

**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 ~~criminal or~~ fraudulent act.¹
- (c) A lawyer may discuss the legal consequences of any proposed course of conduct with a client.
- (d)² [ALT1-A] Notwithstanding paragraph (a), this Rule does not preclude a lawyer from advising a client regarding the validity, scope, and meaning of California laws such as laws related to the cultivation and sale of marijuana, 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 those laws. If California law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal or tribal law and policy.

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.

¹ Per 8/26/16 meeting deliberations, consensus of Commission to delete reference to criminal in paragraph (b) on the theory that criminal law is included in the reference to "any law" in paragraph (a). Nevertheless, given the confusion the deletion of any reference to "criminal law" in paragraph (b) has caused the law professors, it was proposed during the drafting team's 9/7/16 teleconference to recommend the addition of a comment to clarify that paragraph (a) includes criminal law. See Comment [2] and note 3.

² During the 8/26/16 Commission meeting, the drafting team was directed to propose a more general statement that a lawyer can advise and assist a client to conform the client's conduct to California law even if that law conflicts with federal law. Paragraph (d) has been added to conform to that direction, with the specific example of marijuana laws included as suggested during the Commission meeting.

The drafting team recommends that the exception be placed in the black letter, similar to provisions in the corresponding Oregon and Alaska rules, rather than in a comment.

In addition, the drafting team notes that Ohio is currently considering adding a black letter provision about marijuana advice to its version of MR 1.2. See:

[http://www.supremecourtsohio.gov/ruleamendments/documents/med%20marijuana%20leg%20\(as%20published%20for%20public%20comment\).pdf](http://www.supremecourtsohio.gov/ruleamendments/documents/med%20marijuana%20leg%20(as%20published%20for%20public%20comment).pdf)

[2] The reference to “law” in paragraph (a) includes criminal law.³ 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) 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~~.⁴

[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).

³ During 9/7/16 teleconference, it was decided to recommend including a comment to clarify that the reference to “law” in paragraph (a) includes criminal law. Although some members of the Commission believe that is obvious, the letter submitted by the law professors indicates it is not so obvious and requires clarification.

⁴ Brackets removed because the Commission has now recommended adoption of proposed rule 1.16.