

**RRC2 – Rule 3-210 [1.2]**  
**E-mails, etc. – Revised (March 28, 2016)**  
**Drafting Team: Langford (Lead), Clinch, Stout, Zipser**

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**February 12, 2016 OCTC Memo to RRC:**

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**C. Rule 3-210 [Advising the Violation of Law]**

OCTC does not recommend any revisions to rule 3-210.

**February 14, 2016 Kehr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

Carol and all: Here are my thoughts on this draft ---

- 1) The first sentence of proposed paragraph (a) uses "communicate" rather than "consult", the latter being the word used in the last sentence of that paragraph, in the RRC-1 and MR versions of Rule 1.2, and in Rule 1.4(a)(2). The word "consult" is more indicative of the interactive process than is "communicate", and the change could cause confusion and mislead lawyers about what is expected of them.
- 2) Proposed paragraph (c) inserts "is not otherwise prohibited by law," a phrase not found in the RRC-1 or MR versions of this Rule. I was unable to locate any explanation in proposed Comments or elsewhere in the Report of what this limitation is intended to accomplish.
- 3) Proposed Comment [5] does not seem to do more than repeat the Rule, and the Comment could be eliminated.
- 4) In Comments [1] and [6], the word "section" is used instead of the symbol.

**March 23, 2016 Tuft Email to Drafting Team, cc Difuntorum, Mohr & A. Tuft:**

I offer the following comments to Draft 2 of proposed rules 1.2 and 1.2.1

**Rule 1.2**

1. Comment [1] The second sentence before the citation to Blanton v. Womancare is slightly out of context. The language is actually a quotation from Linsk v. Linsk (1969) 70 Cal.2d 272, 276. I think we should include a lead-in sentence along the following lines:

“An attorney retained to represent a client is authorized by reason of that relationship to act on behalf of the client, such as in procedural matters and in making certain tactical decisions. An attorney is not authorized, however, by virtue of the lawyer’s retention to impair the client’s substantial rights or the client’s claim itself.”

New York Rule 1.2(e) addresses this distinction differently (page 21 of the Report and Recommendation)

2. Comment [3] I recommend the comment be limited to the wording of Model Rule 1.2(b). The concept of providing legal services to those who can’t afford them seems out of place in this rule and should be included in a preamble or perhaps Rule 1.0. If the proposed comment is retained, I recommend changing “people” to “a person who is unable to afford legal services, etc.” Also, if the proposed comment is retained, a citation to Business and Professions Code §6068(h) might be appropriate.

**Rule 1.2.1**

1. Heading I recommend that the heading to Rule 1.2.1 be: “Advising or Assisting the Violation of Law”
2. Comment [1] The first two sentences repeat the black letter. To shorten the comment, I would reverse the third and fourth sentences as follows:

“There is a critical distinction under this Rule between presenting a client with 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 the lawyer a party to the course of action.”
3. Comment [2] I would change “is limited to” in the last sentence to “may be limited to.” Reason: the sentence read literally encourages lawyers to believe that the only course available when faced with client wrongdoing is to withdraw rather than to attempt to remonstrate with the client. See Rule 1.13(b).
4. Additional Comment: Several states, such as Massachusetts, include a provision in the rule that a lawyer does not violate this rule by acceding to reasonable requests of opposing counsel which do not prejudice the rights of the client, by avoiding offensive tactics or by treating with courtesy and consideration all persons involved in the legal process. We should think about including something along this lines in a comment or, alternatively, include a comment that a lawyer does not violate this rule by abiding by the State Bar’s Code of Professional Courtesy or codes of courtesy adopted by courts.
5. A Further Comment? Finally, D.C.’s rule 1.2 adds a paragraph (d) providing that a “government lawyer’s authority and control over decisions concerning the representation may, by statute or regulation, be expanded beyond the limits of paragraphs (a) and (c) [our proposed (b)]”.