

# **OPEN SESSION AGENDA ITEM**

## **REGULATION AND DISCIPLINE COMMITTEE III.C.**

**DATE:** May 17, 2018

**TO:** Members, Regulation and Discipline Committee

**FROM:** Randall Difuntorum, Program Manager, Professional Competence

**SUBJECT:** Reconsideration of Proposed Rule 1.2.1 of the Rules of Professional Conduct – Report and Request for Public Comment

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### **EXECUTIVE SUMMARY**

On April 11, 2018, the Supreme Court of California (“Supreme Court”) issued [Administrative Order 2018-04-11](#) on the State Bar’s request to approve proposed rule 1.2.1 (entitled “Advising or Assisting the Violation of Law”) of the Rules of Professional Conduct of the State Bar of California (“rules”). The Supreme Court’s order provides an alternative to one of the comments in proposed rule 1.2.1 and directs the Board of Trustees (“Board”) to consider whether to adopt this modified version of the rule. In consultation with the chair of the Regulation and Discipline Committee, staff referred this matter to the Commission for the Revision of the Rules of Professional Conduct (“Commission”) for study and development of a public comment proposal. This item requests that the Board Committee circulate, for a 45-day public comment period, two draft versions of a modified proposed rule 1.2.1.

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### **BACKGROUND**

At its March 9, 2017 meeting, the Board adopted [proposed rule 1.2.1](#). Adoption of rule 1.2.1 was one part of a comprehensive recommendation for the Board’s adoption of proposed new and amended rules. (See Board open agenda item [701 MARCH 2017](#) and the [Board minutes](#) for that meeting.) On March 30, 2017, the proposed rules were submitted to the Court for approval (Supreme Court case no. [S240991](#)).

Rule 1.2.1 prohibits a lawyer from advising or assisting the violation of law, including criminal conduct, fraudulent conduct and a violation of any law, rule or ruling of a tribunal. It carries forward the substance of [current rule 3-210](#) and adds clarifying language derived from the American Bar Association’s Model Rule 1.2(d) which in part provides that a lawyer may discuss the legal consequences of a client’s proposed course of conduct without violating the prohibition against advising or assisting a violation of law. Rule 1.2.1 also includes explanatory comments, including Comment [6] that addresses circumstances where state law might conflict with federal law or tribal law and policy.

Comment [6] would, for example, serve as guidance to lawyers who advise marijuana dispensaries because California state law permits certain lawful sales and use of marijuana while under federal law, marijuana remains a Schedule I drug pursuant to the Controlled

Substances Act (21 U.S.C. §§ 801-904), rendering the use, possession, distribution, or manufacture of marijuana illegal, even if such conduct otherwise conforms to state law. (See California Supreme Court Committee on Judicial Ethics Opinions, [Formal Opinion 2017-010](#) [Issued April 19, 2017] re “Extrajudicial Involvement in Marijuana Enterprises.”)

On April 11, 2018, the Supreme Court issued [Administrative Order 2018-04-11](#) on the State Bar’s request to approve rule 1.2.1. The Supreme Court’s order provides suggested language changes to Comment 6 and directs the Board to consider these revisions and whether they warrant further public comment.<sup>1</sup> In consultation with the chair of the Board’s Committee on Regulation and Discipline, staff assigned this order to the Rules Revision Commission (“Commission”) for study. The Commission met on May 8, 2018 and has prepared a recommendation to submit two alternative versions for public comment.

## DISCUSSION

### I. The Supreme Court Order

The Supreme Court’s order directs the Board to consider alternative revisions of rule 1.2.1 as follows:

The court directs the Board to consider the alternative revisions of proposed rule 1.2.1 and Comments [1]-[6], as set forth in Attachment 2 to this order, and to assess whether any such revisions may warrant further public comment. To the extent the Board chooses to recommend any modifications to the revised rule and comments as set forth in Attachment 2, the Board may submit such modifications for court approval immediately following its consideration of the revised rule and comments.

(Paragraph two of Administrative Order 2018-04-11.)

The Supreme Court’s Attachment 2 is a redline/strikeout version of rule 1.2.1 showing the specific changes that the Board is directed to consider. (The Supreme Court’s order, including Attachment 2, is provided as Attachment A to this memorandum.) The Court’s order contains language changes to Comment [6] that pose the following rule revision issues.

