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**September 23, 2016 Kehr Email re 1.2 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

In rereading this draft in preparation for our next meeting, I became troubled by the underlined portion of proposed paragraph (b):

A lawyer may limit the scope of the representation if the limitation is reasonable\* under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.

Much of that paragraph, including the underlined language, was taken directly from MR 1.2(c). I'm afraid that the indefiniteness of "reasonable" in this context is an example of the frequent wooliness of the MR drafting style. We provide an explanation in proposed Comment [4], but I see two problems with that. One is that discipline for violating Rue 1.2(b) almost certainly would be based on a lack of competence, but it is not certain that competence is included in the Rule (and a Comment cannot be the basis for discipline). The second is that I have trouble seeing the connection with Rule 1.8.1. Please consider this alternative for paragraph (b):

A lawyer may limit the scope of ~~a the~~ representation if the limitation permits the lawyer to provide competent representation ~~is reasonable\* under the circumstances~~, and is not otherwise prohibited by law, and the client gives informed consent.

I then would remove the Rule 1.1 and 1.8.1 references from Comment [4].

I'm also concerned with the "not otherwise prohibited by law" and by the references to certain Rules of Court on Comment [4]. Perhaps I misunderstand either the Rule or the effect of the Rules of Court, but doesn't this seem to create the risk of professional discipline for violating a Rule of Court that itself contemplates no such consequence?

I look forward to seeing you all next week.

**September 23, 2016 Langford Email re 1.2 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

Robert you drafted fast; re-read what you wrote, as it sounds odd. Also recall with your approval we use reasonable in the advertising Set of rules.

**September 24, 2016 Kehr Email re 1.2 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

Yes, there is a glitch. The word "competence" should have been "competent". I had intended to suggest:

A lawyer may limit the scope of ~~a the~~ representation if the limitation permits the lawyer to provide competent representation under the circumstances, and is not otherwise prohibited by law, and the client gives informed consent.

The use of "reasonable" works in many situations, but here it seems to me merely to hide the point of the paragraph. A limitation is "reasonable" if it permits the lawyer to provided competence legal services, so why not say this directly?

**September 24, 2016 Langford Email re 1.2 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

Wait. The limitation is looked at when it was put in the fee agreement usually. A test you suggest means the lawyer always passes, because he can say he always thought he'd be competent. It is not as client protective. But "reasonable" looks to whether he should have limited the representation in the first place or continued with the limitation, in light of developments in the case.

Experts determine reasonableness, and competence too, in discipline and legal malpractice cases. There is no difficulty in that; of course experts will disagree but that is there always.

**September 24, 2016 Mohr Email re 1.2 to Kehr, cc Drafting Team, Difuntorum, McCurdy & Lee:**

The term "reasonable" is defined in Rule 1.0.1(h) as follows:

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer. (Emphasis added).

We have put an asterisk next to each defined term to signal to the reader it is a defined term. The concept of competence is already contained in "reasonable". To make your recommended change here would suggest that the Commission should make the same change in those places where the concept of "reasonable" is intended to refer to "competent" conduct. I don't think that should be done. Moreover, every other jurisdiction in the country uses the same "reasonable" language except Miss, N.D. and Texas (none of those jurisdictions require that the limitation be "reasonable" or otherwise be one under which the lawyer can provide competent representation.) Substituting your language will just cause confusion as to whether California intends something different by that phrase. It is an unnecessary change as it would be incompetent (i.e., unreasonable) for a lawyer to limit the representation if that limitation would result in the lawyer being unable to provide competent representation.

**September 24, 2016 Langford Email re 1.2 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

I am with Kevin on this one.

**September 24, 2016 Kehr Email re 1.2.1 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

I have two concerns about the most recent edits to this proposed Rule, one a drafting point and one substantive.

The drafting issue is that the first sentence of proposed paragraph (d) is intended to address the situation in which there is a conflict between state and federal law but doesn't say so. It suggests that conflict only by referring to paragraph (a), but I think many would find that confusing. Why not do something specific and direct, perhaps along these lines:

Notwithstanding paragraph (a), ~~this Rule does not preclude a lawyer~~ may advise from ~~advising a client regarding the validity, scope, and meaning of California laws such as~~ advising a client regarding the validity, scope, and meaning of California laws ~~laws related to the cultivation and sale of marijuana, or from assisting , and may assist~~ and may assist 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, even if that law or conduct might violate Federal law.

