MAY LAWYERS ASSIST CLIENTS IN SOME UNLAWFUL CONDUCT?: A RESPONSE TO PAUL TREMBLAY

Bruce A. Green[*]

State courts regulate U.S. lawyers by adopting rules governing lawyers' professional conduct and enforcing the rules through disciplinary processes. Since the early 20th century, the American Bar Association ("ABA") has assisted courts in this task. Most importantly, the ABA has drafted model rules, beginning with the 1908 Canons of Professional Ethics,[1] followed by the 1970 Model Code of Professional Responsibility ("Model Code"),[2] and followed in turn by the 1983 Model Rules of Professional Conduct ("Model Rules").[3] Given the ABA's influence, the care with which lawyers draft, and the ABA's access to America's top lawyers, one would expect the ABA's models to be well considered and carefully written. For the most part, they are.

Paul Tremblay's article, *At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct*,[4] addresses an under-explored ambiguity in the Model Rules concerning the question of whether, and in what circumstances, lawyers may assist clients' misconduct. The earlier Model Code said that a lawyer must not "[c]ounsel or assist [a] client in conduct that the lawyer knows to be *illegal* or fraudulent."[5] The Model Rules narrowed the restriction. Model Rule 1.2(d) says that a lawyer must not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is *criminal* or fraudulent."[6] The change seems significant, since various misconduct might be characterized as "illegal" but not "criminal or fraudulent."[7]

Ethics opinions in New York, my home state, reinforce Professor Tremblay's insight that the difference between "illegal" and "criminal" is meaningful, and not, as some have suggested, insubstantial. Because

1. CANONS OF PROF'L ETHICS (AM. BAR ASS'N 1908).

2. MODEL CODE OF PROF'L RESPONSIBILITY (AM. BAR ASS'N 1969).

3. MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2018).

4. Paul R. Tremblay, *At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct*, 70 FLA. L. REV. 251, 251 (2018).

5. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(7) (AM. BAR ASS'N 1980) (emphasis added).

6. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2018) (emphasis added). The ABA similarly narrowed the provision on wrongful conduct by lawyers themselves. The Model Code subjected lawyers to sanction for "[e]ngag[ing] in *illegal* conduct involving moral turpitude," whereas the Model Rules target a lawyer's commission of "a *criminal* act that reflects adversely on the lawyer's honesty, trustworthiness or fitness in other respects." MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(3) (AM. BAR ASS'N 1980) (emphasis added); MODEL RULES OF PROF'L CONDUCT r. 8.4(b) (AM. BAR ASS'N 2018) (emphasis added).

7. Tremblay, *supra* note 4, at 272–73.

New York's judiciary has rejected the ABA model, New York lawyers remain subject to discipline for assisting clients' "illegal" conduct.[8] The state bar's ethics committee has long assumed that "illegal" conduct is not limited to criminal or fraudulent conduct. Its opinions say, for example, that lawyers may not assist clients in creating or executing illegal surrogacy contracts[9] or in illegal financing transactions (e.g., under statutes, rules, or cases prohibiting certain transfers of claims or judgments),[10] and that prosecutors may not enter into guilty plea agreements containing provisions that are not legal.[11] These opinions illustrate that non-criminal and non-fraudulent "illegalities" may conceivably include any conduct forbidden by a statute, rule, or judicial decision.[12]

The ambiguity arises because, at the same time that Rule 1.2(d) seems to allow lawyers to assist clients in committing certain illegalities, Rule 1.16(a)(1) requires a lawyer to decline or end a representation where "the representation will result in violation of the Rules of Professional Conduct *or other law*."[13] This might be read to mean that a lawyer may not assist a client's violation of *any* law, including a civil violation that does not also constitute a crime or fraud. The Comment accompanying Rule 1.16 seems to reinforce this reading insofar as it states that: "A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is *illegal* . . . ."[14] It is not immediately obvious whether the Model Rules *allow* lawyers to assist clients' wrongdoing that is neither criminal nor fraudulent, as Rule 1.2(d) suggests, or *forbid* lawyers from rendering such assistance, as Rule

---

8. N.Y. RULES OF PROF'L CONDUCT r. 1.2(d) (2017). New York lawyers also continue to be subject to discipline for themselves engaging in "illegal" conduct that raises a substantial question about their fitness to practice law. *Id.*, Rule 8.4(b).

