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**August 5, 2016 Lee Email to Drafting Team, cc Chair, Difuntorum, Mohr, McCurdy, Marlaud & Hollins:**

Rule 1.2.1 Drafting Team:

We have received a public comment on proposed Rule 1.2.1. Please review the attached comment in preparation for the August 26<sup>th</sup> meeting. In addition, a public comment synopsis table is attached. Staff will insert the brief synopses of these comments shortly and upload an updated copy to the Dropbox folder.

Following review of the public comments, please do one of the following:

1. If the drafting team believes the comment(s) received warrant a revision to the proposed rule, please submit an annotated revised rule draft responsive to the public comment(s);

OR

2. If the drafting team believes the comment(s) received DO NOT warrant further revision to the proposed rule, please either present the drafting team's recommendation to reject the commenter's points in a memo format, and/or by filling in a recommended RRC Response in the attached public comment synopsis table, or providing that "blurb" in an email for staff to place in the synopsis table.

Please submit either of these items to all those copied on this message by **Monday, August 15<sup>th</sup> at 10:00 am** for circulation with the August 26<sup>th</sup> agenda materials. If you would like the assistance of staff to schedule/notice a conference call for your drafting team to discuss the comment(s), please include all those copied on this message with that request as some admin. staff will be out of the office (Angela is out until 8/12/16).

**IMPORTANT:** Going forward, all public comments submitted will be uploaded to Dropbox as they are received. We encourage you to regularly check the Dropbox folder for the rules you are assigned to monitor incoming comments. It will not be administratively practical for staff to send comments to each drafting team every time they are received as there are simply too many rule topics to manage in this manner. You can find the public comments on Dropbox:

<http://bit.ly/RRC2014>

Navigate as follows: Public Comments/Comprehensive 90-Day Public Comment Circulation (June 2016)

*(At the top of this folder there is a "File List" document with a table listing all comments received by rule number.)*

**OR** You can find the comments in the individual rule folders: RULES/X Rule/Public Comments

Thank you for your work on this next phase of rule revision work.

Attached:

RRC2 - [3-210][1.2.1] - Public Comment Synopsis Table - REV (8-05-16).doc

RRC2 - [3-210][1.2.1] - PubCom - X-2016-32I-Law Professors (Zitron) [1.2.1]-PH.pdf

**August 10, 2016 Difuntorum Email to Drafting Team, cc Mohr, McCurdy & Lee:**

As context for the issue raised by the Zitrin/law professors comment (attached), see [Los Angeles County Bar Association Op. No. 527](#). An excerpt from this ethics opinion is provided below for convenient reference. While the Zitrin/law professors comment does not mention medical marijuana laws, it does pose the basic question of whether the Commission's proposed rule 1.2.1 is intended to apply to a lawyer's conduct that could be characterized as assisting in a crime. However, also provided below is an excerpt from the State Bar Court Reporter Digest in which a Review Department case is summarized and includes a statement that a lawyer must not assist a client in committing a crime. –Randy D.

*EXCERPT FROM L.A. OPN. NO. 527*

There are two California provisions that address these questions. First, Rule of Professional Conduct 3-210 states:

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.

Second, Business and Professions Code Section 6068(a) states that it is an attorney's duty to "support the Constitution and laws of the United States and of this state."

California does not have a rule of professional conduct that specifically prohibits a lawyer from assisting a client in engaging in an action that the lawyer knows is a crime. Under Business and Professions Code Section 6106, "[t]he commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." But as the California Supreme Court has observed, "discipline may be imposed only for criminal conduct having a logical relationship to an attorney's fitness to practice, and [the] term 'moral turpitude' must be defined accordingly." (*In re Lesansky*, 25 Cal. 4th 11, 14 (2001).) Providing legal advice regarding compliance with California law in a manner that is consistent with a lawyer's professional responsibility would not reflect negatively on a lawyer's fitness to practice law, and, therefore, without more, would not constitute moral turpitude.

By contrast, ABA Model Rule 1.2(d) states that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."

While the Model Rule is comparable to Rule 3-210 in prohibiting a lawyer from advising a client to violate the law, there is no corresponding prohibition in Rule 3-210, or Section 6068(a), or elsewhere in the State Bar Act or the California Rules of Professional Conduct, on assisting a client in conduct that the lawyer knows is

criminal. The issues under the applicable California rules are (i) whether advising a client regarding compliance with California law regarding cultivation, distribution, and use of marijuana is also advising a client to violate federal law, and (ii) whether advising or assisting a client in complying with California law regarding the cultivation, distribution, and use of marijuana, while supportive of California law, is nevertheless a violation of Section 6068(a) because it is not supportive of the laws of the United States.

Neither of these rules is clear on these questions.

*EXCERPT FROM STATE BAR COURT REPORTER DIGEST (at p. 430)*

The whereabouts of a fugitive client known to an attorney constituted privileged communications which the attorney cannot disclose. (Bus. & Prof. Code, § 6068 (e); ABA Model Rules, rule 1.6.) The attorney must advise the client to surrender and must not assist or facilitate the fugitive in avoiding capture or committing a crime. Thus respondent's knowledge that his fugitive client was in California and his meetings with the client to discuss the progress of negotiations with the authorities regarding the outstanding criminal charges were client confidences which respondent was obligated to preserve. However, an attorney's ethical duty not to disclose client confidences does not extend to affirmative acts which further a client's unlawful conduct, and respondent's guilty plea constituted conclusive proof that he committed all the acts necessary to commit the charged offense of harboring his fugitive client with the intent of preventing the client's discovery and arrest by federal authorities. *In the Matter of De Massa (Review Dept. 1991)* 1 Cal. State Bar Ct. Rptr. 737.

