

McCurdy, Lauren

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**From:** Lamport, Stanley W. [SLamport@coxcastle.com]  
**Sent:** Tuesday, May 25, 2010 12:05 PM  
**To:** McCurdy, Lauren; CommissionerJ2@gmail.com; Difuntorum, Randall; hbsondheim@verizon.net; ignazio.ruvolo@jud.ca.gov; jsapiro@sapirolaw.com; kemohr@charter.net; kevin\_e\_mohr@csi.com; kevinm@wsulaw.edu; kmelchior@nossaman.com; Lee, Mimi; linda.foy@jud.ca.gov; Marlaud, Angela; martinez@lbbslaw.com; mtuft@cwclaw.com; pecklaw@prodigy.net; pwwapnek@townsend.com; rlkehr@kscllp.com; snyderlaw@charter.net  
**Subject:** RE: Public Comments Received for Rule 2.1 - MATERIALS DUE FOR JUNE 4TH AGENDA - Additional Comments

Lauren:

The following is my submission for the June 4 agenda. All of the comments we received supported the Rule, so there was nothing for the drafting team to work on in response to the public comment. I am requesting that the Commission consider an additional Comment that would address the issue I raised in the dissent to the Rule.

The concern that I have with this Rule is that it does not explain the difference between independent judgment and candor. Independent judgment appears in the Rule 1.7 Comments and in Rule 1.8.6 and has a consistent meaning in those Rules - judgment that is independent of influences of third parties. However, there are out-of-state cases that suggest that "independent judgment" in Rule 2.1 has a different meaning - judgment independent of the client. I do not believe we should be importing that precedent, particularly since it would be at odds with the concept of independent judgment in the conflicts context. We can achieve that result by consistent with the purpose of the Rule through the candor element of the Rule.

With the foregoing in mind, I would like to propose a new first Comment that would tie into the previously approved for the Rule. There is a title in the Comment, which I propose the Commission delete. The entire Rule and Comment would read as follows:

#### Rule 2.1 Advisor

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

[New] *Independent professional judgment is an aspect of a lawyer's duty of loyalty to a client. Independent judgment is judgment that is not influenced by duties, relationships or interests that are not properly part of the lawyer-client relationship. The duty exists to assure that a lawyer advises a client with the client's interests in mind. A lawyer also owes a duty of candor to a client, which allows a lawyer to discuss broader considerations, which, in the lawyer's reasonable judgment, the client should consider in connection with the lawyer's legal advice.*

## [Scope of Advice] DELETE

[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.

[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. Although a lawyer is not a moral advisor as such, moral and ethical considerations may impinge upon most legal questions and may decisively influence how the law will be applied.

I sent the proposed Comment to Paul over the weekend, but Paul has not yet reviewed or commented on it.

STAN

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**From:** McCurdy, Lauren [mailto:Lauren.McCurdy@calbar.ca.gov]

**Sent:** Friday, May 14, 2010 1:28 PM

**To:** CommissionerJ2@gmail.com; Difuntorum, Randall; hbsondheim@verizon.net; ignazio.ruvolo@jud.ca.gov; jsapiro@sapirolaw.com; kemohr@charter.net; kevin\_e\_mohr@csi.com; kevinm@wsulaw.edu; kmelchior@nossaman.com; Lee, Mimi; linda.foy@jud.ca.gov; Marlaud, Angela; martinez@lbbslaw.com; McCurdy, Lauren; mtuft@cwclaw.com; pecklaw@prodigy.net; pwwapnek@townsend.com; rlkehr@kscllp.com; Lamport, Stanley W.; snyderlaw@charter.net

**Subject:** Public Comments Received for Rule 2.1 - MATERIALS DUE FOR JUNE 4TH AGENDA - Additional Comments  
**Importance:** High

Rule 2.1 Codrafters (LAMPOR, Vapnek):

Two additional public comments have been received for this rule, bringing the total number of comments to 3. According to the Chair's guidelines this rule will be called for discussion at the June 4 & 5 meeting. Here are the instructions from the assignment agenda for all post public comment rules:

**INSTRUCTIONS:** For each rule listed below that has received three or more comments/testimony, the codrafters are assigned to review the comments/testimony received and to prepare a revised draft rule, if any revisions are recommended, and a Public Commenter Chart with RRC responses, for submission to staff by 12 noon on Tuesday, May 25, 2010 to distribute with the June 4 & 5 meeting agenda materials. An updated Dashboard, Introduction, and Model Rule comparison chart are also needed to complete the rule; however, the codrafters have the discretion of waiting until the end of the public comment period (on June 15th) to begin work on these documents. Additional comments will be sent to each drafting team by e-mail as they are received. Where three or more comments have been received, materials are enclosed for codrafters. Rules that have received less than three comments/testimony will not be considered until the June 25 & 26 meeting.

