

**McCurdy, Lauren**

RE: Rule 1.2  
6/25&26/10 Commission Meeting  
Open Session Agenda Item III.D.

**From:** Kevin Mohr [kemohr@charter.net]  
**Sent:** Thursday, June 17, 2010 2:19 PM  
**To:** Mark Tuft  
**Cc:** Kevin Mohr (Work) (E-mail); Kevin Mohr (Home#1) (E-mail); Difuntorum, Randall; Lee, Mimi; Ellen Peck; McCurdy, Lauren; Vapnek, Paul W. ; Dominique Snyder; Harry Sondheim  
**Subject:** Re: RRC - 3-210 1-2 - Public Comment Chart - By Commenter - XDFT2 1 (06-16-10)KEM-DS (2).doc  
**Attachments:** RRC - 3-210 [1-2] - Public Comment Chart - By Commenter - XDFT2.2 (06-17-10)KEM-DS-MLT.doc

Thanks, Mark. I've accept your revision in the attached document, Draft 2.2 (6/17/10)KEM-DS-MLT and ask that it be used w/ the revised rule draft as the agenda materials. Kevin

Attached:  
RRC - 3-210 [1-2] - Public Comment Chart - By Commenter - XDFT2.2 (06-17-10)KEM-DS-MLT.doc

Mark Tuft wrote:

<<RRC - 3-210 1-2 - Public Comment Chart - By Commenter - XDFT2 1 (06-16-10)KEM-DS (2).doc>>

The minor correction is in response to comment "4"

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## Difuntorum, Randall

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**From:** Kevin Mohr [kemohr@charter.net]  
**Sent:** Thursday, June 17, 2010 11:36 AM  
**To:** McCurdy, Lauren; Difuntorum, Randall; Lee, Mimi  
**Cc:** Dominique Snyder; Ellen Peck; Mark Tuft; Harry Sondheim; Kevin Mohr G  
**Subject:** RRC - 1.2 [3-210] - III.D. - 06/25-26/10 Meeting Materials  
**Attachments:** RRC - 3-210 [1-2] - Public Comment Chart - By Commenter - XDFT2.1 (06-16-10)KEM-DS.doc; RRC - 3-210 [1-2] - Rule - Post-PCD [6] (06-16-10) - Cf. to PCD [5].doc

Greetings:

I've attached the following on behalf of Dom:

1. Public Comment Chart, Draft 2.1 (6/16/10)KEM-DS.
2. Rule, Post-public comment draft [#6] (6/16/10), redline, compared to PCD [#5] (2/5/10).

The only change to the Rule is to add a reference to a provision in the California Constitution that was requested by the CPDA.

Please note that the co-drafters (Ellen and Mark) have not had an opportunity to review the attached.

Please let me know if you have any questions. Thanks,

Kevin

Attached:

RRC - 3-210 [1-2] - Public Comment Chart - By Commenter - XDFT2.1 (06-16-10)KEM-DS.doc  
RRC - 3-210 [1-2] - Rule - Post-PCD [6] (06-16-10) - Cf. to PCD [5].doc

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**Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer**  
(Commission's Proposed Rule – Post-PCD [#6] (6/16/10) – COMPARED TO PCD [#5] (2/5/10))

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- (d)
  - (1) 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.
  - (2) Notwithstanding paragraph (d)(1), 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 a law, rule, or ruling of a tribunal.

**Comment**

**Allocation of Authority between Client and Lawyer**

- [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. See e.g. ~~Cal. Constitution Article I section 16~~<sup>1</sup> Penal Code section 1018. A lawyer is not authorized merely by virtue of the lawyer's retention by a client, to impair the client's substantial rights or the client's claim itself. *Blanton v. WomanCare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].) Accordingly, the decisions specified in paragraph (a), such as whether to settle a civil matter or waive a jury trial in a civil matter, must also be made by the client. See Rule 1.4(c) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation, provided the lawyer does not violate Rule 1.6 or Business and Professions Code section 6068(e).

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<sup>1</sup> Drafters' Note: Change made per request of California Public Defenders Association. See Public Comment of Garrick Byers. Cal. Const. Art. I, § 16, provides in part:

A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel.

- [2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).
- [3] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.
- [4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

#### **Independence from Client's Views or Activities**

- [5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of

popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

#### **Agreements Limiting Scope of Representation**

- [6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as imprudent.
- [7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1. Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent legal problems outside the scope of representation.

- [8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6. See also California Rules of Court 3.35-3.37 (limited scope rules applicable in civil matters generally), and 5.70-5.71 (limited scope rules applicable in family law matters).

### **Criminal, Fraudulent and Prohibited Transactions**

- [9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud or to violate any rule, law, or ruling of a tribunal. However, this Rule does not prohibit a lawyer from giving a good faith opinion about the foreseeable consequences of a client's proposed conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction 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.
- [10] The prohibition in paragraph (d)(1) applies whether or not the client's conduct has already begun and is continuing. For example, a lawyer may not draft or deliver documents that the lawyer knows are fraudulent; nor may the lawyer counsel how the wrongdoing might be concealed. The lawyer may not continue assisting a client in conduct that the lawyer originally believed was legally proper but later discovers is criminal, fraudulent, or the violation of any rule, law, or ruling of a tribunal. In any event, the lawyer shall not violate his or her duty of protecting all confidential information as provided in Rule 1.6 and Business and Professions Code section 6068(e). When a lawyer has been retained with respect to client conduct described in paragraph (d)(1), the lawyer shall limit his or her actions to those that appear to the lawyer to be in the best lawful interest of the client, including

counseling the client about possible corrective or remedial action. 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 Rule 1.16.

