

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2.1

Commission Drafting Team Information

Lead Drafter: Eaton

Co-Drafters: Inlender, Tuft

I. CURRENT CALIFORNIA RULE

There is no California Rule that corresponds to Model Rule 2.1, from which proposed Rule 2.1 is derived.

II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

III. PROPOSED RULE (CLEAN)

Rule 2.1 Advisor

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.

IV. PROPOSED RULE (REDLINE TO MODEL RULE 2.1)

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. ~~In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.~~

Comment

~~Scope of Advice~~

~~[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client. 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.~~

~~[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.~~

~~[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.~~

~~[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.~~

Offering Advice

~~[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. 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.~~

V. RULE HISTORY

Although the origin and history of Model Rule 2.1 was not the primary factor in the Commission's consideration of proposed Rule 2.1, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 407 - 411, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VI. OCTC / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
(In response to 45-day public comment circulation):

1. OCTC takes no position on this rule.
2. 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.

- **State Bar Court:** No comments were received from State Bar Court.

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

Four comments, including the above comment from OCTC, were received. One agreed with the proposed rule. Two disagreed, and one did not indicate. A public comment synopsis table, with the Commission's responses to each comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

Delaware Rule 2.1 is identical to Model Rule 2.1:

Rule 2.1. Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social and political factors, that may be relevant to the client's situation.

COMMENT

[1] Scope of Advice. -- A client is entitled to straight forward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a

lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

[5] Offering Advice. In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. 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.

The ABA State Adoption Chart for the ABA Model Rule 2.1, from which proposed rule 2.1 is derived, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_2_1.authcheckdam.pdf
- Forty-five jurisdictions have adopted a rule that is the same as Model Rule 2.1 (AL, AZ, AR, CT, DE, DC, FL, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS,

MO, MT, NE, NV, NH, NJ, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, UT, VT, VA, WA, WV, WI, WY); five jurisdictions have adopted a rule that is substantially similar to Model Rule 2.1 (AK, CO, GA, NM, TX,); only California has not adopted a rule derived from Model Rule 2.1 (CA).

IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. General: Drafting Team consensus that a version of ABA Model Rule 2.1, as amended, be recommended to the Board for adoption.
 - Pros: In the current rules, independent professional judgment is mentioned expressly in only two limited circumstances: a lawyer's participation in a legal services program (Rule 1-600); and a lawyer's acceptance of fees from a third-party payor (Rule 3-310(F)). However, this professional responsibility 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. It is a concept that underlies the conflict of interest rules. Adding proposed rule 2.1 highlights the importance of independent professional judgment and candid advice in a lawyer's role as an advisor and will remove any ambiguity whether the duty of independent professional judgment exists beyond the limited situations regulated by rules 1-600 and 3-310(F).
 - Cons: Model Rule 2.1 is a guidance rule and is used as a disciplinary standard in the states that have adopted it. In California, the disciplinary standard applicable to a lawyer's advice function is the competence rule, Rule 3-110.¹ For disciplinary purposes, a version of Model Rule 2.1 is unnecessary and contrary to the Commission's charter.
2. Delete the second sentence of Model Rule 2.1, modify it, and include it as Comment [2]. Drafting Team consensus.
 - Pros: As worded in Model Rule 2.1, this sentence is guidance on what a lawyer may aspire to do in rendering advice. It is not language of prohibition or a mandatory requirement. As such, it does not belong in the black letter; however, it is appropriate as comment, if modified to be an explanation of what is not prohibited by the rule.
 - Cons: Even as modified this language is at best aspirational guidance and at worst a substantive change to existing California law in that it could suggest that in no case would a lawyer ever be required to include, for example,

¹ The State Bar Court Review Department has stated: "Whether attorneys communicate correct legal advice to their clients is addressed by rule 3-110(A) of the Rules of Professional Conduct of the State Bar. . . ." (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 149.)

political or economic considerations in giving advice. At present, the correctness of a lawyer's advice is governed by the competence rule (see footnote 1) and it is conceivable that a lawyer's failure to give advice on significant political or economic consequences that overshadow the legal considerations of a client's situation might subject that lawyer to discipline for incompetence.

3. Include as Comment [1] the last sentence of Model Rule 2.1, Comment [5]. Drafting Team consensus.

- Pros: Proposed rule 2.1 would be a new rule in California and including this sentence as Comment [1] should avoid a potential ambiguity in interpreting the scope of the duty imposed by the rule. This sentence 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.
- Cons: OCTC's August 27, 2010 comment (see above Section VI) from then Chief Trial Counsel James Towery cites *Nichols v. Keller* (1993) 15 Cal.App.4th 1672 for the proposition that an attorney might be under a duty to volunteer opinions and advice beyond the limits suggested by the terms of Model Rule 2.1 as explained by the Model Rule's comments.

B. Concepts Rejected (Pros and Cons):

1. Include a definition or explanation of "independent professional judgment" as used in the rule. Drafting Team consensus to reject this addition to the proposed rule.

- Pros: The meaning of "independent professional judgment" is the gravamen of this proposed new rule in California and a definition or explanation is needed to use this new rule for disciplinary purposes. Although OCTC opposed the definition drafted by the first Commission (see above section VI) as unclear, a different definition could be drafted.
- Cons: The concept of independent professional judgment is not susceptible to a simple definition that can capture its import in every situation. It means different things in different contexts. Although generally there is a concern that a third party, e.g., a person paying the lawyer's fee, might interfere with the lawyer's representation of the client and provision of candid advice, (e.g., current rule 3-310(F)), there are situations where the lawyer must exercise independent judgment and provide the client with advice that the client may not want to hear, regardless of third party influence. For example, in *Thomas v. Tenneco Packaging Co.* (11th Cir. 2002) 293 F.3d 1306, the court sanctioned a lawyer for rude and abusive conduct that violated several rules of professional conduct or local court rules. In reply to the lawyer's argument

that she merely was following orders from the client, the Court affirmed the sanction, in part because Georgia's equivalent of Model Rule 2.1 requires lawyers to exercise independent professional judgment, and not just follow a client's wishes or orders. To capture all of 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.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:

1. The addition of an explicit duty of independent professional judgment in a lawyer's role as an advisor expands on a duty referenced in the limited situations of current rules 1-600 and 3-310(F) and is already impliedly recognized in current rules 1-310 and 1-320. On the one hand, to the extent that it expands the duty from these limited situations to general application when a lawyer acts as an advisor, it is a substantive change. On the other hand, exercising independent professional judgment and rendering candid advice are essential elements in a lawyer-client relationship based on trust and loyalty to the client and to that extent they are in fact not new duties.

D. Non-Substantive Changes to the Current Rule:

Not Applicable.

E. Alternatives Considered:

~~None.~~ The primary alternative considered was to maintain the status quo of the current rules and not include a standalone rule requiring independent professional judgment. See section A.1 above.

X. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Board of Trustees of the State Bar of California adopt proposed Rule 2.1 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 2.1 in the form attached to this Report and Recommendation.

