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Must Lawyers Now Affirmatively Challenge Their Clients? — New ABA Guidance

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The Lawyer's Obligation to Avoid Counselling or Assisting in a Crime or Fraud: ABA Formal Opinion 491 and Beyond

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I. Text of The Relevant Rules

a. A Lawyer's Knowledge

1. Model Rule 1.2(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.

2. Model Rule 3.3: (a) A lawyer shall not knowingly:
   (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
   (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
   (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.

   (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.
   (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
   (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

b. A Lawyer's Duties of Competence, Diligence, Communication, and Honesty

1. Model Rule 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

2. Model Rule 1.3: A lawyer shall act with reasonable diligence and promptness in representing a client.

3. Model Rule 1.4: (a) A lawyer shall:
   (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
   (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
   (3) keep the client reasonably informed about the status of the matter;
   (4) promptly comply with reasonable requests for information; and
   (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
   (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

4. Model Rule 1.13: (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
   (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
   (c) Except as provided in paragraph (d), if
      (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
      (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent

the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

5. Model Rule 1.16: (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

   (1) the representation will result in violation of the rules of professional conduct or other law;

   (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

   (3) the lawyer is discharged.

   (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

   (1) withdrawal can be accomplished without material adverse effect on the interests of the client;

   (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

   (3) the client has used the lawyer's services to perpetrate a crime or fraud;

   (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

   (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(7) other good cause for withdrawal exists.
(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

6. Model Rule 8.4: It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

II. ABA Formal Opinion 491

1. On April 29, 2020, the ABA issued Formal Opinion 491 (“Opinion 491”), which confirmed a lawyer’s affirmative duty to inquire into facts or circumstances when there is a high probability that a client intends to use the lawyer’s services for criminal or fraudulent activity. By its terms Opinion 491 does not apply to litigation matters.

2. Opinion 491 outlines the bases for the duty to inquire:

i. The duty to inquire is rooted in Rule 1.2(d), which prohibits a lawyer from counseling a client to engage in or assisting the client to engage in activity which the lawyer ***knows*** to be criminal or fraudulent.

    1. Knowledge can refer to actual knowledge.

    2. But knowledge can also be inferred from the circumstances, and a lawyer cannot ignore the obvious.

    3. Rule 1.2(d) is generally understood to apply to *prospective clients* as well.

ii. The duty to inquire is seemingly consistent with past ethics opinions.

    1. ABA Informal Opinion 1470 stated that "a lawyer should not undertake representation in disregard of facts suggesting that the representation might aid the client in perpetrating a fraud or otherwise committing a crime . . . . A lawyer cannot escape responsibility by avoiding inquiry. 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 Comm. on Ethics & Prof'l Responsibility, Informal Op. 1470 (1981).

    2. Legal Ethics Committee of the Indiana State Bar Association Opinion 2 concluded that "[a] lawyer should not undertake representation without making further inquiry if the facts presented by a prospective client suggest that the representation might aid the client in perpetrating a fraud or otherwise committing a crime." Ind. State Bar Ass'n Comm. on Legal Ethics, Op. 2, at 4 (2001).

    3. New York City Bar Association Ethics Opinion 2018-4 found a duty to inquire where the lawyer is "retained to assist an individual client in a transaction that appears to the lawyer to be suspicious." The opinion also noted that failing to inquire could be considered conscious avoidance when "the lawyer is aware of serious questions about the legality of the transaction and renders assistance without considering readily available facts that would have confirmed the wrongfulness of the transaction." N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4, at 2-3 (2018).

iii. The duty to inquire has been recognized by some courts.

    1. In *In re Dobson*, the court held the lawyer to a "knew or should have known" standard in finding that "respondent deliberately evaded knowledge of facts which tended to implicate him in a

fraudulent scheme. This Court will not countenance the conscious avoidance of one's ethical duties as an attorney." 427 S.E.2d 166, 427 (S.C. 1993).

iv. Criminal law treats willful blindness the same as actual knowledge. *Global-Tech Appliances, Inc. v. SEB USA*, 563 U.S. 754, 767 (2011).

v. The duty to inquire seems implicit in other rules of professional conduct as well.

1. Rule 8.4 prohibits a lawyer from committing certain criminal acts and from engaging in conduct involving "dishonesty, fraud, deceit, or misrepresentation." Thus, where a law ascribes culpability to a lawyer even without his actual knowledge, a lawyer must inquire further before proceeding to provide legal services.

2. Rule 1.1 requires competent representation, which in turn "requires inquiry into and analysis of the factual and legal elements of the problem." Comment [5] of Rule 1.1.

3. Rule 1.3 states that a lawyer must obtain the relevant facts and determine the relevant law in an appropriately timely and thorough manner.[1]

4. Rule 1.4 requires a lawyer to provide sufficient explanations for a client to make an informed decision regarding his legal representation, and the Rule also requires that the lawyer consult with his client regarding limitations on the lawyer's conduct. In order to do so, the lawyer may need to investigate the relevant facts and law.

[1] Although not mentioned in the opinion, some literature suggests that, particularly in criminal cases, defense counsel may not wish to obtain all of the facts concerning a client's conduct. *See, e.g.,* Lisa G. Lerman, Philip G. Schrag and Robert Rubinson, *Ethical Problems in the Practice of Law* (5th Ed. Feb. 2020), "Truth and Falsity in Litigation," p. 633 ("Lawyers usually think that they cannot responsibly represent clients without learning as much as possible about their cases. But sometimes, particularly in criminal defense work, lawyers avoid learning all of the facts. Many criminal defense lawyers, for example do not ask their clients whether they committed the crimes of which they are accused. They reason that after a client admits that he committed a robbery, they could not allow that client to testify that he was somewhere else at the time." (footnote omitted); Stephen Ellman, "Truth and Consequences, 69 *Fordham L Rev*. 895, 907 ("Is there any downside to the lawyer's complete knowledge of the facts? Not if that knowledge imposes no constraints on the lawyer's freedom of action. For example, American lawyers take for granted that a lawyer may represent a criminal defendant who pleads 'not guilty' and vigorously defend the case, even if the lawyer knows - from the client's own admissions and the lawyer's corroborating investigation - that the client is guilty as charged. The lawyer remains free to contest the charges no matter how fully she has become convinced of their validity. … In many other circumstances, however, it is conceivable that the lawyer might know too much.").

5. Rule 1.13 requires a lawyer representing an entity and who learns that a person associated with the entity is engaging in or plans to engage in conduct that could injure the entity to "proceed as is reasonably necessary in the best interests of the organization." Proceeding in such a way may require additional factual investigation.

vi. The duty to inquire in transactional matters seemingly complements existing ABA guidance and opinions regarding a lawyer's role in preventing money laundering and terrorist financing.

1. *ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing*: This guidance from 2010 was issued to "assist members of the legal profession in the United States in designing and implementing effective risk-based approaches consistent with the broad contours of the [Financial Action Task Force's] Lawyer Guidance" and advocates for a risk-based approach to preventing money laundering and terrorist financing while also providing various practice pointers.

2. *ABA Formal Opinion 463*: This opinion examines a lawyer's ethical obligations under the rules of professional conduct and considers how these obligations interplay with efforts to identify and combat money laundering. The opinion concludes that the guidance described above is consistent with lawyers' duties under the Model Rules of Professional Conduct. The opinion also analyzes the concept of a lawyer as a gatekeeper to the financial system.

vii. Finally, Opinion 491 states that when a lawyer's judgment is reasonable at the time and in light of all circumstances presented, he should not be subject to discipline, even if that course of action turns out to be wrong in hindsight.

3. Opinion 491 also highlights duties incident to the duty to inquire.

i. Should a client refuse to cooperate with a lawyer's inquiries, the lawyer should explain to the client that the lawyer cannot proceed with the representation without such an inquiry. Continued refusal to provide the necessary information to the lawyer will require the lawyer to decline or withdraw from the representation.

ii. If a client cooperates with the lawyer's inquiries and the lawyer concludes that the client intends to use the lawyer's services to assist fraud or

criminal activity, the lawyer must discuss the matter further with the client, decline the representation, or withdraw from the representation.

iii. If information from sources other than the client is needed, a lawyer should obtain that information if he is able to do so without disclosing information protected by Rules 1.6 and 1.18. If, however, the lawyer would need to disclose information protected by these rules, the lawyer must seek the client's consent. If the client will not agree, the lawyer must terminate or decline the representation.

iv. If the client will not pay any expenses necessary for the lawyer to carry out his duty to inquire, the lawyer may terminate or decline the representation.

v. If the lawyer fulfills his duty to inquire, the lawyer can typically credit an otherwise trustworthy client.

vi. Scope of representation limitations must comport with all of a lawyer's ethical duties and with applicable law.

4. Finally, Opinion 491 includes hypotheticals to illustrate situations in which a lawyer may have a duty to inquire further.

    i. Scenarios in which there is a duty to inquire further:

        1. A prospective client has significant business connections and interests abroad. The client has received substantial payments from sources other than his employer. The client holds these funds outside the U.S. and wants to bring them into the U.S. through a transaction that minimizes U.S. tax liability. The client says: (i) he is "employed" outside the U.S. but will not say how; (ii) the money is in a "foreign bank" in the name of a foreign corporation but the client will not identify the bank or the corporation; (iii) he has not disclosed the payments to his employer or any governmental authority or to anyone else; and (iv) he has not included the amounts in his U.S. income tax returns.

        2. A prospective client tells a lawyer he is an agent for a minister or other government official from a "high risk" jurisdiction who wishes to remain anonymous and would like to purchase an expensive property in the United States. The property would be owned through corporations that have undisclosed beneficial owners. The prospective client says that large amounts of money will be involved in the purchase but is vague about the source of the funds, or the funds appear to come from "questionable" sources.

ii. Scenarios where contextual factors determine whether there is a duty to inquire further:

1. A general practitioner in rural North Dakota receives a call from a long-term client asking her to form a limited liability company for the purpose of buying a ranch.

2. The general practitioner in rural North Dakota receives a call from a new and unknown prospective client saying that the client just won several million dollars in Las Vegas and needs the lawyer to form a limited liability company to buy a ranch.

3. A prospective client in New York City asks a general practitioner in a mid-size town in rural Georgia to provide legal services for the acquisition of several farms in rural Georgia. The prospective client tells the lawyer that he has made a lot of money in hedge funds and now wants to diversify his investments by purchasing these farms but says he doesn't want his purchases to cause a wave of land speculation and artificially inflate local prices. He wants to wire money into the law firm's trust account over time for the purchases. He asks the lawyer to create a series of LLCs to make strategic (and apparently unrelated) acquisitions.

III. To Whom Does ABA Formal Opinion 491 Apply?

1. *Transactional lawyers'* conduct is guided by Rule 1.2(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.").

i. Here, "knowledge" means actual knowledge, which may also be inferred from the circumstances.

ii. The actual knowledge standard has been endorsed in other contexts. *See U.S. v. Parse*, 789 F. 3d 83, 118 (2d Cir. 2015) (finding that attorneys' failure to ask further questions to confirm their suspicion that a juror had lied during voir dire "did not provide an appropriate basis for the court's finding that [the attorneys] did in fact know the truth").

iii. However, particularly in light of ABA Formal Opinion 491, it appears that the profession is moving towards a definition of knowledge that requires a transactional lawyer to investigate red flags.

