



**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.

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[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).



Rule 1.2.1 Advising or Assisting the Violation of Law (Redline Comparison of the Supreme Court's Revisions for Review [ALT1] to the Commission's Proposed Rule [ALT2])

- (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.

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[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.~~ In the event of such a conflict, ~~to~~ 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 ~~that execute or apply to those laws, 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 ~~(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~~ rules 1.1 and 1.4).

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July 1, 2018 Cardona Email to Difuntorum, McCurdy, Tuft & Lee:

Here is what I would suggest as responses to the comments (by paragraph corresponding to the paragraphs set out in the synopsis):

Richard Abrams: [Single response to both paragraphs.] “Like all of the proposed rules, this rule does not exempt prosecutors (including OCTC attorneys) from its application. Though prosecutors and OCTC attorneys typically are not representing individual clients, they do represent clients (i.e., the People of the State of California, the State Bar) and would be governed by this rule to the extent they are discussing proposed courses of action with other representatives of those clients (e.g., elected officials or State Bar officials) .”

Thomas Vidal: (1) “The word ‘determine’ as used in the proposed rule is a broad one that is intended to and does encompass testing or challenging the validity of a particular law, rule, or ruling.” (2) [I think we addressed this or a similar comment in the earlier discussion of this rule, and would be interested to see what our response was at the time.].

Sara Gardner: “The Commission agrees with the expressed preference for Alt. 2.”

COPRAC: “The Commission agrees with the comment and with the expressed preference for Alt. 2.”

Daniel Horwitz: “The Commission does not agree that the conduct prohibited is insufficiently defined. The Commission notes that ABA Model Rule 1.2 applies to both ‘criminal and fraudulent’ conduct. The addition of violations of law, rules, or rulings of a tribunal adds very specific prohibitions to make clear that lawyers may not counsel or assist in such violations except in the circumstances set forth in Section (b). With this language the application of the rule to the example you provide is not ambiguous. Assuming the debtor had been ordered to appear at the judgment debtor examination, under Section (a) the lawyer representing the debtor could not advise the debtor not to appear, nor could the lawyer assist the debtor in failing to appear. Under Section (b), however, the lawyer would remain free to discuss with the debtor the pros and cons of appearing or not appearing. Because there is no ambiguity or lack of specificity, the Commission declines to recommend the proposed change to the Rule.”

July 6, 2018 Mohr Email to Difuntorum, McCurdy, Tuft & Lee:

I've suggested responses to the public comments received in the attached redline Public Comment Synopsis table. Although I don't believe the proposed changes to the black letter text were part of the public comment solicitation, I have suggested responses to their substance. If you believe they are outside the scope of the extended Commission's charge, please delete the responses.

For the separate letter with multiple signatories I've added responses to their two suggestions but have not tried to summarize their letter in the table.

As you can tell from the attached table, I do not believe any further changes to Comment [6] are warranted. I continue to favor ALT2, which contains the Commission's revisions made at the 5/8/18 meeting.

[See public commenter table for Prof. Mohr's responses]

July 6, 2018 Tuft Email to Difuntorum, McCurdy, & Tuft:

I offer the following responses to the public comments received to date

1. Comment by Thomas Vidal. I would change the RRC response to read: The word “determine” as used in the proposed rule is intended to encompass testing or challenging the validity of a particular law, rule or ruling and has been interpreted as doing so in jurisdictions that have adopted a similar version of ABA Model Rule 1.2(d).

Rule 1.2.1 deals with advising or assisting the violation of law rather than a lawyer taking appropriate steps on his or her own to determine the validity of a particular law, rule or ruling. The phrase “make a good faith effort to determine” provides greater clarity than “may take appropriate steps.”

2. Comment by Daniel Horwitz. The comment does not recognize that the rule is limited to conduct that the lawyer “knows” is criminal fraudulent or a violation of any law, rule or ruling of a tribunal. In the responder's example, the reasons for the client not appearing for a debtor's exam would not be considered fraudulent. Nevertheless, the rule does not put the lawyer at odds with what the lawyer believes is in the client's best interest because under paragraph (b), the lawyer may discuss the consequences of the client's decision and may counsel or assist the client in determining whether the reasons for not appearing are justified or mitigated a violation.
3. Orange County Bar Association. I do not recommend a change to the second sentence in comment [6] in alt 2 because the wording is sufficient to alert lawyers to the duty of competence.
4. Professors Mootz et. al. I disagree that alt 2 needs additional clarification. Our recommendation to add “*administering*” to “drafting and complying” with California statutes and other provisions “*that execute or apply to those laws*” addresses the very concern the professors raise and does so better than the rules in Ohio, Colorado and Washington.

RRC3 – Rule 1.2.1
Post-Agenda E-mails, etc. – (July 8, 2018)

Our response to the second recommendation that the rule state that it applies equally to government lawyers should be the same as our response to Richard Abrams (A-2018-1).

5. Jerry Sapiro. I recall that Greg explained that “drafting” was intended to apply to lawyers engaged in drafting laws, regulations etc., and that “administering” and “complying” with state laws is intended to encompass negotiating and drafting documents.

Jerry’s second point may be worth considering. A simple fix would be to change the phrase to read: “and under certain circumstances may also be required to provide legal advice to the client regarding the conflict *and the reasonably foreseeable consequences of violating federal or tribal law.*”