

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 2.1 Advisor

August 2009

(Discussion of Drafting Committee Views on Proposed Rule.)

The drafting team along with Mark Tuft as an ad hoc member was unanimous in recommending adoption of Model Rule 2.1 without revision.

The drafting team is not unanimous with respect to adopting the Comments. Stanley Lamport is troubled by the Comments. First, the Comments do not discuss what independent judgment means. Second, they discuss standards of legal advice that are not in the Rule. They could be read to mean that a lawyer could be disciplined for giving purely tactical advice and for not giving advice based on non-legal considerations. In Stan's view, these are matters of judgment on the part of a lawyer whose outer limited are the bounds of competent representation. Stan recommends the Commission task the drafting team to redraft the Comments.

Tony Voogd would leave the Comments alone. In Tony's view, the rule and comments are harmless platitudes that are too general to lead to discipline. Tony believes that "candid" essentially means unbiased and honest. Bias, honesty and independent judgment are concepts that don't readily lend themselves to proof. In Tony's view the Rule and Comments are unenforceable platitudes which may do some good by way of guidance.

Mark Tuft appreciates Stan's concerns with the Comments from a purely disciplinary angle, but he thinks the Comments are intended to inform lawyers that the role of advisor entails more than rendering purely narrow technical advice. In Mark's view, the Comments tell lawyers that they should counsel clients on what is in the client's best interest even if the advice involves moral, ethical and other consideration as opposed to what a particular statute or rule means. Mark notes that the

Comments may not be entirely artful, but they do expand on the concept of client loyalty and the obligation to render independent and candid professional advice that the client may not want to hear or which may be unpleasant. Mark does not have problems with Comments [1], [2], and [4]. He does not have a strong view on Comment [3]. He thinks Comment [5] presents an issue worth discussing.

<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><b>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.</b></p>	<p>The drafting team recommends that the Commission adopted the Model Rule text.</p>

---

\* 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><b>Scope of Advice</b></p> <p>[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.</p>		<p>Mark and Tony would adopt the Comment without change. Stan thinks the comment should be revised to explain what independent judgment means [i.e. judgment not influenced by factors extraneous to the ordinary lawyer-client relationship] and what candid advice means [i.e. advice that reflects the lawyer's honest assessment of what is in the client's best interests]</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>Mark and Tony would adopt the Comment without change. Stan thinks Comment [2] is of concern and should be revised. The Comment suggests that a lawyer could be disciplined for giving "purely tactical advice" and may be required to give moral advice. It is one thing to say that lawyers may give advice beyond purely tactical advice, but saying that such advice can be inadequate can lead to unnecessary mischief in how the rule is applied. Stan recommend that the second sentence should be deleted or revised.</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><b>Stan thinks this Comments creates a substantive legal standard that goes beyond the Rule. He recommends that the Commission not adopt this Comment.</b></p> <p><b>Mark does not have a strong opinion on the Comment.</b></p> <p><b>Tony would adopted the Comment verbatim.</b></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><b>Mark and Tony recommend adoption of the Comment. Stan would revisit this Comment in light of changes to the other Comments.</b></p>

<p align="center"><u>ABA Model Rule</u> Rule 2.1 Advisor Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 2.1 Advisor Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p><b>Offering Advice</b></p> <p>[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.</p>		<p><b>Stan thinks the Commission should defer action on this Comment pending the outcome of Rule 1.4.</b></p> <p><b>Mark thinks this Comment is worth discussion in the context of Rule 1.4.</b></p> <p><b>Tony recommends the Commission adopt the Comment.</b></p>

**McCurdy, Lauren**

---

**From:** Mark Tuft [MTuft@cwclaw.com]  
**Sent:** Monday, August 10, 2009 3:29 PM  
**To:** Lamport, Stanley W.; Anthonie Voogd; Vapnek, Paul W.  
**Cc:** avoogd@stanfordalumni.org; Kevin Mohr; Kevin Mohr G; Harry Sondheim; Difuntorum, Randall  
**Subject:** RE: RRC - Rule 2.1 - Introduction Template and Comparison Chart

I join in the recommendation that we adopt rule 2.1. This rule has gained importance in recent years as a result of public concern regarding torture memos, the rash of tax shelters opinions and legal advice in the financial markets.

