



**MEMORANDUM**

**DATE:** February 17, 2011

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

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

**SUBJECT:** RAD Meeting on March 4, 2011 – Status of the Professional Competence Unit

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This memorandum provides a 2010 year-end report on the activities of the Professional Competence Unit.<sup>1</sup> In addition to this memorandum, provided are the following: (1) Ethics Hotline Activity Statistics, (2) Professional Competence Budget Summary – Authorized vs. Actuals, and (3) Ethics Hotline satisfaction survey excerpts. Board members with questions may contact Randall Difuntorum at (415) 538-2161 or Lauren McCurdy at (415) 538-2107.

**1. ETHICS HOTLINE**

In 2010, 14,593 member inquiries were received with a completion rate of 92%. This completion rate includes distribution of 598 copies of published ethics opinions and other written materials requested by inquirers and 6,365 referrals to information posted at the Bar's website. (Due to the availability of State Bar Formal Opinions at the Ethics Information area of the website, there is a decreasing need for distribution of this information by mail.) In addition, the staff made 1,803 courtesy follow-up calls to members who placed a call to the Hotline, received a call back from Hotline staff but were not available at that time to take the call from the Hotline staff person. These members received instructions on how to call-in and receive priority handling when they choose to return the Hotline's call at their convenience. However, when no return call is received, the Hotline initiates a courtesy follow-up call.

Six Ethics Hotline paralegals handle the majority of calls received. In 2010: (1) the monthly average number of total calls handled by one paralegal was 319; the monthly average number of completed calls by one paralegal was 196; and (3) the monthly average number of left messages by one paralegal was 123. In 2010, 28 voluntary satisfaction surveys were received from members after using the Ethics Hotline service. Each survey asks for a rating on several specified categories of service, including: satisfaction with the system for handling the calls; helpfulness of receptionist; helpfulness of paralegal; usefulness of materials sent; whether the inquirer would recommend the Hotline to others; and whether they received the assistance they needed. Nearly all of the surveys received gave the Hotline top marks in most survey categories (Copies of 2010 surveys are available upon request). Of these 28 surveys, 5 were received in November and December and were not included in the last status report. Comments from members were provided on three of these surveys. Of these three surveys, two complimented the helpfulness and professionalism of the staff and one survey expressed dissatisfaction with the service received by the staff person who assisted them. (An excerpt from these 3 surveys with the full text of the member comments is attached.)

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<sup>1</sup> There are 13.5 authorized positions in the Professional Competence Unit and all of these positions are currently filled. These authorized positions include a Program/Court Systems Analyst position that is shared with the Office of General Counsel.

## 2. COPRAC

Since the last Professional Competence status report submitted for the Board Committee's January 6, 2011 meeting, COPRAC met on January 14th in Los Angeles. At the January meeting COPRAC continued post-public comment consideration of Formal Opinion Interim No. 06-0004 (Confidentiality and Unsolicited E-mail Correspondence) which was approved for circulation for a second public comment period (see below). COPRAC also continued pre-public comment consideration of 08-0003 (serving subpoenas on existing clients of a law firm), 09-0001A (State Bar complaint threats); 09-0001B (duty of confidentiality and seeking legal advice), 10-0001 (social networking), 10-0002 (communications with attorney's implied consent), and 10-0003 (virtual law practice). In addition the Committee discussed the 2010/2011 annual appointment process, and, continued planning for the 2011 Annual Statewide Ethics Symposium. The Committee's ethics alert article on the subject of Internet scams targeting attorneys was also published in January.

The following opinion was approved for circulation for a second public comment period ending on April 4, 2011:

### Formal Opinion Interim No. 06-0004:

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

**DIGEST:** If an attorney receives a confidential written communication between opposing counsel and opposing counsel's client under circumstances reasonably suggesting that the crime-fraud exception precludes application of the attorney-client privilege, the attorney may ethically read the communication. If the document may be privileged but for the crime-fraud exception, the attorney must notify opposing counsel as soon as possible that the attorney has possession of the communication. The two attorneys should try to resolve the privilege issue or, if that fails, obtain the assistance of a court. Until the issue is resolved, the attorney may not disseminate or otherwise use the communication or its contents.

COPRAC's next meeting is scheduled for February 25, 2011 and will be held in San Francisco. At this meeting, they will continue work on the following matters: post-public comment consideration of Formal Opinion Interim No. 08-0001 (Gifts from Clients) following the second public comment period; pre-public comment consideration of Formal Opinion Interim Nos. 08-0003 (serving subpoenas on existing clients of a law firm), 09-0001A (State Bar complaint threats), 09-0001B (Client Confidentiality and seeking legal advice), 10-0001 (social networking), 10-0002 (communications with attorney's implied consent), and 10-0003 (virtual law practice); the 2010/2011 annual appointment process; continued planning for the 2011 Annual Statewide Ethics Symposium; and State Bar Annual Meeting CLE programs.

