

**Rule 1.2.1 [3-210] Advising or Assisting the Violation of Law
(Commission's Proposed Rule Adopted on March 31 – April 1, 2016
– Clean Version)**

- (a) A lawyer shall not advise or knowingly* assist a client in the violation of any law, rule, or ruling of a tribunal* unless the lawyer believes* in good faith that such law, rule, or ruling is invalid. A lawyer may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.
- (b) A lawyer shall not advise or knowingly* assist a client in a fraudulent* act.
- (c) A lawyer may discuss the legal consequences of any proposed course of conduct with a client.

Comment

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

[2] Paragraphs (a) and (b) apply whether or not the client's conduct has already begun and is continuing. In complying with this Rule, a lawyer shall not violate the duty of confidentiality 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] 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.

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

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

Rule 1.2.1 Advising or Assisting the Violation of Law

- (a) A lawyer shall not advise or knowingly assist a client in the violation of any law, rule, or ruling of a tribunal unless the lawyer believes in good faith that such law, rule, or ruling is invalid. A lawyer may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.
- (b) A lawyer shall not advise or knowingly assist a client in a [criminal¹ or](#) fraudulent act.
- (c) A lawyer may discuss the legal consequences of any proposed course of conduct with a client.

Comment

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

[2] Paragraphs (a) and (b) apply whether or not the client's conduct has already begun and is continuing. In complying with this Rule, a lawyer shall not violate the [lawyer's duty under Business and Professions Code § 6068\(a\)² to uphold the Constitution and laws of the United States and California or the](#) duty of confidentiality 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] 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.

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

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

[6] [This Rule does not preclude a lawyer from advising a client regarding the validity, scope, and meaning of California laws concerning marijuana-related laws, \[CITATIONS\], or from assisting a client in conduct that the lawyer reasonably believes is permitted by California statutes, regulations, orders, and other state or local provisions implementing them. If California](#)

¹ The drafting recommends adding the phrase "criminal or" to paragraph (b) in response to the [July 26, 2016 Law Professors' letter](#).

² [Reference to duty under B&P Code § 6068\(a\) added at drafting team's request.](#)

law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.³

³ Based in part on Colorado Rule 1.2, cmt. [14], which provides:

[14] A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.

Nevada has a nearly identical comment. See Nevada Rule 1.2, cmt. [1].

Rather than being written as permissive, the comment has been reformatted to use the clarifying comment language typically used in the proposed Rules.

The second sentence is taken from Alaska Rule 1.2(f), which provides for an express exception in the Rule text:

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.

Other provisions reviewed by the drafting team include

1. Washington Rule 1.2, cmt. [14], which provides:

At least until there is a change in federal enforcement policy, a lawyer may counsel a client regarding the validity, scope and meaning of Washington Initiative 502 (Laws of 2013, ch. 3) and may assist a client in conduct that the lawyer reasonably believes is permitted by this statute and the other statutes, regulations, orders, and other state and local provisions implementing them.

2. Oregon, which similar to Alaska provides in its Rule 1.2(d):

(d) Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding Oregon's marijuana-related laws. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy.

TOTAL = XX	A =	X
	D =	X
	M =	X
	NI =	X

[illegible]

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED



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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]

II. **Rules requiring revision.**

1. **Model Rule 1.2.1:**

We do not understand why assisting in a “crime” is not part of the MR 1.2.1(b) prohibition. We note that it is, correctly in our view, part of the comment, paragraph 1. This important comment, emphasizing the “critical distinction” also noted in the comment to the ABA rule, includes both “crime” and “fraud.” The rule should too.

[TEXT OMITTED]