

TOTAL = 15 Alt. 1 = 0
 Alt. 2 = 11
 Neither = 4
 None = 0

**Proposed Rule 1.2.1 Advising or Assisting the Violation of Law
 Synopsis of Public Comments**

No.	Commenter/Signatory	Comment on Behalf of Group?	Preferred Alternative / Position ¹	Comment	RRC Response
A-2018-1	Abrams, Richard (05-24-18)	No	Neither	<p>Commenter is concerned the rule does not expressly state that it applies to prosecutors (including OCTC attorneys) who often take the position they do not have a “client” in the same sense that private attorneys or criminal defense attorneys do.</p> <p>When the rules are undergoing revision, they should clearly [be] revised to apply to all attorneys including all prosecutors and State Bar OCTC attorneys. Neither rule even attempts to constrain regular prosecutors or OCTC attorneys.</p>	<p>Kevin’s Redline to George’s Suggested Responses:</p> <p>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 <u>do not</u> representing individual clients, they do represent <u>have</u> 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 <u>organizational</u> clients (e.g., elected officials or State Bar officials) .</p>
A-2018-2	Vidal, Thomas (05-24-18)	No	Neither	<p>The proposed rule is inadequate in informing lawyers how to conduct themselves when representing a client who needs to challenge a law, rule or ruling. It is inadequate because the word “determine” does not convey the same force as “test” or “challenge” and may be construed more narrowly than those terms.</p>	<p>Kevin’s Redline to George’s Suggested Responses:</p> <p>The word ‘determine’ as used in the proposed rule is a broad <u>one that</u> “Determine” is intended to and does encompass the concepts of testing or challenging the validity of a particular law, rule, or ruling.</p> <p>Mark’s Suggested Response:</p> <p>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</p>

¹ Alt. 1 = Supreme Court’s Proposed Rule Alt. 2 = Commission’s Proposed Rule Neither = Neither Alt 1 or Alt 2 None = No Rule Necessary

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				<p>Also, Rule 3-210 is superior because it permits an attorney, whether representing a client or not, to “take appropriate steps” him or herself. I suggest revising the rule as follows:</p> <p>(a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, or fraudulent.</p> <p>(b) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is a violation of any law, rule, or ruling of a tribunal, unless the lawyer believes in good faith that such law, rule, or ruling is invalid.</p> <p>(c) Notwithstanding paragraphs (a) and (b), a lawyer may:</p> <p>(1) discuss the legal consequences of any proposed course of conduct with a client;</p> <p>(2) counsel or assist a client to</p>	<p>similar version of ABA Model Rule 1.2(d).</p> <p>Kevin's Suggested Responses: Although the Commission believes that the commenter's proposal lies outside the scope of the public comment request and thus outside the scope of the Commission's charge, it will attempt to clarify why the text of rule 1.2.1 does not diverge from current rule 3-210 and no further changes need be made to proposed rule 1.2.1.</p> <p>The Commission disagrees with the commenter's interpretation of the second sentence of rule 3-210. Rule 3-210 is part of a chapter containing rules that govern a lawyer's professional relationship with a client. It would be incongruous to interpret the second sentence of rule 3-210 as permitting a lawyer himself or herself to take appropriate steps in good faith to test the validity of a law. First, the sentence follows the first sentence, which prohibits a lawyer from advising the violation of a law, rule or ruling of a tribunal. That first sentence contemplates that the lawyer is advising <i>a client</i>. It is apparent that the second sentence of rule 3-210 refers to the lawyer taking steps on the client's behalf to test the law, etc., about which</p>

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				<p>make a good faith effort to determine, test, or otherwise challenge the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal; and</p> <p>(3) take appropriate steps in good faith to determine, test, or challenge the validity of any law, rule, or ruling of a tribunal.</p>	<p>the client sought advice from the lawyer. A lawyer cannot unilaterally decide by himself or herself to challenge a law that could result in criminal or civil sanctions against the client. Because such a decision could affect the substantial rights of the client, it is the client's choice to make. <i>See Blanton v. Womancare, Inc.</i> (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].) Second, there is no reason why a lawyer needs to be assured in a code of professional conduct that the lawyer himself or herself can personally challenge a law that directly affects the lawyer. In summary, to include the commenter's proposed paragraph (c)(3) would be redundant of paragraph (c)(2) and potentially mislead members in the profession to believe that they can make decisions on matters affecting the client without the client's informed consent.</p> <p>Mark's Suggested Response: 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."</p>