I've attached an updated comment compilation which is current. An updated public commenter chart, but the most recent comment from the SDCBA has not yet been added to the public commenter chart.

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

**Comments rec.  
as of 5/25/10**

TOTAL = 3    Agree = 3  
Disagree =     
Modify =     
NI =   

No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Robert K. Rogers	A	No		I believe that the Rules should apply to an attorney's professional advice based upon the facts and the law. Extending the professional relationship to include more socially or morally relevant terms would tentatively impose a duty that is more personal than professional. The proposed change balances this by excluding the broader duty and merely making reference to it in a permissive way in the notes.	No response necessary.
2	COPRAC	A	Yes		COPRAC supports the adoption of Proposed Rule 2.1 and the Comments to the Rule.	No response necessary.
3	San Diego County Bar Association Legal Ethics Committee	A	Yes		We approve the new rule in its entirety.	No response necessary.

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED



## Rule 2.1 – Public Comment – File List

X-2010-416b Robert Rogers [2.1]	1
X-2010-421g COPRAC [2.1]	2
X-2010-425 SDCBA [2.1]	3





# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

### PUBLIC COMMENT FORM

**INSTRUCTIONS:** This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

*All information submitted is regarded as public record.*

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

Professional Affiliation

Commenting on behalf of an organization

- Yes  
 No

\* Name

\* City

\* State

\* Email address   
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the following link: [Proposed Rules of Professional Conduct](#).

\* Select the Proposed Rule that you would like to comment on from the drop down list.

Rule 2.1 Advisor

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- AGREE with this proposed Rule  
 DISAGREE with this proposed Rule  
 AGREE ONLY IF MODIFIED

**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

I believe that the Rules should apply to an attorney's professional advice based upon the facts and the law. Extending the professional relationship to include more socially or morally relevant terms would tentatively impose a duty that is more personal than professional. The proposed change balances this by excluding the broader duty and merely making reference to it in a permissive way in the notes.



**THE STATE BAR  
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL  
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

May 6, 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,

Carole Buckner, Chair  
Committee on Professional  
Responsibility and Conduct

cc: Members, COPRAC

May 6, 2010

Ms. Audrey Hollins  
Office of Professional Competence, Planning and Development  
The State Bar of California  
180 Howard Street  
San Francisco, CA 94105

**Re:**

<b>RULE</b>	<b>TITLE</b>
Rule 1.0	Purpose and Scope of the Rules of Professional Conduct
Rule 1.0.1	Terminology *BATCH 6*
Rule 1.1	Competence
Rule 1.2	Scope of Representation and Allocation of Authority Between Client and Lawyer
Rule 1.4	Communication
Rule 1.4.1	Disclosure of Professional Liability Insurance *BATCH 6*
Rule 1.5	Fee for Legal Services
Rule 1.5.1	Financial Arrangements Among Lawyers
Rule 1.6	Confidential Information of a Client
Rule 1.7	Conflict of Interests: Current Clients
Rule 1.8.1	Business Transactions with a Client and Acquiring Interests Adverse to the Client
Rule 1.8.2	Use of a Current Client's Confidential Information
Rule 1.8.3	Gifts from Client
Rule 1.8.5	Payment of Personal or Business Expenses Incurred by or for a Client
Rule 1.8.6	Payments Not From Client
Rule 1.8.7	Aggregate Settlements
Rule 1.8.8	Limiting Liability to Client
Rule 1.8.9	Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review
Rule 1.8.10	Sexual Relations with Client
Rule 1.8.11	Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9)
Rule 1.9	Duties to Former Clients
Rule 1.11	Special Conflicts for Former and Current Government Officers and Employees *BATCH 6*
Rule 1.12	Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
Rule 1.13	Organization as Client
Rule 1.14	Client with Diminished Capacity
Rule 1.15	Handling Funds and Property of Clients and Other Persons
Rule 1.16	Declining or Terminating Representation
Rule 1.17	Purchase and Sale of a Law Practice *BATCH 6*
Rule 1.18	Duties to Prospective Clients *BATCH 6*
<b>Rule 2.1</b>	<b>Advisor</b>
Rule 2.4	Lawyer as a Third-Party Neutral
Rule 2.4.1	Lawyer as a Temporary Judge
Rule 3.1	Meritorious Claims
Rule 3.3	Candor Toward the Tribunal
Rule 3.4	Fairness to Opposing Party and Counsel
Rule 3.5	Impartiality and Decorum of the Tribunal
Rule 3.6	Trial Publicity
Rule 3.7	Lawyer As A Witness

