

E-mails, memos,

August 4, 2010 McCurdy E-mail to RRC:

To date, we have received 3 public comments for the rules currently circulating for public comment. Given the extremely short turn-around time between now and the next meeting, it is important that all members read all comments as they are received. I have attached copies of the following comments on the following rules, along with public commenter charts providing a synopsis of these comments:

- Rule 1.0.1 – Peter Liederman
- Rule 3.8 – Ventura DA – Michael Schwartz
- Rule 5.4 – Thomas Quinn

The public comments will be sent out to the entire Commission as they are received, and will also be available at the Google site under the heading “COMMENTS BATCH Y”:

<http://Sites.google.com>

IMPORTANT: Please be advised that the assignments deadline is Thursday, August 26th at 9:00 am, due to the August 25th public comment deadline. This means that the usual opportunity for sending e-mail comments after receipt of the agenda materials will not be possible. Instead, all Commission members are asked to send e-mails responding to the public comment letters as they are distributed. Please send e-mail comments to the entire Commission to assure that leadership and the drafting teams can account for e-mail comments in preparing assignments.

Below is a list of the drafting teams assigned to each rule under consideration at the August meeting. Folders for each rule with the assignment background materials are available at the Google site under the heading “RULES BATCH Y.” As updated public commenter charts become available we will send them to you by e-mail and post them at the Google site.

- III.A. Rule 1.0.1 - Terminology [1-100(B)] – KEHR, Julien, Sapiro
- III.B. Rule 2.1 - Advisor [N/A] – LAMPORT, Vapnek
- III.C. Rule 3.3 - Candor Toward the Tribunal [5-200] – TUFT, Peck, Ruvolo, Sapiro
- III.D. Rule 3.8 - Special Responsibilities of a Prosecutor [5-110] (At the direction of the Board of Governors, public comment is being solicited only as to paragraph (d).) – FOY, Peck, Tuft
- III.E. Rule 4.2 - Communications with a Represented Person [2-100] – MARTINEZ/TUFT
- III.F. Rule 5.4 - Financial and Similar Arrangements with Nonlawyers [1-310, 1-320, 1-600] – MOHR, Martinez, Peck, Tuft
- III.G. Rule 8.4 - Misconduct [1-120] – VAPNEK/PECK, Tuft

We're in the home stretch!

Attached:

- RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - YDFT1 (08-04-10).doc
- RRC - 5-110 [3-8] - Public Comment Chart - By Commenter - YDFT1 (08-04-10).doc
- RRC - 1-310X [5-4] - Public Comment Chart - By Commenter - YDFT1 (08-04-10).doc
- RRC - [3-8] - Public Comment Complete - REV (08-04-10).pdf
- RRC - [5-4] - Public Comment Complete - REV (08-04-10).pdf
- RRC - [1-0-1] - Public Comment Complete - REV (08-04-10).pdf

August 25, 2010 McCurdy E-mail to RRC:

Lead Drafters:

Thanks to those of you who have found time to promptly send e-mails addressing the public comments that have been distributed.

As you know, we will also need completed public commenter charts for each of the rules on the agenda. An updated draft of each public commenter chart including a synopsis of all of the comments received by the end of the comment period is attached. You may already have the most recent version of those charts which did not require a recent update, however we are sending all of them with this e-mail for ease of reference.

For the RRC Response column, we encourage you to fill in a tentative response based on your own individual view or the views that you find in the Commission member e-mails that have been sent concerning the comments. This would be preferable to leaving the RRC Response column blank pending final resolution at the meeting.

We request that you submit your draft public commenter charts, and any other rule agenda materials you wish to provide **no later than tomorrow morning, Thursday, August 26th, at 9:00 am.**

Many thanks for your work on this. You're almost there!

Attached:

RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - YDFT1.3 (08-25-10)LM.doc
RRC - [2-1] - Public Comment Chart - By Commenter - YDFT1 (08-25-10)LM.doc
RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - YDFT1.2 (08-25-10)LM.doc
RRC - 5-110 [3-8] - Public Comment Chart - By Commenter - YDFT1.4 (08-25-10)LM.doc
RRC - 2-100 [4-2] - Public Comment Chart - By Commenter - YDFT1.4 (08-25-10)LM.doc
RRC - 1-310X [5-4] - Public Comment Chart - By Commenter - YDFT1 (08-25-10)LM.doc
RRC - 1-120X [8-4] - Public Comment Chart - By Commenter - YDFT1 (08-25-10)LM.doc

**Rule 2.1 Advisor.
[Sorted by Commenter]**

**TOTAL = 1 Agree = 1
Disagree = _0
Modify = 0
NI = _0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A			COPRAC supports the adoption of proposed Rule 2.1 and the Comments to the Rule.	No response required.