- [11] Paragraph (d)(2) authorizes a lawyer to 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. Determining 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. Paragraph (d)(2) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal 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.
- [12] 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 consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(6).



**Rule 1.2 Scope of Representation  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	California Public Defenders Ass'n ("CPDA") [Garrick Byers]	M	Yes	1.2(a)	<p>The commenter requests that a new comment be added to clarify the last sentence of paragraph (a) of the Rule, which provides:</p> <p style="padding-left: 40px;">Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.</p> <p>Because many prosecutors and criminal defense lawyers (and judges) do not know of the basic California law concerning waiver of jury trial, the commenter requests the addition of the following comment:</p> <p style="padding-left: 40px;">California Constitution article I, section 16, first paragraph, second sentence, provides that "A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel."</p> <p>The commenter also requests the addition of a reference to the leading California treatise</p>	<p>The Commission agrees in part with the request and has added a reference in Comment [1] to the relevant section of the Constitution. The Commission, however, declines to add a reference to the cited treatise because the Rules style does not permit references to such secondary sources.</p>

<sup>1</sup> A = AGREE with proposed Rule      D = DISAGREE with proposed Rule      M = AGREE ONLY IF MODIFIED      NI = NOT INDICATED

<sup>2</sup> The reference could be placed after the first sentence of Comment [1], before the reference to Penal Code § 1018.

**Rule 1.2 Scope of Representation**  
**[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
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 Modify = \_\_  
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No.	Commenter	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					on criminal law, as follows: "See, generally, 5 Witkin & Epstein, California Criminal Law (3d Ed., 2000), Ch. XIV, §§ 452 – 459 ('Waiver of Right [to Jury Trial])."	
3	HALT, Inc. – An Organization of Americans for Legal Reform	A	Yes		The commenter strongly supports the Commission's acceptance of the ABA Model Rule in Proposed Rule 1.2. An attorney works for a client, and has an ethical responsibility to allow the client to make the important decisions in a matter. The commenter supports the Commission's recognition of a lawyer's obligation to "abide by a client's decisions concerning the objectives of representation" and to "abide by a client's decision whether to settle a matter" (Proposed Rule 1.2(a)). In addition, the commenter has long advocated limited representation as a cost-saving innovation that enhances consumer choice. We strongly support the Commission's explicit authorization of this practice (Proposed Rule 1.2(c)).	No response required.
5	Office of Chief Trial Counsel ("OCTC")	M	Yes		1. OCTC is concerned that subparagraphs (a) and (b), although in the Model Rules, are not rules subject to discipline and, thus, do not belong in the Rules of Professional Conduct. Further, OCTC believes that the concepts in subparagraphs (a) and (b) are already implicitly included in the rules regarding competence and the duty to communicate.	1. The Commission disagrees with the commenter's position. The Rule not only provides understandable disciplinary standards in paragraphs (a) and (d), the latter of which simply carries forward current rule 3-210, but also provides important guidance to lawyers in their relationships with clients.

**Rule 1.2 Scope of Representation  
[Sorted by Commenter]**

TOTAL = \_\_\_ Agree = \_\_\_  
Disagree = \_\_\_  
Modify = \_\_\_  
NI = \_\_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>2. OCTC is concerned that, while subparagraph (c) permits limited scope representations if the limitation is reasonable under the circumstances, it does not specifically prohibit limited scope representations when they are not permitted by law. (In the Matter of Valinoti (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520-521.) While Comment 8 states this, it should be in the rule, not just a Comment.</p> <p>3. OCTC believes that the consent in paragraph (c) should be in writing or at least by written documentation, not just informed consent. This would protect both the client and the attorney and impress upon the client the limitation and the importance of the limitation. This is not more than is being required when the attorney informs the client that he or she does not have professional liability insurance or when an attorney enters into a true retainer agreement. (See e.g. proposed rules 1.4.1 and 1.5(e).) Given that limited scope representation is an important</p>	<p>2. The Commission disagrees. OCTC's proposals regarding paragraph (c) and comment [8] do not appear to reflect the views repeatedly expressed by Supreme Court Justice George, the Judicial Council, the Access to Justice Commission and others. Limited scope representation is not prohibited unless there is an exception allowing for such representation. Rather, it is permitted unless specifically prohibited or other duties have been imposed. The OCTC's reading of <i>Valinoti</i> appears overbroad and inconsistent with the goal of access to justice. Nevertheless, the Commission agrees with OCTC's suggestion regarding comment [8] and has added to Comment [7] guidance regarding duties attendant to limited scope representation.</p> <p>The Commission disagrees. The Commission voted unanimously to adopt the rule which is consistent with the Board of Governors resolution concerning limited scope representation. It does not appear that limited scope/discrete task representation is an "adverse" interest or "conflict" that necessitates requiring "written" consent. To some extent, all representations have a limit to the scope. For example, someone providing only "ethics advice" limits the scope of the representation to this area and would not necessarily have the expertise to suggest any or all of the civil/procedural implications of the advice given.</p>

