

# At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct

Paul R. Tremblay

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## AT YOUR SERVICE: LAWYER DISCRETION TO ASSIST CLIENTS IN UNLAWFUL CONDUCT

*Paul R. Tremblay\**

### Abstract

The common, shared vision of lawyers' ethics holds that lawyers ought not collaborate with clients in wrongdoing. Ethics scholars caution that lawyers "may not participate in or assist illegal conduct," or "giv[e] legal services to clients who are going to engage in unlawful behavior with the attorney as their accomplice." That sentiment resonates comfortably with the profession's commitment to honor legal obligations and duties, and to remain faithful to the law.

The problem with that sentiment, this Article shows, is that it is not an accurate statement of the prevailing substantive law. The American Bar Association's (ABA) model standards governing lawyers prohibit lawyers from assisting clients with illegality, but only in certain defined categories—that is, crimes and frauds. The standards, adopted by virtually all states, do not prohibit participation by lawyers in the remaining universe of unlawful conduct. The aim of this Article is to understand the meaning and scope of this apparent acceptance of lawyers' collaboration with unlawful client action. Surprisingly, legal ethics commentary has not explored the nature of the constraints on such collaboration.

This Article offers, as orienting examples, three stories from the entrepreneurial startup world in which clients have requested legal help with activities that are unlawful but may not be criminal or fraudulent. The stories provide a base from which to explore whether all wrongdoing or illegality ultimately equates to something criminal or fraudulent. Examining the text and history of Model Rule 1.2(d), this Article demonstrates that the ABA (and, presumably, the states that adopted the language) intended the Rule's limitation to mean what it says. Some lawyer participation with unlawful action might be prohibited through the operation of "other law." In general, however, no outside authority limits a lawyer's assistance with client wrongdoing—if "unlawful" activity equates to wrongdoing. The startup stories show that "unlawful" is not always synonymous with "wrongful," although, of course, it often will be.

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Lawyers therefore have discretion—but, as this Article shows, no duty—to aid clients in some activities that are illegal. Lawyers must exercise that discretion responsibly, even where no legal sanction or penalty would apply. Relying on the “moral activism” insights that inform lawyer decision making in determining how aggressively to assert legal entitlements when third-party interests are at stake, this Article concludes that lawyers ought to resist aiding those clients whose unlawful actions engender moral harm or injustice.

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## INTRODUCTION

Individuals and businesses sometimes engage in conduct that the law forbids or propose schemes that include unlawful components. Those individuals and businesses often have lawyers working with them and hope to obtain from their lawyers some form of aid in the unlawful activity. That reality is well-known, of course. The expected response to that reality is to prohibit lawyers from providing such assistance,<sup>1</sup> and to craft professional protocols through which lawyers might maintain some distance between their legitimate representational duties and the illegal<sup>2</sup> conduct in which their clients engage.<sup>3</sup> The challenges emerging from that response are intricate and knotty, and do not lack for commentary.<sup>4</sup> Ethicists debate whether ostensibly neutral advice about the law encourages or assists wrongdoing, and if so, what constraints on such advice might be warranted.<sup>5</sup> Jurisprudence scholars assess the benefits

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1. See, e.g., W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 52 (2010) (a "lawyer may not assist the client in illegality"); *id.* at 59 ("Lawyers may lawfully do for their clients only what their clients lawfully may do.").

2. This Article employs the term "illegal," and its equivalent "unlawful," intentionally to include anything that the law prohibits or penalizes, or for which the law imposes some form of liability. Whether some action that fits that definition ought to be deemed illegal or unlawful is a question that this Article addresses in its analysis. See *infra* text accompanying note 138.

3. See, e.g., Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669, 676 (1981) ("[A] lawyer may . . . [r]efuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.").

4. See *generally id.* (providing a leading and insightful exploration of this issue).

5. See, e.g., Bruce A. Green, *Taking Cues: Inferring Legality from Others' Conduct*, 75 *FORDHAM L. REV.* 1429, 1431 (2006); Donald C. Langevoort, *Someplace Between Philosophy and Economics: Legitimacy and Good Corporate Lawyering*, 75 *FORDHAM L. REV.* 1615, 1616, 1618 (2006); John Leubsdorf, *Legal Ethics Falls Apart*, 57 *BUFF. L. REV.* 959, 979, 1051, 1054–55 (2009); Joel S. Newman, *Legal Advice Toward Illegal Ends*, 28 *U. RICH. L. REV.* 287, 288–89 (1994); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 *YALE L.J.* 1545, 1547, 1609–10 (1995) [hereinafter Pepper,

and costs of legal counseling given its potential—and one might say its tendency—to encourage unlawful acts that otherwise might not occur.<sup>6</sup> And policy mavens formulate models of the “lawyer as gatekeeper” to encourage, or even require, lawyers to police lawbreaking among their clients—especially powerful corporate wrongdoers.<sup>7</sup> All of this rich and sophisticated work has as its ultimate aim the minimization of legal assistance to, or encouragement of, wrongdoing.

This Article addresses a strikingly different component of the reality of client lawbreaking. Notwithstanding the efforts and policy aims just described, the professional standards governing lawyers appear to provide almost unfettered permission for lawyers to assist their clients in certain forms of lawbreaking activity. As one prominent observer has written, “The 1983 Model Rules [of Professional Conduct] . . . do not limit a lawyer’s advice, [or] even encouragement, to a client about unlawful acts so long as the acts are not criminal or fraudulent.”<sup>8</sup> That

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*Counseling*]; Stephen L. Pepper, *Three Dichotomies in Lawyers’ Ethics (with Particular Attention to the Corporation as Client)*, 28 GEO. J. LEGAL ETHICS 1069, 1073, 1110–11, 1114 (2015) [hereinafter Pepper, *Three Dichotomies*].

6. See, e.g., Stephen McG. Bundy & Einer Richard Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CALIF. L. REV. 313, 316–17, 319 (1991) [hereinafter Bundy & Elhauge, *Do Lawyers Improve the Adversary System?*]; Stephen McG. Bundy & Einer Elhauge, *Knowledge About Legal Sanctions*, 92 MICH. L. REV. 261, 261–64 (1993) [hereinafter Bundy & Elhauge, *Knowledge About Legal Sanctions*]; Louis Kaplow, *Information and the Aim of Adjudication: Truth or Consequences?*, 67 STAN. L. REV. 1303, 1318 (2015); Louis Kaplow & Steven Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 565, 568 (1989).

7. “The literature on attorney gate-keeping post-Enron is voluminous.” Milan Markovic, *Subprime Scriveners*, 103 KY. L.J. 1, 4 n.19 (2014–2015) (referring to the accounting scandal accompanying the collapse of the Enron corporation in 2001); see also JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 192–244 (2006) (discussing lawyers as gatekeepers for corporate clients); Melanie Garcia, *The Lawyer as Gatekeeper: Ethical Guidelines for Representing a Client with a Social Change Agenda*, 24 GEO. J. LEGAL ETHICS 551, 552 (2011) (analyzing lawyers as gatekeepers of acts of social change); Thomas D. Morgan, *Comment on Lawyers as Gatekeepers*, 57 CASE W. RES. L. REV. 375, 378 (2007) (arguing that lawyers should be viewed as counselors, not gatekeepers); David Nersessian, *Business Lawyers as Worldwide Moral Gatekeepers? Legal Ethics and Human Rights in Global Corporate Practice*, 28 GEO. J. LEGAL ETHICS 1135, 1183–87 (2015) (arguing that lawyers should hold corporate clients accountable based on human rights principles and ethical guidelines); Fred C. Zacharias, *Coercing Clients: Can Lawyer Gatekeeper Rules Work?*, 47 B.C. L. REV. 455, 478, 501 (2006) [hereinafter Zacharias, *Coercing Clients*] (arguing that the gatekeeping rules in the Model Rules of Professional Conduct do not always have the intended effect of encouraging moral decisions by clients); Fred Zacharias, *Lawyers as Gatekeepers*, 41 SAN DIEGO L. REV. 1387, 1389 (2004) (discussing lawyers’ roles as gatekeepers to prevent client misconduct) [hereinafter Zacharias, *Lawyers as Gatekeepers*].

8. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 704 (1986). Charles Wolfram served as the Chief Reporter for the American Law Institute’s Restatement of the Law Governing

opinion, shared by many other commentators,<sup>9</sup> derives from the language of the American Bar Association (ABA) Model Rules of Professional Conduct—language adopted by and still in place today in almost all of the states in the country<sup>10</sup>—prohibiting a lawyer from counseling or assisting a client in conduct “that the lawyer knows is criminal or fraudulent[.]”<sup>11</sup> Chosen by the ABA in 1983, that phrase was “intended by the framers of the rule to be substantially narrower than the proscription in”<sup>12</sup> the ABA’s previous Code of Professional Responsibility, which covered all “illegal” conduct.<sup>13</sup>

The lawyers’ regulatory apparatus thus appears to sanction a wide swath of assistance of direct client wrongdoing. This Article is an effort to understand the scope and the implications of this apparent license to aid and abet client wrongdoing, as those topics remain surprisingly under-examined. But the questions here are more complicated still. Notwithstanding Professor Wolfram’s assertion in his respected treatise<sup>14</sup> and the language and history of Rule 1.2(d), legal ethics scholars regularly declare, well after the 1983 Model Rule adoption, that lawyers categorically may not assist clients in “illegal” or “unlawful” conduct. For example, Professors Fred Zacharias and Bruce Green write that lawyers “may not participate in wrongdoing”<sup>15</sup> or “knowingly participate in illegality and fraud.”<sup>16</sup> Other similarly respected commentators make comparable contentions, proposing that lawyers may not assist clients with any unlawful conduct.<sup>17</sup> Indeed, Professor David Wilkins has

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Lawyers. Charles W. Wolfram, CORNELL L. SCH., <http://www.lawschool.cornell.edu/faculty/bio.cfm?id=183> (last visited Nov. 19, 2017).

9. See, e.g., Rutheford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers*, 56 RUTGERS L. REV. 9, 65 (2003); Martin H. Malin, *Ethical Concerns in Drafting Employment Arbitration Agreements After Circuit City and Green Tree*, 41 BRANDEIS L.J. 779, 817 (2003); Carl A. Pierce, *Client Misconduct in the 21st Century*, 35 U. MEM. L. REV. 731, 906 (2005).

10. See *infra* text accompanying note 139.

11. MODEL RULES OF PROF’L CONDUCT r. 1.2(d) (AM. BAR ASS’N 2014).

12. WOLFRAM, *supra* note 8, at 705.

13. See MODEL CODE OF PROF’L RESPONSIBILITY DR 7–102(A)(7) (AM. BAR ASS’N 1980).

14. WOLFRAM, *supra* note 8, at 704 (“The 1983 Model Rules [of Professional Conduct] . . . do not limit a lawyer’s advice, even encouragement, to a client about unlawful acts . . .”).

15. Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 16 (2005).

16. *Id.* at 51.

17. See, e.g., Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271, 292 (1984) (“The law cannot license some of its subjects, least of all ‘lawyers,’ to assist in the commission or concealment of transactions that it defines as serious wrongs . . . . To do so would license lawyers to be instruments for subverting the structure of law itself.”); Ryan Morrison, *Turn Up the Volume: The Need for “Noisy Withdrawal” in a Post Enron Society*, 92 KY. L.J. 279, 304 (2003–2004) (noting that the Model

described the norm that holds that “zealous advocacy stops at ‘the bounds of the law’” as “the one relatively fixed star in the legal ethics universe.”<sup>18</sup>

On occasion, but not uniformly, such commentators reference another Model Rule, one that seems to undercut the rather clear message of Rule 1.2(d). Model Rule 1.16(a)(1) declares that a lawyer must cease work for a client, or refuse such work, if “the representation will result in violation of the rules of professional conduct *or other law*.”<sup>19</sup> Assisting a client with noncriminal or nonfraudulent unlawful action would be expected to frequently result in a violation of some “other law.” The Rules, then, seem to have competing messages for the lawyers who must honor them. This Article’s aim is to make some sense of this puzzle.

This Article addresses the inquiry in the following way. It first offers three lawyering stories to provide some context for the proceeding discussion. Each story involves an entrepreneurial startup business enterprise. Startup businesses typically have scant money and resources and complying with the law often imposes palpable costs. It is not unusual, observers report, for sympathetic and well-meaning startup founders to seek to skirt some regulatory requirements and to use lawyers in that part of their business just as they do in other components of the business. Those presumably sympathetic examples set the stage for us to explore the limits of lawyers’ assistance of such businesses with the requested illegal activity.

With the stories serving as context, this Article then addresses the language of Rule 1.2(d), along with its historical development, to tease out the apparent message therein that lawyers have some liberty to aid clients in lawbreaking<sup>20</sup> so long as the aid does not involve a crime or fraud. That inquiry invites an analysis of whether all wrongdoing or illegality ultimately equates to something criminal or fraudulent. If that were so, then Rules 1.2(d) and 1.16(a)(1) would harmonize. But it is not so, and the three startup stories help demonstrate why much unlawful conduct is neither criminal nor fraudulent. The lawyers in at least two of the three stories would have good-faith questions about whether the Rules limit their assistance or not. Those questions deserve clearer answers,

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Rules “prevent an attorney from giving legal services to clients who are going to engage in unlawful behavior with the attorney as their accomplice”); *see also* MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102(A)(7) (AM. BAR ASS’N 1980) (“In his representation of a client, a lawyer shall not . . . [c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.”).

18. David B. Wilkins, *In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law*, 38 WM. & MARY L. REV. 269, 269 (1996) (quoting MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (AM. BAR ASS’N 1994)).

19. MODEL RULES OF PROF’L CONDUCT r. 1.16(a)(1) (AM. BAR ASS’N 2014) (emphasis added).

20. *See* MODEL RULES OF PROF’L CONDUCT r. 1.2(d) (AM. BAR ASS’N 2014).

even if the ABA, and the states that adopt the ABA's standards, opt not to provide them.

This Article determines that the most reliable reading of Rule 1.2(d) in context is that the rule means what it says. The analysis shows that Rule 1.16(a)(1)'s more general language is imprecise and not intended to undercut the former rule. That conclusion will be an educated guess at best, based on the most sensible interpretation of the available authorities. Under this interpretation, lawyers do have discretion under the professional guidelines to assist clients in a wide array of illegal activity.

This Article then explores the limitations that "other law"—from outside of the profession—imposes on lawyer assistance of client wrongdoing. Perhaps the ban missing from the Model Rules arrives from other doctrine or regulatory constraints. That inquiry leads to two findings. First, in the presence of such other legal constraints, a lawyer has professional discretion to aid in illegal behavior if the lawyer is willing to accept the costs of doing so. Second, there are many instances where no such outside constraints exist, as the discussion below will show.

We thus end up with three permutations of lawyer assistance with client misconduct:

- (1) The lawyer assists the client with criminal or fraudulent activity. Such assistance is expressly forbidden by the regulatory apparatus.

- (2) The lawyer assists the client with noncriminal or nonfraudulent activity where the lawyer risks some potential penalty or sanction from outside authority. The lawyering regulatory apparatus permits such assistance, but the lawyer must be willing to accept the risk of detection and the resulting costs.

- (3) The lawyer assists the client with noncriminal or nonfraudulent activity where the lawyer risks no penalty or sanction from outside authority for offering such assistance. The lawyering regulatory apparatus permits such assistance.

Those permutations prompt an apparent consequential question: If the authorities provide lawyers permission to assist in categories (2) and (3), does that permission imply a *duty* to aid a client whose representation would be benefitted by such aid? The answer to that question instinctively must be no, and, relying in part on Rule 1.16(a)(1), this Article concludes that a lawyer has discretion to refuse to provide such assistance.

Having covered the doctrinal, law-of-lawyering questions that practicing lawyers ought to understand, this Article then concludes with two more reflective goals. It hypothesizes, admittedly without much evidence, the possible reasoning behind the ABA's express decision to

allow some assistance with illegality in the Model Rules.<sup>21</sup> It then connects that discussion to a more metalevel inquiry about the message Rule 1.2(d) communicates to lawyers, and to the larger society, about the duties to honor the law. Within contemporary legal ethics discourse, the justification for obeying the law has been the topic of lively debate, especially as it applies to instances where adherence to the law results in a morally troublesome result.<sup>22</sup> In that debate, all sides seemingly agree that, absent that morally troublesome factor, citizens owe a presumptive, or *prima facie*, duty to obey properly enacted or issued laws and judicial authority.

This Article visits that debate and shared baseline commitment to argue that the best ethical understanding of the ABA's stance in its enactment of Rule 1.2(d) (and the states' later adoption of the same provision) is connected to the lawyer's moral duties in the face of clear law. The ABA and the states cannot be saying that they approve of lawyers ignoring noncrime and nonfraud laws whenever those laws interfere with their clients' interests or wishes (even though that is what the letter of their lawmaking seems to communicate). Instead, this Article argues, lawyers may only take advantage of the discretion the ABA and the states provide in settings where doing so would advance justice or morality. No other understanding seems plausible. This Article then applies that interpretive turn to the three stories that began it.

### I. THREE LAWBREAKING STORIES

To understand the limits of lawyer assistance with unlawful conduct, it helps to situate the legal and philosophical questions on the ground, in practice, with actual lawyering stories. This Article offers three such stories, each necessarily rather thin as a hypothetical, but with enough texture to serve its purposes. Each involves a lawyer working with a business startup client. Startup clients need help in every sort of way, including guidance from lawyers.<sup>23</sup> But startups are cash- and resource-

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21. As noted above and developed in more detail below, the predecessor to the Model Rules, the Model Code of Professional Responsibility, promulgated by the ABA in 1969 and adopted by all states soon thereafter, prohibited lawyer assistance with all illegality. See MODEL CODE OF PROF'L RESPONSIBILITY DR 7102(A)(7) (AM. BAR ASS'N 1980) ("In his representation of a client, a lawyer shall not . . . [c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."). The 1983 Model Rules changed that provision to limit the prohibition, and the ABA resisted efforts to broaden the ban during the drafting and approval process. See *infra* text accompanying notes 57–72.

22. See, e.g., WENDEL, *supra* note 1, at 57; David Luban, *Misplaced Fidelity*, 90 TEX. L. REV. 673, 688 (2012) (reviewing Wendel's book).

23. See Darian M. Ibrahim, *How Do Start-ups Obtain Their Legal Services?*, 2012 WIS. L. REV. 333, 346 (noting the importance of legal advice to startups); Susan R. Jones, *Small Business*

poor, pretty much by definition.<sup>24</sup> Startup clients also encounter many regulatory and other legal hurdles with which compliance can be expensive and distracting.<sup>25</sup> The client's incentive to fly under the radar, and to operate outside of the formal requirements at least until they are on a more solid financial footing, is great.<sup>26</sup> Startup lawyers, therefore, might find themselves quite interested in the limitations imposed by the bar on their assistance with the under-the-radar operations of their innovative, scrappy clients. They can therefore serve as apt examples of the questions to be explored here.

Of course, not all clients who seek advice and assistance from lawyers with illegal activity are sympathetically resource-poor like prototypical startups. Most of the stories that generate scholarly treatment of the problem of lawyer assistance with wrongdoing involve multinational corporations engaged in some dreadful—if clever and creative—business decisions that cause serious harm to consumers or others.<sup>27</sup> If we

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*and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195, 232 (1997).

24. See Therese Maynard, *Ethics for Business Lawyers Representing Start-Up Companies*, 11 WAKE FOREST J. BUS. & INTELL. PROP. L. 401, 405 (2010–2011); Alison R. Weinberg & Jamie A. Heine, *Counseling the Startup: How Attorneys Can Add Value to Startup Clients' Businesses*, 15 J. BUS. & SEC. L. 39, 43 (2014) (“Startups are cash-poor and time-strapped . . . .”); Sona Karakashian, Note, *A Software Patent War: The Effects of Patent Trolls on Startup Companies, Innovation, and Entrepreneurship*, 11 HASTINGS BUS. L.J. 119, 144 (2015) (“Startup companies are cash-poor . . . .”).

25. See Lee A. Harris, *Taxicab Economics: The Freedom to Contract for a Ride*, 1 GEO. J.L. & PUB. POL'Y 195, 203 (2002) (“Typically, . . . it is legal or technical barriers, rather than natural barriers, that make the start-up costs for potential entrepreneurs prohibitively high.”). Conservative commentators decry, perhaps with some exaggeration, the costs and difficulties associated with regulations that affect startups. See, e.g., James L. Gattuso & Diane Katz, *Red Tape Rising: Five Years of Regulatory Expansion*, HERITAGE FOUND. BACKGROUNDER (Mar. 26, 2014), <http://www.heritage.org/research/reports/2014/03/red-tape-rising-five-years-of-regulatory-expansion>.

