



# The State Bar of California

## **Rule 1.2.1 Advising or Assisting the Violation of Law (Rule Approved by the Supreme Court, Effective November 1, 2018)**

- (a) 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.\*
- (b) Notwithstanding paragraph (a), a lawyer may:
  - (1) discuss the legal consequences of any proposed course of conduct with a client; and
  - (2) 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**

[1] There is a critical distinction under this rule 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. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent\* does not of itself make a lawyer a party to the course of action.

[2] Paragraphs (a) and (b) apply whether or not the client's conduct has already begun and is continuing. In complying with this rule, a lawyer shall not violate the lawyer's duty under Business and Professions Code section 6068, subdivision (a) to uphold the Constitution and laws of the United States and California or the duty of confidentiality as provided in Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6. 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 rules 1.13 and 1.16.

[3] Paragraph (b) authorizes a lawyer to advise a client in good faith regarding the validity, scope, meaning or application of a law, rule, or ruling of a tribunal\* or of the meaning placed upon it by governmental authorities, and of potential consequences to disobedience of the law, rule, or ruling of a tribunal\* that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.

[4] Paragraph (b) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal\* that 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 or invalid.

[5] 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 advise the client regarding the limitations on the lawyer's conduct. (See rule 1.4(a)(4).)

[6] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law. In the event of such a conflict, the lawyer may assist a client in drafting or administering, or interpreting or complying with, California laws, including statutes, regulations, orders, and other state or local provisions, even if the client's actions might violate the conflicting federal or tribal law. If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see rules 1.1 and 1.4).

**NEW RULE OF PROFESSIONAL CONDUCT 1.2.1  
(Former Rule 3-210)  
Advising or Assisting the Violation of Law**

**EXECUTIVE SUMMARY**

In connection with consideration of current rule 3-210 (Advising the Violation of Law) the Commission for the Revision of the Rules of Professional Conduct (“Commission”) has reviewed and evaluated the national standard of ABA Model Rule 1.2 (Advising or Assisting the Violation of Law). The Commission also reviewed relevant California statutes, rules, case law, and ethics opinions relating to the issues addressed by the proposed rules. The evaluation was made with a focus on the function of the rules as disciplinary standards, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. The result of this evaluation is proposed Rule 1.2.1 (Advising or Assisting the Violation of Law).

**Rule As Issued For 90-day Public Comment**

Proposed Rule 1.2.1 carries forward the substance of current rule 3-210 but with additional clarifying language derived from ABA Model Rule 1.2(d) which provides that a lawyer may explain the legal consequences of a client’s proposed course of conduct without running afoul of the rules. This additional language serves as an important public protection as it will assist a lawyer in attempting to dissuade a client from pursuing such a course of conduct. The proposed rule has been further modified by dividing the Model Rule’s single sentence substantive provision into three paragraphs for clarity.

Comment [1] addresses paragraph (c), a new clause being added to current rule 3-210 that assists lawyers by giving them an additional tool to dissuade a client from undertaking a proposed course of action. Given that the clause would be new to the rule, comment [1] explains that lawyers are not given carte blanche to advise clients on how to conduct their affairs in a manner that avoids criminal prosecution.

Comment [2] clarifies that the rule also applies when a client’s conduct has already begun and is continuing. Moreover, the comment explains that a lawyer must comply with his or her duty of confidentiality and that a lawyer’s only recourse if the client persists in illegal conduct may be resignation or withdrawal.

Comment [3] clarifies the application of paragraph (a) by providing interpretive guidance concerning a client’s desire to test the validity of a law, rule, or ruling of a tribunal.

Comment [4] addresses a lawyer’s provision of legal advice and services to a client who contemplates engaging in civil disobedience. The last sentence of the comment provides guidance on the application of the proposed rule.

Comment [5] addresses a lawyer’s obligation to communicate his or her ethical limitations with a client who expects assistance not permitted by the rules.

## **Post-Public Comment Revisions**

After consideration of comments received in response to the initial 90-day public comment period, the Commission revised the text of the rule to use the language of the Model Rule counterpart, Model Rule 1.2(d), but unlike the Model Rule the proposed rule is organized in two main paragraphs ((a) and (b)) and two subparagraphs ((b)(1) and (b)(2)). Paragraph (a) states the general prohibition against counseling a violation of law and paragraph (b) describes conduct that is permitted notwithstanding the general prohibition. The implementation of two subparagraphs in (b) is for clarity because discussion of consequences of a proposed course of conduct is distinct from counseling/assisting a client in a good faith effort to determine the scope or validity of a law. Subparagraph (b)(2) includes language from current California Rule 3-210 that refers to a rule or ruling of tribunal as “law” that can be tested as to its meaning or application.

The Commission also revised the rule comments in response to public comments. First, in Comment [2], the Commission added a reference to a lawyer’s statutory duty to uphold the law (Business and Professions Code § 6068(a)). Comment [2] also includes a non-substantive stylistic revision made to the citation to a lawyer’s duty of confidentiality. Second, a new Comment [6] was added to describe situations where conflicts of law may render it challenging for a lawyer to avoid counseling a federal law violation when the client’s conduct expressly is permitted under state law. A public comment argued in favor of adding an explicit medical marijuana example in the rule but the Commission did not make that change because California laws regulating marijuana cultivation and consumption are subject to change in the near future.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

## **Final Commission Action on the Proposed Rule Following 45-Day Public Comment Period**

After consideration of comments received in response to the additional 45-day public comment period, the Commission combined Comments [3] and [4] to be a single comment numbered as Comment [3], with subsequent comments renumbered accordingly. In the second sentence of the new Comment [3], the word “thus” was added to read: “Paragraph (b) *thus* authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal. . . .”