9. NYSBA Comm. on Prof'l Ethics, Op. 584 (1987).

10. NYSBA Comm. on Prof'l Ethics, Op. 769 (2003).

11. NYSBA Comm. on Prof'l Ethics, Op. 770 (2003).

12. In contrast, the same committee concluded that New York lawyers may assist clients in conduct designed to comply with state medical marijuana law, notwithstanding that federal narcotics law prohibits the delivery, sale, possession and use of marijuana and makes no exception for medical marijuana. NYSBA Comm. on Prof'l Ethics, Op. 1024 (2014). The committee acknowledged that "[i]t is counter-intuitive to suppose that the lawyer's fundamental role might ever be served by assisting clients in violating a law that the lawyer knows to be valid and enforceable." *Id.* But the committee regarded this situation as unusual if not unique, in that "[b]oth the state law and the publicly announced federal enforcement policy presuppose that individuals and entities will comply with new and intricate state regulatory law and, thus, presuppose that lawyers will provide legal advice and assistance to an array of public and private actors and institutions to promote their compliance with state law and current federal policy." *Id.*

13. MODEL RULES OF PROF'L CONDUCT r. 1.16(a)(1) (AM. BAR ASS'N 2018) (emphasis added).

14. *Id.* at r. 1.16 cmt. [2] (emphasis added).

1.16(a)(1) suggests. Homer nods, and so perhaps did the ABA in creating this ambiguity, which has persisted for more than 35 years.

Professor Tremblay argues that Model Rule 1.2(d) implicitly authorizes lawyers to aid clients in illegal conduct that is neither criminal nor fraudulent, and that conventional principles of statutory interpretation, aimed at discerning the "drafters' intent," favor giving supremacy to this implied authorization.[15] It makes little sense that the ABA drafters would have changed "illegal" to "criminal" if they did not mean to liberalize the rule. Notably, the *Annotated Model Rules of Professional Conduct*,[16] an ABA publication said to present "an authoritative and practical analysis" of the Model Rules,[17] lends support to Professor Tremblay's interpretation. With respect to Rule 1.16, it states that: "A lawyer is required to withdraw if the lawyer knows continued representation will result in assisting the client to commit a criminal or fraudulent act"—but not an illegal act.[18] This analysis suggests interpreting "other law" narrowly in Rule 1.16(a)(1) to cover only crimes and frauds.

There is a better way to reconcile Rule 1.2(d) and Rule 1.16(a)(1), however. Rule 1.2(d) focuses on the character of the client's conduct, whereas Rule 1.16(a)(1) focuses on the character of the lawyer's own professional conduct. When Rule 1.16(a)(1) says that "the representation" may not result in a violation of a professional conduct rule or other law, it means that the lawyer must not *personally* violate any rule or other law in conducting the representation. Reading the rules together, the result is that lawyers may assist clients in illegal conduct other than crimes and frauds *as long as the lawyers are not themselves acting illegally in doing so*.[19] Assisting a client's illegal conduct in the course of a representation may itself be illegal in some situations but not in others.[20]

There is no extant record of the ABA drafting committee's deliberations,[21] but, as Professor Tremblay argues, the ABA drafters

---

15. *See, e.g.*, Tremblay, *supra* note 4, at 277 (citing "the ordinary interpretive tool holding that a more specific provision carries more weight than a more general one").

16. ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (8th ed. 2015).

17. *Id.* at iii.

18. *Id.* at 277.

19. Rule 1.16(a)(1) should also be contrasted with Rule 8.4(b), which subjects a lawyer to discipline for committing certain "criminal act[s]" but not for illegal acts that are not criminal. Presumably, Rule 8.4(b) is focusing on a lawyer's conduct occurring outside a professional representation.

20. For a discussion of lawyers' civil liability for aiding and abetting clients' misconduct, *see* Eugene J. Schiltz, *Civil Liability for Aiding and Abetting: Should Lawyers Be "Privileged" to Assist Their Clients' Wrongdoing*, 29 PACE L. REV. 75, 89 (2008).

21. Tremblay, *supra* note 4, at 294.

probably did not want lawyers to help clients engage in any and all lawbreaking other than crimes and frauds. Nor is it likely that the drafters meant to give their blessing to legal assistance in clients' non-criminal, non-fraudulent lawbreaking in all situations where the lawyer was not personally violating a rule or other law. My guess is that *some* members of the drafting committee thought it legitimate for lawyers to help clients break *some* laws. They may have thought that some lawbreaking does not deserve moral opprobrium— that it is sometimes acceptable for clients to break the law and pay the price—and that clients are entitled not only to legal advice but to legal assistance in those situations.[22] On this view, a rule forbidding legal assistance in "illegal" conduct would be too restrictive. But it would be hard to craft a rule perfectly capturing one's intuitions about the distinction between legitimate and illegitimate client lawbreaking, and different drafters would have different intuitions. The solution would be to adopt a narrower restriction while relying on lawyers to exercise self-restraint and good judgment. That might explain Model Rule 1.2(d). The problem is that the drafters forgot to adjust Model Rule 1.16(a)(1) accordingly.

