

## **Rule 1.2 Scope of Representation and Allocation of Authority**

- (a) Subject to paragraph (b), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall reasonably consult with the client as to the means by which they are to be pursued. Subject to Business and Professions Code § 6068(e)(1) and Rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.

### **Comment**

#### *Allocation of Authority between Client and Lawyer*

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. See e.g., Cal. Constitution Article I, § 16; Penal Code § 1018. A lawyer is not authorized merely by virtue of the lawyer's retention by a client, to impair the client's substantial rights or the client's claim itself. *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].

[2] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

#### *Independence from Client's Views or Activities*

[3] [Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.]

#### *Agreements Limiting Scope of Representation*

[4] Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1. Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent legal problems outside the scope of representation. All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8.1 and 5.6. See also California Rules of Court 3.35-3.37 (limited scope rules applicable in civil matters generally), and 5.425 (limited scope rule applicable in family law matters).

**Rule 1.2 Scope of Representation, and Allocation of Authority, ~~and Limitations on Legal Advice~~<sup>1</sup>**

- (a) Subject to paragraphs ~~(c) and (d)~~(b), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall ~~communicate~~ reasonably consult<sup>2</sup> with the client as to the means by which they are to be pursued. Subject to Business and Professions Code ~~section §~~ 6068(e)(1) and Rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- ~~(b) — A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.<sup>3</sup>~~
- ~~(c)~~(b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.
- ~~(d) — (1) — 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.~~
- ~~(2) — Notwithstanding paragraph (d)(1), a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may 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.<sup>4</sup>~~

**Comment**

*Allocation of Authority between Client and Lawyer*

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. See e.g., Cal. Constitution Article I, ~~section §~~ 16; Penal Code ~~section §~~ 1018. A lawyer is not authorized merely by virtue of the lawyer's retention by a client, to impair the

---

<sup>1</sup> With the movement of paragraph (d) into standalone Rule 1.2.1, the last clause of the title no longer applies.

<sup>2</sup> Commission consensus to substitute “reasonably consult” for “communicate.”

<sup>3</sup> At the 2/20/16 meeting session, RRC2 consensus to delete paragraph (b) without prejudice to including the concept in a comment, whether in this Rule or Rule 1.0 [1-100], or in a Preamble.

<sup>4</sup> At the 2/20/16 meeting session, RRC2 voted 14-0-0 to move paragraph (d) into a separate, standalone rule to be numbered 1.2.1.

With the deletion of paragraph (d), comments [5] through [8] are also deleted from Rule 1.2.

client's substantial rights or the client's claim itself. *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].

[2] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

#### *Independence from Client's Views or Activities*

[3]<sup>5</sup> [Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.]

#### *Agreements Limiting Scope of Representation*

[4] Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1. Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent legal problems outside the scope of representation. All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8.1 and 5.6. See also California Rules of Court 3.35-3.37 (limited scope rules applicable in civil matters generally), and 5.425 (limited scope rule applicable in family law matters).

#### *Criminal, Fraudulent and Prohibited Transactions*

~~[5] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud or to violate any rule, law, or ruling of a tribunal. However, this Rule does not prohibit a lawyer from giving a good faith opinion about the foreseeable consequences of a client's proposed conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction 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.~~

~~[6] The prohibition in paragraph (d)(1) applies whether or not the client's conduct has already begun and is continuing. In complying with this Rule, a lawyer shall not violate his or her duty of protecting all confidential information as provided in Rule 1.6 and Business and Professions Code section 6068(e)(1). 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.~~

~~[7] Paragraph (d)(2) authorizes a lawyer to 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. Determining the validity, scope, meaning or application of a law, rule, or ruling of a tribunal in good faith may require a course of action involving disobedience of the law, rule, or ruling of a tribunal, or of the meaning placed upon it by governmental authorities. Paragraph~~

---

<sup>5</sup> [See note 3, above.](#)

~~(d)(2) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal 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.~~

~~[8] — [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 consult with the client regarding the limitations on the lawyer's conduct.]~~

### **Rule 1.2.1 Advising the Violation of Law**

- (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 discuss the legal consequences of any proposed course of conduct with a client and may 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] Paragraph (a) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud or to violate any rule, law, or ruling of a tribunal. However, this Rule does not prohibit a lawyer from giving a good faith opinion about the foreseeable consequences of a client's proposed conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction 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.

[2] The prohibition in paragraph (a) applies whether or not the client's conduct has already begun and is continuing. In complying with this Rule, a lawyer shall not violate his or her duty of protecting all confidential information as provided in Rule 1.6 and Business and Professions Code § 6068(e)(1). 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 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. Determining the validity, scope, meaning or application of a law, rule, or ruling of a tribunal in good faith may require a course of action involving disobedience of the law, rule, or ruling of a tribunal, or of the meaning placed upon it by governmental authorities. Paragraph (b) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal 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.

[4] [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 consult with the client regarding the limitations on the lawyer's conduct.]

**Rule 1.2.1<sup>1</sup> Advising the Violation of Law<sup>2</sup>**

~~(d)~~ ~~(1)~~(a)<sup>3</sup> 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.