I appreciate Stan's concerns with the comments from a purely disciplinary angle, but I think the comments are intended to inform the lawyer that the role of advisor entails more than rendering purely narrow technical advise. The comments tell lawyers they should counsel clients on what is in the client's best interest even if the advise involves moral, ethical and other considerations as opposed to what a particular statute or rule means. The comments may not be entirely artful but they do expand on the concept of client loyalty and the obligation to render independent and candid professional advice that the client may not want to hear or which may be unpleasant. Although I have not checked every state, my limited review is that most states include the ABA comments without major revision.

I do not have a problem with Comments [1] and [2] although I like what the commission is New York recommended as a final sentence to Comment [2]: "For the allocation of responsibility in decision-making between lawyer and client, see Rule 1.2." I do not have an strong opinion on Comment [3] since it does not appear to add very much. I am fine with Comment [4]. Comment [5] presents an issue worth discussing - and that is the sentence added by E2k in 2002 that Rule 1.4 may require discussing ADR options with the client when litigation is contemplated. You may recall we were asked early on by the ADR advocates to require lawyers to inform clients of alternatives to litigation and this may be a salutary compromise.

Mark L. Tuft  
Cooper, White & Cooper LLP  
201 California St.  
17th Floor  
San Francisco, CA 94111  
(415)433-1900  
(415)765-6215 (Direct Line)  
(415)433-5530 (Fax)  
(415)309-1735 (Cell)  
<mailto:mtuft@cwclaw.com>

=====

This communication (including any attachments) contains information which may be confidential and privileged. Unless you are the addressee (or authorized to receive messages for the addressee), you may not use, copy or disclose to anyone the message or any information contained in the communication. If you have received the communication in

error, please advise the sender by reply e-mail and delete the communication. Nothing in this communication should be interpreted as a digital or electronic signature that can be used to authenticate a contract or other legal document.

IRS Circular 230 Disclosure: In accordance with compliance requirements imposed by the Internal Revenue Service, Cooper, White & Cooper LLP informs you that any tax advice contained in this communication (including any attachments), unless expressly stated otherwise, is not intended and may not be used to (i) avoid penalties that may be imposed on taxpayers under the Internal Revenue Code or (ii) promote, market or recommend to another party any of the matters addressed herein.

=====

---

**From:** Lamport, Stanley W. [mailto:SLamport@coxcastle.com]  
**Sent:** Friday, August 07, 2009 2:12 PM  
**To:** Anthonie Voogd; Mark Tuft; Vapnek, Paul W.  
**Cc:** avoogd@stanfordalumni.org  
**Subject:** RRC - Rule 2.1 - Introduction Template and Comparison Chart

Paul, Tony and Mark:

Although Mark is not formally a member of our drafting team, I have included him in light of the interest he expressed in this rule at the last meeting. Below is the exchange that Tony and I had before the last Commission meeting. Paul and Mark, I would like your input on this so that I can prepare a report for the next Commission agenda.

STAN

---

**From:** Anthonie Voogd [mailto:avoogd@roadrunner.com]  
**Sent:** Thursday, July 09, 2009 12:29 PM  
**To:** Lamport, Stanley W.  
**Cc:** Vapnek, Paul W. ; avoogd@stanfordalumni.org  
**Subject:** Re: RRC - Agenda Item III.F. - Rule 2.1 - Introduction Template and Comparison Chart

