

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2.1

Lead Drafter: Eaton
Co-Drafters: Inlender, Tuft
Meeting Date: August 26, 2016

I. CURRENT ABA MODEL RULE

**[There is no California Rule that corresponds to Model Rule 2.1,
from which proposed Rule 2.1 is derived.]**

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

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Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

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

III. PROPOSED RULE (CLEAN)

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Comment

[1] A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

[2] This Rule does not preclude a lawyer who renders advice from referring to considerations other than the law, such as moral, economic, social and political factors that may be relevant to the client's situation.

IV. PROPOSED RULE (REDLINE TO MODEL RULE 2.1)

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. ~~In rendering advice, a lawyer may refer not only to law but to other~~

Comment

[1] A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give

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advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

[2] This Rule does not preclude a lawyer who renders advice from referring to considerations other than the law, such as moral, economic, social and political factors,⁷ that may be relevant to the client's situation.

Comment

Scope of Advice

~~[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.~~

~~[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.~~

~~[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.~~

~~[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.~~

Offering Advice

~~[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the~~

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~~representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.~~

V. PUBLIC COMMENTS SUMMARY

- **Richard Zitrin, Law Professors, July 25, 2016 (written submission in support of public hearing testimony):** As was the case with the first rules commission, this commission has contemplated but has yet to draft a Rule 2.1, addressing the lawyer as advisor and, most importantly, the lawyer's exercise of "independent professional judgment." This is an important rule.

ABA Model Rule 2.1 reads as follows:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

We do not offer specific language to modify this rule, nor language for a comment consistent with the state's high court's advisement to this commission. However, we note that it is exceptionally important to include the term "independent professional judgment" in the rules. However, as we noted in the first ethics professors' letter, commission should fully vet a definition of this term, and must appreciate to not "equate 'independent professional judgment' with 'loyalty' – two vital and important concepts that are nevertheless not the same."

- **Richard Zitrin, Law Professors, March 3, 2014:** Believe that former proposed rule 2.1 needed strengthened comments, and caution against adoption of a definition of "independent professional judgment" without it being vetted.

VI. OCTC / STATE BAR COURT COMMENTS

- **JAMES E. TOWERY, OCTC, 8/27/2010:**

Rule 2.1. Advisor

1. OCTC is concerned about the new Comment 1 to this rule. It seems unnecessary. Further, the second sentence is ambiguous, confusing, and vague. That sentence reads: "Independent professional judgment is judgment not influenced by the duties, relationships or interests that are not properly part of the lawyer-client relationship." OCTC does not know

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what is meant by the term “not properly part of the lawyer-client relationship.” This term is vague and ambiguous. It could cause problems for attorneys in complying with this rule and problems for OCTC in enforcing the rule in a fair manner.

2. Likewise, OCTC is concerned about Comment 2, especially the third sentence in Comment 2: “In presenting advice, a lawyer endeavors to sustain the client’s morale and may put advice in as acceptable a form as honesty permits.” This comment, and particularly the third sentence, appears to impermissibly permit an attorney to balance the attorney’s concern with client morale with the attorney’s duty of candor, straightforward plain talking, and honesty to the client. This comment also seems to be at odds with proposed rules 1.4 and 1.2.

At the very least, the comment is confusing and suggests that attorneys can be less than fully candid and forthright with clients and can hold back on, color, or limit their advice to the clients because of the “attorney’s concern with client moral.” Attorneys, however, owe more than not lying to their clients; they owe their clients full candor and must disclose all significant facts to the clients unless prohibited by law.

They also owe the clients their untarnished advice. One of the attorney’s basic functions is 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. (See *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1683-1684.) Thus, this comment appears to be contrary to the lawyer’s obligation to his or her clients and could impair the client’s ability to make fully informed and reasoned decisions. It will also likely make enforcement of this important rule more difficult.

3. Comments 1, 2 and 3 seem more appropriate for treatises, law review articles, and ethics opinions.

- **RUSSELL WEINER, OCTC, 6/15/2010:**

Rule 2.1. Advisor

1. Comments 1 and 2 seem more appropriate for treatises, law review articles, and ethics opinions.

- **Commenter Name, State Bar Court:** No comments received from State Bar Court.

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

- **Delaware Rule 2.1** is identical to Model Rule 2.1:

Rule 2.1. Advisor

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render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social and political factors, that may be relevant to the client's situation.

Comment

[1] Scope of Advice. -- A client is entitled to straight forward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

[5] Offering Advice. In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

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The ABA State Adoption Chart for the ABA Model Rule 2.1, from which proposed Rule 2.1 is derived, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_2_1.authcheckdam.pdf
- Forty-five jurisdictions have adopted a rule that is the same as Model Rule 2.1 (AL, AZ, AR, CT, DE, DC, FL, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, UT, VT, VA, WA, WV, WI, WY); five jurisdictions have adopted a rule that is substantially similar to Model Rule 2.1 (AK, CO, GA, NM, TX,); only California has not adopted a rule derived from Model Rule 2.1 (CA).

