

# Giving Light: A Lawyer's Role as Advisor

by Keith A. Call

A lawyer friend recently told me about his experience buying a used car in a private transaction. He negotiated aggressively and ended up getting a great deal. But in the end, feeling like he had “won” the negotiation was not entirely satisfying. He thought the transaction would have still been “fair” if he had paid an extra \$500 or \$1,000, and he wondered if the seller needed that extra money more than he did. He asked me if I thought he had done the right thing.

One of the most important rules of ethics is probably one you don't know exists, or you have at least forgotten about. It is in the second part of Utah Rule of Professional Conduct 2.1, which provides, “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.**” (emphasis added).

Lawyers wear different hats. Those of us who litigate, try cases, and negotiate deals for our clients usually wear warrior hats. We zealously advocate for the most advantageous outcomes for our clients. And, of course, there is nothing wrong with that.

But an equally important role is the lawyer's role as *advisor*. Rule 2.1 requires that we give “candid advice” to our clients. Comment [1] of Rule 2.1 explains that this means “straight-forward advice expressing the lawyer's honest assessment,” and adds that this can often involve “unpleasant facts and alternatives that a client may be disinclined to confront.” However, “a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.” Utah R. Pro. Cond. 2.1, cmt. [1].

In other words, lawyers should not sugarcoat the facts when advising a client. This means we should objectively advise our clients on the probable results of a matter and the likely costs of obtaining the result. This will sometimes require the lawyer to candidly explain that their client is wrong, or has done something wrong, even if the client does not want to hear it. It also

requires the lawyer to fully and clearly explain the facts when something bad happens in a case. These can be difficult conversations, but they are ethically required.

Your role as advisor may also extend beyond technical legal advice. Rule 2.1 permits you to refer to moral, economic, social, and political factors in rendering your advice. “Although a lawyer is not a moral adviser as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.” Utah R. Pro. Cond. 2.1, cmt. [2]. For example, maybe your client can get that extra \$500 in a negotiation, but that does not always mean they should. Lawyers have an important responsibility to advise their clients about what is moral and “right.”

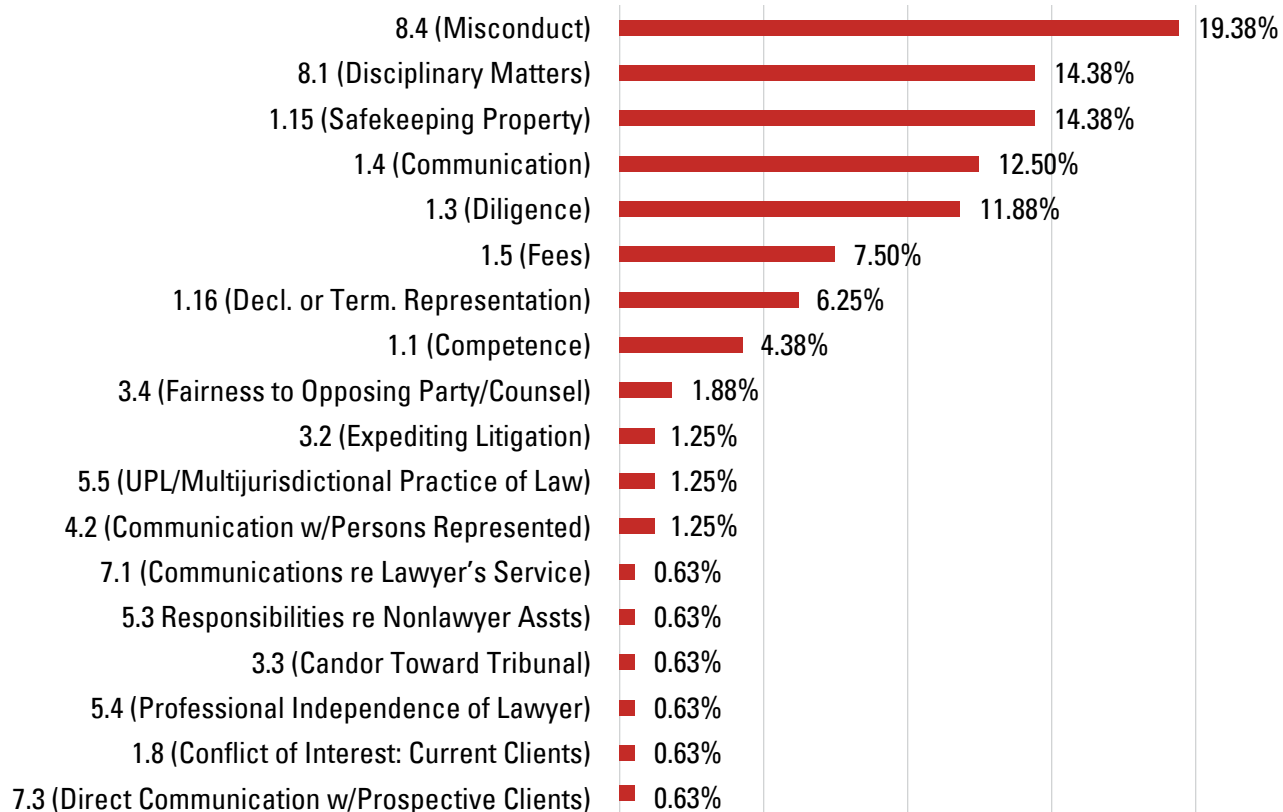
Having provided our best advice – including legal, moral, economic, social, and political factors – it is the lawyer's responsibility to follow the client's decision about the course of action to pursue, provided it is not criminal or fraudulent. See Utah R. Pro. Cond. 1.2. That is so even if the lawyer disagrees with the client's decision, unless the client insists on taking action that the lawyer considers to be repugnant or with which the lawyer has a fundamental disagreement, in which case the lawyer is permitted to withdraw. See Utah R. Pro. Cond. 1.16(b).

