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Ignorance is Bliss – Unless Your Client Engages in Potential Crime or Fraud1

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One of the things that can keep a lawyer up at night is the nagging concern over the often-ambiguous line between legitimately advising a client regarding whether a law pertains to that client or inadvertently facilitating a crime by advising a client on how to favorably interpret a law. Of course, sometimes that line is clear and attorneys still recklessly step over it. Take, for instance, the many New York attorneys that were caught in the 60 Minutes sting reporting of 2016, wherein they appeared all-too-willing to advise on a proposed (bogus) money-laundering scheme. Unfortunately, regarding the broad activities of many corporate clients, it is a line that may not always be clear. Consider the boundaries that should be considered whenever a potential wants legal advice to create a business involving the sale of cannabis. In a recent ABA opinion, the ABA now seeks to help define that line.

On April 29, 2020, the ABA's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 491 titled "Obligations Under Rule 1.2(d) to Avoid Counseling or Assisting in a Crime or Fraud in Non-Litigation Settings." Model Rule 1.2 prohibits a lawyer from advising or assisting a client in conduct the lawyer "knows" is criminal or fraudulent. While Model Rule 1.2(d) plainly bars a lawyer from advising or assisting with conduct the lawyer *actually knows* is criminal or fraudulent, Formal Opinion 491 interprets the rule to also impose a duty to inquire when there are facts before the lawyer indicating a "high probability that a client seeks to use the lawyer's service for criminal or fraudulent activity." Indeed, the available case law sanctioning lawyers for acting in such a way, traditionally, is that of the "how can the lawyer be so dumb" variety, rather than more nuanced conduct. *See, e.g.*, In re Bloom 745 P2d 61 (Cal. 1987) (lawyer disbarred for aiding client in transporting plastic explosives to Libya notwithstanding lawyer's alleged good-faith belief the transport of the explosives was authorized by the National Security Council). While the opinion requires inquiry when there is a "high probability" of criminal or fraudulent activity, it also suggests that the standard may be more subjective and fact intensive. Specifically, the opinion goes on to cite older authority indicating that there is a duty to inquire when the facts "suggest" or "appear" to indicate criminal or fraudulent activity. In evaluating the client's potential motives, a sufficient inquiry may require the lawyer to consider not just the information the client is willing to share, but also information from other sources if they can do so without improperly disclosing confidential information. The opinion ultimately concludes that "what constitutes a suspicion sufficient to trigger an inquiry will depend on the circumstances" and that a lawyer cannot act in "willful blindness or conscious avoidance of facts" suggesting that the client's conduct is criminal or fraudulent.

For those lawyers whose client is a corporation, the obligation to inquire into potentially criminal or fraudulent activity of the client also intersects with the rules on representing an organization. Because a lawyer "represents the organization acting through its duly authorized constituents," the lawyer often has to inquire about the authority for and actions of the organization's constituents. Rule 1.13(a). If a lawyer learns that a constituent's conduct may violate a legal obligation that the constituent owes to the organization, the lawyer "shall proceed as is reasonably necessary in the best interests of the organization." Rule 1.13(b). Determining what is "reasonably necessary" and "in the best interest of the organization" will often require the type of further inquiry that the Opinion requires in other circumstances. *See, e.g., Hays v. Page Perry, LLC*, 92 F.Supp.3d 1315 (N.D. Ga. 2015), aff'd 627 Fed.Appx. 892 (11th Cir. 2015) (holding that a law firm that advised an investment services company had no duty to report the principal owner/manager's possible fraud to the SEC).

The lawyer's ethical obligations to inquire into a client's potentially criminal or fraudulent conduct also intersects with the lawyer's potential legal liability. For example, the Sarbanes-Oxley Act creates a legal duty for a chief legal officer to conduct investigations into a possible violation. Even more broadly, the Department of Justice's "Principles of Federal Prosecution of Business Organizations" ("Principals of Federal Prosecution") specifically acknowledge that corporate directors and officers (which can include its general counsel) owe a fiduciary duty to a corporation's shareholders and a duty of honest dealing to the investing public and consumers in connection with the corporation's regulatory filings and public statements. § 9-28.100. Based on those obligations, the DOJ has emphasized that any corporate resolution of misconduct must also include an assessment of the responsibility of individuals within the corporation, "particularly if it relates to high-level corporate officers." §9-28.210. The DOJ has not been shy about including lawyers as part of this assessment.

Based both on the ethical obligation to not assist a client in committing a crime and the fiduciary duty to protect an organizational client, lawyers need to be cognizant of the benefits (and perhaps obligation) of conducting a thorough internal investigation when facts surface suggesting potentially illegal conduct by a client. In considering the legal liability of an organization (and presumably, the organization's lawyer), the Principles of Federal Prosecution instruct prosecutors to consider the existence of an corporate compliance program and the effectiveness of the program. § 9-29.300. One element of an effective compliance program is undertaking internal investigations when the facts warrant doing so. In evaluating that internal investigation, the DOJ will assess whether the investigation was properly scoped; whether the investigation was objective and conducted by a well-qualified individual; and how the entity responds to the results of the investigation (which may include providing information to the government).

In light of the DOJ's guidance, the internal investigation may not only protect against adverse ethics findings, but may also have tangible benefit when the lawyer is faced with potential legal exposure either of him/herself or the business organization. The undertaking of an internal investigation can demonstrate both an attempt to meet with ethical obligation of inquiring into a client's potentially criminal or fraudulent conduct, but also satisfy all stakeholders and constituencies (the public and media as well in some cases) that it deserves the corporate status it has been awarded.