**Rule 1.2 Scope of Representation**  
**[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
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No.	Commenter	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>exception, it would be better policy and more enforceable to require that it be in writing.</p> <p>4. OCTC agrees with paragraph (d)'s broadening of current rule 3-210 to include criminal and fraudulent conduct as well as any law, rule, or ruling. However, subparagraph (d), unlike rule 3-210, does not specifically provide for the defense of good faith or appropriate steps. Good faith is generally not a defense to a violation of a Rule of Professional Conduct. (See In the Matter of Broderick (Review Dept. 1994) 3 Cal. State Bar Ct. Rpt. 138, 148; Zitny v. State Bar, supra, 64 Cal.2d at 793.) While the Commission's Comments show that it intends to keep a good faith defense, Comments are not rules or authority and OCTC believes that if the Commission wants this defense it should be in the rule and not in a comment.</p> <p>5. OCTC is concerned with Comments [1] and [2]'s statement that an attorney is required to consult with the client regarding the means by which the attorney handles the client's matter. These Comments appear to be overbroad and could be interpreted to change current law. It has never been that the attorney must consult (or advise) on every step and action, just the significant ones.</p>	<p>4. The Commission disagrees. Paragraph (d)(2) uses the Model Rule language and provides in part that a lawyer "may 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." (emphasis added). Whether it is the lawyer who make "takes appropriate steps in good faith" to test the validity of any law, etc., or it is the lawyer who "counsel[s] or assist[s] the client to make a good faith effort" is immaterial. They mean precisely the same thing. If anything, the Model Rule language better reflects that the lawyer may take such steps only with the knowledge and consent of the client.</p> <p>5. The Commission disagrees. See Response to COPRAC, above. In addition, the Commission has included a cross-reference to Rule 1.4(a)(2), which requires that a lawyer "reasonably consult with the client about the means by which to accomplish the client's objectives in the representation." The lawyer does not have to consult with the client about every matter related to the representation.</p>

**Rule 1.2 Scope of Representation**  
**[Sorted by Commenter]**

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No.	Commenter	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>6. OCTC is concerned that nowhere in the Comments are attorneys advised that the courts have found that even where the scope of the representation is expressly limited, the attorney may still have a duty to alert the client to reasonable apparent legal problems outside the scope of the representation. (See <i>Janik v. Rudy, Exelrod &amp; Zieff</i> (2004) 119 Cal.App.4th 930, 940.)</p> <p>7. The rest of the Comments seem more appropriate in other forums, such as treatises, law reviews, and ethics opinions.</p>	<p>6. The Commission has included the following statement at the end of Comment [7]:</p> <p style="padding-left: 40px;">Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent legal problems outside the scope of representation.</p> <p>The foregoing should address OCTC's concern.</p> <p>7. As the Commission has noted in other rules, the Comments to this Rule provide valuable guidance to lawyers in serving their clients.</p>
2	Orange County Bar Association	D	Yes		<p>We oppose the Commission's proposed Rule 1.2 and support the adoption of ABA Model Rule 1.2.</p> <p>Propose changing paragraph (d)(1) of the Model Rule by adding "or a violation of any law, rule, or ruling of a tribunal" after "fraudulent," and by adding "rule or ruling of a tribunal" at the end of paragraph (d)(2) after "law."</p> <p>We believe the additional language proposed by the Commission may introduce a degree of ambiguity into the rule, and may make it</p>	<p>The Commission disagrees with the commenter's concerns about the language that has been added to paragraphs (d)(1) and (d)(2). As already noted, it carries forward the language in current rule 3-210, which the commenter has not asserted has caused any problems for lawyers or the courts. It thus provides continuity with current California law.</p>

**Rule 1.2 Scope of Representation**  
**[Sorted by Commenter]**

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					<p>overbroad and difficult to enforce, inasmuch as the added language could be construed to encompass rules and rulings of tribunals having no jurisdiction over the particular cause at issue.</p> <p>The added language may be unnecessary, because the remedies of contempt and sanctions are available for violations of a tribunal's rules and rulings by those practitioners before that tribunal. The Commission's response expressed disagreement with the OCBA's position, but the only reason given was that the language of Proposed Rule 1.2(d)(1) adopts the language of current Rule 3-120. The objections raised by the OCBA do not appear to have been addressed.</p> <p>OCBA recommends that Comment [5] be stricken in its entirety. Comment [5] purports to relate to paragraph (b) of the Proposed Rule. Paragraph (b) states that a lawyer's representation of a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities." The first sentence of Comment [5] states that legal representation should not be denied to people "who are unable to afford legal service." This statement is not germane to</p>	<p>The Commission again disagrees with the commenter's concerns. The first sentence of Comment [5] provides important clarification of paragraph (b). Paragraph (b) simply states that a lawyer's representation of a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities." Comment [5] then links the concepts that because such a representation does not constitute an endorsement, a lawyer should not raise that possibility as a reason to refuse services to</p>