With these changes, the rule Commission voted to recommend that the Board adopt the proposed rule.

## **Board’s Consideration of the Commission’s Proposed Rule on March 9, 2017**

At its meeting on March 9, 2017, the Board revised the Commission’s final version of the proposed rule. Comment [3] was revised to become two separate comments as follows with other subsequent comments renumbered accordingly:

[3] ~~Determining~~ Paragraph (b) authorizes a ~~A lawyer may~~ advise a client in good faith regarding 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, and of potential consequences to disobedience of the law, rule, or ruling of a tribunal that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.

[4] Paragraph (b) ~~thus also~~ authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal that 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 or invalid.

The above revisions were made by the Board as non-substantive clarifying changes that were reasonably implicit in the 45-day public comment version of the proposed rule. It was observed that these revisions would help eliminate concerns that a lawyer might be required to take affirmative action to determine the validity of a law, for example, by filing a declaratory action, before the lawyer could provide a client with the lawyer's opinion about the validity, scope, meaning or application of a law, rule, or ruling of a tribunal.

The Board adopted proposed rule 1.2.1 at its March 9, 2017 meeting and it was submitted to the Supreme Court for approval on March 30, 2017 as part of a package of comprehensive amendments to rules.

#### **Supreme Court Action (April 11, 2018)**

The Supreme Court did not approve proposed rule 1.2.1 as submitted by the State Bar. The Court issued an order directing the State Bar to consider alternative revisions of the proposed rule provided in an attachment to the Court's order. The Court's order was referred to the Commission for study and a report. Following consideration of the Commission's report, the Board authorized a 45-day public period on two versions of the proposed rule.

#### **Supreme Court Action (May 10, 2018)**

The Supreme Court issued an order approving other proposed rules that were submitted by the State Bar on March 30, 2017. Consistent with Court's order on April 11, 2018, the Court did not approve proposed rule 1.2.1 as submitted by the State Bar on March 30, 2017. The Court amended then current rule 1-120 and adopted it as rule 1.2.1 (Assisting, Soliciting, or Inducing Violations) pending the State Bar's anticipated submission of a modified version of proposed rule 1.2.1 in response to the Court's April 11, 2018 order.

#### **Supreme Court Action (September 26, 2018)**

In response to the Supreme Court's April 11, 2018 order and following consideration of public comments received, the State Bar adopted a further revised version of proposed rule 1.2.1 and submitted it to the Court on August 24, 2018. On September 26, 2018, the Court approved, operative November 1, 2018, this proposed rule without any changes. Set forth below is a redline/strikeout version of rule 1.2.1 showing the language revisions to the version of the rule originally submitted to the Supreme Court on March 30, 2017. (Revised language only appears in Comment [6].)

[6] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law, ~~and, despite~~. In the event of such a conflict, ~~to the lawyer may~~ assist a client in ~~conduct that the lawyer reasonably believes is permitted by~~ drafting or administering, or interpreting or complying with, California laws, including statutes, regulations, orders, and other state or local provisions ~~implementing those laws, even if the client's actions might violate the conflicting federal or tribal law~~. If California law conflicts with federal or tribal law, the lawyer ~~should also advise~~ must inform the client ~~regarding about~~ related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see rules 1.1 and 1.4).

**Rule ~~3-210~~ 1.2.1 Advising or Assisting the Violation of Law  
(Redline Comparison to the California Rule Operative Until October 31, 2018)**

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

- (a) 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.\*
- (b) Notwithstanding paragraph (a), a lawyer may:
- (1) discuss the legal consequences of any proposed course of conduct with a client; and
  - (2) 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.\*

**Discussion**Comment

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

[1] There is a critical distinction under this rule 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. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent\* does not of itself make a lawyer a party to the course of action.

[2] Paragraphs (a) and (b) apply whether or not the client's conduct has already begun and is continuing. In complying with this rule, a lawyer shall not violate the lawyer's duty under Business and Professions Code section 6068, subdivision (a) to uphold the Constitution and laws of the United States and California or the duty of confidentiality as provided in Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6. 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 rules 1.13 and 1.16.

[3] Paragraph (b) authorizes a lawyer to advise a client in good faith regarding the validity, scope, meaning or application of a law, rule, or ruling of a tribunal\* or of the meaning placed upon it by governmental authorities, and of potential consequences to disobedience of the law, rule, or ruling of a tribunal\* that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.

[4] Paragraph (b) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal\* that 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 or invalid.

[5] 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 advise the client regarding the limitations on the lawyer's conduct. (See rule 1.4(a)(4).)

[6] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law. In the event of such a conflict, the lawyer may assist a client in drafting or administering, or interpreting or complying with, California laws, including statutes, regulations, orders, and other state or local provisions, even if the client's actions might violate the conflicting federal or tribal law. If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see rules 1.1 and 1.4).