

**From:** [Dominique Snyder](#)  
**To:** [Difuntorum, Randall](#); [McCurdy, Lauren](#)  
**Cc:** ["Harry Sondheim"](#)  
**Subject:** FW: RRC - 1.2 [3-210] - V.A. - 1/22-23/10 Meeting Materials  
**Date:** Monday, February 08, 2010 10:25:15 AM  
**Attachments:** [RRC - 3-210 \[1-2\] - Rule - DFT5 \(02-05-10\)DS - Cf. to DFT4.3.doc](#)  
[RRC - 3-210 \[1-2\] - Compare - Introduction - DFT3 \(02-05-10\)DS-KEM.doc](#)  
[RRC - 3-210 \[1-2\] - Dashboard - ADOPT - DFT3.1 \(02-05-10\)DS-KEM.doc](#)  
[RRC - 3-210 \[1-2\] - Compare - Introduction - DFT3 \(02-05-10\)DS-KEM - Cf. to DFT2.1.doc](#)  
[RRC - 3-210 \[1-2\] - Rule - DFT5 \(02-05-10\)DS - ANNOT.doc](#)  
[RRC - 3-210 \[1-2\] - Public Comment Chart - By Commenter - DFT4.1 \(02-05-10\)DS-KEM.doc](#)

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Randy and Lauren,

As you can see, Kevin and I have worked on the agenda materials for Rule 1.2. I believe they are ready for submission.

Thanks.

Dom

**From:** Kevin Mohr [mailto:kemohr@charter.net]  
**Sent:** Sunday, February 07, 2010 9:28 PM  
**To:** Dominique Snyder  
**Subject:** Re: FW: RRC - 1.2 [3-210] - V.A. - 1/22-23/10 Meeting Materials

Dom:

I think these can be submitted to Lauren & Randy for inclusion in the agenda materials.

Kevin

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**From:** Dominique Snyder [mailto:snyderlaw@charter.net]  
**Sent:** Sunday, February 07, 2010 11:39 AM  
**To:** 'Kevin Mohr'  
**Subject:** FW: RRC - 1.2 [3-210] - V.A. - 1/22-23/10 Meeting Materials

Kevin,

It all looks fine to me. I noticed an extra period at the end of the commenter chart and have tried deleting it. Hopefully it works.

Should I just send all of this on to Randy and Lauren?

Hope you're having a nice weekend.

Dom

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**From:** Kevin Mohr [mailto:kemohr@charter.net]  
**Sent:** Friday, February 05, 2010 8:54 PM  
**To:** Dominique Snyder  
**Subject:** Re: RRC - 1.2 [3-210] - V.A. - 1/22-23/10 Meeting Materials

Dom:

I've reviewed the documents you sent and made some minor changes. I've also gone ahead and revised the Introduction and Rule & Comment Comparison Chart. Here is what I've attached:

1. Dashboard, Draft 3.1 (2/5/10)DS-KEM. I've highlighted the changes you made in yellow. Note that the correct draft number for the rule itself is 5 and the date is 2/5/10. Drafts take the date on which they are created, not the date of the meeting at which they are considered.
2. Introduction, Draft 3 (2/5/10)DS-KEM. Again, changes are highlighted in yellow.
3. Rule & Comment Comparison Chart, Draft 3 (2/5/10)DS-KEM. Changes highlighted in yellow.
4. Rule, Draft 5 (2/5/10)DS, redline, compared to Draft 4.3 (1/11/10), the draft considered at the 1/22-23/10 meeting. I added annotations to the changes you made so we can keep track of them.
5. Rule, Draft 5 (2/5/10)DS, clean annotated.
6. Public Comment Chart, Draft 4.1 (2/5/10)DS-KEM. I accepted the redline changes you made in the draft you sent me and highlighted them in yellow.

I think that this covers everything that needs to be submitted for circulation to the RRC as a whole. Please let me know if you have any questions. Thanks,

Kevin

Dominique Snyder wrote:

I think I have the Dashboard finished. There was only the addition of the Penal Code reference. Do I have the number of the draft correct?

Dom

**From:** Kevin Mohr [<mailto:kemohr@charter.net>]  
**Sent:** Tuesday, January 12, 2010 12:02 PM  
**To:** Difuntorum, Randall  
**Cc:** Dominique Snyder; McCurdy, Lauren; Lee, Mimi  
**Subject:** Re: RRC - 1.2 [3-210] - III.A.

Greetings:

If it's not too late, I've attached draft 2.1 (1/12/10) of the Dashboard, w/ footer inserted. Thanks,

Kevin

Difuntorum, Randall wrote:  
Dom:

We'll add a post-public comment redline to the materials (comparing the version that was distributed for public comment with the latest version DFT 4.3). This will allow the Commission members to see what is being recommended apart from the comparison to MR 1.2 that is found in the chart. -Randy D.

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**From:** Dominique Snyder [<mailto:snyderlaw@charter.net>]  
**Sent:** Monday, January 11, 2010 11:42 AM  
**To:** Difuntorum, Randall; 'Kevin Mohr'  
**Cc:** McCurdy, Lauren; Lee, Mimi  
**Subject:** RE: RRC - 1.2 [3-210] - III.A.

Randy,

I'm fine with this - I only left the redline so that you could see what I had done. Unless Kevin thinks

we need some further revision, it appears ready to go. Thanks for everything.

Dom

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**From:** Difuntorum, Randall [<mailto:Randall.Difuntorum@calbar.ca.gov>]  
**Sent:** Monday, January 11, 2010 11:37 AM  
**To:** Dominique Snyder; Kevin Mohr  
**Cc:** McCurdy, Lauren; Lee, Mimi  
**Subject:** RE: RRC - 1.2 [3-210] - III.A.

Dom & Kevin:

Attached please find the following slightly revised Rule 1.2 documents. Unless I hear otherwise, these documents will be used for the agenda.

1. CLEAN RULE DRAFT 4.3 (01-11-10). I revised the clean version to add a missing closed parenthesis in Cmt.[1] and to correct some spacing issues probably caused by the redlining. I also removed all redline and strikeout markings as this version is designated as a “clean” version. I numbered the draft as “4.3.”
2. ABA MODEL RULE COMPARISON EXPLANATION CHART. I implemented and cleaned-up all of the my edits that Dom accepted on Friday (I deleted the CAPS text, highlighting etc. . . .). I numbered the chart as “3.2.”
3. INTRODUCTION. I updated the notation to indicate that this Introduction applies to Draft 4.3 of the rule. I numbered the revised Introduction as “3.2.”
4. PUBLIC COMMENTER CHART. I made some minor formatting changes to adjust the alignment of the notations in the “Rule Paragraph” column. I deleted the highlighting. I numbered the chart as “3.1.”