26. *Why Your Startup Needs a Compliance Function*, COMPLYGLOBAL (July 29, 2015, 10:29 AM), <http://www.complyglobal.com/blog/why-your-startup-needs-a-compliance-function> (“It’s almost a cliché that the startup founder focuses on getting more business while neglecting [compliance].”). Observers of business lawyers generally note the demand by management for “the work-around” when legal or regulatory hurdles interfere with the business development. See Lawrence M. Friedman et al., *Laws, Lawyers, and Legal Practice in Silicon Valley: A Preliminary Report*, 64 IND. L.J. 555, 563 (1989) (“They say, ‘OK, here’s what we want accomplished. Here’s the legal problem. What’s the work-around?’ That’s literally the vocabulary they use, and they assume there’s a legal barrier somewhere. They don’t mean, ‘How do I violate the law?’ but ‘How do I structure the deal, so I don’t have that problem?’”).

27. The examples of this are, of course, far too many to cover here. For a brief sample, see, e.g., Marianne Jennings & Lawrence J. Trautman, *Ethical Culture and Legal Liability: The GM Switch Crisis and Lessons in Governance*, 22 B.U. J. SCI. & TECH. L. 187, 189 (2016); Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75, 106 (1993); W. Bradley Wendel, *Professionalism as*

conclude that assistance with some lawbreaking is acceptable for lawyers working with likeable startups, we will then need to discern whether any principled considerations would limit that same kind of assistance to more powerful, less honorable actors.<sup>28</sup>

One other noteworthy quality of the three stories: Each describes lawyering assistance that is *transactional*. It does not situate the lawyer in the role of advocate or litigator. A common theme within legal ethics discourse is that transactional lawyers engaged in proactive counseling about future conduct ought to take a more conservative stance regarding the potential for a client to cross the line demarcating permitted and forbidden conduct.<sup>29</sup> A litigator makes her arguments publicly before an opposing party or lawyer, or before a judge or similar arbiter. She might push the limits of her advocacy given the protections inherent in that systemic arrangement.<sup>30</sup> A counselor, by contrast, encounters fewer institutional constraints, and therefore, as the ethics teachers tell us, she ought to adopt a more principled and realistic approach to her advising.<sup>31</sup>

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*Interpretation*, 99 NW. U. L. REV. 1167, 1167 (2005) (explaining attorneys as a “but-for cause” of accounting scandals of the early 2000s). Tax advisors in particular encounter, with some regularity, the tension between the financial interests of their business clients and the demands of the tax laws. See BERNARD WOLFMAN ET AL., *ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE* 2 (4th ed. 2008); Bret N. Bogenschneider, *Professional Ethics for the Tax Lawyer to the Holmesian “Bad Man,”* 49 CREIGHTON L. REV. 775, 803 (2016); Leubsdorf, *supra* note 5, at 979.

28. As Stephen Pepper writes, “The kind of client we imagine . . . will tend to determine where we come down on issues of lawyer’s ethics . . . .” Stephen Pepper, *Why Confidentiality?*, 23 LAW & SOC. INQUIRY 331, 332 (1998). Pepper uses the example of a well-meaning but cash-strapped startup business to provide a relatively sympathetic client for purposes of examining confidentiality duties. *Id.*; see also Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1402 (1992) (“Stories must be told to create even the semblance of a shared understanding of what the rules require.”).

29. See, e.g., David Luban, *Rediscovering Fuller’s Legal Ethics*, 11 GEO. J. LEGAL ETHICS 801, 809 (1998); Paula Schaefer, *Harming Business Clients with Zealous Advocacy: Rethinking the Attorney Advisor’s Touchstone*, 38 FLA. ST. U. L. REV. 251, 253 (2011) (criticizing the bar for not limiting zeal in business-counseling contexts). This well-accepted ethical principle became more prominent and relevant after the President George W. Bush administration’s reliance upon the “torture memos.” See, e.g., DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 159, 176–80 (2007); Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 U. COLO. L. REV. 1, 4 (2006); W. Bradley Wendel, *Deference to Clients and Obedience to Law: The Ethics of the Torture Lawyers (A Response to Professor Hatfield)*, 104 NW. U. L. REV. COLLOQUY 58, 58, 61 (2009), [http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1217&context=nulr\\_online](http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1217&context=nulr_online); Marisa Lopez, Note, *Professional Responsibility: Tortured Independence in the Office of Legal Counsel*, 57 FLA. L. REV. 685, 716 (2005).

30. WENDEL, *supra* note 1, at 13.

31. See Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161 (1958) (“Partisan advocacy plays its essential part in [litigation], and the lawyer pleading his client’s case may properly present it in the most favorable light. A similar resolution of doubts in one direction becomes inappropriate when the lawyer acts

With those considerations established, here are the three startup stories for our consideration.

### A. *The Independent-Contractor Story*

Foley, Haile & Lingos (FHL) is a small, progressive law firm established by three recent law-school graduates who hope to sustain a practice representing cutting-edge startup enterprises. Emily Haile is one of the three founding partners of FHL. Haile has been assisting an entrepreneur, Jackson Sanchez, with WorkHub, Inc., a new business he has been developing for the past couple of years consisting of a website and app that help startups, professionals, and others find coworking space that fits their needs and price constraints. In Sanchez's words, the model resembles "Airbnb for coworking spaces." Haile organized WorkHub as an S corporation with Sanchez as the majority shareholder, board president, and CEO. Sanchez's sister and her wife are also on the board and own some of the company's shares of stock.

Sanchez has been working informally with two friends from college, Diane Bilder and Paulo Vose, to develop the coding and algorithms needed for the business model to work. Sanchez has asked Haile to prepare for WorkHub an independent-contractor agreement for Bilder and Vose that will include confidentiality, nondisclosure, and noncompete provisions.<sup>32</sup> WorkHub's arrangement with the two coders is that the company will pay each of them \$200 per week for about forty hours of work each week, and will offer each a restricted stock agreement as further compensation for their efforts.<sup>33</sup> WorkHub can most likely afford that commitment, although the cash payment arrangement will be

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as counselor."); see also Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311, 335 (1990) (stating that one of the principle responsibilities of a lawyer in the role of counselor is to counsel against lawbreaking and fraud); Kevin H. Michels, *Lawyer Independence: From Ideal to Viable Legal Standard*, 61 CASE W. RES. L. REV. 85, 103 (2010) ("[T]he reasons for allowing attorneys wide expanse in their presentation of arguments apply only in the advocacy setting; they have no force in the advice or counseling role.").

32. See Martin M. Shenkman & Allan R. Freedman, *Employees, Independent Contractors and Similar Relationships in the Close Corporation*, 142 N.J. LAW. 32, 35, 36 (1991) (noting that the confidentiality and non-disclosure provisions protect the security of the payor's information, while the non-compete provision restricts the contractor from working for a similar business in a local area during a defined period of time); Robert W. Wood, *Drafting Independent Contractor Agreements*, 33 WYO. LAW. 53, 53 (2010) (discussing how an independent-contractor agreement, which need not be in writing, sets forth the terms of the contract between the person performing services and the payor for those services).

33. See Brett R. Turner, *Classifying Restricted Stock Plans*, 23 FAM. ADVOC. 33, 33 (2001) ("In a restricted stock plan, an employee acquires legal title to company stock as soon as a grant is made. The grant is subject, however, to a series of restrictions, which provide that the employee must return the stock to the employer unless certain conditions are met. The most common restriction is a requirement that the employee work for the employer for a set number of years.").

tight given the business's meager bank account balance. WorkHub will offer Bilder and Vose no other benefits.

For present purposes, let us assume what in many jurisdictions and contexts would be undoubtedly true: The arrangement described by Sanchez fails to comply with state or federal wage and hour laws if the coders qualify as employees, which they do.<sup>34</sup> The \$200 per week payment given the hours worked calculates to less than minimum wage even at the federal rate.<sup>35</sup> As employees, the coders are entitled to unemployment insurance protection and workers' compensation benefits, expenses WorkHub cannot afford to provide.<sup>36</sup> WorkHub is required to pay a portion of the coders' FICA payroll taxes and to withhold the remainder of FICA, along with state and federal income taxes.<sup>37</sup> WorkHub does not have the capacity or the dollars to arrange for those payroll logistics.

We may assume further, for whatever purposes it serves, if any, that Bilder and Vose are satisfied with this arrangement and may suspect that the deal is not entirely aboveboard or technically in compliance with whatever regulatory schemes might exist. We may also assume, on similar terms, that Sanchez and WorkHub have committed to alter the employment terms to come into full compliance when WorkHub has adequate financing in place.

The final critical chapter of this story is this: Haile counsels Sanchez and the other two board members about her legal conclusions regarding the regulatory requirements for hiring workers in this way, including the risks of discovery (minimal) and the sanctions likely to be imposed if the arrangement did come to the attention of state or federal enforcement authorities (more unclear; quite harsh if enforced to the letter,<sup>38</sup> but a distinct possibility of discretionary tax response by officials<sup>39</sup>). Having

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34. See David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J.L. & PUB. POL'Y 138, 145 (2015) (noting that the nation's basic employment laws differ depending on whether a worker is classified as an independent contractor or an employee); Jenna Amato Moran, *Independent Contractor or Employee? Misclassification of Workers and Its Effect on the State*, 28 BUFF. PUB. INT. L.J. 105, 106, 122 (2009–2010) (observing that independent contractors and employees are not subject to the same degree of protection of wage and hour laws).

35. See 29 U.S.C. § 206(a)(1)(C) (2012) (noting that the federal minimum wage is \$7.25 per hour).

36. Bauer, *supra* note 34, at 145.

37. *Id.* at 139, 147, 148.

38. See Christopher Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification*, 9 U.C. DAVIS BUS. L.J. 111, 122–27 (2009) (discussing the lack of statutory authority that state governments possess when trying to control worker misclassification).

39. *Id.* at 128–29 (noting that employers who cheat gain an unfair competitive advantage).

considered Haile's advice with great care, Sanchez and the WorkHub board instruct Haile to develop the independent-contractor agreements.

### B. *The Nonprofit-Solicitation Story*

Jonathan Shin is a second-year associate assigned to the tax department of the large national law firm Gould Peabody. His department head has assigned Shin to assist, on a pro bono basis, a new nonprofit organization called Advancement of Multilingual Justice (AMJ), through its founder, Ehsan Rahman. Shin has created a state nonprofit corporation and, as required by state law, submitted registration papers to the Office of the Attorney General, which will issue a "Certificate of Solicitation" within several weeks.<sup>40</sup> Once AMJ has that certificate, it may lawfully solicit funds in the state or on the internet generally.<sup>41</sup> It may solicit funds with that certificate in place even before it obtains its tax-exempt status from the Internal Revenue Service (IRS), although the donors will take the risk that their donations might end up as not tax-deductible.<sup>42</sup>

Rahman informs Shin of his plans, supported by the AMJ board of directors, to solicit funds immediately without the certificate in order to take advantage of some grant-funding opportunities and reach some sympathetic supporters. Some of the donors live out of state. Rahman would like Shin's advice about that plan, and if possible, his help in developing the solicitation strategy and materials.

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40. For an example of how the Office of the Attorney General in Massachusetts requires such a certificate, see *Registering a Public Charity*, OFFICIAL WEBSITE ATT'Y GEN. MASS., <http://www.mass.gov/ago/doing-business-in-massachusetts/public-charities-or-not-for-profits/registering-a-public-charity/> (last visited Nov. 19, 2017).

41. See NAT'L ASS'N OF STATE CHARITY OFFICIALS, THE CHARLESTON PRINCIPLES GUIDELINES ON CHARITABLE SOLICITATIONS USING THE INTERNET 2 (2001), <http://www.nasconet.org/wp-content/uploads/2011/05/Charleston-Principles-Final.pdf> (discussing how the National Association of State Charities Officials (NASCO) has adopted principles that address solicitation over the internet). These principles conclude that an out-of-state charity should be regulated in a particular state only if it "i. Specifically targets persons physically located in the state for solicitation, or ii. Receives contributions from the state on a repeated and ongoing basis or a substantial basis through its Web site." *Id.* at 3; see also Tracy L. Boak, *Navigating the Maze of State Charitable Fundraising Regulation*, 27 TAX'N EXEMPTS 38, 38 (2015) (discussing the financial, reporting, and compliance requirements for charitable fundraising).

42. See I.R.C. § 508(d)(2) (2012) (stating that the IRS will ordinarily certify an organization's tax-exempt status retroactive to the date of its formation, if a proper application is filed in a timely fashion and that donations given before the IRS has determined that an organization is tax-exempt would be deductible to the donor when the retroactive designation occurs).

### C. *The Trademark-Licensing Story*

Dara Bowman directs a law school clinic focusing on startups and entrepreneurship. Her student, Anatoly Litmanovich, has been assigned to work this semester with Winterport Graceful Movement (WGM), a program of innovative music and dance instruction. WGM is a small and struggling but growing for-profit company which has developed some increasingly popular programs within the local community. Its founder and CEO is Yolanda Moreno.

Moreno has asked Litmanovich to create a licensing agreement for the company. The clinic helped WGM to obtain a federal trademark registration for its name and logo, and the business uses both extensively in the local area. A former teacher from WGM, Juan Toledo, has asked Moreno if he could open a version of WGM in Santa Monica, California, where he now lives. Moreno loves the idea, but she wants to make sure that the California program follows the WGM model precisely. Litmanovich's research shows that California has pretty strict and elaborate franchising requirements<sup>43</sup>—stricter than those that apply to all states through the Federal Trade Commission.<sup>44</sup> If WGM proposed a licensing agreement to Toledo, it would be much less expensive and complicated for both parties. The problem is that if Moreno exercises the level of control she insists upon, the “licensing agreement,” regardless of what it might be labeled, will qualify as a franchise arrangement, and will be subject to the state and federal requirements.

Moreno understands the implications of the clinic's advice. She opts to proceed with a licensing agreement with Toledo's permission and his understanding that the law might technically require the parties to proceed in a different way. She and Toledo are each willing to take the risks after the clinic explains them in great detail.<sup>45</sup> Moreno asks Litmanovich to create the licensing agreement documents for her and Toledo to sign.

Each of these three stories entails a client proceeding with a strategy that is not in compliance with the relevant substantive law and requesting counsel's active assistance with that strategy. After a review of the existing constraints on the lawyer's discretion to offer such assistance, this Article will return to each story to assess the limits, if any, on the lawyer's permission to provide such assistance.

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43. See CAL. CORP. CODE §§ 31000–31516 (West 2017); CAL. CODE REGS. tit. 10, § 310.011–.011.1 (2017).

44. See FTC Disclosure Requirements and Prohibitions Concerning Franchising Rule, 16 C.F.R. § 436.2–.5 (2017).

45. Litmanovich's offering explanations of the arrangement to Toledo, the licensee, while he represents WGM, the licensor, raises interesting questions under Model Rule 4.3, but for present purposes we shall assume (and correctly so) that this discussion is proper. See MODEL RULES OF PROF'L CONDUCT r. 4.3 (AM. BAR ASS'N 2014).

## II. THE BASELINE SUBSTANTIVE LAW ON ASSISTANCE WITH UNLAWFUL CONDUCT

Addressing whether lawyers have some liberty to aid their clients in lawbreaking, so long as the aid does not involve a crime or a fraud, invites an analysis of whether all wrongdoing or illegality ultimately equates to something criminal or fraudulent. That analysis must begin with a careful reading of baseline substantive law relating to assistance with unlawful conduct.

### A. *The Role of the Baseline Substantive Law*

The analysis of the startup lawyer's role responsibilities must begin with as clear an understanding as we might achieve of the underlying substantive doctrine and standards governing assistance with unlawful activity. If the available black-letter law governing lawyers (either as lawyers or as citizens generally) prohibits startup counsel from assisting with illegal client conduct, then the ethical duties of lawyers such as Emily Haile, Jonathan Shin, or Anatoly Litmanovich are relatively straightforward. Those duties in that context would not necessarily be unambiguously clear, because we would have to consider whether the legal-realist and contextualized understanding of that black-letter law provides the lawyer some practical discretion to assist in some fashion.<sup>46</sup> By contrast, if the black-letter law does not unambiguously prohibit such assistance, then counsel such as Haile, Shin, or Litmanovich would need to discern the limits—if any—of their participation.

For convenience, let us rely primarily on the story of Jonathan Shin and AMJ as our context for this substantive law discussion, as it is the simplest of the three. Recall that AMJ is requesting Shin's assistance with charitable solicitation efforts that are not lawful under state regulations.<sup>47</sup> For our present purposes, we now know that this regulatory violation is neither criminal nor fraudulent.<sup>48</sup>

### B. *The Meaning of "Assistance"*

The aim of this Article is to test the proposition that a lawyer may actively assist a client with conduct that the lawyer concludes is unlawful;

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46. See David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 508–09 (1990) [hereinafter Wilkins, *Legal Realism*]; David B. Wilkins, *Some Realism About Legal Realism for Lawyers: Assessing the Role of Context in Legal Ethics*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 25, 26–27 (Leslie C. Levin & Lynn Mather eds., 2012) (exploring that question) [hereinafter Wilkins, *Some Realism*].

47. See *supra* text accompanying notes 40–42.

48. For a more contextual examination of that proposition in this factual setting, see *infra* text accompanying notes 277–79.

that is, in violation of some civil duty or administrative obligation. Before proceeding to examine that question, we need to be clear about this Article's understanding of "assistance." This Article does not question whether a lawyer may counsel a client about the meaning of a legal authority, its reach, its enforcement, and the consequences of its breach, even if that authority encompasses criminal or fraudulent activity. For present purposes, this Article accepts that a lawyer may lawfully do so, even if doing so subtly (or not-so-subtly) encourages a client to participate in a crime or fraud.<sup>49</sup> Indeed, that proposition is not terribly controversial and is reasonably well accepted, particularly given the language in Model Rule 1.2(d) inviting a lawyer to engage in that activity, even if the conduct discussed qualifies as criminal or fraudulent.<sup>50</sup> However, confounding questions arise regarding when a lawyer has violated Rule 1.2(d) by so actively "counseling" a client about a crime or fraud that the lawyer encourages and therefore assists the client in that activity.<sup>51</sup> Even more interesting questions arise about the morality—in contrast to the lawfulness—of a lawyer's accepting the invitation of the rule to advise a client about the limits of the law, and how lawyers ought to respond to those moral tensions.<sup>52</sup>

But this Article examines a question that is simpler, more direct, and equally interesting. It imagines a lawyer not merely counseling a client about certain actions but proceeding to assist the client in achieving unlawful goals by creating documents, developing strategies, advocating on the client's behalf, and so forth—the activities that, if the assisted conduct were criminal or fraudulent, would subject the attorney to discipline.<sup>53</sup> The three stories above offer opportunities for that active

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49. See Kaplow & Shavell, *supra* note 6, at 586–88.

50. See MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2014) ("[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.").

51. See Hazard, *supra* note 3, at 674–75; Newman, *supra* note 5, at 290–91; Pepper, *Counseling*, *supra* note 5, at 1588–89.

52. See, e.g., David Luban, *Asking the Right Questions*, 72 TEMP. L. REV. 839, 843 (1999); Tanina Rostain, *Pockets of Professionalism*, 54 STAN. L. REV. 1475, 1486 (2002).

53. It is not uncommon to encounter attorney discipline for such participation. See, e.g., *In re McCarty*, 75 A.3d 589, 597–98 (Vt. 2013) (discussing term suspension for attorney who created false documents to obtain an unlawful eviction); *In re Poff*, 714 S.E.2d 313, 322 (S.C. 2011) (discussing term suspension for aiding a client who reported falsely about her income to obtain Medicaid); *In re Hanserd*, 26 Mass. Att'y Disc. Rep. 229 (2010) (discussing term suspension for assisting in real estate transactions in which the parties misrepresented the facts of the deals); *In re Alberino*, 27 Mass. Att'y Disc. Rep. 1 (2011) (discussing term suspension for participating in a foreclosure rescue scheme in which the clients signed false documents). For an insightful discussion of the meaning of the term "assisting," see Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869, 901–02 (2013).

assistance. This Article will examine whether the lawyers in question “may” participate actively in that wrongdoing.

### C. *The Lessons from the Model Rules*

We start with the Model Rules of Professional Conduct as the baseline substantive law governing lawyers. If the Rules prohibit Shin’s assistance in the solicitation efforts, that pretty much ends the discussion. If the Rules do not prohibit Shin’s participation in his client’s unlawful activity, then we need to explore whether some other law beyond the rules applies to limit the lawyer’s actions.<sup>54</sup>

A review of the Model Rules provisions, including applicable Comments, demonstrates that the ABA, which drafted the rules, and those states that adopted the rules most likely do not prohibit a lawyer like Shin from assisting with AMJ’s unlawful conduct. We see, however, that this conclusion is not without ambiguity. This inquiry starts, sensibly, with Rule 1.2(d).

#### 1. The Rule 1.2(d) Language and History

The language of Rule 1.2(d) and its historical development permit us to tease out the apparent message therein that lawyers have some liberty to aid clients in lawbreaking<sup>55</sup> so long as the aid does not involve a crime or fraud.

##### a. The Rule’s Language

Model Rule 1.2(d) states:

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 . . . .<sup>56</sup>

This language does not prohibit counseling about or assisting with client conduct that is unlawful but not criminal or fraudulent. The Comments to Rule 1.2 do not refer at all to the lawyer’s responsibilities when the prospect of assistance with other unlawful activity arises.<sup>57</sup> One indirect reference to the question explored here appears in Comment [10]:

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54. It is a common refrain within legal ethics circles, even if it might at times get overlooked by the practicing bar, that substantive law beyond the ethics rules can and does constrain lawyer conduct. *See, e.g.*, GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 112–14 (5th ed. 2010).

