

Proposed Rule 2.1 [n/a]

“Advisor”

(Draft #4, 2/19/10)

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

Comparison with ABA Counterpart

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

Primary Factors Considered

- Existing California Law

Rule

Statute

Case law

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

- Other Primary Factor(s)

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

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 8
Opposed Rule as Recommended for Adoption 4
Abstain 0

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:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 2.1* Advisor

February 2010

(Draft rule following consideration of public comment.)

INTRODUCTION:

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

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

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

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

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

* Proposed Rule 2.1, Draft 4 (2/19/10); 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 involves unpleasant <u>may involve</u> facts and alternatives that a client may <u>find unpleasant and may</u> be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.</p>	<p>Comment [1] is nearly identical to Model Rule 2.1, cmt. [1]. It was revised to replace with word “often” with the word “may” because the Model Rule language makes a judgment about what often occurs in a lawyer client relationship that is not necessarily the case and is unnecessary to make the point of the Comment. The reference to “unpleasant facts and alternative” was changed to state “facts and alternatives that a client may find unpleasant” in response to public comment that it is the client’s perception of the facts, rather than the facts themselves, that determine whether they are unpleasant.</p>
<p>[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.</p>	<p>[2] Advice<u>In some cases, advice</u> couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied in <u>rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social and political factors that may be relevant to the client’s situation.</u></p>	<p>Comment [2] is based on Model Rule 2.1, cmt. [2]. The first sentence was revised to clarify that it is not intended to state a proposition that applies in every representation. The second sentence has been deleted because it may suggest to some lawyers that there is a risk of disciplinary exposure if a lawyer provides competent advice but does not also provide advice on moral issues. The third sentence was deleted and its substance incorporated into the last sentence. The last sentence was revised to incorporate language that was taken from the second sentence of the proposed Rule. The Model Rule Comment language in the last sentence was replaced with the second sentence from the proposed Rule, because the deleted language makes a judgment that moral and ethical considerations impinge on most legal questions, that may not be the case and is not necessary to make the point of the Comment.</p>

<p align="center"><u>ABA Model Rule</u> Rule 2.1 Advisor Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 2.1 Advisor Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.</p>	<p>[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.</p>	<p>Model Rule, cmt. [3], has been deleted because the proposition stated therein may be construed as creating a substantive legal standard that goes beyond the terms of the rule itself.</p>
<p>[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.</p>	<p>[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts</p>	<p>Model Rule, cmt. [4], has been deleted as unnecessary practice pointers that distract and potentially undermine the primary message to lawyers and clients that there is a duty of independent professional judgment and candor.</p>

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

Proposed Rule 2.1 Advisor

Minority Dissent

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

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

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

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

Rule 2.1 Advisor

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

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. ~~In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.~~

Comment

Scope of Advice

- [1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice ~~often involves unpleasant~~ may involve facts and alternatives that a client may find unpleasant and may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.
- [2] ~~Advice~~ In some cases, advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Although a lawyer is not a moral advisor ~~as such, moral and ethical considerations impinge upon most legal questions and~~ in rendering advice, a lawyer may ~~decisively influence how the~~ refer not only to law will, but to other considerations such as moral, economic, social and political factors that may be applied relevant to the client's situation.

Rule 2.1 Advisor

(Commission's Proposed Rule – Clean Version)

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

Comment

Scope of Advice

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

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

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

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

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

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

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

Rule 2.1: Advisor

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California has no direct counterpart to Rule 2.1.

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

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

New York has no Disciplinary Rule counterpart to ABA Model Rule 2.1, but compare New York's EC 7-8, which provides, in part, as follows:

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

decision that is morally just as well as legally permissible.

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