(2)(b) Notwithstanding paragraph ~~(d)~~(1)(a), a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may 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**

*~~Criminal, Fraudulent and Prohibited Transactions<sup>4</sup>~~*

[51] Paragraph ~~(d)~~(a) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud or to violate any rule, law, or ruling of a tribunal. However, this Rule does not prohibit a lawyer from giving a good faith opinion about the foreseeable consequences of a client's proposed conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction 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.

[62] The prohibition in paragraph ~~(d)~~(1)(a) applies whether or not the client's conduct has already begun and is continuing. In complying with this Rule, a lawyer shall not violate his or her duty of protecting all confidential information as provided in Rule 1.6 and Business and Professions Code ~~section~~ § 6068(e)(1). 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].<sup>5</sup>

[73] Paragraph ~~(d)~~(2)(b) authorizes a lawyer to 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

---

<sup>1</sup> At the 2/20/16 meeting session, RRC2 voted 14-0-0 to move paragraph (d) of proposed Rule 1.2 into a separate, standalone rule to be numbered 1.2.1.

<sup>2</sup> The tentative title of the Rule carries forward the title from current rule 3-210. However, that title is not particularly accurate, because (i) it does not capture the concept of assisting in the violation of law; and (ii) it arguably suggests that a lawyer can advise the violation of law. Perhaps consider the title originally proposed by RRC1 when its proposed Rule 1.2(d) was still a standalone Rule numbered 1.2.1:

**Counseling or Assisting the Violation of Law**

**Issue:** Should the title be changed?

<sup>3</sup> Subparagraphs (1) and (2) of former paragraph 1.2(d) changed to paragraphs (a) and (b) respectively to conform to RRC2 rule drafting style.

<sup>4</sup> Because all of proposed Rule 1.2.1 is directed to the topic described in the Comment heading, the heading is no longer necessary.

<sup>5</sup> Rule 1.16 bracketed pending its consideration by RRC2.

tribunal. Determining the validity, scope, meaning or application of a law, rule, or ruling of a tribunal in good faith may require a course of action involving disobedience of the law, rule, or ruling of a tribunal, or of the meaning placed upon it by governmental authorities. Paragraph ~~(d)(2)~~(b) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal 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.

[84] [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 consult with the client regarding the limitations on the lawyer's conduct.]<sup>6</sup>

---

<sup>6</sup> Note: Comment [8] has been bracketed pending reconsideration of Model Rule 1.4(a)(5), which RRC2 rejected in its proposed Rule 1.4. MR 1.4(a)(5) provides a lawyer shall:

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

The problem is that Comment [8] inappropriately imposes a duty ("must") without the duty appearing in the blackletter of the Rule.

Comment [8] is nearly verbatim derived from Model Rule 1.2, Comment [13]. However, the MR comment appropriately uses "must" because it expressly cross-references MR 1.4(a)(5).

If Rule 1.2 is to retain Comment [8], RRC2 should either restore MR 1.4(a)(5) to proposed Rule 1.4 or add a new paragraph (c) to proposed Rule 1.2. To avoid creating an unnecessary difference between California and the national standard, the better approach would be the former.



## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-210 [1.2]

**Lead Drafter:** Langford  
**Co-Drafters:** Clinch, Stout, Zipser  
**Meeting Date:** February 19-20, 2016

### I. CURRENT CALIFORNIA RULE

#### Rule 3-210 Advising the Violation of Law

A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.

#### Discussion:

Rule 3-210 is intended to apply not only to the prospective conduct of a client but also to the interaction between the member and client and to the specific legal service sought by the client from the member. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the member. (See *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].) An example of the latter is a request that the member negotiate the return of stolen property in exchange for the owner's agreement not to report the theft to the police or prosecutorial authorities. (See *People v. Pic'l* (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685].)

### II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

### III. PROPOSED RULE 1.2 (CLEAN)

#### Rule 1.2 Scope of Representation, Allocation of Authority, and Limitations on Legal Advice

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall communicate with the client as to the means by which they are to be pursued. Subject to Business and Professions Code section 6068(e)(1) and Rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-210 [1.2]

**Lead Drafter:** Langford  
**Co-Drafters:** Clinch, Stout, Zipser  
**Meeting Date:** February 19-20, 2016

- (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.
- (d)
  - (1) 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.
  - (2) Notwithstanding paragraph (d)(1), a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may 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

#### *Allocation of Authority between Client and Lawyer*

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. See e.g., Cal. Constitution Article I, section 16; Penal Code section 1018. A lawyer is not authorized merely by virtue of the lawyer's retention by a client, to impair the client's substantial rights or the client's claim itself. *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].

[2] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

#### *Independence from Client's Views or Activities*

[3] [Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.]

#### *Agreements Limiting Scope of Representation*

[4] Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1. Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent legal problems outside the scope of representation. All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8.1 and 5.6. See also California Rules of Court 3.35-3.37 (limited scope rules applicable in civil

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-210 [1.2]

**Lead Drafter:** Langford  
**Co-Drafters:** Clinch, Stout, Zipser  
**Meeting Date:** February 19-20, 2016

matters generally), and 5.425 (limited scope rule applicable in family law matters).

