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

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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 fidelity 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 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 the 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.

The Article offers, as orienting examples, three stories from the entrepreneurial startup world in which the clients request legal help with activities that are unlawful, but may not be criminal or fraudulent. Those stories provide a base from which to explore the questions to be addressed. Examining the text and history of Model Rule 1.2(d), the Article demonstrates that the ABA (and, presumably, the states that adopted the language) intended the Rule's limitation to mean what it says. While some lawyer participation with unlawful action might be prohibited through the operation of "other law," often 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, often it will be.

Lawyers therefore have discretion—but, the Article shows, no duty—to aid clients in some activities that are illegal. Lawyers must exercise that discretion

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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, the 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,[1] and to craft professional protocols through which lawyers might maintain some distance between their legitimate representational duties and the illegal[2] conduct in which their clients engage. The challenges emerging from that response are intricate and knotty, and do not lack for commentary.[3] Ethicists debate whether ostensibly neutral advice about the law encourages or assists wrongdoing, and, if so, what constraints on such advice might be warranted.[4] Jurisprudence scholars assess the benefits and the costs of legal counseling given its potential, and one might say its tendency, to encourage unlawful acts that otherwise might not occur.[5] 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.[6] All of this rich and sophisticated work has as its ultimate aim the minimization of legal assistance to, or encouragement of, wrongdoing.

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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] I employ the term "illegal" throughout this Article intentionally to include anything that the law prohibits or penalizes, or for which the law imposes some form of liability. An equivalent term used here is "unlawful." 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* text accompanying note 120 *infra*.

[3] For a leading and insightful exploration of this issue, see Geoffrey Hazard, *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669 (1980).

[4] *See, e.g.,* Bruce A. Green, *Taking Cues: Inferring Legality From Others' Conduct*, 75 FORDHAM L. REV. 1429 (2006); Donald C. Langevoort, *Someplace Between Philosophy and Economics: Legitimacy and Good Corporate Lawyering*, 75 FORDHAM L. REV. 1615 (2006); John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959 (2009); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995) [hereinafter, Pepper, *Counseling*]; Stephen L. Pepper, *Three Dichotomies in Lawyers' Ethics (with Particular Attention to the Corporation as Client)*, 28 GEO. J. LEGAL ETHICS 1069 (2015).

[5] *See, e.g.,* Stephen McG. Bundy & Einer Elhauge, *Knowledge About Legal Sanctions*, 92 MICH. L. REV. 261 (1993); Stephen McG. Bundy & Einer Richard Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CAL. L. REV. 313 (1991); Louis Kaplow & Steven Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 567 (1989); Louis Kaplow, *Information and the Aim of Adjudication: Truth or Consequences?*, 67 STAN. L. REV. 1303 (2015).

[6] "The literature on attorney gate-keeping post-Enron is voluminous." Milan Markovic, *Subprime Scriveners*, 103 KY. L.J. 1, 4 (2014-15) (referring to the accounting scandal accompanying the collapse of the Enron corporation in 2001). *See also* JOHN C. COFFEE, JR., GATEKEEPERS: THE

This Article addresses a strikingly different component of the reality of client lawbreaking. Notwithstanding the efforts and the 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, even encouragement, to a client about unlawful acts so long as the acts are not criminal or fraudulent."[7] That opinion, shared by other commentators as well,[8] 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,[9] prohibiting a lawyer from counseling or assisting a client in conduct "that the lawyer knows is criminal or fraudulent[.]"[10] That phrase chosen by the ABA in 1983 was "intended by the framers of the rule to be substantially narrower than the proscription in"[11] the ABA's previous Code of Professional Responsibility, which covered all "illegal" conduct.[12]

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,[13] 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

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ROLE OF THE PROFESSIONS IN CORPORATE GOVERNANCE (2008); Meliani Garcia, *The Lawyer as Gatekeeper: Ethical Guidelines for Representing a Client With a Social Change Agenda*, 24 GEO. J. LEGAL ETHICS 551 (2011); Thomas D. Morgan, *Comment on Lawyers As Gatekeepers*, 57 CASE W. RES. L. REV. 375 (2007); David Nersessian, *Business Lawyers as Worldwide Moral Gatekeepers? Legal Ethics and Human Rights in Global Corporate Practice*, 28 GEO. J. LEGAL ETHICS 1135 (2015); Fred Zacharias, *Lawyers as Gatekeepers*, 41 SAN DIEGO L. REV. 1387 (2004); Fred C. Zacharias, *Coercing Clients: Can Lawyer Gatekeeper Rules Work?*, 47 B.C. L. REV. 455 (2006) [hereinafter, Zacharias, *Coercing Clients*].

[7] 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 Lawyers.

[8] *See, e.g.,* Rutheford Campbell & Eugene 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, 891 (2005).

[9] *See* text accompanying note 120 *infra*.

[10] MODEL RULES OF PROF'L CONDUCT r.1.2(d) (2013).

[11] WOLFRAM, *supra* note 7, at 705.

[12] *Compare* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(7) (1969).

[13] *See* note 7 *supra*.

lawyers "may not participate in wrongdoing,"[14] and "may not knowingly participate in illegality and fraud[.]"[15] Other respected commentators make comparable contentions, communicating the proposition that lawyers may not assist clients with any unlawful conduct.[16]

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*."[17] Assisting a client with non-criminal or non-fraudulent unlawful action would be expected most often to result in a violation of some "other law." The Rules, then, seem to have competing messages for the lawyers who must honor them. It is the aim of this Article to make some sense of this puzzle.

I address the inquiry in the following way. I first offer three lawyering stories, in order to provide some context for the proceeding discussion. Each story involves an entrepreneurial, startup business enterprise. Startup businesses typically have scarce 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, the 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[18] so long as the aid does not assist 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

[14] Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 16 (2005).
[15] *Id.* at 51.
[16] *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) (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"). *See also* authorities cited at note 94 *infra*.
[17] MODEL RULES OF PROF'L CONDUCT r.1.16(a)(1) (2013) (emphasis added).
[18] *See* note 2 *supra*.

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 a clearer answer, even if the ABA, and the states that adopt the ABA's standards, opt not to provide it.

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

The Article then explores the limitations that "other law"—from outside of the profession—impose 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 conclusions. First, the presence of such other legal constraints in many respects begs the question here, as we are left with a regime that declares that a lawyer possesses professional discretion to aid in illegality if the lawyer is willing to accept the costs of doing so, which costs are reduced by the likelihood of their being imposed. Second, that question-begging consideration notwithstanding, 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 non-criminal or non-fraudulent 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 non-criminal or non-fraudulent 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 of Rule 1.16(a)(1), I conclude 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, I then conclude the Article with two more reflective goals. I hypothesize, admittedly without much evidence, the possible reasoning behind the ABA's express decision, when it created the Model Rules to replace the Model Code, to allow some assistance with illegality.[19] I then connect that discussion to a more meta-level inquiry about the message Rule 1.2(d) communicates to lawyers, and to the general public, 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.[20] 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.

I visit that debate and that 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 certain laws whenever the law interferes with the clients' interests or wishes (even though that is what the letter of their lawmaking seems to communicate). Instead, lawyers may only take advantage of the discretion the ABA and the states provide in settings where justice or morality would be advanced. No other understanding seems plausible. I then apply that interpretive turn to the three stories that began the Article.

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. I offer three such stories here, each necessarily rather thin as a hypothetical, but with enough texture to serve our purposes here. Each involves a lawyer working with a business startup client. Startup clients

[19] 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 7-102(A)(7) (1969) ("In his representation of a client, a lawyer shall not . . . (7) Counsel 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* text accompanying notes 52–65 *infra*.

[20] *See, e.g.,* WENDEL, *supra* note 1; David Luban, *Misplaced Fidelity*, 90 TEX. L. REV. 673, 688 (2012) (review of Wendel's book).

need help in every sort of way, including guidance from lawyers.[21] But startups are cash- and resource-poor, pretty much by definition.[22] And startups encounter many regulatory and other legal hurdles, compliance with which can be expensive and distracting.[23] Their incentive to fly under the radar, to operate outside of the formal requirements at least until they are on a more solid financial footing, is great.[24] 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 that seek advice and assistance from lawyers with activity that is illegal 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.[25] If we 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.[26]

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[21] *See* Darian M. Ibrahim, *How Do Start-Ups Obtain Their Legal Services?*, 2012 Wis. L. Rev. 333 (2012) (noting the importance of legal advice to startups); Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195 (1997).

[22] *See* 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) ("[s]tartups 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) ("[s]tartup companies are cash-poor").

[23] 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 Foundation Backgrounder #2895, March 26, 2014, *available at* http://www.heritage.org/research/reports/2014/03/red-tape-rising-five-years-of-regulatory-expansion.

[24] "It's almost a cliché that the startup founder focuses on getting more business while neglecting [compliance]." ComplyGlobal, *Why Your Startup Needs a Compliance Function*, July 29, 2015, *available at* http://www.complyglobal.com/blog/why-your-startup-needs-a-compliance-function.

