

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 fraudulent act.
- (c) A lawyer may discuss the legal consequences of any proposed course of conduct with a client.
- (d) **[ALT1]** Notwithstanding paragraph (a), this Rule does not preclude a lawyer from advising a client regarding the validity, scope, and meaning of California 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 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.

[2] The reference to "law" in paragraph (a) includes criminal law. 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.

[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] **[ALT1]** Paragraph (d) recognizes that in certain situations, state or local laws might conflict with federal or tribal law, for example, laws that relate to the cultivation and sale of

marijuana or involve the establishment of sanctuary cities. Under such situations, a lawyer may advise a client regarding those laws or assist the client in complying with California law, as long as the lawyer advises the client about the relevant federal or tribal law or policy.

[6] **[ALT2]** 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 involve the establishment of sanctuary cities, 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.

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- (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.
- (d) [\[ALT1\]](#)¹ 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.

[2] The reference to "law" in paragraph (a) includes criminal law. 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.

[1 Per consensus of Commission at 9/30/16 meeting, example of marijuana laws deleted from the black letter.](#)

[Note, however, that there are three options because there did not appear to be a consensus whether the exception should \(1\) appear in the black letter, \(2\) appear in the comment, or \(3\) be removed entirely from the rule, as each position was stated but no vote was taken. In favor of the latter position is the fact that the conflict between federal and state law regarding marijuana laws is likely transitory in nature. However, it was also noted that there is a similar discrepancy between federal law and local laws establishing sanctuary cities, and this does not appear to be transitory.](#)

[After consideration of the foregoing options, the drafting team recommends retaining the general exception in the black letter but include examples of what is intended in a comment. This approach is denominated **ALT1** and implements option 1.](#)

[The drafting team has also included a standalone comment that includes the exception, intended as an alternative to ALT1, which is denominated **ALT2** and implements option 2.](#)

[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] [\[ALT1\]² Paragraph \(d\) recognizes that in certain situations, state or local laws might conflict with federal or tribal law, for example, laws that relate to the cultivation and sale of marijuana or involve the establishment of sanctuary cities. Under such situations, a lawyer may advise a client regarding those laws or assist the client in complying with California law, as long as the lawyer advises the client about the relevant federal or tribal law or policy.](#)

[6] [\[ALT2\]³ 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 involve the establishment of sanctuary cities, 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.](#)

² [See note 1.](#)

³ [See note 1.](#)

To: Rules Revision Commission
From: State Bar Staff
Re: Proposed Rule 1.2.1, paragraph (d) & related comment
Kehr proposed revised paragraph
Date: October 17, 2016

Attached is a suggested revision to paragraph (d) of Rule 1.2.1, Draft 6 (10/2/2016), as proposed by the drafting. It was prepared by Bob Kehr, with Kevin Mohr's assistance, for the Commission's consideration at the October 21-22, 2016 Meeting.

Kehr Draft of Rule 1.2.1(d) & Related Comment, CLEAN, Compared to Drafting Team's Draft 6 (10/2/2016):

- (d) Paragraph (a) does not preclude a lawyer from advising a client on (i) the validity, scope and meaning of, or (ii) compliance with, California law that conflicts with federal or tribal law, so long as the lawyer also advises the client regarding the conflicting federal or tribal law and policy.

[6] The paragraph (d) reference to California law includes state and local statutes, ordinances, regulations, orders, and other provisions of law. Paragraph (d) recognizes that in certain situations, California law might conflict with federal or tribal law, for example, laws that relate to the cultivation and sale of marijuana or involve the establishment of sanctuary cities. In such situations, a lawyer may advise a client regarding those laws, or assist the client in complying with California law, as long as the lawyer advises the client about the relevant federal or tribal law or policy. Moreover, even if a client might be violating federal or tribal law, paragraph (d) does not prevent a lawyer from representing the client in matters unrelated to the validity, scope or meaning of, or compliance with California law, such as representation on corporate, tax, or real estate issues.

Kehr Draft of Rule 1.2.1(d) & Related Comment, REDLINE, Compared to Drafting Team’s Draft 6 (10/2/2016):

(d) ~~Notwithstanding p~~Paragraph (a), ~~this Rule~~¹ does not preclude a lawyer from advising a client ~~regarding on (i) the validity, scope, and meaning of, or (ii) in complying compliance with,~~ California law that conflicts with Federal or tribal law,² ~~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~~³ so long as ~~. If California law conflicts with federal or tribal law,~~ the lawyer ~~shall~~ also advises⁴ the client regarding the related conflicting federal or tribal law and policy.

[6] The paragraph (d) reference to California law includes state and local statutes, ordinances, regulations, orders, and other provisions of law. Paragraph (d) recognizes that in certain situations, California law ~~state or local laws~~ might conflict with federal or tribal law, for example, laws that relate to the cultivation and sale of marijuana or involve the establishment of sanctuary cities. Under In such situations, a lawyer may advise a client regarding those laws, or assist the client in complying with California law, as long as the lawyer advises the client about the relevant federal or tribal law or policy. ~~Paragraph (d) does not prevent a lawyer from representing a client who acts under color of California law~~ Moreover, even if thea client might be violating Federal or tribal law, paragraph (d) does not prevent a lawyer from representing the client in so long as the lawyer’s representation is limited to matters unrelated to the validity, scope or meaning of, or compliance with California law, such as representation on corporate, tax, or real estate issues.