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Rule 3.8	Special Responsibilities of a Prosecutor
Rule 3.9	Advocate in Non-adjudicative Proceedings *BATCH 6*
Rule 3.10	Threatening Criminal, Administrative, or Disciplinary Charges
Rule 4.1	Truthfulness in Statements to Others *BATCH 6*
Rule 4.2	Communication with a Person Represented by Counsel
Rule 4.3	Dealing with Unrepresented Person
Rule 4.4	Respect for Rights of Third Persons *BATCH 6*
Rule 5.1	Responsibilities of Partners, Managers, and Supervisory Lawyers
Rule 5.2	Responsibilities of a Subordinate Lawyer
Rule 5.3	Responsibilities Regarding Nonlawyer Assistants
Rule 5.3.1	Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member
Rule 5.4	Duty to Avoid Interference with a Lawyer's Professional Independence
Rule 5.5	Unauthorized Practice of Law; Multijurisdictional Practice
Rule 5.6	Restrictions on Right to Practice
Rule 6.1	Voluntary Pro Bono Publico Service *BATCH 6*
Rule 6.2	Accepting Appointments *BATCH 6*
Rule 6.3	Legal Services Organizations
Rule 6.4	Law Reform Activities
Rule 6.5	Limited Legal Services Programs *BATCH 6*
Rule 7.1	Communications Concerning the Availability of Legal Services
Rule 7.2	Advertising
Rule 7.3	Direct Contact with Prospective Clients
Rule 7.4	Communication of Fields of Practice and Specialization
Rule 7.5	Firm Names and Letterheads
Rule 8.1	False Statement Regarding Application for Admission to Practice
Rule 8.1.1	Compliance with Conditions of Discipline and Agreements in Lieu of Discipline
Rule 8.2	Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6*
Rule 8.3	Reporting Professional Misconduct
Rule 8.4	Misconduct
Rule 8.4.1	Prohibited Discrimination in Law Practice Management and Operation
Rule 8.5	Disciplinary Authority; Choice of Law

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,



Patrick L. Hosey, President  
San Diego County Bar Association



**SAN DIEGO COUNTY  
BAR ASSOCIATION**

November 11, 2009

Audrey Hollins  
Office of Professional Competence,  
Planning and Development  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105-1639

Re: Comments to Proposed Amendments to the Rules of Professional Conduct of  
The State Bar of California (Batch 5)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit  
the attached comments to Batch 5 of the Proposed Amendments to the Rules of  
Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics  
Committee, and have been approved by our Board of Directors.

Sincerely,

Jerrilyn T. Malana, President  
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee  
Edward J. McIntyre, Co-Chair, SDCBA Legal Ethics Committee

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James W. Talley

SDCBA Legal Ethics Committee  
Subcommittee for Responses to Requests for Public Comment  
Coversheet to Recommendations on State Bar of California Rules Revision Commission  
Batch 5

