

DATE: April 25, 2018

TO: Members, Commission for the Revision of the Rules of Professional Conduct of the State Bar of California

FROM: Randall Difuntorum, Program Manager, Professional Competence

SUBJECT: Proposed Rule 1.2.1 of the Rules of Professional Conduct - Consideration Following Action by the Supreme Court

BACKGROUND

At the Board of Trustees's March 9, 2017 meeting, the Board of Trustees ("Board") adopted [proposed rule 1.2.1](#) of the Rules of Professional Conduct of the State Bar of California ("rule 1.2.1"). Adoption of rule 1.2.1 was part of a comprehensive recommendation for new and amended rules adopted by the Board. (See Board open agenda item [701 MARCH 2017](#) and the [Board minutes](#) for that meeting.) On March 30, 2017, the proposed rules were submitted to the Supreme Court of California ("Supreme Court") for approval (Supreme Court case no. [S240991](#)).

Rule 1.2.1 prohibits a lawyer from advising or assisting the violation of law, including criminal conduct, fraudulent conduct and a violation of any law, rule or ruling of a tribunal. It carries forward the substance of [current rule 3-210](#) and adds clarifying language derived from ABA Model Rule 1.2(d) which provides that a lawyer may discuss the legal consequences of a client's proposed course of conduct. Rule 1.2.1 also includes explanatory comments, including Comment [6] that addresses circumstances where state law might conflict with federal law or tribal law and policy.

Comment [6] would, for example, serve as guidance to lawyers who advise marijuana dispensaries because California state law permits certain lawful sales and use of marijuana while under federal law, marijuana remains a Schedule I drug pursuant to the Controlled Substances Act. (21 U.S.C. §§ 801-904) rendering the use, possession, distribution, or manufacture of marijuana illegal, even if such conduct otherwise conforms to state law. (See California Supreme Court Committee on Judicial Ethics Opinions [Formal Opinion 2017-010](#) [Issued April 19, 2017] re "Extrajudicial Involvement in Marijuana Enterprises.")

On April 11, 2018, the Supreme Court issued [Administrative Order 2018-04-11](#) on the State Bar's request to approve rule 1.2.1. The Supreme Court's order provides alternative revisions of the rule and directs the Board to consider these revisions and whether they warrant further public comment.¹ In consultation with the chair of the Board's Committee on Regulation and Discipline, staff has assigned this order to the Rules Revision Commission ("Commission") for study and preparation of a public comment recommendation.

¹ It is anticipated that a representative of the State Bar's Office of General Counsel will attend the Commission's May 8, 2017 meeting to address the Board's public comment policy.

DISCUSSION

I. The Supreme Court Order

The Supreme Court's order directs the Board to consider alternative revisions of rule 1.2.1 as follows:

The court directs the Board to consider the alternative revisions of proposed rule 1.2.1 and Comments [1]-[6], as set forth in Attachment 2 to this order, and to assess whether any such revisions may warrant further public comment. To the extent the Board chooses to recommend any modifications to the revised rule and comments as set forth in Attachment 2, the Board may submit such modifications for court approval immediately following its consideration of the revised rule and comments.

(Paragraph two of Administrative Order 2018-04-11.)

The Supreme Court's Attachment 2 is a redline/strikeout version of rule 1.2.1 showing the specific changes that the Board is directed to consider. (The Supreme Court's order, including Attachment 2, is provided as Attachment 1 to this memorandum.) Language changes are made to Comment [6] and present the following rule revision issues.

1. Whether the first sentence of Comment [6] should be revised to delete the concept of a lawyer's reasonable belief as an open-ended test for determining the type of assistance that a lawyer is permitted to provide to a client under California law notwithstanding a possible conflict with federal or tribal law. Substituted in the place of this test is the Supreme Court's proposed language specifying the permitted assistance as assisting a client in "drafting, administering, or complying with California statutes, regulations, orders, and other state or local provisions" that execute or apply the state laws that might be in conflict with federal or tribal law.
2. Whether the second sentence of Comment [6] should be revised to delete the phrase "should also advise" and substitute "must inform" in regards to the lawyer's obligation to address with the client the conflicting federal or tribal law. While a duty to inform is less onerous than a duty to provide legal advice, the Supreme Court's language would impose a mandatory requirement. The language adopted by the Board uses the term "should" which describes attorney conduct that would be prudent but not necessarily required.
3. Whether Comment [6] should be revised to include a new cross reference to the duty to communicate under [proposed rule 1.4](#). The Supreme Court's language provides that a lawyer "must inform the client about related federal or tribal law and policy" when there is a conflict with state law. To support the mandatory nature of this proposition, the Supreme Court includes a cross reference to proposed rule 1.4 that, in part, requires a lawyer to keep a client "reasonably informed about significant developments relating to the representation."
4. Whether Comment [6] should be revised to include a new cross reference to the duty of a lawyer to refrain from conduct constituting a breach of the duty of competence under [proposed rule 1.1](#). The Supreme Court's language provides that "under certain