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A-2018-3	Gardner, Sara (05-25-18)	No	Alt. 2	None.	The Commission agrees with the expressed preference for Alt. 2.
A-2018-4	State Bar of California, Committee on Professional Responsibility and Conduct (Dilworth) (06-15-18)	Yes	Alt. 2	Alt. 2 provides useful clarification to practitioners regarding the scope of the Comment's application to legal assistance in situations where California law may conflict with federal or tribal law. In particular, COPRAC considers the clarification that a lawyer may assist a client in drafting, interpreting, administering, or complying with California laws "even if the client's actions might violate the conflicting federal or tribal law" to provide helpful guidance to lawyers from whom such assistance is sought.	The Commission agrees with the comment and with the expressed preference for Alt. 2.
A-2018-5	Horwitz, Daniel (06-15-18)	No	Neither	These measures, as applied to fraud and "violations of any law, rule or ruling of a tribunal" fails to adequately define the conduct prohibited with sufficient specificity. Please take out the references to "fraudulent, or a violation of any law, rule, or ruling of a tribunal."	<p>Kevin's Suggested Responses:</p> <p>Although the Commission believes that the commenter's proposal lies outside the scope of the public comment request and thus outside the scope of the Commission's charge, it will attempt to address the commenter's concerns.</p> <p>The Commission will not recommend the requested change. First, the reference to "any law, rule, or ruling of tribunal" in rule 1.2.1 carries forward language that has been in the California Rules since at least 1975. The Commission is unaware of any</p>

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					<p>problems that the language has raised. Second, with respect to the commenter's concern re the lack of definition of "fraudulent" conduct, new rule 1.0.1(d) defines "fraudulent."</p> <p>Mark's Suggested Responses: 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 is determining whether the reasons for not appearing are justified or mitigated a violation.</p>
A-2018-6	Berger, Karl (06-28-18)	No	Alt. 2	For government attorneys, Alternative 2 - with Comment 6 - is the best alternative. While this does not necessarily go far enough in providing guidance, it certainly does provide a path forward.	<p>Kevin's Suggested Responses: The Commission agrees with the expressed preference for Alt. 2.</p>

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A-2018-7	Orange County Bar Association (Miliband) (06-28-18)	Yes	Alt. 2	<p>We generally support and prefer Alt. 2 over Alt. 1 as we believe that version makes the language of Cmt. [6] more precise.</p> <p>However, neither Alt. 1 nor Alt. 2 go far enough to explain the last sentence of Cmt. [6] and the circumstances that would dictate the necessity for further legal advice to the client regarding the conflict between California law and federal or tribal laws. If Cmt. [6] retains the last sentence, we suggest it should describe or at least provide an example of the circumstances requiring such legal advice.</p>	<p>Kevin's Suggested Responses: The Commission agrees with the expressed preference for Alt. 2.</p> <p>The Commission, however, disagrees with the commenter that any further clarification of the last sentence of Comment [6] is required. Whether a lawyer's duty of competence under rule 1.1 or duty to communicate with the client under rule 1.4 would require the lawyer to provide legal advice about the conflict can depend on a wide array of circumstances that cannot be reduced to a brief explanatory comment.</p> <p>Mark's Suggested Responses: 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.</p>
A-2018-8	Mootz, Francis (07-02-18)	No	Alt. 2	<p>Alt. 2 is the better option for bringing some clarity to the ethical obligations of lawyers dealing with clients involved in the state-legal cannabis trade.</p> <p>However, Alt. 2 is still subject to misinterpretation, and so we urge the Board to use the language in the original Cmt. [6] to correct the</p>	<p>Kevin's Suggested Responses: The Commission agrees with the expressed preference for Alt. 2.</p> <p>The Commission, however, disagrees with the suggestion that the original Comment [6] language should be restored. The Commission believes</p>

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				<p>ambiguity in Alt. 2 by adding that lawyers may “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. Additionally, it would clarify Alt. 2 if the Comment expressly stated that lawyers may ethically assist clients to comply with state law “whether as an attorney for a governmental entity or as counsel advising a non-governmental client.”</p>	<p>that the Supreme Court’s revision to the comment (as further modified by the Commission), which specifically identifies the kind of assistance that a lawyer is permitted to provide under paragraph (b), provides better guidance and is thus more appropriate for a comment to a disciplinary rule.</p> <p>Mark’s Suggested Responses: 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.</p> <p>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).</p>
A-2018-9	State Bar of California, Office of Chief Trial Counsel (Lawrence) (07-02-18)	Yes	Alt. 2	<p>OCTC supports Alt. 2.</p> <p>OCTC believes Alt. 2 is preferable because it is more clearly written and therefore should be more readily understood by attorney-licensees and more easily enforced by our office.</p>	<p>Kevin’s Suggested Responses: The Commission agrees with the comment and with the expressed preference for Alt. 2.</p>

