased to over 190,000. During that same period, lenders recorded nearly 330,000 notices of default on California home mortgages. Recording a notice of default is the first step of a non-judicial foreclosure or trustee sale, the most common process in California, which typically takes four to six months or more. In other words, the crisis seems far from over.

Seeing a business opportunity in this crisis, “foreclosure consultants” purport to offer distressed homeowners assistance in assessing their options and/or negotiating loan modifications with their lenders.² According to the California Legislature,

These foreclosure consultants, however, often charge high fees, the payment of which is often secured by a deed of trust on the residence to be saved, and perform no service or essentially a worthless service. Homeowners, relying on the foreclosure consultants’ promises of help, take no other action, are diverted from lawful businesses which could render beneficial services, and often lose their homes, sometimes to the foreclosure consultants who purchase homes at a fraction of their value before the sale. Vulnerable homeowners are increasingly

¹ See Reports on California Foreclosure Activity issued by DataQuick Information Systems, available at <http://www.dqnews.com/News/California/CA-Foreclosures/RRFor080422.aspx>, <http://www.dqnews.com/News/California/CA-Foreclosures/RRFor080722.aspx>; and <http://www.dqnews.com/News/California/CA-Foreclosures/RRFor081023.aspx>.

² [Civil Code section 2945\(a\)](#) defines “foreclosure consultant” as any person who performs for compensation certain services for a homeowner or makes any solicitation, representation, or offer to do so. The services include, for example, stopping or postponing a foreclosure sale, obtaining forbearance from any beneficiary or mortgagee, obtaining reinstatement of a loan obligation, obtaining an extension for reinstating a loan obligation, obtaining a waiver of an acceleration clause, assisting the owner in getting a loan, and saving the owner’s residence from foreclosure. [Civ. Code § 2945.1\(a\)\(1\)-\(6\) & \(8\)](#). [Section 2945.1\(b\)](#) excludes from the definition of “foreclosure consultant” certain types of people, including generally lawyers licensed in California. See [Civ. Code § 2945.1\(b\)\(1\)](#).

relying on the services of foreclosure consultants who advise the homeowner that the foreclosure consultant can obtain the remaining funds from the foreclosure sale if the homeowner executes an assignment of the surplus, a deed, or a power of attorney in favor of the foreclosure consultant. This results in the homeowner paying an exorbitant fee for a service when the homeowner could have obtained the remaining funds from a trustee's sale from the trustee directly for a minimal cost if the homeowner had consulted legal counsel or had sufficient time to receive notices from the trustee [] regarding how and where to make a claim for excess proceeds.³

To protect distressed homeowners, the Legislature has imposed numerous restrictions on foreclosure consultants.⁴ For example, agreements with foreclosure consultants must be in writing and contain specific disclosures.⁵ Also, foreclosure consultants are prohibited from collecting a fee for any services until after the services have been fully performed.⁶ In addition, distressed homeowners have a right in certain circumstances to rescind foreclosure consultant agreements.⁷ These protections cannot be waived.⁸ The State Bar of California has posted a news release that includes a link to consumer information on loan modification and foreclosures.⁹

There is evidence that some foreclosure consultants may be attempting to avoid the statutory prohibition on collecting a fee before any services have been rendered by having a lawyer work with them in foreclosure consultations. Many of the proposed relationships between these foreclosure consultants and lawyers violate the Rules of Professional Conduct and other ethical rules and, therefore, could result in lawyer discipline.

The purpose of this Ethics Alert is to remind California lawyers of several ethics rules that may apply in the event a foreclosure consultant or another non-lawyer requests assistance from a lawyer and/or refers potential distressed homeowner clients to the lawyer.

³ [Civ. Code § 2945\(a\)](#) (citation to another Civil Code provision omitted).

⁴ See, e.g., [Civ. Code § 2945.4](#).

⁵ [Civ. Code § 2945.3](#).

⁶ [Civ. Code § 2945.4\(a\)](#).

⁷ See [Civ. Code § 2945.2](#).

