

**Rule 1.2.1 [3-210] Advising or Assisting the Violation of Law
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

- (a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows* is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.
- (b) Notwithstanding paragraph (a), a lawyer may:
 - (1) discuss the legal consequences of any proposed course of conduct with a client; and
 - (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law, rule, or ruling of a tribunal.

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) to uphold the Constitution and laws of the United States and California or the duty of confidentiality as provided in Business and Professions Code § 6068(e)(1) and Rule 1.6. 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 (b) 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] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law, and, despite such a conflict, to 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. If California law conflicts with federal or tribal law, the lawyer should also advise the client regarding related federal or tribal law and policy.

Rule 1.2.1 Advising or Assisting the Violation of Law

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[3] Determining the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal in good faith as permitted by paragraph (b)(2) 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. Paragraph (b) thus 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.¹

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Synopsis of Public Comments**

TOTAL = 2 **A = 0**
D = 0
M = 2
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-21b	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Y	M	1.2.1, Cmts. 1-5	<p>1. OCTC is concerned that the proposed rule fails to prohibit an attorney from attempting to violate the rules.</p> <p>2. Supports Comments 2, 4, & 5.</p> <p>3. First sentence of Comment 1 is confusing as it does not address when attorneys provide information in a manner or under</p>	<p>1. The Commission disagrees that Rule 1.2.1 should be expanded to include an “attempt” to advise or assist the violation of law. Most of the cases OCTC cites deal with attempts to commit a crime which itself may be a crime under the Penal Code and a separate basis for discipline. The Commission is not aware of a rule in any other jurisdiction that imposes discipline for attempting to advise or assist the violation of law, or for that matter, conduct that constitutes a crime or other violation involving moral turpitude. OCTC’s comment appears to go beyond the scope of Rule 1.2.1 and deals with attempts to violate a rule or provision of the State Bar Act, which should be addressed under proposed Rule 8.4 rather than this rule.</p> <p>2. No response required.</p> <p>3. The Commission disagrees and has not made the suggested change. The referenced sentence provides</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

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					<p>circumstances that suggests or implicitly recommends a violation of law.</p> <p>4. Comment 3 is incomplete. When challenging a court ruling or order, the attorney must first openly and unequivocally refuse to comply with the order.</p>	<p>a necessary 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>4. The Commission does not believe any change to Comment [3] is required. The authorities cited by the commenter deal mainly with other states' versions of Model Rule 3.4(c) and not this rule.</p>
Y-2016-22	Stewart, John	N	M		<p>The Board is requesting comment on whether the rule should include an express exception for a situation where a lawyer believes in good faith that a law, rule or ruling is invalid." Yes there should be an express exception. Judges are not Kings and if a judge makes a void order I can legally tell a client to ignore it, see <i>In re Berry</i> (1968) 68 Cal.2d 137.</p>	<p>The Commission believes that the paragraph (b)(2) of the rule already permits the conduct sought to be addressed by an express exception. However, to respond to this concern, the Commission has clarified the comments to the rule by combining Comments [3] and [4] and adding the phrase "as permitted by paragraph (b)(2)" to the first sentence of this combined comment.</p>