

MEMORANDUM

TO: Members of the Commission

FROM: Mark L. Tuft

DATE: November 15, 2004

RE: Rule 3-210 [Rule 1.2(d)] Advising the Violation of Law – Open Agenda
Item III.L (December 10, 2004 Meeting)

Current California Rule:

Rule 3-210. Advising the Violation of Law.

A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule or ruling of a tribunal.

Current ABA Model Rule:

ABA Model Rule 1.2(d): Scope of Representation and Allocation of Authority Between Client and Lawyer:

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but 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 the law.

Origin of the Rule:

The concepts in both Rule 3-210 and Rule 1.2(d) can be traced back to the ABA Canons of Professional Ethics. Canon 32 entitled "The Lawyer's Duty In Its Last

Analysis," provides: "No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law, whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. . . . He must also observe and advise his client to observe the statute law, though until a statute shall have construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. . . ."

Issues for Discussions

1. Should the prohibition on advising the violation of law be in a separate rule or should it be included in a rule patterned after Model Rule 1.2?

Recommendation: A separate rule.

Reason: Too much emphasis has been placed on creating exceptions to confidentiality in remediating criminal or fraudulent conduct and not enough emphasis has been placed on the duty of the lawyer in counseling and advising the client on the law. The report of the ABA Task Force on Corporate Responsibility concludes that there is insufficient guidance for corporate lawyers who are confronted with misconduct by corporate officers and insiders. The Bar Association of San Francisco recommended that Model Rule 1.2(d) be a separate rule and not buried at the end of Rule 1.2, a rule that purports to deal with the scope of the representation and authority between lawyer and client. The ABA Task Force included this recommendation in its report.

It is unclear (and input from Mary Yen would be appreciated) the extent to which lawyers have been disciplined under Rule 3-210 in contrast to Bus. & Prof. C. § 6068(b) and (c).

2. Should the prohibition under the rule be limited to advising the violation of law or should the rule also prohibit a lawyer from assisting a client in conduct that the lawyer knows is criminal or fraudulent?

Recommendation: The rule should include both counseling and assisting a client in conduct the lawyer knows to be criminal or fraudulent.

Reason: This is the prohibition in virtually all of the jurisdictions and is consistent with existing California case law. See, e.g., *In re Young* (1989) 49 Cal.3d 257 –

discipline following conviction as accessory to felon where lawyer assisted fugitive client by arranging bail under a false name that client had habitually used; *Matter of DeMassa* (Rev. Dept. 1991) 1 Cal.State Bar Ct. Rptr. 737 – attorney harbored fugitive client; State Bar Formal Opinion 1996 -146 –attorney cannot write letter to developer-client's homeowners regarding warranty that attorney reasonably believes is fraudulent; and see, *Townsend v. State Bar* (1948) 32 Cal.2d, 597 – attorney disciplined when attorney advised client to convey property to defraud judgment creditor, see also *In re Bloom* (1997) 44 Cal.3d, 128 – lawyer disbarred for aiding client in transporting plastic explosive to Libya despite lawyer's argument that lawyer believed in good faith that transport of explosive was authorized by the National Security Council.

3. Should the rule be limited to conduct that the lawyer actually knows is criminal or fraudulent or should the rule include conduct that the lawyer "reasonably should know" is criminal or fraudulent?

Recommendation: Retain the actual knowledge standard.

Reasons: The ABA Corporate Task Force Report recommended Rule 1.2(d) be expanded to include the "ought to know standard." Florida has added the words "or reasonably should know" in Rule 1.2(d). However, a bright line should exist between counseling or assisting a client in conduct that is criminal or fraudulent and the lawyer's right (and sometimes obligation) to advise the client concerning the legal consequences of the client's proposed course of conduct. One commentator argues that the text of Model Rule 1.2(d) requires that two bright lines be crossed: (1) the civil/criminal line and (2) the line between providing information about the law (legal consequences) and other kinds of "assistance" to the client. Pepper, *Counseling at the Limits of the Law: An Exercise In The Jurisprudence in Ethics of Lawyering*, 104 Yale L.J.1545 (1995).

The actual knowledge standard is consistent with aiding or abetting the commission of a crime, which courts in some jurisdictions equate to a lawyer's violation of Rule 1.2(d).

4. Should the rule include a prohibition against counseling or assisting a client in conduct that the lawyer knows to be in violation of a court order?

Recommendation: Undecided.

Reasons: Current Rule 3-210 includes a ruling of a tribunal. Restatement Third on The Law Governing Lawyers, § 94 (2) includes a violation of a court order. ABA Model Rule 1.2(d) omits explicit reference to the client's violation of a court order.

According to Rest § 94 Comment (d), case law commonly treats a lawyer's assistance in a client's violation of a court order as a violation of Model Rule 8.4(d).

5. Is there a sufficient bright line between the prohibition that a lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent and counseling the client about the legal consequences of the client's proposed course of conduct and challenging existing law?

Recommendation: Undecided.

Reasons: Although Ethics 2000 did not recommend any changes to the text of Rule 1.2(d), former Comments 6-9 were revised to provide additional help in determining what Model Rule 1.2(d) means and what lawyers must do to avoid assisting a client to commit a crime or fraud. See e.g., new Comment 10. Comment 9 attempts to clarify the distinction between advising and being a party to a wrongful course of action. Comment 12 (former Comment 9) offers an attorney a more detailed example of a situation in which the attorney will violate Rule 1.2(d) even though the defrauded person is not a party to the transaction. The Comment also replaces "should" with "must" when directing a lawyer not to participate in a criminal or fraudulent act.