⁸ [Civ. Code § 2945.5](#).

⁹ To find the release, go to the State Bar's home page at <http://calbar.ca.gov>. Look down the right hand column of the home page for the links under "[News](#)." Click on "[News Releases](#)." Then click on "[News Releases 2008](#)." Finally, click on the link for the News Release dated October 8, 2008 entitled "[State Bar and Public Interest Clearinghouse Offer Foreclosure Help for Consumers](#)." Among other things, this release identifies, and includes a link to, www.ForeclosureInfoCA.org, a site that offers general information for consumers on mortgages and loans, such as how to avoid losing a home and where to go for assistance when foreclosure is a possibility.

- **A California lawyer may not pay a referral or marketing fee to a foreclosure consultant or other person for referring distressed homeowners to the lawyer.**¹⁰
- **A California lawyer may not directly or indirectly split any attorney's fees that the lawyer earns from a distressed homeowner client with the foreclosure consultant or any other non-lawyer.**¹¹
- **A California lawyer may not aid a foreclosure consultant or anyone else in the unauthorized practice of law. A lawyer may not form a partnership or joint venture with a foreclosure consultant or other non-lawyer if any of the activities of the business would involve providing legal services. A lawyer may not, under the guise of serving as in-house counsel for a foreclosure consultancy business, perform legal services for a distressed homeowner.**¹²

¹⁰ E.g., [Cal. Rules of Prof. Conduct rule 1-320\(B\)](#) ("A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or member's law firm by a client ..."); see also [Bus. & Prof. Code §§ 6151 & 6152](#) (prohibiting running and capping); [Bus. & Prof. Code § 6155](#) ("[N]o lawyer shall accept a referral of such potential clients" from any type of referral service unless certain conditions are met, including registration of the referral service with the State Bar.). California lawyers should be particularly mindful of the rules prohibiting the payment of referral fees if and when they are approached by a foreclosure consultant. A foreclosure consultant may be tempted to propose that a lawyer pay the consultant a fee in exchange for referring a homeowner client to circumvent [Civil Code section 2945.4\(a\)](#), which prohibits a foreclosure consultant from collecting a fee from a distressed homeowner until the consultant's services have been completed. As noted above, a lawyer may not compensate another for a client referral.

¹¹ See, e.g., [Cal. Rules of Prof. Conduct rule 1-320\(A\)](#) ("Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer..."); [In the Matter of Francis E. Jones, III \(Review Dept. 1993\) 2 Cal. State Bar Ct. Rptr. 411](#) (lawyer suspended and placed on probation, *inter alia*, for paying to insurance agent one quarter of client fees); [In the Matter of Robert B. Scapa and Michael S. Brown \(Review Dept. 1993\) 2 Cal. State Bar Ct. Rptr. 635](#) (lawyers suspended and placed on probation, *inter alia*, for paying ex-salesman, ex-police officer and other non-lawyers a portion of fees generated from settlements for clients identified by them); [In the Matter of Lawrence Crawford Bragg, \(Review Dept. 1997\) 3 Cal. State Bar Ct. Rptr. 615](#) (lawyer aided insurance adjuster, who evaluated whether to accept clients for lawyer, negotiated and settled pre-litigation claims with insurers, and occasionally filed lawsuits in lawyer's name, in unauthorized practice of law); compare [Cal. State Bar Formal Opn. No. 1987-91](#) (insurance company's "captive" law firm not engaged in fee splitting because no legal fees paid by insureds); [Cal. Rules of Prof. Conduct rule 2-200\(A\) & \(B\)](#) (permitting lawyer, under certain circumstances, to split fees with another lawyer).