2. *Litigators'* conduct is guided by Rule 3.3(a) ("A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(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.").

    i. For a general understanding of the "knowledge" element in the context of litigation, *see generally* Restatement (Third) of the Law Governing Lawyers § 120, which states that in the context of offering testimony and evidence in litigation, "[a] lawyer may not knowingly counsel or assist a witness to testify falsely or otherwise to offer false evidence; knowingly make a false statement of fact to the tribunal; [or] offer testimony or other evidence as to an issue of fact known by the lawyer to be false." Comment (c) to § 120 clarifies that "[a]ctual knowledge does not include unknown information, even if a reasonable lawyer would have discovered it through inquiry"). *See also United States v. Del Carpio-Cotrina*, 733 F. Supp. 95, 99 n.9 (S.D. Fla. 1990) (in the context of a criminal case where the client had jumped bond and would not appear to stand trial, court noted that "we do not believe that the ethical rules, as written, require a lawyer to take affirmative steps to discover client fraud or future crimes. Independently, the Court is of the view that imposing a duty to investigate the client would be incompatible with the fiduciary nature of the attorney-client relationship"); *Brown v. Commonwealth*, 226 S.W.3d 74, 82 (Sup. Ct. Ky. 2007) (remanding criminal case for a new trial because defendant was deprived of his right to assistance of counsel and citing favorably to a case in which the court rejected defendant's ineffective assistance of counsel claim and stated that "[t]he lawyer may act on the information he or she possesses, as we decline to impose an independent duty on the part of counsel to investigate because such a duty would be 'incompatible with the fiduciary nature of the attorney-client relationship,' [internal citation omitted] and is unnecessary when an attorney relies, in significant part, on incriminating admissions made by the client").

    ii. Litigators can be subject to both criminal and disciplinary proceedings for offering evidence they know to be false. *See Matter of Janoff*, 242 A.D.2d 27, 30 (1st Dept. 1998) ("Having knowingly submitted false and misleading bills of particulars, failed to correct false deposition testimony and acquiesced in the filing of false medical reports in order to obtain

favorable settlements, respondent violated numerous provisions of the Disciplinary Rules.").

iii. Litigators can also be disciplined for failing to correct testimony they knew to be false. In *Matter of Meltzer*, 136 A.D.3d 14 (1st Dept. 2015), a criminal defense attorney was disbarred on consent where a defense witness had, among other things, testified that he and the attorney had not met the night before the witness's testimony, when in fact they had. Appellate Division disbarred the attorney for, among other misconduct, failing to correct the record "though he knew it was false at the time."

iv. An important question in the wake of ABA Formal Opinion 491 is whether litigators will also be subject to a duty to inquire. Importing the understanding of "knowledge" from Opinion 491 into the litigation context would have many applications, including for lawyers preparing evidence and testimony as well as those conducting investigations or employing third parties to do so.

IV. Practical Application: Money Laundering and Terrorist Financing

1. ABA Formal Opinion 491 is not the first to consider the potential for a lawyer to become unwittingly involved in an unscrupulous client's criminal activity. ABA Formal Opinion 463 examines a lawyer's ethical duties through the lens of the detection and prevention of money laundering, the practice of concealing the true nature or source of illegally-derived property by conducting one or more transactions or bank transfers. U.S. law puts onerous requirements on certain financial institutions to implement controls that seek to detect and prevent money laundering, but it does not impose a similar requirement on lawyers.

    i. The opinion finds that the model rules do not require a lawyer to take on the role of gatekeeper; in fact, the model rules do not even permit a lawyer to make the type of reports to the government that a lawyer-as-gatekeeper model would require.

    ii. But, the opinion states that undertaking client due diligence is appropriate in order to ensure that the lawyer is not facilitating or participating in criminal or fraudulent activity.

    iii. The opinion cites ABA Informal Opinion 1470 favorably, reminding the reader that lawyers may have a duty to conduct further factual inquiry pursuant to the lawyer's ethical obligation to act competently.

    iv. The opinion reminds lawyers that they are also subject to federal law prohibiting aiding, abetting, or violating money laundering laws. Although lawyers are not subject to anti-money laundering requirements, like

anyone else they can be guilty of actually laundering money, or conspiring to do so.

v. The opinion notes that Rule 1.16 permits a lawyer to terminate representation even where the lawyer does not have actual knowledge of a client's criminal activities, but instead has reason to believe that the client is engaging or plans to engage in criminal or fraudulent activities.

2. In 2010, the ABA put forth the *ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing*, which advocates for using a risk-based approach to avoid facilitating or assisting clients with money laundering and terrorist financing. The guidance examines several tools for doing so:

    i. Client due diligence: The guidance suggests that lawyers should perform client due diligence sufficient to allow the lawyer to have a reasonable belief that he knows the true identity of his client and of the nature of the service he will be providing. The amount and timing of due diligence that is appropriate depends on the risk profile of the client.

    ii. Covered activities: The guidance covers certain activities commonly performed by transactional lawyers, including buying and selling real estate; managing of client money, securities, or other assets; management of bank, savings, or securities accounts; organization of contributions for the creation, operation, or management of companies; and creation, operation, or management of legal persons or arrangements, and buying and selling of business entities.

    iii. Risk categories: The guidance identifies and describes three categories of risk that a lawyer should bear in mind when assessing a legal engagement: country/geographic risk, client risk, and service risk.

    iv. Risk variables: The guidance acknowledges that many factors can impact the amount of money laundering or terrorist financing risk present in a given situation, and the amount of risk can be situation-dependent. The amount of client due diligence undertaken should thus be proportional to the degree of risk present. Factors which might influence the amount of risk in a given situation include the nature of the client relationship, whether there are existing regulations in place, the client's reputation and publicly-available information about it, duration of the relationship, lawyer's familiarity with the country and/or laws, acting as local counsel, geographic disparity between the lawyer and client, whether it is a one-off transaction, use of technological developments fostering anonymity, origin of the client

relationship or referral, the structure of the transaction, and the involvement of a lower-risk pension fund.

v. Controls: The guidance notes that should a lawyer determine that his client or the transaction is higher risk, he should put appropriate controls in place. These controls include training for lawyers and staff, targeted training for lawyers exposed to the higher risk, enhanced client due diligence, peer and managerial oversight, an evolving evaluation of services being provided, and ongoing evaluation of clients.

vi. Client intake and assessment: The guidance notes the importance of a lawyer making an overall risk assessment of each client, which then dictates the appropriate approach for client due diligence. Client due diligence upon intake may include reviewing the client's basic identification information, conducting an OFAC scan, identifying the client's beneficial owner, obtaining information about the purpose and intended nature of the attorney-client relationship, and conducting ongoing due diligence as appropriate. Reduced due diligence may be appropriate where the client is a public company, a financial institution subject to an anti-money laundering/counter-terrorist financing regime, or a government authority. Enhanced due diligence may be appropriate when the client is deemed to be higher risk, based on the criteria described above.

3. In 2016, the Financial Action Task Force ("FATF") released a report assessing the country's anti-money laundering and counter-terrorist financing measures. The report concluded that the U.S. had a "well developed and robust" framework but also took the U.S. to task for what FATF deemed "significant gaps" in the framework as it pertains to certain "designated non-financial businesses and professions"—a group which includes lawyers. One potentially earth-shaking question for the legal profession that arises from this report is whether, in order to address these gaps, the U.S. should amend the Bank Secrecy Act (the primary federal anti-money laundering law) to cover certain activities of lawyers.

    i. The report's conclusion highlights a vulnerability for money laundering and terrorist financing in the U.S.: the role of (often unwitting) lawyers in legal services such as the creation of anonymous shell companies, movement of untraceable funds, and participation in high-end real estate transactions.

        1. For example, in 2016, *60 Minutes* broadcast a report of an investigation by nonprofit organization Global Witness, which sent an undercover investigator into 13 New York City law firms. The investigator purported to represent an unnamed African government official seeking to move millions of dollars into the

U.S. in order to purchase several big-ticket items. The investigator also told the lawyers that the transactions needed to be done in a way which did not reveal the government official's identity, because the money came from foreign companies that had paid for help in securing mineral rights—red flags that the funds came from official corruption.

a. Only one lawyer flatly refused to consider the engagement.

b. The other lawyers reacted with varying levels of discernment to a variety of red flags, including the huge size of the transactions on behalf of a government minister, the use of terms like "facilitation money" and "honest graft," the insistence on concealing the minister's identity, and the refusal to name the African country. Several of the lawyers suggested multiple ways to conduct transactions that would have the intended effect of concealing the origin and true owner of the property. Because the investigation did not last past the initial meeting, no lawyer actually agreed to transfer purported ill-gotten gains, and none was formally retained. Notwithstanding those facts, two lawyers were publicly censured, on consent, for their actions in connection with the Global Witness initial meeting.

i. *Matter of Koplik*: lawyer was publicly censured "because he counseled a client to engage in conduct he knew was illegal or fraudulent and suggested to the client that lawyers in the United States can act with impunity." 168 A.D.3d 163 (1st Dept. 2019).

ii. *Matter of Jankoff*: lawyer was publicly censured "because he counseled a client to engage in conduct he knew was illegal or fraudulent and misrepresented his personal experience and knowledge during a meeting with the client." 165 A.D.3d 58 (1st Dept. 2018).

2. Of course, lawyers are subject to some portions of the Bank Secrecy Act and its regulations, including the requirement to report cash payments over $10,000 and to comply with targeted financial sanctions requirements, and lawyers are also subject to criminal laws preventing them from actually or conspiring to launder money.

3. But the FATF report calls for lawyers to be subject to more strenuous anti-money laundering requirements, including those

relating to customer due diligence, discernment of beneficial ownership, suspicious transaction reporting requirements, and regulatory oversight.

a. Currently, lawyers are not subject to enhanced client due diligence when dealing with high risk clients, like the fictitious African government official from the *60 Minutes* investigation.

b. Lawyers likewise are not required to obtain beneficial ownership information, even in transactions involving anonymous shell corporations.

i. Law firm escrow accounts often house the funds used in these transactions, but the escrow accounts reflect only the name of the lawyers or law firm.

c. Lawyers may voluntarily file suspicious activity reports, but they are under no legal requirement to do so.

4. Requiring lawyers to essentially act as gatekeepers raises ethical questions for lawyers, including how to balance the attorney-client privilege. Any regulation in this space would therefore need to be properly tailored and would require adequate carveouts to protect privileged and confidential information.

4. In 2013, the FATF published a report called Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals.

i. The report identified certain legal services which were particularly vulnerable to misuse in money laundering or terrorist financing schemes, including client accounts administered by legal professionals, real estate transactions, creations of trusts and companies, management of trusts and companies, creation and management of charities, estate administration, insolvency services, tax advice, preparing powers of attorney, and litigation where the underlying dispute is a sham or involves the proceeds of a crime.

ii. The report found that preventing lawyers from becoming involving in money laundering and terrorist financing depends on the lawyers:

1. Identifying and appropriately responding to red flags.

a. The report identifies 42 red flags, including that the client is overly secretive about who the client or beneficial owner is; the parties to the transaction are connected without an

apparent business reason; the client uses multiple bank accounts or foreign bank accounts without good reason; the client has changed lawyers multiple times in a short amount of time without reason; and that there is an absence of documentation to support the client's story, previous transactions, or company activities.

2. Choosing to abide by their ethical duties and rules of professional conduct.

3. Distinguishing between clients seeking legal services for legitimate purposes and clients seeking legal services in an attempt to conduct criminal activity or thwart law enforcement.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 491 **April 29, 2020**

Obligations Under Rule 1.2(d) to Avoid Counseling or Assisting in a Crime or Fraud in Non-Litigation Settings

Model Rule 1.2(d) prohibits a lawyer from advising or assisting a client in conduct the lawyer "knows" is criminal or fraudulent. That knowledge may be inferred from the circumstances, including a lawyer's willful blindness to or conscious avoidance of facts. Accordingly, where facts known to the lawyer establish a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity, the lawyer has a duty to inquire further to avoid advising or assisting such activity. Even if information learned in the course of a preliminary interview or during a representation is insufficient to establish "knowledge" under Rule 1.2(d), other rules may require the lawyer to inquire further in order to help the client avoid crime or fraud, to avoid professional misconduct, and to advance the client's legitimate interests. These include the duties of competence, diligence, communication, and honesty under Rules 1.1, 1.3, 1.4, 1.13, 1.16, and 8.4. If the client or prospective client refuses to provide information necessary to assess the legality of the proposed transaction, the lawyer must ordinarily decline the representation or withdraw under Rule 1.16. A lawyer's reasonable evaluation after inquiry and based on information reasonably available at the time does not violate the rules. This opinion does not address the application of these rules in the representation of a client or prospective client who requests legal services in connection with litigation.[1]

I. Introduction

In the wake of media reports,[2] disciplinary proceedings,[3] criminal prosecutions,[4] and reports on international counter-terrorism enforcement and efforts to combat money-laundering, the legal profession has become increasingly alert to the risk that a client or prospective client[5] might try to retain a lawyer for a transaction or other non-litigation matter that could be

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2019. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] *See* Debra Cassens Weiss, *Group Goes Undercover at 13 Law Firms to Show How U.S. Laws Facilitate Anonymous Investment,* A.B.A. J. (Feb. 1, 2016), https://www.abajournal.com/news/article/group_goes_undercover_at_13_law_firms_to_show_how_us_laws_facilitate; *see also* Louise Story & Stephanie Saul, *Stream of Foreign Wealth Flows to Elite New York Real Estate*, N.Y. TIMES (Feb. 7, 2015), https://www.nytimes.com/2015/02/08/nyregion/stream-of-foreign-wealth-flows-to-time-warner-condos.html.