circumstances” a lawyer might be “required to provide legal advice” on the conflict with federal or tribal law. To support the mandatory nature of this proposition, the Supreme Court includes a cross reference to proposed rule 1.1 that, in part, prohibits intentional, reckless or repeated acts of incompetence.²

In addition to the language changes to Comment [6], the Supreme Court’s alternative revisions to rule 1.2.1 include corrections of scrivener’s errors in the text of the rule itself and in Comment [5]. These corrections pertain to the use of asterisks as an indicator that a word or phrase is a defined term in [proposed rule 1.0.1](#), the terminology rule. As submitted, rule 1.2.1 omitted asterisks for occurrences of the word “tribunal” in paragraph (a) and in paragraph (b)(2). It also omitted an asterisk for the phrase “reasonably should know” in Comment [5]. The Supreme Court’s revisions add these missing asterisks.

An issue raised by the correction of these scrivener’s errors is whether the first occurrence of the word “know” in Comment [5] should have an asterisk. The Supreme Court did not add an asterisk. In proposed rule 1.0.1, paragraph (f) provides that “knowingly,” “known,” and “knows” means actual knowledge of the fact in question but that a person’s knowledge may be inferred from surrounding circumstances. As indicated by the foregoing, the singular form of the defined term “know” is not included in paragraph (f) of proposed rule 1.0.1. Although this may be an explanation for why the Supreme Court did not add an asterisk to the first occurrence of the word “know” in Comment [5], it does not foreclose Commission consideration of whether “know” should be clarified by applying an asterisk and by revising paragraph (f) of proposed rule 1.0.1 to add the word “know.”

To facilitate the Commission’s study of these issues, staff provides the following recommendation and observations.

II. Staff Recommendation

Regardless of the outcome of the Commission’s consideration of the various issues, staff recommends that the language provided by the Supreme Court be recommended to the Board for a 45-day public comment period. If the Commission develops another version of rule 1.2.1 that differs from the Supreme Court’s alternative revision, then the Supreme Court’s version could be designated as an “ALT 1” version of the proposed rule and any different version of the proposed rule prepared by the Commission could be designated as an “ALT 2” version. By using this approach, the Board would retain the flexibility, after public comment, to adopt the ALT 1 version with the Supreme Court’s language or an ALT 2 version of the rule that implements different revisions that might be developed by the Commission.

III. Staff Observations

Regarding the addition of cross references in the Supreme Court’s alternative revisions, the Commission may wish to consider whether corresponding cross references to rule 1.2.1 should be added to proposed rule 1.4, proposed rule 1.1 or both. For discussion purposes, draft

² A violation of the competence rule requires more than a single act of simple negligence. (See: *In Matter of Torres* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 149 [The State Bar Review Department observed that: “We have repeatedly held that negligent legal representation, even that amounting to legal malpractice, does not establish a [competence] rule 3-110(A) violation.”].)

revisions of the Comments to each of these rules are provided below. (Added language is marked as underlined text.)

Proposed Rule 1.1 Comment Revisions:

Comment

[1] This rule addresses only a lawyer's responsibility for his or her own professional competence. See rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

[2] See rule 1.3 with respect to a lawyer's duty to act with reasonable* diligence.

[3] See rule 1.2.1, Comment [6] regarding required advice to a client in circumstances where a client's matter involves a conflict with federal or tribal law and policy.

Proposed Rule 1.4 Comment Revisions:

Comment

[1] A lawyer will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code § 6068(m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances. For example, a client's matter may involve assistance in complying with California statutes in an area of law where there is a conflict with federal or tribal law and in such circumstances the lawyer must inform the client about the federal or tribal law. (See rule 1.2.1, Comment [6].)

[2] A lawyer may comply with paragraph (a)(3) by providing to the client copies of significant documents by electronic or other means. This rule does not prohibit a lawyer from seeking recovery of the lawyer's expense in any subsequent legal proceeding.

[3] Paragraph (c) applies during a representation and does not alter the obligations applicable at termination of a representation (see rule 1.16(e)(1)).

[4] This rule is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the lawyer to provide work product to the client shall be governed by relevant statutory and decisional law.