1. Whether the first sentence of Comment [6] should be revised to delete the concept of a lawyer’s reasonable belief as an open-ended test for determining the type of assistance that a lawyer is permitted to provide to a client under California law notwithstanding a possible conflict with federal or tribal law. Substituted in the place of this test is the Supreme Court’s proposed language specifying the permitted assistance that may be provided, specifically “drafting, administering, or complying with California statutes, regulations, orders, and other state or local provisions” that execute or apply to the state laws that might be in conflict with federal or tribal law.
2. Whether the second sentence of Comment [6] should be revised to delete the phrase “should also advise” and substitute “must inform” regarding the lawyer’s obligation to communicate to the client the conflicting federal or tribal law. While a duty to inform is less onerous than a duty to provide legal advice, the Supreme Court’s language would impose a mandatory requirement. The language adopted by the Board uses the term “should” which describes attorney conduct that would be prudent but not necessarily required.

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<sup>1</sup> A representative of the State Bar’s Office of General Counsel attended the Commission’s May 8, 2018 meeting to address the Board’s public comment policy.

3. Whether Comment [6] should be revised to include a new cross reference to the duty to communicate under [proposed rule 1.4](#). The Supreme Court’s language provides that a lawyer “must inform the client about related federal or tribal law and policy” when there is a conflict with state law. To support the mandatory nature of this proposition, the Supreme Court includes a cross reference to proposed rule 1.4 that, in part, requires a lawyer to keep a client “reasonably informed about significant developments relating to the representation.”
4. Whether Comment [6] should be revised to include a new cross reference to the duty of competence under [proposed rule 1.1](#). The Supreme Court’s language provides that “under certain circumstances” a lawyer might be “required to provide legal advice” on the conflict with federal or tribal law. To support the mandatory nature of this proposition, the Supreme Court includes a cross reference to proposed rule 1.1 that, in part, prohibits intentional, reckless or repeated acts of incompetence.<sup>2</sup>

In addition to the language changes to Comment [6], the Supreme Court’s alternative revisions to rule 1.2.1 include corrections of scrivener’s errors in the text of the rule itself and in Comment [5]. These corrections pertain to the use of asterisks as an indicator that a word or phrase is a defined term in [proposed rule 1.0.1](#), the terminology rule. As submitted, rule 1.2.1 omitted asterisks for occurrences of the word “tribunal” in paragraph (a) and in paragraph (b)(2). It also omitted an asterisk for the phrase “reasonably should know” in Comment [5]. The Supreme Court’s revisions add these missing asterisks.

## II. Consideration by the Commission

On May 8, 2018, the Commission met to study the Court’s order and to prepare a public comment proposal for the Board Committee’s consideration. The Commission discussed each of the changes posed by the Court’s revision and agreed with all of them. The Commission’s public comment proposal consists of two draft rules.

As an Alternative 1 version of proposed rule 1.2.1, the Commission is recommending that the language in Attachment 2 of the Court’s order be issued for public comment. (The full text of Alternative 1 is provided as Attachment B.) This would enable the Board to fully consider the Court’s version in light of any public comments that might be received. Procedurally, it would also enable the Board to adopt the Court’s version of the rule following the public comment period.

As an Alternative 2 version of proposed rule 1.2.1, the Commission has modified the Court’s language with the goal of clarifying and enhancing the changes made by the Court. (The full text of Alternative 2 is provided as Attachment C. A redline/strikeout version comparing Alternative 1 and Alternative 2 is provided as Attachment D.) Alternative 2 is not a counter-proposal to Alternative 1. It is a version that seeks to sharpen the important points embodied in the Court’s version.

Specifically, in Comment [6], Alternative 2 makes the following changes to the Court’s version.

[6] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal

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<sup>2</sup> A violation of the competence rule requires more than a single act of simple negligence. (See: *In Matter of Torres* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 149 [The State Bar Review Department observed that: “We have repeatedly held that negligent legal representation, even that amounting to legal malpractice, does not establish a [competence] rule 3-110(A) violation.”].)

law, ~~and, despite~~. In the event of such a conflict, ~~to~~the lawyer may assist a client in drafting, interpreting, administering, or complying with California laws, including statutes, regulations, orders, and other state or local provisions ~~that execute or apply to those laws, even if the client's actions might violate the conflicting federal or tribal law~~. If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy (~~see rule 1.4~~), and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see, ~~e.g., rule~~ rules 1.1 and 1.4).

