

From: [Kevin Mohr](#)
To: [McCurdy, Lauren](#); [Difuntorum, Randall](#)
Cc: [Stan Lamport](#); [Paul Vapnek](#); [Harry Sondheim](#); [Kevin Mohr_G](#)
Subject: RRC - 2.1 - III.I. - Agenda Materials (1/22-23/10 Meeting)
Date: Tuesday, January 12, 2010 7:14:30 AM
Attachments: [RRC - \[2-1\] - Compare - Rule & Comment Explanation - DFT3 \(01-11-10\)SWL - Cf. to DFT2.1.doc](#)
[RRC - \[2-1\] - Compare - Introduction - DFT3.1 \(01-11-10\)SWL-KEM - Cf. to DFT2.2.doc](#)
[RRC - \[2-1\] - Dashboard - ADOPT - DFT4.1 \(01-11-10\)SWL-KEM.doc](#)
[RRC - \[2-1\] - Public Comment Chart - By Commenter - DFT3.1 \(01-11-10\)SWL-KEM.doc](#)
[RRC - \[2-1\] - Rule - DFT3 \(01-11-10\)SWL - Cf. to DFT2.1 - LAND.doc](#)

Greetings:

I've attached the following, which are for the most part simply renamed files that Stan sent in yesterday. However, I did make some changes, as described below. All are in Word. I've also inserted Stan's cover e-mail from yesterday so you can use this e-mail as the cover memo for the agenda item.

1. Rule, Draft 3 (1/11/10)SWL, redline, compared to Draft 2.1 (9/1/09), the public comment draft. I've added a footer so we can better keep track of the drafts.
2. Dashboard, Draft 4.1 (1/11/10)SWL-KEM. Again, I've added a footer. I've also highlighted certain sections of the dashboard that we will probably have to revisit after the meeting. In particular, the rule is listed as "highly controversial" and "moderately controversial". Which is it. Also, what was the majority if Stan's revisions are accepted may want to file a minority report on the deletion of the second sentence, so I've flagged that.
3. Introduction, Draft 3.1 (1/11/10)SWL-KEM. I cleaned up the formatting by replacing the text box w/ a table and made a few administrative changes to dates, etc.
4. Rule & Comment Chart, Draft 3 (1/11/10)SWL
5. Public Comment Chart, Draft 3.1 (1/11/10)SWL-KEM. I've re-sorted the chart alphabetically.

January 11, 2010 Lamport E-mail to McCurdy, cc Vapnek, Sondheim, Difuntorum & KEM:

Attached are the materials for Rule 2.1, which reflects Paul's input as well.

Three of the five comments we received, including comments from OCTC, COPRAC and the Santa Clara Bar, maintain that we should not adopt this rule. Given those comments, I recommend that the Commission vote on whether to adopt the rule at all.

The core objection is that the Rule does not establish a disciplinary standard, is not enforceable and is not necessary. I agree that, as phrased, this is not a disciplinary rule and likely is not enforceable. However, these comments illustrate that people are looking to the Rules as disciplinary standards. We dilute their purpose when we sprinkle in non-disciplinary rules. Worse yet, people may try to read disciplinary consequences into this rule, when none were intended. On the other hand, our charge directs us to adopt the Model Rules, unless there is a good reason not to do so. The question whether there is a good reason not to adopt this proposed Rule is something the Commission as a whole should consider.

I have responded to these comments in the table in order to have something in place in the event that we choose to adopt the Rule. However, my recommendation is that the Commission vote whether to have the Rule at all.

In light of the changes to the proposed Rule, I think the minority's concern has been addressed. Accordingly, I have taken the liberty of recommending deletion of the minority position from the Introduction. If the minority believes their objection remains, please let me know.

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Rule 2.1 Advisor

(Commission's Proposed Rule – ~~Clean Version~~ Revised After Public Comment)

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~~ may involve ~~unpleasant~~ 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, A 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 may decisively influence how the law will be applied~~ 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.

Proposed Rule 2.1 [n/a]

“Advisor”

(Draft #3, 1/11/10)

Summary: This proposed new rule describes a lawyer’s role as a client’s advisor. It provides that a lawyer must exercise independent professional judgment and render candid advice. ~~The rule also states that in advising clients, a lawyer may consider factors beyond the law, such as moral, economic, social and political considerations that may be relevant to a client’s situation.~~

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 _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

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:

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:

See the introduction in the Model Rule comparison chart.

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 2.1* Advisor

September 2009 January 2010

(Draft rule to be considered for ~~public comment~~ adoption.)

INTRODUCTION:

Proposed Rule 2.1 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 black letter 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 terms of 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 rule comments, the Commission has made some substantial deletions. The Commission is recommending adoption of modified versions of two of the 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 that non-legal considerations arise in the course of representing clients that 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.

~~*Minority.* A minority of the Commission believes that an express statement should be added to the Rule or to the Comment to the effect that a lawyer who does not render moral, economic, social, or political advice as permitted by the second sentence of the rule does not violate this Rule. Proposed Rule 1.6(e) and Rule 1.14, Comment [7], contain such provisions. The second sentence of Rule 2.1 is not~~

* Proposed Rule 2.1, Draft 3 (1/11/10)

~~intended to be mandatory. However, the absence of such a disclaimer of a violation in this Rule will lead people to argue that a lawyer who does not render such advice should be held accountable in disciplinary proceedings. Otherwise, Rule 1.6(e) and Rule 1.14, Comment [7], would not be necessary.~~

<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 is first sentence -language is identical to the Model Rule. <u>In response to public comment, the Commission deleted the second sentence. The Commission has revised the last sentence of Comment [2] to incorporate language that was taken from the second sentence of the proposed rule.</u></p>

* Proposed Rule 2.1, **Draft 3 (1/11/10)**; 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>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>[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often may involves unpleasant facts and alternatives that a client <u>may find unpleasant and</u> 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 [1] is identical to the <u>a modified version of the</u> Model Rule <u>Comment</u>. <u>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.</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>[2] <u>In some cases,</u> A 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, <u>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,</u> moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.</p>	<p>With the exception of the second sentence, Comment [2] is identical <u>a modified version of</u> to the Model Rule <u>Comment</u>. <u>The first sentence was revised to clarify that it is not intended to state a proposition that applies in every representation.</u> 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. <u>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.</u></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>[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>Comment [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>[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>Comment [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>Comment [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.
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	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>Comment not accepted. 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>Comment accepted. 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>
5	Office of the Chief Trial Counsel ("OCTC"), State Bar of California	A			OCTC is concerned that this is not an enforceable rule. OCTC does not believe the rules should have rules that are not enforceable.	Comment not accepted. 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

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Orange County Bar Association	M		Comment [1]	<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 also to such other considerations the lawyer deems to be 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 may involve facts and alternatives that a client may find unpleasant and 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</p>	<p>Comment accepted. 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.</p> <p>Change not made. 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>Comment accepted. The Commission agrees with the comment.</p>