**Rule 1.2 Scope of Representation  
[Sorted by Commenter]**

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No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>the language of paragraph (b), which has nothing to do with ability to pay for legal services. Moreover, this part of the Comment could be construed as creating an obligation to provide legal services with little or no compensation. The rest of the Comment merely restates paragraph (b), and is thus unnecessary.</p> <p>The Commission's response expressed disagreement with OCBA's position, on the grounds that Comment [5] is identical to Comment [5] for Model Rule 1.2, and it is consistent with the legislative policy of B&amp;P Code section 6068(h). The OCBA believes that if Comment [5] is not stricken, it should at least be modified to clarify that Rule 1.2(d)(2) does not create any obligation for a particular individual attorney to provide legal services to any particular client for little or no compensation, but rather provides a general goal that clients in general not be denied legal services by the legal community as a whole on the basis of inability to pay.</p>	<p>individuals because of their views or activities. As to the commenter's concern with the reference to "ability to pay," the Commission disagrees that the phrase could be interpreted as possibly creating an obligation to provide legal services with little or no compensation. Rather, the phrase recognizes that those whose views might be considered offensive are often the ones who are likely not to have the resources necessary to retain a lawyer.</p>
1	San Diego County Bar Association Legal Ethics Committee	A	Yes		We approve the new rule in its entirety.	No response required.

**Rule 1-2 Scope of Representation.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
 Disagree = \_\_  
 Modify = \_\_  
 NI = \_\_

No.	Commenter	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response

## Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer

(Commission's Proposed Rule – Clean Version)

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- (d)
  - (1) 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.
  - (2) Notwithstanding paragraph (d)(1), 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 a law, rule, or ruling of a tribunal.

### Comment

#### Allocation of Authority between Client and Lawyer

- [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. See e.g. Penal Code section 1018. A lawyer is not authorized merely by virtue of the lawyer's retention by a client, to impair the client's substantial rights or the client's claim itself. *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].) Accordingly, the decisions specified in paragraph (a), such as whether to settle a civil matter or waive a jury trial in a civil matter, must also be made by the client. See Rule 1.4(c) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation, provided the lawyer does not violate Rule 1.6 or Business and Professions Code section 6068(e).
- [2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons

who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

- [3] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.
- [4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

#### **Independence from Client's Views or Activities**

- [5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

#### **Agreements Limiting Scope of Representation**

- [6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's

services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as imprudent.

- [7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1. Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent legal problems outside the scope of representation.

- [8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6. See also California Rules of Court 3.35-3.37 (limited scope rules applicable in civil matters generally), and 5.70-5.71 (limited scope rules applicable in family law matters).

### **Criminal, Fraudulent and Prohibited Transactions**

- [9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud or to violate any rule, law, or ruling of a tribunal. However, this Rule does not prohibit a lawyer from giving a good faith opinion about the foreseeable consequences of a client's proposed conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction 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.
- [10] The prohibition in paragraph (d)(1) applies whether or not the client's conduct has already begun and is continuing. For example, a lawyer may not draft or deliver documents that the lawyer knows are fraudulent; nor may the lawyer counsel how the wrongdoing might be concealed. The lawyer may not continue assisting a client in conduct that the lawyer originally believed was legally proper but later discovers is criminal, fraudulent, or the violation of any rule, law, or ruling of a tribunal. In any event, the lawyer shall not violate his or her duty of protecting all confidential information as provided in Rule 1.6 and Business and Professions Code section 6068(e). When a lawyer has been retained with respect to client conduct described in paragraph (d)(1), the lawyer shall limit his or her actions to those that appear to the lawyer to be in the best lawful interest of the client, including counseling the client about possible corrective or remedial action. 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 Rule 1.16.
- [11] Paragraph (d)(2) authorizes a lawyer to 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. Determining 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. Paragraph (d)(2) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal 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.

- [12] 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 consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(6).

**June 9, 2010 McCurdy E-mail to Snyder, cc Chair, Vice-Chairs & Staff:**

Dom,

Attached is a comprehensive assignment table that lists all of the rules for which you are the lead drafter, along with the names of your codrafters. This message addresses your assignments for the June 25 & 26, 2010 meeting. To minimize email traffic and potential confusion, this message will be copied to your codrafters only after all of the lead drafter assignment messages have been sent.

**ASSIGNMENT SUBMISSION DEADLINE:** The assignment submission deadline for all assignments is **5:00 pm on Wednesday, June, 16, 2010.**

As mentioned at the June 4 meeting, the agenda for the Commission's June 25 & 26 meeting will involve final action on all of the rules recommended for adoption as well as those not recommended for adoption. This means that there are 85 items that require action. To alleviate some of the burden on Commission members, rules that either receive no comments at all or only comments in support will be prepared by staff and will be acted upon en masse by the Commission through the use of a consent agenda. At present, there are about 45 items that fall into this category.

This message provides the assignment background materials for the assignments listed below for which you are the lead drafter, and which are not being handled by staff as anticipated consent agenda items. The materials attached to this message are a staff prepared draft Public Commenter Chart synthesizing all comments/testimony received to date & the current clean draft of a rule as posted for public comment. Consistent with the consent agenda plan, we are only providing assignment materials for those rules that have received a comment in opposition, or a comment stating an "Agree if Modified" position. Your assignment is to review these comments and to prepare a Public Commenter Chart with recommended Commission responses. If the drafters conclude that any revisions to a rule are warranted based on comments received, then a revised draft rule should be prepared. (Note: Where a drafting team decides not to recommend any revisions to a rule, that drafting team recommendation will be included in a second category of consent agenda items for action at the June 25 & 26 meeting.)

