

# PROFESSIONAL RESPONSIBILITY & LEGAL ETHICS RESEARCH

# RESEARCH HELP

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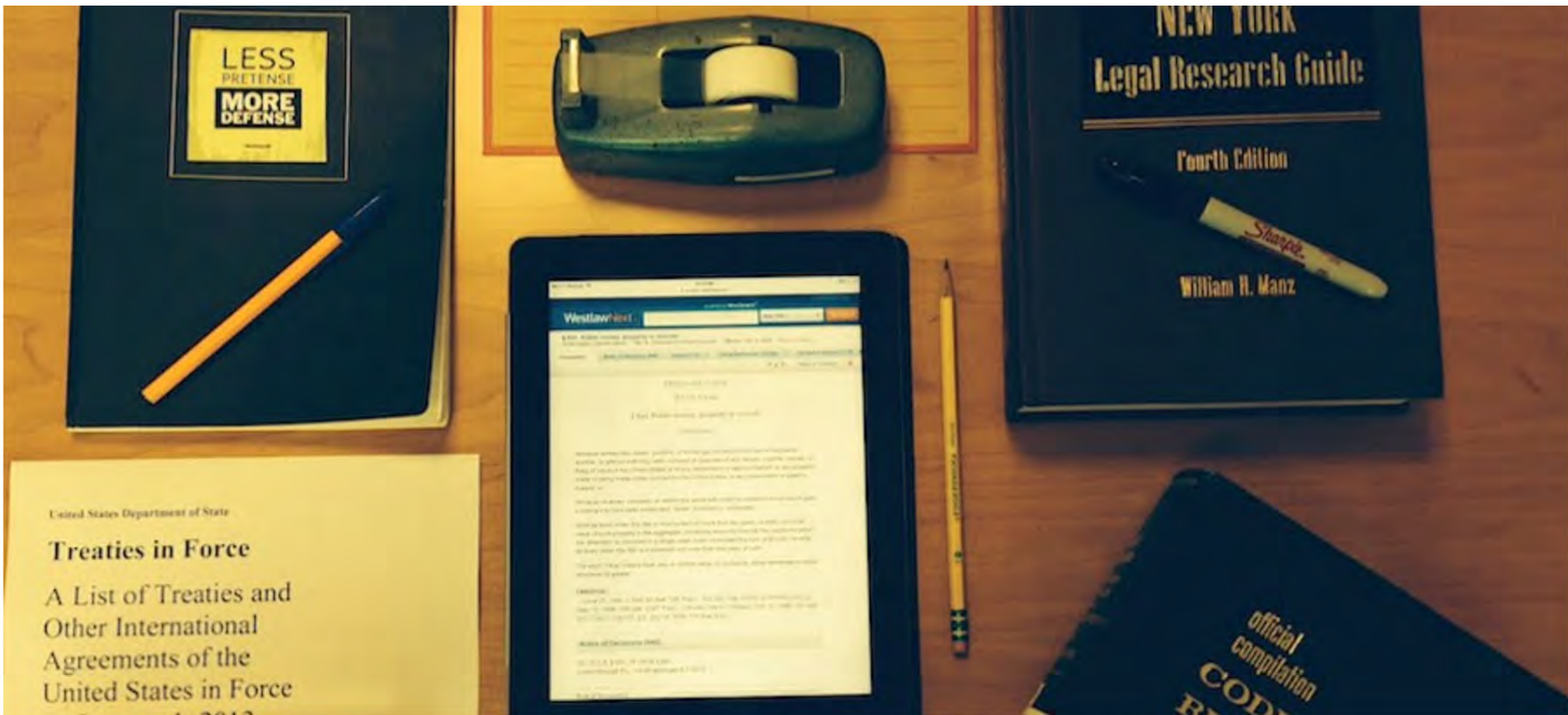
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# ETHICS RESEARCH GUIDE

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## ETHICS & PROFESSIONAL RESPONSIBILITY

A few initial tips:

1. If you have difficulty identifying what rules govern your issue, check for secondary sources (books, articles, CLE materials, blogs, etc.) focusing on ethical issues in the specific practice areas relevant to your issue, such as ethics

1. When researching ethical issue you have to do research. Eyeballing the rule is not enough. Secondary sources, case law, ethics opinions.
2. Don't know which rule? Secondary sources in the area. See, e.g., Professional Responsibility in Criminal Defense Practice (Westlaw); Ethics of Representing Organizations (Lexis).
3. Have Rule? Use Annotated Rules (Simon's, McKinneys & Lexis).
4. Ethics cases and opinions are a smaller pool, keep searches broad, think analogously.

