ANOTHER LOOK AT LAWYER DISCRETION TO ASSIST CLIENTS IN UNLAWFUL CONDUCT: A RESPONSE TO PROFESSOR TREMBLAY

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Professor Paul Tremblay's *At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct*,[1] identifies and explores an apparent gap in the law governing the work of lawyers: the question of whether lawyers may assist clients in unlawful conduct that is not criminal or fraudulent. After introducing the issue through three illustrative scenarios, which he labels "lawbreaking stories,"[2] Professor Tremblay engages in an extensive analysis of the applicable substantive law, relying primarily on ethics codes, which directly regulate the work of lawyers,[3] with additional reference to other sources of law.[4] Having reached the considered conclusion that the law does not prohibit lawyers from assisting clients in unlawful or wrongful—but not criminal or fraudulent—conduct, Professor Tremblay moves to the next stage of his analysis, examining the further question as to the nature and scope of the lawyer's ethical discretion to assist—or to refuse to assist—a client in unlawful or wrongful conduct.[5]

Based on this analysis, which he applies in the context of the three lawbreaking stories, Professor Tremblay presents a complex set of prescriptions: First, "lawyers have discretion to assist or refuse to assist their clients with . . . unlawful [but noncriminal and non-fraudulent] activity."[6] Second:

> Lawyers who choose to participate in clients' unlawful activity, taking advantage of the state's license to do so, ought to be judged by their peers, and the rest of the relevant community, by the nature of the harm that participation produces and its effect on the justice of the resulting action.[7]

Finally, "[t]hat license to collaborate with client unlawfulness is not a license to evade moral responsibility for the acts of their clients."[8]

Building on Professor Tremblay's analysis, this response aims to briefly evaluate the central question he raises—the lawyer's discretion to

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1. Paul R. Tremblay, *At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct*, 70 FLA. L. REV. 251 (2018).
2. *Id.* at 258–64.
3. *Id.* at 265–82.
4. *Id.* at 283–86.
5. *Id.* at 286–312.
6. *Id.* at 312.
7. *Id.*
8. *Id.* at 313.

assist a client's unlawful conduct—by reframing the issue through the prism of a three-tiered, or three-pronged, framework. In so doing, this response suggests that, to the extent Professor Tremblay has identified cases in which ethics codes and other sources of law do not directly or definitively mandate a particular mode of action on the part of lawyers, an assessment of the issue may require a close look at three complementary—but, at times, competing or conflicting—duties underlying ethics codes: the duty to serve the best interests of the client, the duty to promote justice within the American legal system, and the duty to the lawyer's own sense of ethical morality.[9]

As a threshold matter, the preamble to the American Bar Association Model Rules of Professional Conduct (Model Rules) acknowledges that "[i]n the nature of law practice . . . conflicting responsibilities are encountered."[10] As the preamble further observes, "[v]irtually all difficult ethical problems arise from conflicts between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living."[11] Finally, the preamble notes, although ethics rules "often prescribe terms for resolving such conflicts," there remain "many difficult issues of professional discretion . . . [that] must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules."[12] Thus, it would seem that the scenarios Professor Tremblay identifies might helpfully be examined through careful application and analysis of the conflicting duties underlying the Model Rules.

As Professor Tremblay observes, of the lawyer's three concurrent duties, the duty to serve the best interests of the client is generally understood to compose the lawyer's primary and overriding ethical obligation, trumping other duties and concerns.[13] In Lord Henry Brougham's famous—and, largely, descriptively accurate,[14] if controversial[15]—articulation: "[A]n advocate, in the discharge of his

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9. This discussion relies on the framework developed in Samuel J. Levine, *Taking the Ethical Duty to Self Seriously: An Essay in Memory of Fred Zacharias*, 48 SAN DIEGO L. REV. 285, 293–94 (2011).