[3] *In re* Albrecht, 42 P.3d 887, 898–900 (Or. 2002) (disbarment for assisting client in money laundering).

[4] *See, e.g.*, United States v. Farrell, 921 F.3d 116 (4th Cir. 2019) (affirming conviction for money laundering); United States v. Blair, 661 F.3d 755 (4th Cir. 2011) (same); Laura Ende, *Escrow, Money Laundering Cases Draw Attention to the Perils of Handling Client Money*, STATE BAR OF CAL. (Feb. 2017), http://www.calbarjournal.com/February2017/TopHeadlines/TH1.aspx (lawyer sentenced "to five years in prison after being convicted of felonies related to a money laundering scheme").

[5] "Client" refers hereinafter to "client and prospective client" unless otherwise indicated.

legitimate but which further inquiry would reveal to be criminal or fraudulent.[6] For example, a client might seek legal assistance for a series of purchases and sales of properties that will be used to launder money. Or a client might propose an all-cash deal in large amounts and ask that the proceeds be deposited in a bank located in a jurisdiction where transactions of this kind are commonly used to conceal terrorist financing or other illegal activities.[7] On the other hand, further inquiry may dispel the lawyer's concerns.

This opinion addresses a lawyer's obligation to inquire when faced with a client who may be seeking to use the lawyer's services in a transaction to commit a crime or fraud. Ascertaining whether a client seeks to use the lawyer's services for prohibited ends can be delicate. Clients are generally entitled to be believed rather than doubted, and in some contexts investigations can be both costly and time-consuming. At the same time, clients benefit greatly from having informed assistance of counsel. A lawyer's obligation to inquire when faced with circumstances addressed in this opinion is well-grounded in authority interpreting Rule 1.2(d) and in the rules on competence, diligence, communication, honesty, and withdrawal.

As set forth in Section II of this opinion, a lawyer who has knowledge of facts that create a high probability that a client is seeking the lawyer's services in a transaction to further criminal or fraudulent activity has a duty to inquire further to avoid assisting that activity under Rule 1.2(d). Failure to make a reasonable inquiry is willful blindness punishable under the actual knowledge standard of the Rule. Whether the facts known to the lawyer require further inquiry will depend on the circumstances. As discussed in Section III, even where Rule 1.2(d) does not require further inquiry, other Rules may. These Rules include the duty of competence under Rule 1.1, the duty of diligence under Rule 1.3, the duty of communication under Rule 1.4, the duty to protect the best interests of an organizational client under Rule 1.13, the duties of honesty and integrity under Rules 8.4(b) and (c), and the duty to withdraw under Rule 1.16(a). Further inquiry under these Rules serves important ends. It ensures that the lawyer is in a position to provide the informed advice and assistance to which the client is entitled, that the representation will not result in professional misconduct, and that the representation will not involve counseling or assisting a crime or fraud. Section IV addresses a lawyer's obligations in responding to a client who either agrees or does not agree to provide information necessary to satisfy the duty to inquire. Finally, Section V examines hypothetical scenarios in which the duty to inquire would be triggered, as well as instances in which it would not.

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[6] Hereinafter, "transaction" refers both to transactions and other non-litigation matters unless otherwise indicated. This opinion does not address the application of rules triggering a duty to inquire where a client requests legal services in connection with litigation. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1470 (1981), discusses how a lawyer *not* involved in the past misconduct of a client should handle the circumstance of a proposed transaction arising from or relating to the past misconduct.

[7] *See* AM. BAR ASS'N TASK FORCE ON GATEKEEPER REGULATION AND THE PROFESSION, VOLUNTARY GOOD PRACTICES GUIDANCE FOR LAWYERS TO DETECT AND COMBAT MONEY LAUNDERING AND TERRORIST FINANCING 15–16 (2010) [hereinafter GOOD PRACTICES GUIDANCE] (describing institutions, such as the United Nations, the World Bank, the International Monetary Fund, and the U.S. Department of State, believed to be "credible sources" for information regarding risks in different jurisdictions); *id.* at 24 (noting the "higher risk situation" when a client offers to pay in cash).

II. The Duty to Inquire Under Rule 1.2(d)

Rule 1.2(d) states that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." A duty to inquire to avoid knowingly counseling or assisting a crime or fraud may arise under this Rule in two ways. First, Rule 1.0(f) states that to "know[]" means to have "actual knowledge of the fact in question." When 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."[8] This consultation will ordinarily include inquiry into whether there is some misapprehension regarding the relevant facts. If there is no misunderstanding and the client persists, the lawyer must withdraw.[9]

In *In re Blatt*,[10] for example, the New Jersey Supreme Court disciplined a lawyer for participation in a real estate transaction where "*[o]n their face* the [transaction] documents suggest[ed] impropriety if not outright illegality."[11] Addressing the lawyer's duties, the court wrote:

> A lawyer may not follow the directions of a client without first satisfying himself that the latter is seeking a legitimate and proper goal and intends to employ legal means to attain it. . . . The propriety of any proposed course of action must be initially considered by the attorney, and it may be thereafter pursued only if the lawyer is completely satisfied that it involves no ethical compromise. . . . [The lawyer's] duty, upon being requested to draft the aforementioned agreements, was to learn all the details of the proposed transaction. Only then, upon being satisfied that he had indeed learned all the facts, and that his client's proposed course of conduct was proper, would he have been at liberty to pursue the matter further.[12]

Additionally, if facts before the lawyer indicate a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity, a lawyer's conscious, deliberate failure to inquire amounts to knowing assistance of criminal or fraudulent conduct. Rule 1.0(f) refers to "actual knowledge" and provides that "[a] person's knowledge may be inferred

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[8] MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. [13] [hereinafter MODEL RULES].

[9] *See* MODEL RULES R. 1.16(a)(1); Section IV, *infra*. Rule 1.2(d) nevertheless permits a lawyer 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."

[10] 324 A.2d 15 (N.J. 1974).

[11] *Id.* at 18 (emphasis added).

[12] *Id.* at 18–19; *see also In re* Evans, 759 N.E.2d 1064 (Ind. 2001) (mem.) (three-year suspension for filing fraudulent federal tax returns knowingly misrepresenting sale proceeds from real estate transaction); *In re* Harlow, 2004 WL 5215045, at *2 (Mass. State Bar Disciplinary Bd. 2004) (suspending lawyer for violation of 1.2(d) for assisting client in knowing manipulation of state licensing agency's escrow account requirements); State *ex rel.* Counsel for Discipline of Nebraska Supreme Court v. Mills, 671 N.W.2d 765 (Neb. 2003) (two-year suspension for participating in illegal scheme to avoid estate taxes by knowingly backdating and preparing false documents); *accord* N.C. State Bar, Formal Op. 12, 2001 WL 1949450 (2001).

from circumstances." Substantial authority confirms that a lawyer may not ignore the obvious.[13]

The obligation to inquire is well established in ethics opinions. Nearly forty years ago, prior to the adoption of the Model Rules, ABA Informal Opinion 1470 (1981) declared that "a lawyer should not undertake representation in disregard of facts *suggesting* that the representation might aid the client in perpetrating a fraud or otherwise committing a crime . . . . A lawyer cannot escape responsibility by avoiding inquiry. 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 . . . ."[14]

Relying on ABA Informal Opinion 1470, the Legal Ethics Committee of the Indiana State Bar Association concluded in 2001 that "[a] lawyer should not undertake representation without making further inquiry if the facts presented by a prospective client suggest that the representation might aid the client in perpetrating a fraud or otherwise committing a crime."[15] The opinion reasoned that an attorney asked to create a "new" sole power of attorney for a prospective client on behalf of her wealthy grandfather in matters concerning his estate has a duty to inquire further. The opinion emphasized the possibility that the granddaughter could fraudulently use the power of attorney to benefit herself rather than serve the interests of her grandfather, whom the attorney had not consulted, the possibility that the grandfather would not wish to grant sole power of attorney to his granddaughter, and the possibility that the grandfather might lack the capacity to consent to such an arrangement (made likely by the fact that the lawyer's paralegal observed the grandfather's deteriorated condition). Thus, although it is possible that the granddaughter's representation of the facts was accurate and therefore consistent with Rule 1.2(d), "the fact that a proposed client in drafting a power of attorney was the agent and not a frail principal should have suggested to [the lawyer] the possibility that the client's real objective might be fraud. [The lawyer] then *had an ethical responsibility to find out whether the proposal was above-board* before performing the services. By failing to make further inquiry, [the lawyer] violated Rule 1.2."[16]

Similarly, New York City Ethics Opinion 2018-4 concluded that lawyers must inquire when "retained to assist an individual client in a transaction that appears to the lawyer to be suspicious."[17] The opinion explains that "[i]n general, assisting in a suspicious transaction is not competent where a reasonable lawyer prompted by serious doubts would have refrained

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[13] In the words of Charles Wolfram, "as in the criminal law, a lawyer's studied ignorance of a readily ascertainable fact by consciously avoiding it is the functional equivalent of knowledge of the fact. . . . As a lawyer, one may not avoid the bright light of a clear fact by averting one's eyes or turning one's back." CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 696 (1986); *see also* ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 47 (9th ed. 2019) ("[a] lawyer's assistance in unlawful conduct is not excused by a failure to inquire into the client's objectives"); *id.* (gathering cases).

[14] ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1470 (1981) (emphasis added) (interpreting the analogous ABA Model Code provision 7-102(A)(7), which provides that a lawyer must not "[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent").

[15] Ind. State Bar Ass'n Comm. on Legal Ethics, Op. 2, at 4 (2001).

[16] *Id.* at 4 (emphasis added). The Opinion reaches the same conclusion if the grandfather is considered to be the true client. *Id.* at 6–7. *Accord* N.C. State Bar Ass'n, Formal Op. 7 (2003).

[17] N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4, at 2 (2018); *see also* Conn. Bar Ass'n Standing Comm. on Prof'l Ethics, Informal Op. 91-22 (1991).

from providing assistance or would have investigated to allay suspicions before rendering or continuing to render legal assistance. . . . What constitutes a suspicion sufficient to trigger inquiry will depend on the circumstances."[18] Failure to inquire may constitute "conscious avoidance" when, for example, "the lawyer is aware of serious questions about the legality of the transaction and renders assistance without considering readily available facts that would have confirmed the wrongfulness of the transaction."[19]

Courts imposing discipline are generally in accord. When a lawyer deliberately or consciously avoids knowledge that a client is or may be using the lawyer's services to further a crime or fraud, discipline is imposed.[20] Some courts have applied the even broader standard set out in Comment [13] to Rule 1.2, which requires a lawyer to consult with the client when the lawyer "comes to know or *reasonably should know* that [the] client expects assistance not permitted by the Rules of Professional Conduct . . . ." (Emphasis added.) For example, in *In re Dobson*,[21] the South Carolina Supreme Court identified facts showing that the lawyer "knew" or *"should have known*" that he was furthering a client's illegal scheme, and added, "[w]e also find that respondent *deliberately evaded* knowledge of facts which tended to implicate him in a fraudulent scheme. This Court will not countenance the conscious avoidance of one's ethical duties as an attorney."[22]

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[18] N.Y.C Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4, at 3 (2018).

[19] *Id.* Hypotheticals in Section V of this opinion, *infra*, identify circumstances that should prompt further inquiry.

[20] *See In re* Bloom, 745 P.2d 61 (Cal. 1987) (affirming disbarment of lawyer who assisted client in sale and transport of explosives to Libya; categorically rejecting lawyer's defense that he believed in good faith that transaction was authorized by national security officials); *In re* Albrecht, 42 P.3d 887, 898–99 (Or. 2002) ("suspicious nature" of transactions, combined with other facts, support inference that lawyer must have known his participation in scheme constituted money laundering; upholding disbarment for knowingly assisting crime or fraud and rejecting defense that lawyer was "an unwitting dupe to a talented con man"); *see also* ELLEN BENNETT & HELEN GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 47 (9th ed.) ("[a] lawyer's assistance in unlawful conduct is not excused by a failure to inquire into the client's objectives"). *But see* Iowa Supreme Court Att'y Disciplinary Bd. v. Ouderkirk, 845 N.W. 2d 31, 45–48 (Iowa 2014) (declining to infer knowledge of client's fraud despite what disciplinary counsel argued were "highly suspicious" circumstances where sophisticated, longstanding client who typically relied on the lawyer exclusively to prepare final paperwork deceived the lawyer about a fraudulent transfer to avoid creditors).