[25] 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 (2016); Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75 (1993); W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1167 (2005) (attorneys as a "but-for cause" of accounting scandals of the early 2000s). For an extensive treatment of the ways that businesses attempt to avoid tax compliance, often without fidelity to the law, see BERNARD WOLFMAN, DEBORAH H. SCHENK & DIANE M. RING, ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE (4th ed. 2008).

[26] 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?*, 43 LAW & SOC. INQ. 331, 332 (1998) [hereinafter, Pepper, *Why Confidentiality?*]. Pepper uses the example of

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.[27] 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.[28] 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.[29]

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

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

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a well-meaning but cash-strapped startup business to provide a relatively sympathetic client for purposes of examining confidentiality duties. *Id.*

[27] *See, e.g.,* David Luban, *Rediscovering Fuller's Legal Ethics*, 11 GEO. J. LEGAL ETHICS 801 (1998); Paula Schaefer, *Harming Business Clients with Zealous Advocacy: Rethinking the Attorney Advisor's Touchstone*, 38 FLA. ST. U. L. REV. 251 (2011) (criticizing the bar for not limiting zeal in business counseling contexts). This well-accepted ethical principle became more prominent and relevant after the George W. Bush administration's reliance upon of the "torture memos." *See, e.g.,* DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 159, 177–79 (2007); Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 U. COLO. L. REV. 1 (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 (2009); Marisa Lopez, Note, *Professional Responsibility: Tortured Independence in the Office of Legal Counsel*, 57 FLA. L. REV. 685 (2005).

[28] WENDEL, *supra* note 1, at 13.

[29] *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 as counselor."). *See also* Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311 (1990); Kevin H. Michels, *Lawyer Independence: From Ideal to Viable 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.").

find co-working space that fits their needs and price constraints. In Sanchez's words, the model resembles "Airbnb for co-working 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 the algorithms needed for the business model to work. Sanchez has asked Haile to prepare for WorkHub, Inc. an independent contractor agreement for Bilder and Vose that will include confidentiality, non-disclosure, and noncompete provisions.[30] WorkHub's arrangement with the two coders is that the company will pay each of them $200 per week for about 40 hours of work each week, and will offer each a restricted stock agreement as further compensation for their efforts.[31] WorkHub can most likely afford that commitment, although the cash payment arrangement will be tight given the business's meager bank account balance. WorkHub will offer to 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.[32] The $200 per week payment given the hours worked calculates to less than minimum wage even at the federal rate.[33] As employees, the coders are entitled to unemployment insurance protection and workers compensation benefits, which WorkHub cannot afford to provide.[34] WorkHub is required to pay a portion of the coders' FICA payroll taxes, and to withhold the

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[30] 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. *See* Robert W. Wood, *Drafting Independent Contractor Agreements*, 33-OCT WYO. LAW. 53 (2010). The confidentiality and non-disclosure provisions protect the security of the payor's information, while the noncompete provision restricts the contractor from working for a similar business in a local area during a defined period of time. *See* Martin M. Shenkmana & Allan R. Freedman, *Employees, Independent Contractors and Similar Relationships in the Close Corporation*, 142-OCT N.J. LAW. 32 (1991).

[31] "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." Brett R. Turner, *Classifying Restricted Stock Plans*, 23 FAMILY ADVOCATE 33, 33 (Winter 2001).

[32] David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J.L. & PUB. POL'Y 138 (2015); Jenna A. Moran, *Independent Contractor or Employee? Misclassification of Workers and Its Effect on the State*, 28 BUFF. PUB. INT. L.J. 105 (2009).

[33] The federal minimum wage at the time of this writing is $7.25 per hour. *See* 29 U.S.C. § 206(a)(1)(C).

[34] Bauer, *supra* note 32, at 145.

remainder of FICA, along with state and federal income taxes.[35] WorkHub does not have the capacity or the dollars to arrange for those payroll logistics.

We may assume further, for whatever purposes, if any, it serves, that Bilder and Vose are satisfied with this arrangement and may suspect that the deal is not entirely above-board or technically in compliance with whatever regulatory schemes might exist. We may also assume, on similar terms, that Sanchez and WorkHub have every intention, and commit, 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,[36] but a distinct possibility of discretionary lax response by officials[37]). Having considered with great care the advice of Haile, Sanchez and the WorkHub board instruct Haile to develop the independent contractor agreements.

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, within several weeks, issue a "Certificate of Solicitation."[38] Once AMJ has that certificate, it may lawfully solicit funds in the state, or on the internet generally.[39] It may solicit funds with that certificate in place even before it obtains its tax-

[35] *Id.* at 149.
[36] *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).
[37] *Id.* at 128–29 (employers who cheat gain advantages).
[38] For example, in Massachusetts the Office of the Attorney General requires such a certificate. *See* http://www.mass.gov/ago/doing-business-in-massachusetts/public-charities-or-not-for-profits/registering-a-public-charity/.
[39] The National Association of State Charities Officials (NASCO) has adopted what have come to be known as the "Charleston Principles," addressing solicitation over the internet. The Charleston Principles conclude that charities should be regulated in a particular state only if "(a) the charity used the Internet to specifically target (via email or other methods) donors in that jurisdiction or (b) the charity received contributions from that jurisdiction on a 'repeated and ongoing basis or a substantial basis through its Web site.'" NASCO, The Charleston Principles §III.B.1 (2001), available at http://www.nasconet.org/public.php?pubsec=4&curdoc=10).

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.[40]

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 as well as to 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.

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 Música Adolescente, a program to immerse teens and young adults in Spanish language, culture, music, and dance. Música Adolescente is a small, struggling, but growing for-profit company which has developed some increasingly popular programs among local middle and high school students. Its founder and CEO is Yolanda Moreno.

Moreno has asked Litmanovich to create a licensing agreement for the company. The clinic helped Música Adolescente to obtain a federal trademark registration for its name and its logo, and the business uses both extensively in the local area. A former teacher from Música Adolescente, Juan Toledo, has asked Moreno if he could open a version of Música Adolescente in Santa Monica, California, where he now lives. Moreno loves the idea, but wants to make sure that the California program follows the Música Adolescente model precisely. Litmanovich's research shows that California has pretty strict and elaborate franchising requirements,[41] stricter than those that apply to all states through the Federal Trade Commission.[42] If Música Adolescente 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 that 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.

[40] 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. Donations given before the IRS has determined that an organization is tax-exempt would be deductible to the donor when the retroactive designation occurs. *See* I.R.C. § 508(d)(2) (1994).

[41] *See* CALIF. CORP. CODE §§ 31000 *et seq.*; CALIF. ADMIN. CODE Title 10, §§310.011, 310.011.1.

[42] *Compare* Federal Trade Commission Trade Regulation Rule: Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 16 C.F.R. § 436.1 *et seq.* (1978).

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.[43] 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 constraints that exist of 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.

II. THE BASELINE SUBSTANTIVE LAW ON 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 law doctrine and standards governing assistance with unlawful activity. If the available black-letter law governing lawyers (either *qua* lawyers or as citizens generally) prohibits startup counsel from assisting with client conduct that violates the law, 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 further whether the legal realist and contextualized understanding of that black-letter law provides the lawyer some practical discretion to assist in some fashion. 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 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.[44] For our present purposes, we now know that this regulatory violation is neither criminal nor fraudulent.[45]

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[43] Litmanovich's offering explanations of the arrangement to Toledo, the licensee, while he represents Música Adolescente, 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 (2013).

[44] *See* text accompanying note 38–40 *supra*.

[45] For a more contextual examination of that proposition in this fact setting, see text accompanying notes 241–43 *infra*.

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, that is, in violation of some civil duty or administrative obligation. Before proceeding to examine that question, we need to be clear about the understanding the Article employs regarding the concept of "assistance." I do not question here whether a lawyer may counsel a client about the meaning of a legal authority, its reach, its enforcement, and the consequences of its breach. For present purposes, I accept that a lawyer may lawfully do so, even if in doing so subtly (or not-so-subtly) encourages a client to violate the law in question.[46] I treat that proposition as not terribly controversial and 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.[47] I do agree that interesting 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.[48] And I also agree that even more interesting questions arise about the morality—as contrasted with the legality—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.[49]

But the question examined here is more simple, and more direct, if equally interesting. I imagine a lawyer not merely counseling a client about certain actions, but proceeding to assist the client in achieving his 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.[50] The three stories above offer opportunities for that active assistance. The Article will examine whether the lawyers in question "may" provide such assistance.

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[46] *See* Kaplow & Shavell, *supra* note 5, at 586–92.

[47] *See* MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (2013) ("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").

[48] *See* Hazard, *supra* note 3, at 675; Pepper, *Counseling*, *supra* note 4, at 1588–92.

[49] *See, e.g.,* David Luban, *Asking the Right Questions*, 72 TEMP. L. REV. 839 (1999); Tanina Rostain, *Pockets of Professionalism*, 54 STAN. L. REV. 1475 (2002) (book review).