### *Criminal, Fraudulent and Prohibited Transactions*

[5] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud or to violate any rule, law, or ruling of a tribunal. However, this Rule does not prohibit a lawyer from giving a good faith opinion about the foreseeable consequences of a client's proposed conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction 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.

[6] The prohibition in paragraph (d)(1) applies whether or not the client's conduct has already begun and is continuing. In complying with this Rule, a lawyer shall not violate his or her duty of protecting all confidential information as provided in Rule 1.6 and Business and Professions Code section 6068(e)(1). 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.

[7] Paragraph (d)(2) authorizes a lawyer to 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. Determining the validity, scope, meaning or application of a law, rule, or ruling of a tribunal in good faith may require a course of action involving disobedience of the law, rule, or ruling of a tribunal, or of the meaning placed upon it by governmental authorities. Paragraph (d)(2) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal 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.

[8] [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 consult with the client regarding the limitations on the lawyer's conduct.]

## IV. PROPOSED RULE 1.2 (REDLINE TO CURRENT CALIFORNIA RULE 3-210)

### ~~Rule 3-210 Advising the Violation of Law~~ Rule 1.2 Scope of Representation, Allocation of Authority, and Limitations on Legal Advice

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall communicate with the client as to the means by which they are to be pursued. Subject to Business and Professions Code section 6068(e)(1) and Rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-210 [1.2]

Lead Drafter: Langford  
Co-Drafters: Clinch, Stout, Zipser  
Meeting Date: February 19-20, 2016

shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.

(d) (1) ~~A member shall not advise the~~ 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 unless ~~the member believes in good faith that such law, rule, or ruling is invalid.~~

(2) Notwithstanding paragraph (d)(1), a lawyer may discuss the legal consequences of any proposed course of conduct with a client and ~~A member may take appropriate steps in good faith to test~~ may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of any a law, rule, or ruling of a tribunal.

### **Discussion**Comment

~~Rule 3-210 is intended to apply not only to the prospective conduct of a client but also to the interaction between the member and client and to the specific legal service sought by the client from the member. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the member. (See *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].) An example of the latter is a request that the member negotiate the return of stolen property in exchange for the owner's agreement not to report the theft to the police or prosecutorial authorities. (See *People v. Pic'l* (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685].)~~

### Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. See e.g., Cal. Constitution Article I, section 16; Penal Code section 1018. A lawyer is not authorized merely by virtue of the lawyer's retention by a client, to impair the client's substantial rights or the client's claim itself. *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].

[2] At the outset of, or during a representation, the client may authorize the lawyer to take

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-210 [1.2]

**Lead Drafter:** Langford  
**Co-Drafters:** Clinch, Stout, Zipser  
**Meeting Date:** February 19-20, 2016

specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

### Independence from Client's Views or Activities

[3] [Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.]

### Agreements Limiting Scope of Representation

[4] Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1. Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent legal problems outside the scope of representation. All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8.1 and 5.6. See also California Rules of Court 3.35-3.37 (limited scope rules applicable in civil matters generally), and 5.425 (limited scope rule applicable in family law matters).

### Criminal, Fraudulent and Prohibited Transactions

[5] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud or to violate any rule, law, or ruling of a tribunal. However, this Rule does not prohibit a lawyer from giving a good faith opinion about the foreseeable consequences of a client's proposed conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction 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.

[6] The prohibition in paragraph (d)(1) applies whether or not the client's conduct has already begun and is continuing. In complying with this Rule, a lawyer shall not violate his or her duty of protecting all confidential information as provided in Rule 1.6 and Business and Professions Code section 6068(e)(1). 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.

[7] Paragraph (d)(2) authorizes a lawyer to 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. Determining the validity, scope, meaning or application of a law, rule, or ruling of a tribunal in good faith may require a course of action involving disobedience of the law, rule, or ruling of a tribunal, or of the meaning placed upon it by governmental authorities. Paragraph (d)(2) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal the client does not contend is unenforceable or unjust in itself, as a means of protesting

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-210 [1.2]

Lead Drafter: Langford  
Co-Drafters: Clinch, Stout, Zipser  
Meeting Date: February 19-20, 2016

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.

[8] [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 consult with the client regarding the limitations on the lawyer's conduct.]

### V. PROPOSED RULE 1.2 (REDLINE TO MODEL RULE 1.2)

#### Rule 1.2 Scope of Representation~~and~~, Allocation of Authority~~Between Client and Lawyer~~, and Limitations on Legal Advice

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall ~~consult~~ communicate with the client as to the means by which they are to be pursued. ~~A~~ Subject to Business and Professions Code section 6068(e)(1) and Rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. ~~In~~ Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.
- (d) (1) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal~~or~~, fraudulent, ~~but a~~ or a violation of any law, rule, or ruling of a tribunal.
- (2) Notwithstanding paragraph (d)(1), a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of ~~the a~~ law, rule, or ruling of a tribunal.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-210 [1.2]

**Lead Drafter:** Langford  
**Co-Drafters:** Clinch, Stout, Zipser  
**Meeting Date:** February 19-20, 2016

### Comment

#### *Allocation of Authority between Client and Lawyer*

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. ~~The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation. See e.g., Cal. Constitution Article I, section 16; Penal Code section 1018. A lawyer is not authorized merely by virtue of the lawyer's retention by a client, to impair the client's substantial rights or the client's claim itself. *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].~~

~~[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).~~

[32] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

~~[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.~~

#### *Independence from Client's Views or Activities*

[53] [Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.]