For the Dashboard, I don’t think there are any edits at this time, so for the agenda we will use the attached version where the only change is to the caption that now refers to Draft 4.3 of the rule.

That’s it. –Randy D.

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**From:** Dominique Snyder [<mailto:snyderlaw@charter.net>]

**Sent:** Monday, January 11, 2010 10:58 AM

**To:** Difuntorum, Randall; 'Kevin Mohr'

**Subject:** FW: RRC - 1.2 [3-210] - III.A.

Randy & Kevin,

I've now added a redline revision to the Introduction. Is this everything with the prior documents? I don't want to hold you up.

Dom

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**From:** Dominique Snyder [<mailto:snyderlaw@charter.net>]

**Sent:** Sunday, January 10, 2010 6:15 PM

**To:** 'Difuntorum, Randall'

**Subject:** FW: RRC - 1.2 [3-210] - III.A.

Randy,

As we discussed on Friday, I'm fine with your edits. Can you let me know if you have everything I need to submit for Monday? Kevin cleaned up my draft of the Public Commenter chart but I have added my comments to it regarding "written" consent consistent with Harry's email. I've also attached the Clean version of 1.2.

Let me know what else I need to do. Thanks.

Dom

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**From:** Kevin Mohr [<mailto:kemohr@charter.net>]

**Sent:** Friday, January 08, 2010 10:38 AM

**To:** Ellen R. Peck

**Cc:** Dominique Snyder; Mark Tuft; Harry Sondheim; Randall Difuntorum; Lauren McCurdy; Kevin Mohr  
G

**Subject:** Re: RRC - 1.2 [3-210] - III.A.

Ellen:

I agree with your suggestion, see, e.g., Bird concurrence in Blanton, 38 Cal.3d 396, 411 (The right to trial by jury, in both civil and criminal matters, is "a basic and fundamental part of our system of jurisprudence." [citations omitted].) and have inserted it in the attached Draft 4.2 (1/8/10). Thanks,

Kevin

Ellen R. Peck wrote:

Kevin: I like what you have done----but just have a quick question before I send out my approval.

I agree that in a criminal case, the lawyer must abide by the client's decision re putting the client on as a witness and that in a civil case, a lawyer can refuse to put the potentially perjuring client on the witness stand. \*But in a civil case, isn't the client's decision for a jury trial a decision only the client can make???????

If so, should the words "in a criminal case" be moved, for example to read:

\*The lawyer shall abide by the client's decision whether to waive jury trial and, in a criminal case, whether the client will testify.

If I am wrong, then let me know and I will approve your draft forthwith.

All the best, Ellen

Kevin Mohr wrote:

Greetings:

I made several changes to the draft Dom circulated and attached revised draft 4.1 (1/8/10):

1. In paragraph (a), I've specified that the last sentence applies only in criminal cases.
2. Some formatting changes to the citation in Comment [1].
3. Substitute "lawyer" for "attorney" in Comment [7] and added to the footnote the fact that the RRC previously had voted not to include a citation to *Nichols v. Keller* but that the drafters are recommending inclusion of the concept of the deleted sentence in light of OCTC's comment.
4. I've also deleted the brackets around the x-references to Rule 1.4, as 1.4 has been adopted by the BOG.

Please let me know if you have any questions. Thanks,

Kevin

Dominique Snyder wrote:

Fellow Drafters,

Attached is a proposed revised Rule 1.2. I have read the materials and spoken with Kevin. Much of the public comment simply urges the RRC to adopt the minority view. Since the majority has voted, I cannot recommend this overwhelming revision.

However, there are a few things that may be adjusted.

1. In response to comments by Michael's Judge, the California Public Defenders Association and others, I have included a reference and revision consistent with Penal Code section 1018.
2. Several comments (including OCTC) suggest that *\*/written/\** consent be required. Perhaps the RRC would like to revisit this but I have not included such a drastic revision in the absence of a vote by the RRC. Nevertheless, we may wish to flag it for reconsideration.
3. OCTC has raised the issue of the */Valinotti/* case and would like us to state that "limited scope representations are not permitted unless allowed by law." However, I think this misstates the view of the Supreme Court's Presiding Justice Ronald George and the Judicial Council as I understand it. Limited scope is an Access to Justice issue and it is to be encouraged unless it is specifically prohibited - a fundamentally different approach to the issue. Accordingly, I do not recommend this shift in the limited scope section, and I doubt that it would be approved by the Supreme Court or the Board of Governors. However, I have included a reference to */Janik v. Rudy, Exelrod, & Zieff /*(2004) 119 Cal App. 930, 940 recommended by OCTC since I think it provides guidance on the issue.
4. Some of the other comments seem to express general objections to the ABA language. LACBA objects to the rule in its entirety, or alternatively, proposes changes which have already been considered and the RRC has voted in this regard.

I look forward to any feedback that you can provide. I plan to get this out by the deadline on Monday.

My thanks, as always, to Kevin.

Dom

Dominique Snyder

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# Proposed Rule 1.2 [n/a]

## “Scope of Representation and Allocation Of Authority Between Client and Lawyer”

(Draft #5, 2/5/10)

**Summary:** This rule states a requirement that a lawyer abide by a client’s decisions concerning the objective of the representation and that a lawyer obtain client consent to any limited scope representation. It also provides that a lawyer’s representation does not constitute an endorsement of the client’s views or activities and prohibits a lawyer from counseling or assisting a client’s criminal or fraudulent conduct.

### Comparison with ABA Counterpart

Rule	Comment
<input checked="" 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 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

Rules 3.36 – 3.37 and 5.70 – 5.71 of the California Rules of Court

Statute

Bus. & Prof. Code § 6104; **Penal Code § 1018**

Case law

*Blanton v. Womancare Inc.* (1985) 38 Cal.App.3d 396

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

- Other Primary Factor(s)

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

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

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

Vote (see tally below)

Favor Rule as Recommended for Adoption   9  

Opposed Rule as Recommended for Adoption   0  

Abstain   0  

Approved on Consent Calendar

Approved by Consensus

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

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Minority Position Included on Model Rule Comparison Chart:  Yes  No

(See Introduction and Explanation of Changes for paragraph (a) in the Model Rule comparison chart.)