- Rule 1.2      Scope of Representation [N/A]  
APPROVE
- Rule 1.6      Confidentiality of Information [3-100, B&P 6068(e)]  
APPROVE WITH MODIFICATIONS – see comments
- Rule 1.8.2    Use of Confidential Information [3-100, 3-310]  
APPROVE
- Rule 1.8.13   Imputation of Personal Conflicts [N/A]  
APPROVE
- Rule 1.9      Duties to Former Clients [3-310]  
APPROVE
- Rule 1.10     Imputation of Conflicts: General Rule [N/A]  
APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)
- Rule 1.12     Former Judge, Arbitrator, Mediator [N/A]  
APPROVE WITH MODIFICATIONS – see comments
- Rule 1.14     Client with Diminished Capacity [N/A]  
APPROVE
- Rule 2.1      Advisor [N/A]  
APPROVE**
- Rule 3.8      Responsibilities of a Prosecutor [5-110]  
NO POSITION TAKEN – see comments
- Rule 8.5      Choice of Law [1-100(D)] SIMMONS  
APPROVE

**SDCBA Legal Ethics Committee**  
**Comments to Revisions to Rules of Professional Conduct (RPC) Batch 5**  
**SDCBA Legal Ethics Committee Deadline October 8, 2009**  
**Subcommittee Deadline October 26, 2009**  
**State Bar Comment Deadline November 13, 2009**

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: N/A

Proposed New Rule No./ Title: 2.1 - ADVISOR

**QUESTIONS (please use separate sheets of paper as necessary):**

(1) Is the **policy** behind the new rule correct? If “yes,” please proceed to the next question. If “no,” please elaborate, and proceed to Question #4.

Yes [ X ] No [ ]

(2) Is the new rule **practical** for attorneys to follow? If “yes,” please proceed to the next question. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [ X ] No [ ]

(3) Is the new rule **worded correctly and clearly**? If “yes, please proceed to the Conclusions section. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [ X ] No [ ]

(4) Is the policy behind the existing rule correct? If “yes,” please proceed to the Conclusions section. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [ X ] No [ ]

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

*There is a minority that would add a provision stating that the failure to render moral, economic, social, or political advice is not a violation of this Rule (which says a lawyer “may” render such advice). Given the permissive, rather than mandatory, “may” language relating to moral, economic, social, or political advice, the minority’s proposed express statement that the failure to give such advice is not a violation seems somewhat duplicative and unnecessary. Additionally, the Commission proposes striking certain language from the Comments to the Rule, which tend to indicate an affirmative obligation to provide such advice. Accordingly, I agree with the majority’s opinion that the Rule should be added without the proposed addition.*

**CONCLUSIONS (pick one):**

[ X ] We approve the new rule in its entirety. (A dissenting opinion was submitted on this matter and is attached as Exhibit 1 for your consideration.)

We approve the new rule with modifications.\*

We disapprove the new rule and support keeping the old rule.

We disapprove the new rule and recommend a rule entirely different from either the old or new rule.\*

We abstain from voting on the new rule but submit comments for your consideration.\*

\* If you select one of the \* options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.

# Proposed Rule 2.1 [n/a]

## “Advisor”

(Draft #4, 2/19/10)

**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.

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## Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below)

Favor Rule as Recommended for Adoption 8  
Opposed Rule as Recommended for Adoption 4  
Abstain 0

Approved on Consent Calendar

Approved by Consensus

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## Commission Minority Position, Known Stakeholders and Level of Controversy

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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:

Three of the five comments received, including comments from OCTC, COPRAC and the Santa Clara County Bar Association maintain 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.

Moderately Controversial – Explanation:

Not Controversial

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 2.1\* Advisor

February 2010

(Draft rule following consideration of public comment.)

### ***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. The first two Comments were 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.

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\* Proposed Rule 2.1, Draft 4 (2/19/10)

*Minority.* A minority of the Commission objects to this Rule because it imposes an undefined duty to exercise duty of independent judgment. Largely due to the absence of a definition of “independent judgment,” the minority is concerned that the vast majority of lawyers will not understand when and how this Rule applies. See full minority statement, below.

<p align="center"><b><u>ABA Model Rule</u></b> <b>Rule 2.1 Advisor</b></p>	<p align="center"><b><u>Commission's Proposed Rule*</u></b> <b>Rule 2.1 Advisor</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></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.<del>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.</del></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>

