



**MEMORANDUM**

**DATE:** April 15, 2011

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

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

**SUBJECT:** RAD Meeting on May 12, 2011 – Status of the Professional Competence Unit

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This memorandum provides a report on the activities of the Professional Competence Unit through March 31, 2011.<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**

As of March 31, 2011, 3,901 member inquiries were received with a completion rate of 92%. This completion rate includes distribution of 107 copies of published ethics opinions and other written materials requested by inquirers and 1,648 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. As of March 31, 2011: (1) the monthly average number of total calls handled by one paralegal was 337; the monthly average number of completed calls by one paralegal was 208; and (3) the monthly average number of left messages by one paralegal was 129. As of March 31, 2011, 11 voluntary satisfaction surveys were received from members after using the Ethics Hotline service. Each survey asks for a rating on several specified categories of service, including: satisfaction with the system for handling the calls; helpfulness of receptionist; helpfulness of paralegal; usefulness of materials sent; whether the inquirer would recommend the Hotline to others; and whether they received the assistance they needed. All of the surveys received gave the Hotline top marks in most survey categories (Copies of the surveys are available upon request). Comments from members were provided on nine of these surveys and were uniformly favorable. (An excerpt from these 9 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 March 3, 2011 meeting, COPRAC met on February 25th in San Francisco and April 8th in Irvine.

At the February meeting, COPRAC approved Formal Opinion Interim No. 08-0001 (gifts from clients) for submission to RAD for official publication following post-public comment consideration after a 45-day second public comment period ending February 11, 2011 (see below). COPRAC also approved Formal Opinion Interim No. 10-0002 (communications with adverse party with opposing attorney's implied consent) for publication for a 90-day public period with a June 28, 2011 deadline (see below). COPRAC continued post-public comment consideration of Formal Opinion Interim No. 06-0004 (confidentiality and unsolicited e-mail correspondence) which had been circulating for a 60-day second public comment period ending April 4, 2011. The Committee 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), and 10-0003 (virtual law practice). In addition, the Committee discussed the 2010/2011 annual appointment process, planning for the COPRAC sponsored CLE programs at the State Bar Annual Meeting, and continued planning for the then upcoming 2011 Annual Statewide Ethics Symposium. COPRAC also discussed new opinion topics, new committee initiatives including creating free CLE programs on the subject of recently published ethics alert articles and ethics opinions and developing new outreach programs directed to local county and specialty bar associations.

The following opinion was approved at the February meeting for submission to RAD for approval for official publication.

### Formal Opinion Interim No. 08-0001:

**ISSUE:** When does an attorney violate rule 4-400 of the California Rules of Professional Conduct by accepting a gift from a client?

**DIGEST:** An attorney who demonstrates by words or conduct an intent to cause a client to give the attorney a substantial gift violates rule 4-400. Whether a gift is substantial must be determined by examining issues such as the value of the gift from the perspective of both the client and the attorney both financially and otherwise, as well as general standards of fairness.

The following opinion was approved at the February meeting for circulation for a 90-day public comment period ending on June 28, 2011.

### Formal Opinion Interim No. 10-0002:

**ISSUES:** May consent under the "no contact" rule of California Rule of Professional Conduct 2-100 be implied, or must it be provided expressly? If consent may be implied, how is implied consent determined?

**DIGEST:** Consent under the "no contact" rule of California Rule of Professional Conduct 2-100 may be implied. Such consent may be implied by the facts and circumstances surrounding the communication with the represented party. Such facts and circumstances may include the following: whether the communication is within the presence of the other attorney; prior course of conduct; the nature of the matter; how the communication is initiated and by whom; the formality of the communication; the extent to which the communication might

interfere with the attorney-client relationship; whether there exists a common interest or joint defense privilege between the parties; whether the other attorney will have a reasonable opportunity to counsel the represented party with regard to the communication contemporaneously or immediately following such communication; and the instructions of the represented party's attorney.

At the April meeting COPRAC approved Formal Opinion Interim No. 08-0003 (communication with adverse party with opposing attorney's implied consent) for publication for a 90-day public comment period with a deadline to be determined at the time of publication (see below). COPRAC also continued post-public comment consideration of Formal Opinion Interim No. 06-0004 (confidentiality and unsolicited e-mail correspondence) which had been circulating for a 60-day second public comment period ending April 4, 2011. COPRAC also continued pre-public comment consideration of 09-0001A (State Bar complaint threats), 10-0001 (social networking), and 10-0003 (virtual law practice). In addition, the Committee continued discussion of the 2010/2011 annual appointment process, planning for the COPRAC sponsored CLE programs at the State Bar Annual Meeting and the 2011 Annual Statewide Ethics Symposium which was held the following day at UC Irvine School of Law. COPRAC also continued discussion of new opinion topics and new committee initiatives regarding the development of free on-line MCLE ethics programs and outreach programs directed to local county and specialty bar associations.