If revisions to a rule are recommended, then an updated Dashboard, Introduction, and Model Rule comparison chart also should be prepared to complete the rule package for Board submission. As soon as you or your drafting team determines that it will be recommending revisions to an assigned rule, please promptly inform staff and provide us with your revised Rule. We will create a new Model Rule redline version and middle column of the comparison chart, and provide you with the Word version of that document and any other necessary documents (Dashboard, etc . . .). Please contact us for this assistance once you or your team has determined that a revised rule will be recommended.

Because the comment period deadline of June 15<sup>th</sup> has not arrived, we may be updating your assignments. For example, a rule that presently has received no comments might receive an opposition comment prior to the June 15<sup>th</sup> comment deadline and, in that case, we would alert you with an email and provide you with the relevant background materials.

**LIST OF ASSIGNED RULES** (As explained above, these are rules that presently have received a comment in opposition or a comment stating an "Agree if Modified" position):

- 3.5 (Agenda Item III.OO)
- 6.1 (Agenda Item III.HHH) NRFA
- 6.3 (Agenda Item III.JJJ)

Please note: The clean Word version of each rule is imbedded in the attached “Clean Version” PDF for each rule. You will see it and be able to open it when you open and view the PDF file.

Use the following link to the Proposed Rules page to find a copy of the Discussion Draft materials for all of the proposed rules as circulating for public comment:

[www.calbar.org/proposedrules](http://www.calbar.org/proposedrules)

Use the following link to review the full text of public comment letters or transcripts of the public hearings:

<http://sites.google.com/site/commentsrrc/>

Please don't hesitate to contact us with any questions you have.

***Attached:***

- RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - SNYDER - DFT1 (06-09-10).pdf
- RRC - 5-300-[3-5] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - [6-3] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - [6-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10)2.doc
- RRC - [6-3] - Rule - PCD [3] (06-08-09) - CLEAN-LAND.pdf
- RRC - [6-3] - Rule - PCD [3] (06-08-09) - CLEAN-LAND.doc
- RRC - 5-300 [3-5] - Rule - PCD [5.1] (10-19-09) - CLEAN-LAND.pdf
- RRC - 5-300 [3-5] - Rule - PCD [5.1] (10-19-09) - CLEAN-LAND.doc

**June 14, 2010 McCurdy E-mail to Snyder, cc Chair, Vice-Chairs & Staff:**

Dom,

New comments in opposition or recommending modifications have been received for the following rules and updated commenter tables are attached. The comment compilations for these rules are attached, and have also been uploaded to the Google site (<http://sites.google.com/site/commentsrrc/byrule> ). Please review the assignment instructions described in my earlier message below.

- 1.2 (Agenda Item III.D)
- 6.2 (Agenda Item III.III)

The assignment deadline for these rules is the same as the earlier assignments -- **5:00 pm on Wednesday, June, 16, 2010.**

***Attached:***

- RRC - 3-120 [1-2] - Public Comment Chart - By Commenter - XDFT1 (06-14-10).doc
- RRC - [6-2] - Public Comment Chart - By Commenter - XDFT1 (06-14-10).doc
- RRC - [1-2] - Public Comment Complete - REV (06-14-10).pdf
- RRC - [6-2] - Public Comment Complete - REV (06-14-10).pdf

**June 16, 2010 Difuntorum E-mail to RRC:**

Commission Members:

More public comments keep arriving. Here's another one that you can begin addressing. It is from HALT (an actual non-lawyer public interest group). There are 5 rules addressed in the letter but HALT supports 3 rules (1.8.10, 1.4.1, and 1.2), so only the 2 rules listed below require attention. As previously emphasized, the question we need you to answer by the assignment deadline is whether the codrafters will be recommending rule revisions in response to the public comments received. Rules for which there are no recommended revisions will be placed on consent. –Randy D.

1.5 = VAPNEK (Ruvolo)

1.4 = RUVOLO (Julien)

***Attached:***

RRC - 3-410 [1-4-1] - 06-14-10 HALT Comment.pdf

RRC - 3-500 [1-4] - 06-14-10 HALT Comment.pdf

RRC - 3-210 [1-2] - 06-14-10 HALT Comment.pdf

RRC - 3-120 [1-8-10] - 06-14-10 HALT Comment.pdf

RRC - 4=200 [1-5] - 06-14-10 HALT Comment.pdf

**June 16, 2010 McCurdy E-mail to Snyder, cc Chair, Vice-Chairs & Staff:**

Dom,

Additional comments in opposition or recommending modifications have been received for the following rules, and those **comments not previously sent to you** are attached here for your review. The Google site is also up-to-date (<http://sites.google.com/site/commentsrrc/byrule>).