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-210 [1.2]

**Lead Drafter:** Langford  
**Co-Drafters:** Clinch, Stout, Zipser  
**Meeting Date:** February 19-20, 2016

### *Agreements Limiting Scope of Representation*

~~[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.~~

~~[7]~~ Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1. Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent legal problems outside the scope of representation. ~~[8]~~ All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, ~~1.8.1~~ and 5.6. See also California Rules of Court 3.35-3.37 (limited scope rules applicable in civil matters generally), and 5.425 (limited scope rule applicable in family law matters).

### *Criminal, Fraudulent and Prohibited Transactions*

~~[9]~~ Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. ~~This prohibition, however, or to violate any rule, law, or ruling of a tribunal. However, this Rule~~ does not ~~preclude the prohibit a~~ lawyer from giving ~~an honest~~ a good faith opinion about the actual/foreseeable consequences ~~that appear likely to result from~~ of a client's proposed conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction 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.

~~[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a~~

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-210 [1.2]

**Lead Drafter:** Langford  
**Co-Drafters:** Clinch, Stout, Zipser  
**Meeting Date:** February 19-20, 2016

~~client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.~~

[6] The prohibition in paragraph (d)(1) applies whether or not the client's conduct has already begun and is continuing. In complying with this Rule, a lawyer shall not violate his or her duty of protecting all confidential information as provided in Rule 1.6 and Business and Professions Code section 6068(e)(1). 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.

~~[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.~~

~~[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation(2) authorizes a lawyer to 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. Determining the validity, scope, meaning or application of a law, rule, or ruling of a tribunal in good faith may require a course of action involving disobedience of the statute or regulation law, rule, or ruling of a tribunal, or of the interpretation meaning placed upon it by governmental authorities. Paragraph (d)(2) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal 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.~~

~~[13] [If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the these Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).]~~

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-210 [1.2]

**Lead Drafter:** Langford  
**Co-Drafters:** Clinch, Stout, Zipser  
**Meeting Date:** February 19-20, 2016

### VI. PUBLIC COMMENTS SUMMARY

- Bar Association of San Francisco. Recommends revision of rule to address the ethical dilemma caused by conflicting state and federal laws concerning medical marijuana, and specifically the Compassionate Use Act.<sup>1</sup>

### VII. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, \_\_\_\_\_, 2016:**  
A comment on current rule 3-210 is anticipated.
- **RUSSELL WEINER, OCTC, 6/15/2010:**  
OCTC agrees with subparagraph (d)'s broadening of current rule 3-210 to include criminal and fraudulent conduct as well as any law, rule, or ruling. However, subparagraph (d), unlike rule 3-210, does not specifically provide for the defense of good faith or appropriate steps. Good faith is generally not a defense to a violation of a Rule of Professional Conduct. (See *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 148; *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) While the Commission's Comments show that it intends to keep a good faith defense, Comments are not rules or authority and OCTC believes that if the Commission wants this defense it should be in the rule and not in a Comment.
- **MIKE NISPEROS, OCTC, 9/27/2001:**  
OCTC did not comment on rule 3-210 in its 2001 memo.
- **State Bar Court:** No comments received from State Bar Court.

### VIII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

- **Model Rule 1.2.** The ABA State Adoption Chart for Model Rule 1.2, entitled Variations of the ABA Model Rules of Professional Conduct Rule 1.2," revised October 20, 2015, is available at:  
[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_2.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_2.authcheckdam.pdf) [Last visited 1/29/16]

<sup>1</sup> BASF has issued an opinion that addresses the issue. See BASF Ethics Op. 2015-01, available at: [https://www.sfbare.org/ethics/opinion\\_2015-1.aspx](https://www.sfbare.org/ethics/opinion_2015-1.aspx). See also L.A. County Bar Opinion 527 (8/12/15), available at: <http://www.lacba.org/docs/default-source/ethics-opinions/ethics-opinion-527-rev.pdf?sfvrsn=2>.

The topic is raised in the Assignment Memo in Section IV.H., at pp. 3.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-210 [1.2]

**Lead Drafter:** Langford  
**Co-Drafters:** Clinch, Stout, Zipser  
**Meeting Date:** February 19-20, 2016

- Every jurisdiction except California has adopted some version of ABA Model Rule 1.2. Among these jurisdictions, fourteen have adopted the rule verbatim,<sup>2</sup> ten have adopted substantially similar variations of the Model Rule,<sup>3</sup> and twenty-six have a substantially modified version of Model Rule 1.2.<sup>4</sup>

- **Arizona Rule 1.2** is identical to Model Rule 1.2:

### **Rule 1.2. Scope of Representation and Allocation of Authority between Client and Lawyer**

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by ER 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

- **Alaska Rule 1.2** is a substantial departure from the Model Rule, including an enhancement of paragraph (c) concerning limited scope representation, and the addition of new

---

<sup>2</sup> The fourteen jurisdictions are: Arizona, Arkansas, Delaware, Idaho, Iowa, Kentucky, Minnesota, Nevada, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont and Washington.