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

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [2]	<p>themselves.</p> <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><i>“For instance,</i> although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon <i>many</i> legal questions and may influence <i>the client’s course of action.</i>”</p>	<p>Comment accepted in part. The Commission has revised the second sentence of Comment [2] 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.
3	Santa Clara County Bar Association	D			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>Comment not accepted. 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>

Rule 2.1 – Public Comment – File List

E-2009-292i OCBA [2.1]

E-2009-293g State Bar OCTC [2.1]

E-2009-310a COPRAC [2.1]

E-2009-351i SDCBA [2.1]

E-2009-358h Santa Clara County Bar [2.1]

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, November 06, 2009 2:53 PM
To: Hollins, Audrey
Cc: 'Garner, Scott'; 'Shawn M Harpen'
Subject: Orange County Bar Comments Re Proposed Rules of Professional Conduct
Attachments: OCBA Comments to Commission Nov 2009.pdf

Dear Ms. Hollins:

Attached are comments being sent on behalf of the Orange County Bar Association regarding ten (10) of the eleven (11) proposed new or amended Rules of Professional Conduct of the State Bar of California as developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We appreciate the work of the Commission and the opportunity to provide these comments, which are attached in PDF format.

- Proposed Rule 1.2 - Scope of Representation and Allocation of Authority between Client and Lawyer
- Proposed Rule 1.6 - Confidentiality of Information
- Proposed Rule 1.8.2 - Use of Current Client's Information Relating to the Representation
- Proposed Rule 1.8.13 - Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9, and 1.8.12
- Proposed Rule 1.9 - Duties to Former Clients
- Proposed Rule 1.10 - Imputation of Conflicts - General Rule
- Proposed Rule 1.14 - Client with Diminished Capacity
- Proposed Rule 2.1 - Advisor
- Proposed Rule 3.8 - Special Responsibilities of a Prosecutor
- Proposed Rule 8.5 - Disciplinary Authority; Choice of Law

Please let me know if you require any additional information or if you prefer that these comments are provided in a different format.

Trudy C. Levindofske, CAE
Executive Director
Orange County Bar Association
Orange County Bar Association Charitable Fund
(949)440-6700, ext. 213

MEMORANDUM

Date: October 16, 2009

To: Commission for the Revision of the Rules of Professional Conduct of the State Bar of California

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 2.1 – Advisor**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism & Ethics Committee.

The OCBA respectfully submits the following comments concerning the subject proposed Rule:

The OCBA endorses the adoption of the first sentence of the proposed Rule, but recommends that the second sentence be deleted. The proposed Rule should read in its entirety:

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

The second sentence should not be part of the Rule 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:

In rendering advice, a lawyer may refer not only to law, but **also to such other considerations ~~such as moral, economic, social and political factors that may~~ the lawyer deems to be relevant to the client's situation.**

The recommended language reflects that there can be many considerations that are not technically legal considerations, but are important nonetheless in rendering advice to a client. 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. Moreover, the recommended language is consistent with the proposed Rule because it suggests that the lawyer should use his independent judgment in determining what, if any, non-legal considerations may be relevant to the situation.

In addition, the OCBA endorses all of the Commission's recommended deletions from the comments to the ABA Model Rule.

With respect to Comment [1], the OCBA recommends that the language of the second sentence be modified to read as follows:

Legal advice ~~often~~ *may* involve unpleasant facts and alternatives that a client may *find unpleasant and* be disinclined to confront.

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.

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:

For instance, although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon ~~most~~ *many* legal questions and may ~~decisively~~ influence *the client’s course of action* ~~how the law will be applied~~.

These changes reflect that there are many kinds of non-legal considerations that might be relevant to a lawyer when advising a client and change the focus from how the law might be applied to the impact on the client.



THE STATE BAR OF CALIFORNIA

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November 4, 2009

Randall Difuntorum, Director
Office of Professional Competence & Planning
State Bar of California
180 Howard Street
San Francisco, California 94105

re: Comments of the Office of the Chief Trial Counsel to Proposed
Amendments to the Rules of Professional Conduct

Dear Mr. Difuntorum:

Thank you for the opportunity to submit the comments of the Office of the Chief Trial Counsel (OCTC) to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in September 2009. Here are OCTC's comments:

Rule 1.2 Scope of Representation and Allocation of Authority.

1. The Office of the Chief Trial Counsel (OCTC) is concerned that paragraphs (a) and (b) of proposed Rule 1.2, although in the Model Rules version, are not really rules subject to discipline and, thus, do not belong in the Rules of Professional Conduct. OCTC believes that the Rules of Professional Conduct should only address rules that are disciplinable. Otherwise, it can create confusion among the state's lawyers and make enforcement of the rules more difficult. Further, OCTC believes that the concepts in paragraphs (a) and (b) are already implicitly included in the rules regarding competence and the duty to communicate.
2. OCTC is concerned that, while paragraph (c) permits limited scope representations if the limitation is reasonable under the circumstances, it does not specifically prohibit limited scope representations when they are not permitted by law. In *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520-521, an attorney raised the issue of limited scope representation as a defense to charges of incompetence and failing to perform. The court rejected that defense because it found that federal law did not permit limited scope representations in immigration cases and, therefore, the attorney could not defend the charges by asserting a limited scope representation. The court concluded that because the law prohibited limited scope representations the duty to fully and competently represent the client may not be modified by an agreement between the attorney and the client even if the parties expressly noted the limited scope of the representation. That may be what Comment 8 is trying to explain, but, it should be specifically in the rule, not just a comment.

3. OCTC also believes that the consent in paragraph (c) should be in writing. There already are rules requiring that fee agreements and consent to certain fee agreements be in writing. (E.g. Business & Professions Code sections 6147 and 6148 and current Rule 2-200 of the Rules of Professional Conduct.) OCTC recognizes that Business & Professions Code sections 6147 and 6148 are not considered by themselves a basis for discipline (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 279-280), but unless the fee agreements are in writing they are voidable and under current rule 4-200 (proposed rule 1.5) a client must be fully informed of the terms of a fee agreement. Moreover, although California has not made Business & Professions Code sections 6147 and 6148 disciplinable offenses on their own, the Model rules and many other jurisdictions have made the lack of a written agreement disciplinable for contingent fees. (See e.g. Model Rule 1.5 (c); *Statewide Grievance Comm. v. Timbers* (Conn App. Ct. 2002) 796 A.2d 565.) Likewise, current rule 2-200 of the Rules of Professional Conduct has made it a disciplinable violation when the attorney does not obtain the client's written consent to the attorney sharing fees with another attorney. Further, making it in writing prevents future arguments between the attorney and client about the scope of the representation and impresses upon the client the importance of the limitation. A similar purpose was among the purposes noted by the Supreme Court in refusing to honor a fee agreement between attorneys without the informed written consent of the client, in violation of current rule 2-200. (See *Chambers v. Kay* (2002) 29 Cal. 4th 142.) Given that limited scope representation is the exception, it would be better policy and more enforceable to require that it be in writing.
4. OCTC agrees with paragraph (d)'s broadening of current rule 3-210 to include criminal and fraudulent conduct as well as any law, rule, or ruling. However, paragraph (d), unlike current rule 3-210, does not specifically provide for the defense of good faith or appropriate steps. While the Commission's Comments make clear that it intends to keep that defense, OCTC believes that it should be in the rule and not in a comment.
5. OCTC is also concerned with Comments 1 and 2's statement that an attorney is required to consult with the client regarding the means by which the attorney handles the client's matter. These Comments appear to be overbroad and could be interpreted to change current law. The current law is that a lawyer must advise the client of significant developments and that the client has the authority over significant matters, such as settling a case. However, it has never been that the attorney must consult (or advise) on every step and action, just the significant ones. In fact, it is well established that as a general rule an attorney, not a client, controls the presentation of a case. (See e.g. *People v. Hamilton* (1989) 48 Cal.3d 1142, 1163; *People v. Mattison* (1959) 51 Cal.2d 777, 788.) Proposed rule 1.4 requires reasonable consultation, but the Comments to proposed rule 1.2 could be interpreted to change the law and suggest that every means or action by the lawyers requires this consultation. OCTC thinks these Comments need clarification so that only significant means should require consultation and specific communication; and that nothing is intended to change current law about who controls the presentation of cases.
6. OCTC believes that Comment 8 needs clarification to make clear that limited scope representations are not permitted unless allowed by law. OCTC suggests that the Comment reference *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct.