IV. Commission Member Comments and Resources

In advance of the Commission's meeting on May 8, 2018, Commission members may send comments about this matter to staff.³ Commission members should not send comments to any other member of the Commission. Staff will collect all Commission member comments submitted and post them as a part of the open session agenda materials for the May 8, 2018 meeting.

³ Send to Lauren.McCurdy@calbar.ca.gov with a copy to Randall.Difuntorum@calbar.ca.gov and Mimi.Lee@calbar.ca.gov.

For convenient reference, the PDF resource document for rule 1.2.1 that is posted online at the State Bar's website is provided as Attachment 2 to this memorandum. This document includes a clean version of proposed rule 1.2.1, the rule 1.2.1 executive summary and the Commission's rule 1.2.1 report and recommendation.

ATTACHMENT(S) LIST

1. Administrative order 2018-04-11 in Supreme Court case no. S240991.
2. Proposed Rule 1.2.1 PDF resource document.

SUPREME COURT
FILED

APR 11 2018

S240991

Jorge Navarrete Clerk

ADMINISTRATIVE ORDER 2018-04-11

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

**ORDER RE REQUEST FOR APPROVAL OF PROPOSED RULE 1.2.1
OF THE RULES OF PROFESSIONAL CONDUCT OF
THE STATE BAR OF CALIFORNIA.**

On March 30, 2017, the Board of Trustees of the State Bar of California filed a request for approval of proposed rule 1.2.1 of the California Rules of Professional Conduct and proposed Comments [1]-[6] to that rule. (Bus. & Prof. Code, § 6076.) The text of the rule and comments as proposed by the Board is appended as Attachment 1 to this order.

The court directs the Board to consider the alternative revisions of proposed rule 1.2.1 and Comments [1]-[6], as set forth in Attachment 2 to this order, and to assess whether any such revisions may warrant further public comment. To the extent the Board chooses to recommend any modifications to the revised rule and comments as set forth in Attachment 2, the Board may submit such modifications for court approval immediately following its consideration of the revised rule and comments.

It is so ordered.

ATTACHMENT 1

Cantil-Sakauye

Chief Justice

Chin

Associate Justice

Corrigan

Associate Justice

Liu

Associate Justice

Cuéllar

Associate Justice

Kruger

Associate Justice

Associate Justice

ATTACHMENT 1

**Rule 1.2.1 Advising or Assisting the Violation of Law
(Proposed Rule Adopted by the Board on March 9, 2017)**

- (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 section 6068, subdivision (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 section 6068, subdivision (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] Paragraph (b) authorizes a lawyer to advise a client in good faith regarding the validity, scope, meaning or application of a law, rule, or ruling of a tribunal* or of the meaning placed upon it by governmental authorities, and of potential consequences to disobedience of the law, rule, or ruling of a tribunal* that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.

[4] Paragraph (b) also 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

ATTACHMENT 1

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.

ATTACHMENT 2

**Rule 1.2.1 Advising or Assisting the Violation of Law
(With Revisions for Review and Consideration by the Board)**

- (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 section 6068, subdivision (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 section 6068, subdivision (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] Paragraph (b) authorizes a lawyer to advise a client in good faith regarding the validity, scope, meaning or application of a law, rule, or ruling of a tribunal* or of the meaning placed upon it by governmental authorities, and of potential consequences to disobedience of the law, rule, or ruling of a tribunal* that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.

[4] Paragraph (b) also 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

ATTACHMENT 1

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~~drafting, administering, or complying with California statutes, regulations, orders, and other state or local provisions ~~implementing~~that execute or apply to those laws. If California law conflicts with federal or tribal law, the lawyer ~~should also advise~~ must inform the client about ~~regarding~~ related federal or tribal law and policy (see rule 1.4), and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see, e.g., rule 1.1).

**Rule 1.2.1 Advising or Assisting the Violation of Law
(Proposed Rule Adopted by the Board on March 9, 2017)**

- (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] Paragraph (b) authorizes a lawyer to advise a client in good faith regarding the validity, scope, meaning or application of a law, rule, or ruling of a tribunal* or of the meaning placed upon it by governmental authorities, and of potential consequences to disobedience of the law, rule, or ruling of a tribunal* that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.

[4] Paragraph (b) also 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.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.2.1
(Current Rule 3-210)
Advising or Assisting the Violation of Law

EXECUTIVE SUMMARY

In connection with consideration of current rule 3-210 (Advising the Violation of Law) the Commission for the Revision of the Rules of Professional Conduct ("Commission") has reviewed and evaluated the national standard of ABA Model Rule 1.2 (Advising or Assisting the Violation of Law). The Commission also reviewed relevant California statutes, rules, case law, and ethics opinions relating to the issues addressed by the proposed rules. The evaluation was made with a focus on the function of the rules as disciplinary standards, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. The result of this evaluation is proposed Rule 1.2.1 (Advising or Assisting the Violation of Law).