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\* Proposed Rule 2.1, Draft 4 (2/19/10); Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><b><u>ABA Model Rule</u></b> <b>Rule 2.1 Advisor</b> <b>Comment</b></p>	<p align="center"><b><u>Commission’s Proposed Rule</u></b> <b>Rule 2.1 Advisor</b> <b>Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p><b>Scope of Advice</b></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><b>Scope of Advice</b></p> <p>[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice <del>often involves unpleasant</del> <u>may involve</u> facts and alternatives that a client may <u>find unpleasant and may</u> 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 [1] is nearly identical to Model Rule 2.1, cmt. [1]. It was 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>[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>[2] <del>Advice</del><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. <del>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.</del> Although a lawyer is not a moral advisor <del>as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied in</del> <u>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.</u></p>	<p>Comment [2] 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 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>[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><del>[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.</del></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>[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><del>[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</del></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><b>Offering Advice</b></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><del><b>Offering Advice</b></del></p> <p><del>[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.</del></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>

## Proposed Rule 2.1 Advisor

### Minority Dissent

A minority of the Commission dissent to this Rule in its present form because it adopts an undefined duty of independent judgment, which has not been applied consistently in other jurisdictions. Some applications of this Rule in other states would produce results that would be inimical to the interests of client and a lawyer's duty of undivided loyalty to a client. This Rule should not be adopted without a definition of independent judgment that foreclose an interpretation that would be inconsistent with a duty of loyalty.

The Commission chose not to define what is meant by "independent judgment." Traditionally, in California, independent judgment has been understood to be an element of a lawyer's duty of loyalty to a client. That duty requires a lawyer to represent a client's interests faithfully and exercise judgment consistent with the faithful representation of the client. In this sense, "independent judgment" means judgment that is independent of influences other than the client. If the Rule was limited to that concept of independent judgment, there would not be an issue.

However, some jurisdictions that have applied the Rule have construed "independent judgment" to mean judgment independent of the client's interests. (See e.g. *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306 (11th Cir. 2002) [lawyer sanctioned for rude and abusive conduct; in reply to the lawyer's argument that she merely was following orders, the Court confirmed the sanction, in part because Rule 2.1 requires lawyers to exercise independent professional judgment (and not just follow orders)]; *U.S. v. Hughes*, 41 Fed. Appx. 276, 281 n. 3 (10th Cir. 2002) [part of the Court's recital of underlying facts, it explains that counsel sought to withdraw on the basis that they had "reached an ethical conflict between their duty to follow the client's wishes and yet retain the required independent professional judgment mandated by Rule 2.1 ...."] This construction of "independent judgment," which imposes a duty on lawyers to advise clients for the benefit of others, is antithetical to a duty of loyalty and the reason that duty exists. Furthermore, it would conflict with other Rules, such as Rule 1.2 and 1.4.

There is no California authority on this Rule. California courts would be expected to look at cases in other jurisdictions, including cases that have construed “independent judgment” to mean something inconsistent with a duty of loyalty. Neither the courts nor lawyer should be burdened with working out the meaning of this Rule, with unforeseen and potentially negative consequences to the lawyer-client relationship.

## Rule 2.1 Advisor

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

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.~~

### Comment

#### *Scope of Advice*

- [1] 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.
- [2] ~~Advice~~ 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 ~~as such, moral and ethical considerations impinge upon most legal questions and~~ in rendering advice, a lawyer may ~~decisively influence how the~~ refer not only to law will, but to other considerations such as moral, economic, social and political factors that may be applied relevant to the client's situation.

## **Rule 2.1 Advisor**

(Commission's Proposed Rule – Clean Version)

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

### **Comment**

#### *Scope of Advice*

[1] 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.  
[Sorted by Commenter]**

**TOTAL = 5    Agree = 2  
Disagree = 2  
Modify = 1  
NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	D			<p>COPRAC does not support the proposed rule because we do not believe that it is appropriate as a disciplinary rule.</p> <p>Should the proposed rule be adopted in some form, we would recommend removing the second sentence of the proposed rule. We are generally in agreement with the concern expressed as the Minority position. We have no objection to the second sentence being included in a Comment to the rule, nor do we object to the disclaimer recommended by the Minority, but we do not believe that this sentence should be included in the rule itself.</p>	<p>The Commission agrees that the proposed Rule does not state a disciplinary standard. However, the Commission believes that the Rule provides useful guidance to the legal profession regarding the existence and scope of a lawyer's duty of independent judgment and candor.</p> <p>The second sentence of the proposed Rule was moved to replace the second sentence in Comment [2]. The Commission did not include the disclaimer suggested by the minority position because the revised second sentence uses the permissive verb "may," which does not impose a requirement.</p>
2	Office of the Chief Trial Counsel ("OCTC"), State Bar of California	A			<p>OCTC is concerned that this is not an enforceable rule. OCTC does not believe the rules should have rules that are not enforceable.</p>	<p>The Commission agrees that the proposed Rule does not state a disciplinary standard. However, the Commission believes that the Rule provides useful guidance to the legal profession regarding the existence and scope of a lawyer's duty of independent judgment and candor.</p>