Is it ethical to advise a client not to take a  
breathalyzer test?

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# Criminal Defense Ethics: Law & Liability

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# Professional Responsibility in Criminal Defense Practice

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# New York Criminal Practice i ☆ 🔔 ⋮

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CHAPTER 86 PROFESSIONAL RESPONSIBILITY

Synopsis to CHAPTER 86 : PROFESSIONAL RESPONSIBILITY

§ 86.01 Scope: Professional Responsibility

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# Handling the DWI Case in New York

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    - § 40:6. DMV refusal sanctions civil, not criminal, in nature
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## ← § 40:79. Chemical test refusals and the right to counsel

HDWINY § 40:79 • Handling the DWI Case in New York • Test Refusals (Approx. 11 pages)

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#### Part X. Test Refusals

#### Chapter 40. Test Refusals

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§ 40:1. In general

§ 40:2. Refusal to communicate with police--Generally

§ 40:3. Refusal to submit to field sobriety tests

§ 40:4. Refusal to submit to breath screening test

§ 40:5. Refusal to submit to chemical test

Several Courts have held that the right to effective assistance of counsel is violated where the police do not permit the defendant “to conduct a *private* phone conversation with his attorney concerning a breathalyzer test.” *People v. Iannopollo*, 131 Misc. 2d 15, \_\_\_, 502 N.Y.S.2d 574, 577 (Ontario Co. Ct. 1983) (emphasis added). See also *People v. Moffitt*, 50 Misc. 3d 803, \_\_\_, 19 N.Y.S.3d 713, 715 (N.Y. City Crim. Ct. 2015) (if the “qualified right [to counsel] is to have any meaning, the communication between the defendant and his or her attorney must be private. Because the police prevented that privacy here, the court suppresses the results of the breath test, all statements defendant made while on the phone with his attorney, and that portion of the video showing defendant’s breath test and statements to counsel”); *People v. O’Neil*, 43 Misc. 3d 693, \_\_\_, 986 N.Y.S.2d 302, 312 (Nassau Co. Dist. Ct. 2014) (“if the police are not going to provide a defendant with privacy during a telephone conversation with counsel concerning whether or not to submit to a chemical test, then statements overheard by the police during such consultation with counsel must be suppressed”). In *People v. Youngs*, 2 Misc. 3d 823, \_\_\_, 771 N.Y.S.2d 282, 284 (Yates Co. Ct. 2003), the court distinguished *Iannopollo*, finding that, in the particular circumstances presented, “private access to the defendant’s

Is it ethical to advise a client not to take a  
breathalyzer test?

Any person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test of . . . the . . . breath. . . The person's license or permit to drive shall be revoked for refusal to submit to such chemical test . . . whether or not the person is found guilty of the charge for which . . . arrested.

N.Y. Veh. & Traf. Law § 1194

## New York Rule 1.2(d)

A Lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that a lawyer may discuss the legal consequences of any proposed course of conduct with a client



# McKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED

## JUDICIARY LAW

### APPENDIX

#### CODE OF PROFESSIONAL RESPONSIBILITY

[Repealed eff. April 1, 2009. See Rules of Professional Conduct, post.]

§ 1200.1, DR 1-101 to DR 9-102. [22 NYCRR §§ 1200.1 to 1200.46] Repealed eff. April 1, 2009

#### Historical and Statutory Notes

See, now, the Rules of Professional Conduct. DR 2-105-a (22 NYCRR § 1200.10-a) was previously repealed.

#### DISPOSITION TABLE

*Showing where the subject matter of the former New York Disciplinary Rules can be found in the New York Rules of Professional Conduct*

1990 New York Disciplinary Rule	New York Rules of Professional Conduct
Definitions	
Definition 1, 22 NYCRR § 1200.1 Canon 1	1.0
DR 1-101, 22 NYCRR § 1200.2	8.1
DR 1-102, 22 NYCRR § 1200.3	8.4
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Canon 2	
DR 2-101, 22 NYCRR § 1200.6	7.1
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DR 2-106, 22 NYCRR § 1200.11	1.5
DR 2-107, 22 NYCRR § 1200.12	1.5
DR 2-108, 22 NYCRR § 1200.13	5.6
DR 2-109, 22 NYCRR § 1200.14	1.16