¹² See, e.g., [Cal. Rules of Prof. Conduct rule 1-300\(A\)](#) ("A member shall not aid any person or entity in the unauthorized practice of law."); [Cal. Rules of Prof. Conduct rule 1-310](#) ("A member shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership consist of the practice of law."); see also [L.A. County Bar Ass'n Formal Opn. No. 510](#) (fee sharing with financial planning company); [In re Carlos \(Bankr. C.D. Cal. 1998\) 227 B.R. 535, 538-39](#) (paralegal engaged in unauthorized practice of law by negotiating reaffirmation agreements); [In the Matter of Francis E. Jones, III, supra, 2 Cal. State Bar Ct. Rptr. 411](#) (lawyer suspended and placed on probation, *inter alia*, for engaging in legal business with insurance agent); [In the Matter of Robert B. Scapa and Michael S. Brown, supra, 2 Cal. State Bar Ct. Rptr. 635](#) (lawyers suspended and placed on probation, *inter alia*, for opening office staffed solely by non-lawyers who explained retainer agreements and fee arrangements to prospective clients); [In the Matter of Lawrence Crawford Bragg, supra, 3 Cal. State Bar Ct. Rptr. 615](#) (lawyer aided insurance adjuster, who evaluated whether to accept clients for lawyer, negotiated and settled pre-litigation claims with insurers, and occasionally filed lawsuits in lawyer's name, in unauthorized practice of law); compare [Cal. State Bar Formal Opn. No. 1987-91](#) (insurance company's "captive" law firm not aiding unauthorized practice of law because "captive" law firm was independent); [Gafcon, Inc. v. Ponsor & Associates \(2002\) 98](#)

- **A California lawyer may not contact in person or by telephone a distressed homeowner referred to the lawyer by a foreclosure consultant or someone else unless the lawyer has a family or prior professional relationship with the homeowner. Nor may a lawyer direct another to do so on the lawyer's behalf. A lawyer, however, may write to a distressed homeowner who is a prospective client.**¹³
- **A California lawyer may not without good cause file a lawsuit or motions in a lawsuit that are simply intended to delay or impede a foreclosure sale.**¹⁴
- **A lawyer may not intentionally or recklessly fail to perform legal services with competence.**¹⁵
- **A lawyer should be wary of accepting fees for little or no work.**¹⁶

[Cal.App.4th 1388 \[120 Cal.Rptr.2d 392\]](#) (same). Thus, although a foreclosure consultant business, as any business, may hire in-house counsel to provide legal services for the business, such in-house counsel could not ethically provide legal services for distressed homeowners (the business's clients) either directly or through the guise of approving loan modification documentation for the business.

¹³ See, e.g., [Cal. Rules of Prof. Conduct rule 1-400\(C\)](#) ("A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship..."); [Cal. Rules of Prof. Conduct rule 1-400\(B\)](#) ("For purposes of this rule, a 'solicitation' means any communications: (1) Concerning the availability for professional employment of a member or a law firm...; and (2) Which is; (a) delivered in person or by telephone ..."). Thus, a lawyer generally may not call or show up at the doorstep of a potential client with whom the lawyer does not already have a prior relationship. The lawyer may, however, write, fax or e-mail such a potential client. [Rule 1-400 of the Rules of Professional Conduct](#) imposes various restrictions on the form and content of lawyer communications and solicitations. See, e.g., [Cal. Rules of Prof. Conduct rule 1-400\(D\)\(1\), \(2\) & \(3\)](#) (prohibiting lawyer communications or solicitations that contain untrue facts or mislead); [Cal. Rules of Prof. Conduct rule 1-400, standard 5](#) (setting forth requirements for law firm brochures, newsletters, recent legal development advisories, and similar materials that are mailed); see also [Shapero v. Kentucky Bar Assoc. \(1988\) 486 U.S. 466 \[108 S.Ct. 1916\]](#) (unconstitutional for state to ban lawyer from soliciting legal business through truthful and non-deceptive mailing directed to homeowners facing foreclosure, but such communications could be subject to state regulation); see also [Cal. State Bar Formal Opn. No. 1995-142](#) (ethical restrictions on direct mail marketing of legal services).