55. *See* MODEL RULES OF PROF’L CONDUCT r. 1.2(d) (AM. BAR ASS’N 2014).

56. *Id.*

57. *See id.* Comments 9 through 13 appear under the heading of “Criminal, Fraudulent and Prohibited Transactions,” and all of those comments refer to criminal or fraudulent activity.

“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*.”<sup>58</sup> The drafters’ choice to limit the second category of improper conduct is telling and supports the inference that arises from the straightforward reading of Rule 1.2(d).

### b. The Rule’s Development

The development of the text of Rule 1.2(d) during the crafting of the original Model Rules leading up to their adoption in 1983 supports the plain-language reading of the Rule. Before 1983, the ABA promulgated, and all of the states relied on, the predecessor Model Code of Professional Responsibility.<sup>59</sup> The Model Code’s treatment of the assistance question appeared in Disciplinary Rule 7-102(A)(7), which read,

In his representation of a client, a lawyer shall not . . . [c]ounsel or assist his client in conduct that the lawyer knows to be *illegal* or fraudulent.<sup>60</sup>

The Code limited a lawyer’s counseling and assisting a client to activity that was not illegal, a seemingly broader restriction than that included in Rule 1.2(d). In its adoption of the Model Rules, the ABA replaced the adjective “illegal” with “criminal,” perhaps to clarify the meaning of the former, or perhaps to provide lawyers with more discretion than the Code provided. The difference does not matter today. Whether the Code covered less assistance than it seemed to, or whether the drafters intended to limit the scope of the restriction going forward, the result is clear. Applying the well-accepted interpretational rule *expressio unius est exclusio alterius*,<sup>61</sup> the fair reading of Rule 1.2(d) is that it does not apply to activity that is neither criminal<sup>62</sup> nor fraudulent.<sup>63</sup>

58. *Id.* at cmt. 10 (emphasis added).

59. See DEBORAH L. RHODE ET AL., LEGAL ETHICS 85–86 (7th ed. 2016) (explaining all states but California adopted the Model Code, and California established comparable provisions); WOLFRAM, *supra* note 8, at 56–57 (explaining by 1974 all states but California had adopted the 1969 Model Code).

60. MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102(A)(7) (AM. BAR ASS’N 1969) (emphasis added).

61. See *Expressio unius est exclusio alterius*, BLACK’S LAW DICTIONARY (9th ed. 2009); *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (applying the interpretive canon).

62. The Model Penal Code defines a crime as “an offense” defined by statute, “for which the sentence of [death or of] imprisonment is authorized. Crimes are classified as felonies, misdemeanors or petty misdemeanors.” MODEL PENAL CODE § 1.04(1) (AM. LAW INST. 2016).

63. “Fraud” is defined by the Model Rules as “conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.” MODEL

Much unlawful conduct fits within that universe.<sup>64</sup>

The legislative history of the Kutak Commission's development of Rule 1.2(d) adds whatever further support might be needed for this conclusion. The Commission's 1980 discussion draft of the Model Rules included, as then-Rule 4.3, an express limit on lawyer participation in contract drafting and negotiation that employed terms that did not satisfy the requirements of the law:

A lawyer shall not conclude an agreement, or assist a client in concluding an agreement, that the lawyer knows or reasonably should know is illegal, contains legally prohibited terms, would work a fraud, or would be held to be unconscionable as a matter of law.<sup>65</sup>

The Kutak Commission eliminated that provision in its next draft of the Rules. In 1982, as the Kutak Commission refined the language of Rule 1.2(d), the "Final Draft" of the rule included language that would have had some relevance to the inquiry here:

A lawyer shall not counsel or assist a client in conduct that the lawyer knows or reasonably should know is criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows or reasonably should know are legally prohibited . . . , but a lawyer may counsel or assist a client in a good faith effort to determine the validity, scope, meaning or application of the law.<sup>66</sup>

The phrase "or in the preparation of a written instrument containing terms the lawyer knows or reasonably should know are legally prohibited" did not appear in the version of Rule 1.2(d) put forward by the Commission. At the ABA Midyear Meeting in 1983, the International Association of Insurance Counsel (IAIC) proposed an amendment to the

RULES OF PROF'L CONDUCT r. 1.0(d) (AM. BAR ASS'N 2014). The RESTATEMENT OF TORTS describes the elements of common-law fraud as:

One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.

RESTATEMENT (SECOND) OF TORTS § 525 (AM. LAW INST. 1977).

64. "Kinds of law cover a wide spectrum, and hence, do kinds of potential violations: from breach of contract, through negligence, to civil regulatory matters, on to criminal violation." Pepper, *supra* note 28, at 333; *see also* Pierce, *supra* note 9, at 747 (discussing the ways in which illegal can include conduct not defined as criminal).

65. MODEL RULES OF PROF'L CONDUCT r. 4.3 (AM. BAR ASS'N, Discussion Draft 1980).

66. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N, Final Draft 1982).

Commission's proposal, reading as follows:

(d) A lawyer shall not counsel or assist a client in conduct that the lawyer knows is criminal, or fraudulent, *or otherwise intentionally tort[i]ous*, or in the preparation of a written instrument containing terms the lawyer knows are *expressly prohibited by law or unenforceable*, but a lawyer may counsel or assist a client in a good faith effort to determine the validity, scope, meaning or application of the law.<sup>67</sup>

The IAIC argued that “‘criminal or fraudulent’ conduct is too narrow . . . [N]o lawyer should be permitted to counsel or assist in any intentional tort.”<sup>68</sup> The House of Delegates rejected that amendment by a voice vote.<sup>69</sup> At that same meeting, the ABA Section on General Practice proposed to add a new rule, Rule 4.2(a), expressing a prohibition on “knowingly encouraging a client to engage in illegal conduct, except in a good faith effort to test the validity or scope of the law.”<sup>70</sup> The Section withdrew its proposal before any vote on it.<sup>71</sup>

This legislative history shows that the Kutak Commission, later supported by the ABA House of Delegates, communicated that a lawyer *may* prepare agreements with prohibited terms, assist with tortious acts, and otherwise aid in illegality other than crimes or frauds.

### c. The Rule's Interpretation and Application

There is surprisingly little interpretive commentary on the meaning of the “negative pregnant”<sup>72</sup> within Rule 1.2(d). The ABA has never

67. CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013, at 49 (Art Garwin ed., 2013) (emphasis added) [hereinafter LEGISLATIVE HISTORY]. The text uses the term “tortuous” instead of “tortious,” no doubt as a misprint. See 108 A.B.A. ANN. REP. 289, 294 (1983).

68. LEGISLATIVE HISTORY, *supra* note 67, at 50.

69. *Id.* at 49.

70. *Id.* at 50.

71. *Id.*

72. The “negative pregnant” is a rule of statutory construction articulated by the Supreme Court. See *Field v. Mans*, 516 U.S. 59, 67 (1995) (“[U]nder the rule . . . an express statutory requirement [in one section of a statute], contrasted with statutory silence [in another section], shows an intent to confine the requirement to the specified instance.”). It is accepted to apply statutory construction principles to the rules of professional conduct. See ABA Comm'n on Ethics and Prof'l Responsibility, Informal Op. 89-1530 (1989); ABA Comm'n on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995) (dissent of Ralph G. Elliot); David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 GEO. J. LEGAL ETHICS 791, 816–18 (1995).

declared in its publications that Rule 1.2(d) permits lawyers to engage actively in noncriminal and nonfraudulent wrongdoing. The Comments to Rule 1.2(d) do not address what one observer has termed the “negative inference”<sup>73</sup> of the Rule’s choice of language. The Annotated Model Rules of Professional Conduct, produced by the ABA’s Center for Professional Responsibility, similarly skirts the question entirely, focusing only on the importance of avoiding assistance with crimes and frauds and never mentioning the rule’s applicability to other wrongdoing.<sup>74</sup> An earlier version of the Annotated Model Rules included the statement that “[a] lawyer may never further a client’s lawful objectives through unlawful means,”<sup>75</sup> but later editions of the text omitted that advice, which is inconsistent with the Rule 1.2(d) message.<sup>76</sup>

Case law on the question is effectively nonexistent.<sup>77</sup> One court opinion has implied that the application of Rule 1.2(d) only to its identified forms of illegality is appropriate. In *In re Scionti*,<sup>78</sup> a lawyer faced disciplinary charges based on Rule 1.2(d) after advising his client to violate a custody and visitation order.<sup>79</sup> The lawyer and his client feared for the safety of the child.<sup>80</sup> In his defense, the lawyer argued that “a finding of violation of [Indiana Rule] 1.2(d) is unwarranted because the offense Respondent’s client committed derived from a civil action,

73. See Pierce, *supra* note 9, at 854.

74. See ELLEN J. BENNETT ET. AL., AM. BAR ASS’N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 31–47 (8th ed. 2015). That treatise does, however, include the following oblique reference in its discussion of Rule 1.2(d): “A lawyer’s assistance *in unlawful conduct* is not excused by a failure to inquire into the client’s objectives.” *Id.* at 46 (emphasis added). There is no reason to believe that the treatise editors’ employment of that more expansive phrase is intended to communicate anything substantive from the ABA beyond the plain language of the rule itself.

75. CTR. FOR PROF’L RESPONSIBILITY, AM. BAR ASS’N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 23 (3d ed. 1996) [hereinafter ANNOTATED MODEL RULES].

76. Compare *id.*, with BENNETT ET AL., *supra* note 74, at 31–47.

77. The research for this Article has found no discipline based on the Model Rule version of Rule 1.2(d) not involving crime or fraud. The only cases that discipline a lawyer for violation of Rule 1.2(d) after counseling or assisting in other unlawful conduct appear in a state that retained the term “illegal” in its version of the rule. See *In re Rosen*, 35 A.3d 1196, 1197–98 (N.J. 2012) (discipline for assistance with violation of a regulatory requirement that appears not to qualify as a crime or fraud, although termed “deceptive” by the court). Even in those states continuing with the “illegal” ban, discipline almost universally follows assistance with crimes or frauds. See, e.g., *Trumbull Cty. Bar Ass’n. v. Roland*, 63 N.E.3d 1200, 1202 (Ohio 2016) (concealing assets in a divorce proceeding); *In re Lowell*, 784 N.Y.S.2d 69, 72 (N.Y. App. Div. 2004) (discussing assistance with fraud); *In re Goldberg*, 520 A.2d 1147, 1147 (N.J. 1987) (discussing conviction of aiding drug distribution).

78. 630 N.E.2d 1358 (Ind. 1994).

79. *Id.* at 1358–59.

80. *Id.* at 1361.

and therefore a criminal violation was unforeseeable by Respondent.”<sup>81</sup> The court rejected that defense because the criminal implications of the violation were foreseeable.<sup>82</sup>

The Restatement (Third) of the Law Governing Lawyers is only slightly more forthcoming. The Restatement reports that a lawyer may assist a client with a breach of contract without violating the duties captured by Rule 1.2(d).<sup>83</sup> That conclusion is consistent with several other authorities asserting that breach of contract ought not to be considered activity barred by Rule 1.2(d), or even “illegal” for purposes of the broader Code language.<sup>84</sup> Beyond that example of unlawfulness,<sup>85</sup> the Restatement says nothing about whether a lawyer may assist a client with other unlawful activity, such as regulatory violations or intentional torts.<sup>86</sup>

The few scholars who addressed the topic directly have read Rule 1.2(d) to mean what it says, as authorizing (or at least not prohibiting) assistance with a wide array of unlawful activity. For example, Professor Carl Pierce writes,

[O]ne of the most striking features of Rule 1.2(d) is the extent to which it does not prohibit a lawyer from counseling

81. *Id.* at 1360.

82. *Id.*

83. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 57 (AM. LAW INST. 2000).

84. *See, e.g.*, Alaska Bar Ass’n, Ethics Op. 88-2 (1988) (explaining breach of contract (and the attorney’s concealment of breach of contract) would not violate either DR 7-102(A)(7) or Rule 1.2(d)); Hazard, *supra* note 3, at 674–75 (“The term ‘illegality’ in ordinary legal parlance does not embrace breach of contract . . . .”); Lewis Tesser & Timothy Nolen, “*Illegal*” Conduct Under Rule 1.2: When Does Advice to a Client Violate an Attorney’s Ethical Obligations?, N.Y. LEGAL ETHICS REP. (Apr. 1, 2015), <http://www.newyorklegalethics.com/illegal-conduct-under-rule-1-2-when-does-advice-to-a-client-violate-an-attorneys-ethical-obligations/>.

85. *See* Pierce, *supra* note 9, at 901–04 (addressing whether the “unlawful” term ought to apply to that activity).

86. The final adopted Restatement language is more consistent with Rule 1.2(d) than its preliminary draft. The American Law Institute’s 1992 draft stated, in a question-begging way, that “[a] lawyer must not assist the client when doing so would incur liability on the part of the lawyer.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 192 (Preliminary Draft No. 8, 1992). Comment *i* to that section included the following interpretive guidance:

The fact that a client intends to commit criminal or otherwise illegal acts does not by itself entail that a lawyer must not provide legal advice to the client. A lawyer may provide such advice for the purpose of indicating to the client the illegal nature of the activity. A lawyer must not, however, provide such assistance with the purpose of criminally or otherwise assisting the client in the activity.

*Id.* § 192 cmt. *i*.

or assisting a client to engage in a wide variety of misconduct for which the client will be subject to legal liability.<sup>87</sup>

Other writers have offered similar observations,<sup>88</sup> including, as noted in the Introduction, Professor Charles Wolfram, the Chief Reporter for the Restatement (Third) of the Law Governing Lawyers.<sup>89</sup> Professor Stephen Pepper has observed that because “violations of the [National Labor Relations Act] are neither criminal nor fraudulent[,] [u]nder [DR] 7-101(A)(7) the lawyer’s conduct [in assisting such violations] appears to be prohibited; under [Rule] 1.2(d) it appears to be clearly protected.”<sup>90</sup> Professor Martin Malin has applied Rule 1.2(d) to a lawyer’s inclusion in an employment agreement an arbitration term that violates Title VII of the Civil Rights Act, and concludes that, because the provision would constitute neither a crime nor a fraud, “[t]he Model Rules clearly do not prohibit the lawyer from drafting the arbitration agreement.”<sup>91</sup>

As noted above, no lawyer has been disciplined under the Model Rules version of Rule 1.2(d) for misconduct that did not involve a crime or a fraud.<sup>92</sup> That comes as no surprise, of course; it would violate

87. Pierce, *supra* note 9, at 891. Pierce adds, “There are numerous intentional torts other than fraudulent misrepresentation that lawyers are not currently prohibited from encouraging or assisting.” *Id.* at 899.

88. See Campbell & Gaetke, *supra* note 9, at 68 (“[W]e believe it is imperative that the prohibition contained in Model Rule 1.2(d) be expanded to reach all client conduct that would violate a statute or regulation, whether or not that conduct is considered criminal, given that these enactments are the clearest legal pronouncements of societal norms. We also believe that the rule’s restriction on lawyer assistance should reach intentional client conduct that violates common law duties as well.”); Michael C. Durst, *The Tax Lawyer’s Professional Responsibility*, 39 FLA. L. REV. 1027, 1074 (1987) (applying that distinction to tax practice); Henry J. Lischer, Jr., *Professional Responsibility Issues Associated with Asset Protection Trusts*, 39 REAL PROP. PROB. & TR. J. 561, 622 (2004) (applying that distinction to estate planning practice); Tesser & Nolen, *supra* note 84, at 2 (“The ABA Rule . . . appears to apply only to criminal conduct, not civil wrongs.”).

89. See WOLFRAM, *supra* note 8, at 704–05.

90. Pepper, *Counseling*, *supra* note 5, at 1592–93.

91. Malin, *supra* note 9, at 817. Malin also asserts that, while the provision would “literally” violate the former Model Code provision, DR 7-102(A)(7), “the Code was never interpreted to apply to conduct that was neither criminal nor fraudulent.” *Id.*

92. Many reported attorney disciplinary matters cite the Model Rules version of Rule 1.2(d) as a basis for discipline, but always involve criminal or fraudulent activity. On occasion, discipline has been imposed, using Rule 1.2(d), for violation of a court order. See, e.g., *In re Munroe*, 26 Mass. Att’y Disc. R. 385, 388 (2010) (“by assisting his clients in violating a court order, the respondent violated Mass. R. Prof. C. 1.2(d)”); *id.* (interpreting Massachusetts’s version of Rule 1.2(d), which is identical to the Model Rule); *In re Holden*, 982 P.2d 399, 399 (Kan. 1999) (interpreting Kansas’s version of Rule 1.2(d)); Matthew A. Smith, Note, *Advice and Complicity*, 60 DUKE L.J. 499, 503 (2010). That treatment should apply only when the court order violation itself constitutes a crime. Typically, violation of a court order would lead to discipline based upon a different Rule of Professional Conduct, Rule 3.4 (c) or 8.4(c). See, e.g., *Disciplinary Counsel v.*

fundamental fairness and the due process rights of a lawyer—respondent to discipline her for activity not identified in the disciplinary rules.<sup>93</sup>

No observer since the Model Rules were adopted by the ABA in 1983 has argued directly that Rule 1.2(d) ought to be read to cover all illegal or unlawful client activity. One who comes close is Professor W. Bradley Wendel. Wendel agrees that Rule 1.2(d) does not expressly bar a lawyer from assisting with all unlawful conduct, but warns that “[t]his language may tempt lawyers to think they can advise clients to engage in conduct that is not defined as a crime or fraud under the law of the relevant jurisdiction.”<sup>94</sup> He then argues that lawyers would be mistaken in that belief, because of the power of the other law, including malpractice exposure, that prohibits such assistance.<sup>95</sup> Wendel may be correct, although, as the discussion below shows, his assertion is probably not sustainable.<sup>96</sup>

Therefore, considered in light of its plain language and history, Rule 1.2(d) does communicate to lawyers precisely what Wendel worries about: that “they can advise clients to engage in conduct that is not defined as a crime or fraud under the law of the relevant jurisdiction.”<sup>97</sup> But the Rule ought not be read entirely in isolation. Other components of the Model Rules muddy the message in various ways, sometimes supportively, other times not so much. This Article now considers those other provisions.

## 2. Rules 1.2(a) and 1.3

The 1983 Rules adoption included another change from the predecessor Code that has some relevance to this inquiry. The 1969 Model Code included a provision stating that “[a] lawyer shall not intentionally . . . fail to seek the *lawful objectives* of his client through reasonably available means *permitted by law*.”<sup>98</sup> The Kutak Commission chose not to include that duty within the Model Rules, and no future Rules revision added it. Two states have opted to maintain that language within

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Rohrer, 919 N.E.2d 180, 183 (Ohio 2009); *In re Disciplinary Action Against Miley*, 486 N.W.2d 759, 760 (Minn. 1992).

93. Lawyers are entitled to due process protection in disciplinary proceedings. *See Ex Parte Burr*, 22 U.S. (9 Wheat.) 529, 530 (1824); *In re Barach*, 540 F.3d 82, 85 (1st Cir. 2008); Mark J. Fucile, *Giving Lawyers Their Due: Due Process Defenses in Disciplinary Proceedings*, 20 PROF. LAW. 28, 28 (2011).

94. *See* WENDEL, *supra* note 1, at 264.

95. *Id.* (citing *FDIC v. O’Melveny & Myers*, 969 F.2d 774 (9th Cir. 1992), *rev’d*, 512 U.S. 79 (1994), *aff’d in relevant respects on remand*, 61 F.3d 17 (9th Cir. 1995)).

96. *See infra* text accompanying notes 174–83.

97. WENDEL, *supra* note 1, at 264.

98. MODEL CODE OF PROF’L RESPONSIBILITY DR 7-101(A)(1) (AM. BAR ASS’N 1969) (emphasis added).

their version of Rule 1.2(a),<sup>99</sup> but the majority have not.<sup>100</sup> A Comment to Model Rule 1.3 does refer to the lawyer's duty to "take whatever *lawful and ethical* measures are required to vindicate a client's cause or endeavor."<sup>101</sup> In either iteration of that sentiment, the ABA's comment does not undercut Rule 1.2(d). In describing the *duty* of the lawyer to pursue all lawful measures available to achieve a client's interests, the provision begs the question we explore here: whether a lawyer may also, not as a duty but as a choice, assist with some unlawful activity in the pursuit of those same ends.

### 3. Rule 1.16(a)(1)

One provision within the Model Rules does cast some doubt upon the consistent reading of Rule 1.2(d) described just above. Rule 1.16(a)(1) reads as follows:

[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct *or other law* . . . .<sup>102</sup>

This language communicates a prohibition on lawyer assistance of client conduct that will result in a violation of any "other law," whether that other law is considered criminal or fraudulent. This broader language than that found in Rule 1.2(d) appears to impose the same ban that the Model Code provided and the Rules drafters rejected. No explanation appears within the ABA to account for this inconsistency. The question to be explored here is how a practicing lawyer ought to understand Rule 1.2(d) in light of Rule 1.16(a)(1). For instance, if Jonathan Shin contemplates assisting his client, AMJ, in its unlawful charitable solicitation activity, is he barred from doing so?