Even if one is persuaded about the intent of the ABA drafters, lawyers should not be sanguine that if they assist clients in lawbreaking that is neither criminal nor fraudulent, and if they avoid personally violating a rule or other law in doing so, courts will give them a pass. At least in my home state, courts applying the disciplinary rules do not necessarily honor the lines drawn by rule drafters. For example, even though the confidentiality rule subjected a lawyer to discipline only for *intentionally* disclosing a client's confidential information, an appellate court disciplined a lawyer for *recklessly or negligently* disclosing such information; the court invoked a rule forbidding conduct that reflects adversely on the lawyer's fitness to practice law.[23] More recently, the court invoked the same vague rule to sanction a lawyer who unknowingly assisted a client in a transaction defrauding the client's elderly neighbor; even though New York's version of Rule 1.2(d) applies only when the lawyer "knows" that the client's conduct is fraudulent, the court said the lawyer should have investigated because he had reason to suspect that the transaction was fraudulent.[24] Similarly, even though a rule specifically addressing lawyers' public criticism of judges applies only when the

---

22. *Cf.* Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1576–80 (1995) (discussing distinction between malum in se and malum prohibitum offenses); Tremblay, *supra* note 4, at 294; *see generally* Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1523 (1984) (distinguishing between laws that "create prices to compel decisionmakers to take into account the external costs of their acts" and laws that "impose sanctions to deter people from doing what is wrong").

23. *In re* Holley, 729 N.Y.S.2d 128, 132–33 (N.Y. App. Div. 2001).

24. *In re* Reno, 42 N.Y.S.3d 351, 354 (N.Y. App. Div. 2016).

lawyer "knowingly make[s] a false statement of fact concerning the qualifications, conduct or integrity of a judge,"[25] an appellate court invoked the rule forbidding "conduct that is prejudicial to the administration of justice" as the basis for disciplining a prosecutor who purportedly mischaracterized the legal implications of a judicial decision.[26]

As these disciplinary decisions reflect, even when a specific disciplinary rule seems to permit certain professional conduct, courts may limit the lawyer's discretion.[27] In a state that has adopted Model Rule 1.2(d), if the state disciplinary authority proceeds against a lawyer for knowingly assisting a client's illegal conduct, the court may sanction the lawyer even if the client's illegality did not involve a crime or fraud and the lawyer did not personally violate the law. New York decisions suggest one route, namely, applying the rule forbidding "conduct prejudicial to the administration of justice." A recent New York City Bar ethics opinion suggests another possibility—namely, applying Rule 1.1, requiring competent representation, on the theory that: "Regardless of the client's objectives, competent representation presupposes that the lawyer is rendering assistance in carrying out a client's *lawful* objectives. Committing a crime or engaging in other illegal or fraudulent conduct is not a lawful objective."[28] Professor Tremblay may be right that a client who is fully advised about the legal risks will not win a malpractice lawsuit against a lawyer who assisted the client's illegal conduct,[29] but Rule 1.1 is not necessarily coextensive with malpractice law.

Regardless of what the ABA drafters had in mind, state courts—and especially state supreme courts—are free to interpret and apply the professional conduct rules in accordance with their own view of sound lawyer regulation. As I pointed out almost 30 years ago, courts need not employ conventional methods of statutory interpretation when it comes to their own rules.[30] Courts are not obligated to carry out the "intent" of the ABA drafters, who have no lawmaking authority. Nor do separation-of-powers principles require courts to implement the will of any other lawmaking body. Unlike when a court interprets a statute or an administrative rule, state supreme courts interpreting professional conduct rules are interpreting their own law, adopted pursuant to their

---

25.   N.Y. RULES OF PROF'L CONDUCT r. 8.2(a) (2017).

26.   *In re* Soares, 97 A.D.3d 242, 244–45 (N.Y. App. Div. 2012) (citing N.Y. RULES OF PROF'L CONDUCT r. 8.4(d)).

27.   *See* Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 292–94 (2006) (arguing that discretion given to lawyers by certain professional conduct rules may be limited by other rules).

28.   NYSBA Comm. on Prof'l Ethics, Formal Op. 2018-4 (2018) (emphasis in original).

29.   Tremblay, *supra* note 4, at 288.

30.   Bruce A. Green, Doe v. Grievance Committee: *On the Interpretation of Ethical Rules*, 55 BROOK. L. REV. 485, 485–87 (1989).

regulatory authority over lawyers.

Courts are often inattentive at the rule making stage,[31] with the result that professional conduct rules sometimes lead to unanticipated results that the courts disfavor. While courts can solve the problem by amending the rules, that is a laborious process. They can often solve the problem more easily through creative interpretation. It is better for courts to implement their own policy preferences than to put their imprimatur on an undesirable norm of conduct out of fidelity to principles of statutory interpretation. If it turns out that the lawyer whose conduct is in question did not have fair notice of what the court requires, the court can rule prospectively.

So, in the end, I lack Professor Tremblay's confidence that in states that have adopted Model Rule 1.2(d), "lawyers have discretion to assist" clients in "any illegality that does not qualify as a crime or fraud"[32] as long as the lawyers do not themselves break the law. Given the vagaries of judicial interpretation, there may be more indeterminacy than one might expect.

---

31. *See* Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 Ohio St. L.J. 73, 94 (2009) ("As a practical matter, . . . the courts tend to rubberstamp bar proposals.").

32. Tremblay, *supra* note 4, at 312.