The substantive issue is that the second sentence appears to impose on the lawyer the obligation to provide legal advice even if the lawyer is not competent to do so. The problem stems from the use of “shall”.

If California law conflicts with federal or tribal law, the lawyer **shall** also advise the client regarding related federal or tribal law and policy.

This presumably is based on *Nichols v. Keller*, 15 Cal. App. 4th 1672, 1683-84 (1993) (“One of an attorney’s basic functions is to advise ... 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. The attorney need not advise and caution of every possible alternative, but only of those that may result in adverse consequences if not considered.”). However, the opinion in *Nichols* only requires a lawyer to point out what a competent lawyer would recognize, not to provide advice on the topic if, for example, the lawyer is not competent to do so or the client is unwilling to receive that advice. My preferred solution to this would be to remove the sentence entirely. The lawyer’s obligation in the situation addressed by that sentence is handled fully in the *Nichols* line of cases. I don’t see the need to capture that standard in rule form.

One more thing caught my eye. Proposed Comment [5] includes this phrase: “... if the lawyer intends to act contrary to the client’s instructions, ....” (this was borrowed from MR 1.2, Comment [13]). I am troubled by the mischief creating possibility that some lawyers might think this gives them a blank check to ignore clients’ directions, or in later disputes will claim it does. This is another situation in which the right of a lawyer to make decisions is the subject of case law, such as *Blanton v. Womancare, Inc.*, 38 Cal. 3d 396 (1985), and I don’t think there is any easy way to capture that here. Because I think the point made in the quoted phrase is important and worth saving, my suggestion is to do something along these lines:

... if the lawyer intends to act contrary to the client’s instructions when permitted to do so, ....

**September 24, 2016 Mohr Email re 1.2.1 to Kehr, cc Drafting Team, Difuntorum, McCurdy & Lee:**

A few responses to your suggestions:

1. The drafting team was specifically directed to move the comment that provided an exception to the rule into the black letter, make it more generally applicable, but provide specific example(s) as to what is being covered. Your suggestion to remove the reference to marijuana laws goes against that directive. More important, the drafting team discussed whether an example was necessary and concluded it was; otherwise your average lawyer would scratch his or her head and wonder whether that Supremacy Clause discussion during Constitutional Law was a figment of their imagination. Further, but for the relatively unique situation involving medical marijuana and general legalization of marijuana use in a number of jurisdictions, this issue would never have been addressed in this rule. If there is an exception, then the reference to marijuana laws is probably necessary.
2. As to the second sentence, every jurisdiction but one (Washington) that has adopted a similar exception includes that sentence or something similar. While *Nichols v. Keller* might be authority for that requirement, how many lawyers actually are aware of it? The programs that I

have given suggest that not many are familiar with the case or its holding. This is a codification and I think it is a necessary adjunct to the first sentence.

a. I don't understand in the context of this provision your statement that "Nichols only requires a lawyer to point out what a competent lawyer would recognize, not to provide advice on the topic if, for example, the lawyer is not competent to do so or the client is unwilling to receive that advice." Here, a lawyer is providing advice or assistance about California law that is in conflict with federal law. It strikes me that a lawyer who enters such a perilous situation had better be sufficiently competent to have determined whatever law applies to the client's matter, recognize the conflict, and so advise the client. I'm also not sure that whether the client is "unwilling to receive that advice" is relevant to whether the lawyer has a duty to give that advice.

b. In sum, I think it important that the second sentence stay in the black letter. Paragraph (d) provides an unusual exception in a situation where a lawyer, by advising and assisting a client to conform the client's conduct to California law, will, at the same time, necessarily advise and assist the client in the violation of federal law. Under those circumstances, it seems necessary to require the lawyer to apprise the client that there is a conflict with federal law. After all, the requirement only applies "if California law conflicts with federal or tribal law."

3. I think your suggested clause, "even if that law or conduct might violate Federal law," should be included, at least in concept. Given the reference in the second sentence to tribal law, it should also appear in your suggested clause.

4. You make an important point re comment [5] but I wonder the qualifying language should also include those situations where the lawyer is "required" to do so as well:

"... if the lawyer intends to act contrary to the client's instructions when required or permitted to do so, ...."