I would leave the comments alone. The rule and comments are harmless platitudes. They are too general to lead to discipline. How do you prove a failure to exercise independent judgment? The exercise of judgment is internal to the lawyer. If exercise is to be read as taking action inconsistent with the independent judgment of the lawyer you run into all sort of other problems, including instructions to the contrary by the client and requirements of the law etc. Moreover, if you fail to exercise independent judgment because you were influenced by another person should you be disciplined where the judgment of the other person was better than your judgment? Are you failing to exercise independent judgment when you rely on the opinions of experts? Moreover, the rule requirements are stated the conjunctive. I suppose that means that discipline is to be imposed only if both requirements are not met. Thus, the lawyer must also render candid advice. Candid essentially means unbiased and honest. Bias and honesty are concepts that don't readily lend themselves to proof.

Consider the following example. Attorney X has a case on a 1/3 contingency. After discovery he concludes that he has a 90% chance of prevailing, that damages will be about \$10,000, and that it will take a month of his time to try the case. He gets a settlement offer of \$4,000. He exercises his independent professional judgment and concludes acceptance of the offer is clearly in his best interests and not in the best interests of the client. He recom

mends settlement without disclosing his interest in settlement. He has thus violated the candor requirement of the rule. Has he violated the rule as a whole? Has he violated Rule 1.4?

Consider also our existing Rule 5.4 entitled "Duty of Avoid Interference with a Lawyer's Professional Independence." Have we covered the same material elsewhere?

Enough musing. The Rule and comments are unenforceable platitudes which may do some good by way of guidance. They don't fix because "independent professional judgment" is a generality impossible to define.

Tony

On Jul 8, 2009, at 3:27 PM, Lamport, Stanley W. wrote:

Paul and Tony:

I somehow overlooked that this rule is on our July agenda. The rule has been agendaized for half an hour, which we should use to get a sense of direction from the rest of the Commission. I have highlighted the input I would like from you as fellow drafters.

I have no problem with the Rule as drafted. A lawyer is required to exercise independent judgment and communicate candidly with a client. Saying that a lawyer may refer not only to law but to other considerations doesn't trouble me. It does not impose a requirement. I suppose it means that you can't be disciplined for giving advice that includes more than legal considerations. *I know Tony's preference is to adopt the ABA rule. Paul, do you agree?*

I am troubled by the Comments. First, the Comments do not discuss what independent judgment means and the candor discussion is woolly, to use a Kurt term.

Second, the Comments discuss standards of legal advice that are not in the Rule. The first sentence of Comment [1] seems fine as far as it goes, but the next three sentences are nebulous.

Comment [2] is of particular concern. It suggests that a lawyer could be disciplined for giving "purely tactical advice" and may be required to give moral advice. That is how I read the sentences "Purely technical legal advice, therefore, can sometimes be inadequate... 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." My concern is heightened by Comment [3], which suggests that a lawyer may be disciplined for not giving advice based on non-legal considerations. Some of this spills into Comment [4]

There are matters of judgment on the part of a lawyer whose outer limits are the bounds of competent representation. I do not think that the Comments are necessarily a reflection of the civil standard and I don't think they provide appropriate guidance for disciplinary purposes.

Without attempting to redraft these Comments at this point, my recommendation would be that we be tasked to redraft them. *Do you agree?*

Comment [5] is a cross-reference to Rule 1.4. I am not sure where we stand with that rule. Paul, perhaps you know. I would suggest we defer on Comment [5] pending how Rule 1.4 comes out. *Do you agree?*

Please let me know your thoughts. I realize we are past the deadline, but I would still like to get something into Lauren this week if possible.

STAN

---

**From:** Lee, Mimi [<mailto:Mimi.Lee@calbar.ca.gov>]  
**Sent:** Monday, June 15, 2009 11:22 AM  
**To:** Lamport, Stanley W.; Vapnek, Paul W. ; [avoogd@stanfordalumni.org](mailto:avoogd@stanfordalumni.org)  
**Cc:** Kevin Mohr; Kevin Mohr (Work) (E-mail); Harry Sondheim; Difuntorum, Randall  
**Subject:** RRC - Agenda Item III.F. - Rule 2.1 - Introduction Template and Comparison Chart

Drafters:

In order to assist you in your preparation of assignments for the July meeting, attached you will find the Introduction Template and Rule/Comment Comparison Chart for Rule 2.1 (Agenda Item III.F.).