§ 1200.1, DR 1-101 to DR 9-102  
Repealed

1990 New York Disciplinary Rule	New York Rules of Professional Conduct
DR 2-111, 22 NYCRR § 1200.15-a Canon 3	1.17
DR 3-101, 22 NYCRR § 1200.16	5.5
DR 3-102, 22 NYCRR § 1200.17	5.4
DR 3-103, 22 NYCRR § 1200.18 Canon 4	5.4
DR 4-101, 22 NYCRR § 1200.19 Canon 5	1.0, 1.6, 1.8
DR 5-101, 22 NYCRR § 1200.20	1.7, 6.5
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DR 5-105, 22 NYCRR § 1200.24	1.7, 1.10, 1.18
DR 5-106, 22 NYCRR § 1200.25	1.8
DR 5-107, 22 NYCRR § 1200.26	1.8, 5.4
DR 5-108, 22 NYCRR § 1200.27	1.9, 1.10, 1.18
DR 5-109, 22 NYCRR § 1200.28	1.13, 1.16
DR 5-110, 22 NYCRR § 1200.29	6.3
DR 5-111, 22 NYCRR § 1200.29-a Canon 6	1.0, 1.8
DR 6-101, 22 NYCRR § 1200.30	1.1, 1.3
DR 6-102, 22 NYCRR § 1200.31 Canon 7	1.8
DR 7-101, 22 NYCRR § 1200.32	1.1, 1.2, 1.3
DR 7-102, 22 NYCRR § 1200.33	1.2, 3.1, 3.3, 4.1
DR 7-103, 22 NYCRR § 1200.34	3.8
DR 7-104, 22 NYCRR § 1200.35	4.2, 4.3
DR 7-105, 22 NYCRR § 1200.36	4.4
DR 7-106, 22 NYCRR § 1200.37	3.3, 3.4, 3.6
DR 7-107, 22 NYCRR § 1200.38	3.6
DR 7-108, 22 NYCRR § 1200.39	3.5
DR 7-109, 22 NYCRR § 1200.40	3.4
DR 7-110, 22 NYCRR § 1200.41	3.5
DR 7-111, 22 NYCRR § 1200.41-a	4.5
DR 7-102, 22 NYCRR § 1200.32 Canon 8	1.1, 1.2, 1.3
DR 8-101, 22 NYCRR § 1200.42	1.11
DR 8-102, 22 NYCRR § 1200.43	8.2
DR 8-103, 22 NYCRR § 1200.44 Canon 9	8.2
DR 9-101, 22 NYCRR § 1200.45	1.10, 1.11, 1.12, 8.4
DR 9-102, 22 NYCRR § 1200.46	1.15
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7-26	3.3(a)(3)
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9-2	1.4(a)
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## OLD Code DR 7-102(A)(7)

In his representation of a client, a lawyer shall not . . .

Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent

# ANNOTATED RULES

# NEW YORK RULES OF PROFESSIONAL CONDUCT

## Annotated Versions

Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*.

McKinney's, *New York Rules of Professional Conduct* (or type title in Westlaw big box and select in drop down).

Lexis, *New York Rules of Professional Conduct*



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# Simon's New York Rules of Professional Conduct Annotated



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Simon's Overview of the New York Rules of Professional Conduct

Preamble: A Lawyer's Responsibilities

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Article 2. Counselor

Article 3. Advocate

Article 4. Transactions with Persons Other Than Clients

Article 5. Law Firms and Associations

Article 6. Public Service

Article 7. Information About Legal Services

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# Simon's New York Rules of Professional Conduct Annotated

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  - § 1.2:28. Relationship between Rule 1.2(d) and Rule 5.5
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  - § 1.2:30. Money laundering and Rule 1.2(d)
-  Simon's Annotations on Rule 1.2(e)
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-  Rule 1.5. Fees and Division of Fees
-  Rule 1.6. Confidentiality of Information
-  Rule 1.7. Conflict of Interest: Current Clients

§ 1.2:21 Phrase-by-phrase analysis

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  - § 1.2:25. Clients who are fiduciaries to

# § 1.2:21 Phrase-by-phrase analysis

**“(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.”**

Rule 1.2(d) is one of the key provisions in the Rules, just as it was in the Code. It aims to make clear as a bell that a lawyer who “knows” that a client is bent on illegal or fraudulent conduct may neither recommend that the client carry out the illegal or fraudulent plan (*i.e.*, “counsel” the client to commit an illegal or fraudulent act) nor provide legal services that enable the client to accomplish the illegal or fraudulent purpose (*i.e.*, “assist” the client in the illegal or fraudulent conduct). But an express exception allows a lawyer to discuss the “legal consequences” of any future course of conduct with a client, even if the course of conduct is illegal or fraudulent.