No reliable interpretation of the meaning of this provision exists. Writers on occasion cite to the language of Rule 1.16(a)(1) when asserting that a lawyer may not aid a client in illegal or unlawful actions, but never in a directed, analytic fashion, with a careful comparison to Rule 1.2(d).<sup>103</sup> The authorities who interpret Rule 1.2(d) as authorizing

99. MASS. RULES OF PROF'L CONDUCT r. 1.2(a); MICH. RULES OF PROF'L CONDUCT r. 1.2(a).

100. See STEPHEN GILLERS ET AL., REGULATION OF LAWYERS, STATUTES AND STANDARDS (2014) (comparing state versions of Rule 1.2(a)).

101. MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2014) (emphasis added).

102. *Id.* r. 1.16(a)(1) (emphasis added).

103. See, e.g., Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481, 497 (2008) ("[T]he lawyer must not counsel or assist the

assistance with nonfraudulent and noncriminal conduct typically do not account for Rule 1.16(a)(1) in their analysis.<sup>104</sup> In his treatise on the Model Rules, for example, Wolfram, who concludes that Rule 1.2(d) does “not limit a lawyer’s advice, even encouragement, to a client about unlawful acts so long as the acts are not criminal or fraudulent,”<sup>105</sup> separately writes to observe that Rule 1.16(a)(1) would prohibit a lawyer from proceeding in unlawful conduct with “only a fine as the penalty for noncompliance.”<sup>106</sup>

There are three possible ways to understand the juxtaposition of Rule 1.2(d)’s language with Rule 1.16(a)’s language. The first is that the latter provision trumps the former and corrects the implication that Rule 1.2(d) does not cover all unlawful activity. The second is the converse of the first—that Rule 1.16(a)(1)’s general reference to “other law” is a remnant of some prior understanding without undercutting the more deliberative and specific provision of Rule 1.2(d). A third possibility exists—that Rule 1.16(a)(1) refers to some activity other than assisting a client, such as the lawyer’s own conduct and its direct illegality. No authority or legislative history is available to assist us in discerning with full confidence which

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client in ‘conduct that the lawyer knows is criminal or fraudulent,’ or take actions on behalf of the client that ‘will result in violation of the Rules of Professional Conduct or other law.’” (citing Rules 1.2(d) and 1.16(a)(1)); Kevin H. Michels, *Lawyer Independence: From Ideal to Viable Legal Standard*, 61 CASE W. RES. L. REV. 85, 136 n.266 (2010) (the Rules “prohibit[] counsel from assisting a client transaction that counsel knows is wrongful”) (citing Rule 1.16(a)(1)); Morrison, *supra* note 17, at 304 (the Model Rules “prevent an attorney from giving legal services to clients who are going to engage in unlawful behavior with the attorney as their accomplice”) (citing the Rule); Paula Schaefer, *Overcoming Noneconomic Barriers to Loyal Disclosure*, 44 AM. BUS. L.J. 417, 421 n.14 (2007) (“[A]n attorney cannot participate in a client’s fraud and must withdraw from the representation if continuing will assist the client in illegal conduct”) (citing the Rule); Zacharias, *Lawyers as Gatekeepers*, *supra* note 7, at 1395–96 (lawyers “may not participate in or assist illegal conduct”) (citing the Rule).

104. See, e.g., Campbell & Gaetke, *supra* note 9, at 15–16; Malin, *supra* note 9, at 817; Pepper, *Counseling*, *supra* note 5, at 1587; Pierce, *supra* note 9, at 854–58.

105. WOLFRAM, *supra* note 8, at 704.

106. *Id.* at 552 n.88. Here is Wolfram’s example:

Suppose that a lawyer is asked by a client who is a foreign country to engage in some emergency work. Assume that applicable law requires the lawyer to register as the agent of a foreign country before undertaking any legal work with—we will assume, probably inaccurately—only a fine as a penalty for noncompliance. Undertaking the work without registering first seems to violate the Model Rules (MR 1.16(a)(1)) but not the Code.

*Id.* Wolfram’s conclusion that the Code would not be violated rests not on DR 7-102(A)(7), discussed above, but on DR 2-110(B), requiring withdrawal if the representation will result in the lawyer’s violating the Code, but not “other law,” as the Model Rules provide. *Id.*

of the three alternatives is most reliable,<sup>107</sup> but the best reading would conclude that the second alternative is the safest bet.

There are two reasons to reject the first hypothesis—that the general Rule 1.16 language overrules the more specific Rule 1.2 language. The first is the ordinary interpretive tool holding that a more specific provision carries more weight than a more general one.<sup>108</sup> The history explored above shows much deliberation within the ABA, and explicit choices made among identified alternative provisions, to arrive at the terms of Rule 1.2(d), with a perhaps surprising result, and one that represented a change in policy from the rule’s predecessor.<sup>109</sup> By contrast, no such deliberation or debate appears in any historical account of the development of Rule 1.16(a)(1).<sup>110</sup> The second reason to reject that hypothesis is grounded in the ABA’s treatment of the language in question within Rule 1.16. Notwithstanding the text of the Rule, the Comment addressing that provision states that “[a] lawyer *ordinarily* must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law.”<sup>111</sup> The Comment reaffirms the broader coverage (“illegal,” “other law”) but adds an unexplained qualifier. The Annotated Model Rules treatment backs off even more. In explaining the reach of Rule 1.16(a)(1), the Center for Professional Responsibility hedges in a way that seemingly affirms the Rule 1.2(d) message. Under the heading “Assisting Client Misconduct,” the resource advises its readers as follows: “A lawyer is required to withdraw if the lawyer knows continued representation will result in assisting a client to commit a criminal or fraudulent act.”<sup>112</sup> The Annotated Model Rules thus appears to interpret Rule 1.16(a)(1) in harmony with Rule 1.2(d), notwithstanding the apparent broader coverage of the former rule itself. The authors could have easily written, “assisting a client to commit a

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107. The sources that aid in our understanding of the development of the final adopted language of Rule 1.2(d) do not offer any similar legislative history of the basis for the language in Rule 1.16(a). See LEGISLATIVE HISTORY, *supra* note 67; 108 A.B.A. ANN. REP., *supra* note 67.

108. This is a common technique in statutory interpretation, known as “*generalia specialibus non derogant*,” or “general things do not derogate from special things.” See *Generalia Specialibus Non Derogant*, BLACK’S LAW DICTIONARY (10th ed. 2014); CALEB NELSON, STATUTORY INTERPRETATION 538–52 (2011); see also ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 250 (1943) (applying that principle to interpretation of the ethics rules); Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95, 107 (2011) (applying that test to an interpretation of a Model Rule).

109. See *supra* text accompanying note 108.

110. See LEGISLATIVE HISTORY, *supra* note 67, at 365–81; 108 A.B.A. ANN. REP., *supra* note 67, at 323–25.

111. MODEL RULES OF PROF’L CONDUCT r. 1.16 cmt. 2 (AM. BAR ASS’N 2014).

112. ANNOTATED MODEL RULES, *supra* note 75.

criminal or fraudulent act *or to violate some other law*,” in order to be faithful to the provision about which they write. However, the authors chose not to do so. In addition, each of the cases used to illustrate the provision involves a lawyer who assisted a client or engaged in conduct that was either criminal, fraudulent, or in violation of a court order.<sup>113</sup>

The second hypothesis, therefore, earns support for this analysis. This theory suggests that the Model Rules drafters included the Rule 1.16 language more generally to refer to some forms of illegality (for instance, crime and fraud) without intending to cover all illegality—inartful, perhaps, but not a dramatic error in judgment. That reading, like the treatment by the Center for Professional Responsibility, preserves the meaning of Rule 1.2(d) without sacrificing much in the Rule 1.16 realm. No authority or commentator has made this argument, but then again, no authority or commentator has addressed directly the inconsistency at issue here.

Then there is the third hypothesis—that the “other law” term used by Rule 1.16(a)(1) does not refer to assistance with the client’s illegality but rather a more direct application to the law that applies to the lawyer. The argument looks like this: Lawyers are allowed to assist clients in their wrongdoing so long as the client’s wrongdoing is not criminal, fraudulent, or in violation of a court order. But if the representation of the client requires the *lawyer* to break the law, the lawyer may not continue with the representation and must withdraw. This admittedly cramped interpretation would help account for the Professor Wolfram story encountered above, where he concluded that a lawyer would be mandated to withdraw under Rule 1.16, but not under the Model Code, if proceeding with the legal work left the lawyer exposed to a penalty.<sup>114</sup> Applying the respective Model Code and Model Rules mandatory withdrawal provisions, Wolfram concluded that the language in the 1983 rule prohibiting a lawyer from continuing with work that violated “other law” would require withdrawal, while the Code language, referring only to violations of the professional rules, would not.<sup>115</sup> Because Wolfram later concludes that Rule 1.2(d) does not bar the lawyer from assisting with noncriminal or nonfraudulent client misconduct,<sup>116</sup> his interpretation of Rule 1.16(a)(1) to bar lawyer participation requires some justification, and this hypothesis appears to be the only one available.

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113. *Id.* As described above, violation of a court order is a category of lawbreaking that the Model Rules forbid, either through an expansive reading of Rule 1.2(d) or, more aptly, through the application of Model Rule 8.4(c). *See supra* text accompanying note 75.

114. *See* WOLFRAM, *supra* note 8, at 552 n.88; *supra* text accompanying note 105.

115. *See* WOLFRAM, *supra* note 8, at 552 n.88.

116. *Id.* at 704–05.

The problem with this hypothesis is that it has little connection to the actual language of Rule 1.16(a)(1). The rule requires withdrawal<sup>117</sup> when “*the representation will result in violation of [some] other law,*”<sup>118</sup> while the hypothesis would only address the lawyer’s risk of lawbreaking, not the client’s. No authority, either from the ABA or from scholars, has ever read the Rule 1.16(a)(1) provision in this way. For our purposes, therefore, we should accept that the third hypothesis is not a credible one.

The most sensible conclusion, then, is that Rule 1.2(d) remains intact, unaffected by Rule 1.16(a)(1)’s inconsistent language. The enforcement of Rule 1.16(a)(1) within the state disciplinary reports supports that conclusion. Research uncovers scores of discipline reports in which Rule 1.16(a)(1) serves as the basis for attorney discipline. The reports reflect discipline imposed under Rule 1.16(a) consistent with Rule 1.2(d). Every available instance of misconduct leading to discipline for a failure to withdraw involved the lawyer’s encountering or participating in a crime, fraud, or violation of the Rules of Professional Conduct.<sup>119</sup> The rule has never served as the basis for discipline for violation of some “other law” beyond those categories.<sup>120</sup> The most common reason for a court to rely on Rule 1.16(a)(1), rather than (or along with) Rule 1.2(d), is for a developed conflict of interest requiring the attorney’s withdrawal.<sup>121</sup> The next most common fact pattern involves a lawyer’s remaining in some

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117. It also requires refusal to commence representation in the circumstances discussed, but the questions explored here arise almost inevitably within an ongoing engagement. See MODEL RULES OF PROF’L CONDUCT r. 1.16(a) (AM. BAR ASS’N 2014) (stating that “a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if” the listed circumstances arise).

118. *Id.* (emphasis added).

119. See, e.g., *In re Ford*, 98 So. 3d 269, 272 (La. 2012); *In re Edwardson*, 647 N.W.2d 126, 127 (N.D. 2002); *In re Drayton*, 597 S.E.2d 791, 793 (S.C. 2004).

120. One reported discipline opinion relying upon a violation of Rule 1.16(a)(1) implies that the lawyer’s suspension from practice was justified by, among other reasons, the lawyer’s having failed to comply with a state regulation governing real estate transactions. See *Ky. Bar Ass’n v. Katz*, 317 S.W.3d 592, 594 (Ky. 2010) (describing “other law” as “specifically, in violation of Delaware interpretive guidelines regarding residential real estate transactions”). The opinion reads as if some “other law,” other than a crime, fraud, or breach of professional rules, served as the trigger for the Rule 1.16(a)(1) violation. That implication is not supported by the facts, however. The Kentucky discipline was reciprocal, after Delaware had suspended the attorney for misconduct occurring in Delaware. See *In re Katz*, 981 A.2d 1133, 1150 (Del. 2009). The reference to Rule 1.16(a)(1) in the Delaware disciplinary report did not rely on some noncriminal Delaware regulation, which the Kentucky opinion implies, but instead to a special Delaware interpretation of Rule 1.16 requiring lawyers in real estate transactions to avoid certain conflicts of interest. See *id.* at 1141–42. The lawyer in question also engaged in multiple conflicts of interest in violation of Delaware’s Rule 1.7. *Id.* at 1140–41.

121. See, e.g., *Att’y Grievance Comm’n of Md. v. Zhang*, 100 A.3d 1112, 1132 (Md. 2013); *In re Munden*, 559 S.E.2d 589, 590 (S.C. 2002); *In re Hoffman* 700 N.E.2d 1138, 1139 (Ind. 1998).

representation after losing her right to practice law, usually because of an administrative suspension.<sup>122</sup> In almost all of the applications of Rule 1.16(a)(1), the discipline arose from the lawyer's failure to withdraw to prevent a breach of the state's rules of professional conduct.<sup>123</sup>

#### 4. Rule 8.4(e)

Rule 8.4(e), like Rule 1.16(a)(1), undercuts the message within Rule 1.2(d) and its consistent interpretation. Rule 8.4(e) declares that “[i]t is professional misconduct for a lawyer to: . . . (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct *or other law*.”<sup>124</sup> Rule 8.4(e)'s language presents another conundrum within the structure of the Model Rules. If it is true, as so far it seems to be, that Rule 1.2(d) permits a lawyer's assistance with some conduct that is unlawful, Rule 8.4(e) appears to assert that the lawyer may not inform a client (or anyone else) of that possibility. Consider how that language might apply to Jonathan Shin's work for AMJ on its unauthorized solicitation of funds.<sup>125</sup> As the story has been crafted, AMJ's requests for funds from donors are not permitted by the governing state guidelines, but doing so is not criminal or fraudulent, as no AMJ constituent will mislead any donor about any aspect of the requested financial assistance.<sup>126</sup> Rule 1.2(d) does not bar Shin's counseling Ehsan Rahman, the AMJ executive director, to proceed with the requests for donations, or his assistance with that activity. Rule 8.4(e) also does not prohibit Shin's performing that work, at least not expressly. Rule 8.4(e) does, though, appear to prohibit Shin from stating, or even implying, to Rahman that he may perform that work, which would render his counseling of AMJ about that topic virtually impossible.

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122. See, e.g., *In re Fazande*, 23 So. 3d 247, 252 (La. 2009); *In re Swisher*, 179 P.3d 412, 417 (Kan. 2008); *In re Paulson*, 216 P.3d 859, 872 (Or. 2009); *State ex rel Okla. Bar Ass'n v. Knight*, 359 P.3d 1122, 1123 (Okla. 2015).

123. See, e.g., *Att'y Grievance Comm'n of Maryland v. Bleecker*, 994 A.2d 928, 943 (Md. 2010) (discussing violation of Rule 3.3); *In re Dennis*, 188 P.3d 1, 18 (Kan. 2008) (discussing failure to comply with a court order in violation of Rules 3.2 and 8.4(d)); *People v. Johnson*, 35 P.3d 168, 171 (Colo. 1999) (discussing violation of Rules 1.8 and 8.4(a)).

124. MODEL RULES OF PROF'L CONDUCT r. 8.4(e) (AM. BAR ASS'N 2014) (emphasis added).

125. See *supra* text accompanying notes 40–42.

126. The story used here assumes that the regulations bar any requests for donations by a charitable organization, even if the organization makes clear that the deductibility of the donations is contingent on a future determination by the IRS that the organization qualifies as a Section 501(c)(3) tax-exempt organization. See discussion *supra* note 42 and accompanying text; see also *Overview of Solicitation*, MASS.GOV, <http://www.mass.gov/ago/doing-business-in-massachusetts/public-charities-or-not-for-profits/soliciting-funds/overview-of-solicitation.html> (last visited Nov. 19, 2017).

The language of Rule 8.4(e) was shifted by the Ethics 2000 Commission from its placement in the lawyer marketing rule, Model Rule 7.1, to its current placement in the lawyer misconduct rule.<sup>127</sup> Before the Ethics 2000 revision, Rule 8.4(e) contained only the existing language about improper influence of a government agency or official.<sup>128</sup> The Commission intended the new placement of that language “to clarify that the prohibition is not limited to statements made in connection with marketing legal services.”<sup>129</sup> The Commission accompanied the move with a new explanatory Comment, which reads: “Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer’s behalf.”<sup>130</sup> The purpose of the new comment, according to the Commission, was “to explain when a lawyer is subject to discipline for violating or attempting to violate the Rules ‘through the acts of another.’”<sup>131</sup>

No published interpretation of Rule 8.4(e) has concluded that its revised language was intended to expand the scope of Rule 1.2(d)’s prohibitions, and research uncovers no case or disciplinary report in which that interpretation of Rule 8.4(e) has been used.<sup>132</sup> The only ambiguity within the rule is its inclusion of the phrase “other law.” Otherwise, it effectively states a truism—that a lawyer may not claim to be able to employ means that violate the Rules of Professional Conduct.<sup>133</sup> Both the new Comment and the Reporter’s explanation for

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127. LEGISLATIVE HISTORY, *supra* note 67, at 860.

128. *Id.*

129. *Id.* at 861.

130. MODEL RULES OF PROF’L CONDUCT r. 8.4 cmt. n.1 (AM. BAR ASS’N 2014).

131. LEGISLATIVE HISTORY, *supra* note 67, at 861.

132. While attorneys on occasion have been disciplined for violation of a version of Model Rule 8.4(e), none of the disciplinary reports shows conduct unrelated to claims of improper influence of an official. *See, e.g., State ex rel. Okla. Bar Ass’n v. Erickson*, 29 P.3d 550, 554 (2001) (discussing implication of possible bribery); *In re Smith*, 991 N.E.2d 106, 109 (Ind. 2013) (discussing claims in book of having connections); *In re Anderson*, 804 N.E.2d 1145, 1145 (Ind. 2004) (explaining prosecutor arrested for DUI claimed to have had influence); *In re Howard*, 912 S.W.2d 61, 63 (Mo. 1995) (arguing in court that the attorney had influence with superiors); *In re Shariati*, 31 A.3d 81, 84 (D.C. 2011) (discussing charges based on implication that attorney could influence officials). References to Rule 8.4(e) within ethics scholarship appear only in the context of improper influence. *See, e.g., Heidi Reamer Anderson, Allocating Influence*, 2009 UTAH L. REV. 683, 685; George M. Cohen, *The Laws of Agency Lawyering*, 84 FORDHAM L. REV. 1963, 1966 (2016).

133. *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS, THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 8.4-2(f) (2017–2018 ed.):

If a lawyer violates the Rules or other law, then Rule 8.4(a) applies.  
However, under Rule 8.4(e), even if a lawyer does not violate the Rules or other

the Comment confirm that the worry is a lawyer's violation of the rules. Like with the suggested interpretation of Rule 1.16(a)(1) above,<sup>134</sup> there is too little evidence available to conclude that this Rule 8.4(e) should be read to alter the plain language understanding of Rule 1.2(d).

### 5. Summary of the Model-Rules Review

This review of the Model Rules permits a reasonably confident, if far from certain, conclusion that those professional guidelines do not prohibit a lawyer from advising a client about, encouraging a client to engage in, or assisting a client with unlawful actions that are not criminal or fraudulent. The carefully chosen language of Rule 1.2(d) communicates that message to members of the bar, and none of the other more restrictive provisions has the clarity or force to trump Rule 1.2(d)'s plain language. To state that the Rules do not prohibit such assistance or encouragement is to state that the Rules allow the same.<sup>135</sup> And to state that the Rules allow the same is to state that the positive-law allowance applies whether the unlawful or illegal actions cause no harm or some harm.<sup>136</sup> The Rules make no such distinction.<sup>137</sup> If this analysis is sound, two implications warrant further exploration. The first is the possibility that, notwithstanding the Model Rules' permission to encourage or assist with certain wrongdoing,<sup>138</sup> lawyers may not encourage or assist because of some superseding "other law" applicable to them. The second (assuming that the first implication is not dispositive and lawyers do retain some discretion to assist in wrongdoing) is to discern the meaning of the ABA's permission and the practice choices available to lawyers aiming to lead an ethical professional life. This Article will examine each of these implications in order.

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law, but instead only brags to clients that she will do so to accomplish the client's objectives, her statement is disciplinable under Rule 8.4(e).

*Id.* Therefore, according to this commentary, the lawyer's proposed actions must be themselves in violation of the Rules or some law for this rule to apply.

134. See *supra* text accompanying note 107.

135. See Bundy & Elhauge, *supra* note 6, at 308.

136. *Id.*

137. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2014).