Best Regards,

Mimi

\*\*\*\*\*

Mimi Lee  
Professional Competence  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105  
(415) 538-2162  
[Mimi.Lee@calbar.ca.gov](mailto:Mimi.Lee@calbar.ca.gov)

This E-Mail message may contain confidential information and/or privileged material for the sole use of the intended recipient(s). Any review, use, distribution or disclosure by others is strictly prohibited. If you are not the intended recipient (or authorized to receive for the recipient), please contact the sender by reply E-Mail and delete all copies of this message.

<RRC - 2-1 - Compare - RuleComment.doc><RRC - 2-1 - Compare - Introduction.doc>

**Table of Contents**

June 15, 2009 Lee E-mail to Drafters (Snyder, Peck & Tuft), cc Chair & Staff: .....	1
July 8, 2009 Lamport E-mail to Drafters (Voogd & Vapnek):.....	1
July 9, 2009 Voogd E-mail to Drafters: .....	2
August 7, 2009 Lamport E-mail to Drafters & Tuft: .....	2
August 10, 2009 Tuft E-mail to Drafters, cc Peck, Chair, Difuntorum & KEM: .....	2
August 13, 2009 Lamport E-mail to McCurdy & Difuntorum, Drafters, Chair, Vapnek & KEM:.....	3
August 13, 2009 Drafters' Report re proposed Rule 2.1:.....	3
August 23, 2009 Sapiro E-mail to RRC List:.....	4
August 24, 2009 Tuft E-mail to RRC:.....	5

**RRC – Model Rule 2.1  
E-mails, memos, etc. – Revised (8/24/2009)**

**June 15, 2009 Lee E-mail to Drafters (Snyder, Peck & Tuft), cc Chair & Staff:**

In order to assist you in your preparation of assignments for the July meeting, attached you will find the Introduction Template and Rule/Comment Comparison Chart for Rule 2.1 (Agenda Item III.F.).

**July 8, 2009 Lamport E-mail to Drafters (Voogd & Vapnek):**

1. I somehow overlooked that this rule is on our July agenda. The rule has been agendized for half an hour, which we should use to get a sense of direction from the rest of the Commission. I have highlighted the input I would like from you as fellow drafters.
2. I have no problem with the Rule as drafted. A lawyer is required to exercise independent judgment and communicate candidly with a client. Saying that a lawyer may refer not only to law but to other considerations doesn't trouble me. It does not impose a requirement. I suppose it means that you can't be disciplined for giving advice that includes more than legal considerations. I know Tony's preference is to adopt the ABA rule. Paul, do you agree?
3. I am troubled by the Comments. First, the Comments do not discuss what independent judgment means and the candor discussion is wooly, to use a Kurt term.
4. Second, the Comments discuss standards of legal advice that are not in the Rule. The first sentence of Comment [1] seems fine as far as it goes, but the next three sentences are nebulous.
5. Comment [2] is of particular concern. It suggests that a lawyer could be disciplined for giving "purely tactical advice" and may be required to give moral advice. That is how I read the sentences "Purely technical legal advice, therefore, can sometimes be inadequate... 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." My concern is heightened by Comment [3], which suggests that a lawyer may be disciplined for not giving advice based on non-legal considerations. Some of this spills into Comment [4]
6. There are matters of judgment on the part of a lawyer whose outer limits are the bounds of competent representation. I do not think that the Comments are necessarily a reflection of the civil standard and I don't think they provide appropriate guidance for disciplinary purposes.
7. Without attempting to redraft these Comments at this point, my recommendation would be that we be tasked to redraft them. Do you agree?
8. Comment [5] is a cross-reference to Rule 1.4. I am not sure where we stand with that rule. Paul, perhaps you know. I would suggest we defer on Comment [5] pending how Rule 1.4 comes out. Do you agree?
9. Please let me know your thoughts. I realize we are past the deadline, but I would still like to get something into Lauren this week if possible.