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

A. Concepts Accepted (Pros and Cons):

1. General: Drafting Team consensus that a version of ABA Model Rule 2.1, as amended, be recommended to the Board for adoption.
 - Pros: In the current rules, independent professional judgment is mentioned expressly in only two limited circumstances: a lawyer's participation in a legal services program (Rule 1-600); and a lawyer's acceptance of fees from a third-party payor (Rule 3-310(F)). However, this professional responsibility is recognized as a core duty of a lawyer as evidenced by the adoption of a rule derived from Model Rule 2.1 by every other jurisdiction except California. It is a concept that underlies the conflict of interest rules. Adding proposed rule 2.1 highlights the importance of independent professional judgment and candid advice in a lawyer's role as an advisor and will remove any ambiguity whether the duty of independent professional judgment exists beyond the limited situations regulated by rules 1-600 and 3-310(F).
 - Cons: Model Rule 2.1 is a guidance rule and is used as a disciplinary standard in the states that have adopted it. In California, the disciplinary standard applicable to a lawyer's advice function is the competence rule, Rule 3-110.¹ For disciplinary purposes, a version of Model Rule 2.1 is unnecessary and contrary to the Commission's charter.
2. Delete the second sentence of Model Rule 2.1, modify it, and include it as Comment [2]. Drafting Team consensus.
 - Pros: As worded in Model Rule 2.1, this sentence is guidance on what a lawyer may aspire to do in rendering advice. It is not language of prohibition or a mandatory requirement. As such, it does not belong in the black letter; however, it is appropriate

¹ The State Bar Court Review Department has stated: "Whether attorneys communicate correct legal advice to their clients is addressed by rule 3-110(A) of the Rules of Professional Conduct of the State Bar. . . ." (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 149.)

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- as comment, if modified to be an explanation of what is not prohibited by the rule.
- Cons: Even as modified this language is at best aspirational guidance and at worst a substantive change to existing California law in that it could suggest that in no case would a lawyer ever be required to include, for example, political or economic considerations in giving advice. At present, the correctness of a lawyer's advice is governed by the competence rule (see footnote 1) and it is conceivable that a lawyer's failure to give advice on significant political or economic consequences that overshadow the legal considerations of a client's situation might subject that lawyer to discipline for incompetence.
3. Include as Comment [1] the last sentence of Model Rule 2.1, Comment [5]. Drafting Team consensus.
- Pros: Proposed rule 2.1 would be a new rule in California and including this sentence as Comment [1] should avoid a potential ambiguity in interpreting the scope of the duty imposed by the rule. This sentence clarifies that the rule does not impose in every case a duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted. Engaging in such conduct would be required only when doing so appears to be in the client's interest.
 - Cons: OCTC's August 27, 2010 comment (see above Section VI) from then Chief Trial Counsel James Towery cites *Nichols v. Keller* (1993) 15 Cal.App.4th 1672 for the proposition that an attorney might be under a duty to volunteer opinions and advice beyond the limits suggested by the terms of Model Rule 2.1 as explained by the Model Rule's comments.

B. Concepts Rejected (Pros and Cons):

1. Include a definition or explanation of "independent professional judgment" as used in the rule. Drafting Team consensus to reject this addition to the proposed rule.
- Pros: The meaning of "independent professional judgment" is the gravamen of this proposed new rule in California and a definition or explanation is needed to use this new rule for disciplinary purposes. Although OCTC opposed the definition drafted by the first Commission (see above section VI) as unclear, a different definition could be drafted.
 - Cons: The concept of independent professional judgment is not susceptible to a simple definition that can capture its import in every situation. It means different things in different contexts. Although generally there is a concern that a third party, e.g., a person paying the lawyer's fee, might interfere with the lawyer's representation of the client and provision of candid advice, (e.g., current rule 3-310(F)), there are situations where the lawyer must exercise independent judgment and provide the client with advice that the client may not want to hear, regardless of third party influence. For example, in *Thomas v. Tenneco Packaging Co.* (11th Cir. 2002) 293 F.3d 1306, the court sanctioned a lawyer for rude and abusive conduct that violated several rules of professional conduct or local court rules. In reply to the lawyer's argument that she merely was following orders from the client, the Court affirmed the sanction, in part because Georgia's equivalent of Model Rule 2.1

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requires lawyers to exercise independent professional judgment, and not just follow a client's wishes or orders. To capture all of the situations and nuances in which a lawyer's exercise of independent professional judgment is mandated is more appropriately the subject of an ethics opinion or treatise.

C. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:

1. The addition of an explicit duty of independent professional judgment in a lawyer's role as an advisor expands on a duty referenced in the limited situations of current rules 1-600 and 3-310(F) and is already impliedly recognized in current rules 1-310 and 1-320. On the one hand, to the extent that it expands the duty from these limited situations to general application when a lawyer acts as an advisor, it is a substantive change. On the other hand, exercising independent professional judgment and rendering candid advice are essential elements in a lawyer-client relationship based on trust and loyalty to the client and to that extent they are in fact not new duties.

D. Non-Substantive Changes to the Current Rule:

None.

E. Alternatives Considered:

None.

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

None.

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Eaton

- [Date]: Email Comment
- [Date]: Email Comment

Inlender

- [Date]: Email Comment
- [Date]: Email Comment

Tuft

- [Date]: Email Comment
- [Date]: Email Comment

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XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed rule 2.1, derived from ABA Model Rule 2.1 as amended, 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 2.1, derived from ABA Model Rule 2.1 as amended, in the form attached to this Report and Recommendation.

XII. DISSENTING POSITION(S)

None.

XIII. FINAL COMMISSION VOTE/ACTION

[Date of Vote]

[Action: Proposed amended rule adopted or not adopted]

[Record of Roll Call Vote]



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July 25, 2016

Hon. Lee Smalley Edmon, Chair
and all members
Second Commission for the Revision of the Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105
BY U.S. MAIL and EMAIL c/o Lauren.McCurdy@calbar.ca.gov

Re: Comment on proposed rules of professional conduct

Dear Chair Edmon and members of the Commission:

Please consider this comment on behalf of each of the undersigned, each currently or in the recent past a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and, in some cases, other significant identifying information. The information is for identification purposes only.

Introductory remarks:

Preliminarily, groups of ethics professors have written to the State Bar Board in 2010 and the Supreme Court in 2014¹ concerning the first rules commission's work product. We note the following points made in those letters:

First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law.

Second, we believe that in the past, taken as a whole the proposed rules have fallen short in their charge, first and foremost, to protect clients and the public. Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

We now add to those points. Thus, third, we applaud much of the work product of this second commission. It is significantly more client- and public-protective than the first commission's work product. We also commend this commission for its ability to get these rules

¹ Respectively, Letter of June 15, 2010 to State Bar Board of Governors signed by 30 California law professors who teach legal ethics; and Letter of March 3, 2014 to each member of the California Supreme Court, signed by 55 California law professors who teach legal ethics. These letters are substantively identical. We will refer to them here as the "first ethics professors' letter."

to public comment on a tight timetable while still seeking to meet the goals of both the rules and the charge from the California Supreme Court. There are still important issues – see below, Part II – but many positive steps have been taken.

Fourth, we believe that within the Court's charge to the second commission, the black-letter rules and brief comments should serve not only as rules of discipline for those lawyers accused of offenses, but as guidance for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Few California lawyers have the level of sophistication that members of the Rules Commission have, and they need this guidance. For the most part, we believe the commission has successfully provided it.

Three preliminary notes:

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about this rules draft. There are a number of issues we have left unaddressed, such as proposed rules 6.1 (not adopted), 3.10, 1.8.10, the chapter 5 series, and others.
2. While the signatories have all concurred in the entire text of this letter, some would have expressed their agreement in somewhat different language than the drafters have used. Additionally, when we refer to other, earlier ethics professors' letters and reference the pronoun "we," this should not be taken to mean that the signatories here are identical to those on other letters. We use it for convenience; the signatures on each letter including this one speak for themselves. This letter will be updated during public comment as new signatories are added.
3. We have divided the letter into three parts: first, proposed rules that have been modified since the first commission with which we largely agree; second, rules where we still have significant concerns and thus specific recommendations for modifications; and third, rules on which we have commented without a recommendation either way. **Bolded** rules relate to those rules we believe are most significant.

[TEXT OMITTED]

[TEXT OMITTED]

III. **Other comments and observations.**

1. **Model Rule 2.1:**

As was the case with the first rules commission, this commission has contemplated but has yet to draft a Rule 2.1, addressing the lawyer as advisor and, most importantly, the lawyer's exercise of "independent professional judgment." This is an important rule.

ABA Model Rule 2.1 reads as follows:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

We do not offer specific language to modify this rule, nor language for a comment consistent with the state's high court's advisement to this commission. However, we note that it is exceptionally important to include the term "independent professional judgment" in the rules. However, as we noted in the first ethics professors' letter, commission should fully vet a definition of this term, and must appreciate to not "equate 'independent professional judgment' with 'loyalty' – two vital and important concepts that are nevertheless not the same."

[TEXT OMITTED]