¹⁴ See, e.g., [Cal. Rules of Prof. Conduct rule 3-200](#) ("A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is (A) To bring an action ... without probable cause and for the purpose of harassing ... any person; or (B) To present a claim or defense in litigation that is not warranted ..."); [Bus. & Prof. Code § 6068\(c\), \(d\), \(g\)](#) (duty of lawyer to assert legal and just causes only, not to mislead court, and not to encourage commencement or continuance of action "from any corrupt motive of passion or interest").

¹⁵ See, e.g., [Cal. Rules of Prof. Conduct rule 3-110\(A\)](#) ("A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."); see also [Bus. & Prof. Code § 6450](#) (permissible and prohibited activities of paralegals); [In re Ivan O. B. Morse \(1995\) 11 Cal.4th 184 \[44 Cal.Rptr.2d 620\]](#) (lawyer suspended for, *inter alia*, incompetence in connection with mass mailing offering homeowners assistance in filing homestead declarations); [In the Matter of Robert B. Scapa and Michael S. Brown, supra, 2 Cal. State Bar Ct. Rptr. 635](#) (lawyers suspended and placed on probation for opening office staffed solely by secretaries and paralegals).

¹⁶ See, e.g., [Cal. Rules of Prof. Conduct rule 4-200\(A\)](#) ("A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee."). The unconscionability of a fee is determined by multiple factors, including the amount of the fee in proportion to the value of the services performed ([Cal. Rules of Prof. Conduct rule 4-200\(B\)\(1\)](#)), and the time and labor required ([Cal. Rules of Prof. Conduct rule 4-200\(B\)\(10\)](#)).

Distressed homeowners may need legal assistance. California lawyers should be wary, however, of non-lawyers – such as foreclosure consultants – who, seeking to capitalize on the vulnerability of distressed homeowners, offer to provide distressed homeowners assistance in renegotiating their loans and/or assessing and protecting their legal rights. These non-lawyers may propose arrangements that would violate one or more of a lawyer’s ethical obligations. They may attempt to loop California lawyers into their businesses with promises of large numbers of referrals and/or “easy money,” that is, fees for the lawyer for little or no work. They may request that a lawyer pay them a referral or marketing fee. They may propose an agreement to split legal fees obtained from the distressed homeowners. They may request that the lawyer enter into a joint venture with them and a distressed homeowner. They may request that a lawyer approve loan modification documentation. They may request that a lawyer serve as the general counsel to their business in order to provide legal advice to homeowners. They may ask that the lawyer file a frivolous lawsuit on behalf of a homeowner with whom the lawyer has had little or no contact in order to buy time so that the foreclosure consultant will have more time to negotiate a loan modification directly with a homeowner’s lender. As noted above, much of this conduct – accepting referral fees, fee splitting, forming a business with a non-lawyer that performs legal services, helping a non-lawyer engage in the unauthorized practice of law, filing frivolous lawsuits – violates the Rules of Professional Conduct and/or ethics rules set forth in the Business and Professions Code. A California lawyer should consider carefully the applicable ethical rules before agreeing to participate in any such venture involving people acting as foreclosure consultants or in a similar capacity. Failure to do so may result in lawyer discipline.¹⁷

¹⁷ See, e.g., [Cincinnati Bar Ass’n v. Mullaney \(2008\) 119 Ohio St.3d 412 \[894 N.E.2d 1210\]](#) (lawyers disciplined for accepting customers of Foreclosure Solutions, L.L.C.); see also [Cal. State Bar Formal Opn. No. 1997-148](#) (ethical issues, including whether lawyer-client relationship is created, that lawyer should consider when non-lawyer generates prospective clients for lawyer by marketing living trust packages); [Cal. State Bar Formal Opn. No. 1995-143](#) (ethical issues that lawyer should consider when “medical liaison” generates prospective clients for lawyer by giving presentation to physicians).



