LAWYERS' CONSTRAINED FIDUCIARY DUTIES: A COMMENT ON PAUL R. TREMBLAY, *AT YOUR SERVICE: LAWYER DISCRETION TO ASSIST CLIENTS IN UNLAWFUL CONDUCT*

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The Model Rules of Professional Conduct seem to have a blind spot. As Professor Paul Tremblay rightly observes, most legal ethics scholars assert that lawyers are prohibited from assisting "unlawful" conduct or, more broadly, client "wrongdoing."[1] However, Rule 1.2(d), the rule most squarely on point, states only that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ."[2] Professor Tremblay gives a thorough analysis of the text and drafting history of the Model Rules, comparing the prohibition in Rule 1.2(d) with the broader language of the rule requiring a lawyer to withdraw from representation when it will result in a violation of the Rules of Professional Conduct or "other law,"[3] and also comparing the prohibition in the 1969 Model Code of Professional Responsibility on counseling or assisting *illegal* conduct—possibly broader than conduct that constitutes a crime or fraud under applicable law.[4] As he points out, there is very little legal authority supporting the view that lawyers are permitted to assist clients in non-criminal and non-fraudulent wrongdoing.[5] For what it's worth, no lawyer has been disciplined for providing assistance to clients in conduct that is not defined as a crime or fraud, and it may be a violation of due process for discipline to be imposed for this type of assistance, given the clear language of Rule 1.2(d).[6]

Professor Tremblay cites me as a commentator who believes that lawyers are prohibited from assisting clients in unlawful conduct that is not a crime or civil fraud.[7] In this brief comment I will defend that position, but hope to offer an argument with more general significance. My view that lawyers are not permitted to assist clients in legally unpermitted conduct—whether specifically defined as a crime or civil fraud—follows from the fundamental principle that lawyers are agents of their clients and can exercise no more lawful authority than that possessed by clients. The agency principle is at the heart of Second Wave legal ethics theory, which seeks to orient the duties of lawyers not around

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1. Paul R. Tremblay, *At Your Service: Lawyer Discretion to Assist Clients in Unlawful Conduct*, 70 FLA. L. REV. 251, 255 (2018).

2. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2017).

3. *Id.* at r. 1.16(a)(1).

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

5. Tremblay, *supra* note 1, at 271–73.

6. *Id.* at 273–74.

7. *Id.* at 274.

ordinary moral principles such as loyalty and truthfulness, but instead around the political value of the rule of law and the rights and duties allocated to clients by the legal system.[8] In the version of Second Wave theory I offered in my 2010 book,[9] the most basic ethical obligation of lawyers is to promote the legal entitlements of clients through counseling, transactional planning, and assertion in litigation. Legal entitlements are those rights, liberties, privileges, and powers—the whole Hohfeldian rigmarole[10]—that have been established by institutions and procedures of a community's legal system. The role of the lawyer as an agent, serving the client as principal, can be boiled down to the following duty: "[A] lawyer must, in matters within the scope of the representation, proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation."[11] On this way of understanding the lawyers' duties, it is not necessary for rules of professional conduct to recognize an express constraint on lawyers' assistance with *unlawful* client projects. The constraint is implicit in the limitation of the scope of authority to provide assistance to the client in carrying out *lawful* projects. Rule 1.2(d) follows *a fortiori* from the limited scope of the lawyer's authority but is not an independent limitation on that authority. It may, however, indicate the only ground for which an attorney may be subject to discipline by her licensing authority, as distinct from other unpleasant legal consequences.

I strongly dislike the term "ethics rules" to refer to rules of professional conduct adopted by state courts to regulate and discipline lawyers in the jurisdiction. One problem—the one commentators tend to focus on—is that it begs central jurisprudential questions about the authority of law by assuming that lawyers have a moral obligation to do whatever the rules require ("morality" and "ethics" being used more or less interchangeably by most philosophers). A further concern, and the one I want to focus on here, is that referring to the rules of professional conduct as ethics rules may cause lawyers to believe, incorrectly, that if they are not potentially subject to professional discipline for doing something, then there is nothing wrong with it—*in terms of the normative standards of professional ethics*. There are plenty of norms of professional ethics that are not neatly reducible to the disciplinary rules. Ask a bunch of lawyers what they believe is the fundamental ethical

8. *See* David Luban & W. Bradley Wendel, *Philosophical Legal Ethics: An Affectionate History*, 30 GEO. J. LEGAL ETHICS 337, 354 (2017) (citing Tim Dare, Alice Woolley, Daniel Markovits, Kate Kruse, Norman Spaulding, and myself as examples of Second Wave theorists).