[21] 427 S.E.2d 166 (S.C. 1993).

[22] *Id.* at 427 (emphasis added); *see also* Florida Bar v. Brown, 790 So.2d 1081, 1088 (Fla. 2001) (suspension for soliciting illegal campaign contributions from employees and others for political candidates viewed as favorable to business interests of major client of firm; lawyer "should have known" conduct was criminal or fraudulent under Florida version of Rule 1.2(d) which expressly incorporates this standard); *In re* Siegel, 471 N.Y.S. 2d 591, 592 (N.Y. App. Div. 1984) (attorney "knew *or should have known* that at the very least, his conduct was a breach of trust, if not illegal") (emphasis added). Other jurisdictions have rejected a negligence standard for Rule 1.2(d). *See In re* Tocco, 984 P.2d 539, 543 (Ariz. 1999) (en banc) (declining to read a should have known standard into Arizona Rule 1.2(d); "While actual knowledge can be proven by circumstantial evidence, a mere showing that the attorney reasonably *should have known* her conduct was in violation of the rules, without more, is insufficient."); *accord* Iowa Supreme Court Bd. of Prof'l Ethics and Conduct v. Jones, 606 N.W.2d 5, 7–8 (Iowa 2000).

The Committee acknowledges the tension between the "actual knowledge" standard of Model Rule 1.2(d), on the one hand, and those authorities applying a reasonably should know standard. This opinion concludes only that the standard of actual knowledge set out in the text of Model Rules 1.2(d) and 1.0(f) is met by appropriate evidence of willful blindness. When the Model Rules intend a lower threshold of scienter, such as "reasonably should know," the text generally makes this explicit. *See, e.g.*, MODEL RULES R. 2.3(b), 2.4(b), 4.3.

Criminal cases treat deliberate ignorance or willful blindness as equivalent to actual knowledge.[23] As the Supreme Court recently summarized:

> The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. . . . [The Model Penal Code defines] "knowledge of the existence of a particular fact" to include a situation in which "a person is aware of a *high probability* of [the fact's] existence, unless he actually believes that it does not exist." Our Court has used the Code's definition as a guide . . . [a]nd every Court of Appeals—with the possible exception of the District of Columbia Circuit—has fully embraced willful blindness, applying the doctrine to a wide range of criminal statutes.[24]

A lawyer may accordingly face criminal charges or civil liability, in addition to bar discipline, for deliberately or consciously avoiding knowledge that a client is or may be using the lawyer's services to further a crime or fraud.[25] To prevent these outcomes, a lawyer must inquire further when the facts before the lawyer create a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity.[26]

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[23] United States v. Ramsey, 785 F.2d 184, 189 (7th Cir. 1986) ("[A]ctual knowledge and deliberate avoidance of knowledge are the same thing.").

[24] Global-Tech Appliances, Inc. v. SEB USA, 563 U.S. 754, 767 (2011) (emphasis added) (citations omitted) (applying willful blindness standard to statute prohibiting knowing inducement of patent infringement).

[25] *See* United States v. Cavin, 39 F.3d 1299, 1310 (5th Cir. 1994) (upholding deliberate ignorance jury instruction in prosecution of a lawyer); United States v. Scott, 37 F.3d 1564, 1578 (10th Cir. 1994) (affirming use of deliberate ignorance instruction against an attorney convicted of conspiracy to defraud the IRS); Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 590 (9th Cir. 1983) (upholding deliberate ignorance finding against law firm in antitrust suit because firm was aware of high probability that client made illegal payments and failed to investigate); United States v. Benjamin, 328 F.2d 854, 862 (2d Cir. 1964) (a lawyer may be held liable in a securities fraud suit if the lawyer has "deliberately closed his eyes to the facts he had a duty to see"); Harrell v. Crystal, 611 N.E. 2d 908, 914 (Ohio Ct. App. 1992) (affirming finding of liability in malpractice action for lawyer's failure to investigate sham tax shelters); Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 2003-104 (2003) (where facts suggested property transfer to client from relative was to conceal assets from creditors, lawyer handling sale of property to a third party "must evaluate whether the transfer of realty to your client was 'fraudulent'" under state law); *cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94, Reporter's Note, cmt. g. at 17 (AM. LAW INST. 2000) ("the preferable rule is that proof of a lawyer's conscious disregard of facts is relevant evidence which, together with other evidence bearing on the question, may warrant a finding of actual knowledge").

[26] As the authorities and analysis in this Section make clear, the duty to inquire under Model Rule 1.2(d) is tied to the circumstances and the lawyer's state of knowledge. It is *not* a freestanding, blanket obligation to scrutinize every client for illicit ends irrespective of the nature of the specific matter and the attorney-client relationship. *See* United States v. Sarantos, 455 F.2d 877, 881 (2d Cir. 1972) ("Construing 'knowingly' in a criminal statute to include willful blindness . . . is no radical concept in the law," but the standard does not mean that an attorney has a general duty to "investigate 'the truth of his client's assertions' or risk going to jail"; upholding criminal conviction of lawyer who actively aided in immigration related marriage fraud); Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 2001-26 ("*Generally*, a lawyer has no obligation to inquire or otherwise uncover facts that are not necessary to enable the lawyer to fulfill his or her obligations with respect to the representation"; warning nevertheless that Rule 1.2(d) applies to filing of worker's compensation claims and leaving attorney to determine relevance of client's fatal condition to client's specific claim) (emphasis added). However, the

III. The Duty To Inquire Under Other Rules

Rule 1.2(d) is not the only source of a lawyer's duty to inquire. A lawyer may be obliged to inquire further in order to meet duties of competence, diligence, communication, honesty, and withdrawal under Rules 1.1, 1.3, 1.4, 1.13, 1.16, and 8.4. The kinds of facts and circumstances that would trigger a duty to inquire under these rules include, for example, (i) the identity of the client, (ii) the lawyer's familiarity with the client, (iii) the nature of the matter (particularly whether such matters are frequently associated with criminal or fraudulent activity), (iv) the relevant jurisdictions (especially whether any jurisdiction is classified as high risk by credible sources), (v) the likelihood and gravity of harm associated with the proposed activity, (vi) the nature and depth of the lawyer's expertise in the relevant field of practice, (vii) other facts going to the reasonableness of reposing trust in the client,[27] and (viii) any other factors traditionally associated with providing competent representation in the field.

First, Rule 8.4(b) makes it professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Rule 8.4(c) makes it professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Providing legal services could violate Rules 8.4(b) and (c) where the relevant law on criminal or fraudulent conduct defines the lawyer's state of mind as culpable even without proof of actual knowledge.[28] In such a situation, the lawyer must conduct further investigation to protect the client, advance the client's legitimate interests, and prevent the crime or fraud.

Second, and more broadly, the lawyer's duty of competence, diligence, and communication under Rules 1.1, 1.3, and 1.4 may require the lawyer, prior to advising or assisting in a course of action, to develop sufficient knowledge of the facts and the law to understand the client's objectives, identify means to meet the client's lawful interests, to probe further, and, if necessary, persuade the client not to pursue conduct that could lead to criminal liability or liability for fraud. Comment [5] of Rule 1.1 states that "[c]ompetent handling of a particular matter requires inquiry into and analysis of the factual and legal elements of the problem."[29]

Committee rejects the view that the actual knowledge standard of Rule 1.2(d) relieves the lawyer of a duty to inquire further where the lawyer is aware of facts creating a high probability that the representation would further a crime or fraud. *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94 cmt. g. at 11 ("Under the actual knowledge standard . . . a lawyer is not required to make a particular kind of investigation in order to ascertain more clearly what the facts are, although it will often be prudent for the lawyer to do so."); *id.* § 51 cmt. h., ill. 6 at 366; George M. Cohen, *The State of Lawyer Knowledge Under the Model Rules of Professional Conduct*, 3 AM. U. BUS. L. REV. 115, 116 (2014) (discussing association of willful blindness with recklessness, without citing to *Global-Tech Appliances*, and analyzing assumption that "the actual knowledge standard aims to exclude a duty to inquire").

[27] For facts that can undermine the reasonableness of reposing trust, see the discussion of "risk categories" provided by the GOOD PRACTICES GUIDANCE, *supra* note 7, at 15–36.

[28] *See In re* Berman, 769 P.2d 984, 989 (Cal. 1989) (en banc) (holding, in disciplinary proceeding for aiding a money laundering scheme, that attorney's "*belief* that the financial statements contained false information reflects sufficient indicia of fraudulent intent to constitute moral turpitude"). The same conduct would require the lawyer's withdrawal under Rule 1.16(a)(1).

[29] *See also* Iowa Supreme Court Att'y Disciplinary Bd. v. Wright, 840 N.W.2d 295, 301 (Iowa 2013) (failure to conduct even preliminary research on overseas internet scam violates Rule 1.1); *In re* Winkel, 577 N.W.2d 9 (Wis. 1998) (failure to obtain information on trust funds of clients' business prior to surrendering clients' assets to bank). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 cmt. c at 377 ("[A] lawyer must perform tasks reasonably appropriate to the representation, including, where appropriate, inquiry into the facts.").

The duty of diligence under Rule 1.3 requires that a lawyer ascertain the relevant facts and law in a timely and appropriately thorough manner.[30] Rule 1.4(a)(5), which requires consultation with the client regarding "any relevant limitation on the lawyer's conduct" arising from the client's expectation of assistance that is not permitted by the Rules of Professional Conduct or other law, may require investigation of the relevant facts and law. Rule 1.4(b) requires the lawyer to give the client explanations sufficient to enable the client to make informed decisions about the representation.

Rule 1.13 imposes a duty to inquire in entity representations. Rule 1.13(a) provides that a lawyer "employed or retained by the organization represents the organization acting through its duly authorized constituents." Determining the interests of the organization will often require further inquiry to clarify any ambiguity about who has authority and what the organization's priorities are. Under Rule 1.13(b), once the lawyer learns of action, omission, or planned activity on the part of an "officer, employee, or other person associated with the organization . . . that is a violation of a legal obligation to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interests of the organization." Even if the underlying facts regarding the violation or potential violation are already well established and require no additional inquiry, determining what is "reasonably necessary" and in the "best interest of the organization" will commonly involve additional communication and investigation.[31]

Recent ABA guidance and opinions support this approach. Concern that individuals might use the services of U.S. lawyers for money-laundering and terrorist financing prompted the ABA House of Delegates to adopt in 2010 the *ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing* ("Good Practices Guidance"). The Good Practices Guidance advocates a "risk-based approach" to avoid assisting in money laundering or terrorist financing, according to guidelines developed by the Financial Action Task Force on Money Laundering ("FATF").[32] Recommended measures

[30] *See In re* Konnor, 694 N.W. 2d 376 (Wis. 2005) (failure to investigate concern that rents owed to estate were being misappropriated).

[31] *See* MODEL RULES R. 1.13 cmts. [3] & [4]. Rule 1.13(b) was added after a series of high profile financial accounting scandals in the early 2000s. AM. BAR ASS'N TASK FORCE ON CORPORATE RESPONSIBILITY (2003), *reprinted in* 59 BUS. LAW. 145, 166–70 (2003). Other law may also create a duty to inquire. The Sarbanes-Oxley Act of 2002 creates a duty for the "chief legal officer" to conduct an "appropriate" investigation in response to another lawyer's report of "evidence of a material violation" by the company. 17 C.F.R. § 205.3(b)(2) (2012); *see also In re* Kern, 816 S.E. 2d 574 (S.C. 2018) (discussing obligations of securities lawyers); U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS § 9-28.720 (quality of internal investigation can affect eligibility for "cooperation credit"); Cohen, *supra* note 26, at 129–30 (discussing obligations of securities lawyers).