Rule As Issued For 90-day Public Comment

Proposed Rule 1.2.1 carries forward the substance of current rule 3-210 but with additional clarifying language derived from ABA Model Rule 1.2(d) which provides that a lawyer may explain the legal consequences of a client's proposed course of conduct without running afoul of the rules. This additional language serves as an important public protection as it will assist a lawyer in attempting to dissuade a client from pursuing such a course of conduct. The proposed rule has been further modified by dividing the Model Rule's single sentence substantive provision into three paragraphs for clarity.

Comment [1] addresses paragraph (c), a new clause being added to current rule 3-210 that assists lawyers by giving them an additional tool to dissuade a client from undertaking a proposed course of action. Given that the clause would be new to the rule, comment [1] explains that lawyers are not given carte blanche to advise clients on how to conduct their affairs in a manner that avoids criminal prosecution.

Comment [2] clarifies that the rule also applies when a client's conduct has already begun and is continuing. Moreover, the comment explains that a lawyer must comply with his or her duty of confidentiality and that a lawyer's only recourse if the client persists in illegal conduct may be resignation or withdrawal.

Comment [3] clarifies the application of paragraph (a) by providing interpretive guidance concerning a client's desire to test the validity of a law, rule, or ruling of a tribunal.

Comment [4] addresses a lawyer's provision of legal advice and services to a client who contemplates engaging in civil disobedience. The last sentence of the comment provides guidance on the application of the proposed rule.

Comment [5] addresses a lawyer's obligation to communicate his or her ethical limitations with a client who expects assistance not permitted by the rules.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission revised the text of the rule to use the language of the Model Rule counterpart, Model Rule 1.2(d), but unlike the Model Rule the proposed rule is organized in two main paragraphs ((a) and (b)) and two subparagraphs ((b)(1) and (b)(2)). Paragraph (a) states the general prohibition against counseling a violation of law and paragraph (b) describes conduct that is permitted notwithstanding the general prohibition. The implementation of two subparagraphs in (b) is for clarity because discussion of consequences of a proposed course of conduct is distinct from counseling/assisting a client in a good faith effort to determine the scope or validity of a law. Subparagraph (b)(2) includes language from current California Rule 3-210 that refers to a rule of ruling of tribunal as “law” that can be tested as to its meaning or application.

The Commission also revised the rule comments in response to public comments. First, in Comment [2], the Commission added a reference to a lawyer’s statutory duty to uphold the law (Business and Professions Code § 6068(a)). Comment [2] also includes a non-substantive stylistic revision was made to the citation to a lawyer’s duty of confidentiality. Second, a new Comment [6] was added to describe situations where conflicts of law may render it challenging for a lawyer, for example, to avoid counseling a federal law violation when the client’s conduct expressly is permitted under state law. A public comment argued in favor of adding an explicit medical marijuana example in the rule but the Commission did not make that change because the relevant laws are subject to change in the near future.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Commission Modifications to the Proposed Rule Following 45-Day Public Comment Period

After consideration of comments received in response to the additional 45-day public comment period, the Commission combined Comments [3] and [4] to be a single comment numbered as Comment [3], with subsequent comments renumbered accordingly. In the second sentence of the new Comment [3], the word “thus” was added to read: “Paragraph (b) *thus* authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal. . . .”

With these changes, the rule Commission voted to recommend that the Board adopt the proposed rule.

Board’s Consideration of the Commission’s Proposed Rule on March 9, 2017

At its meeting on March 9, 2017, the Board revised the Commission’s final version of the proposed rule. Comment [3] was revised to become two separate comments as follows with other subsequent comments renumbered accordingly:

[3] ~~Determining~~ Paragraph (b) authorizes a A lawyer may to advise a client in good faith regarding 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, and of potential consequences to

disobedience of the law, rule, or ruling of a tribunal that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.

[4] Paragraph (b) ~~thus also~~ 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.

The above revisions were made by the Board as non-substantive clarifying changes that were reasonably implicit in the 45-day public comment version of the proposed rule. It was observed that these revisions would help eliminate concerns that a lawyer might be required to take affirmative action to determine the validity of a law, for example, by filing a declaratory action, before the lawyer could provide a client with the lawyer's opinion about the validity, scope, meaning or application of a law, rule, or ruling of a tribunal.