As indicated above, the Commission has modified the Court's first sentence to become two separate sentences. The first sentence states a basic proposition that paragraph (b) applies to situations where a lawyer is advising a client in a matter where California laws might conflict with federal or tribal law. Thus, those situations are intended to fall under an express exception to paragraph (a)'s general prohibition against advising or assisting a client's violation of law. The new second sentence describes the type of assistance that a lawyer may provide in such representations. The Commission has added "interpreting" California laws to the list of permitted assistance identified in the Court's version (drafting, administering or complying with California laws).

In the last sentence of Comment [6], the Commission has retained the Court's language but has moved the citation to the proposed communication rule, rule 1.4, to the end of the sentence in the same parenthetical citation as the proposed competence rule, rule 1.1. This slight modification reflects the fact that in any given situation it is possible that either or both rules might be triggered by the specific facts of a client's representation. In addition, both proposed rules 1.4 and 1.1 might be construed to involve a degree of informing or advising and those duties should not be viewed as artificially separate or mutually exclusive.

Regarding the implementation of asterisks to mark words and phrases that appear in the proposed terminology rule, rule 1.0.1, the Commission agreed with the asterisks included in the Court's version of the rule. In addition, in Alternative 2, the Commission has added asterisks to the word "knows" in paragraph (a) and the first occurrence of the word "know" in Comment [5].

### III. Timeline for Action

If the Board agrees, the following timeline for action would be pursued.

- A 45-day public comment period ending on Monday, July 2, 2018.
- A Commission meeting as soon as possible after July 2, 2018 to consider any public comments received and to prepare a recommendation for Board action.
- Board action on the Commission's recommendation at the Board's July 19 -20, 2018 meeting.
- Staff preparation and submission of a supplemental memorandum to the Supreme Court in early August.

### **FISCAL/PERSONNEL IMPACT**

None

## **RULE AMENDMENTS**

This agenda item requests authorization for a 45-day public comment period on proposed amendments to the Rules of Professional Conduct of the State Bar of California. Proposed rule 1.2.1 would replace current rule 3-210. Board action to adopt proposed amendments to the rules would occur only after the public comment process.

## **BOARD BOOK AMENDMENTS**

None

## **STRATEGIC PLAN GOALS & OBJECTIVES**

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

## **RECOMMENDATION**

**It is recommended that the Regulation and Discipline Committee approve the following resolution:**

**RESOLVED**, that staff is authorized to make available, for a public comment period of 45-days, alternative proposals to modify proposed rule 1.2.1 of the Rules of Professional Conduct of the State Bar of California as set forth in Attachments B and C; and it is

**FURTHER RESOLVED**, that this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of any proposed new or amended Rule of Professional Conduct.

## **ATTACHMENT(S) LIST**

- A.** Supreme Court Administrative Order 2018-04-11 (case no. S240991)
- B.** Alternative 1 of Proposed Rule 1.2.1 (clean version)
- C.** Alternative 2 of Proposed Rule 1.2.1 (clean version)
- D.** Redline/Strikeout Version Comparing Alternative 1 and Alternative 2



SUPREME COURT  
FILED

APR 11 2018

S240991

Jorge Navarrete Clerk

ADMINISTRATIVE ORDER 2018-04-11

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**IN THE SUPREME COURT OF CALIFORNIA**

EN BANC

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ORDER RE REQUEST FOR APPROVAL OF PROPOSED RULE 1.2.1  
OF THE RULES OF PROFESSIONAL CONDUCT OF  
THE STATE BAR OF CALIFORNIA.

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On March 30, 2017, the Board of Trustees of the State Bar of California filed a request for approval of proposed rule 1.2.1 of the California Rules of Professional Conduct and proposed Comments [1]-[6] to that rule. (Bus. & Prof. Code, § 6076.) The text of the rule and comments as proposed by the Board is appended as Attachment 1 to this order.

The court directs the Board to consider the alternative revisions of proposed rule 1.2.1 and Comments [1]-[6], as set forth in Attachment 2 to this order, and to assess whether any such revisions may warrant further public comment. To the extent the Board chooses to recommend any modifications to the revised rule and comments as set forth in Attachment 2, the Board may submit such modifications for court approval immediately following its consideration of the revised rule and comments.

It is so ordered.

Cantil-Sakauye

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*Chief Justice*

Chin

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*Associate Justice*

Corrigan

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*Associate Justice*

Liu

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*Associate Justice*

Cuéllar

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*Associate Justice*

Kruger

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*Associate Justice*

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*Associate Justice*

**ATTACHMENT 1**

**Rule 1.2.1 Advising or Assisting the Violation of Law  
(Proposed Rule Adopted by the Board on March 9, 2017)**

- (a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.
- (b) Notwithstanding paragraph (a), a lawyer may:
  - (1) discuss the legal consequences of any proposed course of conduct with a client; and
  - (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.