[32] *See* GOOD PRACTICES GUIDANCE, *supra* note 7, at 2. A "risk-based approach" is generally "intended to ensure that measures to prevent or mitigate money laundering and terrorist financing are commensurate with the risks identified . . . [H]igher risk areas should be subject to enhanced procedures, such as enhanced client due diligence ("CDD") . . . ." *Id.* at 8. The report continues: "This paper [identifies] the risk categories and offer[s] voluntary good practices designed to assist lawyers in detecting money laundering while satisfying their professional obligations." *Id.*

include "examining the nature of the legal work involved, and where the [client's] business is taking place."[33]

ABA Formal Opinion 463 addresses efforts to require U.S. lawyers to perform "gatekeeping" duties to protect the international financing system from criminal activity arising out of worldwide money-laundering and terrorist financing activities. Observing that "the Rules do not mandate that a lawyer perform a 'gatekeeper' role," especially in regards to "mandatory reporting" to public authorities "of suspicion about a client," Opinion 463 nevertheless identifies the Good Practices Guidance as a resource "consistent with the Model Rules" and with Informal Opinion 1470.[34] It also reinforces the duty to investigate in appropriate circumstances. Specifically, Opinion 463 states that "[i]t would be prudent for lawyers to undertake Client Due Diligence ("CDD") in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity. . . . *[P]ursuant to a lawyer's ethical obligation to act competently, a duty to inquire further may also arise*. An appropriate assessment of the client and the client's objectives, and the means for obtaining those objectives, are *essential prerequisites* for accepting a new matter or continuing a representation as new facts unfold."[35]

A lawyer's reasonable judgment under the circumstances presented, especially the information known and reasonably available to the lawyer at the time, does not violate the rules. Nor should a lawyer be subject to discipline because a course of action, objectively reasonable at the time it was chosen, turned out to be wrong with hindsight.[36]

IV. Other Obligations Incident to the Duty to Inquire

If the client refuses to provide information or asks the lawyer not to evaluate the legality of a transaction the lawyer should explain to the client that the lawyer cannot undertake the representation unless an appropriate inquiry is made. If the client does not agree to provide

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[33] ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 463, at 2 (2013) (summarizing GOOD PRACTICES GUIDANCE).

[34] *Id.*

[35] *Id*. at 2–3 (emphasis added); *see also id.* at 2 n.10 ("The Good Practices Guidance encourages all lawyers to perform basic CDD by (1) identifying and verifying the identity of each client; (2) identifying and verifying the identity of any 'beneficial owner' of the client, defined as the natural person(s) with ultimate control of a client, when such an analysis is warranted from a risk-based standpoint; and (3) obtaining enough information to understand a client's circumstances, business, and objectives.").

[36] In numerous contexts of evaluating attorney conduct, courts and regulators have warned against hindsight bias. *See* Woodruff v. Tomlin, 616 F.2d 924, 930 (6th Cir. 1980) ("[E]very losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight."); *In re* Claussen, 14 P.3d 586, 593–94 (Or. 2000) (en banc) (declining to discipline lawyer who aided client in converting insurance policy to cash while client's bankruptcy petition was pending; lawyer did not know client would abscond with money and cannot be judged by a standard of "clairvoyance" that reflects the knowledge of "hindsight"); N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4 (2018) ("Under the knowledge standard of Rule 1.2(d), a lawyer is not deemed to 'know' facts, or the significance of facts, that become evident only with the benefit of hindsight."); N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2005-05 (2005) (in handling of "'thrust upon' concurrent client conflicts a lawyer who does balance the relevant considerations in good faith should not be subject to discipline for getting it wrong in hindsight"); Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 2001-100 (2001) (the propriety of accepting stock as payment of legal fees for a start-up "should be made based on the information available at the time of the transaction and not with the benefit of hindsight").

information, then the lawyer must decline the representation or withdraw.[37] If the client agrees, but then temporizes and fails to provide the requested information, or provides incomplete information, the lawyer must remonstrate with the client. If that fails to rectify the information deficit, the lawyer must withdraw. Indeed, proceeding in a transaction without the requested information may, depending on the circumstances, be evidence of the lawyer's willful blindness under Rule 1.2(d).[38] If the client agrees, provides additional information, and the lawyer concludes that the requested services would amount to assisting in a crime or fraud, the lawyer must either discuss the matter further with the client, decline the representation, or seek to withdraw under Rule 1.16(a).[39]

In general, a lawyer should not assume that a client will be unresponsive to remonstration. However, if the client insists on proceeding with the proposed course of action despite the lawyer's remonstration, the lawyer must decline the representation or withdraw.[40] The lawyer may have discretion to disclose information relating to the representation under Model Rule 1.6(b)(1)-(3).[41]

If the lawyer needs information from sources other than the prospective client and can obtain that information without disclosing information protected by Rules 1.6 and 1.18, the information should be sought. If the lawyer needs to disclose protected information in order to analyze the transaction, the lawyer must seek the client's informed consent in advance. [42] If the client will not consent or the lawyer believes that seeking consent will lead to criminal or fraudulent activity, the lawyer must decline the representation or withdraw.[43]

If an inquiry would result in expenses that the client refuses to pay, the lawyer may choose to conduct the inquiry without payment or to decline or discontinue the representation.

Overall, as long as the lawyer conducts a reasonable inquiry, it is ordinarily proper to credit an otherwise trustworthy client where information gathered from other sources fails to resolve the issue, even if some doubt remains.[44] This conclusion may be reasonable in a variety of

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[37] As discussed below, under Rule 1.2(c) a lawyer cannot assent to an unreasonable limitation on the representation even if the client seeks or insists upon such a limitation and offers consent.

[38] *See also* N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4 at 5 ("[A] client's refusal to authorize and assist in an inquiry into the lawfulness of the client's proposed conduct will ordinarily constitute an additional, and very significant, 'red flag.'").

[39] MODEL RULES R. 1.2 cmt. [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 . . . the lawyer must consult with the client regarding the limitations on the lawyer's conduct.").

[40] *See also* N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4 at 6 ("If it becomes clear during a lawyer's representation that the client has failed to take necessary corrective action, and the lawyer's continued representation would assist client conduct that is illegal or fraudulent, Rule 1.16(b)(1) mandates that the lawyer withdraw from representation."). For a discussion of the obligation to withdraw upon learning that a lawyer's services have been used to further a fraud, see ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-366 (1992).

[41] N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4 at 6.

[42] MODEL RULES R. 1.0(e) ("'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.").

[43] MODEL RULES R. 1.16(c)(2).

[44] *See* N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4 at 5.

circumstances. For example, the lawyer may have represented the client in many other matters. The lawyer may know the client personally, professionally, or socially. The business arrangements and other individuals or parties involved in the transaction may be familiar to the lawyer.

Finally, Rule 1.2(c) permits a lawyer to "limit the scope of [a] representation if the limitation is reasonable under the circumstances and the client gives informed consent." Permitted scope limitations include, for example, that the client has limited but lawful objectives for the representation, or that certain available means to accomplish the client's objectives are too costly for the client or repugnant to the lawyer.[45] Any limitation, however, must "accord with the Rules of Professional Conduct and other law," including the lawyer's duty to provide competent representation.[46] In the circumstances addressed by this opinion, a lawyer may not agree to exclude inquiry into the legality of the transaction.

V. Hypotheticals

The following hypotheticals are intended to clarify when circumstances might require further inquiry because of risk factors known to the lawyer. Some are drawn from the Good Practices Guidance, an important resource for transactional lawyers detailing how to conduct proper due diligence as well as how to identify and address risk factors in the most common scenarios in which a lawyer's assistance might be sought in criminal or fraudulent transactions.[47]

Further inquiry would be required in the first two examples because the combination of risk factors known to the lawyer creates a high probability that the client is engaged in criminal or fraudulent activity.

#1: A prospective client has significant business connections and interests abroad. The client has received substantial payments from sources other than his employer. The client holds these funds outside the US and wants to bring them into the US through a transaction that minimizes US tax liability. The client says: (i) he is "employed" outside the US but will not say how; (ii) the money is in a "foreign bank" in the name of a foreign corporation but the client will not identify the bank or the corporation; (iii) he has not disclosed the payments to

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[45] *See* MODEL RULES R. 1.2 cmt. [6] ("A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.")

[46] *See id.* cmt. [7] ("an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation"); *id.* cmt. [8] ("All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law.").

[47] The analysis of the hypotheticals that follows draws on the GOOD PRACTICES GUIDANCE but should not be read to support the conclusion that any isolated risk factor identified in the GOOD PRACTICES GUIDANCE necessarily creates a duty to inquire in all matters in which it may be present. The question is whether a reasonable lawyer under the specific circumstances would be obliged to conduct further inquiry. The Committee further cautions that circumstances that render a specific jurisdiction or other factor "high risk" can change. On the one hand, if new circumstances presenting a greater risk arise the lawyer should take appropriate action, and may need to seek advice on what, if any, action is required. On the other hand, new circumstances may support acceptance or continuation of the representation by showing that, upon inquiry, the high-risk designation is inaccurate or inapplicable to the matter.

his employer or any governmental authority or to anyone else; and (iv) he has not included the amounts in his US income tax returns.[48]

#2: A prospective client tells a lawyer he is an agent for a minister or other government official from a "high risk" jurisdiction[49] who wishes to remain anonymous and would like to purchase an expensive property in the United States. The property would be owned through corporations that have undisclosed beneficial owners. The prospective client says that large amounts of money will be involved in the purchase but is vague about the source of the funds, or the funds appear to come from "questionable" sources.[50]

If, on the same facts as #2, the client assures the lawyer that information will be provided but does not follow through, the lawyer must either withdraw or again discuss with the client the need for the information to continue in the representation, seek an explanation for the delay, and withdraw if the explanation the client offers is unsatisfactory. If the information provided is incomplete — e.g., information that leaves the identity of the actual funding sources opaque — the lawyer must follow the same course: withdraw or again discuss with the client the need for the information to continue in the representation, seek an explanation for the delay, and withdraw if the explanation offered is unsatisfactory.[51]

In examples #3 through #5 below, the duty to inquire depends on contextual factors, most significantly, the lawyer's familiarity with the client and the jurisdiction.

#3: A general practitioner in rural North Dakota receives a call from a long-term client asking her to form a limited liability company for the purpose of buying a ranch.[52]

#4: The general practitioner in rural North Dakota receives a call from a new and unknown prospective client saying that the client just won several million dollars in Las Vegas and needs the lawyer to form a limited liability company to buy a ranch.[53]

#5: A prospective client in New York City asks a general practitioner in a mid-size town in rural Georgia to provide legal services for the acquisition of several farms in rural Georgia. The prospective client tells the lawyer that he has made a lot of money in hedge funds and now wants to diversify his investments by purchasing these farms but says he doesn't want his purchases to cause a wave of land speculation and artificially inflate local prices. He wants

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[48] This hypothetical is drawn from ABA Comm. on Ethics & Prof'l Responsibility, Informal Opinion 1470, which concludes that a lawyer must conduct further inquiry.

[49] For information about "high risk" jurisdictions, see GOOD PRACTICES GUIDANCE, *supra* note 7, at 15–16.

[50] This hypothetical is based on *In re* Jankoff, 81 N.Y.S.3d 733, 734 (N.Y. App. Div. 2018) (public censure imposed on stipulated facts), and *In re* Koplik, 90 N.Y.S.3d 187 (N.Y. App. Div. 2019) (same).

[51] *See supra*, Section IV.

[52] This hypothetical is drawn from GOOD PRACTICES GUIDANCE, *supra* note 7, at 8, and should not require further inquiry regarding the legitimacy of the transaction assuming prior matters have not involved abuse of the attorney-client relationship on the part of the client. It is likely, of course, that some inquiry into other details will be necessary to handle the transaction competently.

[53] This hypothetical is drawn from GOOD PRACTICES GUIDANCE, *supra* note 7, at 8, and requires further inquiry.

to wire money into the law firm's trust account over time for the purchases. He asks the lawyer to create a series of LLCs to make strategic (and apparently unrelated) acquisitions.[54]

VI. Conclusion

Model Rule 1.2(d) prohibits a lawyer from advising or assisting a client in a transaction or other non-litigation matter the lawyer "knows" is criminal or fraudulent. That knowledge may be inferred from the circumstances, including a lawyer's willful blindness or conscious disregard of available facts. Accordingly, where there is a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity, the lawyer must inquire further to avoid advising or assisting such activity. Even if information learned in the course of a preliminary interview or during a representation is insufficient to establish "knowledge" under Rule 1.2(d), other rules may require further inquiry to help the client avoid crime or fraud, to advance the client's legitimate interests, and to avoid professional misconduct. These include the duties of competence, diligence, communication, and honesty under Rules 1.1, 1.3, 1.4, 1.13, 1.16, and 8.4. If the client or prospective client refuses to provide information necessary to assess the legality of the proposed transaction, the lawyer must ordinarily decline the representation or withdraw under Rule 1.16. A lawyer's reasonable evaluation after that inquiry based on information reasonably available at the time does not violate the rules.