ETHICS ALERT

Uncertain Ethics Requirements for Attorney Fee Modifications Counsel Compliance with Rule 3-300 when Modifying a Fee Agreement

Committee on Professional Responsibility and Conduct
(June, 2009)

Attorney fee agreements with clients are often modified during the course of the attorney-client relationship, as a result of changed circumstances in a matter, the needs or desires of the parties, or a number of other reasons. Given the economic turmoil of the times, such modifications may occur with increased frequency. While attorneys are free to bargain for the terms of their engagements at arms length before the commencement of the relationship, there is a quantum change in the attorney's ability to bargain once the fiduciary duties of counsel are assumed.

One controversial and unsettled issue concerns whether an attorney who modifies a fee agreement with a client must comply with rule 3-300 of the California Rules of Professional Conduct ("CRPC"), which concerns, among other things, business transactions with clients and a lawyer's acquisition of adverse pecuniary interests.^{1/}

Rule 3-300 does not expressly address fee agreements or modification of fee agreements. The Official Discussion to rule 3-300 states that the rule is not applicable to fee agreements by which the attorney is "retained,"^{2/} but it leaves uncertain whether it applies to subsequent modifications after the attorney is already "retained." Reflective of this uncertainty, respected ethics scholars and professional responsibility committees of bar associations all across the state have expressed opinions on both sides of the issue as to whether an attorney must comply with rule 3-300 in connection with modifications to the financial terms of an existing fee agreement.

^{1/} Rule 3-300 states: "A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied: (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and (C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition."

^{2/} The Discussion section of rule 3-300 states: "Rule 3-300 is not intended to apply to the agreement by which the member is retained by the client, unless the agreement confers on the member an ownership, possessory, security or other pecuniary interest adverse to the client."

Last year the State Bar of California's Standing Committee on Professional Responsibility and Conduct ("COPRAC") issued [Proposed Formal Opinion Interim No. 05-0001 \("Proposed Opinion"\)](#) which concluded that CRPC Rule 3-300 does not per se apply to a modification of a fee agreement after the attorney-client relationship has commenced. Nonetheless, the Proposed Opinion concluded that any modification of an existing fee agreement will be subject to "close scrutiny" to determine if it is fair, reasonable, fully explained and consented to by the client. Rule 3-300 would go one step further requiring the attorney to advise the client in writing that he or she may wish to consult independent counsel and give the client a reasonable opportunity to do so.

The Proposed Opinion generated numerous [written comments](#)^{3/} both in support and in opposition and ultimately was not approved by the Board of Governor's Committee on Regulations, Admissions and Discipline.

Given the history of the Proposed Opinion, and pending further clarification from the courts and the issuance of the revised CRPC after the work of the Rules Revision Commission is complete, the prudent attorney will be best served by complying with all aspects of rule 3-300 when modifying a fee agreement with an existing client.

^{3/} This link provides the written comments submitted to the State Bar in response to the request for public comment.

**A PUBLICATION OF
THE STATE BAR OF CALIFORNIA
ETHICS HOTLINE**



ETHICS HOTLINER

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OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2107

April 17, 2009

Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed New Rule of Professional Conduct 1-650

Dear Ms. Hollins,

On behalf of the State Bar's Standing Committee on Professional Responsibility and Conduct (COPRAC), we provide the following comments on Proposed New California Rule of Professional Conduct 1-650 (Limited Legal Services Programs). For the reasons set forth below, COPRAC supports adoption of rule 1-650, but recommends some changes to paragraph 4 of the Discussion.

By way of background, COPRAC notes that for years the Board of Governors and the California Commission on Access to Justice have encouraged the participation of California attorneys in the performance of pro bono work. For example, in its Pro Bono Resolution, first adopted in 1989 and modified in 2002, the Board of Governors urges all attorneys to devote at least 50 hours per year to legal services to indigent individuals or to not-for-profit legal service organizations without expectation of compensation other than reimbursement of expenses. The Resolution also urges all law firms and governmental and corporate employers to promote and support the involvement of associates and partners in pro bono and other public service activities.

Pro bono clients deserve advice that is competent and conflict-free. By the same token, members who volunteer their services, and their law firms that permit and encourage them to do so, should have reasonable assurance that their pro bono work will not result in disqualification because of conflicts of interest between the firm's clients and the pro bono clients to whom the member has provided short-term limited legal services pursuant to proposed rule 1-650. This is clearly the intent of proposed rule 1-650.

