

**Carr, David**

**From:** Sarah Banola <SBanola@cwclaw.com>  
**Sent:** Friday, April 10, 2020 2:10 PM  
**To:** Carr, David  
**Subject:** RE: Updated issue memo - 19-0003

David,

I did some research for our ethics opinion and pasted below some of the relevant clips. The first one is the most on-point. I also included a link to an article addressing New York's version of Model Rule 1.2(d) and the meaning of illegality.

4.2.5 Agreements Containing Illegal or Unconscionable Terms A lawyer should not negotiate a settlement provision that the lawyer knows to be illegal.

Committee Notes: The Model Rules forbid a lawyer from assisting a client in conduct that is criminal or fraudulent. Model Rule 1.2(d). The earlier Model Code contained a broader prohibition. It additionally prohibited assisting the client in conduct the lawyer knew to be illegal, even if not fraudulent or criminal. DR 7-102(A)(7). After debate, the Model Rules drafters decided not to retain the broader prohibition. Thus, a lawyer is not subject to discipline under the Model Rules for assisting a client in pursuing settlement terms the lawyer knows to be illegal or unconscionable, although not fraudulent or criminal. Nonetheless, as a matter of sound professional practice, a lawyer should discourage a client from pursuing such terms and should decline to pursue them on the client's behalf.

ABA ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS (August 2002), at 46-47

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. 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. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

Comment 10 to ABA Model Rule 1.2

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

Comment 13 to ABA Model Rule 1.2

Lying to or Misleading Third Parties —

Model Rule 4.1 addresses an attorney's statements to third persons made in connection with the lawyer's representation of a client; lawyers who make such misrepresentations to third parties can be disciplined under both Rules 4.1 and 8.4(c). See, e.g., *In re Warner*, 851 So. 2d 1029, 19 Law. Man. Prof. Conduct 407 (La. 2003) (lawyer disciplined for settling personal injury case without telling opponent's insurer that client had died); *In re Winter*, 770 N.W.2d 463 (Minn. 2009) (immigration lawyer disciplined for falsely telling client's former lawyer that he had filed disciplinary complaint against that lawyer); South Carolina Ethics Op. 05-03 (2005) (lawyer for ex-wife sent letter to ex-husband falsely claiming that ex-husband was required under divorce decree to undergo drug testing; newly hired

lawyer for ex-husband must report ex-wife's lawyer to disciplinary authority because letter was "an intentional misrepresentation of material fact" prohibited by Rules 4.1 and 8.4(c)); Douglas R. Richmond, *Lawyers' Professional Responsibilities and Liabilities in Negotiations*, 22 Geo. J. Legal Ethics 249, 282 (2009) ("A lawyer's knowing failure to disclose 'non-confidential, material and objective fact' upon inquiry by an opponent is improper.... There is room to argue about whether the ... duty would arise under Rule 1.4, Rule 4.1 or Rule 8.4(c) ... but the existence of a duty ... seems indisputable"); see also *In re Discipline of Attorney*, 884 N.E.2d 450 (Mass. 2008) (lawyer disciplined under Rule 8.4(c) alone for sending letters to insurers of opposing parties falsely claiming entitlement to lien on insurance payments payable to his clients); *In re Bosse*, 920 A.2d 1203, 23 Law. Man. Prof. Conduct 223 (N.H. 2007) (lawyer/Realtor disciplined under Rule 8.4 alone for signing homeowner's name to listing agreement and forwarding agreement to administrator of multiple listing service); cf. ABA Formal Ethics Op. 06-439 (2006) (analyzing what is permissible "puffing" and impermissible misrepresentation under Rule 4.1; "whatever the reach of Rule 8.4(c) may be, the Rule does not prohibit conduct that is permitted by Rule 4.1"). But see *In re P.R.B.* Docket No. 2007-046, 989 A.2d 253, 25 Law. Man. Prof. Conduct 691 (Vt. 2009) (lawyer's lying to witness that telephone interview was not being recorded violated Rule 4.1 but not 8.4(c) because it was not "conduct that calls into question an attorney's fitness to practice law"). *Lawyers' Manual on Professional Conduct: Practice Guides, Misconduct and Discipline, Dishonesty, Fraud, Deceit, Misrepresentation*

#### Assisting Client's Crime or Fraud —

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The only restriction Model Rule 1.2 places on an attorney's obligation to pursue the client's objectives is that the lawyer must not counsel or assist the client in criminal or fraudulent conduct. Model Rule 1.2(d).

See, e.g., *Ligon v. Rees*, 364 S.W.3d 19 (Ark. 2010) (lawyer negotiating client's personal-injury settlement advised client to go along with scheme to cheat medical-lien claimants); *Florida Bar v. Brown*, 790 So. 2d 1081, 17 Law. Man. Prof. Conduct 462 (Fla. 2001) (by failing to consider legality of client's request for "premium billing" as part of client's campaign-contribution reimbursement scheme, lawyer helped client in crime or fraud); *In re Lightfoot*, 85 So. 3d 56, 28 Law. Man. Prof. Conduct 225 (La. 2012) (lawyer advised federal judge and judge's spouse to use fictitious names and temporary post office box address when filing for bankruptcy, to avoid embarrassing publicity); *In re Werme*, 839 A.2d 1, 20 Law. Man. Prof. Conduct 18 (N.H. 2003) (lawyer advised client in child-abuse case to violate statute, which required judicial approval before disclosing confidential records, in giving case information to newspaper); *In re Poff*, 714 S.E.2d 313, 27 Law. Man. Prof. Conduct 572 (S.C. 2011) (lawyer representing client in domestic matter helped her misrepresent her income to qualify for Medicaid benefits); *In re Nussberger*, 719 N.W.2d 501, 22 Law. Man. Prof. Conduct 439 (Wis. 2006) (lawyer suggested to probate client that he could bill estate for inflated amount and split the extra with her). However, under Rule 1.2(d), a lawyer is free to "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." See *Arizona Ethics Op. 11-01*, 27 Law. Man. Prof. Conduct 163 (2011) (Rule 1.2(d) permits lawyer to advise client how best to take advantage of state's medical-marijuana law, but lawyer must also warn client of possible "federal law implications"); *Maine Ethics Op. 199*, 26 Law. Man. Prof. Conduct 431 (2010) (state's medical-marijuana law authorizes conduct that could be criminal under federal law; when consulted about it, lawyer must therefore determine "whether the particular legal service being requested rises to the level of assistance in violating federal law"). See generally *Renee Newman Knake, Attorney Advice and the First Amendment*, 68 Wash. & Lee L. Rev. 639 (2011).

*Lawyers' Manual on Professional Conduct: Practice Guides, Scope of Relationship*

<http://www.newyorklegalethics.com/illegal-conduct-under-rule-1-2-when-does-advice-to-a-client-violate-an-attorneys-ethical-obligations/>