[54] This hypothetical is drawn from AMERICAN LAW INSTITUTE, ANTI-MONEY LAUNDERING RULES AND OTHER ETHICS ISSUES 450-51 (2017) and requires further inquiry.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 463 **May 23, 2013**

Client Due Diligence, Money Laundering, and Terrorist Financing

The Model Rules of Professional Conduct and the ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing ("Good Practices Guidance") are consistent in their ethical principles, including loyalty and confidentiality. The Good Practices Guidance provides information to help lawyers recognize and evaluate situations where providing legal services may assist in money laundering and terrorist financing. By implementing the risk-based control measures detailed in the Good Practices Guidance where appropriate, lawyers can avoid aiding illegal activities in a manner consistent with the Model Rules.[1]

In an effort to combat money laundering and terrorist financing, intergovernmental standards-setting organizations and government agencies have suggested that lawyers should be "gatekeepers" to the financial system.[2] The underlying theory behind the "lawyer-as-gatekeeper" idea is that the lawyer has the capacity to monitor and to control, or at least to influence, the conduct of his or her clients and prospective clients in order to deter wrongdoing.[3] Many have taken issue with this theory[4] and with the word "gatekeeper." The Rules do not mandate that a lawyer perform a "gatekeeper" role in this context.[5] More importantly, mandatory reporting of suspicion about a client is in conflict with Rules 1.6 and 1.18, and reporting without informing the client is in conflict with Rule 1.4(a)(5). In this opinion we examine the contours of a lawyer's ethical obligations under the Model Rules of Professional Conduct with regard to efforts to deter and combat money laundering.

In August 2010 the ABA's policymaking House of Delegates adopted the *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist*

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[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2013. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] Kevin L. Shepherd, *The Gatekeeper Initiative and the Risk-Based Approach to Client Due Diligence: The Imperative for Voluntary Good Practices Guidance for U.S. Lawyers*, 2010 J. PROF. LAW 83, 88 (lawyers are considered "gatekeepers" because they have the ability to furnish access to the various functions that might help criminals move or conceal funds).

[3] *See* Press Center, *Treasury Deputy Secretary Stuart Eizenstat House Committee on Banking and Financial Services*, U.S DEPARTMENT OF THE TREASURY (Mar. 9, 2000), http://www.treasury.gov/press-center/press-releases/Pages/ls445.aspx (stating that "[w]e are aggressively pursuing programs aimed at the lawyers, accountants and auditors who function as 'gatekeepers' to the financial system. While legal rules properly insulate professional consultations from overly broad scrutiny and create a zone of safety within which professionals can advise their clients, those rules should not create a cover for criminal conduct.").

[4] *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2013 BCCA 147 (2013), *available at* http://www.canlii.org/en/bc/bcca/doc/2013/2013bcca147/2013bcca147.html (striking down Canadian legislation as violating the solicitor-client privilege and interfering with the independence of the Bar).

[5] *But see* Rutheford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers*, 56 RUTGERS L. REV. 9 (2003).

Financing ("Good Practices Guidance"),[6] along with a resolution stating that the Association "acknowledges and supports the United States Government's efforts to combat money laundering and terrorist financing." The approved Good Practices Guidance states that it is not intended to be, nor should it be construed as, a statement of the standard of care governing the activities of lawyers in implementing a risk-based approach to combat money laundering and terrorist financing, but rather is intended to serve as a resource that lawyers can use in developing their own voluntary approaches.[7]

Good Practices Guidance policy supports a "risk-based" approach in accord with guidelines developed by the Financial Action Task Force on Money Laundering ("FATF") created by the U.S. and other leading industrialized nations.[8] This approach differs from a rules-based approach that requires compliance with every element of detailed laws, rules, or regulations irrespective of the underlying quantum or degree of risk. The Good Practices Guidance urges lawyers to assess money-laundering and terrorist financing risks by examining the nature of the legal work involved, and where the business is taking place.[9]

The Model Rules neither require a lawyer to fulfill a gatekeeper role, nor do they permit a lawyer to engage in the reporting that such a role could entail. It would be prudent for lawyers to undertake Client Due Diligence ("CDD")[10] in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity. This admonition is consistent with Informal Opinion 1470 (1981), where we stated that "[a] lawyer cannot escape responsibility by avoiding inquiry. 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 and without relying on past client crime or fraud to achieve results the client now wants."[11] Further in that opinion we stated that, pursuant to a lawyer's ethical obligation to act competently,[12] a duty to inquire further may also arise.[13]

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[6] Resolution & Report 116, *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing*, AMERICAN BAR ASSOCIATION (2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/116.authcheckdam.pdf. *See generally* Shepherd, *supra* note 2.

[7] Resolution & Report 116, *supra* note 6, at 7.

[8] *Federation of Law Societies of Canada v. Canada*, *supra* note 4.

[9] *See* Michael A. Lindenberger, *Into the Breach: Voluntary Compliance on Money Laundering Gets a Boost from the ABA and Treasury*, ABA JOURNAL (Oct. 2011), *available at* http://www.abajournal.com/magazine/article/into_the_breach_voluntary_compliance_on_money_laundering_gets_a_boost/ (quoting the ABA President to encourage lawyers to be more vigilant about combating money laundering by following the Good Practices Guidance so that gatekeeper legislation regulating the legal profession will be unnecessary).

[10] The Good Practices Guidance encourages all lawyers to perform basic CDD by (1) identifying and verifying the identity of each client; (2) identifying and verifying the identity of any "beneficial owner" of the client, defined as the natural person(s) with ultimate control of a client, when such an analysis is warranted from a risk-based standpoint; and (3) obtaining enough information to understand a client's circumstances, business, and objectives. Resolution & Report 116, *supra* note 6, at 9-11.

[11] ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1470 (1981) [hereinafter ABA Informal Op. 1470]. *See also*, GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.6:403, 199-200 (2d ed. 1990 & Supp. 1998). *Cf.* Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 200 (1978) (warning lawyers against "assum[ing] the worst regarding the client's desires").

[12] *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 6-101 (1979) (now Rule 1.1).

An appropriate assessment of the client and the client's objectives, and the means for obtaining those objectives, are essential prerequisites for accepting a new matter or continuing a representation as new facts unfold. Rule 1.2(d) prohibits a lawyer from *knowingly* counseling or assisting a client to commit a crime or fraud. A lawyer also is subject to federal laws prohibiting conduct that aids, abets, or commits a violation of U.S. anti-money laundering laws (*e.g.*, 18 U.S.C. Sections 1956 and 1957) or counter-terrorist financing laws.[14] Thus, for example, lawyers should be mindful of legal restrictions applicable to all persons in the U.S. to avoid providing certain legal services to, and receiving money from, individuals or entities publicly identified by the U.S. Department of the Treasury on its Specially Designated Nationals List ("SDN List").[15] In certain circumstances, checking a client's identity internally within the firm against the SDN List can avoid the risk of unlawful conduct by the lawyer.

The level of appropriate CDD varies depending on the risk profile of the client, the country or geographic area of origin, or the legal services involved.[16] For example, the fact that clients are deemed to be "Politically Exposed Persons," (*e.g.*, domestic or foreign senior government, judicial, or military officials) may justify enhanced due diligence on the part of the lawyer because of the potential for corruption. Clients or legal matters associated with countries that are subject to sanctions or embargoes issued by the United Nations, or those identified by credible sources as having significant levels of corruption or other criminal activity or that provide funds or support to terrorist organizations, may require greater examination. Furthermore, clients who ask that the lawyer handle actual receipt and transmission of funds or those who request accelerated real estate transfers for no apparent reason may also require an extra level of scrutiny.

Once a representation has commenced, a lawyer may terminate it in a number of circumstances in which the lawyer does not *know* for certain the client's plans or whether the client is engaged in criminal or fraudulent activities, but the lawyer has reason to believe that the client is engaging, or plans to engage, in such improper activities. Rule 1.16(b)(2) (Declining or Terminating Representation) states that a lawyer may withdraw from representing a client if "the client persists in a course of action involving the lawyer's services that the lawyer *reasonably believes* is criminal or fraudulent." (Emphasis added).[17]

The Committee believes that the advice derived from the Good Practices Guidance is consistent, and not in conflict, with the ethical obligations of lawyers under the Model Rules. Indeed, the Good Practices Guidance states that "when faced with a situation where the lawyer is compelled to decline or terminate the relationship, the lawyer should comply with the requirements of the applicable rules of professional conduct."[18] Accordingly, lawyers should be

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[13] ABA Informal Op. 1470, *supra* note 11.

[14] These laws include, for example, the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272; Exec. Order No. 13224, 66 Fed. Reg. 49079 (Sept. 23, 2001).

[15] *Specially Designated Nationals List*, U.S. DEPARTMENT OF THE TREASURY, http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx (last visited May 20, 2013).

[16] *Supra* note 10.

[17] Moreover, Model Rule 1.16 (b)(4) allows a lawyer to withdraw when "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."

[18] Resolution & Report 116, *supra* note 6, at 38.

conversant with the risk-based measures and controls for clients and legal matters with an identified risk profile and use them for guidance as they develop their own client intake and ongoing client monitoring processes. When in a lawyer's professional judgment aspects of the contemplated representation raise suspicions about its propriety, that lawyer's familiarity with risk-based measures and controls will assist in avoiding unwitting assistance to unlawful activities. Indeed, the usefulness of the Good Practices Guidance is an example of the declaration in the Model Rules that "[t]he Rules do not … exhaust the moral and ethical considerations that should inform a lawyer…."[19]

[19] MODEL RULES OF PROF'L CONDUCT, SCOPE, cmt. 16. *See also* MODEL RULES OF PROF'L CONDUCT R. 2.1 (explaining that "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 335 (1974) (stating that in the context of writing opinions for transactions involving sales of unregistered securities, a lawyer should not "accept as true that which he does not reasonably believe to be true.").

165 A.D.3d 58
Supreme Court, Appellate Division,
First Department, New York.

In the MATTER OF John H. JANKOFF
(admitted as John Henry Jankoff),
an attorney and counselor-at-law:
Attorney Grievance Committee for the
First Judicial Department, Petitioner,
v.
John H. Jankoff, Respondent.

M-1365
|
M–3174
|
September 20, 2018

Disciplinary proceedings instituted by the Attorney Grievance Committee for the First Judicial Department. Respondent, John Henry Jankoff, was admitted to the Bar of the State of New York at a Term of the Appellate Division of the Supreme Court for the First Judicial Department on December 23, 1968.

Attorneys and Law Firms

Jorge Dopico, Chief Attorney, Attorney Grievance Committee, New York, (Si Aydiner, Esq. and Denice Szekely, Esq., of counsel), for petitioner.

Michael S. Ross, Esq., for respondent.

John W. Sweeny, Jr., Justice Presiding, Dianne T. Renwick, Rosalyn H. Richter, Sallie Manzanet–Daniels, Richard T. Andrias, Justices.

Opinion

PER CURIAM

***59** Respondent, John H. Jankoff, was admitted to the practice of law in the State of New York by the First Judicial Department on December 23, 1968, under the name John Henry Jankoff. At all times relevant to this proceeding, respondent maintained an office for the practice of law within the First Judicial Department.

****734** The Attorney Grievance Committee commenced this disciplinary proceeding by a petition of charges (Judiciary Law § 90[2], Rules for Attorney Disciplinary Matters [22 NYCRR] § 1240.8), alleging that respondent was guilty of certain misconduct in violation of the Rules of Professional Conduct (22 NYCRR 1200.0) because he counseled a client to engage in conduct he knew was illegal or fraudulent and misrepresented his personal experience and knowledge during a meeting with the client. Specifically, respondent met with a potential client who represented himself as appearing on behalf of a West African minister. The individual stated that the minister desired to purchase real property in the form of a brownstone, an airplane, and a yacht in the United States and identified the money as "gray money" or "black money." Respondent did not personally inquire as to the provenance of the money. Although respondent knew that the money was questionable, he informed the individual that he would have to consult with an expert to determine whether the money could be moved anonymously and to make sure that the money was "clean" and not criminally derived. Nonetheless, respondent offered suggestions on how to transfer the money into the United States from other countries in ways that would mask the minister as the ultimate or beneficial owner. He also misrepresented his personal experience and knowledge of the subject matter to keep the potential client interested.