**July 9, 2009 Voogd E-mail to Drafters:**

1. I would leave the comments alone. The rule and comments are harmless platitudes. They are too general to lead to discipline. How do you prove a failure to exercise independent judgment? The exercise of judgment is internal to the lawyer. If exercise is to be read as taking action inconsistent with the independent judgment of the lawyer you run into all sort of other problems, including instructions to the contrary by the client and requirements of the law etc. Moreover, if you fail to exercise independent judgment because you were influenced by another person should you be disciplined where the judgment of the other person was better than your judgment? Are you failing to exercise independent judgment when you rely on the opinions of experts? Moreover, the rule requirements are stated the conjunctive. I suppose that means that discipline is to be imposed only if both requirements are not met. Thus, the lawyer must also render candid advice. Candid essentially means unbiased and honest. Bias and honesty are concepts that don't readily lend themselves to proof.
2. Consider the following example. Attorney X has a case on a 1/3 contingency. After discovery he concludes that he has a 90% chance of prevailing, that damages will be about \$10,000, and that it will take a month of his time to try the case. He gets a settlement offer of \$4,000. He exercises his independent professional judgment and concludes acceptance of the offer is clearly in his best interests and not in the best interests of the client. He recommends settlement without disclosing his interest in settlement. He has thus violated the candor requirement of the rule. Has he violated the rule as a whole? Has he violated Rule 1.4?
3. Consider also our existing Rule 5.4 entitled "Duty of Avoid Interference with a Lawyer's Professional Independence." Have we covered the same material elsewhere?
4. Enough musing. The Rule and comments are unenforceable platitudes which may do some good by way of guidance. They don't fix because "independent professional judgment" is a generality impossible to define.

**August 7, 2009 Lamport E-mail to Drafters & Tuft:**

Although Mark is not formally a member of our drafting team, I have included him in light of the interest he expressed in this rule at the last meeting. Below is the exchange that Tony and I had before the last Commission meeting. Paul and Mark, I would like your input on this so that I can prepare a report for the next Commission agenda.

**August 10, 2009 Tuft E-mail to Drafters, cc Peck, Chair, Difuntorum & KEM:**

1. I join in the recommendation that we adopt rule 2.1. This rule has gained importance in recent years as a result of public concern regarding torture memos, the rash of tax shelters opinions and legal advice in the financial markets.
2. I appreciate Stan's concerns with the comments from a purely disciplinary angle, but I think the comments are intended to inform the lawyer that the role of advisor entails more than rendering purely narrow technical advice. The comments tell lawyers they should counsel clients on what is in the client's best interest even if the advice involves moral, ethical and other considerations as opposed to what a particular statute or rule means. The comments

**RRC – Model Rule 2.1  
E-mails, memos, etc. – Revised (8/24/2009)**

may not be entirely artful but they do expand on the concept of client loyalty and the obligation to render independent and candid professional advice that the client may not want to hear or which may be unpleasant. Although I have not checked every state, my limited review is that most states include the ABA comments without major revision.

3. I do not have a problem with Comments [1] and [2] although I like what the commission is New York recommended as a final sentence to Comment [2]: "For the allocation of responsibility in decision-making between lawyer and client, see Rule 1.2." I do not have a strong opinion on Comment [3] since it does not appear to add very much. I am fine with Comment [4]. Comment [5] presents an issue worth discussing - and that is the sentence added by E2k in 2002 that Rule 1.4 may require discussing ADR options with the client when litigation is contemplated. You may recall we were asked early on by the ADR advocates to require lawyers to inform clients of alternatives to litigation and this may be a salutary compromise.