9. *See* W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 49–50 (2010).

10. *See generally* Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

11. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(1) (AM. LAW INST. 2000).

obligation of lawyers and I bet more than half would say "zealous advocacy." There is no requirement anywhere in the rules that a lawyer be "zealous,"[12] but lawyers regard this norm as fundamental to understanding what their professional role is all about. Lawyers are supposed to be steadfast and dedicated, and see themselves as champions of their client's interests, whether in litigation or otherwise. The point is, the norm of zealous advocacy is derived through reflection on the lawyer's role and its associated rights and duties, considered as a whole. It is not grounded in any specific rule of professional conduct, yet it is fundamental to the way we think about the duties of lawyers.

Consider Professor Tremblay's illuminating independent-contractor example[13] from this normative perspective. On his assumption, the two would-be independent contractors should be treated as employees for the purposes of federal and state wages-and-hours laws. Can a lawyer assist the client in drafting the agreement governing the relationship between the company and the workers, knowing that it is in violation of federal and state law? If Rule 1.2(d) is the whole story, then the answer would turn on whether there happen to be criminal penalties attached to the statutory violations.[14] But what a strange way to think about the duties of lawyers! Again helping ourselves to Hohfeld, the client's position may be understood as asserting a privilege to pay the workers without withholding FICA taxes or providing unemployment and workers' compensation insurance protection, which is correlated not with a duty on the part of the government but with the claim that the state has no right to interfere with the arrangement.[15] The lawyer's work for the startup company purports to establish a juridical relationship among the company, the workers, and the federal and state agencies responsible for enforcing fair labor standards. The trouble is, the law does not support the assertion of no-right on the part of the government. Whether there are criminal penalties attached to the client's avoidance of withholding FICA taxes is irrelevant to the analysis of whether the lawyer's advice and assistance is grounded in a genuine legal entitlement or is merely smoke and mirrors. Anyone can provide empty words on paper; a lawyer, on the other hand, purports to provide words with legal import. Drafting the

12. A comment to the rule requiring lawyers to act with reasonable diligence states that "[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." MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2017). The Preamble to the Model Rules also states: "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." MODEL RULES OF PROF'L CONDUCT pmbl. (AM. BAR ASS'N 2017).

13. Tremblay, *supra* note 1, at 261–63.

14. Professor Tremblay later takes advantage of an "out" by observing that there is a possibility, albeit remote, of criminal penalties for willful violations of the federal statute. *Id.* at 306–07.

15. *See* Hohfeld, *supra* note 10, at 723–24.

independent-contractor agreement when the lawyer knows the workers should be treated as employees under applicable law is the equivalent of crossing one's fingers while telling a lie—it does nothing to alter the legal significance of the client's conduct. Whether there are criminal penalties for acting without authorization in this way (that is, treating employees as independent contractors) is at most a secondary consideration when the lawyer's conduct is viewed through the lens of the principal-agent structure of the lawyer-client relationship, with due attention to the content of the client's legal entitlements. Professor Tremblay's example of drafting a licensing agreement when the arrangement would in fact require compliance with state franchise laws[16] should come out the same way, from the normative perspective, as the independent-contractor example.

It is true that the characterization of the client's action as a crime or fraud does make a difference to the lawyer's exposure to professional discipline under Rule 1.2(d).[17] If the Attorney Grievance Commission of State X proceeds against the lawyers in Professor Tremblay's independent-contractor and franchise stories, the results would be different. To my mind, however, this is merely a gap in the Model Rules, probably designed to overprotect good faith legal advice in close cases, and is not productive of any deeper insight into the duties of lawyers. For one thing, even if the lawyer drafts the licensing agreement without worrying about professional discipline,[18] the lawyer may still have to consider the possibility of civil liability for malpractice. If the clients subsequently incur expenses they would not have had to pay if the lawyers had properly treated the licensing of the company's curriculum as a franchise arrangement under state law, the clients may have a cause of action for malpractice.