<sup>3</sup> The ten jurisdictions are: Colorado, Florida, Indiana, Louisiana, Maryland, New Jersey, New Mexico, Oklahoma, South Carolina and Tennessee.

<sup>4</sup> The twenty-six jurisdictions are: Alabama, Alaska, Connecticut, District of Columbia, Georgia, Hawaii, Illinois, Kansas, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oregon, Texas, Virginia, West Virginia, Wisconsin and Wyoming.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-210 [1.2]

**Lead Drafter:** Langford  
**Co-Drafters:** Clinch, Stout, Zipser  
**Meeting Date:** February 19-20, 2016

paragraphs (e) and (f):

### **Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer**

(a) Subject to paragraphs (c), (d), and (e), a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to offer or accept a settlement. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, whether the client will testify, and whether to take an appeal.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c)<sup>5</sup> A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client consents after consultation.

(1) If a written fee agreement is required by Rule 1.5, the agreement shall describe the limitation on the representation

(2) The lawyer shall discuss with the client whether a written notice of representation should be provided to other interested parties.

(3) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with this rule is considered to be unrepresented for purposes of Rules 4.2 and 4.3 unless the opposing lawyer knows of or has been provided with:

(A) a written notice stating that the lawyer is to communicate only with the limited representation lawyer as to the subject matter of the limited representation; or

(B) a written notice of the time period during which the lawyer is to communicate only with the limited representation lawyer concerning the subject matter of the limited representation.

(d) Except as provided in paragraph (f), a lawyer shall not counsel or assist a client to engage in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the

---

<sup>5</sup> Other jurisdictions that have expanded paragraph (c) regarding limited scope representation include: Colorado, Florida, Maine, Maryland, Montana, New Hampshire, and Wyoming.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-210 [1.2]

**Lead Drafter:** Langford  
**Co-Drafters:** Clinch, Stout, Zipser  
**Meeting Date:** February 19-20, 2016

relevant limitations on the lawyer's conduct.<sup>6</sup>

(f)<sup>7</sup> A lawyer may counsel a client regarding Alaska's marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. If Alaska law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.

- **New York Rule 1.2** is also a substantial departure from the Model Rule, including the addition of new paragraphs (e) through (g):

### **Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer**

(a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

(e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not

---

<sup>6</sup> Note that a similar provision is found in Model Rule 1.4(a)(5), which provides that a lawyer shall:

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

Further note that this Commission has declined to include a provision similar to MR 1.4(a)(5) in its proposed Rule.

<sup>7</sup> Other jurisdictions that have provisions addressing legal advice relating to the jurisdiction's marijuana laws include: Colorado (comment), Hawaii (rule), Illinois (rule & comment), Nevada (comment), Oregon (rule), and Washington (comment).

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-210 [1.2]

**Lead Drafter:** Langford  
**Co-Drafters:** Clinch, Stout, Zipser  
**Meeting Date:** February 19-20, 2016

prejudice the rights of the client.

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

(g) A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

### IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

#### A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of Model Rule 1.2, as revised, which adds three paragraphs, (a) through (c), discussed below, to current rule 3-210 to expressly address allocation of authority between client and lawyer, lawyer responsibility for client's views or activities, and limiting the scope of representation, respectively. Proposed paragraph (d) would carry forward current rule 3-210, as modified.
  - Pros: Carries forward current rule 3-210, as modified, to expressly recognize that a lawyer may explain the legal consequences of the client's proposed course of conduct without running afoul of the law. The additional provisions (paragraphs (a) through (c)) clarify the relationship between lawyer and client and eliminate an unnecessary difference between California and other jurisdictions, all of which have substantially adopted some form of Model Rule 1.2. Further, the concepts in the added paragraphs already exist in California law; the provisions will provide ease of access to for lawyers seeking to understand their duties set forth in those paragraphs. The specific advantages of expanding the scope of the rule are discussed in relation to each paragraph, below.
  - Cons: Question whether it is necessary to include the concepts of paragraphs (a) through (c) in a set of disciplinary rules when they are already present in statutes or case law. In addition, several of the provisions or parts thereof are permissive, (e.g., paragraph (c)) or aspirational (e.g., paragraph (b)).
2. Recommend adoption of Model Rule 1.2(a), which relates to the allocation of authority within the lawyer-client relationship and which has been modified as follows:
  - a. Substitutes "communicate" for "consult" to conform to the reference to Rule 1.4 [communication].
  - b. Limit a lawyer's implied authority to act on the client's behalf by the lawyer's duties under Bus. & Prof. Code § 6068(e)(1) and Rule 1.6 [3-100], in recognition of this Commission's decision not to include such a provision in proposed Rule 1.6.
  - c. Limit the requirement of a lawyer to abide by a client's decision to enter a plea in capital cases, in which guilty pleas require the lawyer's consent. (See Penal Code § 1018).
    - Pros: The provision does not change California law; all of the concepts in paragraph (a) are found in California law:
      - a. The concepts that (i) the client retains the authority to make decisions concerning the objectives of the representation, and (ii) the lawyer may make