Paragraph 4 of the Discussion to proposed rule 1-650 currently reads,

Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the member's law firm, paragraph (b) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (A)(2). Paragraph A(2) makes the participating member subject to imputed conflicts of interest when the lawyer knows that any lawyer in the member's law firm is disqualified by rule 3-310. By virtue of paragraph (B), moreover, a member's participation in a short-term limited legal services program will not be imputed to the member's law firm or preclude the member's law

ATTACHMENT H

Letter to Audrey Hollins

April 17, 2009

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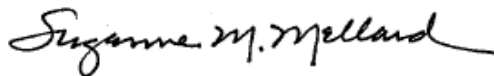
firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

Proposed rule 1-650 is based on ABA Model Rule 6.5. Similarly, paragraph 4 of the Discussion on rule 1-650 is based on paragraph 4 of the Comments to Model Rule 6.5. Model Rule 6.5 references Model Rule 1.10, which under certain circumstances requires screening to avoid imputation of conflicts of interest arising from a former representation. Contrary to the ABA Model Rule 1.10, the California Rules of Professional Conduct have no screening provision. Similarly, proposed rule 1-650(A)(2) does not discuss screening. COPRAC agrees that a firm employing a member who provided short-term limited legal services to a pro bono client pursuant to rule 1-650 should not run the risk of being disqualified if, unknown to the member, one of the firm's clients is directly adverse to the member's pro bono client or if the firm subsequently undertakes the representation of a client adverse to the member's pro bono client in a substantially related matter. However, COPRAC believes that under such circumstances, the member should be screened from the firm's engagement. Thus, COPRAC recommends that Discussion paragraph 4 be modified to read as follows (changes underscored):

Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the member's law firm, paragraph (b) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (A)(2). Paragraph A(2) makes the participating member subject to imputed conflicts of interest when the lawyer knows that any lawyer in the member's law firm is disqualified by rule 3-310. By virtue of paragraph (B), moreover, a member's participation in a short-term limited legal services program will not be imputed to the member's law firm or preclude the member's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program. However, once the conflict is identified, the member should be screened from the member's firm's representation of a client with interests adverse to a client that the member previously represented under the program's auspices.

COPRAC thanks you for the opportunity to comment on proposed rule 1-650.

Very truly yours,



Suzanne M. Mellard, Chair
Committee on Professional
Responsibility and Conduct

copy: Mark Taxy, Staff Counsel
COPRAC Members



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**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

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January 9, 2009

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Ms. Maylee Tong
Trusts & Estates Section
The State Bar of California
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Re: *Guide to the California Rules of Professional Conduct for
Estate Planning, Trust and Probate Counsel*

Dear Mr. Stern and Ms. Tong:

As Chair and on behalf of the State Bar Standing Committee on Professional Responsibility and Conduct ("COPRAC"), I wish to congratulate your section and its leadership for its updated 2008 edition of the **Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel**. Members of our Committee have reviewed the publication with great interest and it was the subject of discussion at our September meeting.

A review of the guide suggests that there are quite a number of significant and recurring areas of uncertainty and controversy involving the professional responsibilities of attorneys who handle estate planning, and the administration of trusts and estates. We would like to encourage your Section to bring ethics issues or inquiries involving your areas of practice to our attention so that they might be addressed by formal COPRAC opinions.

We also believe that COPRAC's work would be enhanced by having members with expertise in trust and estates. Toward that end we encourage your Section to advance the names of potential candidates who would be interested in serving on our Committee. Applications are available online and are due on February 1, 2009.

If you have any questions about COPRAC and its work, I would be happy to discuss them with you.

Very truly yours,

A handwritten signature in cursive script, reading "Suzanne M. Mellard".

Suzanne M. Mellard, Chair
Committee on Professional
Responsibility and Conduct

Copy: Members, COPRAC