Rptr. 498, 520-521 for this proposition. OCTC is also concerned that nowhere in the Comments are attorneys advised that the courts have found that even where the scope of the representation is expressly limited, the attorney may still have a duty to alert the client to reasonable apparent legal problems outside the scope of the representation. (See *Janik v. Rudy, Exelrod, & Zieff* (2004) 119 Cal.App.4th 930, 940.)

Rule 1.6 Confidentiality of Information.

1. OCTC is concerned that this proposed rule might create confusion and enforcement problems since Business & Professions Code section 6068(e) already addresses the issues raised in proposed rule 1.6. For example, OCTC is concerned that paragraph (a) of proposed Rule 1.6 uses the term information but not the term confidences or secrets, which is used in Business & Professions Code section 6068(e)(1). If California is to have a rule to cover this issue, OCTC suggests that paragraph (a) use the same terms as Business & Professions Code section 6068(e)(1) to ensure that the rule is not interpreted to change the duty of an attorney to preserve the confidences and secrets of a client as provided in Business & Professions Code section 6068(e). For the same reason, OCTC believes that paragraph (a) should refer to all of Business & Professions Code section 6068(e) including (e)(2)'s statement when an attorney may reveal the information ordinarily protected under section (e)(1).
2. OCTC is further concerned that paragraph (b)(1) does not address what happens if any further changes occur to Business & Professions Code section 6068(e). Even if the Supreme Court later changed paragraph (b)(1) to be consistent with any changes in section (e) the delay would be substantial before that occurred. Paragraph (b)(1) currently mirrors the language of Business & Professions Code section 6068(e)(2), but does not specifically refer to Business & Professions Code section 6068(e)(2). To prevent the problems that would occur if the Legislature changed Business & Professions Code section 6068(e)(2) OCTC suggests that, if California is to have a Rule of Professional Conduct to cover the same concerns as already addressed in Business & Professions Code section 6068(e), paragraph (b)(1) of proposed Rule 1.6 simply state that a lawyer may reveal confidential information as permitted under Business & Professions Code section 6068(e). This would prevent conflicting rules, avoid any confusion, and allow for enforcement of this important provision.
3. OCTC agrees with the concerns of the Minority of the Commission that paragraph (b)(3) permits disclosure to establish a claim or defense on behalf of the lawyer without a court determination. We believe a court, not an attorney, should make this determination. This will also aid in the enforcement of violations of this paragraph.
4. OCTC disagrees with the removal from paragraph (b)(4) of the term "other law" and agrees with the Model Rule drafters that this term should be included in this paragraph. OCTC does not believe that the term "other law" is too vague or imprecise. It simply provides that if there is other law preventing or permitting disclosure, it will be complied with. It should be followed in California's rule. There are statutes that require certain disclosures and the rules should not encourage disobedience of those statutes. OCTC also believes that the term court order should be in this paragraph. Thus, OCTC agrees with the majority view regarding proposed paragraph (b)(4)'s use of the term court order because an attorney should not be disobeying a court order. Such disobedience violates

Business & Professions Code section 6103, brings disrespect to the court, and demeans the profession. It also mocks the court's authority and sends a message that juries may also disobey the judge's directives and ignore the law. (See *People v. Chong* (1999) 76 Cal.App.4th 232, 244.) The Supreme Court has stated that an attorney's disobedience of a court order is one of the most serious violations of professional duties. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 112.) Thus, no rule should permit or encourage disobedience of a court order. There should not be an exception to obeying court orders for an attorney's claim of attorney-client confidences. The court, not the lawyer, should be the final decider of what must be disclosed. Further, this type of behavior is subject to serious abuse by attorneys who simply use this as an excuse to violate court orders and frustrate the proper administration of justice, no matter how frivolous their assertions. A court, not an attorney, should be the final arbiter of when an attorney can refuse to disclose matters. In fact, OCTC has recently experienced cases in the State Bar Court where attorneys attempted to disrupt, delay, and frustrate our proceedings by refusing to obey court orders to answer questions by making frivolous claims of attorney-client confidences. Thus, unless an attorney obtains an immediate stay or a writ is granted, he or she should not be allowed to disobey a court order. The minority view would in our opinion result in chaos in and disrespect to the court and the law.

5. As to paragraph (b)(5), OCTC refers to its discussion of proposed rule 1.14(b).
6. OCTC has some concerns about paragraph (e). It appears paragraph (e) is an attempt to carry forward the concept in Business & Professions Code section 6068(e)(2) that an attorney may but is not required to reveal some information. The problem is that proposed paragraph (e) is too broad. It covers all of proposed paragraph (b), but that would include that an attorney could not be disciplined for disobeying a law or court order to reveal the information. (See our discussion of paragraph (b)(4).) Although the Commission states this paragraph is just what current rule 3-100(E) states, proposed paragraph (b)'s language is much broader than current rule 3-100(B). Proposed paragraph (e), as written, unlike current rule 3-100, includes allowing an attorney to refuse to reveal confidences required by a court order, apparently even after all the appeals have been completed. It seems to OCTC that this paragraph needs clarification and that it should be a violation to disobey a court order or law.
7. OCTC also has some concerns about the Comments. In general, OCTC thinks there are too many and that some are not necessary. Further, OCTC finds Comment 9 confusing. It states that the overriding value of life permits disclosure otherwise protected by Business & Professions Code section 6068(e)(1), but Business & Professions Code section 6068 (e)(2) already provides for this. More importantly, OCTC does not think the rules should be adding Comments that are explaining a statute passed by the Legislature. OCTC recommends that this Comment be stricken.
8. Comment 15 is overly narrow and seems to imply that the rule of limited disclosure when disclosing information applies only to prevent criminal conduct. If that is what is meant, OCTC strongly disagrees and believes that is contrary to established law. OCTC would strike the Comment or significantly modify it. Comment 19 could result in a claim that, in an investigation commenced under the State Bar's own authority and not the result of a client's complaint, the respondent does not have to provide certain information. It does

not explain what it means by cooperation. What if OCTC subpoenas the client? Comment 21's last sentence could be interpreted as implying that an attorney can disobey a court order or law, even if not appealing it. As previously discussed, OCTC has concerns with that. Likewise, Comment 23 has the problem that it appears to allow a lawyer to disobey a court order or a law.