Comments [9]-[13] of Rule 1.2, headed “Illegal and Fraudulent Transactions,” explain many aspects of Rule 1.2(d). I will analyze the rule phrase by phrase, quoting liberally from those Comments.

**“A lawyer shall not”:** Rule 1.2(d) begins with a flat prohibition, but the prohibition is slightly moderated by an express exception in the last clause of the paragraph

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## § 1.2:21 Phrase-by-phrase analysis

NYRPCA § 1.2:21 • Simon's New York Rules of Professional Conduct Annotated • New York Rules of Professional Conduct (Approx. 5 pages)

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New York Rules of Professional Conduct

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Simon's Annotations on Rule 1.2(d)

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§ 1.2:27. Counseling about marijuana under Rule 1.2(d)

§ 1.2:28. Relationship between Rule 1.2(d)

**"is illegal":** The word "illegal" is not defined in the Rules of Professional Conduct, but it certainly includes criminal conduct, and probably also includes conduct that violates administrative ordinances even if the conduct is not denominated as "criminal." It may also include intentional torts, such as trespass or defamation.

**"or fraudulent":** The term "fraudulent" is defined in Rule 1.0(i) as follows:

(i) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

In short, conduct is "fraudulent" within the meaning of Rule 1.2(d) if it is either (1) "fraudulent under the substantive or procedural law" or (2) has a "purpose to deceive"—and if it lacks a purpose to deceive (*i.e.*, "scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations"), then it is not fraudulent within the meaning of Rules 1.0(i) and 1.2(d) even if a statute or administrative rule characterizes the conduct as fraudulent. The policy rationale for Rule 1.2(d) is plain. Nothing erodes public trust in the profession more than a belief that lawyers are active co-conspirators with their clients in defrauding the public.

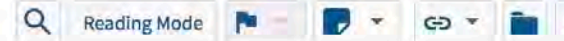
In *United States v. Greebel*, 782 Fed. Appx. 72 (2d Cir. 2019), the court affirmed a lawyer's convictions for wire fraud and conspiracy to commit securities fraud. The convicted lawyer argued "that the district court erred by instructing that lawyers 'disclose all material facts' to their clients and not, in his view, the more limiting obligation to keep clients 'reasonably informed' but the Second Circuit was "unpersuaded that the district court erred." The Second Circuit did not cite Rule 1.2(d), but the case struck fear into many attorneys.



## § 1.2:27 Counseling about marijuana under Rule 1.2(d)

NYRPCA § 1.2:27 • Simon's New York Rules of Professional Conduct Annotated • New York Rules of Professional Conduct (Approx. 3 pages)

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New York Rules of Professional Conduct

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§ 1.2:27. Counseling about marijuana under Rule 1.2(d)

§ 1.2:28. Relationship between Rule 1.2(d) and Rule 5.5


# § 1.2:27 Counseling about marijuana under Rule 1.2(d)

State laws permitting medical or recreational use of marijuana have created ethical problems under Rule 1.2(d) across the country, because marijuana is still classified as a Schedule I controlled substance under the federal Controlled Substances Act, which makes it illegal to manufacture, distribute, or dispense a controlled substance. *See generally* Francis Mootz III, Ian Stewart and Sehreen Ladak, *Calif. Rules for Advertising Cannabis Need Clarity: Part I* (Law360 July 24, 2018) (discussing ethical issues under Rule 1.2(d) when advising clients regarding cannabis, which is legal on a recreational level in California and various other jurisdictions); David L. Hudson Jr., *Lawyers advising clients on marijuana laws may run afoul of ethics rules* (ABAJ online Jan 1, 2017) ("A key question is whether a lawyer advising a client on the cultivation, sale or use of marijuana under state law runs afoul of professional conduct rules given that such activities are illegal under federal law"); Samson Habte, *Lawyers Explore Murky Ethics of Representing Weed Industry* (32 Law. Man. Prof. Conduct 373 June 15, 2016); *The High Risk Of Going Green: Problems Facing Transactional Attorneys and the Growth of the State-Level Legal Marijuana Industries*, 37 New England L. Rev. 371 (2015) (addressing ethical and professional conduct-related issues for transactional attorneys assist clients involved in legal cannabis markets).