138. This Article uses the term "wrongdoing" to refer to unlawful or illegal conduct, but advisedly so. It recognizes that some activity that might be considered "unlawful"—such as breaching a contract—may not be considered "wrongful." As one court has written, "a breach of contract is not considered wrongful activity in the sense that a tort or a crime is wrongful." Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., 313 F.3d 385, 389 (7th Cir. 2002); see also RESTATEMENT (SECOND) OF CONTRACTS ch. 16, topic 3, intro. note (AM. LAW INST. 1981) (treating remedies as a cost).

#### D. *The Availability of “Other Law” as a Supplement to Rule 1.2(d)*

This Article next explores the limitations that “other law”—from outside of the profession—imposes on lawyer assistance of client wrongdoing. Perhaps the ban missing from the Model Rules arrives from other doctrine or regulatory constraints.

##### 1. The Relevance of Other Law

If the Model Rules do not prohibit—and as a consequence allow—the kinds of assistance with wrongdoing just described, that reality may matter very little if some equally effective “other law” accomplished the same prohibition.<sup>139</sup> If some authority applicable to lawyers specifically, or to citizens generally, prohibits assistance with illegal conduct beyond crimes and fraud, attorneys would effectively proceed as though the older Model Code language prohibiting assistance with all “illegal” conduct were still in place. It appears that such is not the case, however. While some restrictions do exist in select contexts, no widely applicable authority categorically prohibits a lawyer from assisting a client with conduct that violates some statute or regulation or constitutes a civil tort or breach of contract.

Before proceeding with this step of the analysis, we need to be clear about the question to be addressed in this subpart. As a matter of discipline and the authority of the relevant state supreme court’s ethical rules, the applicable Model Rule provisions control, *even if* it were true that the lawyer risks some other, separate sanction for his assistance with client wrongdoing. Put another way, it will matter to a practicing lawyer whether the disciplinary authority bars a certain action, notwithstanding any other implications of the action. For example, if we accept that Rule 1.2(d) does not prohibit a lawyer from assisting a client who engages in intentionally tortious conduct,<sup>140</sup> a lawyer who does so might nevertheless be found liable to pay damages to the injured party,<sup>141</sup> even if she might not be subject to discipline for her participation. Given this Article’s aim to understand the proper professional role responsibilities

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139. See Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don’t Get It*, 6 GEO. J. LEGAL ETHICS 701, 705–06 (1993) (noting the importance of “other law” to the realm of lawyering activity).

140. See *supra* text accompanying note 67.

141. See *Kurker v. Hill*, 689 N.E.2d 833, 836–37 (Mass. App. Ct. 1998) (ruling that minority business owner’s allegations against co-owners and lawyers supported claim of civil conspiracy); RESTATEMENT (SECOND) OF TORTS § 876(b) (AM. LAW INST. 1977) (explaining that a person may be liable in tort if he “knows that the . . . conduct [of another person] constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself”); Douglas R. Richmond, *Lawyer Liability for Aiding and Abetting Clients’ Misconduct Under State Law*, 75 DEF. COUNS. J. 130, 131 (2008); Eugene J. Schiltz, *Civil Liability for Aiding and Abetting: Should Lawyers Be “Privileged” to Assist Their Clients’ Wrongdoing?*, 29 PACE L. REV. 75, 89 (2008).

of lawyers, it matters little what risks those lawyers choose to accept. The critical question is how the profession and its regulators address the underlying attorney conduct. This Article treats a lawyer as having discretion to perform some action if the bar chooses not to prohibit it, even if some other consequences to the lawyer ensue. Yet some types of assistance with wrongdoing expose the lawyer to no penalties or sanctions at all, whether through the disciplinary system, exposure to civil penalties, or administrative sanctions.

## 2. The Consequences Arising from Other Law

With that understanding, it is useful to summarize at least briefly the risks a lawyer does accept in his decision to assist his clients in illegality which the state bar authorities allow. That summary obviously excludes considering criminal sanctions or civil liability for assistance with fraud, since a lawyer has no permission from the bar to engage in either activity.

The remaining risks may be divided into two categories: civil damages for aiding in client wrongdoing and regulatory sanctions for activity declared off-limits by some federal, state, or local law. Let us consider each in turn.

*Civil liability:* A lawyer may, without breaching her ethical duties as established by the bar, engage in representational conduct on behalf of a client for which she may be found liable and ordered to pay damages to an injured party. A lawyer in some circumstances may face liability for assisting in breaches of fiduciary duty<sup>142</sup> or for aiding and abetting torts.<sup>143</sup> In limited circumstances, a lawyer may be required to pay damages for interference with contractual relationships.<sup>144</sup> A lawyer may

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142. See *Adena, Inc. v. Cohn*, 162 F. Supp. 2d 351, 358 (E.D. Pa. 2001) (finding against lawyer for aiding in a partner's breach of fiduciary duty); *Kenny v. Murphy*, No. 08-P-996, 2010 WL 46376, at \*3 (Mass. App. Ct. Jan. 8, 2010); *Cacciola v. Nellhaus*, 733 N.E.2d 133, 139-40 (Mass. App. Ct. 2000); Christine L. Eid, Comment, *Lawyer Liability for Aiding and Abetting Squeeze-Outs*, 34 WM. MITCHELL L. REV. 1177, 1198 (2008); Katerina P. Lewinbuk, *Let's Sue All the Lawyers: The Rise of Claims Against Lawyers for Aiding and Abetting a Client's Breach of Fiduciary Duty*, 40 ARIZ. ST. L.J. 135, 140 (2008); Brinkley Rowe, Note, *See No Fiduciary, Hear No Fiduciary: A Lawyer's Knowledge Within Aiding and Abetting Fiduciary Breach Claims*, 85 FORDHAM L. REV. 1389, at 1389, 1392 (2016); .

143. See *Thornwood, Inc. v. Jenner & Block*, 799 N.E.2d 756, 768 (Ill. App. Ct. 2003) (“[W]e see no reason to impose a per se bar that prevents imposing liability upon attorneys who knowingly and substantially assist their clients in causing another party's injury.”); RESTATEMENT (SECOND) OF TORTS § 876 (AM. LAW INST. 1979). Considerable uncertainty exists regarding whether lawyers may be held liable for assistance with a client's tortious conduct. See Kevin Bennardo, *The Tort of Aiding and Advising?: The Attorney Exception to Aiding and Abetting a Breach of Fiduciary Duty*, 84 N.D. L. REV. 85, 87, 90 (2008).

144. Ordinarily, a lawyer may not be held liable for interference with contractual relationships when advising a client who chooses to breach a contract. See *Macke Laundry Serv. Ltd. P'ship v. Jetz Serv. Co.*, 931 S.W.2d 166, 181-82 (Mo. Ct. App. 1996) (providing lawyers

be found to qualify as a “primary” violator of Section 10b-5 of the securities laws and ordered to pay damages to injured investors as the result of work performed for clients,<sup>145</sup> or be held liable to investors for negligent advice about a securities offering.<sup>146</sup> In none of those settings would a lawyer have necessarily violated her ethical duties within her state, but she may pay a price for her conduct.

*Regulatory sanctions:* An agency or regulatory body could sanction a lawyer for actions performed while representing a client even if those actions do not violate Rule 1.2(d) because the conduct, while contrary to an administrative regulation, is not criminal or fraudulent. Some regulatory sanctions will qualify as crimes<sup>147</sup> and therefore would be prohibited by Rule 1.2(d). Other sanctions, however, are administrative and not covered by Rule 1.2(d).<sup>148</sup> It is true that another Model Rule prohibits a lawyer’s assisting some such administrative wrongdoing in an adjudicative proceeding. Rule 3.4(c) states that “[a] lawyer shall not . . . (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.”<sup>149</sup> In an adjudicative proceeding before a state or federal agency, the agency is a “tribunal” for purposes of Rule 3.4(c).<sup>150</sup> A lawyer’s assistance to a client with conduct that violates agency rules would therefore be prohibited by Rule 3.4(c) even if not by Rule 1.2(d). For

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with a qualified privilege, when acting within the scope of attorney–client relationship, to assist a client not to perform a contract); Eid, *supra* note 142, at 1217–18. *But see* Schott v. Glover, 440 N.E.2d 376, 380 (Ill. App. Ct. 1982) (holding that a claim against a lawyer for tortious interference with a contract must allege actual malice; “[s]uch allegations, however, would necessarily include a desire to harm, which is independent of and unrelated to the attorney’s desire to protect his client”).

145. *See* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 191 (1994) (“Any person or entity, including a lawyer, accountant, or bank . . . may be liable as a primary violator under 10b-5 . . .”) (referring to Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5 (2017)) *superseded by statute*, Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, *as recognized in* SEC v. Fehn, 97 F.3d 1276, 1280 (9th Cir. 1996).

146. *See* FDIC v. O’Melveny & Meyers, 969 F.2d 744, 748 (9th Cir. 1992), *rev’d and remanded*, 512 U.S. 59 (1994).

147. *See* 18 U.S.C. § 1512(c) (2012); 18 U.S.C. § 1519 (2012) (listing criminal penalties for violations of the Sarbanes-Oxley Act); *see also* Greta Fails, *The Boundary Between Zealous Advocacy and Obstruction of Justice After Sarbanes-Oxley*, 68 N.Y.U. ANN. SURV. AM. L. 397, 420 (2012) (discussing the criminal penalties under the Sarbanes-Oxley Act applicable to lawyer activity on behalf of clients).

148. *See* Cohen, *supra* note 132, at 1984–85 (stating that some administrative violations may not trigger Rule 1.2(d)).

149. MODEL RULES OF PROF’L CONDUCT r. 3.4(c) (AM. BAR ASS’N 2014).

150. *Id.* r. 1.0(m) (defining “tribunal” to include an “administrative agency . . . acting in an adjudicative capacity”); *see also* Cohen, *supra* note 132, at 1966 (“When an agency ‘act[s] in an adjudicative capacity,’ it is a ‘tribunal’ under Rule 1.0(m).”).

example, lawyers who practice before the Social Security Administration (SSA) must comply with separate, agency-driven requirements when representing claimants.<sup>151</sup> Failure to honor those standards of conduct may lead to sanctions, including suspension of the right to practice before the SSA.<sup>152</sup> The Securities and Exchange Commission<sup>153</sup> and the United States Patent and Trademark Office<sup>154</sup> may also discipline attorneys for failure to meet their respective representational standards. That discipline may include suspension of the right to practice before those agencies.<sup>155</sup>

A lawyer might actively assist a client to violate an agency's regulatory scheme but not in an adjudicative setting. That is the arrangement captured by two of the three stories that began this Article—the nonprofit solicitation tale<sup>156</sup> and the trademark licensing tale.<sup>157</sup> In such a setting, the lawyer faces no agency or bar discipline sanctions for assisting the client to proceed with actions that do not comply with the regulatory requirements.

### III. IMPLICATIONS OF THE SUBSTANTIVE LAW LESSONS

We thus find ourselves facing three permutations of lawyer assistance with client misconduct and an apparent consequential question: If the authorities provide lawyers permission to assist where such assistance is not expressly forbidden, does that permission imply a *duty* to aid a client whose representation would be benefitted by such aid? The answer to that question instinctively, and analytically, must be no.

#### A. Three Lawyer Postures

Given the available substantive law principles at play, the lawyer's role responsibilities when encountering client plans that implicate unlawful actions fit within three separable, and seemingly mutually exclusive, categories. These categories address the *client's* unlawful conduct and the lawyer's possible assistance of that forbidden activity. They do not address the separate category involving unlawful activity

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151. 20 C.F.R. § 404.1740 (2017).

152. *Id.* § 404.1745; see also Drew A. Swank, *The Social Security Administration's Condoning of and Colluding with Attorney Misconduct*, 64 ADMIN. L. REV. 507, 519–20 (2012) (“Since 1980, when records were first maintained, a total of 178 attorneys and nonattorneys have been suspended or disqualified from representing claimants before the Social Security Administration.”).

153. See 17 C.F.R. §§ 205.1–.7 (2017).

154. See 37 C.F.R. § 11.19 (2017).

155. See 20 C.F.R. § 404.1745 (2017); see also 35 U.S.C. § 32 (2012) (USPTO); 17 C.F.R. § 205.6.

156. See *supra* text accompanying notes 40–42.

157. See *supra* text accompanying notes 43–45.

under the professional codes for the lawyer herself to engage in, such as, for example, offering false evidence to a tribunal<sup>158</sup> or advising an unrepresented person whose interests are adverse to the lawyer's client's interests.<sup>159</sup> Because those latter activities are forbidden directly, the questions examined here do not arise.

### 1. Criminal or Fraudulent Actions

There is no ambiguity that a lawyer may not counsel her client to engage in a crime or a fraud and may not assist the client should the client elect to do so. The lawyer may actively counsel her client *about* the criminal or fraudulent nature of the activity and aid the client to understand the consequences of proceeding, but if that latter counseling encourages the crime or fraud, the lawyer most likely has violated Rule 1.2(d).<sup>160</sup> As far as one may discern, though, no lawyer has been disciplined for merely counseling a client about the consequences of, without actively assisting with, the forbidden activity.<sup>161</sup> Nevertheless, the absence of such precedent does not permit an inference that such encouragement is acceptable.<sup>162</sup>

### 2. Unlawful Activity That Is Neither Criminal nor Fraudulent, but Does Expose the Lawyer to Other Liability Risks

The professional regulatory apparatus will not discipline a lawyer for active assistance with most remaining unlawful conduct beyond the category of crime and fraud, but other substantive law may operate to penalize or impose costs upon a lawyer who does so. The typical examples of this category are assistance provided to a client to commit an intentional tort, such as a breach of fiduciary duty,<sup>163</sup> or

158. MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2014).

159. *Id.* r. 4.3.

160. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 56 cmt. c (AM. LAW INST. 2000) ("Proper advice to a client does not constitute assistance leading to liability."); ROTUNDA & DZIENKOWSKI, *supra* note 133, at § 1.2-4(a); Green, *supra* note 5, at 1447 (defending advice about enforcement practices); Pepper, *Counseling*, *supra* note 5, at 1548.

161. Research has uncovered no instance of a lawyer disciplined for a violation of Rule 1.2(d), or a state's variation of the ABA Rule with comparable content, for advising a client about remedies or consequences without some affirmative assistance. *Cf.* Banco Popular N. Am. v. Gandi, 823 A.2d 809, 815 (N.J. Super. Ct. App. Div. 2003) (noting but not resolving, at the pleading level, the fine line between advising about the law and assisting with fraud for purposes of lawyer liability for aiding and abetting fraud), *aff'd in part, rev'd in part*, 184 N.J. 161 (2005).

162. See *id.* (observing the difficulty in making distinction and implying that some advice might reach the level of assistance).

163. See *supra* notes 142–45 and accompanying text. The earlier discussion noted the hurdles a nonclient faces in asserting claims against a lawyer for damages for aiding an intentional tort, but some nonclients have succeeded in such claims.

encouragement to a client to breach a contract, resulting in interference with a contractual relationship.<sup>164</sup>

It is also possible, although seemingly unlikely, that a lawyer may risk a judgment against her for professional negligence or malpractice for assisting a client in conduct for which the client is later found liable. At least one authority has made this claim.<sup>165</sup> The unlikelihood of this exposure stems from two considerations. First, assuming the lawyer *is not negligent* in her counseling role and either advises the client of the possible risks in proceeding contrary to some regulatory scheme or discloses accurately the costs of the resulting breach of contract or tort action the client's stance will invite, no malpractice claim should survive.<sup>166</sup> Second, it is typically a defense to a malpractice claim if the client has unclean hands, or acts *in pari delicto*.

The [*in pari delicto*] defense is . . . available only in circumstances in which a client may reasonably be expected to know that the activity is a wrong despite the lawyer's implicit endorsement of it, for example when a client claims to have followed the advice of a lawyer to commit perjury.<sup>167</sup>

A lawyer's collaborative strategy with a client to proceed knowingly in the face of contrary legal authority should therefore not subject the lawyer to the risk of suit by her own client. The only outside risk of a negligence action arises if a trustee stands in the shoes of the client; in that setting, the *in pari delicto* defense might not be available.<sup>168</sup>

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164. See Eid, *supra* note 142, at 1217–18 (noting the qualified privilege that lawyers possess against such suits).

165. See WENDEL, *supra* note 1, at 264 (citing FDIC v. O'Melveny & Myers, 969 F.2d 774 (9th Cir. 1992), *rev'd*, 512 U.S. 79 (1994), *aff'd in relevant respects on remand*, 61 F.3d 17 (9th Cir. 1995)).

166. See Wood v. McGrath, North, Mullin & Kratz, PC, 589 N.W.2d 103, 107 (Neb. 1999) (“Because the client bears the risk, it is the client who should assess whether the risk is acceptable.”); Union Planters Bank v. Thompson Coburn, 935 N.E.2d 998, 1022 (Ill. App. Ct. 2010); Robert Kehr, *Lawyer Error: Malpractice, Fiduciary Breach, or Disciplinary Offense?*, 29 W. ST. L. REV. 235, 243–44 (2002).

167. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 54 cmt. f (AM. LAW INST. 2000).

168. See FDIC v. O'Melveny & Myers, 61 F.3d 17, 19 (9th Cir. 1992) (“While a party may itself be denied a right or defense on account of its misdeeds, there is little reason to impose the same punishment on a trustee, receiver or similar innocent entity that steps into the party's shoes pursuant to court order or operation of law.”). That outside risk is the concern expressed by Brad Wendel in his argument that assistance with client wrongdoing risks harm to the lawyer. WENDEL, *supra* note 1, at 264.

### 3. Unlawful Activity That Is Neither Criminal nor Fraudulent, but Does Not Expose the Lawyer to Other Liability Risks

The final category of assistance involves client illegality for which the lawyer does not risk any outside sanction or claims for damages. This is a real category, even if some authorities imply otherwise.<sup>169</sup> While some assistance of illegality permitted by the Model Rules will generate some penalties for a lawyer,<sup>170</sup> not every instance will create that consequence. And it is not the case that only *de minimis* wrongdoing fits this category. Some serious wrongdoing by a client, assisted actively by a lawyer, will be considered noncriminal and nonfraudulent, and will not lead to separate sanctions or liability on the part of the lawyer. Consider, for example, the advertising world. The Federal Trade Commission (FTC) regulates deceptive advertising.<sup>171</sup> Congress has endowed the FTC with a number of enforcement remedies. For example, the FTC may issue cease-and-desist orders<sup>172</sup> and impose fines, including significant fines for persistent and recidivist violators.<sup>173</sup> Commercial actors and their advertising agencies must regularly make important judgments about whether a marketing campaign that stretches the truth qualifies as “deceptive” under the FTC regulations and the agency’s 1983 Policy

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169. See, e.g., WENDEL, *supra* note 1, at 263–64 n.53 (arguing that the gap in Rule 1.2(b) is addressed by other constraints on lawyering assistance).

170. That is, if the lawyer gets caught. Like some private actors, the lawyer might calculate the odds of detection versus the cost of any resulting sanctions after detection. See Richard W. Wright, *Hand, Posner, and the Myth of the “Hand Formula,”* 4 THEORETICAL INQUIRIES L. 145, 151–52 (2003) (discussing the “Learned Hand formula,” introducing a cost–benefit analysis to negligence law, in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947)). The cost–benefit calculation may include the probability of detection. See Richard Craswell, *Deterrence and Damages: The Multiplier Principle and Its Alternatives*, 97 MICH. L. REV. 2185, 2211–23 (1999); Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 881 (1984). The Model Rules, at least, appear to permit a lawyer to engage in such cost–benefit analysis. See also William H. Simon, *The Ethics Teacher’s Bittersweet Revenge: Virtue and Risk Management*, 94 GEO. L.J. 1985, 1986 (2006) (noting that ethics instruction typically overlooks “episodes in which lawyers who violate [legal ethics] precepts [escape] sanctions and achieve unmitigated success”).

171. 15 U.S.C. § 45(a) (2012) (making unlawful and authorizing the FTC to prevent “unfair or deceptive acts or practices in or affecting commerce”); *id.* § 45(n) (requiring the FTC to only declare practices unlawful if the practices cause “or [are] likely to cause substantial injury to consumers” and consumers cannot “reasonably avoid[]” the injury themselves); see Richard Craswell, *Regulating Deceptive Advertising: The Role of Cost-Benefit Analysis*, 64 S. CAL. L. REV. 549, 571 (1991) (discussing, for example, the FTC’s prohibition of certain cigarette advertisements in the 1950s and early 1960s).

172. FED. TRADE COMM’N, OPERATING MANUAL 3 (1976), <https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch05orders.pdf>.

173. *Id.* at 13; see Gerard M. Stegmaier & Wendell Bartnick, *Another Round in the Chamber: FTC Data Security Requirements and the Fair Notice Doctrine*, 17 J. INTERNET L. 17, 22 (2013) (reporting FTC fine of \$22.5 million against Google for multiple violations of a consent order).