**Comment**

[1] There is a critical distinction under this rule between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent does not of itself make a lawyer a party to the course of action.

[2] Paragraphs (a) and (b) apply whether or not the client's conduct has already begun and is continuing. In complying with this rule, a lawyer shall not violate the lawyer's duty under Business and Professions Code section 6068, subdivision (a) to uphold the Constitution and laws of the United States and California or the duty of confidentiality as provided in Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with rules 1.13 and 1.16.

[3] Paragraph (b) authorizes a lawyer to advise a client in good faith regarding the validity, scope, meaning or application of a law, rule, or ruling of a tribunal\* or of the meaning placed upon it by governmental authorities, and of potential consequences to disobedience of the law, rule, or ruling of a tribunal\* that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.

[4] Paragraph (b) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal\* that the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds

objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes\* to be unjust or invalid.

[5] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by these rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must advise the client regarding the limitations on the lawyer's conduct. (See rule 1.4(a)(4).)

[6] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law, and, despite such a conflict, to assist a client in conduct that the lawyer reasonably believes is permitted by California statutes, regulations, orders, and other state or local provisions implementing those laws. If California law conflicts with federal or tribal law, the lawyer should also advise the client regarding related federal or tribal law and policy.

**ATTACHMENT 2**

**Rule 1.2.1 Advising or Assisting the Violation of Law  
(With Revisions for Review and Consideration by the Board)**

- (a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.\*
- (b) Notwithstanding paragraph (a), a lawyer may:
- (1) discuss the legal consequences of any proposed course of conduct with a client; and
  - (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.\*

**Comment**

[1] There is a critical distinction under this rule between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent does not of itself make a lawyer a party to the course of action.

[2] Paragraphs (a) and (b) apply whether or not the client's conduct has already begun and is continuing. In complying with this rule, a lawyer shall not violate the lawyer's duty under Business and Professions Code section 6068, subdivision (a) to uphold the Constitution and laws of the United States and California or the duty of confidentiality as provided in Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with rules 1.13 and 1.16.

[3] Paragraph (b) authorizes a lawyer to advise a client in good faith regarding the validity, scope, meaning or application of a law, rule, or ruling of a tribunal\* or of the meaning placed upon it by governmental authorities, and of potential consequences to disobedience of the law, rule, or ruling of a tribunal\* that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.

[4] Paragraph (b) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal\* that the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences

of blocking the entrance to a public building as a means of protesting a law or policy the client believes\* to be unjust or invalid.

[5] If a lawyer comes to know or reasonably should know\* that a client expects assistance not permitted by these rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must advise the client regarding the limitations on the lawyer's conduct. (See rule 1.4(a)(4).)

[6] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law, and, despite such a conflict, to assist a client in ~~conduct that the lawyer reasonably believes is permitted by~~drafting, administering, or complying with California statutes, regulations, orders, and other state or local provisions ~~implementing~~that execute or apply to those laws. If California law conflicts with federal or tribal law, the lawyer ~~should also advise~~ must inform the client ~~about~~ regarding related federal or tribal law and policy (see rule 1.4), and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see, e.g., rule 1.1).

**Rule 1.2.1 Advising or Assisting the Violation of Law  
(With Revisions for Review and Consideration by the Board [ALT1])**

- (a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.\*
- (b) Notwithstanding paragraph (a), a lawyer may:
  - (1) discuss the legal consequences of any proposed course of conduct with a client; and
  - (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.\*

**Comment**

[1] There is a critical distinction under this rule between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent does not of itself make a lawyer a party to the course of action.

[2] Paragraphs (a) and (b) apply whether or not the client's conduct has already begun and is continuing. In complying with this rule, a lawyer shall not violate the lawyer's duty under Business and Professions Code section 6068, subdivision (a) to uphold the Constitution and laws of the United States and California or the duty of confidentiality as provided in Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with rules 1.13 and 1.16.

[3] Paragraph (b) authorizes a lawyer to advise a client in good faith regarding the validity, scope, meaning or application of a law, rule, or ruling of a tribunal\* or of the meaning placed upon it by governmental authorities, and of potential consequences to disobedience of the law, rule, or ruling of a tribunal\* that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.