Rule 1.8.2 Use of Current Client's Information Relating to the Representation.

1. The Commission has asked for comments as to whether it should exclude the term relating to the representation and whether it should require written consent. As to relating to representation, OCTC would suggest that the rule not use that term because the lawyer may learn client secrets not related to the representation but as a result of the representation or otherwise and the lawyer's duty of loyalty would still suggest that the lawyer should not be able to use it. Further, it would undermine the relationships of attorneys and clients and inhibit candid communications between the client and the lawyer. OCTC also supports the idea of written consent as it prevents future disagreement and, as the Supreme Court noted on a difference subject in *Chambers v. Kay* (2002) 29 Cal.4th 142, it impresses upon the client the importance of the decision. Moreover, the State Bar believes that it assists in the enforcement of the rule.

Rule 1.9. Duties to Former Clients.

1. OCTC is concerned with paragraphs (a) and (b) of proposed Rule 1.9 because the Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. Thus, it would appear to be a significant change in the law. Moreover, while the term "materially adverse" is in the Model Rules version, the proposed paragraph does not state what that means and why the lawyer, not the client, should decide whether it is material. That should be left to the clients to decide, not the lawyers. Further, it creates uncertainty for the lawyers and makes it more difficult to prosecute for a violation. OCTC also agrees with the Minority of the Commission that paragraph (b) might narrow the duty of confidentiality because it refers to the confidentiality rules in the Rules of Professional Conduct but not Business & Professions Code section 6068(e). OCTC believes that the rule should reference Business & Professions Code section 6068(e) as well.
2. OCTC is concerned about the phrase "except as these Rules or the State Bar Act would permit . . . or when the information has become generally known" in paragraph (c)(1). This concern goes back to our concern whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Further, it is unclear what is meant by "information generally known." Business & Professions Code section 6068(e) has traditionally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) Is California now going to allow lawyers to use that information against the former client even though they learned of it during or because of the representation? OCTC does not think California should. It opposes any change in the law that allows lawyers to use information obtained from the client as a result of a representation, even if it is already in the public record. Further, the paragraph would make the disclosures prohibited by the rule more difficult to prosecute as OCTC would have to prove the information was not

“generally known.”

3. Further, paragraph (c)(2) references the exception to current clients. Like paragraph (c)(1), paragraph (c)(2) has the issue of whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Unlike paragraph (c)(1), paragraph (c)(2) does not include the language “or when the information is generally known.” Although this proposed language is also in the Model Rules version, OCTC is not sure when paragraph (c)(1) applies or when paragraph(c)(2) applies. This needs more clarity.
4. OCTC has problems with some of the Comments to this proposed rule, particularly Comment 5. Comment 5 states or implies that the substantial relationship test applies in disqualification cases, but “might not be necessary” in disciplinary proceedings or civil litigation. (The substantial relationship test states that when an attorney’s former representation is substantially related to a current representation it is conclusively presumed that the attorney received and knows of confidential information from the first client.) However, the statement in Comment 5 that the presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to State Bar decisional law. In *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: “Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.)” (Id at 747.)

If there is to be a change in the law, it should be in the rule, not a comment. Further, OCTC disagrees with the analysis in Comment 5. Comment 5 states that the reason for this suggested difference is that in a disciplinary proceeding or in civil litigation the new client may not be present and so the attorney can provide the evidence concerning information actually received. However, these are public proceedings; and so the new client can learn of them even if not present. Further, nothing prevents the new client from being present or reading the pleadings or a transcript. The new client may also be a witness.

Moreover, the courts have held that this conclusive presumption is a “rule of necessity.” Thus, the presumption exists because it is not within the power of the client (or anybody else) to prove what is in the mind of the attorney. Nor should the attorney have to engage in a subtle evaluation of the extent to which the lawyer acquired relevant information and the actual use of that knowledge and information. (See e.g. *Global Van Lines Inc v. Superior Court* (1983) 144 Cal.App.3d 483, 489; *Western Continental Operating Co v. Natural Gas Co.* (1989) 212 Cal.App.3d 752, 759.) The Commission’s Comment excluding the presumption in disciplinary and civil cases would force OCTC and the other party to try to prove what was provided to the attorney and what is in the attorney’s mind. It would create numerous disputes as to what the client really told the lawyer. In fact, OCTC’s experience is that the lawyers often claim that no confidences were disclosed, no matter how absurd that claim is. In fact, that is exactly what attorney Lane claimed in his State Bar matter. (See *In the Matter of Lane*, supra, 2 Cal. State Bar Ct. Rptr at 747.)

Further, the conflicts rule is intended to prevent the use of confidential information, not just its disclosure, and it is also intended to prevent the attorney from being put in the position of having to resolve conflicting obligations. Thus, the presumption is just as necessary in State Bar and civil cases as in disqualification motions.

Moreover, the presumption springs from the fact that all attorney-client communications are presumptively confidential and any communication between the lawyer and the client in the first representation must necessarily have been material to the ongoing matter in which the lawyer has switched sides. (*City National Bank v. Adams* (2002) 96 Cal.App.4th 315, 328.) That is, it springs from the common sense notion that clients necessarily provide confidential information material to the lawyer's representation of the client. Thus, the duty of confidentiality complements the evidentiary presumption that communications from client to attorney during their professional relationship are confidential and involves public policy of paramount importance which is reflected in various statutes as well as the Rules of Professional Conduct. (See *In the Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. at 189-190; *In re Jordan* (1972) 7 Cal.3d 930, 940-941.)

In addition, while the primary purpose of the presumption is to protect client confidences, the presumption also exists to preserve the attorney's duty of loyalty to the client. (See *City National Bank v. Adam, supra*, Cal.App.4th at 328; *In re I Successor Corp* (Bkrcty S.D.N.Y. 2005) 312 B.R. 640, 656.) Any concern about tangential matters being covered by this presumption is already addressed in the presumption. In recent years, there has arisen a limited exception to the presumption in those rare instances where the lawyer can show that there was no opportunity for confidential information to be divulged. However, the limited exception is not available when the lawyer's former and current representation is on the opposite sides of the very same matter or the current matter involves the work the lawyer performed for the former client. (*City National Bank v. Adams, supra*, 96 Cal.App.4th at 327-328.) There is no reason to exclude the presumption in disciplinary cases since the basis for the disqualification is the same as the basis for attorney discipline: the need to maintain ethical standards of professional responsibility. (See *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135, 1145.)

