

**DATE:** October 11, 2011

**TO:** Members, Regulation, Admissions and Discipline Oversight

**FROM:** Randall Difuntorum, Director, Office of Professional Competence

**SUBJECT:** Proposed State Bar Formal Opinion Interim No. 10-0002 (re Communications with a Party Represented by Counsel)

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### **EXECUTIVE SUMMARY**

This agenda item seeks Board Committee on Regulation, Admissions and Discipline (“RAD”) approval for the publication of proposed Formal Opinion Interim No. 10-0002 developed by the Committee on Professional Responsibility and Conduct (“COPRAC”).

On August 16, 2011, the proposed opinion was distributed for RAD approval pursuant to State Bar Board Book Tab 19, Article 2, section 6(j), which provides: “If within thirty days of circulation, no member of the Board Committee objects to publication, the formal opinion shall be published as hereinafter provided. If within thirty (30) days of circulation, any member of the Board Committee does object, the issue of whether the formal opinion shall be published shall be placed on the agenda of the next succeeding meeting of the Board Committee for decision.”

On Wednesday, September 14, 2011, before the expiration of the thirty-day period, Michael Tenenbaum, a member of RAD at that time, submitted an objection to RAD’s approval of the proposed opinion.

A COPRAC representative and Mr. Tenenbaum are anticipated to attend the Board Committee’s meeting. Board members with questions about this item may contact Randall Difuntorum at (415) 538-2161 or Lauren McCurdy at (415) 538-2107.

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### **BACKGROUND**

COPRAC is charged with developing the State Bar’s non-binding, advisory ethics opinions.<sup>1</sup> Authority to approve the issuance of an opinion is exercised by RAD in accordance with applicable State Bar procedure - State Bar Board Book Tab 19, Article

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<sup>1</sup> Although non-binding, State Bar formal ethics opinions have been cited by the California courts in analyzing issues of attorney professional responsibility. For example, so far this year at least two published court decisions have referred to State Bar formal opinions. See: *Desert Outdoor Advertising v. Superior Court* (2011) 196 Cal.App.4th 866 [127 Cal.Rptr.3d 158]; and *Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135 [125 Cal.Rptr.3d 765].

2, section 6(j), which provides: “If within thirty days of circulation, no member of the Board Committee objects to publication, the formal opinion shall be published as hereinafter provided. If within thirty (30) days of circulation, any member of the Board Committee does object, the issue of whether the formal opinion shall be published shall be placed on the agenda of the next succeeding meeting of the Board Committee for decision.”

## **DISCUSSION**

Proposed Formal Opinion Interim No. 10-0002 was drafted by COPRAC, distributed for public comment, and revised following consideration of public comments received. The full text of the proposed opinion, in the form distributed to RAD for approval, is provided as Attachment 1. The question addressed in the proposed opinion is “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?” The digest answer provides:

“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.”

On August 16, 2011, the proposed opinion was distributed to RAD for approval indicating the date of September 16, 2011 as the deadline for Board member objections. On Wednesday, September 14, 2011, Michael Tenenbaum, a member of RAD at that time, submitted a timely objection to the publication of the formal opinion.

On October 3, 2011, a designated member of COPRAC spoke with Michael Tenenbaum about his concerns. Based on that discussion, staff anticipates that Mr. Tenenbaum will attend RAD’s meeting to state his concerns about Rule 2-100, itself, and that the objection to the proposed opinion will be withdrawn at that time. COPRAC understands that Mr. Tenenbaum will encourage the Board to consider amending Rule 2-100 or, if not, then to consider new prosecutorial policies for that rule.

If, as anticipated, the objection to RAD's approval of proposed Formal Opinion Interim No. 10-0002 is withdrawn, then no RAD action is needed provided no current member of RAD objects to the approval of the opinion. If Mr. Tenenbaum does not withdraw his objection or if a current member of RAD objects, then a motion and vote is required to approve the opinion.

**FISCAL / PERSONNEL IMPACT:**

There is no unbudgeted fiscal or personnel impact associated with the Board Committee's action to approve the publication of proposed Formal Opinion Interim No. 10-0002.

**RULE AMENDMENTS:**

Board Committee action to approve the publication of proposed Formal Opinion Interim No. 10-0002 does not effectuate any rule amendments.

**BOARD BOOK/ADMINISTRATIVE MANUAL IMPACT:**

Board Committee action to approve the publication of proposed Formal Opinion Interim No. 10-0002 does not require any revisions to the Board Book/Administrative Manual.

**PROPOSED BOARD COMMITTEE RESOLUTION:**

If RAD action is needed to approve the proposed opinion, then adoption of the following resolution would be appropriate:

**RESOLVED**, following publication for comment and consideration of comments received, that the Board Committee on Regulation, Admissions and Discipline Oversight approves the publication of proposed Formal Opinion Interim No. 10-0002, in the form attached.