Statement on Deception. The latter requires minimum levels of substantiation for any advertising claims made about products.<sup>174</sup> Those actors and agencies rely on their counsel for guidance in assessing those judgments.<sup>175</sup>

A lawyer representing an advertising agency that elects to disseminate an advertisement that cannot meet the FTC's deception standards may be asked to assist in that campaign. Dissemination of the advertising would be unlawful or illegal under the FTC standards, but not a crime or a fraud.<sup>176</sup> While the company bears the risk of FTC enforcement and any possible fines, the lawyer bears no risk at all in her participation in that conduct, given the scope of Rule 1.2(d) described above.<sup>177</sup>

The FTC and deceptive advertising example is just one of many, likely countless, settings where a client's wrongdoing is neither criminal nor fraudulent and no other external authority imposes any sanctions upon the lawyer for her assistance with the wrongdoing.<sup>178</sup> The question that now arises is the scope of the lawyer's discretion to *refuse* to assist a client in this latter setting. The next Subsection confronts that question.

174. See Letter from James Miller, Chairman, Fed. Trade Comm'n, to The Hon. John D. Dingell, Chairman, U.S. House of Representatives (Oct. 14, 1983), <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception> (mentioning the amorphous requirement that advertisers must at least have a "reasonable basis" for advertising claims).

175. The Practising Law Institute, a national, nonprofit lawyer training and education organization, offers at least one "Hot Topics in Advertising Law" day-long seminar each year for subscribers. Each such seminar includes a session on the ethical issues confronted by those lawyers in their guidance of their organizational clients. See, e.g., *Hot Topics in Advertising Law 2017*, PRACTISING LAW INST. (June 30, 2017), [http://www.pli.edu/Content/OnDemand/Hot\\_Topics\\_in\\_Advertising\\_Law\\_2017/\\_/N-4nZ1z10olt?fromsearch=false&ID=322340](http://www.pli.edu/Content/OnDemand/Hot_Topics_in_Advertising_Law_2017/_/N-4nZ1z10olt?fromsearch=false&ID=322340).

176. See FED. TRADE COMM'N, *supra* note 172, ch. 12 (omitting any reference to criminal penalties for violation of FTC standards, except that a party who severely or frequently violates an FTC injunction can be held in criminal contempt of court). For an example of the FTC charging a company with violation of the FTC Act, see Complaint, Nissan N. Am., Inc., No. C-4454, (F.T.C. May 1, 2014), File No. 122-3010, 2014 WL 1993549 (discussing deceptive Nissan Frontier pickup truck television ad).

177. Of course, the lawyer will advise the client of the risks it faces in proceeding with the dissemination of the deceptive ad, including the likelihood of FTC action and the costs to the agency client of any such actions taken. The client will then decide whether to proceed. While commentators have grappled with the challenging question of whether a lawyer may counsel a client about such enforcement consequences when the action is criminal, see, e.g., Pepper, *Counseling*, *supra* note 5, at 1551–52, in this setting, because the lawyer could actively assist with the unlawful activity, that challenging question is moot.

178. See *supra* text accompanying notes 44–46 (the example of Winterport Graceful Movement from the introduction, where the lawyer's startup client chose to proceed with the use of material for which the business did not possess intellectual property rights, is one of those settings); see also *supra* text accompanying notes 147–52 (discussing the fact that certain government agencies, like the Securities and Exchange Commission, can discipline attorneys for failure to meet their respective representational standards).

### B. *The Scope of Lawyer Discretion to Refuse Assistance*

If a client asks a lawyer to perform legal work that assists the client with unlawful activity that is not criminal, fraudulent, or otherwise prohibited by the Model Rules, may a lawyer nevertheless refuse to do so? If so, on what grounds? Ordinarily, a lawyer will act with zeal and commitment to support her client's interests,<sup>179</sup> so if the Rules provide the lawyer permission to proceed, the lawyer needs a different basis to refuse the service from the claim that she is prohibited from aiding her client.

If the activity exposes the lawyer to some liability and the lawyer does not choose to accept that risk, the lawyer has ample grounds to refuse the client's request. A lawyer who is unwilling to accept the exposure inherent in assisting a client in wrongdoing, where such exposure exists, develops a conflict of interest with his client, and must take appropriate actions to address that conflict.<sup>180</sup> Presumably, the client will agree not to use the lawyer's services for the client's illegal strategy, and with that agreement (assuming that the lawyer's continuing work for the client actually—rather than inadvertently—assists the client in the illegality<sup>181</sup>), the lawyer will continue the representation.<sup>182</sup> If the client insists on the lawyer's assistance with the unlawful and cost-imposing conduct, the lawyer arguably must withdraw from the representation to avoid a violation of Rule 1.7.<sup>183</sup> Rule 1.16(a) requires withdrawal when necessary to avoid violating a rule.<sup>184</sup> Even if not required, the withdrawal is likely permitted. Rule 1.16(b)(4) affords counsel the opportunity to withdraw from representation of a client if “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.”<sup>185</sup> That discretion exists even if the lawyer's

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179. MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2014) (“A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.”).

180. *Id.* r. 1.7 cmt. 2.

181. See ROTUNDA & DZIENKOWSKI, *supra* note 133, § 1.2-4 (discussing the possibility of advising a client about consequences, not withdrawing, but not assisting).

182. Because no rule prohibits the lawyer from affirmatively assisting the client, any inadvertent assistance that might result from the lawyer's continued work with the client will not present any disciplinary risks for the client. Whether the lawyer may face civil liability for inadvertent aiding of a client's wrongdoing is a matter beyond the scope of this Article. See RESTATEMENT (SECOND) OF TORTS § 876(a) cmt. c (AM. LAW INST. 1979) (“One who innocently, rightfully and carefully does an act that has the effect of furthering the tortious conduct or cooperating in the tortious design of another is not for that reason subject to liability.”).

183. See MODEL RULES OF PROF'L CONDUCT r. 1.7(b)(2) (AM. BAR ASS'N 2014).

184. *Id.* r. 1.16(a)(1).

185. *Id.* r. 1.16(b)(4).

ceasing work for the client ends up harming the client's interest,<sup>186</sup> and any such client would be unlikely to challenge the withdrawal if based on the combination of illegal activity and risk of harm to the lawyer himself.<sup>187</sup> While that permissive-withdrawal basis is construed strictly and requires serious concern,<sup>188</sup> the lawyer's risk of civil liability or costs ought to satisfy the standard.<sup>189</sup>

If the unlawful activity proposed by the client exposes the lawyer to no liability but the lawyer believes that he should not participate in it, then he ought to retain the same discretion to demur, and it is difficult to imagine any risk to the lawyer in doing so. The lawyer would likely rely on the same "serious disagreement" standard of Rule 1.16(b)(4) just described. The lawyer would also refer to Rule 1.16(a)(1), even if the discussion here has concluded that, its literal reading notwithstanding, that provision does not *require* the lawyer to withdraw.<sup>190</sup> As above, it is difficult to imagine a client challenging a lawyer's choice not to aid the client in actions that are illegal.

186. *Id.* r. 1.16 cmt. 7.

187. At least one authority has concluded that, when moving to withdraw on the basis of Rule 1.16(b)(4), a lawyer may not reveal to the court the basis for the lawyer's conclusion of repugnance or serious disagreement. *See Oregon St. Bar Formal Op. No. 2011-185* (2011). That opinion does agree, though, that if the judge hearing a motion to withdraw requires further information, the lawyer may disclose otherwise confidential matters pursuant to Rule 1.6(b)(6). MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(6) (AM. BAR ASS'N 2014) (revelation allowed "to comply with . . . a court order").

188. The repugnance exception "applies only when the lawyer's feeling of repugnance is of such intensity that the quality of the representation is threatened." GEOFFREY C. HAZARD, JR. ET AL., *THE LAW OF LAWYERING* § 51.5, at 51–57 (4th ed. 2014). It "does not extend to cases in which the lawyer and the client merely disagree; it is limited instead to cases of such profound and irremediable inability to work together that no reasonable lawyer could continue the representation." WENDEL, *supra* note 1, at 144.

189. While examples of successful use of the "repugnant" or "substantial disagreement" tests from Rule 1.16(b)(4) are scarce in case reports, commentators have agreed that the provision may be used by lawyers to meet their gatekeeping duties. *See, e.g., Campbell & Gaetke, supra* note 9, at 28 (suggesting that Rule 1.16(b)(4) may be relied upon to meet the "public interest obligation of lawyers to act to protect society by refusing to assist, and thereby discouraging, their clients' misconduct"); Zacharias, *Coercing Clients, supra* note 7, at 497.

190. The counseling moment where a lawyer relies upon Rule 1.16(a)(1) would involve some delicate discussion. The lawyer might show the client the language of that rule, stating that the lawyer must not proceed with the representation if the result will be a violation of the law. If the analysis in this Article is sound, the lawyer will know that Rule 1.16(a)(1) does not actually mean what it says, if the illegal activity is neither criminal nor fraudulent. *See supra* text accompanying notes 102–23. The lawyer therefore cannot imply to the client that the language means something that it does not mean. Model Rule 2.1, in its Comments, advises an attorney to give the client her "honest assessment" and "candid advice" regarding a proposed course of action. MODEL RULES OF PROF'L CONDUCT r. 2.1 cmt. 1 (AM. BAR ASS'N 2014). The lawyer's most likely course of action would be to show the client Rule 1.16(a)(1), point out that ethicists disagree about its meaning, but that the lawyer prefers to eliminate any risk that the rule might mean what it says.

#### IV. DISCRETION TO ASSIST CLIENT WRONGDOING IN PRACTICE

This final Part assesses the meaning of Rule 1.2(d) in context for lawyers working at street level with clients. It first endeavors to understand the ABA's message in its choice to carve out some discretion for noncriminal and nonfraudulent illegality. That assessment hypothesizes that the ABA opted for the existing compromise as the only reliable way to permit lawyers to guide clients in borderline but acceptable conduct that by some broader definitions would be deemed unlawful. Next, Subsection IV.B suggests a framework, relying on the vibrant "moral activism" understanding of lawyer roles and responsibilities, for lawyers' exercise of the discretion that the ABA's compromise grants. That discussion reveals a reversal of the usual moral activism concerns, where lawyers have been criticized for pursuing "legal" means that accomplish immoral ends. Here, lawyers must choose which illegal means to pursue and which to refuse to assist, using the same considerations that the activists develop. Subsection IV.C then applies that assessment to the three lawyering stories that introduced the Article.

##### A. *The Bar's Vision*

The ABA's chosen message, as indicated through the language and indicated carve-outs in Rule 1.2(d), must be analyzed to understand the Bar's vision as to the application of the Rule to lawyers in practice.

##### 1. The ABA's Drafting Strategy

In 1983, the ABA had a choice in drafting a mandatory disciplinary rule related to lawyer assistance with client wrongdoing. It could have prohibited lawyer assistance with "illegal" conduct, including criminal or fraudulent activity.<sup>191</sup> Doing so would have been easy, as the then-existing Model Code of Professional Responsibility included exactly that prohibition,<sup>192</sup> and its predecessor, the 1908 Canons of Professional Ethics, similarly employed broader language about wrongdoing.<sup>193</sup> Instead, over the objections of certain of its constituents,<sup>194</sup> the ABA

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191. *See supra* text accompanying notes 56–58.

192. *See supra* text accompanying notes 59–60.

193. CANONS OF PROF'L ETHICS Canon 15 (AM. BAR ASS'N 1908) ("[I]t is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane.").

194. *See supra* text accompanying notes 64–71.

elected to limit the prohibition to the most serious (in its view<sup>195</sup>) of wrongdoing.

The limited legislative history of the Kutak Commission's deliberations and the ABA's treatment of its proposals do not shed much, if any, light on the reasoning behind the ABA's choice. One possible explanation would be that the ABA affirmatively supported and encouraged lawyers' aiding clients in all illegal conduct except that itemized in Rule 1.2(d). That hypothesis simply defies belief. A more plausible explanation would be that the Kutak Commission and the ABA House of Delegates feared that the continued use of the term "illegal" from the Model Code would restrict lawyer representational choices unacceptably, encompassing in its coverage some useful and legitimate legal work along with some work that lawyers ought not to engage in. Some commentary has supported this hypothesis,<sup>196</sup> and it seems plausible. Other commentators have argued that the language of Rule 1.2(d) describes what the ABA meant by its use of the term "illegal" in the Model Code,<sup>197</sup> confirming the limited coverage but not a change of policy.

The worries that Kutak Commission participants would have identified most likely included aiding a client to breach contracts,<sup>198</sup> drafting contracts later determined to be unconscionable,<sup>199</sup> and assisting a client who had made the cost-benefit assessment that an intentional tort would be worth the risks.<sup>200</sup> As noted above, breaching a contract (and accepting the costs of such breach), or committing a tort (and accepting

195. Like most of the statements in this Subsection, this is entirely speculation, but surely reliable speculation. There can be little doubt that the ABA and its Kutak Commission viewed crimes and frauds as the most worrisome of client wrongdoing, and therefore identified those categories as warranting the prohibition. *See Pierce, supra* note 9, at 746-47 (discussing that assessment).

196. *See WOLFRAM, supra* note 8, at 704 (implying that the ABA in 1983 worried about exposing lawyers to liability for assisting with contracts found to be unconscionable); Bundy & Elhauge, *Do Lawyers Improve the Adversary System?*, *supra* note 6, at 324 ("That choice appears most plausible on the assumption that the crime-fraud line accurately distinguishes those laws that, because they are narrowly drawn around the most egregious conduct, that [sic] are relatively less overinclusive and relatively more worrisome in terms of underdeterrence.").

197. *See James M. Altman, Modern Litigators and Lawyer-Statesmen*, 103 YALE L.J. 1031, 1062 n.145 (1994) (discussing Rule 1.2(d) and DR 7-102(A)(7) and "virtually identical" in their coverage); Hazard, *supra* note 17, at 277 (the Rule 1.2(d) language "is substantially identical to" the "cognate provision" of DR 7-102(A)(7)).

198. *See Pierce, supra* note 9, at 900.

199. *See id.* at 901; *see WOLFRAM, supra* note 8, at 704.

200. *See Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 370 (Cal. Ct. App. 1981) (finding Ford to have engaged in cost-benefit analysis in deciding whether to spend money to improve safety of Ford Pinto to reduce costs resulting from accident-related injuries and deaths); *see also* DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 206-10 (1988) (finding the same).

the risk of damages to be paid to the victim), may not have been deemed “illegal” and therefore would not have been disciplinable under the Model Code.<sup>201</sup> But because of the ambiguity of that assertion, maintaining the Model Code’s language in the Model Rules could have the effect of chilling a lawyer’s guidance of clients whose business decisions include accepting the risks of damages for certain actions. The ABA likely changed the language of the prohibition to avoid that chilling effect.

While both the Model Code<sup>202</sup> and its successor, the Model Rules,<sup>203</sup> permit—and arguably encourage<sup>204</sup>—lawyers to assist clients to determine the scope or the validity of a law, assisting a client to breach a contract or to engage in an intentional tort may be viewed as not falling into that type of general exception. In light of that worry and given the consensus that lawyers ought not be disciplined for working with a client who, for economically rational reasons, opts not to honor a contract or exercise due care in addressing a duty, one may understand the ABA’s reluctance to continue to ban lawyer assistance with “illegal” conduct. But that rationale, based on a client’s breach of contract or tortious action, does not address the parallel question of other forms of civil illegality, particularly some regulatory infractions.<sup>205</sup> It is not at all clear what the Kutak Commission and the ABA expected lawyers’ duties to be when their clients opt not to comply with regulatory duties, assisted by the lawyers’ work. What seems sufficiently clear, though, is that the language chosen by the ABA permits that assistance.

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201. See Hazard, *supra* note 3, at 706–07 (noting that ambiguity); Pepper, *Counseling*, *supra* note 5, at 1566. At least some authorities viewed some intentional torts as subject to the Model Code’s “illegality” language. See Lischer, *supra* note 88, at 622 (“[C]onspiracy is an intentional tort, and . . . [p]articipation in a conspiracy may be a separate ground for discipline as a violation of [Model Code] DR 7-102(A)(7).”). No instances of a lawyer actually being disciplined for violation of DR 7-102(A)(7) for assisting a client with an intentional tort may be found, however. See Pepper, *Counseling*, *supra* note 5, at 1593 (finding no cases, as of 1995, of a lawyer disciplined for advice without active assistance with a crime or fraud).

202. MODEL CODE OF PROF’L RESPONSIBILITY EC 7-3 (AM. BAR ASS’N 1969).

203. MODEL RULES OF PROF’L CONDUCT r. 1.2(d) (AM. BAR ASS’N 2014).

204. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94 cmt. f (AM. LAW INST. 2000) (addressing the lawyer’s responsibility to advise clients about the limits of the applicable law). *But see* Pepper, *Counseling*, *supra* note 5, at 1589–90 (noting that the ABA in Rule 1.2(d) included discretion, but no duty, to advise clients about the legal limits of their proposed conduct, implying some uncertainty about the benefits of that service).

205. See, e.g., Pepper, *Counseling*, *supra* note 5, at 1592 (citing violation of the National Labor Relations Act as an example of noncriminal unlawfulness).

## 2. The “Boundary Claim” and Lawyer Exceptionalism

The apparent discretion lawyers have to aid clients in some activity that the state has forbidden invites consideration of the “boundary claim” and its accompanying notions of lawyer exceptionalism. The question to be explored here is whether the Rule 1.2(d) limitations evidence another example of “the law between the bar and the state,”<sup>206</sup> in which the bar’s commitment to “the bounds of the law” evidences some feebleness when the issue is lawyer behavior on behalf of client interests.

The boundary claim, as we saw above,<sup>207</sup> is the central ethical commitment among lawyers to limit their representational actions to “the bounds of the law.”<sup>208</sup> This type of claim has received significant attention, not only regarding the ambiguity and manipulability of its “bounds,” leading critics to question the depth of its actual substance,<sup>209</sup> but also regarding the bar’s questionable adherence to that commitment where the law of lawyering is concerned.<sup>210</sup> The latter is particularly relevant for the purposes of this Article. Most notably in the context of client confidentiality, critics observe that, rather than encouraging full fidelity to legal authority, the bar “actively and openly encourage[s] disobedience of other law” that requires disclosure.<sup>211</sup> The bar assumes a posture of “exceptionalism” *vis-à-vis* state law when lawyer advocacy and protection of client interests is at issue.<sup>212</sup>

The question of interest to the assessment of Rule 1.2(d) is whether the bar’s approach to lawyers’ assistance with wrongdoing serves as another example of this exceptionalism stance—one that transcends the well-explored confidentiality context. While there is an available narrative that fits this premise, a more plausible narrative offers a less cynical understanding of the bar’s strategic intentions.

The less flattering narrative would look something like this: The bar respects the state for its substantive authority represented by its statutes and regulations and requires bar members to honor that authority at the

206. See generally Koniak, *supra* note 28, at 1401–02.

207. See Wilkins, *supra* note 18, at 269 (describing this notion as “the one relatively fixed star in the legal ethics universe”).

208. The “boundary claim” phrase originated with David Wilkins. See Wilkins, *Legal Realism*, *supra* note 46, at 471.

209. See *id.* Brad Wendel has called the claim “[t]he most shopworn aphorism in legal ethics.” W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1181 (2005).

210. See, e.g., Rebecca Aviel, *The Boundary Claim’s Caveat: Lawyers and the Confidentiality Exception*, 86 TUL. L. REV. 1055, 1057 (2012); Susan P. Koniak, *When the Hurlyburly’s Done: The Bar’s Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1255 (2003).

211. Koniak, *supra* note 28, at 1419.

212. Aviel, *supra* note 210, at 1087; Sung Hui Kim, *Lawyer Exceptionalism in the Gatekeeping Wars*, 63 SMU L. REV. 73, 97 (2010).

risk of some professional sanction, but only where that authority concerns the most serious misconduct—that is, criminal and fraudulent acts. Otherwise, this narrative proceeds, members of the bar may choose to honor the laws of the state as they and their clients please. This selective fidelity is necessary in order to ensure that clients receive the most zealous and faithful assistance from their counsel.

A less cynical and more hopeful narrative would look something like this: The bar respects the state for its substantive authority represented by its statutes and regulations and requires bar members to honor that authority at the risk of some professional sanction. Articulating and enforcing that professional obligation presents challenges, though. To insist that lawyers never assist clients with “illegal” or “unlawful” actions risks overbreadth, chilling the delivery of necessary legal services to clients.<sup>213</sup> Therefore, the bar will only impose discipline where the misconduct is unambiguously criminal or fraudulent.<sup>214</sup> While this enforcement strategy quite plainly results in underinclusion, the bar expects its members not to exploit that interpretive gap in ways that are harmful to third parties.<sup>215</sup>

The bar’s relative silence about the lacuna generated by Rule 1.2(d)’s language leaves the choice of narrative to any individual lawyer’s imagination. It is easy to state, though, that the second narrative is far preferable, and not at all inconsistent with the limited legislative history and commentary about Rule 1.2(d).

### B. *Exercising Discretion in Assistance with Unlawful Conduct*

Let us turn to the lawyers in the field. We now understand that the risk of professional sanction for assisting a client with unlawful activity that is neither a crime nor a fraud is either zero (if the analysis developed here is sound) or, at worst, pretty close to zero (given the conceded ambiguity within the ABA’s standards recognized above<sup>216</sup>). Will a lawyer, then, readily aid a client who requests such assistance? And, more importantly, *should* she?