Most importantly, without the conclusive presumption, OCTC would be forced to require from the client or the attorney in a public forum the very disclosure the rule is intended to protect. The courts have held that it is the possibility of the breach of confidence, not the fact of the breach, which triggers the rule. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934.) While *Woods* addresses a disqualification motion, its point is equally applicable in discipline and civil cases. Without the conclusive presumption, OCTC would be forced to require the disclosure of the very information the rule was intended to protect.

5. Comment 6 also presents some concerns for OCTC. The Comment's statement is too narrow in defining "substantially related." It, again, does not reference Business & Professions Code section 6068(e). Yet, Comment 7, unlike Comment 6, references Business & Professions Code section 6068(e). The difference in these Comments could create some confusion and uncertainty. Comment 11 refers to paragraph (c). OCTC is

concerned that, like in the proposed paragraph (c) itself, what is meant by “generally known information” and this Comment appears not consistent with the established law that Business & Professions Code section 6068(e) is broader than the attorney-client privilege. Business & Professions Code section 6068(e) has generally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) This needs to be clarified and OCTC opposes any change to the requirement that Business & Professions Code section 6068(e) precludes an attorney from disclosing or using information provided by a client to the attorney that might be in the public record.

Rule 1.10 Imputation of Conflicts.

1. OCTC is concerned that paragraph (b) leaves out a reference to Business & Professions Code section 6068(e). Further, Comment 1 simply states that whether two or more lawyers constitute a firm depends on specific facts. OCTC is concerned that the proposed rule is not a rule subject to discipline and, further, that neither the rule nor Comment 1 provides guidance as to what constitutes a law firm. OCTC believes that either California follow the Model rules version or come up with a more definitive definition, or the Commission should strike the Comment completely. Current rule 1-110 defines a “[l]aw [f]irm” as “two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities.” The Supreme Court discussed the definition of law firm, partnership, etc in *Chambers v. Kay* (2002) 29 Cal.4th 142, although not in a conflict context, and if there is a comment on the definition of law firm the Comment might reference that case and the Supreme Court’s discussion of the meaning of the term “of counsel” in *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135.)
2. OCTC is not sure what the purpose of Comment 3 is. OCTC suggests either it be clarified or stricken. Comment 4 discusses non-lawyer situations: secretaries, paralegals, law clerks and provides for screening of them. It is not clear why this Comment is provided given that the rules do not regulate these people. Comment 9 seems unnecessary and is confusing to OCTC. It needs more clarification or should be stricken.

Rule 1.14 Client with Diminished Capacity.

1. OCTC is concerned that, while this rule attempts to address some important issues, it does not appear to be an enforceable rule as written and appears to undermine the other confidentiality rules. OCTC is concerned that paragraph (b) leaves too much discretion to an attorney’s unqualified personal assessment of a client’s abilities and using that unqualified assessment to permit the attorney to reveal a client’s confidences. Further, it appears to be broadening what Business & Professions Code section 6068(e) allows.
2. Comment 1 is problematic as to when and how to utilize the rule. The problem here is when and who decides when a client is not capable of making decisions - - and how and to whom does the attorney reveal this. If the client is not capable of making the decisions, is the lawyer able to give advice, take direction, or do anything on the client’s behalf as to the matter? Comment 3 attempts to address this, but in such broad terms that it is vague and leaves too much discretion to the attorney. It also states that the attorney

may in appropriate situations seek the advice of a diagnostician. While this may be appealing, the Comment creates its own exception to confidentiality not specifically in the rule. OCTC believes this is not appropriate for a Comment. It either should be stated specifically in the rule or not at all. Moreover, the Comment does not define diagnostician. Is it a psychiatrist, a psychologist, a marriage counsel, a priest, or some other person? If this exception is to be permitted, it should be in the rule and more specific.

3. Comment 4 states that before taking any action on this rule the lawyer should take all reasonable steps to preserve the client's confidence and decision-making authority, including explaining to the client the need to take such action and requesting the client's permission to do so. However, the Comment states that, if the client refuses or is unable to give this permission, the lawyer may still proceed under paragraph (b). The Comment then lists a number of considerations for the lawyer in making the decision to reveal the client's confidences. There is, however, nothing in the rule that specifically provides for these considerations. OCTC is concerned that this Comment may make enforcement of the confidentiality rules much more difficult.
4. Comments 5 and 6 states the lawyer may discuss these matters with the client's family members, although the lawyer must keep the client's interests foremost. Again, the question is to what extent is this consistent with Business & Professions Code section 6068(e) and this Comment may make enforcement of the confidentiality rules much more difficult. Comment 7, which is different than the Model Rules Comment 7, explains that section (b) is a balancing between the interest of preserving client confidences and of protecting a client with significantly diminished capacity. It also states that a lawyer who reveals such information is not subject to discipline. This would prevent discipline from almost any attorney who claims that he or she revealed the confidences because they believed it was appropriate under this rule. Thus, what safeguards exist for the client?
5. Comment 8 states that the lawyer may not file guardianship or conservatorship or similar action or take actions that would violate proposed rule 1.7 (current rule 3-310.) Thus, according to this comment, an attorney may reveal confidences to others that may take this action, but not do it themselves. The reason for this is not explained. Is it better to disclose the confidences than to file under seal a motion to the court disclosing the confidences?

Rule 2.1 Advisor.

1. OCTC is concerned that this is not an enforceable rule. OCTC does not believe the rules should have rules that are not enforceable.

Rule 3.8 Special Responsibilities of a Prosecutor.

1. OCTC is concerned that paragraph (a) of proposed Rule 3.8 does not explain what it means by recommending for prosecution. Does a prosecutor's advice to his or her supervisor to prosecute constitute a disciplinable offense? Does this apply when the investigation is not finished? Are we going to prosecute differences in opinion? What if the opinion is based on differences about what is admissible evidence?
2. OCTC is also concerned about paragraph (b)'s requirement that a prosecutor make reasonable efforts to assure that the accused has been advised of the right to and the

procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel. This section fails to address that in most situations the police, not the prosecutor is involved in this. The police, at least in California, are usually independent of the criminal prosecutor. Further, to what extent is this impinging on certain investigative tools and the role of the prosecutor in them? The same concern seems to apply to section (c) which prohibits a prosecutor from obtaining from an unrepresented accused a waiver of important pretrial rights, such as a preliminary hearing, unless the tribunal has approved of the appearance of the accused in propria persona.

3. Likewise, OCTC is concerned with paragraph (f)'s requirement that the prosecutor use reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under proposed rule 3.6. While in principle laudable, this Comment seems to have the same problem of not addressing the thorny issue of when law enforcement, such as the police, is independent of the prosecutor. This is particularly difficult when the Chief Law Enforcement officer is an elected position.
4. OCTC is concerned that paragraph (e) does not discuss how the prosecutor is to deal with a waiver of the privilege or the work product doctrine.
5. OCTC agrees with the majority of the Commission regarding paragraph (g) and supports this paragraph.
6. OCTC believes that if there are Comments to this rule, the Commission might consider having a Comment to advise prosecutors and former prosecutors and their partners of their duties under Business & Professions Code section 6131. This is an important but often forgotten provision affecting prosecutors and former prosecutors and their partners.