ATTACHMENT 2

COMMISSION REPORT AND RECOMMENDATION: RULE 1.2.1

Commission Drafting Team Information

Lead Drafter: Carol Langford

Co-Drafters: Nanci Clinch, Hon. Dean Stout, Dean Zipser

I. CURRENT CALIFORNIA RULE

Rule 3-210 Advising the Violation of Law

A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.

Discussion:

Rule 3-210 is intended to apply not only to the prospective conduct of a client but also to the interaction between the member and client and to the specific legal service sought by the client from the member. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the member. (See *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].) An example of the latter is a request that the member negotiate the return of stolen property in exchange for the owner's agreement not to report the theft to the police or prosecutorial authorities. (See *People v. Pic'l* (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685].)

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 1.2.1 [3-210]

Vote: 14 (yes) – 0 (no) – 1 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 1.2.1 [3-210]

Vote: 11 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)¹

Rule 1.2.1 Advising or Assisting the Violation of Law

- (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] Paragraph (b) authorizes a lawyer to advise a client in good faith regarding the validity, scope, meaning or application of a law, rule, or ruling of a tribunal* or of the meaning placed upon it by governmental authorities, and of potential consequences to disobedience of the law, rule, or ruling of a tribunal* that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.

¹ At its March 9, 2017 meeting, the Board revised the Commission's final version of this proposed rule. The version of Comment [3] that the Commission submitted to the Board was modified by the Board and split into two separate comments. These changes are implemented in this clean version of the proposed rule and this report has been adapted to account for these changes (including the renumbering of the comments). Refer to the proposed rule 1.2.1 executive summary for more information about the changes made by the Board.

[4] Paragraph (b) also 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.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 3-210)

Rule ~~[3-210]~~ 1.2.1 Advising or Assisting the Violation of Law

(a) A ~~member shall not advise the~~ 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 ~~unless the member believes in good faith that such law, rule,~~

(b) Notwithstanding paragraph (a), a lawyer may:

(1) discuss the legal consequences of any proposed course of conduct with a client; and

(2) ~~or ruling is invalid. A member may take appropriate steps in~~ counsel or assist a client to make a good faith effort to test ~~determine~~ the validity of ~~any, scope, meaning or application of a~~ law, rule, or ruling of a tribunal.

Comment Discussion

~~Rule 3-210 is intended to apply not only to the prospective conduct of a client but also to the interaction between the member and client and to the specific legal service sought by the client from the member. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the member. (See *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].) An example of the latter is a request that the member negotiate the return of stolen property in exchange for the owner's agreement not to report the theft to the police or prosecutorial authorities. (See *People v. Pic'l* (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685].)~~

[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] Paragraph (b) authorizes a lawyer to advise a client in good faith regarding the validity, scope, meaning or application of a law, rule, or ruling of a tribunal* or of the meaning placed upon it by governmental authorities, and of potential consequences to disobedience of the law, rule, or ruling of a tribunal* that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.

[4] Paragraph (b) also 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.

V. RULE HISTORY

A. History of California Rule 3-210

Rule 3-210 originated with the 1928 rules as rule 11. Former rule 11 stated: "A member of the State Bar shall not advise the violation of any law. This rule shall not apply to advice, given in good faith, that a law is invalid."

When the rules were revised operative January 1, 1975, rule 11 became new rule 7-101 (Advising the Violation of Law). The Special Committee to Study the ABA Code of Professional Responsibility recommended that new rule 7-101 retain the identical text contained in rule 11. However, the State Bar ultimately submitted, and the Supreme Court approved, an amended rule providing that: “A member of the State Bar shall not advise the violation of any law, rule or ruling of a tribunal unless he believes in good faith that such law, rule or ruling is invalid. A member of the State Bar may take appropriate steps in good faith to test the validity of any law, rule or ruling of a tribunal.”

This rule was last amended effective May 27, 1989. Rule 7-101 was renumbered as rule 3-210, and the rule filing stated “no substantive changes to current rule 7-101 are proposed.” The Supreme Court ultimately approved a rule that deleted the phrase “of the State Bar” and changed “he” to “the member.” In addition, the Supreme Court also approved the State Bar’s proposed Discussion paragraph providing:

Rule 3-210 is intended to apply not only to the prospective conduct of a client but also to the interaction between the member and client and to the specific legal service sought by the client from the member. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the member. (See *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].) An example of the latter is a request that the member negotiate the return of stolen property in exchange for the owner’s agreement not to report the theft to the police or prosecutorial authorities. (See *People v. Pic’l* (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685].)