The problem under Rule 1.2(d) is a national problem because about half of all states now permit medical use of marijuana, and (after the November 2016 election) at least eight states also permit recreational use. States with such laws have scrambled to explain why a lawyer who provides legal services to a client in the marijuana business is not assisting a client in "conduct that the lawyer knows is criminal..." Some states (including Alaska, Hawaii, and Oregon) have

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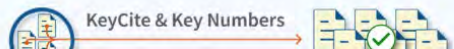
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new york rules of professional



New York



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**Appendix (§ 1200.1 to § Canon 5)**

- Code of Professional Responsibility [Repealed eff. April 1, 2009. See Rules of Professional Conduct.] (§ 1200.1 to § DR 9-102)
- Rules of Professional Conduct [eff. April 1, 2009. As Amended to May 1, 2023.] (Rule 1.0 to APPENDIX A)
- Code of Judicial Conduct (Canon 1 to Canon 5)

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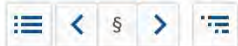


## Rule 1.2. Scope of Representation and Allocation of Authority Bet...

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Rules of Prof. Con., Rule 1.2 McK.Consol.Laws, Book 29 App.

### Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

#### Currentness

(a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by [Rule 1.4](#), shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

## Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

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*by Professor Patrick M. Connors*

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**C1.2:2 Decision Making in the Lawyer-Client Relationship; Settlements and Various Decisions in Civil Cases**

**C1.2:3 Decision Making in the Lawyer-Client Relationship; Pleas, Waiver of Jury Trial, and Various Decisions in Criminal Cases**

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### Subdivision (d)

#### C1.2:7 Counseling or Assisting Client in Illegal or Fraudulent Conduct-Knowledge Requirement

While the lawyer must generally “abide by the client's decisions concerning the objectives of representation,” Rule 1.2(a), there are several limitations on this tenet. For example, Rule 1.2(d) prohibits a lawyer from counseling or assisting the client in conduct that the lawyer “knows is illegal or fraudulent.”

Interpretation of this important provision requires numerous references to Rule 1.0, the “Terminology section of the New York Rules of Professional Conduct.

Initially, before Rule 1.2(d) can be violated, the lawyer must “know” that the client's conduct or proposed conduct is illegal or fraudulent. This means that the lawyer must have “actual knowledge” that the conduct is illegal or fraudulent. Rule 1.0(k). The lawyer's knowledge can be “inferred from the circumstances,” but the knowledge standard is still a subjective one. The mere fact that the lawyer “should have known” that the client's actions were illegal or fraudulent will not give rise to a violation of Rule 1.2(d).

An example helps to illustrate the degree of knowledge required by Rule 1.2(d). Assume a lawyer is representing a client in a transaction, such as the sale of certain goods, and the client's conduct in regard to the transaction is illegal or fraudulent in some respect. The lawyer will not be in violation of this provision merely because an ordinary lawyer exercising reasonable skill and care would have known that the client's conduct was illegal or fraudulent. Rather, it must be demonstrated that the lawyer in question had actual knowledge that the client's conduct was illegal or fraudulent. That knowledge can be inferred from a set of circumstances related to the transaction, but only if the circumstances demonstrate that the lawyer did actually know that the client's conduct was illegal or fraudulent.

The fact that a reasonably prudent lawyer under the same circumstances would have known that the client was engaged in illegal or fraudulent conduct will not, standing alone, establish a violation of Rule 1.2(d). See *Attorney Grievance Com'n of Maryland v. Rohrback*, 323 Md. 79, 94, 591 A.2d 488, 495 (Md. 1991) (applying “actual knowledge” standard, court concluded over a dissent that the evidence before it was “legally insufficient to support a determination, under the clear and convincing evidence standard, that [attorney] assisted [client] in conduct that [attorney] knew was going to be a fraud,” although the attorney



## Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

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privileged communication with the client. Nassau County Bar Ass'n, Ethics Op. 94-10.

#### 8. Illegality

Suspension from practice of law for period of two years was warranted by conduct of attorney who pleaded guilty to criminal facilitation in the fourth degree and knowingly and intentionally provided client with means to defraud school district for period of approximately 15 months. In re Katz (2 Dept. 2006) 31 A.D.3d 125, 815 N.Y.S.2d 663. Attorneys And Legal Services 1066(1); Attorneys And Legal Services 1066(3)

By knowingly and intentionally providing his client with the means to defraud school district and by engaging in such conduct for period of approximately 15 months, attorney engaged in conduct adversely reflecting upon his fitness to practice law in violation of Code of Professional Responsibility. In re Katz (2 Dept. 2006) 31 A.D.3d 125, 815 N.Y.S.2d 663. Attorneys And Legal Services 763; Attorneys And Legal Services 809