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

See the Introduction and Explanation of Changes for paragraph (a) of the proposed Rule in the Model Rule comparison chart.

Not Controversial

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 1.2\* Scope Of Representation And Allocation Of Authority Between Client And Lawyer

(Draft rule ~~September 2009~~ February 2010  
~~to be considered for~~ following consideration of public comment)

### *INTRODUCTION:*

Proposed Rule 1.2 largely tracks Model Rule 1.2. There are only two differences between the black letter of the Model Rule and the proposed Rule. First, a clause has been added to paragraph (a) in recognition that in certain situations, a lawyer's consent to a guilty plea is required. Second, ~~is found in~~ paragraph (d), which has been divided into two subparagraphs for clarity, with subparagraph (d)(1) stating the general prohibition and subparagraph (d)(2) clarifying what a lawyer is permitted to do in providing counsel to the client.

The comments for paragraphs (a) through (c) (Comments [1]-[8]) closely follow the Model Rule comments, with citations to seminal California authority added. In particular, a reference has been added in Comment [8] to California Rules of Court, Rules 3.35-3.37 (limited scope representation rules applicable in civil matters generally), and 5.70-5.71 (limited scope representation rules applicable in family law matters), implemented to promote access to justice. The comments accompanying paragraph (d) (Comments [9]-[12]), which were prepared in conjunction with the Commission's consideration of proposed Rule 1.13 ("Organization as Client") have been substantially revised to provide better guidance to lawyers in providing counsel to clients.

*Minority.* A minority of the Commission objects on the ground that the Rule is not suitable as a disciplinary rule. See Explanation of Changes for paragraph (a).

*Variation in Other Jurisdictions.* Most jurisdictions have made minor changes to Model Rule 1.2. At least four states (Maine, Missouri, New Hampshire, and Wyoming) have enhanced MR 1.2(c), limiting the scope of representation, to encourage lawyers to provide such services, thereby promoting the access to justice. See "Selected State Variations," Model Rule 1.2, from Gillers, Simon & Perlman, REGULATION OF LAWYERS: STATUTES AND STANDARDS (2009), attached.

\* Proposed Rule 1.2, ~~Draft 3 (8/31/09)~~ Draft 5 (2/5/10). Redline/strikeout showing changes to the ABA Model Rule.



<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.</p>	<p>(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. <del>In</del> <u>Except as otherwise provided by law</u> <del>in</del> a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.</p>	<p>Paragraph (a) is <b>substantially similar</b> to Model Rule 1.2(a), <b>except the last sentence has been revised to recognize that, at least in California, there are certain situations under which a lawyer's consent to a guilty plea is required. See Penal Code § 1018. See also Comment [1].</b></p> <p><u>Minority.</u> A minority of the Commission objects to the Rule on the ground that, although it might be appropriate as a statement of hortatory principles, it is wrong as a disciplinary rule and will conflict with lawyers' duties to their clients, both constitutional and statutory. The minority identifies a fundamental problem in that there is no clear distinction between the "objectives" and the "means" of representation. For example, in a criminal case, the accused has a constitutional right to have the complaining witness cross-examined. If we characterize the decision about whether to cross-examine that witness as "means" and therefore within the dominion of the lawyer, we deprive the accused of a fundamental Constitutional right. Denial of cross-examination of a witness without a waiver by the client is ". . . a constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." <i>Brookhart v. Janis</i>, 384 U.S. 1, 3 (1966). A rule of professional conduct should not deprive a client of a Constitutional right. The majority notes that the rule does not countenance such conduct by the lawyer. As explained in Comment [1], decisions concerning a client's "substantial rights" are within the province of the client. The rule does not require a lawyer to ignore the client's interests in making decisions about how to conduct a case; rather, it emphasizes that the lawyer must be sensitive to the client's</p>

\* Proposed Rule 1.2, **Draft 5 (2/5/10)**. Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>rights and interests.</p> <p>The minority also suggests that, even if there were a valid distinction between “objectives” and “means,” as to many “means,” the client should be able to instruct the lawyer. Again, the rule provides for exactly that outcome. See Comment [1].</p>
<p>(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.</p>	<p>(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.</p>	<p>Paragraph (b) is identical to Model Rule 1.2(b).</p>
<p>(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.</p>	<p>(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.</p>	<p>Paragraph (c) is identical to Model Rule 1.2(c).</p>
<p>(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.</p>	<p>(d) <u>(1)</u> A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, <del>or</del> fraudulent, <u>or a violation of any law, rule, or ruling of a tribunal.</u></p> <p><u>(2) Notwithstanding paragraph (d),</u> <del>but</del> a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or</p>	<p>Paragraph (d) is based on Model Rule 1.2(d), retaining both its substance and language. The single Model Rule paragraph has been split into two subparagraphs for clarity: subparagraph (d)(1) sets forth the general prohibition and subparagraph (d)(2) clarifies what the lawyer is permitted to do.</p> <p>In addition, the phrase “violation of any law, rule or ruling of a tribunal” is added to the scope of the rule for greater protection of the public and the fair administration of justice.</p>

<p align="center"><u>ABA Model Rule</u></p> <p><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>assist a client to make a good faith effort to determine the validity, scope, meaning or application of <del>the</del> <a href="#">law, rule, or ruling of a tribunal</a>.</p>	