**1.2** (Agenda Item III.D) – 3 Comments: **CPDA (attached)**; HALT; and, OCTC (sent with Randy's 6/15/10 e-mail)

**3.5** (Agenda Item III.OO) - OCTC (sent with Randy's 6/15/10 e-mail)

**6.2** (Agenda Item III.III) - OCTC (sent with Randy's 6/15/10 e-mail)

**6.3** (Agenda Item III.JJJ) - OCTC (sent with Randy's 6/15/10 e-mail)

**NOTE:** As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

**RRC – Rule 1.2 [3-210]  
E-mails, memos, etc. – Revised (6/21/2010)**

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

***Attached:***

RRC - [1-2] - 06-14-10 CPDA Comment re Rule.pdf

**June 17, 2010 KEM E-mail to McCurdy, Difuntorum & Lee, cc Drafters & Chair:**

I've attached the following on behalf of Dom:

1. Public Comment Chart, Draft 2.1 (6/16/10)KEM-DS.
2. Rule, Post-public comment draft [#6] (6/16/10), redline, compared to PCD [#5] (2/5/10).

The only change to the Rule is to add a reference to a provision in the California Constitution that was requested by the CPDA.

Please note that the co-drafters (Ellen and Mark) have not had an opportunity to review the attached.

Please let me know if you have any questions.

***Attached:***

RRC - 3-210 [1-2] - Public Comment Chart - By Commenter - XDFT2.1 (06-16-10)KEM-DS.doc  
RRC - 3-210 [1-2] - Rule - Post-PCD [6] (06-16-10) - Cf. to PCD [5].doc

**June 17, 2010 Snyder E-mail to Drafters, Chair & Staff:**

I apologize to Ellen and Mark for not including them earlier - but because of the number of assignments I had as lead drafter and the number of last minute comments, I did not do so. I was just doing my best, with Kevin's invaluable assistance, to get everything done.

**June 17, 2010 Tuft E-mail to Drafters, Chair & Staff:**

Other than making one grammatical change, which is highlighted, I am signing off on this chart.

***Attached:***

RRC - 3-210 [1-2] - Public Comment Chart - By Commenter - XDFT2.2 (06-17-10)KEM-DS-MLT.doc

**June 17, 2010 KEM E-mail to Tuft, cc Drafters, Chair & Staff:**

Thanks, Mark. I've accept your revision in the attached document, Draft 2.2 (6/17/10)KEM-DS-MLT and ask that it be used w/ the revised rule draft as the agenda materials. Kevin

***Attached:***

RRC - 3-210 [1-2] - Public Comment Chart - By Commenter - XDFT2.2 (06-17-10)KEM-DS-MLT.doc

**RRC – Rule 1.2 [3-210]  
E-mails, memos, etc. – Revised (6/21/2010)**

**June 21, 2010 McCurdy E-mail to Snyder, cc Chair, Vice-Chairs & Staff:**

Dom,

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter chart and there should now be a synopsis for every comment received. However, there are a number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

Our goal is to send out a supplemental mailing providing a copy of all of the final or near-final commenter charts on Tuesday or Wednesday, for receipt prior to the meeting this week.

**If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22<sup>nd</sup>.**

***Attached:***

RRC - [6-3] - Public Comment Chart - By Commenter - XDFT2.2 (06-21-10).doc  
RRC - 5-300 [3-5] - Public Comment Chart - By Commenter - XDFT2.2 (06-21-10)-RD.doc  
RRC - [6-1] - Public Comment Chart - By Commenter - XDFT2.2 (06-21-10).doc  
RRC - [6-2] - Public Comment Chart - By Commenter - XDFT2 (6-21-10)ML.doc  
RRC - 3-210 [1-2] - Public Comment Chart - By Commenter - XDFT2.2 (06-17-10)KEM-DS-MLT.doc

**Rule 1.2 Scope of Representation.  
[Sorted by Commenter]**

TOTAL = 5    Agree = 2  
Disagree = 2  
Modify = 1  
NI = \_\_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	California Public Defenders Ass'n ("CPDA") [Garrick Byers]	M	Yes	1.2(a)	<p>The commenter requests that a new comment be added to clarify the last sentence of paragraph (a) of the Rule, which provides:</p> <p>Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.</p> <p>Because many prosecutors and criminal defense lawyers (and judges) do not know of the basic California law concerning waiver of jury trial, the commenter requests the addition of the following comment:</p> <p>California Constitution article I, section 16, first paragraph, second sentence, provides that "A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel."</p> <p>The commenter also requests the addition of a reference to the leading California treatise</p>	<p>The Commission agrees in part with the request and has added a reference in Comment [1]<sup>2</sup> to the relevant section of the Constitution. The Commission, however, declines to add a reference to the cited treatise because the Rules style does not permit references to such secondary sources.</p>

<sup>1</sup> A = AGREE with proposed Rule    D = DISAGREE with proposed Rule    M = AGREE ONLY IF MODIFIED    NI = NOT INDICATED

<sup>2</sup> The reference could be placed after the first sentence of Comment [1], before the reference to Penal Code § 1018.