**August 13, 2009 Lamport E-mail to McCurdy & Difuntorum, Drafters, Chair, Vapnek & KEM:**

Attached is a report to the Commission from the drafting team on this rule, along with a copy of the email exchange between the drafters.

**August 13, 2009 Drafters' Report re proposed Rule 2.1:<sup>1</sup>**

1. The drafting team along with Mark Tuft as an ad hoc member was unanimous in recommending adoption of Model Rule 2.1 without revision.
2. The drafting team is not unanimous with respect to adopting the Comments. Stanley Lamport is troubled by the Comments. First, the Comments do not discuss what independent judgment means. Second, they discuss standards of legal advice that are not in the Rule. They could be read to mean that a lawyer could be disciplined for giving purely tactical advice and for not giving advice based on non-legal considerations. In Stan's view, these are matters of judgment on the part of a lawyer whose outer limited are the bounds of competent representation. Stan recommends the Commission task the drafting team to redraft the Comments.
3. Tony Voogd would leave the Comments alone. In Tony's view, the rule and comments are harmless platitudes that are too general to lead to discipline. Tony believes that "candid" essentially means unbiased and honest. Bias, honesty and independent judgment are concepts that don't readily lend themselves to proof. In Tony's view the Rule and Comments are unenforceable platitudes which may do some good by way of guidance.
4. Mark Tuft appreciates Stan's concerns with the Comments from a purely disciplinary angle, but he thinks the Comments are intended to inform lawyers that the role of advisor entails more than rendering purely narrow technical advice. In Mark's view, the Comments tell lawyers that they should counsel clients on what is in the client's best interest even if the advice involves moral, ethical and other consideration as opposed to what a particular statute or rule means. Mark notes that the Comments may not be entirely artful, but they do

---

<sup>1</sup> Note: The Report was inserted in the "Introduction" to the Comparison Chart for this Rule.

**RRC – Model Rule 2.1  
E-mails, memos, etc. – Revised (8/24/2009)**

expand on the concept of client loyalty and the obligation to render independent and candid professional advice that the client may not want to hear or which may be unpleasant. Mark does not have problems with Comments [1], [2], and [4]. He does not have a strong view on Comment [3]. He thinks Comment [5] presents an issue worth discussing.

**August 23, 2009 Sapiro E-mail to RRC List:**

1. I agree with Stan. Both this rule and its comment can be used to impose discipline upon lawyers who take unpopular stands or represent unpopular clients.
2. Model Rule 2.1 works as an ethical aspiration. It does not work as a disciplinary rule. Stan is correct when he suggests that the comment should be rewritten. Read literally, Model Rule 2.1 and its comment are inconsistent with Model Rule 1.2. Balancing their offsetting concerns works in the ethical construct, but it does not work in discipline. A lawyer will face discipline for violating Rule 2.1, regardless of Rule 1.2.
3. As written, Model Rule 2.1 would require [it uses the word “shall”] a lawyer to exercise independent professional judgment and give candid advice. That is ethically a correct statement. However, when it is read with the second sentence and the Comment, it can be misapplied, and the entirety of the rule may be misleading.
4. For example, if a lawyer has a wealthy client and thinks that the lawyer has found a tax loophole created by Congress, do the rule and its comments require the lawyer to tell the client about the loophole but recommend that the client not take advantage of it? If the lawyer, to use the phrase in the second sentence of the Model Rule, for “moral, economic, social and political” reasons thinks that Congress should not have given the wealthy client the right to avoid payment of tax, is the lawyer to be disciplined if he or she does not recommend that the client not take advantage of the loophole? The answer is, “Of course not.”
5. But look at the comment. “Purely technical legal advice, therefore, can sometimes be inadequate.” And “. . . moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.” This can be interpreted to allow, to encourage, or to require a lawyer to shade that tax advice and recommend that a perfectly legitimate loophole not be used, so the lawyer’s moral or ethical considerations prevail. That is not what we should be communicating.
6. I started with a trivial example because tax law is emotionally neutral for most people. But the example has parallels in real life. For example, until the 1940s, California had anti-miscegenation laws. Suppose an interracial couple came to a lawyer in 1946 and wanted to get married. If the new rule had been in effect, and the lawyer believed that interracial marriage was immoral or unethical, the literal wording of the proposed rule and Comment [2] would have encouraged the lawyer to shade his or her advice. “You can fight the law, but I don’t recommend it. It would be immoral for you to marry for the following reasons . . . .”
7. Or suppose the lawyer took the case in the 1930s, notwithstanding his own moral, social or political beliefs, and lost. [California’s antimiscegenation law was not held unconstitutional until 1948] Could he have been disciplined for not giving his candid moral, social or political advice? The rule suggests he could. And the holders of the reins of the establishment would have had incentive to punish the deviant lawyer.