10. MODEL RULES OF PROF'L CONDUCT pmbl. para. 9 (AM. BAR ASS'N 2018).

11. *Id.*

12. *Id.*

13. *See* Tremblay, *supra* note 1, at 275, 291.

14. *See, e.g.*, Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 3 (2005) (describing Brougham's declaration as "emblematic of a conception that is arguably the 'dominant' one among United States lawyers—that advocates owe 'entire devotion to the interest of the client'" (footnotes omitted)).

15. *See, e.g.*, *id.* at 8 ("It is a popular, but gross mistake, to suppose that a lawyer owes no fidelity to any except his client; and that the latter is the keeper of his professional conscience." (quoting Rush v. Cavenaugh, 2 Pa. 187, 189 (1845) (Gibson, C.J.))); *see also* Russell Fowler,

duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons . . . is his first and only duty . . . ."[16] Indeed, various statements in both the preamble and other sections of the Model Rules support a conception of the primacy of the lawyer's duty to zealously represent the interests of the client.[17]

Applied to Professor Tremblay's scenarios, at first glance, the lawyer's duty to serve the best interests of the client would seem to require that that lawyer accede to the client's request to assist in unlawful but noncriminal conduct.[18] To the extent that the substantive law permits the lawyer to facilitate the client's noncriminal activity, the prevailing norm of zealous advocacy would obligate the lawyer to take whatever legal action is necessary to help further the client's goals.[19] In short, may

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Queen Caroline's Case, TENN. B.J., July 2015, at 34, 35 (stating that Lord Brougham's declaration "has been praised by defense lawyers and condemned by others ever since").

16. 2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed., London, J. Robins & Co. Albion Press 1821).

17. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT pmbl. para. 2 (AM. BAR ASS'N 2018) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); *id.* para. 8 (describing the lawyer as "a zealous advocate on behalf of a client"); *id.* para. 9 (citing "the lawyer's obligation zealously to protect and pursue a client's legitimate interests"); *id.* r. 1.3, cmt. 1 ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. 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."); *see also* Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1338 (1995) (finding that "[t]he codes start with a premise of zeal" and that "the clear implication of the codes is that lawyers should maximize client interests"); *cf.* MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (AM. BAR ASS'N 1980) ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.").

18. It should be noted that, as I have observed elsewhere, "the 'best interests' of the client may not always entail zealous advocacy of the client's legal advantages. Moreover, it may be proper, in some cases, for the lawyer to include broader considerations, including moral values, in counseling a client regarding what course of action would, in fact, best serve the client's interests." *See* Samuel J. Levine, *The Law and the "Spirit of the Law" in Legal Ethics*, 2015 J. PROF. LAW. 1, 7 n.33 (2015) (citing THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY (1994); Thomas L. Shaffer, *Inaugural Howard Lichtenstein Lecture in Legal Ethics: Lawyer Professionalism as a Moral Argument*, 26 GONZ. L. REV. 393 (1991); Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319 (1987)); *cf.* Tremblay, *supra* note 1, at 305 ("[T]he lawyer must have a more nuanced, and possibly more difficult, conversation about why he chooses not to collaborate on the project that fails to comply with some applicable regulations.").

19. *See, e.g.*, Zacharias, *supra* note 17, at 1340 ("When the codes authorize lawyers to choose between emphasizing partisanship and important third party or societal interests, lawyers' natural incentives encourage them to select partisanship. Lawyers who make that choice can readily justify their conduct as mandated by the code by claiming adherence to the code provisions that call for zeal."); Zacharias & Green, *supra* note 14, at 2 (describing "the popular conception that an attorney in this country must do everything legally permissible to promote his client's interests and objectives").

implies must.