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p><b>Allocation of Authority between Client and Lawyer</b></p> <p>[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.</p>	<p><b>Allocation of Authority between Client and Lawyer</b></p> <p>[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. <a href="#">See e.g. Penal Code section 1018. A lawyer is not authorized merely by virtue of the lawyer's retention by a client, to impair the client's substantial rights or the client's claim itself. <i>Blanton v. Womanicare, Inc.</i> (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156]. Accordingly, <del>the</del> the decisions specified in paragraph (a), such as whether to settle a civil matter <a href="#">or waive a jury trial in a civil matter</a>, must also be made by the client. See Rule 1.4(a)(2) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation, <a href="#">provided the lawyer does not violate Business and Professions Code section 6068(e) or Rule 1.6.</a></a></p>	<p>Comment [1] is based on Model Rule 1.2, cmt. [1] but makes <b>five</b> changes to conform the comment to California law.</p> <p><b>First, as a specific example of "limits imposed by law and the lawyer's professional obligations," the comment includes a reference to Penal Code § 1018, which provides: "No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received without the consent of the defendant's counsel."</b></p> <p>Second, it adds language and a citation to well-settled California authority, <i>Blanton v. Womanicare, Inc.</i>, concerning the allocation of authority between lawyer and client.</p> <p><b>Third, it recognizes that in California, the authority under the California Constitution to waive a jury trial in a civil matter resides in the client.</b></p> <p>Fourth, it substitutes a cross-reference to proposed Rule 1.4(c), which expressly sets forth a lawyer's communication duties concerning settlement offers. Rule 1.4(c) carries forward current rule 3-510, which itself conforms to legislative policy in Bus. &amp; Prof. Code § 6103.5.</p> <p>Finally, Comment [1] clarifies that acting with the client's implied</p>

<p align="center"><b><u>ABA Model Rule</u></b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
		<p>authority does not include implied authority to disclose client confidential information protected by Bus. &amp; Prof. Code section 6068(e) or rule 1.6 of these rules. By clarifying that implied authorization does not include implied disclosure of confidential information, this provides greater protection to consumers of legal services and conforms the rule to current California law and proposed Rule 1.6.</p>
<p>[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule</p>	<p>[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule</p>	<p>Comment [2] is identical to Model Rule 1.2, cmt. [2], except that the specific reference to Model Rule 1.16(b)(4) has been deleted because the Commission recommends not adopting that subparagraph. Model Rule 1.16(b)(4) permits a lawyer to withdraw from representing a client if: "(4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the employment effectively." The Commission's recommended drafting of Rule 1.16 increases client protection by narrowing a lawyer's right to withdraw from a representation. Consequently, the Comment now generally points the lawyer to proposed Rule 1.16(b), which governs permissive withdrawal from the representation.</p>

<p align="center"><b>ABA Model Rule</b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Commission's Proposed Rule</b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p>1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).</p>	<p>1.16(b)<del>(4)</del>. Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).</p>	
<p>[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.</p>	<p>[3] At the outset of, <u>or during</u> a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.</p>	<p>Comment [3] is identical to MR 1.2, cmt. [3], except that it clarifies that a client may authorize the lawyer to take specific action at any time during the representation.</p>
<p>[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.</p>	<p>[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.</p>	<p>Comment [4] is identical to MR 1.2, cmt. [3].</p>
<p><b>Independence from Client's Views or Activities</b></p> <p>[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.</p>	<p><b>Independence from Client's Views or Activities</b></p> <p>[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.</p>	<p>Comment [5] is identical to MR 1.2, cmt. [5]. It is consistent with legislative policy in Bus. &amp; Prof. Code § 6068(h), which provides it is the duty of a lawyer: "(h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed."</p>

<p align="center"><b>ABA Model Rule</b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Commission's Proposed Rule</b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p><b>Agreements Limiting Scope of Representation</b></p> <p>[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.</p>	<p><b>Agreements Limiting Scope of Representation</b></p> <p>[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as <del>repugnant or</del> imprudent.</p>	<p>Comment [6] is nearly identical to Model Rule 1.2, cmt. [6], the only change being the deletion of "repugnant," a term found in Model Rule 1.16(b)(4), a provision the Commission recommends not adopting. See Explanation of Changes, Comment [2], above.</p>
<p>[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement</p>	<p>[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement</p>	<p>Comment [7] is <b>nearly</b> identical to Model Rule 1.2, cmt. [7]. <b>However, a sentence has been added at the end of the comment to alert lawyers that they may be obligated to inform clients of legal problems that fall outside the scope of representation. See, e.g., Nichols v. Keller (1993) 19 Cal.Rptr.2d 601.</b></p>

<p align="center"><b>ABA Model Rule</b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Commission's Proposed Rule</b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p>for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.</p>	<p>for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1. <u>Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent legal problems outside the scope of representation.</u></p>	
<p>[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.</p>	<p>[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6. <u>See also California Rules of Court, Rules 3.35 -3.37 (limited scope rules applicable in civil matters generally), and 5.70-5.71 (limited scope rules applicable in family law matters).</u></p>	<p>Comment [8] is based on Model Rule 1.2, cmt. [8] and is identical, except that references to the California Rules of Court on limited scope representation have been added to apprise lawyers of these important provisions for access to justice.</p>
<p><b>Criminal, Fraudulent and Prohibited Transactions</b></p> <p>[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the</p>	<p><b>Criminal, Fraudulent and Prohibited Transactions</b></p> <p>[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. <del>This prohibition or to violate any rule, however law, or ruling of a tribunal. However, this Rule</del> does not <del>preclude the prohibit a</del> lawyer from giving <del>an honest a good faith</del> opinion about the <del>actual foreseeable</del> consequences <del>that appear likely to result from of</del> a client's <u>proposed</u> conduct. Nor</p>	<p>Comment [9] is based on Model Rule 1.2, cmt. [9], but adds language primarily to conform to and explain the added scope of proposed paragraph (d).</p> <p>Sentence 1 adds the language of the expanded scope of proposed paragraph (d) by adding "or to violate any rule, law or ruling of a tribunal."</p>