[50] *See, e.g.,* Matter of Alberino, 27 Mass. Att'y Disc. R. 1 (2011) (term suspension for participating in a foreclosure rescue scheme in which the clients signed false documents); Matter of Hanserd, 26 Mass. Att'y Disc. R. 229 (2010) (term suspension for assisting in real estate transactions in which the parties misrepresented the facts of the deals); In re McCarty, 75 A.3d 589 (Vt. 2013) (term suspension for attorney who created false documents to obtain an unlawful eviction); In re Poff, 714 S.E.2d 313 (S.C. 2011) (term suspension for aiding a client who reported falsely about her income to obtain Medicaid). For an insightful discussion of the meaning of the term "assisting," see Sam Kamin & Eli Wald, *Medical Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869, 901 (2013).

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.[51]

A review of the Model Rules provisions, including applicable Comments, demonstrates that the ABA, which drafted the rules, and those states that then adopt 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

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 . . . .[52]

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 of other unlawful activity arises.[53] One indirect reference to the question explored here appears in Comment [10], in this sentence: "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*."[54] The drafters' choice to limit the second category of improper conduct is telling, and supports the inference that arises from the straightforward read of Rule 1.2(d).

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[51] 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., SUSAN P. KONIAK, ROGER C. CRAMTON, GEORGE M. COHEN & W. BRADLEY WENDEL, THE LAW & ETHICS OF LAWYERING 62–148 (5th ed. 2010).

[52] MODEL RULES OF PROF'L CONDUCT r.1.2(d) (2013).

[53] *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.

[54] *Id.* at Cmt. [10] (emphasis added).

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 read of the Rule. Before 1983, the ABA promulgated and all of the states relied on the predecessor Model Code of Professional Responsibility.[55] 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 . . . (7) Counsel or assist his client in conduct that the lawyer knows to be *illegal* or fraudulent.[56]

The Code limited a lawyer's counseling and assisting a client to activity that was not illegal, a much 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 that the Code provided. The difference does not matter today. Whether the Code in fact 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*,[57] the only fair reading of Rule 1.2(d) is that it does not apply to activity not criminal and not fraudulent. Much unlawful conduct fits within that universe.[58]

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:

> Rule 4.3: A lawyer shall not conclude an agreement, or assist a client in concluding an agreement, that the lawyer knows or reasonably should

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[55] *See* DEBORAH L. RHODE, DAVID LUBAN, SCOTT L. CUMMINGS & NORA FREEMAN ENGSTROM, LEGAL ETHICS 85–86 (7th ed. 2016) (all states but California adopted the Model Code, and California established comparable provisions); WOLFRAM, *supra* note 7, at 56 (by 1972 all states but California had adopted the 1969 Model Code).

[56] MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(7) (1969) (emphasis added).

[57] BLACK'S LAW DICTIONARY 661–62 (9th ed. 2009); *see* Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993).

[58] "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, *Why Confidentiality?*, *supra* note 26, at 333.

> know is illegal, contains legally prohibited terms, would work a fraud, or would be held to be unconscionable as a matter of law.[59]

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:

> Rule 1.2(d): 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.[60]

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 Commission's proposal, reading as follows:

> (d) A lawyer shall not counsel or assist a client in conduct that the lawyer knows is criminal, fraudulent, *or otherwise intentionally tortious*, or in the preparation of a written instrument containing terms the lawyer knows or reasonably should know 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.[61]

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."[62] The House of Delegates rejected that amendment by a voice vote.[63] 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

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[59] Model Rules of Professional Conduct Rule 4.3 (Discussion Draft 1980), *cited in* William T. Vukowich, *Lawyers and the Standard Form Contract System: A Model Rule That Should Have Been*, 6 GEO. J. LEGAL ETHICS 799, 799 (1993).

[60] Model Rules of Professional Conduct Rule 1.2(d) (Final Draft 1982), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_8-82.authcheckdam.pdf (last visited December 5, 2016).

[61] A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013 49 (Art Garwin, ed. 2013) (emphasis added). The text uses the term "tortuous" instead of "tortious," no doubt as a misprint.

[62] *Id.*

[63] *Id.*

illegal conduct, except in a good faith effort to test the validity or scope of the law."[64] The Section withdrew its proposal before any vote on it.[65]

This legislative history demonstrates that the Kutak Commission, later supported by the ABA House of Delegates, communicated its conclusion that a lawyer *may* prepare agreements with prohibited terms, assist with tortious acts, and otherwise aid in illegality other than crimes or frauds, as there is no prohibition in the rules against doing so.

c. The Rule's Interpretation and Application

There is surprisingly little interpretive commentary on the meaning of the "negative pregnant"[66] within Rule 1.2(d). The ABA has never declared in its publications that Rule 1.2(d) permits lawyers to engage actively in non-criminal and non-fraudulent wrongdoing. The Comments to Rule 1.2(d) do not address what one observer calls the "negative inference"[67] 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, never mentioning the rule's applicability to other wrongdoing.[68] 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,"[69] but later editions of the text omitted that advice, which is inconsistent with the Rule 1.2(d) message.[70]

Caselaw on the question is effectively nonexistent.[71] One court opinion has implied that the application of Rule 1.2(d) only to certain forms of illegality is

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[64] *Id.* at 50.
[65] *Id.*
[66] The "negative pregnant" is a rule of construction articulated by the Supreme Court. *See* Field v. Mans, 516 U.S. 59, 67 (1995) ("[U]nder that 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.").
[67] Pierce, *supra* note 8, at 854.
[68] AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT § 1.2 (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.* (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.
[69] AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT § 1.2, p. 23 (3rd ed. 1996).
[70] *Compare id.* with ANNOTATED MODEL RULES, *supra* note 68, at § 1.2(d).
[71] My research assistant and I have 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* Matter of Rosen, 35 A.3d 1196 (N.J. 2012) (discipline

appropriate. In *In re Scionti*,[72] a lawyer faced disciplinary charges based on Rule 1.2(d) after advising his client to violate a custody and visitation order. The lawyer and his client feared for the safety of the child. 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, and therefore a criminal violation was unforeseeable by Respondent."[73] The court rejected that defense because the criminal implications of the violation were foreseeable.[74]

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).[75] 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.[76] Beyond that example of unlawfulness,[77] the Restatement says nothing about whether a lawyer may assist a client with other unlawful activity, such as regulatory violations or intentional torts.

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 or assisting a client to engage in a wide variety of misconduct for which the client will be subject to legal liability.[78]

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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.,* In re Lowell, 784 N.Y.S.2d 69 (N.Y. App. Div. 2004) (assistance with fraud); Trumbull Cty. Bar Assn. v. Roland, 63 N.E.3d 1200 (Ohio 2016) (concealing assets in a divorce proceeding); Matter of Goldberg, 520 A.2d 1147 (N.J. 1987) (conviction of aiding drug distribution).

[72] 630 N.E.2d 1358 (Ind. 1994).

[73] *Id.* at 1360.

[74] *Id.*

[75] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 57 (2000).

[76] *See, e.g.,* Alaska Bar Association, Ethics Op. 88-2 (1988) (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 ("[t]he term 'illegality' in ordinary legal parlance does not embrace breach of contract"); Lewis Tesser & Timothy Nolan, *"Illegal" Conduct Under Rule 1.2: When Does Advice to a Client Violate an Attorney's Ethical Obligations?*, N.Y LEGAL ETHICS REPORTER (April 2015).

[77] *See* Pierce, *supra* note 8, at 901–04 (addressing whether the "unlawful" term ought to apply to that activity).

[78] *Id.* at 891–92. Pierce adds, "There are numerous intentional torts other than fraudulent misrepresentation that lawyers are not currently prohibited from encouraging or assisting." *Id.*

Other writers have offered similar observations,[79] including, as noted in the Introduction, Professor Charles Wolfram, the Chief Reporter for the Restatement (Third) of the Law Governing Lawyers.[80] 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."[81] 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."[82]

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.[83] That comes as no surprise, of course; it would violate fundamental fairness and the due process rights of a lawyer-respondent to discipline her for activity not identified in the disciplinary rules.[84]

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[79] *See* Campbell & Gaetke, *supra* note 8, 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."); Tesser & Nolen, *supra* note 76, at 2 ("The ABA Rule . . . appears to apply only to criminal conduct, not civil wrongs.").

[80] *See* WOLFRAM, *supra* note 7, at 704.

[81] Pepper, *Counseling*, *supra* note 4, at 1592–93.

[82] Martin H. Malin, *Ethical Concerns in Drafting Employment Arbitration Agreements After* Circuit City *and* Green Tree, 41 BRANDEIS L.J. 779, 817 (2003). 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.*

[83] Many reported attorney disciplinary matters cite the Model Rules version of Rule 1.2(d) as a basis for discipline, but always involving criminal or fraudulent activity. On occasion, discipline has been imposed, using Rule 1.2(d), for violation of a court order. *See, e.g.,* Matter of 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)") (interpreting Massachusetts's version or Rule 1.2(d), which was identical to the Model Rule); Matter of Holden, 982 P.2d 399 (Kan. 1999); 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 is covered by a different Rule of Professional Conduct, Rule 3.4 (c) or 8.4(c). *See, e.g.,* Disciplinary Counsel v. Rohrer, 919 N.E.2d 180 (Ohio 2009); In re Disciplinary Action Against Miley, 486 N.W.2d 759 (Minn. 1992).

