

Table of Contents

April 30, 2018 Tuft Email to Difuntorum, McCurdy & Lee: 1

May 1, 2018 Rothschild Email to Difuntorum, McCurdy & Lee:..... 3

May 3, 2018 Cardona Email to Difuntorum & McCurdy:..... 4

May 3, 2018 Eaton Email to Difuntorum & McCurdy: 4

May 3, 2018 Mohr Email to Difuntorum, McCurdy & Lee: 5

May 3, 2018 Fortescue Email to Difuntorum, McCurdy & Lee:..... 6

April 30, 2018 Tuft Email to Difuntorum, McCurdy & Lee:

I offer the following suggestions and comments in regard to the Supreme Court's Administrative Order 2018-04-11:

1. I support the Supreme Court's proposed revision to Comment [6] that replaces the lawyer's reasonable belief concept with language that specifies permitted assistance in complying with California law that conflicts with federal or tribal law.
2. The term "drafting" in the first sentence in Comment [6] appears to be incongruous with the other permitting assistance in applying California law. Here are two alternatives in an attempt to make the sentence clearer:

Alt 1:

"to assist a client in drafting instruments and administering or complying with California statutes, regulations, orders, and other state or local provisions that execute or apply to those laws."

Alt 2:

"to assist a client in administering or complying with California statutes, regulations, orders, and other state or local provisions that execute or apply to those laws, including drafting instruments."

3. I do not oppose changing "should also advise" to "must conform" in the second sentence in Comment [6]. However, the change raises two issues that should be addressed.

The first issue is whether the comment imposes a mandatory requirement that is not in the black letter rule. In this instance, I believe it does not. Comment [5] reminds lawyers that they must advise clients regarding the limitations on the lawyer's conduct, citing rule 1.4(a)(4). Similarly, the second sentence in Comment [6] as revised by the Court reminds lawyers that rule 1.4 requires that they inform the client about related federal or tribal law and policy. I would sharpen the revised comment by changing the cross reference to rule 1.4(a)(3).

The second issue is whether the remainder of the sentence following the citation to rule 1.4 provides sufficient clarity. I do not believe the phrase "under certain circumstances" provides useful guidance. Because the remainder of the sentence is intended to alert lawyers to the duty of competence that may require giving legal advice regarding the conflict, I recommend that it be a separate sentence that reads as follows:

"Depending on the circumstances, the lawyer may also be required to provide legal advice to the client regarding the conflict. (see rule 1.1)."

4. I do not recommend that we propose a the black letter rule that deals with conflicting state and federal law as some states have adopted. (see, e.g., Oregon rule 1.2(d), Ohio rule 1.2(d)(2) and Alaska rule 1.2(f).
 5. I agree to adding the asterisks in Attachment 2 to the Court order.
 6. I am not opposed to adding an asterisk to the word "know" in Comment [5], but if we do, shouldn't there also be an asterisk after "know" in paragraph (a)?
 7. I am opposed to adding a cross reference to rule 1.2.1, Comment [6] in either rule 1.1 or rule 1.4. Not only are these revisions unnecessary, doing so would further delay approval of the rules and could invited even more public comments.
 8. Attached is a draft of Comment [6] with the changes suggested in this memorandum. (See below.)
-

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 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 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 validity.

[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 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 [drafting instruments and] administering or complying with California statutes, regulations, orders, and other state or local provisions that execute or apply to those laws, [including drafting instruments]. If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy (see rule 1.4(a)(3)). Depending on the circumstances, the lawyer may also be required to provide legal advice to the client regarding the conflict (see rule 1.1).

May 1, 2018 Rothschild Email to Difuntorum, McCurdy & Lee:

Below are my comments on the Proposed rule 1.2.1 changes.

1. I agree with the proposed change to the first sentence of Comment[6].
2. I agree that informing the client of the conflicting federal or tribal law should be mandatory.
3. I disagree with the cross reference to rule 1.4. rule 1.4 requires lawyers keep clients informed of "significant developments" in the case. To me, this implies changes in the status of the case, not issues that exist when the case first begins. If the law, federal, state or tribal, changes, that would be a development.
4. I think the cross reference to rule 1.1 is more appropriate than 1.4. Advising a lawyer of how to sell marijuana without telling the client of the federal prohibition to me addresses competence. 1.1 provides explanation for both the requirement to inform and, under some circumstances, to advise the client about the conflict.

5. I like staff's suggestion to add "know" to rule 1.0.1 (f), and to mark it with an asterisk in rule 1/2/1 comment [5]. We probably then need to do a global search to see if "know" appears anywhere else in the proposed rules.
6. I agree that we should send out the Court draft as ALT 1 and whatever we come up with (if different) as ALT 2.
7. I agree that a new comment to 1.1 should be added as provided by staff. As to 1.4, as noted above, I believe the cross reference is inappropriate. If the cross reference remains, we should add it to 1.4 as well. I am troubled by the staff draft. To me, the use of "for example" should refer to a common occurrence. By using the term here, it makes it sound like this is what 1.4 means, rather than a ruling in the case by a judge, a change in the law, or new facts discovered in the case which may impact the handling or outcome of the case.