**August 10, 2016 Mohr Email re 1.2.1 to Drafting Team, cc Difuntorum, McCurdy & Lee:**

I've attached draft 4 of proposed Rule 1.2.1, redline, compared to draft 3, the draft the Commission previously approved. With thanks to Randy, I've made the additions that were discussed during the teleconference earlier this afternoon. There are three alternative comments, which are similar to one another.

A black letter exception is not included in the rule but the footnotes include language from two jurisdictions that have such an exception: Alaska and Oregon. Alaska Rule 1.2(f) is the basis for ALT3.

As discussed during the teleconference, it's hoped that the drafting team can agree on a single proposed comment for inclusion in the agenda materials (with the remaining examples as backup that can be brought out during the meeting.)

Please let me know if you have any questions. Thanks,

Attached:

RRC2 - [3-210][1.2.1] - Rule 1.2.1 - DFT4 (08-10-16) - Cf. to DFT3 (04-01-16).docx

**August 10, 2016 Langford Email re 1.2.1 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

Kevin Mohr is to draft language for us and we will talk about it via email.

**August 11, 2016 Clinch Email re 1.2.1 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

I read Kevin's proposed modifications to RRC2 - Rule 1.2.1.[3-210] and believe Alternative 1 to be the best choice. However, I suggest we include the words "and tribal" in the second sentence, between "related federal" and tribal "law and policy." The "and tribal" used in the Oregon statute is also applicable in California, particularly since most tribal lands have sovereign rights.

**August 11, 2016 Langford Email re 1.2.1 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

I like Alt 1. I don't think we need tribal law as that is covered by Federal law, right? I don't think we need the 6068 part, though.

**August 12, 2016 Clinch Email re 1.2.1 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

I will withdraw the tribal law suggestion.

**August 14, 2016 Stout Email re 1.2.1 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

I've taken the liberty of suggesting another alternative below...

I have combined parts of Alt 1 and Alt 3, so to retain the language from the first sentence of Alt 1 (that I believe Carol prefers...and I agree), and also capture the advantage that Kevin noted with respect to the last sentence of Alt 3, of not having to revisit the Rule should federal law change. I have also utilized the Oregon language of "marijuana-related laws."

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

I did not include reference to tribal law...As you may be aware, California is a Public Law 280 state, so I'm not sure it's necessary, but I haven't completely wrapped my brain around this aspect. Attorney Jennifer Walter, lead staff to the Judicial Council's Tribal Court/State Court Advisory Committee would be a good resource. E-mail: [jennifer.walter@jud.ca.gov](mailto:jennifer.walter@jud.ca.gov) Justice Dennis Perluss and Judge Abby Abinanti co-chair the Committee.

I appreciate Carol's concern, but am still wondering if this particular exception, like Oregon, should be in the black letter.

**August 14, 2016 Langford Email re 1.2.1 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

I very much like Dean's language.

**August 14, 2016 Clinch Email re 1.2.1 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

So do I. I will try to contact Jennifer Walter Monday morning re the tribal law issue.

**August 18, 2016 Difuntorum Email re 1.2.1 to Drafting Team, cc Mohr, McCurdy & Lee:**

CNBC article re attorney professional responsibility concerns in advising clients on marijuana issues.

<http://www.cnn.com/2016/08/18/attorneys-caught-in-haze-as-pot-firms-look-for-assistance.html>

**August 18, 2016 Langford Email re 1.2.1 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

I had seen this. New Mexico, however, is extremely strict in its discipline. I know this because I guest taught at U. New Mexico School of Law and talked at length to the Dean.

**August 18, 2016 Clinch Email re 1.2.1 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

I followed Dean's suggestion and contacted Jennifer Walter, an attorney with the Judicial Council who specializes in Indian legal issues. She was very excited when I told her about our discussion of whether or not to include "and tribal" in the last sentence of Comment 6. She informed me there are 23 Tribal Courts in California, each with its own tribal laws. All of the Tribal Courts handle civil matters and some also handle criminal matters (i.e., misdemeanors and infractions). Due to lack of sufficient federal funding to run the Tribal Courts, some Tribal Court Judges have been able to sit as Superior Court Judges. Usually this is accomplished by memorandums of understanding between the Superior Courts and Tribal Courts. Dean and Jennifer know more about this issue than I do, and both advised me that it would be appropriate to add "and tribal" to Comment 6.

Jennifer is in the process of discussing this issue with several attorneys who work for the Judicial Council to obtain more information.

By this e-mail I am suggesting we consider including "and tribal" to Comment 6, if it isn't too late to do so.

**August 18, 2016 Stout Email re 1.2.1 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

I agree. Thanks, Nanci.

**August 18, 2016 Difuntorum Email re 1.2.1 to Drafting Team, cc Mohr, McCurdy & Lee:**

It is not too late. In the posted agenda materials, the annotated version of the drafting team's proposed rule 1.2.1 includes a footnote to Comment [6] (Footnote No. 3) that provides the text of the Oregon rule. The Oregon rule refers to "federal or tribal law." Please do exchange further emails on this issue within the drafting team as we expect to post email compilations next week. The email compilation can serve to tee-up the tribal law issue for the drafting team's presentation to the full Commission.

**August 19, 2016 Stout Email re 1.2.1 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

Just noticed an interesting decision in the *Daily Journal*

*U.S. v. McIntosh*, 2016 DJDAR 8484  
No. 15-10117  
United States Court of Appeals  
Ninth Circuit  
Filed August 16, 2016

It doesn't change my opinion on the continuing need for an exception re marijuana, but an interesting decision nonetheless.

Front page article can be found in the Los Angeles Daily Journal, Vol. 129, No. 159, Wednesday August 17, 2016.