The parties agree on the stipulated facts, including the admission to the acts of professional misconduct and the violation of rules 1.2(d), 8.4(c) and 8.4(h), the relevant factors in mitigation, ***60** and on the discipline. The parties now jointly move pursuant to 22 NYCRR 1240.8(a)(5) for discipline on consent and request the imposition of a public censure.

In support of the joint motion for discipline by consent, the parties rely on *Matter of Scher*, 224 A.D.2d 132, 647 N.Y.S.2d 857 (2d Dept. 1996), *Matter of Lesser*, 217 A.D.2d 398, 636 N.Y.S.2d 38 (1st Dept. 1995), *Matter of Rosales*, 190 A.D.2d 214, 598 N.Y.S.2d 302 (2d Dept. 1993), and *Matter of Kanarek*, 33 A.D.2d 280, 307 N.Y.S.2d 363 (2d Dept. 1970), and agree that the circumstances in those case are analogous here and should be followed. In light of the significant factors in mitigation, including respondent's cooperation, admitted conduct and acceptance of responsibility, and the fact that the misconduct was aberrational and occurred in the context of a single, open-ended conversation during a meeting with a potential client after which respondent took no further steps, the parties agree that a public censure is appropriate.

Accordingly, the parties' motion for discipline by consent should be granted, and respondent is censured. The

Committee's separately filed petition of charges should be denied as moot.

Ordered that the parties' motion for discipline by consent is granted, and respondent is publicly censured (M–3174). The Committee's petition of charges is denied as moot (M–1365).

All concur.

All Citations

165 A.D.3d 58, 81 N.Y.S.3d 733 (Mem), 2018 N.Y. Slip Op. 06148

New York Official Reports

242 A.D.2d 27, 672 N.Y.S.2d
89, 1998 N.Y. Slip Op. 03829

In the Matter of Lester D. Janoff (Admitted as Lester David Janoff), an Attorney, Respondent. Departmental Disciplinary Committee for the First Judicial Department, Petitioner.

Supreme Court, Appellate Division,
First Department, New York
M-5015, M-7302
April 28, 1998

CITE TITLE AS: Matter of Janoff

SUMMARY

Disciplinary proceedings instituted by the Departmental Disciplinary Committee for the First Judicial Department. Respondent was admitted to the Bar on March 18, 1964, at a term of the Appellate Division of the Supreme Court in the Second Judicial Department, as Lester David Janoff. An unpublished order of this Court was made and entered on November 29, 1993, *inter alia,* deeming the offense of which respondent was convicted to be a "serious crime" within the meaning of Judiciary Law § 90 (4) (d) and Rules of this Court (22 NYCRR) § 603.12 (b).

HEADNOTES

Attorney and Client
Disciplinary Proceedings

(1) Respondent attorney, who was convicted of insurance fraud in the fifth degree and attempted petit larceny, serious crimes within the meaning of Judiciary Law § 90 (4) (d), and who knowingly submitted false and misleading bills of particulars, failed to correct false deposition testimony and acquiesced in the submission of false medical reports, is guilty of professional misconduct and is suspended from the practice of law for a period of four years.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Attorneys at Law, §§ 33, 74, 97.

Carmody-Wait 2d, Officers of Court §§ 3:188, 3:204, 3:217, 3:224.

McKinney's, Judiciary Law § 90 (4) (d).

NY Jur 2d, Attorneys at Law, §§ 323-325, 373, 401.

ANNOTATION REFERENCES

See ALR Index under Attorney or Assistance of Attorney; Discipline and Disciplinary Actions.

APPEARANCES OF COUNSEL

Richard M. Maltz of counsel (*Hal R. Lieberman,* attorney), for petitioner. ***28**
Gustave H. Newman of counsel (*Newman & Schwartz,* attorneys), for respondent.

OPINION OF THE COURT

Per Curiam.

Respondent Lester D. Janoff was admitted to the practice of law in the State of New York by the Second Judicial Department, as Lester David Janoff, on March 18, 1964. At all times relevant to this proceeding, respondent maintained an office for the practice of law within the First Judicial Department.

On March 18, 1992, following trial in the Supreme Court of the State of New York, County of New York, respondent was convicted of three counts of insurance fraud in the fifth degree and one count of attempted petit larceny. Both crimes are misdemeanor offenses. The court imposed a fine in the amount of $11,910, including mandatory surcharges. On March 16, 1993, this Court affirmed the judgment (*People v Aksoy,* 191 AD2d 271, *affd* 84 NY2d 912).

Respondent's criminal conviction and the disciplinary charges against him result from his representation of a mother and son, who were plaintiffs in numerous personal injury actions extending over a 10-year period. Disciplinary proceedings were initiated following respondent's criminal conviction and, on November 29, 1993, this Court entered an order granting the Departmental Disciplinary Committee's petition for a finding that respondent's offenses constitute "serious crimes" pursuant to Judiciary Law § 90 (4) (d). This Court

referred the matter back to the Disciplinary Committee to conduct a hearing and recommend an appropriate sanction. During the course of the hearing, the Committee, *sua sponte,* initiated an investigation into additional misconduct relating to respondent's criminal offenses.

The Disciplinary Committee brought 20 formal charges against respondent, containing allegations similar to those underlying the criminal charges. Many of the formal charges involve the submission of inaccurate medical reports. They allege that respondent knew or should have known that his clients gave false and misleading information to doctors, which was thereby incorporated into false medical reports and relied upon by his adversaries.

The proceedings arising out of respondent's conviction of serious crimes and the formal charges subsequently preferred by the Committee were consolidated. Numerous hearings were ***29** held between July 1995 and July 1996, following which the Hearing Panel issued a 65-page report setting forth its factual findings, conclusions of law and recommendation for sanction. In addition, the Hearing Panel issued a 22-page supplemental report concerning the application of collateral estoppel to its review of the criminal conviction and respondent's obligation to correct false deposition testimony given by his clients. The Hearing Panel dismissed all disciplinary charges against respondent and, as a sanction for his conviction of serious crimes, recommended only public censure.

The Departmental Disciplinary Committee moves to disaffirm the recommendation of the Hearing Panel. It proposes that respondent be suspended for a period of three years (assuming this Court agrees that dismissal of the disciplinary charges is warranted) as a result of his conviction.

The Hearing Panel improperly engaged in an analysis of the jurors' reasoning, speculating that the verdict was a compromise based upon its independent assessment that the evidence does not support conviction. In applying the doctrine of collateral estoppel to its review of the general verdict, the Hearing Panel impermissibly considered extrinsic evidence to determine what issues were litigated and were, therefore, necessarily decided by the jury as essential to the judgment of conviction.

The parties do not dispute that *Matter of Levy* (37 NY2d 279), *Matter of Schwartz* (164 AD2d 184) and the Rules of this Court (22 NYCRR 603.12 [c]; 605.13 [j] [3]) set forth the applicable law. This Court has declared, in unequivocal terms, by the enactment of these two rules, that an attorney convicted of a crime cannot challenge the issue of guilt in disciplinary proceedings. The Court rule (22 NYCRR 603.12 [c]) states, in pertinent part: "A certificate of the conviction of an attorney for any crime shall be conclusive evidence of his guilt of that crime in any disciplinary proceeding instituted against him and based on the conviction, and the attorney may not offer evidence inconsistent with the essential elements of the crime for which he was convicted as determined by the statute defining the crime."

Thus, an attorney convicted of a crime may not relitigate the issue of guilt but may only introduce evidence to explain or mitigate the significance of his conviction (*Matter of Levy, supra,* at 281). Concomitantly, a Hearing Panel may not engage in a wholesale review of a jury verdict. Therefore, the Hearing Panel's findings with respect to the serious crime portion of the hearing must be disaffirmed. ***30**

We further disaffirm the Panel's findings with regard to the dismissal of the formal disciplinary charges. Having knowingly submitted false and misleading bills of particulars, failed to correct false deposition testimony and acquiesced in the filing of false medical reports in order to obtain favorable settlements, respondent violated numerous provisions of the Disciplinary Rules, specifically: engaging in conduct involving fraud, deceit or misrepresentation, in violation of Code of Professional Responsibility DR 1-102 (A) (4) (22 NYCRR 1200.3); engaging in conduct reflecting adversely on his fitness to practice law, in violation of DR 1-102 (A) (6) (now DR 1-102 [A] [8]); participating in the creation or preservation of evidence known to be false, in violation of DR 7-102 (A) (6) (22 NYCRR 1200.33); and intentionally assisting a client in illegal or fraudulent conduct, in violation of DR 7-102 (A) (7).

Despite respondent's conviction for several misdemeanor offenses, the Hearing Panel recommends only public censure, not suspension. This Court finds that evidence of respondent's complicity in the submission of false and misleading medical reports and testimony is substantial. Therefore, the Court concludes that respondent has committed serious infractions of the Disciplinary Rules and agrees with the Disciplinary Committee that suspension is warranted, although for a greater period than that proposed.

Accordingly, the report of the Hearing Panel is disaffirmed. The motion of the Departmental Disciplinary Committee

is granted to the extent that respondent is suspended from the practice of law for a period of four years, effective immediately. Respondent's cross motion to confirm the Hearing Panel's report is denied.

Sullivan, J. P., Milonas, Rosenberger, Ellerin and Rubin, JJ., concur.

The motion is granted to the extent that the report of the Hearing Panel is disaffirmed, and respondent is suspended from the practice of law in the State of New York for a period of four years, effective immediately, and until the further order of this Court. Respondent's cross motion to confirm the Hearing Panel's report is denied. ***31**

168 A.D.3d 163
Supreme Court, Appellate Division,
First Department, New York.

In the MATTER OF Marc S. KOPLIK
(Admitted as Marc Stephen Koplik),
an Attorney and Counselor-at-Law:
Attorney Grievance Committee for the
First Judicial Department, Petitioner,
v.
Marc S. Koplik, Respondent.

M–4179, M–5384
|
January 15, 2019

Synopsis

Background: Attorney Grievance Committee commenced disciplinary proceeding alleging that attorney was guilty of misconduct because he counseled potential foreign client to engage in conduct that he knew was illegal or fraudulent and suggested to client that lawyers in United States could act with impunity. Parties jointly moved for discipline by consent in form of public censure.

[Holding:] The Supreme Court, Appellate Division, held that public censure was appropriate discipline to impose on attorney.

Public censure ordered.

West Headnotes (1)

[1] **Attorneys and Legal Services** Mitigating factors

Attorneys and Legal Services Public Reprimand, Censure, or Admonition

Public censure was appropriate discipline to impose on attorney who stipulated that he was guilty of misconduct because he counseled potential foreign client to engage in conduct that he knew was illegal or fraudulent and suggested to client that lawyers in United States could act with impunity, in light of significant factors in mitigation, including attorney's cooperation, and fact that misconduct was aberrational and occurred in context of single, open-ended conversation during meeting with potential client after which attorney took no further steps. N.Y. Judiciary Law § 90(2); N.Y. Comp. Codes R. & Regs. tit. 22, §§ 1240.8, 1240.8(a)(5).

Disciplinary proceedings instituted by the Attorney Grievance Committee for the First Judicial Department. Respondent, Marc S. Koplik, was admitted to the Bar of the State of New York at a Term of the Appellate Division of the Supreme Court for the First Judicial Department on June 25, 1973.

Attorneys and Law Firms

Jorge Dopico, Chief Attorney, Attorney Grievance Committee, New York, (Denise M. Szekely and Si Aydiner, of counsel), for petitioner.

David Gendelman, Esq., New York for respondent.

Rolando T. Acosta, Presiding Justice, Dianne T. Renwick, Angela M. Mazzarelli, Ellen Gesmer, Anil C. Singh, Justices.

Opinion

PER CURIAM

***164** Respondent, Marc S. Koplik, was admitted to the practice of law in the State of New York by the First Judicial Department on June 25, 1973, under the name Marc Stephen Koplik. At all times relevant to this proceeding, respondent maintained an office for the practice of law within the First Judicial Department.