Rule 8.5 Disciplinary Authority: Choice of Law.

1. OCTC agrees with the policy behind this rule, but has concerns that the rule as written is in conflict with Business & Professions Code section 6049.1. Business & Professions Code section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Thus, how can we now enforce a rule that permits discipline based on another jurisdiction's rules if those rules are in conflict with California's rules? Is rule 8.5 changing Business & Professions Code section 6049.1 and its intent? While this concern would not be true in all cases where the choice of law was the other jurisdiction's law, it would occur in those cases where the other jurisdiction's rules are in conflict with California's rules. This needs to be discussed and addressed in this rule and its Comments.

Letter to Randall Difuntorum @ Office of Professional Competence & Planning
November 4, 2009
Page Number 11

Again, we thank you for the opportunity to present our views. If you have any questions, please feel free to contact us.

Very truly yours,

A handwritten signature in black ink that reads "Russell G. Weiner". The signature is written in a cursive style with a large, sweeping initial "R".

Russell G. Weiner
Interim Chief Trial Counsel



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

November 9, 2009

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 Standing 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 and offers the following comments.

COPRAC does not support the proposed rule, because we do not believe that it is appropriate as a disciplinary rule.

While we agree with the commentary in the Introduction as to “the importance of this Rule as guidance to lawyers and clients on a lawyer’s duty to exercise independent professional judgment,” we do not believe that such guidance – in the form of a Rule of Professional Conduct – should be imposed upon lawyers as a disciplinary rule. Further, we recognize that the Introduction itself acknowledges that “it is anticipated that the terms of the Rule may not be frequently applied as a lawyer disciplinary standard,” however, we do not believe the proposed rule should ever be applied as a disciplinary standard.

Should the proposed rule be adopted in some form, notwithstanding the concerns expressed above, 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.

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,

Carole J. Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



**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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**State Bar Board of Governors
District Nine Representative**
Bannie M. Dumanis

**Conference of Delegates of
California Bar Associations
District Nine Representative**
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.



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: NOVEMBER 13, 2009

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 links below:

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

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.

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.

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**RRC – Model Rule 2.1
E-mails, memos, etc. – Revised (1/19/2010)**

December 14, 2009 McCurdy E-mail to Drafters (Lampton, Vapnek), cc Chair, Vice-Chairs & Staff:

Rule 2.1 Drafting Team (LAMPOR, Vapnek):

This message provides the assignment background materials for Rule 2.1 on the January agenda. **The assignment deadline is Monday, January 11, 2010.**

This message includes the following draft documents:

1. public comment compilation (full text of comment letters received)
2. public commenter chart (a staff prepared chart with the synopsis of comments in draft form and open third column for the codrafters recommended response to the comments)
3. dashboard (staff prepared template)
4. introduction (text of public comment version of the introduction – this should be updated if there are any recommended amendments to the rule)
5. Model Rule comparison chart (version of chart as issued for public comment)
6. clean rule text (public comment version – use this clean version to make any changes to the rule, do not edit the rule in the Model Rule comparison chart)
7. state variations excerpt (this does not require any work)

The codrafters are assigned to review any written comments received and to prepare a revised draft rule and comment, if any changes are recommended. The “RRC Response” column on the public commenter chart should be filled in with the drafting team’s recommended action in response to the public comment. In addition, we need the drafting team to prepare a completed dashboard, and to update, as needed, the Introduction, and the Explanations in the third column of the Model Rule comparison chart based on the revised rule. Please do not edit the redline-middle column of the Model Rule comparison chart. Staff is available to generate a new redline of the post public comment rule to the Model Rule and will assist in completing the middle column of the Model Rule comparison chart.

We are looking for submissions that are as close to final form as possible. As noted above, please feel free to send us your revised clean version of the proposed rule and we will generate a redline comparison to the Model Rule for the comparison chart. Of course, you will still need to complete the Explanation column of the Model Rule Comparison Chart. Lastly, if among the drafters there is a minority view, please consider including the minority view in your draft Introduction.

Attached:

RRC - [2-1] - Dashboard - ADOPT - DFT3 (09-03-09).doc
RRC - [2-1] - Compare - Introduction - DFT2.2 (09-03-09).doc
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RRC - [2-1] - State Variations (2009).pdf

December 15, 2009 Lamport E-mail to KEM, cc Drafters, Chair & Staff:

Could you send me a copy of the meeting summary for this rule? I am trying to refresh my recollection on the discussion within the Commission on the rule in preparing a response to the public comment.

December 15, 2009 KEM E-mail to Lamport, cc Drafters, Chair & Staff:

Here are my notes in PDF. Please let me know if you prefer them in Word.

January 8, 2010 McCurdy E-mail to Drafters, cc Chair & Staff:

Rule 2.1 Drafting Team (MELCHIOR, Lamport, Peck):

This message provides an updated commenter chart adding the previously omitted comment of the OCTC. The comment was included in the full text comment compilation provided in the earlier assignment materials, but didn't make it into the chart. If you have already completed work on the commenter chart, please copy the column for the OCTC comment (final entry on the attached chart) into your chart and add your recommended response.

Attached:

RRC - [2-1] - Public Comment Chart - By Commenter - DFT2 (01-08-10)AT.doc

January 11, 2010 Lamport E-mail to McCurdy, cc Drafters, Chair & Staff:

Attached are the materials for Rule 2.1, which reflects Paul's input as well.

Three of the five comments we received, including comments from OCTC, COPRAC and the Santa Clara Bar, maintain that we should not adopt this rule. Given those comments, I recommend that the Commission vote on whether to adopt the rule at all.

The core objection is that the Rule does not establish a disciplinary standard, is not enforceable and is not necessary. I agree that, as phrased, this is not a disciplinary rule and likely is not enforceable. However, these comments illustrate that people are looking to the Rules as disciplinary standards. We dilute their purpose when we sprinkle in non-disciplinary rules. Worse yet, people may try to read disciplinary consequences into this rule, when none were intended. On the other hand, our charge directs us to adopt the Model Rules, unless there is a good reason not to do so. The question whether there is a good reason not to adopt this proposed Rule is something the Commission as a whole should consider.

I have responded to these comments in the table in order to have something in place in the event that we choose to adopt the Rule. However, my recommendation is that the Commission vote whether to have the Rule at all.

In light of the changes to the proposed Rule, I think the minority's concern has been addressed. Accordingly, I have taken the liberty of recommending deletion of the minority position from the Introduction. If the minority believes their objection remains, please let me know.