<p align="center"><b>ABA Model Rule</b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Commission's Proposed Rule</b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p>course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.</p>	<p>does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.</p>	<p>Sentence 2 substitutes "prohibit" for "preclude" to clarify that the prohibition is mandatory. It substitutes "good faith" for "honest" to change from the subjective standard to an objective standard. The words "forseeable consequences of a client's proposed conduct" have been substituted for "actual consequences that appear likely to result from a client's conduct" for the sake of clarification, brevity and to create an objective rather than subjective standard.</p>
<p>[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.</p>	<p>[10] <del>When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The prohibition in paragraph (d)(1) applies whether or not the client's conduct has already begun and is continuing. The lawyer is required to avoid assisting the client, for example, by drafting a lawyer may not draft or delivering deliver documents that the lawyer knows are fraudulent or by suggesting; nor may the lawyer counsel</del> how the wrongdoing might be concealed. <del>A</del> The lawyer may not continue assisting a client in conduct that the lawyer originally <del>supposed</del> believed was legally proper but <del>then</del> later discovers is criminal or, fraudulent. <del>The lawyer must, therefore, withdraw from or the representation violation of any rule, law, or ruling of a tribunal. In any event, the lawyer shall not violate his or her duty of protecting all confidential information as provided in Business &amp; Professions Code section 6068(e)(1). When a lawyer has been retained with respect to client conduct described in paragraph (d)(1), the lawyer shall limit his or her actions to those that appear to the lawyer to be in</del></p>	<p>Although the concepts contained in Model Rule 1.2, cmt. [10] have been retained, the comment has been redrafted to remove ambiguity and to create a brighter line for lawyer guidance and public protection.</p> <p>Sentence 1 of the Model Rule comment has been stricken because it provides no guidance (i.e., telling a lawyer that a situation is delicate provides no guidance concerning conduct). Substituted sentence 1 provides guidance by clarifying that a lawyer must comply with subparagraph (d)(1) regardless of the temporal status of the client's conduct.</p> <p>Sentence 2 strikes language creating ambiguity and clarifies that a lawyer may not engage in the conduct described.</p> <p>Sentence 3 substitutes "believed" for "supposed" and "later" for "then" to removed ambiguity and to conform with the proposed black letter rule.</p> <p>Sentence 4 has been added to conform the Comment to statutory duties of confidentiality.</p>

<p align="center"><b>ABA Model Rule</b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Commission's Proposed Rule</b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
	<p><del>the best lawful interest</del> of the client <del>in, including counseling the matter. See Rule 1.16(a) client about possible corrective or remedial action.</del> In some cases, <del>withdrawal alone might be insufficient. It may be necessary for the lawyer</del> <u>lawyer's response is limited to give notice of the fact of withdrawal</u> <u>lawyer's right and, where appropriate, duty to disaffirm any opinion, document, affirmation</u> <u>resign or the like.</u> <u>See withdraw in accordance with Rule 4.1.16.</u></p>	<p>Sentence 5 has been added to clarify that the lawyer's duties are consistent with California law.</p> <p>Sentence 6 retains the Model Rule Comment concept of withdrawal but clarifies that the option may be mandatory or permissive, depending upon the circumstances.</p> <p>The last sentence of the Model Rule Comment concerning disaffirmation of "any opinion, document, affirmation or the like," has been deleted to conform to California policies of confidentiality, which do not permit "noisy" withdrawals.</p>
<p>[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.</p>	<p><del>[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.</del></p>	<p>Model Rule 1.2, cmt. [11] has been stricken because it is ambiguous and may imply a relationship with beneficiaries that is not consistent with California law. For example, a lawyer representing a trustee generally has no duties or special obligations to the beneficiaries of a trust.</p>
<p>[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental</p>	<p><del>[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute, law, rule or regulation of a tribunal. Determining the</del></p> <p><del>(2) authorizes</del> <u>applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking</u> <u>assist a criminal defense incident</u> <u>client to make a general retainer for legal services</u> <u>good faith effort to a lawful enterprise.</u> <u>The last clause of paragraph (d) recognizes that determining</u> <u>determine</u> the validity, <u>scope, meaning or interpretation</u> <u>application</u> of a <u>statute, law, rule or regulation</u> <u>ruling of a tribunal.</u> <u>Determining the</u></p>	<p>Although Comment [11] retains the concepts contained in Model Rule 1.2, cmt. [12], the Model Rule comment has been substantially revised to provide better guidance to lawyers, and thus better protection to client's, concerning the scope of sub paragraph (d)(2)'s permitted conduct. In particular, in the last two sentences the revised comment expands on the last clause of subparagraph (d)(2), providing guidance to lawyers whose clients intend to engage in civil disobedience.</p>

<p align="center"><b>ABA Model Rule</b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Commission's Proposed Rule</b></p> <p align="center"><b>Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p>authorities.</p>	<p><u>validity, scope, meaning or application of a law, rule, or ruling of a tribunal in good faith</u> may require a course of action involving disobedience of the <del>statute</del><u>law, rule, or regulation</u><del>ruling of a tribunal,</del> or of the <del>interpretation</del><u>meaning</u> placed upon it by governmental authorities. <u>Paragraph (d)(2) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes to be unjust.</u></p>	
<p>[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).</p>	<p><del>[13]</del><u>[12]</u> If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by <del>the</del><u>these</u> <del>Rules of Professional Conduct</del> or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(<del>5</del><u>6</u>).</p>	<p>Comment [12] is based on Model Rule 1.2, cmt. [13]. The only changes are to conform to California rules style and to correct a cross-reference.</p>



## Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise expressly provided by law,<sup>1</sup> in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, ~~the lawyer shall abide by the client's decision~~ whether to waive jury trial and, ~~in a criminal case,~~ whether the client will testify.<sup>2</sup>
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- (d) (1) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.
- (2) Notwithstanding paragraph (d)(1), a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law, rule, or ruling of a tribunal.

### Comment

#### Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. See e.g. Penal Code section 1018. ~~(“No plea of guilty of a felony for which the maximum punishment is death or life without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall~~

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<sup>1</sup> [RRC Action: Deletion of comma after “law” deemed approved. See 1/22-23/10 KEM Meeting Notes, III.A., at ¶. 1.a.](#)

<sup>2</sup> [RRC Action: At the 1/22-23/10 meeting, the RRC voted 10-0-0 to retain the opening clause of the penultimate sentence of paragraph \(a\), but to restore the Model Rule single sentence approach and address civil jury trial waivers in a comment. See 1/22-23/10 KEM Meeting Notes, III.A., at ¶. 4.a.](#)

**RRC – Rule 1.2 [3-210]**  
**Rule – Draft 5 (2/5/10) – COMPARED TO DFT 4.3 (1/11/10)**  
**February 26-27, 2010 Meeting; Agenda Item V.A.**

~~that plea be received without the consent of the defendant's counsel.”~~<sup>3</sup> A lawyer is not authorized merely by virtue of the lawyer's retention by a client, to impair the client's substantial rights or the client's claim itself. *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156]. Accordingly, the decisions specified in paragraph (a), such as whether to settle a civil matter or waive a jury trial in a civil matter,<sup>4</sup> must also be made by the client. See Rule 1.4(c) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation, provided the lawyer does not violate Business and Professions Code section 6068(e) or Rule 1.6.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

### **Independence from Client's Views or Activities**

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval.