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A-2018-10	Traylor, Robert (07-03-18)	No	Alt. 2	None.	The Commission agrees with the expressed preference for Alt. 2.
A-2018-11	Kitabayashi, Mark (07-03-18)	No	Alt. 2	We support Alt. 2. In particular, the addition of the word “interpreting” California laws is vital as an essential function of an attorney’s obligations toward his/her clients.	The Commission agrees with the expressed preference for Alt. 2.
A-2018-12	Sapiro, Jerome (07-03-18)	No	Alt. 2	I prefer Alt. 2. However, I offer two suggestions. First, the word “drafting” makes the intent of that part of the phrase unclear. If the Commission intends that the lawyer may only draft laws, then the word “drafting” is correct. However, lawyering involves more than that, such as a lawyer may be involved with negotiating and drafting documents other than laws. That should also be permissible under the proposed comment. I fear there is a risk that the comment may be interpreted to mean that drafting anything other than a law is prohibited. That mistaken interpretation should expressly be precluded by the wording of the comment.	Kevin’s Suggested Responses: The Commission agrees with the expressed preference for Alt. 2. The Commission appreciates the commenter’s suggestion and notes that the commenter is correct that the word “drafting” is intended to apply to a lawyer who drafts laws on behalf of governmental client. The Commission does not believe that, as drafted, the comment is misleading and could reasonably be construed to suggest that any other drafting is prohibited. Mark’s Suggested Responses: 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.

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				<p>Second, with respect to the third sentence, I believe a lawyer in this situation should do more than just advise the client about the conflict between the laws. Merely stating that the laws conflict is inadequate. I suggest that the concept be expanded to include requiring the lawyer to warn the client about the potential consequences to the client if the client is found to have violated federal or tribal law. One way of phrasing the expansion could be: “. . . the lawyer must inform the client about related federal or tribal law or policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict <i>and the reasonably foreseeable potential consequences to the client if the client is found to have violated federal or tribal law.</i>”</p>	<p>Kevin’s Suggested Responses: With respect to the commenter’s second point, i.e., specifying what a lawyer’s advice might entail, the Commission notes that the specific advice that might be required would depend on what is needed to fully inform the client after a consideration of the lawyer’s duty of competence under rule 1.1 and duty to communicate with the client under rule 1.4. The Commission believes that whether the advice must be given and the scope of that advice can depend on a wide array of circumstances that cannot be reduced to a specific kind of advice identified in a brief rule comment.</p> <p>Mark’s Suggested Responses: 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.”</p>
A-2018-13	Mandell, Joshua (07-03-18)	No	Alt. 2	Alt. 2 is preferable to Alt. 1 because the language “even if the client’s actions might violate the conflicting federal or tribal law” expressly recognizes the conflict among the laws and in doing so clarifies that	The Commission agrees with the comment and with the expressed preference for Alt. 2.

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				the attorney may nonetheless advise the client about how to comply with California law without fear that in giving such advice that the attorney is engaged in unethical conduct.	
A-2018-14	Multiple Signatories (Bastidas) (07-03-18)	Yes	Neither	<p>We respectfully request the Board reject all proposed changes and revert to the original language of Comment [6] or, in the alternative, adopt Alt. 2 with our recommended changes.</p> <p>The phrase “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” is somehow both too limited and overly vague.</p> <p>In Alt. 2, the inclusion of the word “interpreting” to the list of acceptable activities is a welcome addition, and the use of “including” makes the entire clause more expansive, but we ask that the Commission also consider inserting “advocating,” “negotiating,” and “filing” to this list.</p> <p>We would support the addition of a safe harbor provision to protect that sector of the Bar assisting state-</p>	<p>Kevin's Suggested Responses:</p> <p>The Commission agrees with the expressed preference for Alt. 2 over Alt. 1.</p> <p>However, the Commission does not agree with the commenters' suggestions to further revise Comment [6].</p> <p>First, the Commission does not believe it is necessary to add “advocating,” “negotiating,” or “filing” to the list of permitted lawyer assistance in Comment [6]. The Commission believes the word “comply” is sufficiently broad to encompass each of the suggested additional words, thus rendering them redundant.</p> <p>Second, the Commission disagrees with the commenters' request that a safe harbor provision be added to the</p>

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				<p>compliant cannabis businesses. We request that the following clause be inserted at the end of Comment [6]:</p> <p>“This Rule shall not be interpreted so as to limit or prohibit the provision of advice or services rendered in compliance with state and local cannabis laws and regulations.”</p>	<p>rule and will not recommend the addition. The Commission believes that Comment [6] provides sufficient guidance to lawyers regarding the scope of assistance they may provide to a client when California law conflicts with federal law. The commenters’ proposed addition is thus redundant at best and, more to the point, would threaten to swallow paragraph (a)’s prohibition against assisting a client in criminal or fraudulent conduct.</p>
A-2018-15	Hossack, Joanna (07-03-18)	No	Alt. 2	None	The Commission agrees with the expressed preference for Alt. 2.