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

3	Orange County Bar Association	M		<p>The OCBA endorses the adoption of the first sentence of the proposed Rule, but recommends that the second sentence be deleted.</p> <p>The second sentence should be deleted because it is not intended to be mandatory and is, essentially, a practice pointer. With modifications to the language, the second sentence should be placed in an appropriate location in the Comments to read as follows:</p> <p>“In rendering advice, a lawyer may refer not only to law, but <b>also to such</b> other considerations <b>the lawyer deems to be</b> relevant to the client’s situation.”</p> <p>The OCBA believes that it is more appropriate for the language to be as broad as possible, rather than focusing on “moral, economic, social and political” factors.</p> <p>The OCBA recommends that the language in Comment [1] be modified to read as follows:</p> <p>“Legal advice <b>may</b> involve facts and alternatives that a client may <b>find unpleasant and</b> be disinclined to confront.”</p> <p>There is no need for the word “often,” and whether facts are unpleasant depends on the client’s perspective and not on the facts themselves.</p>	<p>Comment accepted.</p> <p>The second sentence of the proposed Rule was deleted, The Commission has revised the second sentence of Comment [2] to incorporate language that was taken from the second sentence of the proposed rule. The Commission, however, did not make the further changes the commenter suggests. The sentence in question states that the lawyer may refer not only to the law, but to other considerations. It, therefore, is not focused on just moral, economic, social and political factors. Instead these factors are listed as examples of the types of other considerations a lawyer may discuss with a client.</p> <p>The Commission agrees with the comment and has made the requested change.</p>
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				Comment [2]	<p>With respect to Comment [2], the OCBA endorses the deletion of the second and third sentences from the comment to the Model Rule, but suggests that the last sentence be modified as follows:</p> <p><b><i>“For instance,</i></b> although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon <b><i>many</i></b> legal questions and may influence <b><i>the client’s course of action.</i></b>”</p>	<p>Although the Commission did not use the commenters’ suggested language verbatim, it has revised the second sentence of Comment [2] along the lines suggested to incorporate language that was taken from the second sentence of the proposed rule in response to OCBA’s prior comment.</p>
4	San Diego County Bar Association Legal Ethics Committee	A			We approve the new rule in its entirety.	No response required.
5	Santa Clara County Bar Association	D			<p>This rule is unnecessary and, indeed, encourages an attorney to provide advice to a client that is beyond the scope of the lawyer’s expertise.</p>	<p>The Commission agrees that the proposed Rule does not state a disciplinary standard. However, the Commission believes that the Rule provides useful guidance to the legal profession regarding the existence and scope of a lawyer’s duty of independent judgment and candor. It has deleted the second, permissive sentence of the public comment version of the Rule and moved it into the Comment.</p>

## Rule 2.1: Advisor

### STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 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** has no Disciplinary Rule counterpart to ABA Model Rule 2.1, but compare New York's EC 7-8, which provides, in part, as follows:

. . . Advice of a lawyer to the client need not be confined to purely legal considerations. . . . A lawyer should bring to bear upon this decision-making process the fullness of his or her experience as well as the lawyer's objective viewpoint. In assisting the client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a

decision that is morally just as well as legally permissible.