**RRC – Model Rule 2.1**  
**E-mails, memos, etc. – Revised (8/24/2009)**

8. Or assume an automobile accident. One driver is arrested for drunk driving. The lawyer could challenge the results of the sobriety tests but believes that drunk driving – or even drinking – is immoral, socially wrong, and politically incorrect. That is the phrase in the second sentence of the black letter rule. Does Comment [2] allow the lawyer not to be a vigorous advocate for the defendant? For example, can he recommend to the accused that he could challenge the results of the breathalyzer test, but he would not recommend it? Instead, he tells the defendant that he was wrong to be driving after leaving the party and should plead guilty in exchange for a negotiated sentence. “Don’t worry about whether the breathalyzer test was accurate. You were wrong, so take some reasonable punishment. Besides, we can get a reasonable sentence in a plea bargain.” Rule 2.1 and its Comments suggest that the lawyer’s moral, social and political beliefs about drunk driving should influence what advice the lawyer gives.
9. Similarly, in some offices in San Francisco the rent control ordinance is more sanctified than the Holy Grail. If a client wants to evict a tenant, and the lawyer thinks he or she found a loophole in the rent control ordinance, and we have adopted Rule 2.1, will the lawyer be disciplined for not advising the client not to evict the tenant, because the tenant is a nice, deserving person?
10. Unfortunately, Mark’s comment about Stan’s objections reinforces my concern. If John Yoo was asked to research whether water boarding can legally be permissible, and he reached an unpopular conclusion, should he be disciplined for giving his candid legal advice?
11. The collection of platitudes in the Comment to the rule do not make this ethical standard palatable as a disciplinary rule. They suggest that a lawyer has a duty to give advice that may be inconsistent with a client’s legal rights and should be disciplined if he or she does not do so. For example, see the last sentence of proposed Comment [3].
12. The reality is that many cases require lawyers to give advice as to which there may not be a “right” decision. If we adopt Model Rule 2.1 and its comments, lawyers may be required or tempted to taint their advice by their own, personal, “moral, economic, social and political” beliefs. When Comment [2] says that correct, technical legal advice is inadequate, it goes on to suggest that moral and ethical considerations should override correct statements of the law. [“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.”]
13. If the lawyer’s moral suasion puts him or her at odds with the client’s position, the lawyer’s duty is not to fudge the lawyer’s advice given to the client. Yet, that is what the comment to Model Rule 2.1 suggests.
14. To me, Model Rule 2.1 does not provide useful guidance to the practitioner and is definitely not an appropriate basis for discipline. We should not adopt it.

**August 24, 2009 Tuft E-mail to RRC:**

I have compared comment [5] to proposed rule 2.1 with the mail ballot version of Rule 1.4 and I believe the comment is consistent with our version of Rule 1.4, particularly Rule 1.4(a)(2). Since the majority voted not to include Model Rule Comments [2] and [3] to Rule 1.4, this comment offers worthwhile guidance in the context advising the client under Rule 2.1.