[84] 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 No. 4 PROF. LAW. 28 (2011).

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 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."[85] 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.[86] Wendel may be correct, although, as the discussion below shows, his assertion is probably not sustainable.[87]

Therefore, considered in light of its plain language and history, Rule 1.2(d) does communicate to lawyers 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."[88] 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. We now consider 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*."[89] 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 their version of Rule 1.2(a),[90] but the majority have not.[91] 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."[92] 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

[85] *See* WENDEL, *supra* note 1, at 264.
[86] *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).
[87] *See* text accompanying note 151–60 *infra*.
[88] WENDEL, *supra* note 1, at 264.
[89] MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(A)(1) (1969) (emphasis added).
[90] MASS. RULES OF PROF'L CONDUCT r. 1.2(a); MICH. R. PROF'L CONDUCT r. 1.2(a).
[91] *See* STEPHEN GILLERS, ROY D. SIMON & ANDREW M. PERLMAN, REGULATION OF LAWYERS, STATUTES AND STANDARDS (2014) (comparing state versions of Rule 1.2(a)).
[92] MODEL RULES OF PROF'L CONDUCT r.1.3 Cmt [1] (2013) (emphasis added).

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 read 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:
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> (1) the representation will result in violation of the rules of professional conduct *or other law* . . . .[93]

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 that 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).[94] The authorities who interpret Rule 1.2(d) as authorizing assistance with non-fraudulent and non-criminal

[93] *Id.* at r. 1.16(a)(1) (emphasis added).

[94] *See, e.g.,* Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481, 498 (2008) ("the lawyer must not counsel or assist the 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 16, 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 n14 (2007) ("an 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 6, at 1395–96 (lawyers "may not participate in or assist illegal conduct") (citing the Rule).

conduct typically do not account for Rule 1.16(a)(1) in their analysis.[95] In his treatise on the Model Rules, for example, Charles 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,"[96] 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."[97]

There are three possible ways to understand the juxtaposition of the Rule 1.2(d) language and the Rule 1.16(a) 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 prior law 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 to discern with full confidence which of the three alternatives is most reliable, but the best read 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.[98] 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

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[95] *See, e.g.,* Campbell & Gaetke, *supra* note 8 (no discussion of Rule 1.16); Malin, *supra* note 8, (same); Pepper, *Counseling*, *supra* note 4, (same); Pierce, *supra* note 8, at 854–58 (same).

[96] WOLFRAM, *supra* note 7, at 704.

[97] *Id.* at §9.5.4, p. 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.

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.*

[98] This is a common technique in statutory interpretation, known as "*generalia specialibus non derogant*," or "general things do not derogate from special things." *See* 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. NEGO. L. REV. 95, 107 (2011) (applying that test to an interpretation of a Model Rule).

predecessor.[99] By contrast, no such deliberation or debate appears in any historical account of the development of Rule 1.16(a)(1).[100] 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."[101] 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."[102] 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 easily could have written, to be faithful to the provision about which they write, "assisting a client to commit a criminal or fraudulent act *or to violate some other law*." 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.[103]

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 or fraudulent, or in violation of a court order.

[99] *See* text accompanying notes 55–56 *supra*.
[100] *See* LEGISLATIVE HISTORY, *supra* note 61, at 365-81.
[101] MODEL RULES OF PROF'L CONDUCT r. 1.16 Cmt. [2] (2013).
[102] ANNOTATED MODEL RULES, *supra* note 68.
[103] *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* text accompanying note 83 *supra*.

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 Charles Wolfram story we 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.[104] 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.[105] Because Wolfram later concludes that Rule 1.2(d) does not bar the lawyer from assisting with non-criminal or non-fraudulent client misconduct,[106] 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.

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[107] when "*the representation* will result in violation of [some] other law,"[108] 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, or fraud, or violation of the Rules of Professional Conduct.[109] The rule has never served as the basis for discipline for violation of some "other law" beyond those categories.[110] The most common reason for a

[104] *See* WOLFRAM, *supra* note 7, at 552, n.88, discussed at note 97 *supra*.
[105] *Id.*
[106] *Id.* at 704.
[107] 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) (2013) ("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).
[108] *Id.* at r. 1.16(a)(1) (emphasis added).
[109] Westlaw search, December 19, 2016 (producing 76 state court opinions involving attorney discipline and citing Rule 1.16(a)(1)).
[110] 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

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.[111] The next most common fact pattern involves a lawyer's remaining in some representation after losing her right to practice law, usually because of an administrative suspension.[112] 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.[113]

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* . . . ."[114] 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.[115] 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, and not fraudulent, as no AMJ constituent

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failed to comply with a state regulation governing real estate transactions. *See* Kentucky Bar Ass'n v. Katz, 317 S.W.3d 592, 594 (2010) (describing "other law" as "specifically, in violation of Delaware interpretive guidelines regarding 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 (Del. 2009). The reference to Rule 1.16(a)(1) in the Delaware disciplinary report did not rely on some non-criminal 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. The lawyer in question also engaged in multiple conflicts of interest in violation of Delaware's Rule 1.7. *Id.* at 1140–41.

[111] Westlaw search, *supra* note 109 (showing twenty-two such instances). *See, e.g.,* Attorney Grievance Com'n of Maryland v. Zhang, 100 A. 3d 1112 (Md. 2013); Matter of Munden, 559 S.E. 2d 589 (2002); Matter of Hoffman 700 N.E. 2d 1138 (Ind. 1998).

[112] *Id.* (showing twenty such instances). *See, e.g.,* In re Fazande, 23 So.3d 247 (La. 2009); Matter of Swisher, 179 P.3d 412 (Kan. 2008); In re Paulson, 216 P.3d 859 (Or. 2009); State ex rel Okla. Bar Ass'n v. Knight, 359 P.3d 1122 (2015).

[113] *See, e.g.,* Attorney Grievance Com'n of Maryland v. Bleecker, 994 A.2d 928 (Md. 2010) (violation of Rule 3.3); In re Dennis, 188 P.3d 1 (2008) (failure to comply with a court order in violation of Rules 3.2 and 8.4(d)); People v. Johnson, 35 P.3d 168 (Colo. 1999) (violation of Rules 1.8 and 8.4(a)).

[114] *Id.* at r. 8.4(e) (emphasis added).

[115] *See* text accompanying notes38–40 *supra*.

will mislead any donor about any aspect of the requested financial assistance.[116] 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.

No published interpretation of Rule 8.4(e) has concluded that it undercuts Rule 1.2(d) in this way, and research uncovers no case or disciplinary report in which that interpretation of Rule 8.4(e) has been used.[117] One may only speculate about how the drafters intended to reconcile the inconsistent messages of Rules 1.2(d) and 8.4(e). The most plausible hypothesis would likely be this: Rule 8.4(e)'s role within the attorney regulatory structure serves to limit a lawyer's improper influence of public officials.[118] The language about "stat[ing] or imply[ing]" an ability to achieve unlawful goals is intended, most likely, to ensure that lawyers not only do not exert that improper influence, but do not communicate that capacity to others even if they happen to possess it. Such a hypothesis remains just that, of course, as no reliable commentary explains the language in question, and that provision has only been relied upon as a source of attorney discipline in instances of alleged influence of an official, or implications of that capacity.[119]

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[116] 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 at note 40 *supra. See also* Massachusetts Attorney General Solicitation Guidelines, *available at* http://www.mass.gov/ago/doing-business-in-massachusetts/public-charities-or-not-for-profits/soliciting-funds/overview-of-solicitation.html.

[117] While attorneys on occasion have been disciplined for violation of a version of Model Rule 8.4(e), none 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) (implication of possible bribery); Matter of Anderson, 804 N.E.2d 1145 (Ind. 2004) (prosecutor arrested for DUI claimed to have had influence); Matter of Smith, 991 N.E.2d 106, 109 (Ind. 2013) (claims in book of having connections).

[118] 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 (2009); George M. Cohen, *The Laws of Agency Lawyering*, 84 FORDHAM L. REV. 1963, 1966 (2016).

[119] Attorney discipline based upon the ABA's version of Rule 8.4(e) consistently involves influence of a public official. *See, e.g.,* Matter of Howard, 912 S.W.2d 61 (Mo. 1995) (arguing in court that the attorney had influence with superiors); In re Shariati, 31 A.3d 81 (D.C. 2011) (charges based on implication that attorney could influence officials). In Massachusetts, Rule 8.4(e) appears in the Massachusetts Disciplinary Reports just once, and it appears to be a typographical error. *See* Matter of Greece, 19 Mass. Att'y Disc. R. 186 (2003) (citing Rule 8.4(e) for the proposition that the disbarred lawyer engaged in "conduct that adversely reflects on his fitness to practice law," the phrase found in Rule 8.4(h) of the Massachusetts Rules of Professional Conduct.