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

Proposed Rule 2.1 [n/a]

“Advisor”

(XDFT5.2, 07/06/10)

Summary: Proposed Rule 2.1 is based on Model Rule 2.1 and describes a lawyer’s role as a client’s advisor. It provides that a lawyer must exercise independent professional judgment and render candid advice.

Comparison with ABA Counterpart

Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input type="checkbox"/> Some material additions to ABA Model Rule	<input checked="" type="checkbox"/> Some material additions to ABA Model Rule
<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule	<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

- Existing California Law

Rule

Statute

Case law

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- Other Primary Factor(s)

This Model Rule has no counterpart in the current California rules but in stating the duty of independent professional judgment, the rule emphasizes an important principle that is fully consistent with California law.

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 6
Opposed Rule as Recommended for Adoption 2
Abstain 2

Approved on Consent Calendar

Approved by Consensus

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included on Model Rule Comparison Chart: Yes No
(See the introduction in the Model Rule comparison chart.)

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Comments received during the initial comment period asserted that the proposed Rule should not be adopted because it is not a disciplinary rule, it is not enforceable, is unnecessary and provides for advice that is beyond a lawyer's expertise. Comments received during the subsequent comment period objected to the Commission's omission of comments found in Model Rule 2.1.

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 2.1* Advisor

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

INTRODUCTION:

Proposed Rule 2.1 is based on Model Rule 2.1 and describes a lawyer's role as a client's advisor. There is no counterpart to this Rule in the California rules and the Commission is recommending adoption of the first sentence of the Model Rule without any change. The Commission is recommending that the second sentence of the Model Rule not be adopted, but that the sentence be incorporated into Comment [2] to the proposed Rule. Although it is anticipated that the Rule may not be frequently applied as a lawyer disciplinary standard, the Commission recognizes the importance of this Rule as guidance to lawyers and clients on a lawyer's duty to exercise independent professional judgment.

Regarding the comments to the Rule, the Commission is recommending adoption of modified versions of two of the Model Rule Comments, and deletion of three Model Rule comments. For the most part, deletions have been made to focus the rule on key concepts of independent professional judgment and candor. The commentary concerning a lawyer's responsibility to render *advice* on factors beyond technical legal considerations, such as moral or social factors, was viewed as inconsistent with the terms of the Rule itself, which provides only that a lawyer duly consider these factors in rendering legal advice. A new Comment [1] has been added that clarifies the concept of independent professional judgment. The first two Comments of the Model Rule counterpart have been modified to remove references that suggest the frequency in which non-legal considerations might arise in the course of representing clients. The Commission determined that the Model Rule statements may not be the case and are unnecessary to make the point of the comment and to clarify that the standards in the Rule are permissive, rather than mandatory requirements in every representation.

* Proposed Rule 2.1, XDFT5.2 (07-06-10)

The Commission added a new Comment [1], which explains the independent judgment standard in the Rule. The Commission added the Comment because the concept of independent judgment in California is a fairly well defined concept. Courts in other jurisdictions have not been consistent in their application of the independent judgment standard. In some cases, courts in other jurisdictions have applied the independent judgment standard in a way that would be inconsistent with a lawyer's duty of loyalty to a client. Comment [1] was added to assure a clear and consistent application of the independent judgment standard."

<p align="center"><u>ABA Model Rule</u> Rule 2.1 Advisor</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 2.1 Advisor</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.</p>	<p>In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.</p>	<p>The proposed Rule is identical to the first sentence of the Model Rule. In response to public comment, the second sentence of the Model Rule was deleted and moved to Comment [2].</p>

* Proposed Rule 2.1, XDraft 5.2(7/6/10); Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 2.1 Advisor Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 2.1 Advisor Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[1] Independent professional judgment is an essential element of a lawyer's relationship with a client. Independent professional judgment is judgment that is not influenced by duties, relationships or interests that are not properly part of the lawyer-client relationship.</p>	<p>The Commission added a new Comment [1] which clarifies the concept of "independent professional judgment." Although one public comment expressed concerns about any possible language relating the concept to the duty of loyalty, the Commission's new Comment [1] does not equate independent professional judgment with the concept of loyalty.</p>
<p>Scope of Advice</p> <p>[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.</p>	<p>Scope of Advice</p> <p>[42] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant may involve facts and alternatives that a client may find unpleasant and may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.</p>	<p>Comment [2] is based on Model Rule 2.1, cmt.[1]. The heading "Scope of Advice" has been deleted as unnecessary and inaccurate given the Commission's narrower version of the rule. The first sentence of the comment has been revised to replace with word "often" with the word "may" because the Model Rule language makes a judgment about what often occurs in a lawyer client relationship that is not necessarily the case and is unnecessary to make the point of the Comment. The reference to "unpleasant facts and alternative" was changed to state "facts and alternatives that a client may find unpleasant" in response to public comment that it is the client's perception of the facts, rather than the facts themselves, that determine whether they are unpleasant.</p>