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<sup>3</sup> [RRC Action: Deletion of description of Penal Code § 1018 deemed approved. See 1/22-23/10 KEM Meeting Notes, III.A., at ¶. 2.a.](#)

<sup>4</sup> [See footnote 2.](#)

By the same token, representing a client does not constitute approval of the client's views or activities.

### **Agreements Limiting Scope of Representation**

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. [See Rule 1.1.](#) Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent legal problems outside the scope of representation.<sup>5</sup> ~~See Rule 1.1.~~

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6. See also California Rules of Court, Rules 3.35 -3.37 (limited scope rules applicable in civil matters generally), and 5.70 -5.71 (limited scope rules applicable in family law matters).

### **Criminal, Fraudulent and Prohibited Transactions**

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud or to violate any rule, law, or ruling of a tribunal. However, this Rule does not prohibit a lawyer from giving a good faith opinion about the foreseeable consequences of a client's proposed conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting

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<sup>5</sup> [RRC Action: At the 1/22-23/10 meeting, a motion to delete the last sentence of Comment \[7\] was defeated by a 5-6-0 vote. See 1/22-23/10 KEM Meeting Notes, III.A., at ¶. 3A.](#)

**RRC – Rule 1.2 [3-210]**  
**Rule – Draft 5 (2/5/10) – COMPARED TO DFT 4.3 (1/11/10)**  
**February 26-27, 2010 Meeting; Agenda Item V.A.**

an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] The prohibition in paragraph (d)(1) applies whether or not the client's conduct has already begun and is continuing. For example, a lawyer may not draft or deliver documents that the lawyer knows are fraudulent; nor may the lawyer counsel how the wrongdoing might be concealed. The lawyer may not continue assisting a client in conduct that the lawyer originally believed was legally proper but later discovers is criminal, fraudulent, or the violation of any rule, law, or ruling of a tribunal. In any event, the lawyer shall not violate his or her duty of protecting all confidential information as provided in Business & Professions Code section 6068(e)(1). When a lawyer has been retained with respect to client conduct described in paragraph (d)(1), the lawyer shall limit his or her actions to those that appear to the lawyer to be in the best lawful interest of the client, including counseling the client about possible corrective or remedial action. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16.

[11] Paragraph (d)(2) authorizes a lawyer to counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law, rule or ruling of a tribunal. Determining the validity, scope, meaning or application of a law, rule, or ruling of a tribunal in good faith may require a course of action involving disobedience of the law, rule, or ruling of a tribunal, or of the meaning placed upon it by governmental authorities. Paragraph (d)(2) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes to be unjust.

[12] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by these Rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(6).

## Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law<sup>1</sup> in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.<sup>2</sup>
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- (d) (1) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.
- (2) Notwithstanding paragraph (d)(1), a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law, rule, or ruling of a tribunal.

### Comment

#### Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. See e.g. Penal Code section 1018.<sup>3</sup> A lawyer is not authorized merely by virtue of the lawyer's retention by a client, to impair the client's

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<sup>1</sup> **RRC Action:** Deletion of comma after "law" deemed approved. See 1/22-23/10 KEM Meeting Notes, III.A., at ¶. 1.a.

<sup>2</sup> **RRC Action:** At the 1/22-23/10 meeting, the RRC voted 10-0-0 to retain the opening clause of the penultimate sentence of paragraph (a), but to restore the Model Rule single sentence approach and address civil jury trial waivers in a comment. See 1/22-23/10 KEM Meeting Notes, III.A., at ¶. 4.a.

<sup>3</sup> **RRC Action:** Deletion of description of Penal Code § 1018 deemed approved. See 1/22-23/10 KEM Meeting Notes, III.A., at ¶. 2.a.

substantial rights or the client's claim itself. *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].] Accordingly, the decisions specified in paragraph (a), such as whether to settle a civil matter or waive a jury trial in a civil matter,<sup>4</sup> must also be made by the client. See Rule 1.4(c) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation, provided the lawyer does not violate Business and Professions Code section 6068(e) or Rule 1.6.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

### **Independence from Client's Views or Activities**

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

### **Agreements Limiting Scope of Representation**

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<sup>4</sup> See footnote 2.

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1. Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent legal problems outside the scope of representation.<sup>5</sup>

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6. See also California Rules of Court, Rules 3.35 -3.37 (limited scope rules applicable in civil matters generally), and 5.70 -5.71 (limited scope rules applicable in family law matters).

### **Criminal, Fraudulent and Prohibited Transactions**

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud or to violate any rule, law, or ruling of a tribunal. However, this Rule does not prohibit a lawyer from giving a good faith opinion about the foreseeable consequences of a client's proposed conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] The prohibition in paragraph (d)(1) applies whether or not the client's conduct has already begun and is continuing. For example, a lawyer may not draft or deliver documents that the lawyer knows are fraudulent; nor may the lawyer counsel how the

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<sup>5</sup> **RRC Action:** At the 1/22-23/10 meeting, a motion to delete the last sentence of Comment [7] was defeated by a 5-6-0 vote. See 1/22-23/10 KEM Meeting Notes, III.A., at ¶. 3A.

wrongdoing might be concealed. The lawyer may not continue assisting a client in conduct that the lawyer originally believed was legally proper but later discovers is criminal, fraudulent, or the violation of any rule, law, or ruling of a tribunal. In any event, the lawyer shall not violate his or her duty of protecting all confidential information as provided in Business & Professions Code section 6068(e)(1). When a lawyer has been retained with respect to client conduct described in paragraph (d)(1), the lawyer shall limit his or her actions to those that appear to the lawyer to be in the best lawful interest of the client, including counseling the client about possible corrective or remedial action. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16.

[11] Paragraph (d)(2) authorizes a lawyer to counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law, rule or ruling of a tribunal. Determining the validity, scope, meaning or application of a law, rule, or ruling of a tribunal in good faith may require a course of action involving disobedience of the law, rule, or ruling of a tribunal, or of the meaning placed upon it by governmental authorities. Paragraph (d)(2) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes to be unjust.

[12] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by these Rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(6).