5. Summary of the Model Rules Review

This review of the Model Rules permits a reasonably confident 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 or overrule 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. And to state that the Rules allow the same is to state that the allowance applies whether the unlawful or illegal actions cause no harm, or cause some harm. The Rules make no such distinction. If this analysis thus far 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,[120] lawyers in fact 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.

D. The Availability of "Other Law" as a Supplement to Rule 1.2(d)

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.[121] If some authority, applicable to lawyers specifically or to citizens generally, prohibits assistance with illegal conduct beyond crimes and fraud, then 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

[120] I use the term "wrongdoing" to refer to unlawful or illegal conduct, but advisedly so. I recognize 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, introductory note (1981) (treating remedies as a cost).

[121] *See* Geoffrey C. Hazard, *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).

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 or not the disciplinary authority bars a certain action, notwithstanding any other implications of the action. For example, given that Rule 1.2(d) does not prohibit a lawyer's providing assistance to a client who engages in intentionally tortious conduct,[122] a lawyer who does so might be found liable to pay damages to the injured party,[123] but not be subject to discipline for her participation. Given this Article's aim to understand the proper professional role responsibilities 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. But it seems to be true that some types of assistance with wrongdoing expose the lawyer to no penalties or sanctions at all, either through the disciplinary system, exposure to civil penalties, or administrative sanctions.

2. The Consequences Arising from Other Law

With that understanding in place, it is useful to summarize at least briefly the risks that a lawyer does accept in his decision to assist his clients in illegality for which the state bar authorities allow permission. That summary obviously excludes consideration of 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.

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[122] *See* text accompanying note 61 *supra*.

[123] *See* RESTATEMENT (SECOND) OF TORTS § 876(b) (1977) (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"); Kurker v. Hill, 689 N.E.2d 833 (Mass. App. Ct. 1998) (minority business owner's allegations against co-owners and lawyers supported claims of oppression and civil conspiracy); Douglas R. Richmond, *Lawyer Liability for Aiding and Abetting Clients' Misconduct Under State Law*, 75 DEF. COUNS. J. 130 (2008); Eugene J. Schiltz, *Civil Liability for Aiding and Abetting: Should Lawyers Be "Privileged" to Assist Their Clients' Wrongdoing?*, 29 PACE L. REV. 75 (2008).

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 a breach of fiduciary duty,[124] or for aiding and abetting torts.[125] In limited circumstances a lawyer may be required to pay damages for interference with contractual relationships.[126] A lawyer may be found to qualify as a "primary" violator of Section 10b5 of the securities laws and ordered to pay damages to injured investors as the result of work performed for clients,[127] or be held liable to investors for negligent advice about a securities offering.[128] 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 issue a sanctions order against 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

[124] *See* 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 (2008); Christine L. Eid, Comment, *Lawyer Liability for Aiding and Abetting Squeeze-Outs*, 34 WM. MITCHELL L. REV. 1177, 1195 (2008) (LLC context); 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 (2016); Cacciola v. Nellhaus, 733 N.E.2d 133 (Mass. App. 2000) (claim stated against lawyer for aiding in a partner's breach of fiduciary duty); Kenny v. Murphy, 919 N.E.2d 716 (Mass. App. 2010) (same); Adena, Inc. v. Cohn, 162 F. Supp. 2d 351 (E.D. Pa. 2001) (same).

[125] *See* RESTATEMENT (SECOND) OF TORTS § 876 (1979); Thornwood, Inc. v. Jenner & Block, 799 N.E.2d 756, 768 (Ill. App. Ct. 2003) ("we 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"). 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 (2008).

[126] Ordinarily, a lawyer may not be held liable for interference with contractual relationships when advising a client who chooses to breach a contract. *See* Eid, *supra* note 124, at 1217–18; Macke Laundry Serv. Ltd. P'ship v. Jetz Serv. Co., 931 S.W.2d 166, 181–82 (Mo. Ct. App. 1996) (providing lawyers with a qualified privilege, when acting within the scope of attorney-client relationship, to assist a client not to perform a contract). *But see* Schott v. Glover, 440 N.E.2d 376, 380 (Ill. Ct. App. 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").

[127] *See* Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 191 (1994) ("[a]ny 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).

[128] *See* Federal Deposit Insurance Corp. v. O'Melveny & Meyers, 969 F.2d 744 (9th Cir. 1992), rev'd on other grounds, 512 U.S. 79 (1994).

regulatory sanctions will qualify as crimes,[129] and therefore would be prohibited by Rule 1.2(d). Other sanctions are administrative,[130] though, and not covered by Rule 1.2(d). For some such administrative wrongdoing, that occurring in an adjudicative proceeding, another Model Rule prohibits a lawyer's assisting it. 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[.]"[131] In an adjudicative proceeding before a state or federal agency, the agency is a "tribunal" for purposes of Rule 3.4(c).[132] A lawyer's assistance to a client with conduct that violates the rules of the agency would therefore be prohibited by Rule 3.4(c) even if not by Rule 1.2(d). For example, lawyers who practice before the Social Security Administration must comply with separate, agency-driven requirements when representing claimants.[133] Failure to honor those standards of conduct may lead to sanctions, including suspension of the right to practice before the SSA.[134] The Securities and Exchange Commission[135] and the United States Patent and Trademark Office[136] 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.[137]

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[138] and the franchise/license tale.[139] In such a setting, the lawyer faces no agency

[129] *See* 18 U.S.C. § 1512(c) (2006); 18 U.S.C. § 1519 (2006) (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).
[130] *See* Cohen, *supra* note 118, at 1975–76.
[131] MODEL RULES OF PROF'L CONDUCT r. 3.4(c) (2013).
[132] *See id.* at r. 1.0(m) (defining "tribunal" to include "an administrative agency … act[ing] in an adjudicative capacity." *See also* Cohen, *supra* note 118, at 1975–76.
[133] 20 C.F.R. § 404.1740 (2015) (Rules of Conduct and Standards of Responsibility for Representatives).
[134] 20 C.F.R. § 404.1741 (2015) (Violations of Our Requirements, Rules, or Standards); *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.")
[135] *See* 17 C.F.R. § 205.1–.7 (2015) (Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer).
[136] *See* 37 CFR Ch. I, Subch. A, Pt. 11, Subpt. C (2015) (Practice Before the Patent and Trademark Office).
[137] *See* 20 C.F.R. § 404.1745 (Social Security Administration); 35 U.S.C. § 32 (2012) (USPTO); 17 C.F.R. §205.6 (SEC).
[138] *See* text accompanying notes 38–40 *supra*.
[139] *See* text accompanying notes 41–43 *supra*.

sanctions, and faces no bar discipline sanction, for assisting the client to proceed with actions that do not comply with the regulatory requirements.

III. IMPLICATIONS OF THE SUBSTANTIVE LAW LESSONS

A. Three Lawyer Postures

We now understand that, 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, universes. 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 activity that is unlawful under the professional codes for the lawyer herself to engage in, such as, for example, offering false evidence to a tribunal[140] or advising an unrepresented person whose interests are adverse to the lawyer's client's interests.[141] 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).[142] As far as one may discern, though, no lawyer has been disciplined for merely counseling a client about the consequences of, without then active assistance with, the forbidden activity.[143] The absence of such precedent, though, does not permit an inference that such encouragement is acceptable.[144]

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[140] MODEL RULES OF PROF'L CONDUCT r. 3.3 (2013).
[141] *Id.* at r. 4.3
[142] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 56 comment *c* (2000) ("Proper advice to a client does not constitute assistance leading to liability."); RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS, THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1.2.–4 (2013-2014); Bruce A. Green, *Taking Cues: Inferring Legality From Others' Conduct*, 75 FORDHAM L. REV. 1429, 1447 (2006) (defending advice about enforcement practices); Pepper, *Counseling*, *supra* note 4, at 1548.
[143] 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. *Cf.* Banco Popular North America v. Gandi, 823 A.2d 809, 815 (N.J. 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).
[144] *See Banco Popular North America*, at 815 (observing the difficulty in making distinction, and implying that some advice might reach the level of assistance).

2. *Unlawful Activity that Is Not Criminal or Fraudulent, but Exposes 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 crime/fraud category, 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,[145] or encouragement to a client to breach a contract, resulting in interference with a contractual relationship.[146]

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.[147] The unlikelihood of this exposure stems from two considerations. First, assuming that the lawyer *is not negligent* in her counseling role, and advises the client of the risks it faces in proceeding contrary to some regulatory scheme, or discloses accurately the costs of the resulting breach of contract or tort action that the client's stance will invite, no malpractice claim should survive.[148] Second, it is typically a defense to a malpractice claim if the client has unclean hands, or acts *in pari delecto*. "The [*in pari delecto*] 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."[149] 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 delecto* defense might not be available.[150]

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[145] *See* notes 124–27 *supra* 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.

[146] *See* Eid, *supra* note 124, at 1217–18 (noting the qualified privilege that lawyers possess against such suits).

[147] *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).