It is unlikely you will be charged with unethical conduct for violating Rule 2.1. The Utah Office of Professional Conduct has issued numerous reports that summarize its prosecution activities. The OPC's 2021 Annual Report contains the following chart showing which rules were violated in connection with 2021 disciplinary actions:

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## Rule Violations as Percentage of the 160 Total Violations found in Discipline Orders (Year 2021)



OFFICE OF PROFESSIONAL CONDUCT, ANNUAL REPORT 22 (Feb. 2022), <https://www.opcutah.org/wp-content/uploads/2022/04/OPC-ANNUAL-REPORT-2021.pdf>.

Rule 2.1 is noticeably absent from this list. There are relatively few Utah cases or ethics opinions that tackle the key elements of Rule 2.1, although there are a few from other jurisdictions. For example, the Minnesota Court of Appeals has stated that an in-house lawyer's advice to management regarding its possibly illegal activity was part of his or her "most basic duties to his or her client – to be competent, to be diligent, to use good judgment, to render candid advice." *Kidwell v. Sybaritic, Inc.*, 749 N.W.2d 855, 866 (Minn. Ct. App. 2008). The Missouri Supreme Court has held that a lawyer in a criminal case is duty bound to advise the defendant regarding the advantages and disadvantages of choosing a plea. *See Evans v. State*, 477 S.W.2d 94 (Mo. 1972). And the Washington Court of Appeals, in invalidating a prenuptial agreement, warned that lawyers handling prenuptial contracts "should seriously consider the implications of RPC 2.1. . . . Marital tranquility is not achieved by a contract which is economically unfair or achieved by unfair means." *In re Marriage of Foran*, 834 P.2d 1081, 1089 n.14

(Wash. Ct. App. 1992); *see also* Ted Weckel, *Helping Our Clients Tell the Truth, Part II*, 26 UTAH B.J. 42 (Jul/Aug 2013) (providing excellent discussion of Rule 2.1 in context of criminal defense matters, including the complexities of providing moral advice and representing a client with zeal and loyalty).

For me, Rule 2.1 carries with it a sense of sanctity, something that sets the legal profession apart and makes it a true "*profession*." Lawyers should be more than robotic hired guns whose objective is to make money by doing their clients' bidding. We have an ethical and moral obligation to our *clients* and to *society* to be trustworthy *advisors*.

*Every case is different. This article should not be construed to state enforceable legal standards or to provide guidance for any particular case. The views expressed in this article are solely those of the author.*