The answer to the latter question is relatively easy to state but maddeningly complicated to implement. A lawyer ought to exercise the permitted discretion to assist clients in unlawful conduct when doing so achieves desirable results but should refuse assistance when that

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213. See Bundy & Elhauge, *Knowledge of Legal Sanctions*, *supra* note 6, at 324.

214. *Id.*

215. *Id.*

216. See *supra* text accompanying note 103 (discussing the implications of Rule 1.16(a)(1)).

contribution leads to undesirable results.<sup>217</sup> The “desirability” quality may be discerned from grounded notions of moral commitments or substantive justice.<sup>218</sup> In their deliberations, lawyers may be informed by the long-standing debates within legal ethics circles about what is often referred to as “moral activism.”

Legal ethicists have long engaged with the question of a lawyer’s responsibility when the exercise of his client’s legal rights causes what the lawyer determines is a clear moral wrong.<sup>219</sup> Legal ethics scholars and moral philosophers with quite differing views<sup>220</sup> explored whether a lawyer ought to be “morally activist”<sup>221</sup> and refuse to aid clients when doing so would achieve immoral (or unjust<sup>222</sup>) ends, even if the law supported that aid,<sup>223</sup> or whether she should remain faithful to the client’s

217. The “desirability” test is one employed by Professors Kaplow and Shavell in their theoretical examination of the value of lawyer advice. See Kaplow & Shavell, *supra* note 6, at 586.

218. *Id.*

219. See, e.g., David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1014–15 (1990) (responding to Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 147–51 (1990) (reviewing LUBAN, *supra* note 200)).

220. The debates began in earnest in the 1970s and have continued since, with the most vibrant activity occurring in the 1980s and 1990s. Contributors to the early moral activism enterprise included ALAN GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 1 (1980); Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853, 855 (1992); Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 3 (1951); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060–61 (1976); Gerald Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 63 (1980); Murray L. Schwartz, *The Zeal of the Civil Advocate*, in *THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS* 150 (D. Luban ed. 1983); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 30; Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901, 901 (1995); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 1 (1975).

221. The “moral activism” phrase appears to have originated with David Luban. See LUBAN, *supra* note 200, at xxii; Luban, *supra* note 219, at 1014.

222. William Simon has articulated a moral-activism stance based not on moral concerns, but on a commitment to justice. See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* 15 (1998); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083 (1988) (arguing that “[l]awyers should have ethical discretion to refuse to assist in the pursuit of legally permissible courses of action and in the assertion of potentially enforceable legal claims,” and that such discretion is “a professional duty of reflective judgment”).

223. See generally Katherine R. Kruse, *Professional Role and Professional Judgment: Theory and Practice in Legal Ethics*, 9 U. ST. THOMAS L.J. 250, 263 (2011) (discussing higher moral duties that a lawyer may have); Luban, *supra* note 219 (discussing the legal system’s ability to go beyond a moral duty); Paul R. Tremblay, *Moral Activism Manqué*, 44 S. TEX. L. REV. 127, 148 (2002) (noting the fact that lawful actions can still be morally wrong).

apparent legal interests and support the client's autonomous choices.<sup>224</sup> The nub of the debate within moral-activism circles is whether a lawyer ought to provide concededly lawful services to a client when doing so causes significant harm. Wendel argues that fidelity to the law ought to trump the lawyer's personal moral considerations;<sup>225</sup> Professor David Luban<sup>226</sup> and others<sup>227</sup> disagree, arguing that substantive law commitments cannot justify recognizably harmful actions.

The differing perceptions about the proper role of lawyer response to perceived injustice or unfairness emerge from a reasonably shared acknowledgement of a *prima facie* duty to obey the law.<sup>228</sup> Some point out that lawyers especially, given their role as officers of the court, ought to honor that fundamental commitment.<sup>229</sup> That duty may be undercut by unjust laws<sup>230</sup> or facially fair laws whose execution in a particular circumstance creates discrete harm.<sup>231</sup> The moral activism critics, whom Luban terms the "new wave of ethics theoreticians,"<sup>232</sup> accept a stronger application of that duty than do the moral activists, but the latter accept the necessity of that baseline commitment at some presumptive level.<sup>233</sup> While lawyers practicing their craft at the retail level may not be in a

224. See MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 50 (4th ed. 2010); WENDEL, *supra* note 1, at 53; W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 363 (2004); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 614 (1986).

225. WENDEL, *supra* note 1, at 54–59.

226. See Luban, *supra* note 22, at 678 (reviewing WENDEL, *supra* note 1).

227. See Anthony V. Alfieri, *Fidelity to Community: A Defense of Community Lawyering*, 90 TEX. L. REV. 635, 653–55 (2012) (reviewing WENDEL, *supra* note 1); William H. Simon, *Authoritarian Legal Ethics: Bradley Wendel and the Positivist Turn*, 90 TEX. L. REV. 709, 718–22 (2012) (reviewing WENDEL, *supra* note 1).

228. For a discussion of that topic generally, see, e.g., George C. Christie, *On the Moral Obligation to Obey the Law*, 1990 DUKE L.J. 1311; Kent Greenawalt, *The Natural Duty to Obey the Law*, 84 MICH. L. REV. 1 (1985); John Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3, 3 (Sidney Hook ed., 1964) ("I shall assume, as requiring no argument, that there is, at least in a society such as ours, a moral obligation to obey the law, although it may, of course, be overridden in certain cases by other more stringent obligations.").

229. See WENDEL, *supra* note 1, at 55–56; Kamin & Wald, *supra* note 53, at 925; Wilkins, *supra* note 18, at 289–90. *But see* James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court,"* 48 BUFF. L. REV. 349, 408 (2000) (discerning no greater duty than non-lawyers).

230. WENDEL, *supra* note 1, at 113; Wilkins, *supra* note 18, at 287.

231. LUBAN, *supra* note 200, at 32–43.

232. Luban, *supra* note 22, at 675–76 (including Tim Dare, Katherine Kruse, Daniel Markovits, Norman Spaulding, and Bradley Wendel in that group).

233. See, e.g., *id.* at 684 ("When the law represents a genuine scheme of social cooperation, disobedience is a form of free riding, and it expresses disdain for one's fellows."); Simon, *supra* note 227, at 721 (arguing that "principled noncompliance" with the law is justified, albeit arising infrequently).

position to resolve the oftentimes intricate philosophical debates among the activists and the new wavers,<sup>234</sup> they will recognize that the ethical deliberation begins with a presumption against assisting with unlawful action.

Because that commitment is only presumptive, lawyers working at the street level deserve guidance on the question of how to exercise the discretion the Model Rules allow them. For the activists, that exercise of discretion ought to mirror the approach that lawyers should follow when confronted with legal entitlements that generate injustice. For the new wave critics, the response is more complicated. Let us review the separable approaches.

For the moral activists,<sup>235</sup> the stance of the state following the ABA's lead, not penalizing a lawyer who aids in his client's wrongdoing is in some ways a welcome development. Here's why. The moral activists accept a weaker presumption of the shared duty to honor legal obligations.<sup>236</sup> The activists trust legal institutions and the reliability of positive law less than new-wave writers,<sup>237</sup> and if honoring legal commitments leads to recognizable harm or injustice, lawyers ought not participate in advancing those legal commitments. This is true even if their clients have a purported right, based on positive law, to take the action in question. The most common setting for this response is where a client's exercise of some inarguably legal right leads to unwarranted harm to others.<sup>238</sup> The moral-activism response, therefore, is frequently

234. Kruse, *supra* note 223, at 251–52. See generally Deborah J. Cantrell & Kenneth Sharpe, *Practicing Practical Wisdom*, 67 MERCER L. REV. 331 (2016) (discussing the various roles lawyers play).

235. The discussion here includes William Simon within the group this Article refers to as the “moral activists,” while conceding that for him the term is inapposite. Simon is an activist for sure, but he does not base his activism in conceptions of morality. His argument is that lawyers ought to act proactively to achieve justice even if contrary to positive-law authority and the interests of clients. See SIMON, *supra* note 222, at 38–39. The notion of justice is not grounded in considerations of common morality; instead, it must be based on legal principles and purposes. See William H. Simon, *The Legal and the Ethical in Legal Ethics: A Brief Rejoinder to Comments on The Practice of Justice*, 51 STAN. L. REV. 991, 993 (1999).

236. Luban, *supra* note 22, at 677; SIMON, *supra* note 222, at 103–04. For Simon, the topic of prima facie obligation “begs the question of what we mean by law.” *Id.* at 103.

237. W. Bradley Wendel, *Legal Ethics Is About the Law, Not Morality or Justice: A Reply to Critics*, 90 TEX. L. REV. 727, 737–38 (2012).

238. Activist writers, and new-wave writers responding to the activists, often use the example of the wealthy defendant who seeks to rely on a statute of limitations defense to avoid repayment of a just debt to a needy plaintiff. See, e.g., TIM DARE, *THE COUNSEL OF ROGUES?: A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE* 2–3, 48–51 (2009); LUBAN, *supra* note 200, at 9–10; WENDEL, *supra* note 1, at 27–28; Stephen Pepper, *Integrating Morality and Law in Legal Practice: A Reply to Professor Simon*, 23 GEO. J. LEGAL ETHICS 1011, 1014–15 (2010); Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 54–55 (2003); Susan Wolf, *Ethics, Legal Ethics, and the Ethics of Law*, in *THE GOOD LAWYER*,

contrary to the lawyer's client's interest.<sup>239</sup> But some powerful activism stories present the opposite valence—where a recognized, presumptively valid law thwarts a client's achievement of a just result, calling upon the lawyer to assist the client to evade or ignore that law. In their arguments, the moral activists rely with some frequency on stories from the civil rights struggles, for instance, to make that point.<sup>240</sup>

For the former, more common activist stories where the client aims to exploit the positive law for its benefit and the lawyer resists, the state's stance on the assistance of unlawful conduct is irrelevant. The professional rules about assisting clients with unlawfulness say nothing at all to lawyers about their *refusal* to aid clients to achieve what the law offers to them, such as the extinguishment of a just debt after the statute of limitations has expired.<sup>241</sup> The activist writing is seldom clear enough about how the lawyer ought to implement his refusal to aid a client in the unjust or immoral enterprise,<sup>242</sup> but the implication within the literature is that the professional rules do not provide sufficiently safe space for the lawyer to meet his moral commitments without fear of discipline.<sup>243</sup>

For the latter, less common activist stories, the state's stance offers some solace, albeit limited. The state's choice to limit the scope of Rule 1.2(d) offers a recognition that at times, a client's choice to disobey a presumptively valid law, while exposing the client to risk of penalty or cost, is not so fundamentally offensive that a lawyer must take pains to distance herself from that action. Sometimes, the state seems to be saying, it is acceptable for the lawyer to work with clients who choose not to comply with their duties. That attitude is precisely what the activists profess. And, in those (perhaps unusual<sup>244</sup>) moral-activism settings where the client's civil disobedience does not qualify as a crime or a fraud, the

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*supra* note 220, at 38, 46, 59; *see also* Zaballa v. Pakel, 242 F.2d 452, 455 (7th Cir. 1957) (reporting such a setting).

239. *See* Paul R. Tremblay, *Practiced Moral Activism*, 8 U. ST. THOMAS L. REV. 9, 40–41 (1995).

240. *See, e.g.*, Alfieri, *supra* note 227, at 654; Simon, *supra* note 227, at 715.

241. *See supra* text accompanying note 238.

242. *See* Tremblay, *supra* note 239, at 9–12 (seeking to articulate how activists proceed in practice when encountering moral conflict). The most lawfully available responses would be seeking to withdraw from representation when the client's aims are repugnant, *see* MODEL RULES OF PROF'L CONDUCT r. 1.16(b)(4) (AM. BAR ASS'N 2014), or engaging in what ethicists have come to know as a "moral dialogue." For a discussion of both such remedies, *see* Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389, 435, 442 (2005).

243. Tremblay, *supra* note 239, at 66–67.

244. Most of the civil rights and civil-disobedience stories likely include criminal activity, though. *See* Martha L. Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723, 726 (1991); Daniel T. Ostas, *Civil Disobedience in a Business Context: Examining the Social Obligation to Obey Inane Laws*, 47 AM. BUS. L.J. 291, 291–92 (2010).

lawyer's aid of his client is supported—or at least not condemned—by the state bar.

A moral activist would suggest that the discretion the state offers to lawyers to aid in wrongdoing should only be exercised in those settings where adherence to the law would be intolerable or unjust—that is, in those settings where, even were Rule 1.2(d)'s exemption not in place, the lawyer would be inclined to collaborate with the client in evading the law in question. Of course, Rule 1.2(d) ostensibly provides lawyers a pass when assisting with much less noble lawbreaking. In that respect, the state's stance is disheartening to the moral-activism project. The activists' message to lawyers is something like the following: "If the law permits your client to do X, but X is unacceptable when evaluated by standards of morality or justice, you have a duty not to participate." The state's message to lawyers may be understood to look something like the following: "If the law forbids your client to do Y, but your client wants to do Y because Y is in your client's interest, and doing so is neither a crime nor a fraud, you may collaborate with your client to do Y." That message, applied to, say, corporate misconduct, is contrary to the activists' stance.<sup>245</sup>

The response on the part of the new-wave critics is complicated in a different way. The core of their response to activism is "fidelity" to those institutions that seek to manage intractable disagreement through the promulgation of (imperfect) substantive law.<sup>246</sup> The states that adopt the ABA rules are such institutions. One might suppose, then, that the new-wave ethicists support lawyers who exercise their discretion to aid in wrongdoing if the lawyers and clients are willing to accept the risks of that action, given the law-of-lawyering support for that stance. But, of course, that proposition proves far too much.

When the state, following the lead of the ABA, provides attorneys license to assist clients with certain forms of lawbreaking, that invitation does not make the resulting assistance desirable or justified. If the attorney assists the client primarily because it is in the client's economic or similar interest to skirt the noncriminal and nonfraudulent law in

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245. See, e.g., LUBAN, *supra* note 200, at 206–10 (discussing Ford's cost-benefit approach to its design of the Pinto); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2624 n.27 (1995) (reviewing the secret terms of the Dalkon Shield settlement); see also Joan MacLeod Heminway, *The Role of Business Counsel as Compliance Gatekeepers: Toward Understanding and Combatting Reckless Disregard for Legal and Ethical Compliance in Business Entities*, 62 WAYNE L. REV. 7, 17 (2016) (reporting that businesses regularly show disdain for legal rules and business ethics); Donald C. Langevoort, *Chasing the Greased Pig Down Wall Street: A Gatekeeper's Guide to the Psychology, Culture, and Ethics of Financial Risk Taking*, 96 CORNELL L. REV. 1209, 1244–45 (2011) (describing lawyers' hypercompetitive pressures to do what their business clients want).

246. See Simon, *supra* note 222, at 1114.

question, the new-wave thesis would condemn the assistance as lacking fidelity to the shared commitment that the underlying law represents.<sup>247</sup> The state's choice not to punish the collaborating lawyer does not undercut the new-wave arguments at all. Like the moral activists, the critics agree that the duty to obey the law is presumptive and must cede to powerful counterarguments on occasion.<sup>248</sup> The state's choice not to interfere with the lawyer is no such counterargument, especially because it provides only discretion, far from any duty, to assist in the wrongful conduct.

What, then, does this mean for ordinary practicing lawyers without deep philosophical training, familiarity with the sophisticated writing of the competing ethicists, and perhaps even without reliable recollection of the ethics training they received in law school?<sup>249</sup> Many of those lawyers may accept the oft-heard (if inaccurate) sentiment that their assistance must remain within the bounds of the law<sup>250</sup> and refuse to aid clients in actions that violate any substantive law. There is no harm at all in that practice orientation, subject to the activists' teaching about some need in appropriate instances for civil disobedience.<sup>251</sup> This Article, however, is more focused on the expected response by lawyers who appreciate the discretion offered them by the ABA and their state bar authorities.

In the next Subsection, an examination of the three stories that introduced this Article will serve to flesh out some appropriate responses in context, but a few observations here ought to help frame the proceeding discussion. Most critically, a lawyer ought not exercise her Rule 1.2(d) discretion in a purely instrumental way, focusing only on client interest and profitability without paying heed to the implications of his client's illegal activity. While no law expressly prohibits that assistance, a lawyer

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247. See Samuel J. Levine, *The Law and the "Spirit of the Law" in Legal Ethics*, 2015 J. PROF. L. 1, 2–3 [hereinafter Levine, *Spirit of the Law*]; Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation*, 37 IND. L. REV. 21, 23–24 (2003) [hereinafter Levine, *Taking Ethical Discretion Seriously*].

248. WENDEL, *supra* note 1, at 113.

249. See Leslie Levin, *The Ethical World of Solo and Small Firm Practitioners*, 41 HOUS. L. REV. 309, 368 (2004) (reporting that lawyers she surveyed "rarely consulted bar codes when deciding how to handle ethical issues").

250. Sophisticated legal scholarship frequently overstates the breadth of the lawyer's duty to avoid assisting with crimes or frauds. See, e.g., WENDEL, *supra* note 1, at 189 (the substantive law "require[s] lawyers to refuse to assist a client in an action that is not permitted by the law"); Morrison, *supra* note 17, at 304 (the Model Rules "prevent an attorney from giving legal services to clients who are going to engage in unlawful behavior with the attorney as their accomplice"); Zacharias & Green, *supra* note 15, at 16 (lawyers "may not participate in wrongdoing" (citing Rule 1.2(d))).

251. See Louis Fisher, Note, *Civil Disobedience as Legal Ethics: The Cause-Lawyer and the Tension Between Morality and "Lawyer Law"*, 51 HARV. C.R.-C.L. L. REV. 481, 489–90 (2016).

ought to accept responsibility for her actions, and her peers may criticize her if her assistance serves undesirable ends.<sup>252</sup> Stephen Pepper offers the story of a client engaged in a violation of the NLRA to show a setting where Rule 1.2(d)'s limits on assistance would not apply, but where harm to third parties could be significant.<sup>253</sup> Assistance with an advertiser's violation of the FTC rules and guidelines, as in the earlier example,<sup>254</sup> serves as a similar cautionary example. But if the client's unlawful strategy causes little or no harm to third parties or the public, and the lawyer faces no risk herself for her participation, it is difficult to criticize the lawyer for serving her client in that way.

One potentially worrisome component of this exercise of discretion is the operation of cognitive biases within the lawyer's decision-making calculus.<sup>255</sup> If the rubric proposed here is for the lawyer to assist clients only when the balance of harm is low, the lawyer's ability to appreciate that balance will be (not "may be") distorted by the biases to which decision makers inevitably succumb.<sup>256</sup> A lawyer contemplating such assistance will always represent a client who prefers to engage in the unlawful activity because doing so serves the client's interests. The lawyer's responsibility is to assess the risk of harm triggered by the unlawful action. Behavioral psychologists warn of the power of the self-serving bias,<sup>257</sup> confirmation bias,<sup>258</sup> and similar shared cognitive blocks<sup>259</sup> to distort such judgments. Lawyers need to be aware of these

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252. As David Luban describes it, the lawyer may not rely on the "adversary system excuse" to justify harmful actions. LUBAN, *supra* note 200, at 129–33. She must accept responsibility for the aid she provides to her clients. David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 641–42. If no external authority penalizes the lawyer for his assistance, peer criticism seems to be the only available remedy.

253. Pepper, *Counseling*, *supra* note 5, at 1592–93.

254. See *supra* notes 159–63 and accompanying text.

255. See Tigran W. Eldred, *Insights From Psychology: Teaching Behavioral Legal Ethics as a Core Element of Professional Responsibility*, 2016 MICH. ST. L. REV. 757, 763, 765; Catherine Gage O'Grady, *Behavioral Legal Ethics, Decision Making, and the New Attorney's Unique Professional Perspective*, 15 NEV. L.J. 671, 677 (2015); Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 IND. L.J. 1639, 1649, 1651 (2015); Jennifer Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1129 (2013).

256. Robbennolt & Sternlight, *supra* note 255, at 1129; Tremblay, *supra* note 223, at 148.

257. See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1094 (2000); Perlman, *supra* note 255, at 1652 n.91.

258. See PAUL BREST & LINDA HAMILTON KRIEGER, *PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICYMAKERS* 277–89 (2010); O'Grady, *supra* note 255, at 677–78.

259. See Eldred, *supra* note 255, at 763, 765–66; Robbennolt & Sternlight, *supra* note 255, at 1129.

limitations on their ability to assess risks accurately and perhaps adopt a risk-averse approach to their exercise of discretion as a result.<sup>260</sup>

In those settings, and one expects that they will be very common, where the lawyer opts not to aid his client in the wrongdoing, the lawyer who appreciates the reach of Rule 1.2(d) will have a more complicated conversation with her client when the wrongdoing is neither a crime nor a fraud. It would most likely be preferable to such a lawyer to explain to her client something like this:

Your proposal is understandable, but I need to advise you that it violates our state's regulations, and therefore subjects you to some risks. If you proceed while knowing those risks, that is your choice, but I cannot work with you on that project because my professional duties forbid me from assisting my clients with unlawful actions.

That explanation is attractive but inaccurate. We know that the lawyer may not beg off from the requested assistance by reference to some overriding bar duty because no such bar duty exists, and the lawyer may not pretend that it does.<sup>261</sup> Therefore, the lawyer must have a more nuanced, and possibly more difficult, conversation about why he chooses not to collaborate on the project that fails to comply with some applicable regulations.