[148] *See* Wood v. McGrath, North, Mullin & Kratz, PC, 589 N.W.2d 103, 107 (Neb. 1999) ("[b]ecause the client bears the risk, it is the client who should assess whether the risk is acceptable"); Union Planters Bank v. Thompson Coburn, 402 Ill. App. 3d 317, 344 (5th Dist. 2010); Robert Kehr, *Lawyer Error: Malpractice, Fiduciary Breach, or Disciplinary Offense?*, 29 W. ST. U. L. REV 235 (2002).

[149] RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 54 cmt. *f* (2000).

[150] *See* FDIC v. O'Melveny & Myers, 61 F.3d at 19 ("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, and 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.[151] While some assistance of illegality permitted by the Model Rules will generate some penalties for a lawyer,[152] not every instance will create that consequence. And it is not the case that only *de minimus* wrongdoing fits this category. Some serious wrongdoing by a client, assisted actively by a lawyer, will be considered non-criminal and non-fraudulent, 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.[153] Congress has imbued the FTC with a number of enforcement remedies, including issuance of cease-and-desist orders,[154] and imposition of fines, including significant fines for persistent and recidivist violators.[155] 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 Statement on Deception, which requires minimum levels of

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[151] *See, e.g.,* WENDEL, *supra* note 1, at 264 n53 (arguing that the gap in Rule 1.2(b) is addressed by other constraints on lawyering assistance).

[152] 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 INQ. 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.

[153] See 15 U.S.C. § 45(a) (2006) (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 the consumers cannot "reasonably avoid[]" the injury themselves); *See also* Richard Craswell, *Regulating Deceptive Advertising: The Rule of Cost-Benefit Analysis*, 64 S. CAL. L. REV. 549 (1991).

[154] FEDERAL TRADE COMMISSION, OPERATING MANUAL, Chapter 5 (Orders), § .1, available at https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch05orders.pdf.

[155] *Id.*, at Chapter 12 (Compliance), § .5, available at https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch12compliance.pdf. *See* Gerard M. Stegmaier & Wendell Bartnick, *Another Round in the Chamber: FTC Data Security Requirements and the Fair Notice Doctrine*, 17 J. INTERNET L. 1, 22 (2013) (reporting FTC fine of $22 million against Google for multiple violations of a consent order).

substantiation for any advertising claims made about products.[156] Those actors and agencies rely on their counsel for guidance in assessing those judgments.[157]

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.[158] 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.[159]

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.[160] 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.

B. The Scope of Lawyer Discretion to Refuse Assistance

The question we confront in this subsection is intriguing, but in the end quite easily answered. If a client requests that its lawyer perform some legal work that assists the client with unlawful, but not criminal or fraudulent, activity, and

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[156] FTC POLICY STATEMENT ON DECEPTION (October 1983), available at https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception ("[T]he underlying legal requirement of advertising substantiation [is] that advertisers and ad agencies have a reasonable basis for advertising claims before they are disseminated.").

[157] 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 2016*, available at http://www.pli.edu/Content/Hot_Topics_in_Advertising_Law_2016_/_/N-1z11i83Z4n?ID=290355#AddCartPopupJump.

[158] *See* FTC Operating Manual, *supra* note 154, at Chapter 12 (omitting any reference to criminal penalties for violation of FTC standards). For an example of the FTC charging a company with violation of the FTC Act, see In the Matter of Nissan North America, Inc., available at https://www.ftc.gov/system/files/documents/cases/140123nissancmpt.pdf (2014) (deceptive Nissan Frontier pickup truck television ad).

[159] 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 or not. 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 4, at 1551, in this setting, because the lawyer could actively assist with the unlawful activity, that challenging question is moot.

[160] The example of Música Adolescente 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, serves as one of those settings. *See* text accompanying note 129–37 *supra*.

the Model Rules do not prohibit a lawyer from doing so, may a lawyer nevertheless refuse to do so? If so, on what grounds? Ordinarily, a lawyer will act with zeal and commitment to support his client's interests,[161] 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.[162] 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 does not inadvertently but actually assist the client in the illegality[163]) the lawyer will continue the representation.[164] 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. Rule 1.16(a) requires withdrawal when necessary to avoid violating a Rule.[165] 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[.]"[166] That discretion exists even if the client's interests end up harmed as a result of the lawyer's ceasing work for the client,[167] 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.[168] While that permissive withdrawal basis is construed strictly, and

[161] MODEL RULES OF PROF'L CONDUCT r.1.3, Cmt. [1] (2013) ("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.").
[162] *Id.* at r. 1.7 Cmt. [2].
[163] *See* ROTUNDA & DZIENKOWSKI, *supra* note 142, at §1.2–4 (discussing the possibility of advising a client about consequences, not withdrawing, but not assisting).
[164] 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(b). Illustration c. (1977) ("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.").
[165] MODEL RULES OF PROF'L CONDUCT r. 1.16(a) (2013).
[166] *Id.* at r. 1.16(b)(4).
[167] *Id.* at r. 1.16 Cmt [7].
[168] 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

requires serious concern,[169] the lawyer's risk of civil liability or costs ought to satisfy the standard.[170]

If the unlawful activity proposed by the client exposes the lawyer to no liability, but the lawyer believes that he ought not participate in it, 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 read notwithstanding, that provision does not *require* the lawyer to withdraw.[171] As above, it is difficult to imagine a client challenging a lawyer's choice not to aid the client in actions that the lawyer will advise the client are illegal.

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 message of the ABA in its choice to carve out some discretion for non-criminal and non-fraudulent 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, Subpart B suggests a framework, relying on the vibrant "moral activism" understanding of lawyer roles and responsibilities, for lawyers'

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information, the lawyer may disclose otherwise confidential matters pursuant to Rule 1.6(b)(6). *See id.* at r. 1.6(b)(6) (revelation allowed "to comply with … a court order").

[169] 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., W. WILLIAM HODES & PETER R. JARVIS, THE LAW OF LAWYERING § 51.5, pp. 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.

[170] 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 8, at 29 (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 6, at 497.

[171] 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* text accompanying notes 93–113 *supra*. 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 2.1 Cmt. [1] (2013). 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.

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. Subpart C then applies that assessment to the three lawyering stories that introduced the Article.

A. The ABA's Vision

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.[172] Doing so would have been easy, as the then-existing Model Code of Professional Responsibility included exactly that prohibition.[173] Instead, over the objections of certain of its constituents,[174] the ABA elected to limit the prohibition to the most serious (in its view[175]) of wrongdoing.

The limited legislative history of the Kutak Commission's deliberations and the ABA's treatment of its proposals does 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. No commentary has developed this hypothesis,[176] but it seems entirely plausible.

The worries that Kutak Commission participants would have identified most likely included aiding a client to breach contracts,[177] drafting contracts later determined to be unconscionable,[178] and assisting a client who had made the cost-

[172] *See* text accompanying notes 52–54 *supra*.
[173] *See* text accompanying notes 55–56 *supra*.
[174] *See* text accompanying notes 59–65 *supra*.
[175] Like most of the statements in this Subpart, 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 8, at 746–47 (discussing that assessment).
[176] *But see* WOLFRAM, *supra* note 7, at 704 (implying that the ABA in 1983 worried about exposing lawyers to liability for assisting with contracts found to be unconscionable).
[177] *See* Pierce, *supra* note 8, at 900.
[178] *See* HAZARD & HODES, *supra* note 169; WOLFRAM, *supra* note 7, at 704.

benefit assessment that an intentional tort would be worth the risks.[179] It is arguable—but only arguable—that breaching a contract (and accepting the costs of such breach), or committing a tort (and accepting the risk of damages to be paid to the victim) are not "illegal,"[180] and would not have been disciplinable under the Model Code.[181] But because of the ambiguity, 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 may have changed the language of the prohibition to avoid that chilling effect.

While both the Model Code[182] and its successor the Model Rules[183] permit—and, arguably, encourage[184]—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 shared consensus that lawyers ought not be disciplined for working with a client who, for economically rational reasons, opts not to honor a contract or not to 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, and in particular regulatory infractions.[185] 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, and the lawyers' work assists in that noncompliance. What is clear, though, is that language chosen by the ABA permits that assistance.

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[179] *See* Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 370 (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).

[180] *See* Hazard, *supra* note 3, at 706–07 (noting that ambiguity); Pepper, *Counseling*, *supra* note 4, at 1566 (same).

[181] At least some authorities viewed some intentional torts as subject to the Model Code's "illegality" language. *See* Henry J. Lischer, Jr., *Professional Responsibility Issues Associated with Asset Protection Trusts*, 39 REAL PROP. PROB. & TR. J. 561, 622 (2004) ("conspiracy 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 4, at 1593 (finding no cases, as of 1995, of a lawyer disciplined for advice without active assistance with a crime or fraud).

[182] MODEL CODE OF PROF'L RESPONSIBILITY EC 7-3 (1969).

[183] MODEL RULES OF PROF'L CONDUCT r.1.2(d) (2013).

[184] *See* RESTATEMENT, *supra* note 149, at § 94 Cmt. *f* (addressing the lawyer's responsibility to advise clients about the limits of the applicable law). *But see* Pepper, *Counseling*, *supra* note 4, 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).