Yet, as Professor Tremblay further notes, the application of the norm of zealous advocacy loses much of its force in the context of the scenarios he examines, because, in each of these cases, the lawyer is involved in assisting the client in unlawful conduct[20] and the lawyer plays a transactional role rather than an advocacy role.[21] Thus, even if, as Professor Tremblay maintains, the lawyer is permitted to engage in this form of legal practice—and even under an approach that maintains a robust emphasis on client-centered lawyering—it seems unlikely that adherence to a duty of zealous advocacy would mandate that the lawyer assist a client in these unlawful activities.[22] Instead, Professor Tremblay concludes, in the absence of a clear answer based in substantive law, it appears that the ethical response to the question of whether to assist a client in unlawful conduct remains at the discretion of the lawyer.[23]

For legal ethicists, the conclusion that a lawyer has discretion over whether to undertake a particular mode of conduct is not the end of the conversation, but instead raises further questions—specifically, in this context: "*should*" the lawyer assist a client's wrongdoing?[24] The answer to this question entails a further conversation, taking into account

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20. *See* Tremblay, *supra* note 1, at 256 (citing the view "describ[ing] the norm that holds that 'zealous advocacy stops at "the bounds of the law"' as 'the one relatively fixed star in the legal ethics universe'") (quoting David B. Wilkins, *In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law*, 38 WM. & MARY L. REV. 269, 269 (1996)). Although Professor Tremblay's article is premised on a distinction between assisting a client's criminal conduct and assisting a client's unlawful but noncriminal conduct, the latter of which he does not find prohibited, the norm that zealous advocacy stops at the bounds of the law would at least seem to negate any mandatory obligation on the part of the lawyer to assist in unlawful activity.

21. *See* Tremblay, *supra* note 1, at 260 ("Each [scenario] 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."); *see also* Fred C. Zacharias, *Practice, Theory, and the War on Terror*, 59 EMORY L.J. 333, 354 (2009) ("I . . . have differentiated counseling and negotiations from the advocacy setting. An emphatic client orientation is justified in litigation . . . ." (footnote omitted)); Fred C. Zacharias, *The Images of Lawyers*, 20 GEO. J. LEGAL ETHICS 73, 93 (2007) (arguing that application of an aggressive adversarial role "may not be necessary—or may even be counter-intuitive—in contexts divorced from litigation (e.g., the advice setting, matters involving transactions with the client) or in contexts in which systemic safeguards of the adversary system are not present (e.g., negotiations)" (footnote omitted)).

22. Some proponents of a client-centered approach might understand the duty of zealous advocacy to include assisting a client's criminal activity—at least in the context of advocating on behalf of a client who is exercising constitutional rights, such as a criminal defendant who is testifying falsely. *See* Monroe Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1475–78 (1966).

23. *See* Tremblay, *supra* note 1, at 283–84.

24. *Id.* at 297.

additional levels of ethical deliberation and analysis.[25] As Professor Tremblay puts it, "[t]he answer to the . . . 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."[26]

Accordingly, Professor Tremblay's scenarios may call for a consideration of the lawyer's other competing duties, such as the duty to promote justice.[27] Although often inconsistent with the arguably overarching duty to zealously represent the best interests of the client, the lawyer's duty to promote justice underlies many aspects of ethics rules,[28] and, at least in the view of some leading scholars, may comprise the lawyer's primary ethical obligation.[29]

Professor William Simon, who may be the most prominent proponent of this position, sets forth a "Contextual View," rooted in the "basic maxim . . . that the lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice."[30] Under this view, when a legal rule's "underlying purpose . . . would be frustrated by the invocation of the rule,"[31] the lawyer should look to the "spirit" of the law to determine the extent to which the contours of the rule should govern a lawyer's conduct.[32] For example, according to Professor Simon, in evaluating the ethics of pleading the

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25. *See generally* Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265 (2006) (analyzing the permissive nature of the ethical rules as opposed to what other law prohibits); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) (arguing that lawyers should use reflective judgment rather than rely solely on ethical rules when determining whether to pursue claims on behalf of their clients); Zacharias & Green, *supra* note 14 (offering more approaches to legal ethics beyond the traditional Dominant View and the Personal Conscience View). *See also* Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation*, 37 IND. L. REV. 21, 24 (2003) ("suggest[ing] that the lawyer's professional responsibility carries with it a duty on the individual lawyer to exercise . . . discretion through consideration of the relevant ethical issues").