**Rule 1.2 Scope of Representation.  
[Sorted by Commenter]**

**TOTAL = 5**  
**Agree = 2**  
**Disagree = 2**  
**Modify = 1**  
**NI = \_\_\_**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					on criminal law, as follows: "See, generally, 5 Witkin & Epstein, California Criminal Law (3d Ed., 2000), Ch. XIV, §§ 452 – 459 ('Waiver of Right [to Jury Trial]')." "	
3	HALT, Inc. – An Organization of Americans for Legal Reform	A	Yes		The commenter strongly supports the Commission's acceptance of the ABA Model Rule in Proposed Rule 1.2. An attorney works for a client, and has an ethical responsibility to allow the client to make the important decisions in a matter. The commenter supports the Commission's recognition of a lawyer's obligation to "abide by a client's decisions concerning the objectives of representation" and to "abide by a client's decision whether to settle a matter" (Proposed Rule 1.2(a)). In addition, the commenter has long advocated limited representation as a cost-saving innovation that enhances consumer choice. We strongly support the Commission's explicit authorization of this practice (Proposed Rule 1.2(c)).	No response required.
5	Office of Chief Trial Counsel ("OCTC")	M	Yes		1. OCTC is concerned that subparagraphs (a) and (b), although in the Model Rules, are not rules subject to discipline and, thus, do not belong in the Rules of Professional Conduct. Further, OCTC believes that the concepts in subparagraphs (a) and (b) are already implicitly included in the rules regarding competence and the duty to communicate.	1. The Commission disagrees with the commenter's position. The Rule not only provides understandable disciplinary standards in paragraphs (a) and (d), the latter of which simply carries forward current rule 3-210, but also provides important guidance to lawyers in their relationships with clients.

**Rule 1.2 Scope of Representation.  
[Sorted by Commenter]**

**TOTAL = 5**  
**Agree = 2**  
**Disagree = 2**  
**Modify = 1**  
**NI = \_\_\_**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>2. OCTC is concerned that, while subparagraph (c) permits limited scope representations if the limitation is reasonable under the circumstances, it does not specifically prohibit limited scope representations when they are not permitted by law. (In the Matter of Valinoti (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520-521.) While Comment 8 states this, it should be in the rule, not just a Comment.</p> <p>3. OCTC believes that the consent in paragraph (c) should be in writing or at least by written documentation, not just informed consent. This would protect both the client and the attorney and impress upon the client the limitation and the importance of the limitation. This is not more than is being required when the attorney informs the client that he or she does not have professional liability insurance or when an attorney enters into a true retainer agreement. (See e.g. proposed rules 1.4.1 and 1.5(e).) Given that limited scope representation is an important</p>	<p>2. The Commission disagrees. OCTC's proposals regarding paragraph (c) and comment [8] do not appear to reflect the views repeatedly expressed by Supreme Court Justice George, the Judicial Council, the Access to Justice Commission and others. Limited scope representation is not prohibited unless there is an exception allowing for such representation. Rather, it is permitted unless specifically prohibited or other duties have been imposed. The OCTC's reading of <i>Valinoti</i> appears overbroad and inconsistent with the goal of access to justice. Nevertheless, the Commission agrees with OCTC's suggestion regarding comment [8] and has added to Comment [7] guidance regarding duties attendant to limited scope representation.</p> <p>The Commission disagrees. The Commission voted unanimously to adopt the rule which is consistent with the Board of Governors resolution concerning limited scope representation. It does not appear that limited scope/discrete task representation is an "adverse" interest or "conflict" that necessitates requiring "written" consent. To some extent, all representations have a limit to the scope. For example, someone providing only "ethics advice" limits the scope of the representation to this area and would not necessarily have the expertise to suggest any or all of the civil/procedural implications of the advice given.</p>

**Rule 1.2 Scope of Representation.  
[Sorted by Commenter]**

**TOTAL = 5**  
**Agree = 2**  
**Disagree = 2**  
**Modify = 1**  
**NI = \_\_\_**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>exception, it would be better policy and more enforceable to require that it be in writing.</p> <p>4. OCTC agrees with paragraph (d)'s broadening of current rule 3-210 to include criminal and fraudulent conduct as well as any law, rule, or ruling. However, subparagraph (d), unlike rule 3-210, does not specifically provide for the defense of good faith or appropriate steps. Good faith is generally not a defense to a violation of a Rule of Professional Conduct. (See In the Matter of Broderick (Review Dept. 1994) 3 Cal. State Bar Ct. Rpt. 138, 148; Zitny v. State Bar, supra, 64 Cal.2d at 793.) While the Commission's Comments show that it intends to keep a good faith defense, Comments are not rules or authority and OCTC believes that if the Commission wants this defense it should be in the rule and not in a comment.</p> <p>5. OCTC is concerned with Comments [1] and [2]'s statement that an attorney is required to consult with the client regarding the means by which the attorney handles the client's matter. These Comments appear to be overbroad and could be interpreted to change current law. It has never been that the attorney must consult (or advise) on every step and action, just the significant ones.</p>	<p>4. The Commission disagrees. Paragraph (d)(2) uses the Model Rule language and provides in part that a lawyer "may 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." (emphasis added). Whether it is the lawyer who "takes appropriate steps in good faith" to test the validity of any law, etc., or it is the lawyer who "counsel[s] or assist[s] the client to make a good faith effort" is immaterial. They mean precisely the same thing. If anything, the Model Rule language better reflects that the lawyer may take such steps only with the knowledge and consent of the client.</p> <p>5. The Commission disagrees. See Response to COPRAC, above. In addition, the Commission has included a cross-reference to Rule 1.4(a)(2), which requires that a lawyer "reasonably consult with the client about the means by which to accomplish the client's objectives in the representation." The lawyer does not have to consult with the client about every matter related to the representation.</p>