Attorney counseled or assisted a client in conduct which she knew was illegal, criminal, or fraudulent, in violation of Rules of Professional Conduct, by having her divorce client sign fraudulent promissory notes and false certifications which attorney then filed with the court. In re Lowell (1 Dept. 2004) 14 A.D.3d 41, 784 N.Y.S.2d 69, appeal dismissed 4 N.Y.3d 846, 797 N.Y.S.2d 421, 830 N.E.2d 320, leave to appeal denied 5 N.Y.3d 708, 803 N.Y.S.2d 28, 836 N.E.2d 1151. Attorneys And Legal Services 784

Attorney's fabrication and submission for probate of will and supporting documents, undertaken on behalf of decedent's widow, amounted to illegal conduct involving moral turpitude, conduct involving dishonesty, fraud, deceit, or misrepresentation, conduct prejudicial to the administration of justice, conduct adversely reflecting on his fitness to practice law, knowingly assisting a client in illegal conduct, and illegal conduct, in violation of applicable professional responsibility rules. In re Nolan (2 Dept. 2000) 268 A.D.2d 164, 706 N.Y.S.2d 704. Attorneys And Legal Services 784

It is improper for a lawyer to accept a retainer from an organization, known to be unlawful, and agree in advance to defend its members when from time to time they are accused of crime arising out of its unlawful activities. ABA Opinion 281 (1952).

When a client requests or instructs a lawyer to commit or attempt to commit a crime that is not prohibited by law and that would not be

# NY CLS Rules Prof Conduct

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This document reflects all changes received as of November 30, 2023

 **Heading**

---

NY - New York Court Rules  
Selected Chapters from the Codes, Rules and Regulations  
(NYCRR) of the State of New York Relating to Judges and  
Attorneys  
Rules of Professional Conduct



## Rule 1.2. Scope of Representation and Allocation of Authority between Client and Lawyer



(a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.



(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.



(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.



(e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the

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applied. [Matter of Jean-Pierre, 136 A.D.3d 88, 25 N.Y.S.3d 135, 2016 N.Y. App. Div. LEXIS 625 \(N.Y. App. Div. 1st Dep't 2016\).](#)



Surrogate's court did not abuse its discretion in computing attorneys' respective counsel fees based solely upon the \$100,000 monetary settlement received from the city because a scholarship established by the university in the decedent's memory was not an asset of the decedent's estate and had no monetary value for purposes of computing the requested counsel fees. [Matter of Ginsburg, 144 A.D.3d 1357, 41 N.Y.S.3d 598, 2016 N.Y. App. Div. LEXIS 7594 \(N.Y. App. Div. 3d Dep't 2016\).](#)

Info   
 Notes



Attorney received a three-year suspension because the attorney misused her escrow accounts to help clients shield funds from creditors and tax authorities, falsely testified at her second deposition before the Grievance Commission, submitted a fabricated ledger to the Grievance Commission, improperly advanced funds to clients, wrote checks payable to "cash," failed to maintain proper bookkeeping records, lacked remorse, and lacked significant mitigation. [Matter of Cassidy, 181 A.D.3d 51, 118 N.Y.S.3d 35, 2020 N.Y. App. Div. LEXIS 562 \(N.Y. App. Div. 1st Dep't 2020\).](#)



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## Rule 1.2. Scope of Representation and Allocation of Authority Between Client and ...

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<input type="checkbox"/> <b>3. Siegel's New York Practice s 115, § 115. Representation by Attorney</b>	2023	—
Adult natural persons may prosecute or defend an action in person, but a corporation and association may do so only through an attorney. It has been held, however, that the...  ...court or the lawyer as to when a limited scope appearance would be inappropriate, or when the		

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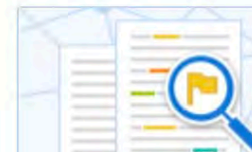
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Supreme Court, Appellate Division, Second Department, New York. • June 01, 1993 • 190 A.D.2d 214 • 598 N.Y.S.2d 302 • 90-007  
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Disciplinary proceeding was instituted against attorney by Grievance Committee for Second and Eleventh Judicial District. Special referee sustained charge of professional misconduct. Committee thereafter moved to confirm report of special referee. The Supreme Court, Appellate Division, held that knowledge that purpose purchasers had in paying client a portion of purchase price in cash was to assist his client in evading payment of required taxes in connection with the real estate transaction warrants censure.

Attorney censured.

**Headnote**

Headnote 1

Evidence supported finding that attorney violated Disciplinary Rule providing that in representing a client,

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N.Y.C.Assn.B.Comm.Prof.Jud.Eth. February 01, 1999 NYC Eth. Op. 1999-2 1999-2 1999 WL 1845730

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...proceeds is unlawful or will be used to commit an **illegal or fraudulent** act. A lawyer may continue to represent a fugitive client...