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-210 [1.2]

**Lead Drafter:** Langford  
**Co-Drafters:** Clinch, Stout, Zipser  
**Meeting Date:** February 19-20, 2016

decisions that the lawyer is impliedly (or expressly) authorized to make in order to carry out the client's representation, are expressed in California case law. (See *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 403 – 405 [212 Cal.Rptr. 151].)

b. That a lawyer must abide by a client's decision whether to settle a matter is consistent with existing California case law. Lawyers have been disciplined for settling a client's claim without the client's knowledge or consent. (See, *Levin v. State Bar* (1989) 47 Cal.3d 1140, 1144-1148 [255 Cal.Rptr. 422]. See also, *In the Matter of Guzman* (Rev. Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 314.

- Cons: See "Cons" in paragraph 1. There is no reason to include these concepts in disciplinary rules when they already are found in statutes or case law, particularly the permissive second sentence concerning a lawyer's implied authority.

3. Recommend adoption of Model Rule 1.2(b), which disclaims that a lawyer's representation of a client is an endorsement of a client's views or activities.

- Pros: The purpose of paragraph (b) is articulated in proposed Comment [3] of the rule:

"Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of unpopular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities."

Bus. & Prof. Code § 6068(h) states that it is the duty of an attorney to "[n]ever reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed." Similarly, current rule 2-400(B)(2) states that a member shall not unlawfully discriminate, or knowingly permit unlawful discrimination, when accepting or terminating the representation of a client, a provision that would be carried forward in proposed Rule 8.4.1. These authorities are intended to support the policy of promoting access to justice. Promulgating such concepts should avoid a potential obstacle to access to justice and zealous representation by assuring members of the legal profession and the public that a lawyer's representation of an unpopular or otherwise notorious client is not an endorsement of the client's views or actions.

- Cons: The provision is aspirational and has no place in a set of disciplinary rules. If it were to be placed anywhere in the Rules, it should not be in the blackletter but perhaps as a comment to proposed Rule 1.0 or in a Preamble.

4. Recommend adoption of Model Rule 1.2(c), relating to a lawyer's ability to limit the scope of representation.

- Pros: Permitting lawyers and clients to engage in limited scope agreements is consistent with California case law and rules of court, and contributes to access to justice by making the availability of legal services more affordable. The "reasonable" limitation is consistent with California case law which clarifies that a lawyer may still have a duty to inform the client of reasonably apparent

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-210 [1.2]

**Lead Drafter:** Langford  
**Co-Drafters:** Clinch, Stout, Zipser  
**Meeting Date:** February 19-20, 2016

“legal problems,” even though a potential claim or defense might fall outside of the scope of the limited engagement.

For example, in *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1684 [19 Cal.Rptr.2d 601], a lawyer representing an injured worker sought to limit the scope of the representation to the client’s workers’ compensation claim and entered into an express agreement to that effect. The agreement did not mention the potential for a third-party tort claim. Subsequently, when the tort case was time-barred, the client brought a negligence action against the attorney for failing to inform the client about a potential third-party tort claim. In analyzing this claim, the Court of Appeal stated:

“One of an attorney’s basic functions is to advise. Liability can exist because the attorney failed to provide advice. Not only should an attorney furnish advice when requested, but he or she should also volunteer opinions when necessary to further the client’s objectives. The attorney need not advise and caution of every possible alternative, but only of those that may result in adverse consequences if not considered.” (*Nichols v. Keller*, supra, 15 Cal.App.4th 1672, 1683-1684.)

In addition to case law, California Rules of Court, rules 3.35 – 3.37 (limited scope rules applicable in civil matters generally), and 5.425 (limited scope rule applicable in family law matters) permit limited scope representation under certain circumstances. A driving force behind the adoption of these rules was increasing access to justice. Both of these rule provisions define limited scope representation as “a relationship between an attorney and a person seeking legal services in which they have agreed that the scope of the legal services will be limited to specific tasks that the attorney will perform for the person.”

- Cons: The provision is permissive and has no place in a set of disciplinary rules. The concept is already adequately addressed in Rules of Court and case law.
- 5. Recommend adoption of Model Rule 1.2(d), which would carry forward the substance of current rule 3-210, but with the additional clarifying language that a lawyer may explain the legal consequences of a client’s proposed course of conduct.
  - a. Current rule 3-210 is modified by adding the aforementioned clause concerning the consequences of a client’s proposed course of conduct.
  - b. Modifications to the Model Rule include:
    - (i) Dividing the Model Rule’s single sentence substantive provision that encompasses two separate concepts into two subparagraphs for clarity.
    - (ii) Substituting current rule 3-210’s term, “law, rule, or ruling of a tribunal” for the Model Rule’s term, “law.”
  - Pros: The paragraph, as amended, will carry forward the substance of current rule 3-210, which expressly prohibits lawyer from counseling or assisting a client in a criminal or fraudulent conduct, but permits the lawyer to counsel or assist the client in a good faith attempt to test the validity of a law, etc. The addition of the Model Rule clause that permits a lawyer to “discuss the legal consequences of