### C. *Exercising Discretion in Context: The Three Stories*

Let us complete this project by adding context to the foregoing analysis to appreciate how a lawyer might respond to a client's request for assistance with some unlawful conduct. This Article began with three examples from the startup world. We return to those stories here.

*The Independent Contractor Story:*<sup>262</sup> In this example, the attorney, Emily Haile, has been asked by Jackson Sanchez, the CEO of WorkHub, Inc., to draft independent-contractor agreements to offer to Diane Bilder and Paulo Vose. Bilder and Vose are two friends who have agreed to work for the company for minimal compensation now in return for promises of equity, or at least better wages, later. Because of the work they perform, Haile concludes that Bilder and Vose qualify as employees, not independent contractors. Haile has explained to Sanchez the implications for him and his company of not complying, but—given the realities of the startup world—he is willing to proceed in this rogue way

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260. See Eldred, *supra* note 255, at 763, 765–66.

261. See MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 2014) (explaining that a lawyer owes his client a candid assessment of the circumstances of the representation).

262. See *supra* text accompanying notes 32–38.

until the company has better cash flow. The story also asked us to assume that Bilder and Vose are satisfied with the arrangement.

I understand this to be among the most common of the lawbreaking stories within the startup community.<sup>263</sup> Effected carefully, the arrangement should not qualify as fraud. The terms of the compensation and the status offered to the two workers will be presented accurately, without any deception.<sup>264</sup> The wage-and-hour laws are primarily regulatory in nature, imposing, through state<sup>265</sup> and federal<sup>266</sup> provisions, requirements on employers as a matter of public policy. It would seem, then, that collaborating with WorkHub to produce honest, but unlawful, compensation arrangements would be a permissible representational strategy for Haile under Rule 1.2(d).

On further examination, though, the question is considerably more complicated. The Fair Labor Standards Act (FLSA)<sup>267</sup> imposes criminal penalties for willful violations of the wage-and-hour laws,<sup>268</sup> as do some states.<sup>269</sup> Given the counseling that Haile will have engaged in with Sanchez about the state of the law, WorkHub's noncompliance with the FLSA will qualify as "willful." A nascent startup employer like WorkHub that fails to honor the wage-and-hour laws and is challenged by an employee or a government agency will almost assuredly not be subject to criminal penalties.<sup>270</sup> But no authority holds that Rule 1.2(d) does not apply when the criminal enforcement is unlikely.<sup>271</sup> Developing

263. I have been unable to locate published accounts confirming that understanding, but colleagues within private firms and transactional clinical practices tell me that this arrangement is not unusual.

264. See, e.g., Luz M. Molina et al., *Vulnerabilities of Low-Wage Workers and Some Thoughts on Improving Workplace Protections: The Experience of the Workplace Justice Project*, 17 LOY. J. PUB. INT. L. 215, 254 (2016) (explaining that intentional misclassification of workers as independent contractors is sometimes labeled "payroll fraud"); see also Payroll Fraud Prevention Act of 2014, H.R. 4611, 113th Cong. (2014) ("The Payroll Fraud Prevention Act of 2014" does not include the elements of common law fraud); RESTATEMENT (SECOND) OF TORTS § 538(2)(a) (AM. LAW INST. 1977).

265. See, e.g., MASS. GEN. LAWS ch. 151A, § 47 (2016).

266. See Fair Labor Standards Act of 1938, 29 U.S.C. § 201 (2012).

267. Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–204, 206–207, 209–218, 218(b)–(c), 219 (2012)).

268. *Id.* § 216(a)–(b).

269. See, e.g., ch. 151A, § 47; *Commonwealth v. N. Telecom, Inc.*, 517 N.E.2d 491, 492 (Mass. App. Ct. 1988).

270. See MERRICK T. ROSSEIN, 1 EMP. L. DESKBOOK HUM. RESOURCES PROF. § 6:83 (2016) (explaining that criminal charges arise most commonly when an employer covers up wrongdoing, retaliates against a complaining employee, or engages in child-labor-law violations).

271. See Maine Prof'l Ethics Comm'n, Op. No. 199 (July 7, 2010) (referring to marijuana businesses, legal in Maine but not under federal law, stating that Maine's Rule 1.2(d) "does not make a distinction between crimes which are enforced and those which are not"); see also Kamin & Wald, *supra* note 53, at 901 (rejecting as failing the common-sense test "the position that no

interpretations of Rule 1.2(d) as applied in the context of marijuana possession or sale, which are lawful in some states<sup>272</sup> but unlawful at the federal level,<sup>273</sup> offer some leeway for attorney assistance with unenforced criminal provisions.<sup>274</sup> However, those developments would not apply to the wage-and-hour context, where the underlying obligations are enforced aggressively, even if not criminally.

Given the requirements of Rule 1.2(d), this analysis would appear to conclude that Haile may not assist WorkHub actively by drafting independent-contractor agreements whose use constitutes a federal crime. Two possible arguments would be available to Haile to permit such assistance, and neither is fully persuasive.

The first argument examines the meaning of the term “assist” in Rule 1.2(d). If Haile produces for WorkHub the independent-contractor agreements whose use by the client constitutes a federal crime, her work has no doubt helped the client in effecting that crime. But, as Professors Kamin and Wald suggest in their assessment of the role of lawyers for marijuana businesses, Haile may not have “assisted” in the crime in a manner forbidden by Rule 1.2(d).<sup>275</sup> Kamin and Wald argue that with crimes that are *mala prohibita* rather than *mala in se*,<sup>276</sup> a lawyer offering conventional legal services that further the criminal act ought not be subject to sanctions unless the attorney actively intended to assist in the crime.<sup>277</sup> Such intent typically calls for participation beyond the provision of the types of legal services ordinarily offered to clients generally.<sup>278</sup>

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conduct can be criminal if the government is aware of the conduct and systematically fails to enforce the law”).

272. See *29 Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, PROCON, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated Oct. 13, 2017) (showing twenty-nine states with some legalization of marijuana).

273. See Controlled Substances Act, 21 U.S.C. §§ 841, 844 (2012) (listing criminal penalties).

274. See, e.g., State Bar of Arizona, Ethics Op. No. 11-01 (2011) (“[W]e decline to interpret and apply [Arizona’s Rule] 1.2(d) in a manner that would prevent a lawyer who concludes that the client’s proposed conduct is in ‘clear and unambiguous compliance’ with state law from assisting the client in connection with activities expressly authorized under state law.”); Massachusetts Board of Bar Overseers/Office of Bar Counsel, *BBO/OBC Policy on Legal Advice on Marijuana* (Mar. 19, 2017) (announcing that the BBO/OBC will not discipline lawyers for “assisting a client in conduct that the lawyer reasonably believes is permitted by Massachusetts statutes, regulations, orders, and other state or local provisions implementing them”); Kamin & Wald, *supra* note 53, at 903–04.

275. Kamin & Wald, *supra* note 53, at 905–14.

276. For a discussion of the difference between those two categories of crimes, see Michael L. Travers, *Mistake of Law in Mala Prohibita Crimes*, 62 U. CHI. L. REV. 1301, 1301 n.3 (1995); Pepper, *Counseling*, *supra* note 5, at 1576.

277. Kamin & Wald, *supra* note 53, at 908–10.

278. *Id.* at 917. Kamin and Wald then argue that lawyers practicing in states where marijuana is legal and who offer conventional legal services (contract work, lease negotiation, entity

That distinction is found in the law of criminal conspiracy and accomplice liability.<sup>279</sup> Applying that distinction to Haile's work with WorkHub, if the FLSA violation is deemed a crime *malum prohibitum* and the law firm provides to WorkHub the kinds of legal product offered to business clients generally, the lawyer arguably will not have violated Rule 1.2(d).

This first argument has two components. It requires both that a violation of the FLSA qualifies as *malum prohibitum* and that the services Haile provides are those offered to business clients generally. There can be no doubt that in many, and perhaps most, contexts a violation of FLSA constitutes a serious injustice causing cognizable harm to vulnerable laborers, especially when contracting with undocumented immigrant workers.<sup>280</sup> Wage-and-hour violations are not status crimes,<sup>281</sup> and an employer that disregards the FLSA may face significant liability.<sup>282</sup> But in some settings, like that with WorkHub, where the business owners are operating in good faith and the workers understand the arrangements and voluntarily agree to work for the terms offered, the statutory prohibition looks more like a status offense than an offense *malum in se*. The fact that legal assistance with this kind of activity on behalf of startups is so common<sup>283</sup> lends support to the conclusion that the potentially criminal activity is not inherently exploitative or evil. In that context, Haile could, under this reasoning, satisfy the first of the two elements necessary for her to avoid discipline under Rule 1.2(d).<sup>284</sup>

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formation, etc.) to marijuana businesses have a good faith argument that they are not in violation of Rule 1.2(d). *Id.* at 917–19.

279. See, e.g., *United States v. Fountain*, 768 F.2d 790, 798 (7th Cir. 1985) (comparing a shopkeeper who sells a dress to a prostitute with a gun dealer who sells a gun to customer who will use it to murder a relative).

280. See, e.g., Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 415–16 (1995); Nantiya Ruan, *Same Law, Different Day: A Survey of the Last Thirty Years of Wage Litigation and Its Impact on Low-Wage Workers*, 30 HOFSTRA LAB. & EMP. L.J. 355, 367 (2013); Michael Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 509 (2004).

281. Typically crimes *mala prohibita* cause little inherent harm, but are criminal because a statute has so stated. See Travers, *supra* note 276, at 1301 n.3 (“Examples of such crimes include speeding and disposing of hazardous waste without the appropriate permit.”).

282. See, e.g., *Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d 1299, 1306 (W.D. Wash. 2001), *aff'd*, 290 F.3d 1043, 1044 (9th Cir. 2002) (explaining treatment of employees as freelancers subjected Microsoft to damages; matter settled for \$97 million).

283. See *supra* note 263 and accompanying text.

284. Correspondingly, a law firm asked to participate in an exploitative, strategic effort to misclassify workers under the FLSA would not satisfy this element, because in that context the criminal activity may not be deemed to be *malum prohibitum*.

The second element of the first possible defense is that Haile is only providing legal services offered to clients generally. This element rests on the formulation made famous by Judge Richard Posner in *United States v. Fountain*,<sup>285</sup> where Judge Posner noted the difference between a dressmaker who sells clothing to a prostitute and a firearms dealer who knowingly sells a gun to a person intending to commit a murder.<sup>286</sup> The dressmaker sells dresses to all customers, and the fact that a customer uses the product to commit a crime (and notably a crime *malum prohibitum*<sup>287</sup>) does not trigger conspiracy liability for the merchant. That reasoning serves as the basis for the proposition that lawyers offering corporate legal services to the marijuana industry ought not be deemed to have “assisted” the federal crime in violation of Rule 1.2(d).<sup>288</sup>

However solid that strand of reasoning is for the marijuana industry lawyers, it is harder to sustain for a lawyer like Haile, who knowingly provides an unlawful document to her client to be used expressly for a purpose that is criminal. If Haile prepared a template independent-contractor agreement to be used by WorkHub and Sanchez for lawful purposes, and Sanchez then uses it with workers who are employees under federal law, that seems to satisfy the *Fountain* formulation. Similarly, if Haile were to create corporate formation documents for WorkHub, a business that violated the FLSA, that would not present a problem at all. But the example used here is far more direct and intentional. Sanchez has asked Haile to draft independent-contractor agreements for employees, and Haile aims to provide those documents. That description appears to qualify as direct assistance with a crime.

The second argument available to Haile is perhaps more promising. If WorkHub’s use of independent-contractor agreements with these two employees is not criminal, then Haile has discretion to provide that service without running afoul of Rule 1.2(d). The questions for Haile, then, are these: Does *every* willful violation of the FLSA, regardless of the levels of harm and exploitation, qualify as a “crime?” Given the availability of criminal penalties should a prosecutor pursue them? And does she *know* that conclusion?<sup>289</sup> If Haile were to conclude that ordinary

285. 768 F.2d 790 (7th Cir. 1985).

286. *Id.* at 798; *see also* *People v. Lauria*, 59 Cal. Rptr. 628, 635 (Cal. Ct. App. 1967) (holding there was no conspiracy to commit prostitution by providing a telephone-answering service).

287. *Fountain*, 768 F.2d at 798 (describing prostitution as “a minor crime”).

288. Kamin & Wald, *supra* note 53, at 908; Eric Mitchell Schumann, *Clearing the Smoke: The Ethics of Multistate Legal Practice for Recreational Marijuana Dispensaries*, 6 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS 332, 357–58 (2016) (discussing, but not adopting, the argument).

289. Rule 1.2(d) requires that the lawyer “know” that the conduct is criminal. MODEL RULES OF PROF’L CONDUCT r. 1.2(d) (AM. BAR ASS’N 2014).

misapplication of the FLSA such as that proposed by WorkHub is not criminal, or that she does not know that it is,<sup>290</sup> then, the reasoning goes, she may assist WorkHub without risking discipline for having violated Rule 1.2(d).

*The Nonprofit Solicitation Story:* In this example of regulatory noncompliance, the lawyer, Jonathan Shin, considers whether to work closely with his nonprofit client, Advancement of Multilingual Justice (AMJ), as it solicits donations before completing the registration with the state's Office of the Attorney General (OAG), as the applicable state statute requires. Ehsan Rahman, AMJ's founder and executive director, has the opportunity to raise some money and worries that he needs to act quickly, and the OAG is well-known for moving slowly to approve a registration and issue the necessary "certificate of solicitation."<sup>291</sup> Rahman would use Shin's services in his efforts to solicit donors, especially to explain how the donation might retroactively qualify as a tax-deductible gift once AMJ obtains tax-exempt status.<sup>292</sup>

In AMJ's state, it is not a crime to fail to comply with the solicitation statute, and nothing Rahman will do in his communications with donors will qualify as fraud, as he intends to be transparent about the status of AMJ. But the solicitation remains "unlawful." Therefore, Shin has discretion to assist Rahman in his efforts but could also choose not to assist because of the unlawful character of the activity. We may also assume that nothing in the state's statutory or regulatory scheme applicable to charitable solicitation addresses a penalty that Shin or his law firm would risk. AMJ may face some penalties for its noncompliance, but as Shin knows, the chances of any penalties being imposed are insignificant, especially if AMJ proceeds to register and await its certificate of solicitation expeditiously.

Shin may exercise his discretion to assist in the unlawful conduct of AMJ without criticism. The violation of the law qualifies as *malum prohibitum* and not *malum in se*.<sup>293</sup> The world may be a better place if AMJ can secure donations that might be missed if Rahman delays. Even if that is not true, and even if Rahman is simply impatient to start buttonholing prospective donors, Shin may decide that helping this ambitious founder is a good use of the firm's resources. The firm might, of course, decline to participate. It may, for example, elect to implement an advance directive policy establishing that the firm will not participate in *any* wrongdoing in order to stave off other more complicated requests

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290. See Pierce, *supra* note 9 at 748–49 (discussing this factor in light of the ambiguity of the criminal law).

291. See *supra* note 40 and accompanying text. We must assume for purposes of this discussion that the state in which AMJ operates has adopted the ABA's version of Rule 1.2(d).

292. See *supra* note 42 and accompanying text.

293. See Travers, *supra* note 276, at 1301 n.3.

from clients. Or the firm's relationship with the Office of the Attorney General might be such that it chooses not to risk any chance of its assistance with noncompliance such as this becoming known to that agency. But for present purposes, the critical conclusion is that neither the standards governing lawyers, nor the ethos of the profession, would censure Shin for offering his firm's aid to AMJ.

*The Trademark Licensing Story:* In this startup story, a law-school clinic student, Anatoly Litmanovich, represents a new for-profit business, Winterport Graceful Movement, through its founder and CEO, Yolanda Moreno. Moreno hopes to license its curriculum and trademark to a colleague in California and needs the clinic's assistance in drafting the licensing agreement. The problem is that the nature of the arrangement, in Litmanovich's opinion, qualifies as a franchise, not a license. The franchise requirements, both nationally and in California, can be intense and costly.<sup>294</sup> Litmanovich and his faculty supervisor, Dara Bowman, need to understand the clinic's alternatives.

Federal and state law prohibits WGM from proceeding without compliance with the franchise requirements. Litmanovich's drafting of a licensing agreement therefore qualifies as counseling and assisting a client in illegal conduct. But it is not a crime to evade the franchise laws, even if it is a regulatory infraction subjecting the franchisor to penalties. Moreno will explain to her California colleague why WGM cannot afford to offer a franchise agreement, so the colleague will not be deceived or misled. Therefore, the conduct is not fraud. That colleague will have rights under the franchise laws and could later assert them against WGM,<sup>295</sup> and perhaps against Moreno personally.<sup>296</sup> Moreno understands

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294. See *supra* note 44 and accompanying text.

295. The federal franchising scheme does not permit a private right of action for injured franchisees, although the FTC may bring a claim against the franchisor. See, e.g., *Baum v. Great W. Cities, Inc. of N.M.*, 703 F.2d 1197, 1209 (10th Cir. 1983); *Dreisbach v. Murphy*, 658 F.2d 720, 730 (9th Cir. 1981); *Fulton v. Hecht*, 580 F.2d 1243, 1249 n.2 (5th Cir. 1978). Some state laws do permit a private right of action. See *Bans Pasta, LLC v. Mirko Franchising, LLC*, No. 7:13-cv-00360-JCT, 2014 WL 637762 (W.D. Va. Feb. 12, 2014) (explaining negligence per se claim can be based on violation of FTC Franchise Rule); *Akers v. Bonifasi*, 629 F. Supp. 1212, 1221–22 (M.D. Tenn. 1984); *KC Leisure, Inc. v. Haber*, 972 So. 2d 1069, 1074 (Fla. Dist. Ct. App. 2008) (holding violation of Florida DUTPA can be based on violation of FTC Franchise Rule). *But see LeBlanc v. Belt Ctr. Inc.*, 509 So. 2d 134, 137 (La. Ct. App. 1987) (holding that the failure of a franchisor to comply with the FTC disclosure regulations does not constitute an unfair trade practice under state law where there is no element of fraud, misrepresentation, deception, or unethical conduct in the creation of the franchise agreement).

296. See Edward Wood Dunham, *The Liability of Shareholders, Officers, Directors, and Employees for Franchise Law Violations*, 13 *FRANCHISE L.J.* 101, 101 (1994); Cynthia M. Klaus, *Personal Liability of Franchisor Executives and Employees Under State Franchise Laws*, 29 *FRANCHISE L.J.* 99, 99 (2009).

those risks, and she considers them minimal given her relationship with her colleague.

The question here is whether Litmanovich may lawfully produce the licensing agreement for Moreno and WGM. The answer is yes. Should he do so, or ought he decline to exercise that discretion? Putting aside the no-doubt significant factor of his status as a clinical student,<sup>297</sup> Litmanovich ought not receive criticism for choosing to aid Moreno. The federal and state franchise laws are far less easily assigned a label of *mala prohibita* than the charitable solicitation example above. The franchise laws are, we may assume, important consumer-protection vehicles which aim to prevent the exploitation of franchisees. A business's evading those laws could easily be considered *malum in se*, and therefore simply unacceptable. But the story we encounter here is not that story. Moreno and her California colleague both want this arrangement to happen, and it cannot, and will not, happen if WGM must meet the stringent requirements of the federal and state laws. It also will not happen—or will be much harder to implement—without the clinic's help. As long as the two contracting parties enter into the licensing agreement with a full understanding of the risks and benefits of doing so, a lawyer who aids them to achieve that end should not be reproached. No professional lawyering authority bars Litmanovich from drafting the agreement, and he may opt to do so without pangs of conscience.<sup>298</sup>

#### CONCLUSION

This Article demonstrates that the ABA, through its rule about assisting clients with misconduct, and the states that have chosen to adopt that rule, empower lawyers to participate in a defined, but not necessarily very limited, universe of unlawful conduct—any illegality that does not qualify as a crime or a fraud. That permission has not been articulated often or clearly by the ABA or by state disciplinary authorities. Nor has it been examined or addressed in any depth by legal ethics scholars and commentators. This Article argues that lawyers have discretion to assist or refuse to assist their clients with that type of unlawful activity. Lawyers who choose to participate in clients' unlawful activity, taking advantage of the state's license to do so, ought to be judged by their peers, and the rest of the relevant community, by the nature of the harm that participation produces and its effect on the justice of the resulting action.

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297. See *supra* note 289 and accompanying text. Licensed lawyers such as Jonathan Shin and Emily Haile above may be willing to accept some of the risks that, while likely very small, remain inherent in proceeding with the interpretation of Rule 1.2(d) developed here. A not-yet-licensed student attorney such as Anatoly Litmanovich will likely be much more risk-averse.

298. See ANTHONY TROLLOPE, *THE WARDEN* 25 (1964) (describing a lawyer who believes “that he might sleep at night without pangs of conscience”); Luban, *supra* note 223, at 89.

That license to collaborate with client unlawfulness is not a license to evade moral responsibility for the acts of their clients.