[185] *See, e.g.,* Pepper, *Counseling*, *supra* note 4, at 1592 (citing violation of the National Labor Relations Act as an example of non-criminal unlawfulness).

B. Exercising Discretion in Assistance with Unlawful Conduct

Let us now 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[186]). Will a lawyer, then, readily aid a client who requests such assistance? And, more importantly, *should* he?

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 contribution leads to undesirable results.[187] The "desirability" quality may be discerned from grounded notions of moral action or substantive justice. In their deliberations, lawyers may be informed from 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 a clear moral wrong.[188] Provocative challenges from Charles Fried[189] and Richard Wasserstrom,[190] among others,[191] questioned whether a lawyer ought to be "morally activist"[192] and refuse to aid clients to achieve immoral (or unjust[193])

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[186] *See* text accompanying notes 93–113 *supra* (discussing the implications of Rule 1.16(a)(1)).

[187] 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 5, at 586–93.

[188] *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) [hereinafter Luban, *Partisanship, Betrayal and Autonomy*] (responding to Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 147–151 (1990) (reviewing DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988) [hereinafter LUBAN, LAWYERS AND JUSTICE])).

[189] Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 (1976).

[190] Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

[191] Other early contributors to the moral activism enterprise included ALAN GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS (1980); Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853 (1992); Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951); Gerald Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 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; Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901 (1995).

[192] The "moral activism" phrase appears to have originated with David Luban. *See* LUBAN, LAWYERS AND JUSTICE, *supra* note 188, at xxii; Luban, *Partisanship, Betrayal and Autonomy*, *supra* note 188, at 1014.

ends even if the law supported that aid,[194] or should remain faithful to the client's legal interests and support the client's autonomous choices.[195] 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. W. Bradley Wendel argues that fidelity to the law ought to trump the lawyer's personal moral considerations;[196] David Luban[197] and others[198] disagree, arguing that substantive law commitments cannot justify recognizably harmful actions.

All participants in this colloquy recognize a prima facie duty to obey the law;[199] lawyers especially ought to honor that fundamental commitment.[200] That duty may be undercut by unjust laws,[201] or facially fair laws whose execution in a particular circumstance creates discrete harm.[202] Those whom Luban terms the "new wave" activism critics[203] accept a stronger application of that duty than do the moral activists, but the latter accept the necessity of that baseline

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[193] 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 (1998); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083 (1988) [hereinafter Simon, *Ethical Discretion*] (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").

[194] *See generally* Katherine R. Kruse, *Professional Role and Professional Judgment: Theory and Practice in Legal Ethics*, 9 U. ST. THOMAS L.J. 250 (2011); David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER, *supra* note 191; Paul R. Tremblay, *Moral Activism Manqué*, 44 S. TEX. L. REV. 127 (2002).

[195] *See* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS (4th ed. 2010); WENDEL, *supra* note 1; W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 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 [hereinafter Pepper, *Amoral Role*]).

[196] WENDEL, *supra* note 1, at 54–59.

[197] *See* David Luban, *Misplaced Fidelity*, 90 TEXAS L. REV. 673 (2012) (reviewing WENDEL *supra* note 1).

[198] *See* Anthony V. Alfieri, *Fidelity to Community: A Defense of Community Lawyering*, 90 TEXAS L. REV. 635 (2012) (reviewing WENDEL *supra* note 1); William H. Simon, *Authoritarian Legal Ethics: Bradley Wendel and the Positivist Turn*, 90 TEXAS L. REV. 709 (2012) (reviewing WENDEL, *supra* note 1).

[199] *See generally* 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."); 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).

[200] *See* LUBAN, LAWYERS AND JUSTICE, *supra* note 188, at 32–43; WENDEL, *supra* note 1, at 55–56.

[201] WENDEL, *supra* note 1, at 113; David 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, 287 (1996).

[202] LUBAN, LAWYERS AND JUSTICE, *supra* note 188, at 32–43.

[203] Luban, *Misplaced Fidelity*, *supra* note 197, at 675–76 (including Tim Dare, Katherine Kruse, Daniel Markovits, Norman Spaulding, and Bradley Wendel in that group).

commitment.[204] Given that shared consensus among the ethicists, lawyers practicing at street-level ought to approach the discretion offered them by the Rules of Professional Conduct with that same baseline assumption—that assisting clients with actions that the state has classified as not lawful must be disfavored given the presumptive moral commitment to honor the law.

Because that commitment is only presumptive, lawyers practicing at street-level deserve guidance on the question of how to exercise the discretion that 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, the stance of the state, following the ABA's lead, not to penalize 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.[205] The activists trust legal institutions less than do the new-wave writers,[206] and if honoring legal commitments leads to recognizable harm, lawyers ought not participate in advancing those legal commitments, even if their clients have an articulated right to take the action in question. The most common setting within which the moral activism response is triggered where a client's exercise of some inarguably legal right leads to unwarranted harm to others.[207] The moral activism response, therefore, is most often contrary to the lawyer's client's interest.[208] 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. The moral activists

[204] *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, *Authoritarian Legal Ethics*, *supra* note 198, at 721 ("principled noncompliance" with the law is justified, albeit arising infrequently);

[205] Luban, *Misplaced Fidelity*, *supra* note 197, at 677.

[206] 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).

[207] 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.,* LUBAN, LAWYERS AND JUSTICE, *supra* note 188, 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, *supra* note 191, at 38, 46, 59. *See also* Zabella v. Pakel, 242 F.2d 542 (7th Cir. 1957) (reporting such a setting).

[208] *See* Paul R. Tremblay, *Practiced Moral Activism*, 8 ST. THOMAS L. REV. 9, 40–41 (1995) [hereinafter Tremblay, *Practiced Moral Activism*].

rely with some frequency in their arguments on stories from the civil rights struggles, for instance, to make that point.[209]

For the former, more common activist stories where the client aims to exploit the law for its benefit and the lawyer resists, the stance of the state 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.[210] 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,[211] 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.[212]

But for the latter, less common activist stories, the state's stance offers some, albeit limited, solace. The state's choice to limit the scope of Rule 1.2(d) suggests 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[213]) moral activism settings where the client's civil disobedience does not qualify as a crime or a fraud, the 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 offered by the state to lawyers to aid in wrongdoing ought to be exercised only 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) provides lawyers a pass when assisting with much less noble lawbreaking. In that respect, the stance of the state is disheartening to the moral activism project. The activists' message to lawyers is something like the

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[209] *See, e.g.,* Alfieri, *supra* note 198, at 654; Simon, *Authoritarian Legal Ethics*, *supra* note 198, at 715.

[210] *See* text accompanying note 207 *supra*.

[211] *See* Tremblay, *Practiced Moral Activism*, *supra* note 208, 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) (2013), 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 (2005).

[212] Tremblay, *Practiced Moral Activism*, *supra* note 208, at 66–67.

[213] Most of the civil rights stories likely include criminal activity, though.

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 is 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.[214]

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. The states that adopt the ABA rules are such institutions, or course. One might suppose, then, that the new-wave ethicists might support lawyers who exercise their discretion to aid in wrongdoing if the lawyers and clients are willing to accept the risks of that action. 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 non-criminal and non-fraudulent law in question, the new-wave thesis would condemn the assistance as lacking fidelity to the shared commitment that the underlying law represents. 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, on occasion, cede to powerful counterarguments.[215] The state's choice not to interfere with the lawyer is no such counterargument, especially in light of its providing only discretion, and 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?[216] For many of those lawyers, they may accept the oft-heard (if inaccurate) sentiment that their assistance must remain within the bounds

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[214] *See, e.g.,* LUBAN, LAWYERS AND JUSTICE, *supra* note 188, 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).

[215] WENDEL, *supra* note 1, at 113.

[216] *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").

of the law,[217] 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.[218] But for this project we need be more interested in the expected response by lawyers who appreciate the discretion offered them by the ABA and then their state bar authorities.

The examination in the next Subpart 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 his 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 prohibits that assistance, a lawyer ought to accept responsibility for his actions, and his peers may criticize him if his assistance serves undesirable ends.[219] 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.[220] Assistance with an advertiser's violation of the FTC rules and guidelines, as in the earlier example,[221] 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 himself for his participation, it is difficult to criticize the lawyer for serving his 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.[222] If

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[217] 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 16, 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"); Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 16 (2005) (lawyers "may not participate in wrongdoing" (citing Rule 1.2(d)).

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

[219] As David Luban describes it, the lawyer may not rely on the "adversary system excuse" to justify harmful actions. She must accept responsibility for the aid she provides to her clients. LUBAN, LAWYERS AND JUSTICE, *supra* note 188, at 129–33; David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637. If no external authority penalizes the lawyer for his assistance, peer criticism seems to be the only available remedy.

[220] Pepper, *Counseling*, *supra* note 4, at 1592–93.

[221] *See supra* notes 153–57 and accompanying text.