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-210 [1.2]

**Lead Drafter:** Langford  
**Co-Drafters:** Clinch, Stout, Zipser  
**Meeting Date:** February 19-20, 2016

- any proposed course of conduct with a client” is an important public protection addition, as it will assist a lawyer in attempting to dissuade a client from pursuing such a court of conduct.
- Cons: The addition of the permissive Model Rule clause does not belong in a set of disciplinary rules.
6. Recommend adoption of Comment [1], which is derived from RRC1 cmt. [1], and which identifies the specific statutory authority for the express exception in paragraph (a) concerning the client’s right to enter a plea in a criminal matter, and also provides a citation to a seminal California Supreme Court opinion on the allocation of authority between client and lawyer.
- Pros: The citations to the statute and case provide additional explanation to lawyers on how paragraph (a) should be applied, thus enhancing both enforcement and compliance with the Rule.
  - Cons: None identified.
7. Recommend adoption of Comment [2], which is identical to MR 1.2, cmt. [3] and RRC1 cmt. [3], and which clarifies that a lawyer may settle a matter on the client’s behalf with the client’s advance authorization.
- Pros: The comment provides important interpretive guidance regarding the meaning of a client’s decision to settle a matter, i.e., that the client’s decision to settle within specific parameters can be given in advance, revocable at any time. (See also State Bar Formal Ethics Op. 2002-160).
  - Cons: None identified.
8. Recommend adoption of Comment [4], which includes concepts from RRC1 cmts. [7] and [8], and which provides interpretative guidance regarding the application of paragraph (c), as well as providing cross-references to the California Rules of Court that expressly permit limited scope representation under certain conditions.
- Pros: Limited scope representation is an important component in the pursuit of making justice more accessible. (See discussion in paragraph 4, above.) This comment provides important guidance that an agreement to limit the scope of representation is not an agreement to limit the lawyer’s duty of competence and that the lawyer might still be required to advise the client of other rights or liabilities not within the scope of representation. Finally, the comment cross-references the Rules of Court that sanction limited scope representation.
  - Cons: See Cons related to paragraph (c), in paragraph 4, above.
9. Recommend adoption of Comment [5], which is identical to MR 1.2, cmt. [9] and RRC1 cmt. [9], and which explains the new clause that is being added to current rule 3-210, i.e., a lawyer’s ability to explain the consequences of a proposed course of conduct.
- Pros: The added clause is critical in providing the lawyer with an added tool in dissuading a client from a proposed course of action. Given that the clause would be new with this rule, it is important that lawyers understand that they do not have carte blanche to explain to a client how to conduct their affairs as to avoid criminal prosecution.
  - Cons: The blackletter language is sufficiently clear. There is no need for further explanation.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-210 [1.2]

**Lead Drafter:** Langford  
**Co-Drafters:** Clinch, Stout, Zipser  
**Meeting Date:** February 19-20, 2016

10. Recommend adoption of Comment [6], which is derived from MR 1.2, cmt. [10] and RRC1 cmt. [10], and which clarifies that the rule also applies when the client's conduct has already begun and is continuing. It also cautions that the lawyer must comply with the lawyer's duties under Bus. & Prof. Code § 6068(e)(1) and Rule 1.6 [3-100], and that the lawyer's only recourse if the client persists in illegal conduct may be resignation or withdrawal.
  - Pros: This comment brings proposed rule 1.2(d) in line with the Commission's proposed Rule 1.6 and Bus. & Prof. Code § 6068(e)(1) by re-emphasizing that a client's proposed illegal course of conduct does not necessarily permit the lawyer to report it to the authorities.
  - Cons: A lawyer's options when a client is intent on pursuing an illegal course of conduct is already adequately addressed in Rule 1.16 [3-700].
11. Recommend adoption of Comment [7], which is based on RRC1 cmt. [11] and has no counterpart in MR 1.2, and which clarifies the application of subparagraph (d)(2) concerning a client's testing the validity of a law, rule, or ruling of a tribunal.
  - Pros: In addition to providing interpretive guidance concerning subparagraph (d)(2), Comment [7] also addresses a lawyer's provision of legal advice and services to a client who contemplates engaging in civil disobedience. This comment, particularly the last sentence example, provides critical guidance on the application of the subparagraph.
  - Cons: The language of the blackletter of subparagraph (d)(2) speaks for itself. There is no need for further clarification.

### B. Concepts Rejected (Pros and Cons):

1. Include a blackletter provision or comment that recognizes that a lawyer does not violate Rule 1.2(d) by advising a client how to comply with California laws that permit the cultivation or sale of medical marijuana, notwithstanding that there is federal law to the contrary.
  - Pros: Advising a client how to comply with California law that permits the cultivation and sale of medical marijuana necessarily also constitutes advice on violating federal law regulating controlled substances, including marijuana. Lawyers should be able to provide advice to clients on how to comply with the law without the lawyer being subject to the specter of discipline for unavoidably "facilitating" the violation of federal law. Including such a provision would provide lawyers with sufficient assurance that they will not be subject to discipline. Although there are two recent ethics opinions that reason that a lawyer can provide legal advice and assistance to medical marijuana growers and sellers,<sup>8</sup> the opinions are advisory only with no precedential effect. At least six jurisdictions have adopted similar provisions,<sup>9</sup> and Vermont has a

---

<sup>8</sup> See note 1, above.