On April 9, 2011, COPRAC held the Annual Ethics Symposium with the theme of *Ethics Across the Profession*. The following four panel programs were presented: Ethics on the Outside: Electronic Communication and Professional Responsibility – Can they Coexist?; Ethics on the Inside – an Exploration of Ethical Issues Faced by In-House Attorneys; Ethics, Innocence and Prosecutorial Misconduct; and Ethics in Limbo: Practical Issues for Lawyers as Changes in the Law Regulating Lawyers Continue. The 2011 Symposium is the first Symposium that was presented both in-person and via live webcast. In addition, the individual programs were recorded to be offered as State Bar provided CLE video programs. Over 130 persons attended the Symposium which featured UCI Law School Dean Erwin Chemerinsky as keynote speaker and State Bar President William Hebert who provided welcoming remarks.

The following opinion was approved at the April meeting for circulation for a 90-day public comment period.

Formal Opinion Interim No. 08-0003 (deadline to be determined at time of circulation for public comment):

**ISSUES:** When at the outset of representation it appears an attorney would need to serve a discovery subpoena for production of documents on another current client of the attorney or the attorney's law firm, may the attorney accept the representation of the new client and serve the discovery subpoena on the current client? If doing so raises a conflict of interest, may the attorney seek informed written consent in order to accept the representation including possible service of the subpoena? What obligations arise if an attorney seeks informed written consent?

**DIGEST:** When an attorney discovers at the outset of representation that the attorney must serve a discovery subpoena for production of documents on another current client of the attorney or the attorney's law firm, serving the discovery subpoena is an adverse action such that a concurrent client conflict of interest arises. To represent a client who seeks to serve such a subpoena, the attorney must seek informed written consent from each client, disclosing the relevant circumstances and the actual and reasonably foreseeable adverse consequences to the client providing consent.

On May 27, 2011 in San Francisco, COPRAC's appointments subcommittee will conduct interviews of applicants for appointment to COPRAC for the 2001-2012 committee year. The recommendations of COPRAC's appointments subcommittee will be considered at COPRAC's June 3, 2011 meeting for submission to VIC for action at VIC's July meeting.

COPRAC's next meeting is scheduled for June 3, 2011 and will be held in San Francisco. At this meeting, the Committee will continue work on the following matters: post-public comment consideration of Formal Opinion Interim No. 06-0004 (confidential information and unsolicited e-mail correspondence); pre-public comment consideration of Formal Opinion Interim Nos. 09-0001A (State Bar complaint threats), 09-0001B (client confidentiality and seeking legal advice), 10-0001 (social networking), and 10-0003 (virtual law practice); the 2010/2011 annual appointment process; continued planning for the 2011 State Bar Annual Meeting CLE programs; new opinion topics and the new Committee CLE initiatives and outreach programs.

### **3. RULES REVISION COMMISSION**

Staff assigned to prepare the Supreme Court filing met with Jon Streeter on March 29, 2011 to discuss options for the submission. An oral report will be provided at the RAD meeting.

### **4. COMPETENCE PUBLICATIONS**

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

California Compendium on Professional Responsibility: Work on the 2011 Compendium update will be completed in May, with sales beginning in June.

CA Rules of Professional Conduct & State Bar (a.k.a Publication No. 250): The 2011 Publication 250 was received from the printer on April 4<sup>th</sup>. Publication notice flyers were mailed to the subscribers and orders are being processed.

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

Two free online MCLE self-study articles produced by the Office of Professional Competence have been used by thousands of lawyers to obtain free MCLE credit in ethics. So far in 2011, an article entitled "A 'Charging Lien' as an Adverse Interest Under Rule 3-300 of the Rules of Professional Conduct" has been used by 1,627 members and another article addressing the topic of the Proposed New and Amended Rules of Professional Conduct has been used by 2,236.