¹ It is only paragraph (a) that is relevant to paragraph (d), so we can be specific.

² A lawyer should not always be required to believe the client’s conduct complies with CA when advising on CA law because a lawyer might advise such a client that its conduct does not comply with CA law, and that advice would be valuable and proper. The reasonable belief requirement, and the obligation to advise on federal or tribal law, should apply only to aiding the client’s project in complying with the questionable CA law. It should not apply to a lawyer who is *not* advising on the CA law that is the subject of paragraph (d), such as a real estate lawyer providing advice on a commercial lease or an immigration lawyer advising on whether a person is legally employable. Those lawyers are unlikely to have any knowledge of the CA law on marijuana or sanctuary cities. I pick up in Comment [6] the lawyer who aids such a client on matters other than the CA law that conflicts with federal or tribal law.

³ I suggest moving the explanation of “California law” to a Comment to make paragraph (d) simpler and more direct.

⁴ The word “related” is too broad and is indefinite. There might be any number of things that arguably are related to some degree but don’t conflict with the CA law that is the subject of paragraph (d).

**Proposed Rule 1.2.1 [3-210] Advising or Assisting the Violation of Law
Synopsis of Public Comments**

TOTAL = 7	A = 0
	D = 0
	M = 7
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-43aw	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (9-8-16)	Y	M	Cmt. 4	Comment 4 creates ambiguity with regard to the meaning of paragraph (c). Suggests that advice regarding consequences is permissible in only limited circumstances which conflicts with (c).	The Commission did not make any change in response to this concern. Comment [4] does not limit paragraph (c), it explains how to apply (c) and offers an example.
X-2016-32I	Law Professors (Zitrin) (07-25-16)	Y	M	1.2.1	Assisting a crime should also be prohibited under 1.2.1(b). While it is addressed in the comment, it should be a part of the rule too.	The Commission agreed in concept that the application of this rule to assisting in a crime needed clarification. However, rather than revising paragraph (b), the Commission added a new first sentence to Comment [2] stating that the reference to "law" in paragraph (a) includes criminal law. Thus, under paragraph (a) a lawyer is prohibited from advising or knowingly assisting in a client's crime.
X-2016-52I	Law Professors (Zitrin) (08-24-16)	Y	M	1.2.1	See X-2016-32I Law Professors (Zitrin) dated July 25, 2016, for the comment synopsis. The comments are identical and the only difference is the signatories.	See response to X-2016-32I Law Professors (Zitrin) dated July 25, 2016.
X-2016-68I	Law Professors (Zitrin) (09-21-16)	Y	M	1.2.1	See X-2016-32I Law Professors (Zitrin) dated July 25, 2016, for the comment synopsis. The comments are identical and the only difference is the signatories.	See response to X-2016-32I Law Professors (Zitrin) dated July 25, 2016.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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TOTAL = 7	A = 0
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X-2016-67b	Orange County Bar Association (OCBA) (Friedland) (9-16-16)	Y	M	1.2.1	Questions whether it is wise to include the phrase “knowingly assist” as part of the rule as it is vague and possibly subjects lawyers to discipline.	The Commission did not make any change in response to this concern. The phrase “knowingly assist” is a key component of this rule. The term “knowingly” is defined in proposed rule 1.0.1(f) and the word “assist” is the operative term used by jurisdictions that adopt Model Rule 1.2(d).
X-2016-104e	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	M	1.2.1, cmt. 1	Proposed rule fails to prohibit attorney from attempting to violate rules.	In connection with Model Rule 8.4, the Commission considered but rejected the concept of an overarching prohibition on attempts to violate a rule. The Commission believes that attempts should be addressed on a rule-by-rule basis. This approach should result in any prohibition on an attempt being tailored to a specific rule’s violation and potential harm, and avoid creating a blunt instrument for discipline that would serve little purpose when applied to most rules. For example, in proposed Rule 1.5 [4-200], this Commission has recommended a rule that provides a lawyer “shall not make an agreement for, charge, or collect an unconscionable or illegal fee.” The terms “make” and

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					<p>“charge” in effect prohibit an attempt to “collect” an unconscionable fee. Although only the actual collection of an unconscionable fee will result in harm to a client, even an attempt to impose a legal obligation on a client to pay such a fee should be prohibited.</p> <p>The Commission did not make the requested deletion because it provides needed explanation that <i>this rule</i> draws a distinction a lawyer’s legal analysis and a lawyer’s recommendation of the means by which a crime or fraud might be committed. If this is contrary to case law, then allegations of misconduct should be brought under those cases rather than by charging this rule.</p> <p>The Commission did not make the requested change because the openly refuse requirement might not be available in all circumstances.</p>	

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X-2016-115h	Lamport, Stanley (9-27-16)	N	M		Rule needs a comment that will allow lawyers to assist clients with complying with California law when California law and federal law conflict, such as with respect to California's marijuana laws. This concept is consistent with Los Angeles County Bar Association Ethics Opinion 527 and an opinion promulgated by the San Francisco County Bar Association.	The Commission agrees in concept with the concerns raised and has included a reference, by way of example, to marijuana laws in proposed new Comment [6]. Comment [6] is an explanation of new paragraph (d) that permits advising on California laws so long as advice also is provided on potentially conflicting federal or tribal law and policy.