26. Tremblay, *supra* note 1, at 297–98.

27. *See id.* at 298.

28. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT pmbl. para. 7 (AM. BAR ASS'N 2018) ("A lawyer should strive to . . . exemplify the legal profession's ideals of public service."); *id.* para. 8 ("A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done."); *id.* para. 9 (articulating "a lawyer's responsibilities . . . to the legal system").

29. *See, e.g.*, WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 7–8 (1998).

30. *Id.* at 9.

31. William H. Simon, *The Past, Present, and Future of Legal Ethics: Three Comments for David Luban*, 93 CORNELL L. REV. 1365, 1369 (2008).

32. William H. Simon, *Introduction: The Post-Enron Identity Crisis of the Business Lawyer*, 74 FORDHAM L. REV. 947, 953–54 (2005).

statute of limitations when the debtor admits to the lawyer to not having repaid the debt, "a lawyer who concluded that the basic principle of the statute was to spare judicial determination of claims on unreliable evidence might infer it inappropriate to plead the statute."[33]

Applied to Professor Tremblay's question, it would seem that the lawyer's obligation to promote justice would preclude assisting a client in unlawful conduct. After all, according to Professor Simon, pleading the statute of limitations, though unquestionably legal, may prove inconsistent with the lawyer's role in promoting justice.[34] If so, outright assistance of unlawful conduct, which would subvert justice, should generally be off-limits to a lawyer. To be sure, Professor Simon's approach incorporates additional layers of complexity, allowing for subversion of the law when necessary to promote justice.[35] Yet, Professor Simon's contextual analysis would not appear to justify assisting the client in unlawful activity that is merely designed to further the client's financial goals, without the added virtues of civil disobedience.[36]

A similar result seems to obtain under Professor Tremblay's application of an alternative approach to ethical discretion, "moral philosoph[y]," which "explore[s] whether a lawyer ought to be 'morally activist' and refuse to aid clients when doing so would achieve immoral (or unjust) ends."[37] Based on this approach, Professor Tremblay closes his article with the declaration that the "license to collaborate with client unlawfulness is not a license to evade moral responsibility for the acts of their clients."[38]

Notwithstanding the appeal of these conclusions, however, neither

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33. SIMON, *supra* note 29, at 33. For other discussions of the ethical implications of pleading the statute of limitations, see, for example, Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY'S L.J. 343, 368–70 (2008); Bruce A. Green & Russell G. Pearce, *"Public Service Must Begin at Home": The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207, 1216–17 (2009); Tremblay, *supra* note 1, at 300–01, 300 & n.238. *See also* RICHARD POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 242 (1999) (addressing the pragmatic approach to balancing substantive justice and precedent in the use of statutes of limitations).

34. *See* SIMON, *supra* note 29, at 33 (arguing the statute of limitations to dismiss a meritorious case "undercuts the Rule of Law").

35. For example, Professor Simon calls for violating the duty of confidentiality when necessary to prevent a horrendous injustice, declaring that "the lawyer might have to consider disclosure as a form of nullification" and, in the absence of an alternative, "the lawyer should defy the rule." SIMON, *supra* note 29, at 163–64; *see also* Tremblay, *supra* note 1, at 299 n.233, 301 & n.240 ("'[P]rincipled noncompliance' with the law is[, at times,] justified . . . ." (quoting William H. Simon, *Authoritarian Legal Ethics: Bradley Wendel and the Positivist Turn*, 90 TEX. L. REV. 709, 721 (2012))).

36. *See* Tremblay, *supra* note 1, at 302 (referring to "assisting [clients] with much less noble lawbreaking").

37. *See id.* at 298–303 (footnotes omitted).

38. *Id.* at 313.

Professor Simon—whose model, as Professor Tremblay notes, purports to be based on principles of justice[39]—nor the "moral activists"[40] appear to find support for their approach either in the substantive law or within mainstream and prevailing norms of lawyering.[41] Accordingly, it would seem unlikely, as Professor Tremblay prescribes, that "[l]awyers who choose to participate in clients' unlawful activity, taking advantage of the state's license to do so" would be "judged by their peers, and the rest of the relevant community, by the nature of the harm that participation produces and its effect on the justice of the resulting action."[42]

As an alternative, perhaps Professor Tremblay's analysis can find support in an application of yet another of the lawyer's ethical duties: the duty to the lawyer's own sense of ethical morality.[43] In contrast to approaches that impose upon the lawyer ethical determinations based in preconceived notions of justice or morality, relying upon the lawyer's duty to self has the advantage of employing the lawyer's own views of morality as a basis for ethical decision making.[44] Moreover, unlike an approach that calls upon the outside judgment of the lawyer's peers to evaluate the lawyer's decisions, the duty to self defers to the lawyer's own professional judgment as the primary source of guidance.[45]

Perhaps most significantly, as acknowledged in the preamble to the Model Rules, the lawyer's responsibilities to "remain[] an ethical person" and to "exercise . . . sensitive professional and moral judgment" are a key component of the principles underlying the Model Rules, and as such, comprise the third of the lawyer's competing ethical duties.[46] Thus, while

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39. *See id.* at 300 n.235.

40. *Id.* at 300.

41. *See, e.g.*, Monroe H. Freedman, *A Critique of Philosophizing About Lawyers' Ethics*, 25 GEO. J. LEGAL ETHICS 91, 96 (2012); Tremblay, *supra* note 1, at 300–01 ("The moral-activism response . . . is frequently contrary to the lawyer's client's interest."); *see also* Levine, *supra* note 18, at 6 (observing that "[o]n a number of levels, Simon's model appears inconsistent with basic elements of the lawyer's legal and ethical obligations to the client"); Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901, 904 (1995) ("Simon's alternative to categorical reasoning, which he terms 'ethical discretion,' appears incompatible with the current rules of legal ethics."); W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 21–22 (1999) (concluding that such a practice of lawyering "will not be normatively justified, and will therefore lack political legitimacy"); Heidi Li Feldman, *Apparently Substantial, Oddly Hollow: The Enigmatic* Practice of Justice, 97 MICH. L. REV. 1472, 1483 (1999) (reviewing SIMON, *supra* note 29) (finding Professor Simon's approach unlikely to result in a substantive conception of justice).

42. Tremblay, *supra* note 1, at 312.

43. *See, e.g.*, John J. Flynn, *Professional Ethics and the Lawyer's Duty to Self*, 1976 WASH. U. L.Q. 429, 429 (1976). *See generally* Levine, *supra* note 9; *id.* at 289 nn.16–17, 290–92 nn.21–23.

44. *See* Flynn, *supra* note 43, at 437.

45. *Id.* at 444.

46. MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2018) pmbl. para. 9; *see also id.* para. 7 (stating that "a lawyer is also guided by personal conscience"); MODEL RULES OF PROF'L

incorporating and building upon elements of Professor Tremblay's discussion, conceptualizing the analysis through the prism of the lawyer's duty to self may strike a suitable balance, deferring the lawyer's discretion in deciding whether to assist clients in unlawful conduct, while at the same time expecting that lawyers will exercise this discretion in a way that allows them to remain true to their own moral commitments.[47]

CONDUCT Scope para. 14 (AM. BAR ASS'N 2018) (describing lawyer's "discretion to exercise professional judgment").

47. *Cf.* sources cited *supra*, note 25 (supporting the view that gives lawyers discretion to determine how to represent their clients when faced with unlawful conduct).