The public comment posting for the circulation for COPRAC's Proposed Formal Opinion No. 10-0002 was posted at the Public Comment page of the Bar's website.

cc: Robert A. Hawley

## ETHICS HOTLINE ACTIVITY STATISTICS - 2011

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	20	1,325	1,283	42	97%	3%	54	531
February	19	1,155	1,044	111	90%	10%	23	507
March	22	1,421	1,273	148	90%	10%	30	610
Cumulative Totals	60	3,901	3,600	301	92%	8%	107	1,648

### 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.

### Key Hotline Activity Averaged by Day and Month

<b>Daily:</b>	Incoming Calls:	64
	Completed Calls:	59
<b>Monthly:</b>	Incoming Calls:	1,300
	Completed Calls:	1,200

### Aggregate Outgoing Calls

<b>Current Month:</b>	2,234
<b>Cumulative to Date:</b>	6,058

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

# Professional Competence Budget Summary

## Authorized vs. Actual

Year-to-Date as of February 28, 2011

<b>Budget (Actual)</b>	\$320,005
<b>Budget (Authorized)</b>	\$370,232
<b>Savings</b>	\$50,227

### Monthly (January-June)

	January	February	March	April	May	June
<b>Budget (Actual)</b>	\$160,273	\$159,732	-	-	-	-
<b>Budget (Authorized)</b>	\$185,116	\$185,116	-	-	-	-
<b>Variance</b>	\$24,843	\$25,384	-	-	-	-

**NOTE:** At the time of this report, the financial records for the month of March had not been officially closed by the Office of Finance and were not available. March figures will be included in the next report to RAD.

Excerpt from Ethics Hotline Customer Satisfaction Surveys  
Additional Comments

(Surveys Received January - March, 2011)

1. Received January 14, 2011

COMMENTS / SUGGESTIONS:

Ms. Cobb was very friendly, informed and gave the impression she wanted to help me solve my issue. I appreciate this service and Ms. Cobb's efforts.

2. Received January 25, 2011

COMMENTS / SUGGESTIONS:

I have called the ethics hotline on several occasions. In each instance, the attorneys have provided me with thorough, pertinent information regarding the issues in questions. I rely heavily upon the ethics hotline when ethics issues arise, and recommend it to my colleagues. It is an invaluable service.

3. Received January 26, 2011

COMMENTS / SUGGESTIONS:

I spoke with David Jasper and he was so kind and helpful. I think it is important to have such a personable first response from this particular "arm" of the State Bar. He immediately made me feel like "help is on the way."

Thank you for making this process as smooth as possible.

4. Received February 10, 2011

COMMENTS/SUGGESTIONS:

My first contact was with the receptionist, David, who was very professional and positive. The paralegal who assisted me, Pamela Hill, was able to direct me immediately to the pertinent statutes and ethical opinion that literally made the difference in enabling me to resolve the issue promptly and efficiently. I have employed numerous associates and assistants over the years and would hire Ms. Hill in a second. The State Bar is fortunate to have her on its team.

5. Received February 17, 2011

COMMENTS/SUGGESTIONS:

Sorry, I have lost track of the call date, although it was in February, 2011. The date given below is a guess, because the system will not accept this evaluation unless I plug in a date.

I had a question for which I could find no authority in the statutes, the Code of Professional Responsibility, case law or ethics opinions. I was concerned that I might be missing something, a quandary from which an attorney cannot escape by their own effort.

Pam and another staff member helped me review and evaluate my own reasoning and determined that they could find no authority on the issue either. This gave me as much comfort as it was reasonably possible to have, given the logical impossibility of "proving a negative."

I always do my own research before calling the Ethics Hotline, which means that when I do call it is my last resort and absolutely indispensable as a resource.

I am very grateful that this service is available and I regularly recommend it to other attorneys.

6. Received March 8, 2011

COMMENTS/SUGGESTIONS:

I had a very positive interaction with both David, the receptionist, as well as Lynn, the paralegal. I am quite pleased with the experience overall and would strongly recommend the service to a friend.

7. Received March 22, 2011

COMMENTS/SUGGESTIONS:

Lynn Cobb was the adviser; very knowledgeable and helpful, as always.

8. Received March 23, 2011

COMMENTS/SUGGESTIONS:

Brief call to be sure that, in the course of research I did prior to calling the Hotline, I had found everything on point concerning a question involving "limited scope" representation.

The paralegal sized-up the question very quickly and directed me to two useful LACBA opinions that I had not found.

Only a few minutes were involved in the telephone call, but after reading the LACBA opinions I was much more comfortable that my research was as complete as reasonably possible.

In particular, the LACBA opinions helped me in drafting the parts of the fee agreement that explain the nature of limited scope representation.

This will be good for me and good for the client.

9. Received March 25, 2011

COMMENTS/SUGGESTIONS:

I wanted to say thank you to the Ethics Hot Line staff, from the receptionist to the representative who called me back. I spoke to the receptionist several times before successfully connecting with the representative and each time he was patient, polite and personable. The representative was knowledgeable and was ready with the citations I needed to resolve my question the first time we spoke. It has been years since I have needed to call the hot-line with a question. However, the service that I received today was of the highest caliber.