Professor Tremblay rightly notes that the lawyer would not be liable unless she is negligent.[19] Here, however, he relies on the doctrine of judgmental immunity in a way that is belied by at least two of his three examples. The lawyers in the independent-contractor example have not concluded, after reasonable legal research, that the law is uncertain; rather, they determined that the company is required to withhold FICA taxes, but it is unlikely that the independent-contractor ruse will be detected and punished.[20] Similarly, Professor Tremblay stipulates that the trademark-license agreement really ought to be treated as a franchise

16. Tremblay, *supra* note 1, at 264, 311–12.
17. *Id.* at 272–73.
18. *Id.* at 311–12.
19. *Id.* at 288.
20. *Id.* at 262–63, 309.

arrangement under applicable law.[21] The doctrine of judgmental immunity protects a lawyer from liability where a judgment call about the application of law turns out to be incorrect in hindsight, but was reasonable at the time it was made.[22] This reasoning also underlies the factual causation element in legal malpractice cases, which requires the plaintiff to show that the result would have been different but for the lawyer's negligence.[23] But suppose, to vary one of the examples, an inexperienced lawyer had failed to conduct reasonable research and, as a result, failed to discover that the intellectual property licensing arrangement actually triggered state franchise law treatment, creating an expensive headache for the client who subsequently had to deal with an enforcement action and administrative penalties. The lawyer's malpractice insurer would probably settle that claim expeditiously. If the "regulatory apparatus" is understood as limited to the discipline and grievance commissions organized under the authority of the state judiciary to enforce the rules of professional conduct and impose discipline related to licensure (disbarment, suspension, reprimands, etc.), then okay, the regulatory apparatus permits direct assistance in client wrongdoing.[24] If our understanding of the regulatory apparatus includes civil actions for malpractice, as I believe it should,[25] then assistance with client wrongdoing is not countenanced, even if the client's conduct is not a crime or a fraud.

The judgmental immunity doctrine does overlap with the rationale for limiting Rule 1.2(d) to crimes and frauds where there is genuine uncertainty regarding the application of law. A lawyer should not be subject to professional discipline, nor liable for malpractice, for providing advice, after reasonably adequate research, that the client *may* be permitted to do something, even if there is some risk that a court or administrative tribunal may interpret the law to prohibit the conduct. Tax lawyers frequently work in legal gray areas, and are ethically permitted to give clients advice of this form: "We believe your proposed tax treatment of the transaction will be upheld, but there is a 25% chance that the IRS may disallow it—it's up to you whether you want to take that risk." But to add one cautionary note in conclusion of this comment, it is

21. *Id.* at 264, 311. I'm a bit uncertain regarding the second of Professor Tremblay's three examples, involving solicitation for a non-profit organization prior to receiving a certificate from the state Attorney General. *Id.* at 263. It is not clear whether solicitation without the certificate is prohibited, or whether it merely puts at risk the donors' deductibility of donations.

22. *See, e.g.*, Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 483–84 (Tex. 2015); Seed Co. Ltd. v. Westerman, 62 F. Supp. 3d 56, 65–67 (D.D.C. 2014).

23. *See, e.g.*, Viner v. Sweet, 70 P.3d 1046, 1052 (Cal. 2003).

24. Tremblay, *supra* note 1, at 255.

25. It is a commonplace in tort law and theory that a judgment imposing liability on the ground that, for example, it is negligent for a maritime transportation company to fail to equip its tugboats with radios is tantamount to a regulation requiring tugboats to be equipped with radios.

absolutely essential that the advice be based on a hypothetically well-informed adjudicator's evaluation of the law and facts, and *not* on the probability of detection. Quite a bit of abusive legal assistance, from the tax shelter frauds described by Tanina Rostain and Mitt Regan to the more recent asset-sheltering scheme revealed by the Panama Papers leak,[26] takes the form of "advice" that would never withstand scrutiny, concealed using complex transactional structures, overseas shell corporations, and the imbalance in resources between the tax authorities and wealthy clients. As suggested above, the gap in Rule 1.2(d), exempting lawyers from discipline for assisting clients with conduct that is not known to constitute a crime or civil fraud, is probably designed to overprotect advice in gray area matters so that lawyers do not limit client entitlements out of an excess of caution and concern about discipline imposed in hindsight. It is important not to overgeneralize from this gap, however, and conclude that lawyers are permitted to provide assistance to client conduct that is not legally authorized. Doing so may not subject a lawyer to professional discipline, but it is a kind of pseudo-lawyering that should be discouraged from an ethical point of view.

26. *See* TANINA ROSTAIN & MILTON C. REGAN, JR., CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY 332–34 (2014); Eric Lipton & Julie Cresswell, *Documents Show How Wealthy Hid Millions Abroad*, N.Y. TIMES, June 6, 2016, at A1; Int'l Consortium of Investigative Journalists, *Giant Leak of Offshore Financial Records Exposes Global Array of Crime and Corruption*, ICIJ: THE PANAMA PAPERS (Apr. 3, 2016), https://www.icij.org/investigations/panama-papers/20160403-panama-papers-global-overview/ [https://perma.cc/4K32-SXPG].