The Attorney Grievance Committee commenced this disciplinary proceeding by a petition of charges (Judiciary Law § 90[2], Rules for Attorney Disciplinary Matters [22 NYCRR] § 1240.8), alleging that respondent was guilty of certain misconduct in violation of the Rules of Professional Conduct (22 NYCRR 1200.0) because he counseled a client to engage in conduct he knew was illegal or fraudulent and suggested to the client that lawyers in the United States can act with impunity. Specifically, respondent met with a ****188** potential client who represented himself as appearing

on behalf of a West African minister. The individual stated that the minister desired to purchase real property in the form of a brownstone, an airplane, and a yacht in the United States. Respondent was under the impression that the money involved was in the tens of millions. The individual's explanation of the source of the money suggested that the money was questionable. The individual related that "companies are eager to get hold of rare earth or other minerals ... And so they pay some special money for it. I wouldn't name it bribe; I would say facilitation money." Respondent informed the individual that they would need to hide the true source of the money by setting up different corporations to own the properties the minister sought to purchase. Respondent also provided assurances regarding protection of the attorney-client privilege and stated that "[t]hey don't send the lawyers [in the United States] to jail because we run the country."

The parties agree on the stipulated facts, including the admission to the acts of professional misconduct and the violation ***165** of rules 1.2(d) and 8.4(h) of the Rules of professional Conduct, the relevant factors in mitigation, and on the discipline. The parties now jointly move pursuant to 22 NYCRR 1240.8(a)(5) for discipline by consent and request the imposition of a public censure.

In support of the joint motion for discipline by consent, the parties rely on *Matter of Jankoff*, 165 A.D.3d 58, 81 N.Y.S.3d 733 [1st Dept. 2018], and agree that the circumstances in that case are analogous here and should be followed. In light of the significant factors in mitigation, including respondent's cooperation, admitted conduct and acceptance of responsibility, and the fact that the misconduct was aberrational and occurred in the context of a single, open-ended conversation during a meeting with a potential client after which respondent took no further steps, the parties agree that a public censure is appropriate.

Accordingly, the parties' motion for discipline by consent should be granted, and respondent is censured. The Committee's separately filed petition of charges should be denied as moot.

All concur.
The parties' motion for discipline by consent is granted, and respondent is publicly censured (M–5384). The Committee's petition of charges is denied as moot (M–4179).

All Citations

168 A.D.3d 163, 90 N.Y.S.3d 187, 2019 N.Y. Slip Op. 00248

New York Official Reports

136 A.D.3d 14, 21 N.Y.S.3d 63, 2015 N.Y. Slip Op. 08945

**1 In the Matter of Ronald J. Meltzer (Admitted as Ronald Meltzer), an Attorney, Respondent. Departmental Disciplinary Committee for the First Judicial Department, Petitioner

Supreme Court, Appellate Division, First Department, New York
M-4461
December 3, 2015

CITE TITLE AS: Matter of Meltzer

SUMMARY

Disciplinary proceedings instituted by the Departmental Disciplinary Committee for the First Judicial Department. Respondent was admitted to the bar on March 26, 1990 at a term of the Appellate Division of the Supreme Court in the First Judicial Department.

HEADNOTE

Attorney and Client
Disciplinary Proceedings
Resignation

Inasmuch as resignor's proffered resignation complied with the requirements of 22 NYCRR 603.11 in that his affidavit averred that the resignation was submitted voluntarily after consultation with counsel and with full awareness of the implications of its submission, and he acknowledged that he could not successfully defend himself against charges of professional misconduct if they were predicated upon the matters under investigation, resignor's resignation was accepted and he was immediately disbarred.

RESEARCH REFERENCES

Am Jur 2d, Attorneys at Law §§ 31, 35, 37–38, 44–45, 49–54, 63–66, 91, 111, 117; Am Jur 2d, Perjury § 18.

Carmody-Wait 2d, Officers of Court §§ 3:261, 3:277, 3:279, 3:298, 3:318–3:321, 3:326, 3:328, 3:333, 3:337, 3:343.

22 NYCRR 603.11.

NY Jur 2d, Attorneys at Law §§ 362, 368, 438, 447, 449, 462–467, 476, 483, 490, 493; Criminal Law: Substantive Principles and Offenses § 1479.

ANNOTATION REFERENCE

Propriety of attorney's resignation from bar in light of pending or potential disciplinary action. 54 ALR4th 264.

FIND SIMILAR CASES ON WESTLAW

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Query: disciplin! /s resign! & aff! /s vol! & investigat! & fals!

*15 APPEARANCES OF COUNSEL

Jorge Dopico, Chief Counsel, Departmental Disciplinary Committee, New York City (*Vitaly Lipkansky* of counsel), for petitioner.
Patrick J. Brackley, for respondent.

OPINION OF THE COURT

Per Curiam.

Respondent Ronald J. Meltzer was admitted to the practice of law in the State of New York by the First Judicial Department on March 26, 1990, under the name Ronald Meltzer. At all times relevant herein, respondent maintained a registered address within the First Department.

The Departmental Disciplinary Committee moves, pursuant to Rules of the Appellate Division, First Department (22 NYCRR) § 603.11, for an order accepting respondent's affidavit of resignation from the practice of law and striking his name from the roll of attorneys. **2 Respondent's affidavit of resignation, sworn to September 4, 2015, complies with section 603.11 in that he states that, inter alia: (1) he has consulted with and is represented by counsel of his choice; (2) his resignation is submitted freely, voluntarily and without coercion or duress; and (3) that he is fully aware of the implications of submitting his resignation (*see* 22 NYCRR 603.11 [a] [1]).

Respondent states further that he is aware that he is the subject of a disciplinary investigation into allegations that, inter alia:

in preparing his client, and his client's friend, for the client's criminal trial involving charges of driving while intoxicated, he suborned the perjury/false trial testimony of the friend by instructing him to "downplay" the number of times he met with respondent to prepare for trial in the event that he was asked such a question on cross-examination (22 NYCRR 603.11 [a] [2]).

Respondent states that his instruction to his client's friend was given about six to eight months before the actual trial; and, on June 21, 2012, at the trial, the friend testified that he and respondent met a total of three times to discuss his testimony. In fact, they met a total of five to six times. Further, the friend testified that he did not meet with respondent the ***16** night before his trial testimony when, in fact, he did. * Respondent admits that he did nothing to correct the friend's false testimony, though he knew it was false at the time.

Respondent states that the reason he instructed the friend to "downplay" the number of times that they met was so that it did not appear to the jury that they had rehearsed the "perfect story." Respondent avers that he always believed his client had a valid defense in that his friend was present on the night of his arrest, and that they both went to the two venues they testified about. His client was arrested, while legally parked with the engine running, in the vicinity of one of the venues. Respondent states further that he always believed that this was a valid defense "at least up until many months after the trial when I learned that [they] had given false testimony about [the friend] being present on the night of the incident."

In addition, respondent states that he is aware that he is the subject of allegations that during the trial he knowingly made a false statement to the trial judge and the prosecutor when at a sidebar conference he falsely stated to the court that there was no written material that he was obligated to turn over to the prosecution pursuant to *People v Rosario* (124 AD2d 683 [2d Dept 1986], *lv denied* 69 NY2d 833 [1987]). In fact, respondent knew that such material existed in the form of a memorandum that he had prepared based on his conversations with his client and the friend, but he concealed its existence from the court and the prosecutor so that the prosecution could not use the document for purposes of cross-examination/impeachment (*see* 22 NYCRR 603.11 [a] [2]).

Respondent acknowledges that if disciplinary charges were brought against him predicated on these allegations, he could not successfully defend himself on the merits against such charges (*see* 22 NYCRR 603.11 [a] [3]).

In addition, respondent states "[t]o my knowledge, there are no other complaints of professional misconduct pending against me in this or any other jurisdiction, and I greatly regret my actions in this matter."

Respondent's affidavit of resignation fully complies with 22 NYCRR 603.11 and, therefore, should be accepted by this Court ***17** (*see e.g. Matter of Weintraub*, 123 AD3d 135 [1st Dept 2014]; *Matter of Teplen*, 120 AD3d 139 [1st Dept 2014]; *Matter of Riley*, 115 AD3d 112 [1st Dept 2014]).

Accordingly, the Committee's motion should be granted and respondent's affidavit of resignation from the practice of law accepted, and his name stricken from the roll of attorneys ****3** and counselors-at-law in the State of New York, effective nunc pro tunc to September 4, 2015.

Tom, J.P., Andrias, Moskowitz, Richter and Kapnick, JJ., concur.

Respondent's name stricken from the roll of attorneys and counselors-at-law in the State of New York, nunc pro tunc to September 4, 2015.

FOOTNOTES

Footnotes

* Respondent further states that on cross-examination, Nunez testified that he and respondent met once about two weeks before trial; and that on redirect examination he "rehabilat[ed] [the friend] to some extent by asking him questions and having him testify that we also met a couple of times over the winter."

MRPC RULE 1.1

American Bar Association

Model Rules of Professional Conduct

Client-Lawyer Relationship

RULE 1.1 - COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily

require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Definitional Cross-References

“Reasonably” *See* Rule 1.0(h)

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MRPC RULE 1.2

American Bar Association

Model Rules of Professional Conduct

Client-Lawyer Relationship

RULE 1.2 - SCOPE OF REPRESENTATION AND ALLOCATION OFAUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d), 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 may take such action on behalf of the client as is impliedly authorized to carry out the representation. 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 and the client gives informed consent.

(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.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental

disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[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.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[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).

Definitional Cross-References

“Fraudulent” *See* Rule 1.0(d)

“Informed consent” *See* Rule 1.0(e)

“Knows” *See* Rule 1.0(f)

“Reasonable” *See* Rule 1.0(h)

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MRPC RULE 1.3

American Bar Association

Model Rules of Professional Conduct

Client-Lawyer Relationship

RULE 1.3 - DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. 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. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to

review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

Definitional Cross-References

"Reasonable" *See* Rule 1.0(h)

MRPC RULE 1.4

American Bar Association

Model Rules of Professional Conduct

Client-Lawyer Relationship

RULE 1.4 - COMMUNICATION

(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations--depending on both the importance of the action under consideration and the feasibility of consulting with the client--this duty will require consultation prior to taking action. In other circumstances, such as during

a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Definitional Cross-References

“Informed consent” *See* Rule 1.0(e)

“Knows” *See* Rule 1.0(f)

“Reasonably” *See* Rule 1.0(h)

End of Document

MRPC RULE 1.13

American Bar Association

Model Rules of Professional Conduct

Client-Lawyer Relationship

RULE 1.13 - ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if
(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law; and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. “Other constituents” as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances,

the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization

of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Definitional Cross-References

“Knows” *See* Rule 1.0(f)

“Reasonably” *See* Rule 1.0(h)

“Reasonably believes” *See* Rule 1.0(i)

“Reasonably should know” *See* Rule 1.0(j)

“Substantial” *See* Rule 1.0(l)

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MRPC RULE 1.16

American Bar Association

Model Rules of Professional Conduct

Client-Lawyer Relationship

RULE 1.16 - DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering

papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

Definitional Cross-References

"Fraud" and "Fraudulent" *See* Rule 1.0(d)

"Reasonable" *See* Rule 1.0(h)

"Reasonably believes" *See* Rule 1.0(i)

"Tribunal" *See* Rule 1.0(m)

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MRPC RULE 3.3

American Bar Association

Model Rules of Professional Conduct

Advocate

RULE 3.3 - CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(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.

(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.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of ““““““tribunal.” It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a) (3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the

advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate.

Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done--making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility

to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Definitional Cross-References

“Fraudulent” *See* Rule 1.0(d)

“Knowingly” and “Known” and “Knows” *See* Rule 1.0(f)

“Reasonable” *See* Rule 1.0(h)

“Reasonably believes” *See* Rule 1.0(i)

“Tribunal” *See* Rule 1.0(m)

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MRPC RULE 8.4

American Bar Association

Model Rules of Professional Conduct

Maintaining the Integrity of the Profession

RULE 8.4 - MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving “moral turpitude.” That concept can be construed to include offenses

concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and antiharassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Definitional Cross-References

“Fraud” *See* Rule 1.0(d)

“Knowingly and knows” *See* Rule 1.0(f)

“Reasonably should know” *See* Rule 1.0(j)

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