...representing a client. 1. Conduct the Lawyer Knows to be **illegal or Fraudulent**. The Code clearly prohibits a lawyer from actively contributing to...

...the client in conduct that the lawyer knows to be **illegal or fraudulent**. DR 7-102(A)(7) (emphasis added). Accordingly, if a...

...in any way that the lawyer knows will further an **illegal or fraudulent** purpose. 2. Conduct the Lawyer Believes to be **illegal or Fraudulent**. A related dilemma arises when the client's motives are unclear...

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Inquiries may be mailed to the committee at One Elk Street, Albany, New York 12207, or faxed to (518) 487-5694, or e-mailed to [ethics@nysba.org](mailto:ethics@nysba.org). Please include in all inquiries your name, mailing address, telephone and fax number.

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*NEW YORK STATE BAR ASSOCIATION*  
*Committee on Professional Ethics*

Opinion #522 - 6/9/80 (16-80)

Topic: Zealous representation; illegal or fraudulent conduct

Digest: Proper for an attorney to advise client to refuse breathalyzer test requested by police officer

Code: Canon 7; EC 7-8; DR 7-102(A)(7)

QUESTION

May a lawyer advise a client to refuse a police officer's request to submit to a breathalyzer test to determine whether the client was driving under the influence of alcohol?

But what is critical for the issue raised by the inquiry here is that New York law has established that a refusal to submit to a breathalyzer is not itself criminal conduct. A refusal invokes no criminal sanctions, and a revocation of the license constitutes a civil sanction. *Minnick v. Melton*, 53 A.D. 2d 1016, 386 N.Y.S. 2d 488 (4th Dept. 1976).

The advice an attorney gives his client must be tested ethically under Canon 7 which states that "A lawyer should represent a client zealously within the bounds of the law." DR 7-102(A)(7) prohibits a lawyer from counseling or assisting his client in conduct that the lawyer knows to be illegal or fraudulent. Inasmuch as a refusal to take a breathalyzer test is neither illegal nor fraudulent and a client who wishes to take the risk of a license revocation would be acting well within the law, a lawyer who recommends such a refusal to a client can hardly be deemed to be violating any ethical standard.

← **TOPIC: ZEALOUS REPRESENTATION; ILLEGAL OR FRAUDULENT CONDUCT**

New York State Bar Association Committee on Professional Ethics • June 9, 1980 (Approx. 3 pages)

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NY Eth. Op. 522 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 1980 WL 19221

New York State Bar Association

Committee on Professional Ethics

**TOPIC: ZEALOUS REPRESENTATION; ILLEGAL OR FRAUDULENT CONDUCT**

Opinion Number 522

June 9, 1980

DIGEST: Proper for an attorney to advise client to refuse **breathalyzer** test requested by police officer.

\*1 CODE: Canon 7; EC 7-8; DR 7-102(A)(7).

## QUESTION

→ May a lawyer advise a client to refuse a police officer's request to submit to a **breathalyzer** test to determine whether the client was driving under the influence of alcohol?

## OPINION

New York State's Vehicle and Traffic Law (§§ 1192, 1193-a and 1194) provides sanctions for the use of alcohol by one who operates a motor vehicle in the State. Section



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### *Paragraph (d): Counseling or Assisting in Unlawful or Fraudulent Conduct*

#### LAWYER MAY NOT ASSIST CLIENT IN CRIMINAL OR FRAUDULENT CONDUCT

A lawyer may not assist a client in conduct that the lawyer knows is criminal or fraudulent. See *People v. Chappell*, 927 P.2d 829 (Colo. 1996) (helping client violate child custody order, resulting in felony charges against client); *People v. Theodore*, 926 P.2d 1237 (Colo. 1996) (driving client to family home in violation of restraining order); *Att'y Grievance Comm'n v. Protokowicz*, 619 A.2d 100 (Md. 1993) (helping former client in breaking into client's wife's home, killing pet cat in microwave oven, and searching for evidentiary documents to steal for use in proceedings); *In re Hogue*, 764 N.W.2d 328 (Minn. 2009) (hiring client and supervising activity that client was barred from performing under client's criminal probation terms); *In re LaDuca*, 299 A.2d 405 (N.J. 1973) (aiding client in extorting ransom for return of stolen property); *In re Siegel*, 471 N.Y.S.2d 591 (App. Div. 1984) (corporate counsel engaging in fraudulent scheme involving unrecorded cash sales of corporate merchandise with corporation president and chair of board); *In re Feeley*, 581 S.E.2d 487 (S.C. 2003) (helping client forge checks for payment of client's bond and lawyer's fees); Mich. Informal Ethics Op. RI-298 (1997) (lawyer may not assist title company in illegal or fraudulent conduct by agreeing to be named as drafter of deed, prepared by nonlawyer title company employee whom lawyer does not supervise, which lawyer does not review before delivery and execution); N.J. Ethics Op. 710 (2006) (lawyer may not participate in scheme whereby realty buyer and seller inflate sale price of property and credit inflated increment back to buyer at closing to enhance financing fees earned by mortgage service provider); N.Y. State Ethics Op. 2082 (2016) (in-house lawyer for finance company may not provide legal services to company's customers; doing so would constitute assisting in the unauthorized practice of law, a crime). See generally Landon C. Davis III, Isaac A. McBeth & Elizabeth Southall, *A Distinction Without a Difference? An Examination of the Legal and Ethical Difference Between Asset Protection and Fraudulent Transfers Under Virginia Law*, 47 U. Rich. L. Rev. 381 (2012).