6. Should the prohibition under the rule be limited to counseling or assisting the violation of any law?

Recommendation: The conduct should be limited to conduct the lawyer knows is either criminal or fraudulent. "Fraud or fraudulent" should be a defined term in the terminology to the rules. See ABA Model Rule 1.0(d).

Reason: There are First Amendment and independent professional judgment issues that caution against a more expansive rule. A bright line rule is preferred.

7. Should the rule include the additional requirement found in Restatement § 94(2) that the lawyer may not counsel or assist a client in conduct that the lawyer knows to be criminal or fraudulent "with the intent of facilitating or encouraging the conduct."?

Recommendation: Not necessary.

8. Should the rule be combined with Rule 3-200 on prohibited objectives of employment?

Recommendation: Undecided.

9. Should the rule provide that a lawyer "may counsel or assist a client to make a *good faith* effort to determine the validity, scope, meaning or application of the law (ABA Model Rule 1.2(d)) or should the rule provide that the lawyer may counsel or assist a client in conduct "when the lawyer *reasonably believes* that the client's conduct constitutes a good faith effort to determine the validity, scope, meaning or application of the law or court order (Restatement § 94(2))?"

Recommendation: Undecided. See Rest. § 94, Comment (e) and reporter's notes.

10. Should the rule include the provision found in Restatement § 94(2)(b) that a lawyer may counsel or assist a client in conduct "where the lawyer reasonably believes . . . that the client can assert a non-frivolous argument that the client's conduct will not constitute a crime or fraud or violate a court order."?

Recommendation: This should be a comment and not part of the rule.

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(December 6, 2004)

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1. Rule Amendment History
2. Ethics Hotline Staff Recommendations

NOTE: No Office of Chief Trial Counsel or public comments received for this rule.

RULE AMENDMENT HISTORY (2004)

Rule 3-210. Advising the Violation of Law

Current Rule

Rule 3-210. Advising the Violation of Law

A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.

Discussion:

Rule 3-210 is intended to apply not only to the prospective conduct of a client but also to the interaction between the member and client and to the specific legal service sought by the client from the member. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the member. (See *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].) An example of the latter is a request that the member negotiate the return of stolen property in exchange for the owner's agreement not to report the theft to the police or prosecutorial authorities. (See *People v. Pic'l* (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685].)

Summary of 1992 Amendments

NA

Amendments Operative 1989 (Comparison of Current Rule to Former Rule)

Rule 3-210. ~~7-404~~. Advising the Violation of Law

A member ~~of the State Bar~~ shall not advise the violation of any law, rule, or ruling of a tribunal unless ~~he~~ the member believes in good faith that such law, rule, or ruling is invalid. A member ~~of the State Bar~~ may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.

Discussion:

Rule 3-210 is intended to apply not only to the prospective conduct of a client but also to the interaction between the member and client and to the specific legal service sought by the client from the member. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the member. (See *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].) An example of the latter is a request that the member negotiate the return of stolen property in exchange for the owner's agreement not to report the theft to the police or prosecutorial authorities. (See *People v. Pic'l* (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685].)

[December, 1987 grey bound rule filing, Enc. 2]

RULE AMENDMENT HISTORY (2004)

Summary of 1989 Amendments

No substantive changes to current rule 7-101 are proposed.

[December, 1987 grey bound rule filing at pg. 32]

Text of Rule 7-101 as Operative on January 1, 1975 (Appendix E of Publication 250)

Rule 7-101. Advising the Violation of Law

A member of the State Bar shall not advise the violation of any law, rule or ruling of a tribunal unless he believes in good faith that such law, rule or ruling is invalid. A member of the State Bar may take appropriate steps in good faith to test the validity of any law, rule or ruling of a tribunal.

Excerpt from 1972 Final Report of the Special Committee to Study the ABA Code of Professional Responsibility

Rule 7-101. Advising the Violation of Law

A member of the State Bar shall not advise the violation of any law. This rule shall not apply to advice, given in good faith, that a law is invalid.

Comment. Rule 7-101 is the identical text of present Rule 11, Rules of Professional Conduct.

(Note: The version of proposed rule 7-101 as set forth above differs from the version adopted by the Supreme Court operative 1/1/75.)

MEMORANDUM

DATE: December 2, 2004
TO: Members, Rules Revision Commission
FROM: Ethics Hotline Staff
SUBJECT: Rule 3-210 Proposed Amendments

Rule 3-210. Advising the Violation of Law

Proposed Amendments:

1. Address whether the case law cited in the discussion section of 3-210 is the most current and/or relevant examples to use for this rule.

For example, *People v. Superior Court (Fairbank)* (1987) 192 Cal.App.3d 32. This case held once defense counsel is in possession of removed or altered physical evidence, counsel has a duty to immediately inform the court of such evidence and to turn it over to the prosecution.

Question(s) to the Hotline that this proposed amendment would address:

While no specific question has arisen, members who call the Hotline appear to be confused about whether Rule 3-210 requires affirmative conduct or advice, consistent with the law, in addition to simply refraining from advising the violation of law.

2. Perhaps there should be a reference in the Discussion section of Rule 3-210 to Business & Professions Code sec. 6068(c) "It is the duty of an attorney to do all of the following: (c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense."

Question(s) to the Hotline that this proposed amendment would address:

While no specific question has arisen, members who call the Hotline appear to be confused about whether Rule 3-210 requires affirmative conduct or advice, consistent with the law, in addition to simply refraining from advising the violation of law.

3. Add to the Discussion section *In re Young* (1989) 49 Cal.3d 257 [261 Cal.Rptr. 59] where the court held that an attorney had a duty not to further his client's misconduct.

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