**Rule 1.2 Scope of Representation.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
7	California Attorneys for Criminal Justice ("CACJ")	M		1.2(a)	Our proposed modification would be to add the following language to paragraph (a) at the end/following sentence: A lawyer shall abide by a client's decision whether to settle a matter, "to the extent it is not in conflict with statutory or constitutional law."	The Commission agreed in principle and modified the last sentence of paragraph (a) as follows:  <b>Except as otherwise provided by law in</b> a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.  The Commission also added a reference to Penal Code § 1018 in Comment [1].
4	California Public Defenders Association ("CPDA")	M		Cmt. [2]	CPDA's primary concern is with the Proposed Rule as developed in Proposed Comment [2].  CPDA proposes that to avoid a potential conflict with established legal practice, the second and third sentence in Comment [2] should be deleted. (Proposed deletion: "Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.")  As noted in the Comment, the rich existing	The Commission disagrees with the deletion of the two sentences in Comment [2], both of which are accurate.  The Commission also disagrees that the Comment to the Rule should be a compendium of the law as developed in the case law. It would be impossible to capture every possible variation.

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

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.2 Scope of Representation.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>record of decisional law clearly defines the responsibility that lawyers have to know and practice legal obligations while respecting the client's goals.</p> <p>To this end, CPDA believes that it would be helpful if the Comment included references to the most common guidelines provided by established case law. CPDA believes that inclusion of these fundamental decisional references, along with deletion of the two sentences identified above, will clarify the existing ambiguities in the Proposed Rule and Comment.</p>	
3	COPRAC	M		1.2(a)	As to paragraph (a), COPRAC agrees with the minority of the Commission and believes that it is difficult to differentiate between means and objectives. COPRAC also agrees with the minority that the language of section (a) of the rule might be read to conflict with a client's Constitutional and statutory duties to the lawyer's clients. COPRAC also notes that the last sentence of paragraph (a) raises the issue whether the lawyer can waive a jury trial on behalf of a client in a civil case.	The Commission disagrees with COPRAC's comment concerning means and objectives. The typical meaning understood is that objectives are achieved through the means utilized. Comments [1] and [2] provide guidance on this issue.
				1.2(d)	As to paragraph (d), COPRAC objects to the inclusion in paragraph (d)(1) of the proposed rule (modifying paragraph (d) of the corresponding ABA Model Rule) of the phrase referring to "a violation of any law, rule, or	The Commission disagrees. The language cited is carried forward from current rule 3-210.

**Rule 1.2 Scope of Representation.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
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Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt. [9]	<p>ruling of a tribunal.” We believe that such language may subject lawyers to an inappropriate and unnecessarily harsh disciplinary standard. Absent fraud or criminal conduct, COPRAC does not believe such assistance should subject lawyers to possible discipline.</p> <p>Should the above phrase be included in the rule, we recommend a modification to Comment [9] to conform the references to this phrase. The phrase including the added scope is included in the first sentence of Comment [9]. A corresponding reference to the added scope should be included in the second sentence of Comment [9].</p>	The Commission does not understand how adding the phrase, “to violate any rule, law, or ruling of a tribunal,” would clarify the second sentence.
1	Judge, Michael P. Los Angeles County Public Defender	D		1.2(a)	We agree with the concern of the minority of the Commission regarding the intersection of the proposed rule and the provisions of Penal Code Section 1018.	The Commission agrees and has revised the last sentence of paragraph (a). See Response to CACJ, above.
8	Los Angeles County Bar Association (“LACBA”), Professional Responsibility and Ethics Committee	D			<p>We oppose Proposed Rule 1.2 in its entirety because the committee believes that it is not appropriate as a disciplinary rule.</p> <p>Failure to follow the client's objectives may result in a malpractice action or fee dispute, but should not lead to discipline.</p> <p>If Rule is adopted, here are suggested amendments:</p> <p>Last sentence of paragraph (a) should state:</p>	<p>The Commission disagrees with LACBA’s position. The rule not only provides understandable disciplinary standards in paragraphs (a) and (d), the latter of which simply carries forward current rule 3-210, but also provides important guidance to lawyers in their relationships with clients.</p> <p>The Commission did not make the suggested</p>

**Rule 1.2 Scope of Representation.  
[Sorted by Commenter]**

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No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.2(a)	"In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, whether the client will testify, <i>and whether to file an appeal.</i> "	change. The language used is taken from the Model Rule and addresses client's substantial rights that are universally recognized as constitutionally based.
				1.2(d)	We suggest the following changes to 1.2(d): "A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal or fraudulent, <i>but</i> a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of <i>the</i> law."	The Commission did not make the suggested change. First, the Commission determined it was appropriate to carry forward the phrase, "or a violation of any law, rule, or ruling of a tribunal," from current rule 3-210. Second, the Commission concluded that dividing what is currently two sentences in rule 3-210, one stating the general rule and the other the exception, into separate subparagraphs would make the provision clearer.
				Cmt. [1]	We suggest that the following sentence be added to Comment [1]: "Paragraph (a) does not override the rules concerning mandatory or permissive withdrawal."	The Commission did not make suggested change. References to Rule 1.16 (Termination of the Representation) concerning permissive and mandatory withdrawal are already found in Comments [2] and [10], respectively.
9	Office of Chief Trial Counsel ("OCTC"), State Bar of California			1.2(a),(b)	1. OCTC is concerned that paragraphs (a) and (b) of proposed Rule 1.2, although in the Model Rules version, are not rules subject to discipline and thus do not belong in the Rules of Professional Conduct.	1. The Commission disagrees. See Response to LACBA, <a href="#">above</a> .

**Rule 1.2 Scope of Representation.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
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NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.2(c)	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. See <i>In the Matter of Valinoti</i> (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520-521. That may be what Comment [8] is trying to explain, but, it should be specifically in the rule, not just a comment.	2. The Commission disagrees. OCTC's proposals regarding paragraph (c) and comment [8] do not appear to reflect the views repeatedly expressed by Supreme Court Justice George, the Judicial Council, the Access to Justice Commission and others. Limited scope representation is not prohibited unless there is an exception allowing for such representation. Rather, it is permitted unless specifically prohibited or other duties have been imposed. The OCTC's reading of <i>Valinoti</i> appears overbroad and inconsistent with the goal of access to justice. Nevertheless, the Commission agrees with OCTC's suggestion regarding comment [8] and has added to Comment [7] guidance regarding duties attendant to limited scope representation.
				1.2(c)	3. OCTC also believes that the consent in paragraph (c) should be in writing. Given that limited scope representation is the exception, it would be better policy and more enforceable to require that it be in writing.	The Commission disagrees. The Commission voted unanimously to adopt the rule which is consistent with the Board of Governors resolution <b>concerning limited scope representation</b> . It does not appear that limited scope/discrete task representation is an "adverse" interest or "conflict" that necessitates requiring "written" consent. To some extent, all representations have a limit to the scope. For example, someone providing only "ethics advice" limits the scope of the representation to this area and would not necessarily have the expertise to suggest any or all of the civil/procedural implications of the advice given.