<p align="center"><u>ABA Model Rule</u> Rule 2.1 Advisor Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 2.1 Advisor Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.</p>	<p>[23] Advice<u>In some cases, advice</u> couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and<u>in rendering advice, a lawyer</u> may decisively influence how<u>refer not only to law</u> will, but to other considerations such as moral, economic, social and political factors that may be applied<u>relevant to the client's situation.</u></p>	<p>Comment [3] is based on Model Rule 2.1, cmt. [2]. The first sentence was revised to clarify that it is not intended to state a proposition that applies in every representation. The second sentence has been deleted because it may suggest to some lawyers that there is a risk of disciplinary exposure if a lawyer provides competent advice but does not also provide advice on moral issues. The third sentence was deleted and its substance incorporated into the last sentence. The last sentence was revised to incorporate language that was taken from the second sentence of the proposed Rule. The Model Rule Comment language in the last sentence was replaced with the second sentence from the proposed Rule, because the deleted language makes a judgment that moral and ethical considerations impinge on most legal questions, that may not be the case and is not necessary to make the point of the Comment.</p>
<p>[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.</p>	<p>[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.</p>	<p>Model Rule, cmt. [3], has been deleted because the proposition stated therein may be construed as creating a substantive legal standard that goes beyond the terms of the rule itself.</p>

<p align="center"><u>ABA Model Rule</u> Rule 2.1 Advisor Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 2.1 Advisor Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.</p>	<p>[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts</p>	<p>Model Rule, cmt. [4], has been deleted as unnecessary practice pointers that distract and potentially undermine the primary message to lawyers and clients that there is a duty of independent professional judgment and candor.</p>

<p align="center"><u>ABA Model Rule</u> Rule 2.1 Advisor Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 2.1 Advisor Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Offering Advice</p> <p>[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.</p>	<p>Offering Advice</p> <p>[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.</p>	<p>Model Rule, cmt. [5], has been deleted, in part, because the Commission has included comparable guidance in other proposed rules. For example, the proposed rule on client communication, Rule 1.4, includes Comment [1] that, in part, states:</p> <p>“Depending upon the circumstances, a lawyer may also be obligated pursuant to paragraphs (a)(2) or (a)(3) to communicate with the client concerning the opportunity to engage in alternative dispute resolution processes.”</p>

Rule 2.1 Advisor

(Redline Comparison of the Proposed Rule to the Previous Public Comment Draft)

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Comment

Scope of Advice

[1] Independent professional judgment is an essential element of a lawyer's relationship with a client. Independent professional judgment is judgment that is not influenced by duties, relationships or interests that are not properly part of the lawyer-client relationship. A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice may involve facts and alternatives that a client may find unpleasant and may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] In some cases, advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Although a lawyer is not a moral advisor, in rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

Rule 2.1 Advisor

(Commission's Proposed Rule – Clean Version)

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Comment

[1] Independent professional judgment is an essential element of a lawyer's relationship with a client. Independent professional judgment is judgment that is not influenced by duties, relationships or interests that are not properly part of the lawyer-client relationship.

[2] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice may involve facts and alternatives that a client may find unpleasant and may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[3] In some cases, advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Although a lawyer is not a moral advisor, in rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

Rule 2.1: Advisor

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2010 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California has no direct counterpart to Rule 2.1.

Colorado adds the following sentence at the end of Rule 2.1: “In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.”

Georgia moves the second sentence of the ABA rule to a Comment, and adds the following sentence to the text of the rule in its place: “A lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.”

New York: In the rules effective April 1, 2009, Rule 2.1 adds the word “psychological” after “moral, economic, social” but is otherwise substantially the same as the Model Rule.

Texas: Rule 2.01 begins, “In advising or otherwise representing a client . . . ,” and Texas deletes the second sentence of ABA Model Rule 2.1.

Rule 2.1 – Public Comment – File List

Y-2010-534a COPRAC [2.1]



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

August 9, 2010

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 2.1

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 2.1– Advisor. COPRAC supports the adoption of proposed Rule 2.1 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in cursive script that reads "Carole J. Buckner".

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC