

Rule 2.1 Advisor
(Commission's Proposed Rule Adopted on October 30, 2016 – Clean Version)

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Comment

[1] A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

[2] This Rule does not preclude a lawyer who renders advice from referring to considerations other than the law, such as moral, economic, social and political factors that may be relevant to the client's situation.

**Proposed Rule 2.1 Advisor
Synopsis of Public Comments**

TOTAL = 4 **A = 1**
D = 2
M = 0
NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-25c	Bar Association of San Francisco (Banola) (1-13-17)	Y	A		We support proposed Rule 2.1 because the professional responsibility to exercise independent professional judgment and to render candid advice is recognized as a core duty of a lawyer that should be included within the California Rules of Professional Conduct. Adding this rule will stress the importance of this essential professional responsibility. All other jurisdictions, except California, have adopted a rule derived from Model Rule 2.1. Adopting Rule 2.1 will remove any ambiguity concerning whether the duty of independent professional judgment exists beyond the limited situations regulated by current Rules 1-600 (legal service programs) and 3-310(f) (accepting compensation for representation from one other than the client).	No response required.
Y-2016-6d	Los Angeles County Bar Association (LACBA) (Schmid) (12-20-16)	Y	D		1. Proposed Rule 2.1 is not a disciplinary standard. It is an aspirational rule that would be extremely difficult, if not impossible to enforce. It includes aspirational comments, which do not elucidate the rule. As such,	1. The Commission disagrees with the commenter's assessment. The proposed rule is not a purely aspirational rule any more than current rules 1-600 or 3-310(F), both of which mandate that lawyers

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

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					<p>the proposed Rule is inconsistent with the Supreme Court's direction to the Second Commission.</p> <p>There is no question that independent professional judgment is a core element of a lawyer's duty of loyalty to a client. The duty is already addressed in a number of rules which focus on circumstances that can affect a lawyer's independent judgment.</p> <p>While it is possible to discipline a lawyer for representing a client in circumstances that would tend to interfere with a lawyer's exercise of independent professional judgment, it would be extremely difficult, if not impossible, to identify and prosecute a true lack of independent judgment in a disciplinary proceeding. Whether a lawyer is exercising independent judgment in a given circumstance is speculative at best. One would have to know what the lawyer was actually thinking.</p>	<p>exercise independent professional judgment. The rule provides important public protection in requiring that lawyers exercise professional judgment and render candid advice in non-litigation as well as litigation matters. The proposed rule complements other rules of professional conduct, including proposed rules 1.2.1, 1.4, 1.13, 5.4, 7.2(b), and 8.4(c); thus, its application is not limited to situations involving conflicts of interest. The rule applies in a variety of situations where a lawyer's independence of professional judgment may be compromised; e.g., lawyers hired by insurance companies to defend insureds when faced with restrictive guidelines; referral arrangements that interfere with a lawyer professional judgment in making referrals or providing candid advice.</p> <p>Rules, such as rule 1.7(b), that are intended to avoid situations that risk compromising a lawyer's independence of professional judgment are not effective without the predicate in Rule</p>

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						<p>2.1 that mandates that lawyers exercise independent professional judgment and render candid advice in representing a client. Not including Rule 2.1 would leave a void in lawyer regulation and would signal that California does not view independent professional judgment as a “core element” of professional responsibility.</p> <p>In sum, rule 2.1 is not a stand-alone rule; it has been enforced along with other rules that risk impairment of a lawyer’s exercise of professional judgment. See, e.g., Matter of Halverson, 998 P.2d. 833 (Wash. 2000).</p> <p>2. The Commission considered and rejected the notion that the term “independent judgment” is ambiguous and requires a definition. It expressly rejected the first Commission’s definition. See Response 3.</p> <p>3. The simple answer to the commenter’s question is that “professional judgment” involves both the exercise of judgment that is uninfluenced</p>

