ABA Issues Ethics Guidance on Lawyers' Duties When Clients Engage in Fraudulent or Criminal Behavior

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What are the lawyer's ethical responsibilities when the lawyer's client appears to be engaging in a fraudulent scheme or criminal behavior, and seeks the lawyer's advice or assistance in furthering that conduct?

The American Bar Association's Model Rule of Professional Conduct 1.2(d) ("Model Rule") prohibits a lawyer from advising or assisting a client in conduct the lawyer "knows" is criminal or fraudulent. The text of the Model Rule states:

> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may 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.

The Rule sounds simple enough, and plainly suggests that a lawyer must have *actual knowledge* of a client's intended or ongoing criminal or fraudulent conduct before other professional duties may be triggered, such as the lawyer refusing to act on the client's behalf or withdrawing from the representation. This reading is consistent with Model Rule 1.0(f), which states that to "know" something "denotes actual knowledge of the fact in question." Rule 1.0(f) clarifies that a lawyer's knowledge may be inferred from the circumstances.

On April 29, 2020, the ABA Standing Committee on Ethics and Professional Responsibility ("Ethics Committee") issued Formal Opinion 491 ("Formal Opinion") to provide additional guidance on this topic.[1]

The Ethics Committee recognized that the Model Rule's requirement of *actual knowledge* of a client's intended or ongoing criminal or fraudulent conduct could be viewed as

[1] The Formal Opinion expressly applies only to transactional matters, and not to litigation. The opinion does not explain why the guidance was not intended to apply more broadly to litigation matters, or what other analysis might apply in that context. However, by its terms, Model Rule 1.2(d) is not limited to transactional matters. Indeed, Comment [12] to Model Rule 1.2(d) specifically notes that the Rule "does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise."

an invitation to a lawyer to turn a blind eye toward the client's improper conduct. As the United States Supreme Court recently discussed, actual knowledge means "exactly what it says." *Intel Corp. Investment Policy Committee v. Sulyma*, 140 S. Ct. 768 (2020) (construing an ERISA provision found at 29 U.S.C. §1113(2)). "[T]o have 'actual knowledge' of a piece of information, one must in fact be aware of it." *Id.* at 776. At common law, the Supreme Court explained:

> Legal dictionaries give "actual knowledge" the same meaning: "[r]eal knowledge as distinguished from presumed knowledge or knowledge imputed to one." Ballentine's Law Dictionary 24 (3d ed. 1969); accord, Black's Law Dictionary 1043 (11th ed. 2019) (defining "actual knowledge" as "[d]irect and clear knowledge, as distinguished from constructive knowledge"). *Id.*

The Court noted that, in contrast, "the law will sometimes impute knowledge—often called "constructive" knowledge—to a person who fails to learn something that a reasonably diligent person would have learned." *Id.*

What, then, does the Rule require of practitioners? May a lawyer ignore troublesome facts to avoid acquiring actual knowledge of a client's intended criminal or fraudulent scheme?

The Formal Opinion explains that where a lawyer has actual knowledge of a client's intended criminal or fraudulent conduct, the lawyer's responsibility is clear under the Model Rules: the lawyer must not provide legal advice in furtherance of the improper conduct, and may be required to withdraw from the representation. Where facts already known to the lawyer are so strong as to constitute actual knowledge of criminal or fraudulent activity, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. A lawyer "must be satisfied, on the facts before him and readily available to him, that he can perform the requested services without abetting fraudulent or criminal conduct[.]" ABA Informal Op. 1470 (1981).

Going further, the Ethics Committee explained that if the "facts before the lawyer indicate a *high probability* that a client seeks to use the lawyer's services for criminal or fraudulent, activity," then the lawyer is obligated to inquire further, to ensure that the representation will not aid the client in engaging in criminal or fraudulent conduct. Formal Op. at 4. The opinion thus equates "willful blindness" with "actual knowledge." *Id.* at 6. A lawyer may not willfully ignore facts that trigger the obligation to make further inquiry. If further inquiry is necessary to make a determination about the client's intended conduct, the lawyer may need to ask the client whether there is some misapprehension regarding the relevant facts. After further consultation, if there is no misunderstanding and the client persists, the lawyer must withdraw from representation pursuant to Rule 1.16. What constitutes suspicion sufficient to trigger further inquiry will depend on the circumstances. *Id.* at 5.[2] A determination that there is no need for further inquiry, on the other hand, will depend largely on the background facts, including the lawyer's familiarity with the client or the jurisdiction where the legal work is to be performed.