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

**RRC – Model Rule 2.1**  
**E-mails, memos, etc. – Revised (6/1/2010)**

February 25, 2010 Tuft E-mail to Lamport, cc RRC: ..... 20

February 25, 2010 Lamport E-mail to Tuft, cc RRC: ..... 20

February 25, 2010 Tuft E-mail to Lamport, cc RRC: ..... 21

February 26, 2010 Lamport E-mail to Tuft, cc RRC: ..... 22

March 1, 2010 Lamport E-mail to Difuntorum & KEM, cc Kehr, Chair & McCurdy:..... 23

March 1, 2010 Difuntorum E-mail to Lamport, cc Chair, McCurdy & KEM:..... 23

May 5, 2010 McCurdy E-mail to Drafters (Lamport & Vapnek), cc RRC:..... 24

May 14, 2010 McCurdy E-mail to Drafters (Lamport & Vapnek), cc RRC:..... 24

May 25, 2010 Lamport E-mail to McCurdy, cc RRC:..... 25

May 31, 2010 Kehr E-mail to RRC:..... 26

May 31, 2010 Tuft E-mail to RRC:..... 26

June 2, 2010 Lamport E-mail to RRC: ..... 27

**RRC – Model Rule 2.1  
E-mails, memos, etc. – Revised (6/1/2010)**

**May 5, 2010 McCurdy E-mail to Drafters (Lampport & Vapnek), cc RRC:**

Rule 2.1 Codrafters (LAMPOR, Vapnek):

The public comments received to date on this rule are attached in a combined PDF. I've also provided a Word copy of the draft public commenter chart with the comment synopses filled in. To keep pace with the comments being received, please consider beginning to add the RRC responses, and if desired, modifications to the synopses.

Of course, more comments continue to be received each day, and we will convey updated information periodically in order to keep abreast of the public comment review in anticipation of the work being carried out at your June 4 & 5, and June 25 & 26 meetings.

***Attached:***

RRC - [2-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc  
RRC - [2-1] - Public Comment Complete - REV (05-05-10).pdf

**May 14, 2010 McCurdy E-mail to Drafters (Lampport & Vapnek), cc RRC:**

Rule 2.1 Codrafters (LAMPOR, Vapnek):

Two additional public comments have been received for this rule, bringing the total number of comments to 3. According to the Chair's guidelines this rule will be called for discussion at the June 4 & 5 meeting. Here are the instructions from the assignment agenda for all post public comment rules:

INSTRUCTIONS: For each rule listed below that has received three or more comments/testimony, the codrafters are assigned to review the comments/testimony received and to prepare a revised draft rule, if any revisions are recommended, and a Public Commenter Chart with RRC responses, for submission to staff by 12 noon on Tuesday, May 25, 2010 to distribute with the June 4 & 5 meeting agenda materials. An updated Dashboard, Introduction, and Model Rule comparison chart are also needed to complete the rule; however, the codrafters have the discretion of waiting until the end of the public comment period (on June 15th) to begin work on these documents. Additional comments will be sent to each drafting team by e-mail as they are received. Where three or more comments have been received, materials are enclosed for codrafters. Rules that have received less than three comments/testimony will not be considered until the June 25 & 26 meeting.

I've attached an updated comment compilation which is current. An updated public commenter chart, but the most recent comment from the SDCBA has not yet been added to the public commenter chart.

***Attached:***

RRC - [2-1] - Public Comment Chart - By Commenter - XDFT2 (05-1410).doc  
RRC - [2-1] - Public Comment Complete - REV (05-14-10).pdf

**May 25, 2010 Lampton E-mail to McCurdy, cc RRC:**

The following is my submission for the June 4 agenda. All of the comments we received supported the Rule, so there was nothing for the drafting team to work on in response to the public comment. I am requesting that the Commission consider an additional Comment that would address the issue I raised in the dissent to the Rule.

The concern that I have with this Rule is that it does not explain the difference between independent judgment and candor. Independent judgment appears in the Rule 1.7 Comments and in Rule 1.8.6 and has a consistent meaning in those Rules - judgment that is independent of influences of third parties. However, there are out-of-state cases that suggest that "independent judgment" in Rule 2.1 has a different meaning - judgment independent of the client. I do not believe we should be importing that precedent, particularly since it would be at odds with the concept of independent judgment in the conflicts context. We can achieve that result by consistent with the purpose of the Rule through the candor element of the Rule.

With the foregoing in mind, I would like to propose a new first Comment that would tie into the previously approved for the Rule. There is a title in the Comment, which I propose the Commission delete. The entire Rule and Comment would read as follows:

**Rule 2.1 Advisor**

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

[New] *Independent professional judgment is an aspect of a lawyer's duty of loyalty to a client. Independent judgment is judgment that is not influenced by duties, relationships or interests that are not properly part of the lawyer-client relationship. The duty exists to assure that a lawyer advises a client with the client's interests in mind. A lawyer also owes a duty of candor to a client, which allows a lawyer to discuss broader considerations, which, in the lawyer's reasonable judgment, the client should consider in connection with the lawyer's legal advice.*

**[Scope of Advice] DELETE**

[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.