[222] *See* Tigran W. Eldred, *Insights From Psychology: Teaching Behavioral Legal Ethics as a Core Element of Professional Responsibility*, 2016 MICH. ST. L. REV. 757; Catherine Gage O'Grady, *Behavioral Legal Ethics, Decision Making, and the New Attorney's Unique Professional Perspective*, 15 NEV. L.J. 671 (2015); Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*,

the rubric proposed here is for the lawyer to assist clients when the balance of harm is low, but not when it is high, the lawyer's ability to appreciate that balance will be (and I intentionally do not write "may be") distorted by the biases to which decision makers inevitably succumb.[223] 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,[224] confirmation bias,[225] and similar shared cognitive roadblocks[226] to distort such judgments. Lawyers need to be aware of these limitations on their ability to assess risks accurately, and, perhaps, adopt as a result a risk-averse approach to their exercise of discretion.[227]

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 his client when the wrongdoing is neither a crime nor a fraud. It would most likely be preferable to such a lawyer to explain to his 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.[228] The lawyer therefore 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.

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90 IND. L.J. 1639 (2015); Jennifer Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107 (2013).

[223] Robbennolt & Sternlight, *supra* note 222; Tremblay, *Moral Activism Manqué*, *supra* note 194.

[224] *See* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1092 (2000); Perlman, *supra* note 222, at 91.

[225] *See* PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICYMAKERS 267–302 (2010); O'Grady, *supra* note 222, at 677–78.

[226] *See* Eldred, *supra* note 222; Robbennolt & Sternlight, *supra* note 222.

[227] Eldred, *supra* note 222.

[228] A lawyer owes his client a candid assessment of the circumstances of the representation. *See* MODEL RULES OF PROF'L CONDUCT r.1.4 (2013).

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:[229] 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, two friends who have agreed to work for the company now for minimal compensation 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 with great care 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 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.[230] 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.[231] The wage-and-hour laws are primarily regulatory in nature, imposing, through state[232] and federal[233] 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 (FSLA) imposes criminal penalties for willful violations of the wage-and-hour laws,[234] as do some states.[235] Given

[229] *See* text accompanying notes 30–36 *supra*.
[230] 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.
[231] While intentional misclassification of workers as independent contractors is sometimes labeled "payroll fraud," *see, e.g.,* Luz M. Molina, Andrea M. Agee & Erika A Zucker, *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), and recent legislation combating it was labeled "The Payroll Fraud Prevention Act of 2014," *see* H.R. 4611, 113th Cong. (2014), the practice as described in the text does not include the elements of common-law fraud. *See* RESTATEMENT (SECOND) OF TORTS §538(2)(a) (1977).
[232] For one example, see G.L. c. 151A § 47 (2016) (Massachusetts).
[233] *See* Fair Labor Standards Act ("FLSA"), 29 U.S.C.A. §§ 201 et seq. (2006).
[234] 29 U.S.C.A. § 216(a)-(b) (2006).

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.[236] But no authority holds that Rule 1.2(d) does not apply when the criminal enforcement is unlikely.[237] While developing interpretations of Rule 1.2(d) as applied in the context of marijuana possession or sale, which may be lawful in a state while unlawful at the federal level, offer some leeway for attorney assistance with unenforced criminal provisions,[238] those developments would not apply to the wage-and-hour context, where the underlying obligations are enforced aggressively, even if not criminally.

This analysis would appear to conclude, then, that Haile may not assist WorkHub by drafting independent contractor agreements whose use constitutes a federal crime, given the requirements of Rule 1.2(d).

The only possible uncertainty on which Haile might rely stems from 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, his 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).[239] Kamin and Wald argue that with crimes that

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[235] *See, e.g.,* Mass. G. L. c. 151A § 47; Com. v. Northern Telecom, Inc., 517 N.E. 2d 491 (Mass. App. 1988).

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

[237] *See* Maine Prof'l Ethics Comm'n, Op. 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 50, at 901 (rejecting as failing the "common-sense test … the position that no conduct can be criminal if the government is aware of the conduct and systematically fails to enforce the law").

[238] *See, e.g.,* State Bar of Arizona, Formal Op. 11-01 (2011), available at http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710 ("[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, Policy on Legal Marijuana (2016) (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 50, at 903–04.

[239] Kamin & Wald, *supra* note 50, at 905–14.

constitute *mala prohibita*, and not *mala in se*,[240] 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.[241] Such intent typically calls for participation beyond the provision of the types of legal services ordinarily offered to clients generally.[242] That distinction is found in the law of criminal conspiracy and accomplice liability.[243] Applying that distinction to the work of Haile with WorkHub, if the FLSA violation is deemed a *mala prohibita* crime, and if 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).

For this analysis, much will turn on the assessment that a violation of the FLSA qualifies as *mala prohibita*. There can be no doubt that in many, and perhaps most, contexts a violation of FLSA constitutes a serious injustice causing profound harm to vulnerable laborers, especially when contracting with undocumented immigrant workers.[244] Wage-and-hour violations are not status crimes,[245] and an employer that disregards that law may face significant liability.[246] 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 *mala in se*. The fact that legal assistance with this kind of activity on behalf of startups is so common[247] lends support to the conclusion that the potentially criminal activity is not inherently exploitative or evil. In that context, Haile could, under this reasoning, exercise his discretion to assist WorkHub with its paperwork, and his actions ought not risk discipline.

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[240] 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 (1995); Pepper, *Counseling*, *supra* note 4, at 1576.

[241] Kamin & Wald, *supra* note 50, at 908–10.

[242] *Id.* 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 formation, etc.) to marijuana businesses have a good faith argument that they are not in violation of Rule 1.2(d).

[243] *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).

[244] *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 (1995); Nantiya Ruan, *Same Work, 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 (2013); Michael Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497 (2004).

[245] Typically *mala prohibita* crimes cause little inherent harm, but are criminal because a statute has so stated. *See* Travers, *supra* note 240, at 1301 n.3 ("examples of such crimes include speeding and disposing of hazardous waste without the appropriate permit").

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

[247] *See* notes 230 *supra*.

Correspondingly, a law firm asked to participate in an exploitative, strategic effort to misclassify workers under the FSLA may not participate, because in that context the criminal activity may not be deemed to be *mala prohibita*.

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.[248] 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." Rahman would use Shin's services in his efforts to solicit donors, especially to explain how the donation might retroactively qualify, once AMJ obtains tax-exempt status, as a tax-deductible gift.[249]

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." Shin therefore 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. The scheme may include some penalties faced by AMJ for its noncompliance, but, as Shin knows, the chances of any penalties being imposed are insignificant, especially if AMJ proceeds expeditiously to register and await its certificate of solicitation.

Shin may exercise his discretion to assist in the unlawful conduct of AMJ, without criticism. The violation of the law qualifies as *malum prohibita*, and not *malum in se*.[250] 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 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

[248] *See* text accompanying notes 38–39 *supra*. 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).
[249] *See* text accompanying note 40 *supra*.
[250] *See* Travers, *supra* note 240.

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 for-profit new business, Música Adolescente. Its founder and CEO is 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.[251] Litmanovich and his faculty supervisor, Dara Bowman, need to understand the clinic's alternatives.

Federal and state law prohibits Música Adolescente from proceeding without compliance with the franchise requirements. Litmanovich's drafting 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 Música Adolescente 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 Música Adolescente,[252] and perhaps against Moreno personally.[253] Moreno understands those risks, and she considers them minimal given her relationship with her colleague.

The question confronted here is whether Litmanovich may lawfully produce the licensing agreement for Moreno and Música Adolescente. The answer to that question is yes. Should he do so, or ought he decline to exercise

[251] *See* text accompanying notes 41–43 – *supra*.

[252] 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.*, Akers v. Bonifasi, 629 F. Supp. 1212, 1221–1222 (M.D. Tenn. 1984); Baum v. Great Western Cities, Inc. v. New Mexico, 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). 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. 2014) (negligence per se claim can be based on violation of FTC Franchise Rule); KC Leisure, Inc. v. Haber, 972 So. 2d 1069 (Fla. Dist. Ct. App. 2008) (violation of Florida DUTPA can be based on violation of FTC Franchise Rule). *But see* LeBlanc v. Belt Center Inc., 509 So. 2d 134 (La. Ct. App. 1st Cir. 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).

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

that discretion? Putting aside the no doubt significant factor of his status as a clinical student,[254] Litmanovich ought not receive criticism for choosing to aid Moreno. The federal and state franchise laws are far less easily assigned a label of *malum prohibita* than the charitable solicitation example above. The franchise laws are, we may assume, important consumer protection vehicles which aim to prevent exploitation of franchisees. A business's evading those laws could easily be considered *malum in se*, and 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 Música Adolescente 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.[255]

CONCLUSION

This Article demonstrates that the American Bar Association, 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 in fact have discretion to assist, but also to 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. That license to collaborate with client unlawfulness is not license to evade the moral responsibility for the acts of their clients.

[254] Licensed lawyers such as Christopher 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.

[255] *See* ANTHONY TROLLOPE, THE WARDEN 25 (1964) (describing a lawyer who believes "that he might sleep at night without pangs of conscience"); Luban, *The Adversary System Excuse*, *supra* note 191, at 89.