May 3, 2018 Cardona Email to Difuntorum & McCurdy:

My view is that we should recommend the modifications proposed by the Supreme Court, which seem to correctly define what a lawyer should do when confronted with a conflict among various laws. I do think we should add an asterisk to knows, both for consistency and because we want the broader form of knowledge set out in the definitions. I do not think the addition of cross-references in other rules is necessary.

May 3, 2018 Eaton Email to Difuntorum & McCurdy:

I believe the concepts the Supreme Court proposes should be accepted, though, per the Commission charter, I believe one of those concepts -- as a mandatory duty that expands the scope of the rule -- ought to be placed in the rule instead of the comment.

Here is what I propose:

A new subpart c to read: If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy.

Revise the Court's proposed revision to Comment 6 as follows: This rule 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 drafting, administering, or complying with California statutes, regulations, orders, and other state or local provisions that execute or apply to those laws. In addition to having a duty to inform the client of such a conflict imposed by paragraph (c), a lawyer under certain circumstances may be required to provide legal advice to the client regarding the conflict (see, e.g., rule 1.1).

I agree with staff that the Supreme Court's version should go out for public comment as Alt1.

May 3, 2018 Mohr Email to Difuntorum, McCurdy & Lee:

I think the changes the Court made to Comment [6] of proposed rule 1.2.1 constitute an essential revision that provides important guidance to lawyers representing government entities responsible for drafting California statutes, promulgating rules, or issuing orders, the legal effect of which might be in conflict with federal or tribal law.

I think there may be an extra “to” in the Comment’s first sentence, however, that should be removed. I think the last clause should provide “other state or local provisions that execute or *apply* those laws,” not “*apply to* those laws.” On the other hand, if that was the court’s intent, doesn’t “apply” mean the same thing as “execute” and, in accordance with the drafting rule to avoid redundancies, be deleted?

Alternatively, if the Court’s intent were to use “apply to” to mean “are related to,” I think that phrase should be used. I don’t recall seeing the phrase “apply to” having been used in any rule or comment in a similar way. I’m find referring to “other state or local provisions” that “apply to” the conflicting state laws to be confusing.

My preference would be to delete the phrase “apply to.”

I also wonder whether the reference to “related federal or tribal law and policy” in the second sentence of the Comment should be “*the* related federal or tribal law and policy.”

In short, I would revise the comment as follows:

[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 drafting, administering, or complying with California statutes, regulations, orders, and other state or local provisions that execute ~~or apply to~~ those laws. If California law conflicts with federal or tribal law, the lawyer must inform the client about the 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).

. . . I am in agreement with all the proposed revisions by the Court to Comment [6] except as I indicated in my previous message, as well as the staff's proposed cross-references in rules 1.1 and 1.4, both of which I view as non-substantive changes.

As to revising the definition of “Knowingly,” “known,” or “knows” in proposed rule 1.0.1(f) to add the term “know,” I previously wrote Randy that I thought that would be “fine,”

though I also noted that no other jurisdiction has made a similar change, even though most use the MR phrase "comes to know" in their Rule 3.3.

May 3, 2018 Fortescue Email to Difuntorum, McCurdy & Lee:

Thank you for providing the post-agenda emails regarding the court's proposed revisions to Comment [6]. I decided to include my own personal thoughts (i.e., not those of the court) now in the hope it might facilitate our discussion and the decision-making process next Tuesday.

- I believe Prof. Mohr adroitly detected the court's rationale for including the terms "drafting, administering" in the first sentence. My understanding is the comment is intended to provide ethical guidance to all lawyers in this area, including government lawyers operating at state and local levels who are seeking to discharge their professional obligations to their governmental clients in an ethical manner.
- The "apply to" language is intentional. I believe the purpose is to distinguish between the discrete body of law (i.e., statutes, regulations, ordinances, etc.) that actually conflicts with federal or tribal law from the broader set of generally applicable California laws (e.g., licensing regulations, financing laws, labor and employment laws, CEQA, FEHA, ADA, etc.) that may also apply to a client engaged in conduct permitted by California law but prohibited by federal law (e.g., operating a marijuana dispensary). That said, I am sympathetic to the notion that "apply to" (or even "are related to") may not clearly convey this intention. I am certain the court is open to any alternative suggestions that the Commission and/or Board may have that can improve the comment in this regard.
- I do not believe it was the intention to create a new duty to inform or advise within Comment [6] itself, but to alert lawyers of these duties rooted elsewhere in the CRPC. I tend to agree with Toby that an obvious conflict between California law and federal or tribal law that relates to the subject of the representation and is manifest from the beginning probably would not be considered a "development" within the meaning of rule 1.4(a)(3). However, it may be if, as he posits, the client decides mid-representation to engage in a new course of conduct that makes the conflict suddenly relevant. Additionally, I am wondering whether a failure to explain the implications of such conflict to a client at the outset of representation to the extent reasonably necessary for the client to make informed decision (i.e., whether or not to go through with setting up the marijuana business) would constitute a violation of rule 1.4(b).