## 3. RULES REVISION COMMISSION

At RAD's January meeting, the Board Committee declined a staff recommendation to reconsider proposed Rule 7.5(c). Otherwise, given the Board's action to place the Rules Revision Commission into an abeyance status at the time of the Board's final action to adopt the proposed rules for submission to the Supreme Court, there is currently no Commission activity to report. In the event that the Commission is reactivated to address issues referred by the Board, such as questions that might be received from the Supreme Court, we will provide an update on that Commission activity.

#### 4. COMPETENCE PUBLICATIONS

Handbook on Client Trust Accounting for CA Attorneys: A revised 2011 online version of the handbook is anticipated in the coming months. The updated book will address recent developments in FDIC coverage for IOLTA client trust accounts.

California Compendium on Professional Responsibility: In 2010, 350 Compendium updates were sold. Work on the 2011 Compendium update is nearly complete and production of that update is anticipated in March, with sales beginning in April.

CA Rules of Professional Conduct & State Bar (a.k.a Publication No. 250): In 2010, 1,600 copies of the 2010 Publication 250 were sold. The 2011 Publication 250 is in production and is anticipated to be available in March.

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

The State Bar tracks the web activity for all website pages accessed. The chart below lists selected web pages administered by Professional Competence and the 2010 activity in terms of downloads and visits (a.k.a. "hits").

Webpage	Approx. Number of Downloads/Visits
2010 California Rules of Professional Conduct pdf	291,400 downloads*
Trust Accounting Handbook pdf	98,800 downloads*
Loan Modification Ethics Alert pdf	48,500 downloads*
Rules of Professional Conduct html webpage	177,800 visits
The State Bar Act html webpage	19,500 visits
Ethics Opinions html webpage	27,000 visits
Ethics Information html webpage	124,700 visits

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\*NOTE: Since the transition to the new website in June, 2010 web download statistics are no longer available [are currently unavailable] for Adobe PDF documents. The figures shown are projections based on the activity of the first six months of 2010.

Two free online MCLE self-study ethics articles produced by the Office of Professional Competence have been used by thousands of lawyers. One article entitled "A 'Charging Lien' as an Adverse Interest Under Rule 3-300 of the Rules of Professional Conduct" posted at the website on November 19, 2010, has been used by 1,834 members to obtain 1 hour of free ethics credit. Another article posted in September, 2010, addressing the topic of the Proposed New and Amended Rules of Professional Conduct has been used by 2,807 members to obtain 1 hour of free ethics credit.

The new COPRAC Ethics Alert article on Internet scams that specifically target attorneys published in January was posted at the Ethics Hotliner online newsletter webpage.

The public comment posting for an additional public comment circulation for COPRAC's Proposed Formal Opinion No. 06-0004 was posted at the Public Comment page of the Bar's website.

cc: Robert A. Hawley

# Professional Competence Budget Summary

## Authorized vs. Actual

Year-to-Date as of December 31, 2010

<b>Budget (Actual)</b>	\$2,214,951
<b>Budget (Authorized)</b>	\$2,345,806
<b>Savings</b>	\$130,855

### Monthly (January-June)

	January	February	March	April	May	June
<b>Budget (Actual)</b>	\$155,433	\$182,603	\$210,592	\$264,943	\$156,510	\$769
<b>Budget (Authorized)</b>	\$184,616	\$184,616	\$184,616	\$252,649	\$184,616	\$181,616
<b>Variance</b>	\$29,183	\$2,013	-\$25,976	-\$12,294	\$28,106	\$180,847

### Monthly (July-December)

	July	August	September	October	November	December
<b>Budget (Actual)</b>	\$177,404	\$169,271	\$163,630	\$234,387	\$153,320	\$346,089
<b>Budget (Authorized)</b>	\$184,603	\$184,597	\$184,543	\$251,660	\$183,710	\$183,964
<b>Variance</b>	\$7,199	\$15,326	\$20,913	\$17,273	\$30,390	\$-162,125

## ETHICS HOTLINE ACTIVITY STATISTICS - 2010

Month	Work Days	Incoming Calls	Completed Calls	Left Messages	Percentage of Incoming Calls that are Completed Calls	Percentage of Incoming Calls that are Left Messages	Resources Mailed/ Faxed	Internet Resource Referrals
January	19	1317	1107	210	84%	16%	46	504
February	19	1310	1230	80	94%	6%	49	594
March	22	1438	1301	137	90%	10%	53	649
April	22	1316	1186	130	90%	10%	62	585
May	20	1184	1078	106	91%	9%	40	522
June	22	1320	1222	98	93%	7%	59	589
July	21	1075	993	82	92%	8%	68	527
August	22	1178	1118	60	95%	5%	41	541
September	21	1192	1115	77	94%	6%	52	536
October	20	1141	1063	78	93%	7%	49	504
November	19	1082	1019	63	94%	6%	35	406
December	19	1040	984	56	94%	5%	44	408
<b>Cumulative Totals</b>	<b>246</b>	<b>14,593</b>	<b>13,416</b>	<b>1,177</b>	<b>92%</b>	<b>8%</b>	<b>598</b>	<b>6,365</b>

### EXPLANATIONS

**Incoming Calls:** Total member inquiries to the Hotline received during that month.

**Completed Calls:** Member inquiries received in that month which were handled and resolved by staff during that month.

**Left Messages:** Member inquiries received that month where staff left an initial message or courtesy follow-up message, but did not reach the member to resolve the inquiry.

