Rule 2.1 Advisor
(Rule Approved by the Supreme Court, Effective November 1, 2018)

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

Comment

[1] A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

[2] This rule does not preclude a lawyer who renders advice from referring to considerations other than the law, such as moral, economic, social and political factors that may be relevant to the client's situation.

NEW RULE OF PROFESSIONAL CONDUCT 2.1
(No Former Rule)
Advisor

EXECUTIVE SUMMARY

ABA Model Rule 2.1 (Advisor) was not studied by the Commission for the Revision of the Rules of Professional Conduct ("Commission") in time to be included with the Commission's request for public comment authorized by the Board last June. The Commission has now studied Model Rule 2.1, a rule that has no direct California counterpart, as well as relevant case law relating to the issues addressed by this rule. The result of this evaluation is proposed rule 2.1 (Advisor).

Rule As Issued For 45-day Public Comment

Proposed rule 2.1 requires lawyers to exercise independent professional judgment and to render candid advice. The proposed rule adopts the first sentence of ABA Model Rule 2.1 verbatim. It moves the concept incorporated in the second sentence of ABA Model Rule 2.1 to comment [2]. The professional responsibility to exercise independent professional judgment and to render candid advice is recognized as a core duty of a lawyer as evidenced by the adoption of a rule derived from Model Rule 2.1 by every other jurisdiction except California. Adding this rule highlights the importance of these professional responsibility concepts and removes any ambiguity whether the duty of independent professional judgment exists beyond the limited situations regulated by current rules 1-600 (legal service programs) and 3-310(F) (accepting compensation for representation from one other than the client).

As stated above, the blackletter of proposed rule 2.1 provides that in representing a client, a lawyer must exercise independent professional judgment and render candid advice. The Commission has considered but ultimately declined to define or explain the term "independent professional judgment" because capturing all of the situations and nuances in which a lawyer's exercise of independent professional judgment is mandated is more appropriately the subject of an ethics opinion or a treatise.

Comment [1] clarifies that the rule does not impose in every case a duty to initiate investigation of a client's affairs nor give unwanted advice. Initiating such advice is required when doing so appears to be in the client's best interest.

Comment [2] provides that in rendering advice, a lawyer may consider factors other than the law such as moral, economic, and social factors relevant to the client's situation. This concept is a part of the blackletter of ABA Model Rule 2.1 but the Commission has moved it to the Comment [2] of the proposed rule because it merely clarifies the delimits the scope of advice a lawyer may render but does not impose any duty to take include those factors in the lawyer's advice to the client.

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

After consideration of comments received in response to the 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

The Board adopted proposed rule 2.1 at its March 9, 2017 meeting.

Supreme Court Action (May 10, 2018)

The Supreme Court approved the rule as submitted by the State Bar to be effective November 1, 2018.

Rule 2.1 Advisor
(Redline Comparison to the ABA Model Rule)

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

Comment

~~*Scope of Advice*~~

[1] A ~~client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.~~lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

[2] This rule does not preclude a lawyer who renders advice from referring to considerations other than the law, such as moral, economic, social and political factors that may be relevant to the client's situation.

~~[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.~~

~~[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.~~

~~[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.~~

~~*Offering Advice*~~

~~[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.~~