<sup>9</sup> See note 7, above.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-210 [1.2]

**Lead Drafter:** Langford  
**Co-Drafters:** Clinch, Stout, Zipser  
**Meeting Date:** February 19-20, 2016

similar provision under consideration. There is no reason why this Commission should not recommend adoption of a similar provision.

- Cons: Both recent ethics opinions, from the Bar Association of San Francisco and the Los Angeles County Bar Association, concluded that a lawyer can provide advice and assistance to medical marijuana growers and sellers under the current Rules of Professional Conduct. There is no apparent crisis in providing such services so there is no compelling need for a change in the Rule.
- 2. Include a provision similar to Model Rule 1.2, cmt. [10], which states that in some circumstances, a lawyer might be justified in making a “noisy withdrawal” and disaffirm a document or opinion that the lawyer has provided to a client.
  - Pros: Noisy withdrawal is appropriate in some circumstances to avoid harm to the public.
  - Cons: The concept of noisy withdrawal is inimical to California’s strong defense of client confidentiality. Any such withdrawal would be a violation of the lawyer’s duties under Rule 1.6 and Bus. & Prof. Code § 6068(e)(1).

### C. Changes in Duties/Substantive Changes to the Current Rule:

1. Although the proposed rule would add three provisions to current rule 3-210, (i.e., paragraphs (a), (b) and (c)), none of those provisions would be a substantive change in the current law of California. (See discussion in paragraphs A.2 through 4, above.)
2. The addition in subparagraph (d)(1) of the clause from the Model that provides a lawyer may discuss the consequences of a client’s proposed course of conduct is a substantive change. (See discussion in paragraph A.5, above.)

### D. Non-Substantive Changes to the Current Rule:

1. Substitute the term “lawyer” for “member.”
  - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
  - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).
  - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers,

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-210 [1.2]

**Lead Drafter:** Langford  
**Co-Drafters:** Clinch, Stout, Zipser  
**Meeting Date:** February 19-20, 2016

- the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
3. The title has been changed from Model Rule 1.2 to add the phrase, “and Limitations on Legal Advice” to more accurately reflect the rule’s content.
  4. As noted in paragraph C.1, above, paragraphs (a) through (c) of Model Rule 1.2 are not substantive changes. (See discussion in paragraphs A.2 through 4, above.)

**E. Alternatives Considered:**  
None.

### X. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

1. Whether to recommend adoption of Comment [3], which is identical to Model Rule 1.2, cmt. [5] and RRC1 cmt. [5], and which explains paragraph (b).
  - Pros: Paragraph (b) provides an important disclaimer that a lawyer’s representation of a client does not constitute the lawyer’s endorsement of the client’s views or conduct. Comment [3] adds an important link to the concept of access to justice, importantly stating that a person’s access to legal services should not be denied because of the controversy surrounding their cause.
  - Cons: The comment, particularly the second sentence, merely restates paragraph (b). If this comment has any place, it is in a Preamble or a pro bono rule.
2. Whether to recommend adoption of Comment [8], which is derived from MR 1.2, cmt. [13] and RRC1 cmt. [12], and which states that if the client expects the lawyer to provide the client with assistance not permitted by the Rules or other law, or if the lawyer intends to act contrary to the client’s wishes, the lawyer must explain the limitations on the lawyer’s ability to provide legal assistance.
  - Pros: This Commission has decided not to recommend adoption of MR 1.4(a)(5), which is nearly identical to proposed Comment [8].<sup>10</sup> The concept and guidance provided by Comment [8] should appear some place in the Rules. With the rejection of MR 1.4(a)(5), this is the logical place for it.
  - Cons: A lawyer’s duty to explain the limitations on the lawyer’s ability to provide legal assistance is already contained in proposed Rule 1.4, which requires a lawyer to communicate to the client significant developments in the representation, which would include limitations on the lawyer’s services. There is no need for a comment that would redundantly state that duty in a different rule. In any event, if the language

<sup>10</sup> Model Rule 1.4(a)(5) provides that a lawyer shall:

(5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law

## **DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-210 [1.2]**

**Lead Drafter:** Langford  
**Co-Drafters:** Clinch, Stout, Zipser  
**Meeting Date:** February 19-20, 2016

is included in the Rules, it should be in the blackletter of Rule 1.4.

### **XI. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS**

**Cardona**

- [Date]: Email Comment

**Langford**

- [Date]: Email Comment

**Zipser**

- [Date]: Email Comment

### **XII. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION**

**Recommendation:**

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 3-210 [1.2] in the form attached to this report and recommendation.

**Proposed Resolution:**

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 3-210 [1.2] in the form attached to this Report and Recommendation.

### **XIII. DISSENTING POSITION(S)**

None.

### **XIV. FINAL COMMISSION VOTE/ACTION**

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)