**Percentage of Incoming Calls that are Completed Calls:** Proportion of Incoming Calls that were Completed Calls handled and resolved by the staff.

**Percentage of Incoming Calls that are Left Messages:** Proportion of Incoming Calls where staff left a message but the member did not return the call.

### 2010 Key Hotline Activity Averaged by Day and Month

<b>Daily:</b>	Incoming Calls:	59
	Completed Calls:	55
<b>Monthly:</b>	Incoming Calls:	1,216
	Completed Calls:	1,118

### 2010 Aggregate Outgoing Calls

<b>Current Month:</b>	1,586
<b>Cumulative to Date:</b>	22,951

This figure accounts for all calls placed by staff, including: Completed Calls, Left Messages and courtesy follow-up messages. Due to "telephone tag," staff may place multiple calls and leave multiple messages prior to completing a call.

Excerpt from Ethics Hotline Customer Satisfaction Surveys  
Additional Comments  
(Surveys Received in November & December, 2010)

1. Received November 2, 2010

COMMENTS / SUGGESTIONS:

Allow me to preface this by saying that I contacted the Hotline because opposing counsel filed a motion to disqualify me from a pending Merced County Superior Court lawsuit, and then got one of the judges to grant an order shortening time, such that my opposition was due in four working days. As a result, I was "under the gun" more so than otherwise, and had a limited amount of time to research the issue presented (an alleged implied-in-fact attorney client relationship with a pro se defendant/party that purportedly created a conflict between my clients and the pro se defendant/party).

The motion was heard on the morning of November 3. After reviewing the moving and opposition papers, the Court granted my ex parte application/cross-motion to continue the hearing for the express purpose of allowing me time to file a Civ. Proc. Code section 128.7 motion for sanctions against the moving attorney and his client, on the grounds that the motion was frivolous. (It is, for a variety of reasons -- including that the pro se defendant/party expressly disavowed that he has/had any such attorney-client relationship with me.)

Having given the "backstory," allow me to express my appreciation to your staff, specifically:

Susan Derr: Ms. Derr gave me a number of cases that might bear on my situation. None did, other than a couple that I had already located. But Ms. Derr's information nonetheless was helpful in what I would call the "Am I Missing Something?" context, i.e., she confirmed my "read" on the controlling law. Please note that I do not mean to denigrate Ms. Derr's contribution. Often a "You Haven't Missed Something" response, from someone knowledgeable, is as useful/helpful as a citation to relevant authority.

Mark Taxy: Mr. Taxy was kind enough to respond to a last-minute followup call that I was forced to make, the afternoon before the November 3 hearing, when the moving attorney changed his theory (to another, equally meritless contention that I engaged in an improper ex parte communication). Mr. Taxy drew my attention to a specific provision (CRPC 2-100(c)(3) that I had not yet considered, which section is controlling (in the Court's view and mine).

David Jasper: Mr. Jasper, in his "gatekeeper" role, had the experience and common sense to recognize that I needed to reach someone ASAP on my followup call, given that I had to get from my office in Los Angeles to Merced for the hearing the following morning. Mr. Jasper put me in touch with Mr. Taxy, who was able to give me the "bullet point" referenced above.

In summary, and as per my Survey responses: The Ethics Hotline is an invaluable resource, staffed by very responsive professionals. I consider the Hotline program a VERY good use of my Bar dues, as does every attorney with whom I have communicated about this service. I STRONGLY urge the Bar to continue to fund this program to whatever extent is required.

If you require additional information, please do not hesitate to contact me.

2. Received December 15, 2010

COMMENTS/SUGGESTIONS:

I spoke with Ricardo Patino (not sure if I spelled the name correctly). I did not find him knowledgeable about helping an attorney apply the professional responsibility rule to a particular situation. He did not understand basic accounting practices, or at least he couldn't articulate this.

While he was generally pleasant, this does not provide a service to the attorney who needs help. I had to explain to him professional responsibility rules and how they apply.

At the beginning of the call, he gave me wrong advice. He said that a Paypal fee would be considered as a bank fee and just add the extra money into the account to cover these charges. I had to explain that I believed this would be commingling. If I had just stopped and taken his advice, I would have received erroneous information. However, I argued with him, and told him that I would make a complaint about him. He became much more helpful then.

By the end of our call, he had changed what he said. He asked the "director." Had I not kept questioning though, I'd have been misled. It is fine not to give me information and say he can't help, but it is dangerous to give misleading information.

3. Received December 22, 2010

COMMENTS/SUGGESTIONS:

David Jasper was very kind and helpful. Made this a very positive experience.