**Rule 1.2 Scope of Representation.  
[Sorted by Commenter]**

**TOTAL = 5**  
**Agree = 2**  
**Disagree = 2**  
**Modify = 1**  
**NI = \_\_\_**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>6. OCTC is concerned that nowhere in the Comments are attorneys advised that the courts have found that even where the scope of the representation is expressly limited, the attorney may still have a duty to alert the client to reasonable apparent legal problems outside the scope of the representation. (See <i>Janik v. Rudy, Exelrod &amp; Zieff</i> (2004) 119 Cal.App.4th 930, 940.)</p> <p>7. The rest of the Comments seem more appropriate in other forums, such as treatises, law reviews, and ethics opinions.</p>	<p>6. The Commission has included the following statement at the end of Comment [7]:</p> <p style="padding-left: 40px;">Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent legal problems outside the scope of representation.</p> <p>The foregoing should address OCTC's concern.</p> <p>7. As the Commission has noted in other rules, the Comments to this Rule provide valuable guidance to lawyers in serving their clients.</p>
2	Orange County Bar Association	D	Yes		<p>We oppose the Commission's proposed Rule 1.2 and support the adoption of ABA Model Rule 1.2.</p> <p>Propose changing paragraph (d)(1) of the Model Rule by adding "or a violation of any law, rule, or ruling of a tribunal" after "fraudulent," and by adding "rule or ruling of a tribunal" at the end of paragraph (d)(2) after "law."</p> <p>We believe the additional language proposed by the Commission may introduce a degree of ambiguity into the rule, and may make it</p>	<p>The Commission disagrees with the commenter's concerns about the language that has been added to paragraphs (d)(1) and (d)(2). As already noted, it carries forward the language in current rule 3-210, which the commenter has not asserted has caused any problems for lawyers or the courts. It thus provides continuity with current California law.</p>

**Rule 1.2 Scope of Representation.  
[Sorted by Commenter]**

**TOTAL = 5**    **Agree = 2**  
**Disagree = 2**  
**Modify = 1**  
**NI = \_\_\_**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>overbroad and difficult to enforce, inasmuch as the added language could be construed to encompass rules and rulings of tribunals having no jurisdiction over the particular cause at issue.</p> <p>The added language may be unnecessary, because the remedies of contempt and sanctions are available for violations of a tribunal's rules and rulings by those practitioners before that tribunal. The Commission's response expressed disagreement with the OCBA's position, but the only reason given was that the language of Proposed Rule 1.2(d)(1) adopts the language of current Rule 3-120. The objections raised by the OCBA do not appear to have been addressed.</p> <p>OCBA recommends that Comment [5] be stricken in its entirety. Comment [5] purports to relate to paragraph (b) of the Proposed Rule. Paragraph (b) states that a lawyer's representation of a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities." The first sentence of Comment [5] states that legal representation should not be denied to people "who are unable to afford legal service." This statement is not germane to</p>	<p>The Commission again disagrees with the commenter's concerns. The first sentence of Comment [5] provides important clarification of paragraph (b). Paragraph (b) simply states that a lawyer's representation of a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities." Comment [5] then links the concepts that because such a representation does not constitute an endorsement, a lawyer should not raise that possibility as a reason to refuse services to</p>

**Rule 1.2 Scope of Representation.  
[Sorted by Commenter]**

**TOTAL = 5**  
**Agree = 2**  
**Disagree = 2**  
**Modify = 1**  
**NI = \_\_\_**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>the language of paragraph (b), which has nothing to do with ability to pay for legal services. Moreover, this part of the Comment could be construed as creating an obligation to provide legal services with little or no compensation. The rest of the Comment merely restates paragraph (b), and is thus unnecessary.</p> <p>The Commission's response expressed disagreement with OCBA's position, on the grounds that Comment [5] is identical to Comment [5] for Model Rule 1.2, and it is consistent with the legislative policy of B&amp;P Code section 6068(h). The OCBA believes that if Comment [5] is not stricken, it should at least be modified to clarify that Rule 1.2(d)(2) does not create any obligation for a particular individual attorney to provide legal services to any particular client for little or no compensation, but rather provides a general goal that clients in general not be denied legal services by the legal community as a whole on the basis of inability to pay.</p>	<p>individuals because of their views or activities. As to the commenter's concern with the reference to "ability to pay," the Commission disagrees that the phrase could be interpreted as possibly creating an obligation to provide legal services with little or no compensation. Rather, the phrase recognizes that those whose views might be considered offensive are often the ones who are likely not to have the resources necessary to retain a lawyer.</p>
1	San Diego County Bar Association Legal Ethics Committee	A	Yes		We approve the new rule in its entirety.	No response required.

**Rule 1.2 Scope of Representation.  
[Sorted by Commenter]**

**TOTAL = 5**  
**Agree = 2**  
**Disagree = 2**  
**Modify = 1**  
**NI = \_\_\_**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response