B. History of ABA Model Rule 1.2

Although the origin and history of Model Rule 1.2 was not the primary factor in the Commission’s consideration of proposed Rule 1.2.1, 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 47 - 64, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. Proposed rule fails to prohibit attorney from attempting to violate rules.

Commission Response: 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 “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.

2. First sentence of Comment [1] should be stricken as contrary to established case law.

Commission Response: The Commission did not make the requested deletion because it provides needed explanation that this rule draws a distinction between 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.

3. Comment [3] is incomplete because an attorney must first openly refuse to comply with the order before challenging it.

Commission Response: The Commission did not make the requested change because the openly refuse requirement might not be available in all circumstances.

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

1. OCTC is concerned that the proposed rule fails to prohibit an attorney from attempting to violate the rules.

Commission Response: 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.

2. Supports Comments [2], [4], & [5].

Commission Response: No response required.

3. First sentence of Comment [1] is confusing as it does not address when attorneys provide information in a manner or under circumstances that suggests or implicitly recommends a violation of law.

Commission Response: The Commission disagrees and has not made the suggested change. The referenced sentence provides a necessary explanation that this rule draws a distinction between 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.

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.

Commission Response: 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.

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

VII. PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, seven public comments were received. All seven comments agreed with the proposed Rule only if modified. During the 45-day public comment period, two public comments were received. Both comments agreed with the proposed Rule only if modified. Public comment synopsis tables, with the Commission's responses to each public comment, are provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Business and Professions Code section 6068(a) states it is the duty of an attorney to do the following: "To support the Constitution and laws of the United States and of this state."

As a result, discipline may be imposed for violating any state or federal law. [See, *In Re Brimberry* (Rev. Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 397 fn. 9 ("Section 6068(a) is a conduit for disciplining attorneys who violate laws and are not otherwise disciplinable under the State Bar Act.")]. The exposure to discipline exists for failing to comply with case law, as well as statutory law. (See, *Matter of Field* (Rev. Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171, 183-184.)

Proposed Rule 1.2.1, which is patterned on Model Rule 1.2(d), prohibits a lawyer from counseling or assisting a client in conduct the lawyer knows is criminal or fraudulent. The proposed Rule is similar to current rule 3-210, which prohibits a lawyer from advising the violation of any law, rule, or ruling of a tribunal.

Both the Model rule and current rule 3-210 permit the lawyer to test the validity of a law. Under the Model Rule, a lawyer may "counsel or assist a client to make a good faith

effort to determine the validity, scope, meaning or application of the law.” Current rule 3-210 states that a lawyer “may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.” A significant difference between the Model Rule and current rule 3-120 is that the Model Rule expressly permits a lawyer to “discuss the legal consequences of any proposed course of conduct with a client.”

B. ABA Model Rule 1.2(d) Adoptions

- **Arizona Rule 1.2(d)** is identical to Model Rule 1.2(d):

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

* * *

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

- **Alaska Rule 1.2(d)** is a substantial departure from Model Rule 1.2(d), as it is qualified by the addition of new paragraphs (e) and (f):

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

* * *

(d) Except as provided in paragraph (f), a lawyer shall not counsel or assist a client to engage in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct.²

² Note that a similar provision is found in Model Rule 1.4(a)(5), which provides that a lawyer shall:

(5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

Further note that this Commission has declined to include a provision similar to MR 1.4(a)(5) in its proposed Rule.

(f)³ A lawyer may counsel a client regarding Alaska’s marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. If Alaska law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.

- **New York Rule 1.2(d)** is also a departure from Model Rule 1.2(d), being qualified by the addition of new paragraph (f):

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

* * *

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

* * *

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

- **Model Rule 1.2(d)**. The ABA State Adoption Chart for Model Rule 1.2, entitled Variations of the ABA Model Rules of Professional Conduct Rule 1.2,” revised October 28, 2016, is available at:
 - http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_2.authcheckdam.pdf (Last accessed on 2/7/17.)
 - Every jurisdiction except California has adopted a version of ABA Model Rule 1.2(d). Among the other jurisdictions, forty-three have adopted the Model Rule paragraph verbatim, four have adopted a substantially similar variation of the Model Rule,⁴ and four have a substantially modified version of Model Rule 1.2(d).⁵

³ Other jurisdictions that have provisions addressing legal advice relating to the jurisdiction’s marijuana laws include: Colorado (Comment), Hawaii (Rule), Illinois (Rule & Comment), Nevada (Comment), Ohio (Rule), Oregon (Rule), and Washington (Comment).