[4] Paragraph (b) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal\* that the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes\* to be unjust or invalid.

[5] If a lawyer comes to know or reasonably should know\* that a client expects assistance not permitted by these rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must advise the client regarding the limitations on the lawyer's conduct. (See rule 1.4(a)(4).)

[6] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law, and, despite such a conflict, to assist a client in drafting, administering, or complying with California statutes, regulations, orders, and other state or local provisions that execute or apply to those laws. If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy (see rule 1.4), and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see, e.g., rule 1.1).

**Rule 1.2.1 Advising or Assisting the Violation of Law  
(Commission's Proposed Rule Adopted on May 8, 2018 [ALT2])**

- (a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows\* is criminal, fraudulent,\* or a violation of any law, rule, or ruling of a tribunal.\*
- (b) Notwithstanding paragraph (a), a lawyer may:
  - (1) discuss the legal consequences of any proposed course of conduct with a client; and
  - (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.\*

**Comment**

[1] There is a critical distinction under this rule between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud\* might be committed with impunity. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent\* does not of itself make a lawyer a party to the course of action.

[2] Paragraphs (a) and (b) apply whether or not the client's conduct has already begun and is continuing. In complying with this rule, a lawyer shall not violate the lawyer's duty under Business and Professions Code section 6068, subdivision (a) to uphold the Constitution and laws of the United States and California or the duty of confidentiality as provided in Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with rules 1.13 and 1.16.

[3] Paragraph (b) authorizes a lawyer to advise a client in good faith regarding the validity, scope, meaning or application of a law, rule, or ruling of a tribunal\* or of the meaning placed upon it by governmental authorities, and of potential consequences to disobedience of the law, rule, or ruling of a tribunal\* that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.

[4] Paragraph (b) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal\* that the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes\* to be unjust or invalid.

[5] If a lawyer comes to know\* or reasonably should know\* that a client expects assistance not permitted by these rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must advise the client regarding the limitations on the lawyer's conduct. (See rule 1.4(a)(4).)

[6] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law. In the event of such a conflict, the lawyer may assist a client in drafting, interpreting, administering, or complying with California laws, including statutes, regulations, orders, and other state or local provisions, even if the client's actions might violate the conflicting federal or tribal law. If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see rules 1.1 and 1.4).

**Rule 1.2.1 Advising or Assisting the Violation of Law  
(Redline Comparison of the Supreme Court's Revisions for Review [ALT1]  
to the Commission's Proposed Rule [ALT2])**

- (a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows<sup>\*</sup> is criminal, fraudulent,<sup>\*</sup> or a violation of any law, rule, or ruling of a tribunal.\*
- (b) Notwithstanding paragraph (a), a lawyer may:
  - (1) discuss the legal consequences of any proposed course of conduct with a client; and
  - (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.\*

**Comment**

[1] There is a critical distinction under this rule between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud<sup>\*</sup> might be committed with impunity. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent<sup>\*</sup> does not of itself make a lawyer a party to the course of action.

[2] Paragraphs (a) and (b) apply whether or not the client's conduct has already begun and is continuing. In complying with this rule, a lawyer shall not violate the lawyer's duty under Business and Professions Code section 6068, subdivision (a) to uphold the Constitution and laws of the United States and California or the duty of confidentiality as provided in Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with rules 1.13 and 1.16.

[3] Paragraph (b) authorizes a lawyer to advise a client in good faith regarding the validity, scope, meaning or application of a law, rule, or ruling of a tribunal<sup>\*</sup> or of the meaning placed upon it by governmental authorities, and of potential consequences to disobedience of the law, rule, or ruling of a tribunal<sup>\*</sup> that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.

[4] Paragraph (b) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal<sup>\*</sup> that the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes<sup>\*</sup> to be unjust or invalid.

[5] If a lawyer comes to know<sup>\*</sup> or reasonably should know<sup>\*</sup> that a client expects assistance not permitted by these rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must advise the client regarding the limitations on the lawyer's conduct. (See rule 1.4(a)(4).)

[6] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law, ~~and, despite,~~ In the event of such a conflict, ~~to~~the lawyer may assist a client in drafting, interpreting, administering, or complying with California laws, including statutes, regulations, orders, and other state or local provisions ~~that execute, even if the client's actions might violate the conflicting federal~~ or ~~apply to those laws~~tribal law. If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy (~~see rule 1.4~~), and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see, ~~e.g., rule~~ rules 1.1 and 1.4).