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					<p>interests that are outside the lawyer-client relationship (which is along the lines of the first Commission definition) or is “independent judgment” judgment that is independent of the client’s interest so as to include social and political norms.</p> <p>4. The proposed rule appears to be more of a vehicle for the practice advice in the Comments. The two Comments present a non-disciplinary permissive discussion regarding (i) advice a lawyer may initiate when doing so may be in the client’s interest and (ii) permitting advice regarding moral, economic, social and political factors. While the Comments may be good advice to the profession, they are merely aspirational commentary. They do nothing to explain how the rule would apply as a disciplinary standard.</p> <p>Proposed Rule 2.1 and the</p>	<p>by other duties and interests as well as straightforward advice the lawyer believes is in the client’s best interest even if it involves unpleasant facts and alternatives the client may not wish to confront. Outside influence is not a prerequisite to the rule’s application. To capture all the situations and nuances in which a lawyer’s exercise of independent professional judgment is mandated is more appropriately the subject of an ethics opinion or treatise.</p> <p>4. As noted, see Response 1, the Commission disagrees with the commenter’s assessment that the rule is not a proper rule of discipline. Further, it disagrees that the comments are merely aspirational. Comment [1] clarifies that the rule does not impose in every case a duty to initiate investigation of a client’s affairs or to give advice that the client has indicated is unwanted. Engaging in such conduct would be required only when doing so appears to be in the client’s interest. Comment [2], as modified, explains what is not prohibited</p>

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					proposed comments are inconsistent with all of [the] directions from the Supreme Court. As such, the Rule should not be adopted.	by the rule, an appropriate function for a comment under the Commission's Charter.
Y-2016-21t	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Yes	NI		<ol style="list-style-type: none"> OCTC takes no position on this rule. Comment [1] could be interpreted as contrary to established law regarding the duty to investigate client matters. Also, Comment [1]'s statement that an attorney has no duty to give advice that the client has indicated is unwanted is too broad, and may be misleading. 	<ol style="list-style-type: none"> No response required. The Commission believes that Comment [1] comment is consistent with <i>Butler v. State Bar</i> (1986) 42 Cal.3d 323, 329, cited by the commenter, because <i>Butler</i> states that an investigation "may" be required in certain situations. It does mandate an investigation in all circumstances. Comment [1] uses the qualifier "ordinarily" to appreciate this distinction. In addition, <i>Nichols v Keller</i> (1993) 15 Cal.App.4th 1672, 1687, cited by the commenter, is a civil liability standard arising from the facts of the particular matter. While lawyers should be mindful of this standard of care, the Commission does not believe it should be codified as an absolute disciplinary standard.
Y-2016-7o	State Bar Standing Committee on Professional Responsibility and	Y	D	Cmt. 1, 2	1. Rule is aspirational and fails to define disciplinable conduct. The issues addressed in the	1. The professional responsibility to exercise independent professional

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	Conduct (COPRAC) (Spencer) (01-06-17)				<p>proposed rule are addressed elsewhere in the proposed rules.</p> <p>2. Comment [1] should be deleted as it is inconsistent with the proposed rule and the Commission's charter.</p> <p>3. A minority of COPRAC believes that the Commission erred in eliminating the second sentence from ABA Model Rule 2.1 and relegating</p>	<p>judgment and to render candid advice is recognized as a core duty of a lawyer as evidenced by the adoption of a rule derived from Model Rule 2.1 by every other jurisdiction except California. Adding this rule highlights the importance of these professional responsibility concepts and removes any ambiguity whether the duty of independent professional judgment exists beyond the limited situations regulated by current rules 1-600 (legal service programs) and 3-310(f) (accepting compensation for representation from one other than the client).</p> <p>2. Comment [1] is appropriate because it explains that a lawyer might be required to investigate a client's affairs and initiate advice not requested by the client when doing so appears to be in the client's best interest.</p> <p>3. The Commission disagrees and did not make the suggested change. This aspect of Model Rule 2.1 is completely permissive and not integrated with to any</p>

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					that concept to proposed comment [2]. The minority believes this is a substantive rule intended to prevent clients and disciplinary authorities from later contending that otherwise proper advice should be punished because it embodies controversial discussions of the additional factors that the lawyer viewed as relevant to the client's situation.	affirmative duty. As such the Commission believes it is a helpful comment in aiding a lawyer's general understanding of the concept of "candid advice" but it does not belong in black letter text of the rule.