RRC – Model Rule 2.1
E-mails, memos, etc. – Revised (1/19/2010)

Attached:

RRC - [2-1] - Public Comment Chart - By Commenter - DFT3 (01-11-10)SWL.doc
RRC - [2-1] - Dashboard - ADOPT - DFT4 (01-11-10)SWL.doc
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RRC - [2-1] - Compare - Rule & Comment Explanation - DFT3 (01-11-10)SWL - Cf. to DFT2.1.doc
RRC - [2-1] - Rule - DFT3 (01-11-10)SWL - Cf. to DFT2.1 - LAND.doc

January 12, 2010 KEM E-mail to McCurdy & Difuntorum, cc Lamport, Vapnek & Sondheim:

I've attached the following, which are for the most part simply renamed files that Stan sent in yesterday. However, I did make some changes, as described below. I've also inserted Stan's cover e-mail from yesterday so you can use this e-mail as the cover memo for the agenda item.

1. Rule, Draft 3 (1/11/10)SWL, redline, compared to Draft 2.1 (9/1/09), the public comment draft. I've added a footer so we can better keep track of the drafts.
2. Dashboard, Draft 4.1 (1/11/10)SWL-KEM. Again, I've added a footer. I've also highlighted certain sections of the dashboard that we will probably have to revisit after the meeting. In particular, the rule is listed as "highly controversial" and "moderately controversial". Which is it. Also, what was the majority if Stan's revisions are accepted may want to file a minority report on the deletion of the second sentence, so I've flagged that.
3. Introduction, Draft 3.1 (1/11/10)SWL-KEM. I cleaned up the formatting by replacing the text box w/ a table and made a few administrative changes to dates, etc.
4. Rule & Comment Chart, Draft 3 (1/11/10)SWL
5. Public Comment Chart, Draft 3.1 (1/11/10)SWL-KEM. I've re-sorted the chart alphabetically.

January 11, 2010 Lamport E-mail to McCurdy, cc Vapnek, Sondheim, Difuntorum & KEM:

Attached are the materials for Rule 2.1, which reflects Paul's input as well.

Three of the five comments we received, including comments from OCTC, COPRAC and the Santa Clara Bar, maintain that we should not adopt this rule. Given those comments, I recommend that the Commission vote on whether to adopt the rule at all.

The core objection is that the Rule does not establish a disciplinary standard, is not enforceable and is not necessary. I agree that, as phrased, this is not a disciplinary rule and likely is not enforceable. However, these comments illustrate that people are looking to the Rules as disciplinary standards. We dilute their purpose when we sprinkle in non-disciplinary rules. Worse yet, people may try to read disciplinary consequences into this rule, when none were intended. On the other hand, our charge directs us to adopt the Model Rules, unless there is a good reason not to do so. The question whether there is a good reason not to adopt this proposed Rule is something the Commission as a whole should consider.

RRC – Model Rule 2.1
E-mails, memos, etc. – Revised (1/19/2010)

I have responded to these comments in the table in order to have something in place in the event that we choose to adopt the Rule. However, my recommendation is that the Commission vote whether to have the Rule at all.

In light of the changes to the proposed Rule, I think the minority's concern has been addressed. Accordingly, I have taken the liberty of recommending deletion of the minority position from the Introduction. If the minority believes their objection remains, please let me know.

January 17, 2010 Kehr E-mail to RRC:

Here are my comments on these materials, all based on the assumption that the Commission will decide to retain the Rule:

1. The third line of Comment [2] includes “as such”. I would remove these words. Without them, the sentence is an absolute statement that a lawyer is not a moral advisor, which I believe is right. With them, the sentence implies that it is part of a lawyer’s role to provide moral advice.
2. Several of the Responses in the commenter chart are phrased as “Comment accepted” or “Comment not accepted”. The commenters have gone to consider trouble to provide their assistance to us, and I would prefer a less imperious phrasing.

Finally, because of the suggestion, such as in the COPRAC letter, that Rule 2.1 might have no purpose, I’ve done a highly abbreviated and incomplete search to see if Rule 2.1 actually is used anywhere. It turns out that there are dozens of cases in which it has been cited. Here are some examples: *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 (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” Id. at 281 n. 2.]; *Lee v. State Farm Mutual Ins. Co.*, 2007 U.S. Dist. LEXIS 97565 (D. Colo. 2007) [This is the report of a special master appointed to make *in camera* inspections of assertedly privileged materials in a lawsuit alleging that State Farm’s conduct in attempting to avoid a coverage obligation amounted to fraud and other torts. The lawyers apparently failed to fully advise his client regarding various aspect of the pending litigation, possibly because of their relationship with State Farm, which they represented in other matters. The Special Master found that this raised a substantial question as to a Rule 2.1 violation.]; *Pyles v. City of Philadelphia*, 2006 U.S. Dist. LEXIS 89174 (E.D.Pa. 2006) [This is a Title VII action filed by a female African-American lawyer who was terminated from her employment. Plaintiff wrote a legal opinion that was modified by her supervisor. Plaintiff objected, and the disagreement went up the ladder with the revisions approved at each rung. Plaintiff argued, among other things, that her conduct was proper because it was required by Rule 2.1.]; *Commissariat A L’Energie Atomique v. Samsung Electronics Co, Ltd.*, 430 F. Supp.2nd (D.Del. 2006) [There is brief reference to Rule 2.1 in deciding on a motion to allow defendant’s counsel to share certain trade secret information with its client]; *Patterson v. Powell, Goldstein, Frazer & Murphy, LLP*, 332 B.R. 450 (N.D.Ala. 2005) [Rule 2.1 used in the traditional loyalty sense in ruling that a non-client could not sue a lawyer]; and *Cambria v. Association of*

RRC – Model Rule 2.1
E-mails, memos, etc. – Revised (1/19/2010)

Flight Attendants, 2005 U.S. Dist. LEXIS 13101 (E.D.Pa. 2005) [An employee sued her labor union, claiming, among other things, that it failed to meet its duty of fair representation. With respect to the recommendation by the union-provided lawyer regarding deficiencies in her claim, the Court in a footnote agreed with the attorney was obligated to act as she did under Rule 2.1.]

I did not locate any cases of professional discipline based on Rule 2.1 (although additional research might turn one up, but it has been used for purposes of court sanctions: *In re Johnson*, 2008 Bankr. LEXIS 164 (E.D.Virg. 2008) [This was a Ch. 13 filing by an 18 year old who just had graduated from high school and had no significant debts but was used by her father and grandmother as part of their scheme to defraud their creditors. Her lawyer also had represented or was representing the father and grandmother in four other serial bankruptcy filings, and for that and other reasons the lawyer was implicated in the scheme. The court suspended the attorney from filing bankruptcy cases in the court for a period of not less than 120 days and ordered the attorney to disgorge the attorney's fees that he charged the debtor. The court referred to Rule 2.1 in explaining how the lawyer should have behaved, but the use of Rule 2.1 seems entirely unnecessary because the lawyer, like his other clients, violated pertinent bankruptcy abuse statutes.]; and *In re Ebel*, 371 B.R. 866 (S.D.Ill. 2007) [The court suspended the lawyer from practice before the bankruptcy court based on findings that he had provided incompetent legal representation and advice, had charged and collected fees far in advance of the value of services rendered, and had demonstrated an inability to be candid and forthright in the representation of his clients and in his dealing with the standing trustees, the U.S. Trustees, opposing counsel, and the court. Rule 2.1 is identified in a listing of Rules, but it is not apparent what it added to the analysis.]