**Rule 1.2 Scope of Representation.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
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NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.2(d)	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.	<p>Requiring written consent would operate as an impediment to access to justice. It places a burden on legal services attorneys and attorneys who might be willing to undertake a discrete task for a small fee, if they must also create a writing in every such matter as well. This would have a chilling effect and deter attorneys who may be making little or no money.</p> <p>Public protection will not be compromised since attorneys will have the burden of demonstrating that they have obtained "informed consent" - they may choose the obvious method of a writing - but it should not be <b>subject to</b> discipline if they do not. Other jurisdictions have not included such a requirement.</p> <p>4. The Commission disagrees. Paragraph (d)(2) uses the Model Rule language and provides in part that a lawyer "may counsel or assist a client to make a <i>good faith</i> effort to determine the validity, scope, meaning or application of a law, rule, or ruling of a tribunal." (emphasis added). Whether it is the lawyer who make "takes appropriate steps in good faith" to test the validity of any law, etc., or it is the lawyer who "counsel[s] or assist[s] the client to make a good faith effort" is immaterial. They mean precisely the same thing. If anything, the Model</p>

**Rule 1.2 Scope of Representation.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
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NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmts. [1], [2]	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. 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.	Rule language better reflects that the lawyer may take such steps only with the knowledge and consent of the client.
				Cmt. [8]	6. OCTC believes that Comment 8 needs clarification to make clear that limited scope representations are not permitted unless allowed by law.	5. The Commission disagrees. See Response to COPRAC, above. In addition, the Commission has included a cross-reference to Rule 1.4(a)(2), which requires that a lawyer "reasonably consult with the client about the means by which to accomplish the client's objectives in the representation." The lawyer does not have to consult with the client about every matter related to the representation.  6. See Response #2, above.
				Cmt. [7]	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	The Commission has included the following statement at the end of Comment [7]:  Even where the scope of representation is expressly limited, the lawyer may still have a duty to alert the client to reasonably apparent

**Rule 1.2 Scope of Representation.  
[Sorted by Commenter]**

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No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					client to reasonable apparent legal problems outside the scope of the representation. (See <i>Janik v. Rudy, Exelrod, &amp; Zieff</i> (2004) 119 Cal.App.4 <sup>th</sup> 930, 940.)	legal problems outside the scope of representation. The foregoing should address OCTC's concern.
2	Orange County Bar Association	D		1.2(d)	The OCBA opposes the Commission's proposed Rule 1.2 and supports the adoption of ABA Model Rule 1.2.	The Commission disagrees. The proposed Rule is <b>substantially similar</b> to the Model Rule except for paragraph (d). As explained in the Response to LACBA, above, the Commission revised MR 1.2(d) for two reasons: First, the Commission determined it was appropriate to carry forward the phrase, "or a violation of any law, rule, or ruling of a tribunal," from current rule 3-210. Second, the Commission concluded that dividing what is currently two sentences in rule 3-210, one stating the general rule and the other the exception, into separate subparagraphs would make the provision clearer.
				Comment [5]	The OCBA recommends that Comment [5] be stricken in its entirety.	The Commission disagrees. Comment [5] is identical to MR 1.2, cmt. [5]. It is consistent with legislative policy in Bus. & Prof. Code § 6068(h), which provides it is the duty of a lawyer: "(h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed."
5	San Diego County Bar Association Legal Ethics Committee	A			We approve the new rule in its entirety.	No response necessary.

**Rule 1.2 Scope of Representation.  
[Sorted by Commenter]**

**TOTAL =** \_\_ **Agree =** \_\_  
**Disagree =** \_\_  
**Modify =** \_\_  
**NI =** \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
6	Santa Clara County Bar Association	A		1.2(c)	Approve as proposed with the exception of subsection (c), where "informed consent" should be "informed written consent."	<p>The Commission disagrees. The Commission voted unanimously to adopt the rule which is consistent with the Board of Governors resolution. It does not appear that limited scope/discrete task representation is an "adverse" interest or "conflict" that necessitates requiring "written" consent. To some extent, all representations have a limit to the scope. For example, someone providing only "ethics advice" limits the scope of the representation to this area and would not necessarily have the expertise to suggest any or all of the civil/procedural implications of the advice given.</p> <p>Requiring written consent would operate as an impediment to access to justice. It places a burden on legal services attorneys and attorneys who might be willing to undertake a discrete task for a small fee, if they must also create a writing in every such matter as well. This would have a chilling effect and deter attorneys who may be making little or no money.</p> <p>Public protection will not be compromised since attorneys will have the burden of demonstrating that they have obtained "informed consent" - they may choose the obvious method of a writing - but it should not be discipline if they do not. Other jurisdictions have not included such a requirement.</p>

**Rule 1.2 Scope of Representation.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt. [8]	<p>Add to Comment [8] language that would clarify that county counsel is governed by Government Code 999 et. Seq. which gives them greater authority in limiting the scope of their representation in certain situations such as settlements. Specifically, the following is suggested:</p> <p>“A government lawyer’s authority and control over decisions concerning the representation may, by statute or regulation, be expanded beyond the limits imposed by paragraphs (a) and (c). See for example, Cal. Gov. Code Sections 825; 995; 996.”</p> <p>This language is the same as that used by the District of Columbia in modifying the ABA Model Rule version.</p>	<p>The Commission did not make the requested change. The Commission has revised the Model Rule language from which proposed Comment [8] is derived to add reference to generally-applicable Rules of Court concerning limited scope representation. Moreover, that comment already states that “[a]ll agreements concerning a lawyer’s representation of a client must accord with the Rules of Professional Conduct and other law,” which would include the referenced Government Code sections..</p>