⁴ The four jurisdictions whose provision is substantially similar to the Model Rule are Connecticut, Florida, New Mexico and Texas. Connecticut has added parenthetical numbers before each clause of the Model Rule paragraph, and Florida and New Mexico have added a subtitle for the paragraph (“Criminal or Fraudulent Conduct” in Florida and “Course of Conduct” in New Mexico. Otherwise, the rule language is identical to the Model Rule. Texas divides the single Model Rule sentence into two sentences, but otherwise the language is the same.

⁵ The four jurisdictions that substantially diverge from the language and scope of the Model Rule are Alaska, Illinois, New York and Ohio. Of these, Alaska simply adds the clause “Except

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

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of Model Rule 1.2(d), which would carry forward the substance of current rule 3-210, but with the additional clarifying language that a lawyer may explain the legal consequences of a client's proposed course of conduct.
 - a. Current rule 3-210 is modified by adding the aforementioned clause concerning the consequences of a client's proposed course of conduct.
 - b. Modifications to the Model Rule paragraph include:
 - (i) Dividing the Model Rule's single sentence substantive provision that encompasses two separate concepts into two subparagraphs for clarity.
 - (ii) Substituting current rule 3-210's term, "law, rule, or ruling of a tribunal" for the Model Rule's term, "law."
 - Pros: The paragraph, as amended, will carry forward the substance of current rule 3-210, which expressly prohibits a lawyer from counseling or assisting a client in a criminal or fraudulent conduct, but permits the lawyer to counsel or assist the client in a good faith attempt to test the validity of a law, etc. The addition of the Model Rule clause that permits a lawyer to "discuss the legal consequences of any proposed course of conduct with a client" is an important public protection addition, as it will assist a lawyer in attempting to dissuade a client from pursuing such a course of conduct.
 - Cons: The addition of the permissive Model Rule clause, proposed paragraph (b), does not belong in a set of disciplinary rules.
2. Recommend adoption of Comment [1], which is a substantially shortened version of Model Rule 1.2, Comment [9] and the first Commission's Comment [9], and which explains the new clause that is being added to current rule 3-210, i.e., a lawyer's ability to explain the consequences of a proposed course of conduct.
 - Pros: The added clause is critical in providing the lawyer with an added tool

as provided in paragraph (f)," to except advice regarding medical marijuana. Both Illinois and Ohio add a subparagraph permitting advice or assistance with respect to state law, e.g., medical marijuana, that conflicts with federal law. New York has deleted the last clause of the rule, which provides: "and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

in dissuading a client from a proposed course of action. Given that the clause would be new with this Rule, it is important that lawyers understand that they do not have carte blanche to explain to a client how to conduct their affairs as to avoid criminal prosecution.

- Cons: The blackletter language is sufficiently clear. There is no need for further explanation.
3. Recommend adoption of Comment [2], which is derived from Model Rule 1.2, Comment [10] and the first Commission's Comment [10], and which clarifies that the Rule also applies when the client's conduct has already begun and is continuing. It also cautions that the lawyer must comply with the lawyer's duties under Bus. & Prof. Code § 6068(a) and Bus. & Prof. Code § 6068(e)(1) and Rule 1.6 [3-100], and that the lawyer's only recourse if the client persists in illegal conduct may be resignation or withdrawal.
- Pros: This Comment brings proposed Rule 1.2.1 in line with the Commission's proposed Rule 1.6 and Bus. & Prof. Code § 6068(e)(1) by re-emphasizing that a client's proposed illegal course of conduct does not necessarily permit the lawyer to report it to the authorities. It also emphasizes that central to compliance with the Rule is compliance with the lawyer's duties under § 6068(a).
 - Cons: A lawyer's options when a client is intent on pursuing an illegal course of conduct is already adequately addressed in Rule 1.16 [3-700].
4. Recommend adoption of Comments [3] and [4], which are based on the first Commission's Comment [11] and has no counterpart in Model Rule 1.2, clarifies the application of subparagraph (b)(2) concerning a client's testing the validity of a law, rule, or ruling of a tribunal.
- Pros: In addition to providing interpretive guidance concerning subparagraph (b)(2), these comments address a lawyer's provision of legal advice and services to a client who contemplates engaging in civil disobedience. This Comment, particularly the example contained the Comment's last sentence, provides critical guidance on the application of the subparagraph.
 - Cons: The language of the blackletter of subparagraph (b)(2) speaks for itself. There is no need for further clarification.
5. Recommend adoption of Comment [5], which is derived from Model Rule 1.2, Comment [13] and the first Commission's Comment [12], and which clarifies that a lawyer is obligated under proposed Rule 1.4(a)(4) to consult with a client about the limitations on the lawyer's ability to advise or assist the client in illegal or criminal activity.
- Pros: As noted, this Rule alerts a lawyer to the lawyer's obligation under proposed Rule 1.4(a)(4) to consult with the client when the lawyer's advice or