Even passive assistance, such as withholding information from a court or the government, may violate Rule 1.2. See, e.g., *People v. Casey*, 948 P.2d 1014 (Colo. 1997) (lawyer failed to inform court that client charged with trespassing was using someone else's identity); *In re Price*, 429 N.E.2d 961 (Ind. 1982) (withholding information from government to assist client in obtaining Medicaid benefits illegally); *State ex rel. Okla. Bar Ass'n v. Golden*, 201 P.3d 862 (Okla. 2008) (lawyer convicted under fec

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CONFIDENCES OF THE CLIENT

### OPINION 2010-6

# ADVISORY ETHICS OPINION 97-06

## SYNOPSIS:

Newly enacted H.70 criminalizes the refusal of a motor vehicle operator to take an evidentiary test for alcohol in specified circumstances. Counsel for such an operator may not advise the client to refuse to take the evidentiary test, but may advise the client of the legal consequences of taking or refusing the evidentiary test and any good faith argument for contesting the validity of the law.

AK Eth. Op. 84-1, 1983 WL 204255 (Alaska Bar.Assn.Eth.Comm.)

Alaska Bar Association Ethics Committee

\*1 RE: ADVICE TO DEFENDANT TO REFUSE TO SUBMIT TO A  
BREATHALYZER  
TEST

Ethics Opinion No. 84-1

Adopted: October 6, 1983

Approved: January 13, 1984

This Committee has been requested to address the question of the ethical propriety of a defense attorney advising his client not to submit to a breathalyzer test when under arrest for driving while intoxicated. This Committee concludes that such a recommendation by an attorney is improper without the addition of further advice and discussion as outlined below. An attorney, however, should present legal theories which the attorney in good faith believes might challenge the validity of the statute; advise the defendant concerning the legality of prospective conduct; explain the legal consequences and judicial response to any refusal to take a breathalyzer in light of recent court decisions; and submit his professional opinion of the scope, meaning and validity of the involved laws.

OPINION NO. 86-5  
March 10, 1986

QUESTION:

May an attorney ethically advise a client arrested for driving while intoxicated to refuse to undergo blood, breath, or urine tests?

In short, we hold that, given the language of the decision of the Supreme Court in Campbell, an attorney may not, consistent with the Rules of Professional Conduct, advise his client to refuse to submit to a blood alcohol test upon being arrested for driving while intoxicated. Cf. Davis v. Goodson, 635 S.W.2d 226 (Ark. 1982) (counsel may not advise his client to refuse to submit to a court-ordered breathalyzer test). He may, however, "discuss the legal consequences of any proposed course of conduct with a client," pursuant to ER 1.2(d), and may therefore discuss with the client the consequences of a refusal to take the test, without actually counselling refusal.

OPINION NO. 87-5  
February 17, 1987

FACTS:

The inquiring attorney requests that we reconsider our Opinion No. 86-5 in light of a new opinion of the Arizona Court of Appeals, State v. Superior Court of Pima County, Ariz. \_\_\_\_\_, \_\_\_\_\_ P.2d \_\_\_\_\_, (2 CA-CIV 5598, June 2, 1986).

QUESTION:

May an attorney ethically advise a client arrested for driving while intoxicated to refuse to undergo blood, breath or urine tests?

We accordingly conclude that an attorney may, without violating the Rules of Professional Conduct, advise a client arrested for driving while intoxicated to refuse to undergo blood, breath or urine tests. Nevertheless, the preferable course of conduct is for the attorney to fully advise the client of the consequences of refusing to undergo the tests and to permit the client to make his or her own decision.