The Formal Opinion also notes that Model Rules other than Rule 1.2(d) may trigger an obligation on the part of the lawyer to make further inquiry of his or her client. The rules concerning duties of competence, diligence, communication, honesty and withdrawal may also oblige the lawyer to inquire further of the client to understand the client's objectives and intent. Additionally, other ethics guidance, such as ABA Formal Opinion 463, address a lawyer's "gate-keeping" function, and the potential need for further investigation. Formal Opinion 463 concerned the lawyer's duties to protect the international finance system from criminal activity

[2] The ABA Ethics Committee acknowledged the "tension between the 'actual knowledge' standard of the Model Rule, on the one hand, and … [some state] authorities applying a "reasonably should know standard." *Id.* at 5, fn. 22. The Ethics Committee explained that its Formal Opinion should only be read to prohibit "willful blindness" to the facts before the lawyer. *Id.* Practitioners must be guided by their respective jurisdiction's Rules of Professional Conduct, if those Rules, or applicable opinions of the courts in that jurisdiction, differ from the Model Rules.

constituting money laundering and terrorist financing. One can imagine other circumstances where, either under a lawyer's gate-keeping function under Formal Opinion 463 or the requirements of Formal Opinion 491, further factual inquiry of a client might be warranted. These could include circumstances where, for example, a lawyer becomes aware of facts suggesting that the client intends to make a fraudulent insurance claim (a fraudulent COVID-19 insurance claim could be a current concern).[3]

Other examples cited in the Formal Opinion include circumstances where:

- A prospective client has significant business interests abroad, and has received substantial payments from sources other than his employer. Those funds are held outside the US, but client wants to bring them to the US through a transaction that minimizes tax liability. The client tells you a) that he is employed outside of the US, but does not say how, b) the money is in a foreign bank, but the client will not identify the bank, c) client has not disclosed the payments to his employer or anyone else, and has not included the amounts on his US tax return.
- A prospective client says he is an agent for a minister or other government official from a "high risk" jurisdiction and wants to buy a piece of property on behalf of an anonymous party. The client wants the property to be owned by undisclosed beneficial owners, and the source of the funds is vague or questionable.

The Ethics Committee also explained that a lawyer should not be subject to discipline where, under the circumstances, and under the facts available to the lawyer, the lawyer's judgment was reasonable at the time. As long as the lawyer conducts a reasonable inquiry, where necessary pursuant to the Formal Opinion, the lawyer has performed his or her duty under the Model Rule 1.2(d), "even if some doubt remains." *Id.* at 10. Of course, the corollary is that the lawyer may be required to decline the representation or withdraw where the Model Rule

[3] A recent disciplinary proceeding in New York provides a good example of the need for further inquiry when the facts demand it. *In the Matter of Robert L. Rimberg*, No. 2017-06111 (2d Dept. NY App. Div., June 3, 2020), the New York Grievance Committee issued an Opinion and Order suspending a lawyer from practice for three years, after a client came to his office with $1 million in cash, told the lawyer that the money was "clean," and asked the lawyer to distribute the money to various accounts. The lawyer later testified that he "didn't feel good about it" but proceeded to assist the client nonetheless. Later, the money was determined to have been "drug money." The Grievance Committee quoted the judge who sentenced the lawyer for illegal activity that the lawyer "should have known that the money was from an illegal source" because "people usually don't walk into an office with a million dollars in cash." *Id.* at 3.

requires further inquiry and "the client or prospective client refuses to provide information necessary to assess the legality of the proposed transaction[.]" *Id.* at 13. Lawyers who receive indications that the client may be involved in planning or perpetrating a fraud or criminal conduct using the lawyer's services should conduct further inquiry and, where necessary, secure the advice of ethics counsel.

Although the Formal Opinion is expressly limited to transactional matters, the Model Rule applies to both transactional and litigation matters. Thus, civil litigators should consider how the guidance provided in the Formal Opinion could assist in ensuring compliance with the Model Rule and other Rules of Professional Conduct applicable to civil litigation. For example, Model Rule 3.3 (Candor Toward the Tribunal) provides:

> (a) A lawyer shall not knowingly:
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> * * * *
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> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
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> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Under Rule 3.3 a lawyer is prohibited from "knowingly" offering evidence that the lawyer "knows" to be false, and may not represent a client in an adjudicative proceeding where the lawyer "knows" that the client intends to or is engaged or has engaged in criminal or fraudulent conduct relating to the proceeding. That is, the lawyer may not turn a blind eye toward the client's conduct in adjudicative proceedings, and may be required to make reasonable

inquiries of the client where there is a *high probability* that the client intends to offer false testimony or otherwise use the proceedings to further criminal or fraudulent conduct.

Additionally, litigators, and especially white collar criminal defense litigators, must be sensitive to the possibility that their attorney's fees derive from the client's fraudulent or criminal activity. In federal criminal cases, for example, the Department of Justice may seek forfeiture of attorney's fees where there are reasonable grounds to believe that the lawyer had "actual knowledge" that the funds were subject to forfeiture at the time of transfer. The existence of "actual knowledge" is "determined on a case-by-case basis, taking into consideration all of the relevant evidence." USAM § 9-120.109.[4]

The Formal Opinion drives home the importance of remaining vigilant to situations where clients may be engaging in fraudulent or criminal conduct, and the duty to avoid assisting in such conduct.

[4] *See also United States v. McGorkle*, 321 F.3d 1292 (11th Cir. 2003) (ordering the forfeiture of $2 million in legal fees collected by F. Lee Bailey which resulted from an illegal money laundering scheme).