assistance is not permitted under the Rules. This is an important duty warranting the cross-reference. As to the con argument that if it is important, the duty belongs in the black letter of *this* Rule, it in fact was paragraph (e) of original Model Rule 1.2. However, the Ethics 2000 Commission reasoned that the duty, which is part of a lawyer's duty to communicate with the client, was more appropriately placed in Model Rule 1.4, and the vast majority of jurisdictions have followed suit. Following this approach will remove an unnecessary difference between the California Rules and the rules adopted in a substantial majority of the jurisdictions.

- Cons: The language of the blackletter of proposed Rule 1.4(a)(4) speaks for itself. There is no need for further clarification in this Rule. If it is an important duty related to a lawyer's ability to advise or assist a client, then it should be in the blackletter of this Rule, not in Rule 1.4.
6. Recommend adoption of Comment [6], which has no counterpart in Model Rules or the current California Rules, but is based on blackletter text and Comments in Model Rule 1.2 counterparts in other jurisdictions that have addressed, in either the blackletter or a Comment, the conflict that exists between federal and state law in jurisdictions that permit the use of medical marijuana. See, e.g., the rules in Alaska (Rule); Colorado (Comment), Hawaii (Rule), Illinois (Rule & Comment), Nevada (Comment), Ohio (Rule), Oregon (Rule), and Washington (Comment). See also L.A. County Bar Ethics Op. 527, available at: <http://www.lacba.org/docs/default-source/ethics-opinions/archived-ethics-opinions/ethics-opinion-527-rev.pdf> and Bar Association of San Francisco Ethics Op. 2015-1, available at https://www.sfbar.org/ethics/opinion_2015-1.aspx
- Pros: Advising a client how to comply with California law that permits the cultivation and sale of medical marijuana necessarily also constitutes advice on violating federal law regulating controlled substances, including marijuana. Lawyers should be able to provide advice to clients on how to comply with the law without the lawyer being subject to the specter of discipline for unavoidably "facilitating" the violation of federal law. Including such a provision that would provide lawyers with sufficient assurance that they will not be subject to discipline. Although there are two recent ethics opinions that reason that a lawyer can provide legal advice and assistance to medical marijuana growers and sellers,⁶ the opinions are advisory only with no precedential effect. At least eight jurisdictions have adopted similar provisions,⁷ and Vermont has a similar provision under consideration. The Comment is an important clarification of the scope of application of the proposed Rule in situations where state or local might conflict with federal law, e.g., medical marijuana or sanctuary cities. Thus, notwithstanding the recent legalization of marijuana use in 2016, this is not necessarily a transitory issue.

⁶ See paragraph A.6, above.

⁷ See note 3, above.

Further, because the Comment provides interpretative guidance by clarifying the scope of the Rule's application, its substance is appropriately placed in a Comment rather than the blackletter text of the Rule.

- Cons: In light of the recent legalization of marijuana use in California, this is a transitory issue that does not need to be addressed in a rule of professional conduct. The two local bar association ethics opinions cited above provided sufficient clarification on the Rule's application. There is no apparent crisis in providing such services so there is no compelling need for a change in the Rule. Further, if it is determined that a provision is necessary, it more appropriately belongs in the blackletter text of the Rule, not in a Comment, because it provides an exception to the application of the Rule.

B. Concepts Rejected (Pros and Cons):

1. Include a provision similar to Model Rule 1.2, Comment [10], which states that in some circumstances, a lawyer might be justified in making a “noisy withdrawal” and disaffirm a document or opinion that the lawyer has provided to a client.
 - Pros: Noisy withdrawal is appropriate in some circumstances to avoid harm to the public.
 - Cons: The concept of noisy withdrawal is inimical to California's strong defense of client confidentiality. Any such withdrawal would be a violation of the lawyer's duties under Bus. & Prof. Code § 6068(e)(1) and Rule 1.6.

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:

1. The addition in subparagraph (d)(1) of the clause from the Model that provides a lawyer may discuss the consequences of a client's proposed course of conduct is a substantive change. (See discussion in Section IX.A.1, above.)

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term “lawyer” for “member.”
 - Pros: The current Rules' use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See, e.g., rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

- Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. Change the Rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).
- Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
 - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.2.1 [3-210] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.2.1 [3-210] in the form attached to this Report and Recommendation.