[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. Although a lawyer is not a moral advisor as such, moral and ethical considerations may impinge upon most legal questions and may decisively influence how the law will be applied.

I sent the proposed Comment to Paul over the weekend, but Paul has not yet reviewed or commented on it.

**May 31, 2010 Kehr E-mail to RRC:**

I support Stan's suggested new comment, but only in part.

I agree that independent judgment does not mean "independent of the client", but I don't agree that the duty of candor is limited to the right to discuss broader implications. The duty of candor under California law obligates the lawyer to make disclosures that are unbiased. An attorney's fiduciary duty: "... embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests. Where there is a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud. ...[citation omitted] Thus, as we stated in *Amen v. Merced County Title Co.* [citation omitted], Cases in which the defendant stands in a fiduciary relationship to the plaintiff are frequently treated as if they involved fraudulent concealment of the cause of action by the defendant. The theory is that although the defendant makes no active misrepresentation, this element 'is supplied by an affirmative obligation to make full disclosure, and the non-disclosure itself is a "fraud.'" *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal.3d 176, 188-89 (1971). See, also, *Health Maintenance Network v. Blue Cross of So. Cal.*, 202 Cal.App.3d 1043, 1062 (1988), *Johnson v. Haberman & Kassoy*, 201 Cal.App.3d 1468, 1477 (1988), *Hobbs v. Bateman Eichler, Hill Richards, Inc.*, 164 Cal.App.3d 174, 201 (1985), *Reynolds v. City of Los Angeles*, 76 Cal.App.3d 882, 891 (1978), and *Werschull v. United California Bank*, 85 Cal.App.3d 981, 1001 (1978). *Neel* is cited with approval for this self-reporting obligation in *Beal Bank v. Arter & Hadden, LLP*, 42 Cal.4th 503, 514 (2007). The duty of full disclosure encompasses all "... facts that materially affect the beneficiary's rights and interests. (citation omitted)" *Fortunato v. Superior Court*, 114 Cal. App.4th 475, 483 (2003).

I believe that unbiased disclosure (candor) overlaps with independent judgment, b/c both require the lawyer to act with undivided loyalty to the client, that is, unaffected by the lawyer's interests or those of others. I would attempt to meld Stan's candor thought with the opinion in *Neel*, but there is not time for this.

Returning to independent judgment, I don't agree with the proposed third sentence. It dilutes the first two sentences to say that a lawyer only needs to have the client's interests in mind. I would drop that sentence as I think the prior sentences are complete without it.

Finally, a drafting nit. I would insert a comma after "relationships" in the second sentence.

**May 31, 2010 Tuft E-mail to RRC:**

I am not sure what is intended by this proposed comment. If the intent is to say that independent judgment is simply an aspect of client loyalty and nothing more, than I would disagree. Loyalty and independent judgment are both essential elements of the lawyer's relationship to a client. MR, Cmt [1]. Much has been written on the principle of independent professional judgment and this comment does not capture it. Also the duty of candor entails more than discussing "broader considerations." I recommend that we not be the one jurisdiction that attempts to define these concepts in a single comment.

**June 2, 2010 Lamport E-mail to RRC:**

1. I am not saying that independent judgment is "simply an aspect of client loyalty and nothing more." In my view faithful representation, independent judgment and maintaining a client's trust are all part of a lawyer's duty of loyalty, but it is not essential to the Comment to classify independent judgment in this way. I would be fine with changing the first sentence to state: "Independent judgment is an essential element of a lawyer's relationship with a client."

2. The point of this Comment is to make clear that independent judgment does not mean "judgment independent of the client." I am not hearing any objection to that concept. If the Comment said that much, I think we would have clarified the issue for the profession. Current Comment [1] discusses candid advice. So perhaps it is not essential to define it. At the same time we could avoid a debate about the scope of candid advice, which is not necessary to the point I am trying to make here.

3. With the foregoing in mind, I would suggest a Comment that simply says:

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