

STATE BAR OF CALIFORNIA

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA

OPEN SESSION ACTION SUMMARY

**Tuesday, May 8, 2018
(10:00 am – 4:00 pm)**

State Bar of California
State Bar of California
845 So. Figueroa Street
Los Angeles, CA 90017

Members Present: Lee Edmon (Chair), George Cardona, Danny Chou, Daniel Eaton, Tobi Inlander (Public Member), Kevin Mohr, Toby Rothschild, and Mark Tuft.

State Bar Staff Present: Allen Blumenthal (Office of Chief Trial Counsel) (by teleconference), Randall Difuntorum (Office of Professional Competence), Gordon Grenier (State Bar Court), Donna Hershkowitz (Chief of Programs), Andrew Tuft (Office of Professional Competence), Mimi Lee (Office of Professional Competence), and Lauren McCurdy (Office of Professional Competence, by teleconference).

Others Present: James Blume, Jose Castaneda, Greg Fortescue (Supreme Court staff) (by teleconference), Diane Karpman (by teleconference), and Heather Rosing (Advisor) (by teleconference).

I. REMARK'S FROM THE CHAIR

A. Roll Call

B. Public Comment

Mr. Blume addressed the Commission indicating concerns about situations where multiple attorneys represent a client successively on the same case and each attorney requests multiple extensions before withdrawing and leaving the client to re-file multiple times. As a result, the client is eventually labeled as a vexatious litigant.

C. Announcements

The Chair reported that the Board of Trustees extended the terms of the current Commission members until the 2018 State Bar annual meeting.

D. Staff Report

Mr. Difuntorum reported on the anticipated procedural steps for the State Bar's reconsideration of proposed rule 1.2.1, including anticipated Board Committee authorization for a 45-day public comment period.

Mr. Fortescue reported that the Supreme Court's review of the proposed rules has been completed and that next steps were under consideration.

E. Approval of Open Session Action Summary from the January 23, 2018 Meeting

The consent agenda was presented to the Commission and upon motion made, seconded and adopted, it was

RESOLVED, that the Commission approves the action summary of the Commission's January 23, 2018 meeting.

All members present voted yes except Mr. Cardona who abstained.

II. ACTION

A. Reconsideration of Proposed Rule 1.2.1 in Response to Supreme Court Administrative Order 2018-04-11, Supreme Court Case No. S240991

Mr. Difuntorum explained the staff recommendation that the Supreme Court's version of a modified rule be included with any public comment proposal recommended by the Commission.

Mr. Fortescue provided personal observations on the language changes in the Supreme Court's version of a modified rule.

Mr. Eaton explained his concern that mandatory obligations codified in rules must not be placed in the comments to a rule.

After discussion, the following actions were taken.

Upon motion made, seconded and adopted, it was

RESOLVED, that the Commission will recommend public comment on two versions of a modified rule 1.2.1 with the Supreme Court's version as ALT-1 and an ALT-2 version that includes further revisions by the Commission intended to sharpen and clarify the Supreme Court's version.

All members present voted yes.

Upon motion made, seconded and adopted, it was

RESOLVED, that the Commission adopts the changes to Comment [6] in the form attached to this action summary.

All members present voted yes with exception of Mr. Chou who abstained.

Upon motion made, seconded and adopted, it was

RESOLVED, that the Commission adopts the addition of asterisks to the defined terms in the black letter and in the comment in the form attached to this action summary.

All members present voted yes.

Upon motion made, seconded and adopted, it was

RESOLVED, that the Commission adopts as ALT-2 the modified version of proposed rule 1.2.1 in the form attached to this action summary.

All members present voted yes with exception of Mr. Chou who abstained.

B. Reconsideration of Proposed Rules Referred Back by Supreme Court Staff

No other proposed rules were considered.

CLOSED SESSION

*None**

*Closed under Bus. & Prof. Code § 6026.5(a) to consult with counsel concerning pending or prospective litigation.

*Closed under Bus. & Prof. Code Sec. 6026.5(d) to consider a personnel matter.



**Rule 1.2.1 Advising or Assisting the Violation of Law
([ALT1] Revised Rule Included in the Supreme Court's April 11, 2018
Administrative Order)**

- (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 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



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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, 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 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 ([ALT2] Commission's Proposed Rule Adopted on May 8, 2018)

- (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 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



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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. In the event of such a conflict, the lawyer may assist a client in drafting, interpreting, administering, or complying with California laws, including statutes, regulations, orders, and other state or local provisions, even if the client's actions might violate the conflicting federal or tribal law. If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see rules 1.1 and 1.4).