I'll hold any comments on the wisdom of including the Rule until the meeting.

January 17, 2010 Sondheim E-mail to RRC:

The issue regarding this rule seems to be quite clear and does not require debate since the commenters appear to give the pro and con views: Shall we have the rule with only the first sentence? Accordingly, as suggested by Stan, we will take a vote without discussion unless someone raises a matter in an e-mail before the deadline which requires discussion.

January 18, 2010 Vapnek E-mail to RRC:

1. I have no problem with deletion of "as such" in the third line of Comment 2.
2. I don't agree that "Comment accepted" or "Comment not accepted" are imperious, but we can come up with more felicitous language if the Commission votes to adopt this rule.
3. Thanks to RLK for the research on cites to Rule 2.1. We have already adopted a number of rules that have no disciplinary component, and even discussed adding such a caution as has Georgia (if I remember correctly) to some of its rules. The duty to exercise independent judgment is an important duty of every lawyer and ought to be stated clearly somewhere. The Rules is the best place, not just in MCLE lectures, etc. We are long past the "discipline only" phase of rule writing, especially in light of our revised charge to adopt the Model Rules unless there is a compelling reason not to do so. That the rule may not be one that states a disciplinable offense is not a compelling reason to reject it.

Lee, Mimi

From: Lamport, Stanley W. [SLamport@coxcastle.com]
Sent: Tuesday, January 19, 2010 9:47 PM
To: Robert L. Kehr; snyderlaw@charter.net; Ellen R. Peck; hbsondheim@verizon.net; CommissionerJ2@gmail.com; jsapiro@sapirolaw.com; justice.ruvolo@jud.ca.gov; kemohr@charter.net; Kevin Mohr G; kmelchior@nossaman.com; McCurdy, Lauren; linda.foy@jud.ca.gov; martinez@lbbslaw.com; Lee, Mimi; mtuft@cwclaw.com; Paul Vapnek; Difuntorum, Randall; Yen, Mary
Subject: RE: RRC_Rule 2.1 January 2010 agenda item III.I.

Paul's response to Bob's email did not carry over the text of Bob's original email. I have pasted Paul's email below so that my comments are in context.

1. I am fine with the deletion of "as such" in the third line of Comment [2]. It is the language used in the Model Rule Comment, but I agree with Bob's reasons for removing it.
2. I agree with Paul that the "Comment accepted" and "Comment not accepted" does not seem imperious. No matter what we say, we need to communicate clearly that we either revised the Rule in response to the Comment or we did not and why. We need to do it in a way where the reader knows instantly where we are going with our response to a comment.
3. I have looked at the some of the cases that Bob has cited. They highlight a lack of consensus on what "independent professional judgment" means. I find some of these cases so troubling that I cannot support this Rule in its present form. In my view "independent professional judgment" means judgment not influenced by factors extraneous to the lawyer-client relationship. It is an element of a lawyer's duty of undivided loyalty, which embraces the concept that a lawyer represents a client's interest and no one else's. As an extension of that basic duty, a lawyer has a duty to exercise judgment in the client's interests that is not influenced by the interests of others or the lawyer's interests that are extraneous to the compensatory nature of the normal lawyer-client relationship (which distinguishes why some fee arrangements involve conflicts and others do not). The duty of independent judgment has a client focus and exists to assure a minimum standard of professional judgment necessary to fulfill the basic function of the lawyer-client relationship.

IT IS ABSOLUTELY NOT A DUTY TO EXERCISE JUDGMENT INDEPENDENT OF THE CLIENT'S INTERESTS! Nor should it be for reasons I expect we all know. Imposing 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. There are limits on the extent a lawyer can advance a client's interests to be sure. Can't break a law, commit a crime, defraud, violate a court order or exceed certain standards in a adjudicatory proceeding. These are external limits on the duty of loyalty and that is the level at which those breaks should be applied.

Yet, some of the cases Bob cites interpret "independent professional judgment" in Rule 2.1 to mean "independent of the client's interests." In *Thomas v. Tenneco Packaging*, the court sanctioned a lawyer for conduct the lawyer maintained was in the client's interest by saying the lawyer had to exercise independent judgment and not just follow orders. That is not a duty of independent judgment. If the lawyer violated a court rule or order, then that is the violation. But to say that the lawyer was sanctioned for not exercising independent judgment in failing to comply with a court rule is the wrong way to analyze the issue. *U.S. v. Hughes* is the same. The court is drawing a distinction between a duty to follow a client's wishes and a duty to exercise independent judgment. Some of the other cases seem closer to the mark, but the fact that some courts have taken the rule in a different direction is very troubling.

If we adopt this rule, we import all of the out-of-state case law that goes with it. There is no California authority on this Rule. The Rule is being imported. We should expect California courts to look at cases in other states where the Rule has been in place, states that do not share some of the core values we share on matters such as confidentiality and undivided loyalty. We may very well be stuck with the holdings in these cases if a California court follows them without knowing better. The way to avoid this is to define independent judgment in a way that forecloses interpreting the duty to mean judgment independent of the client's interest. If we are not prepared to do that, we should not recommend adoption of this Rule.

STAN

From Paul Vapnek:

1. I have no problem with deletion of "as such" in the third line of Comment 2.
2. I don't agree that "Comment accepted" or "Comment not accepted" are imperious, but we can come up with more felicitous language if the Commission votes to adopt this rule.
3. Thanks to RLK for the research on cites to Rule 2.1. We have already adopted a number of rules that have no disciplinary component, and even discussed adding such a caution as has Georgia (if I remember correctly) to some of its rules. The duty to exercise independent judgment is an important duty of every lawyer and ought to be stated clearly somewhere. The Rules is the best place, not just in MCLE lectures, etc. We are long past the "discipline only" phase of rule writing, especially in light of our revised charge to adopt the Model Rules unless there is a compelling reason not to do so. That the rule may not be one that states a disciplinable offense is not a compelling reason to reject it.

From: Robert L. Kehr [mailto:rlkehr@kscllp.com]

Sent: Sunday, January 17, 2010 2:21 PM

To: snyderlaw@charter.net; Ellen R. Peck; hbsondheim@verizon.net; CommissionerJ2@gmail.com; jsapiro@sapirolaw.com; justice.ruvolo@jud.ca.gov; kemohr@charter.net; Kevin Mohr G; kmelchior@nossaman.com; Lauren McCurdy; linda.foy@jud.ca.gov; martinez@lbbslaw.com; Mimi Lee; mtuft@cwclaw.com; Paul Vapnek; Randall.Difuntorum@calbar.ca.gov; Lamport, Stanley W.; Yen, Mary

Subject: RRC_Rule 2.1 January 2010 agenda item III.I.