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Reasonable Suspicion: Clients Involved in Suspicious Activities

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Most clients are honest. Unfortunately, not all are. The dishonest few sometime seek lawyers' assistance in carrying out activities that are illegal or fraudulent. When that occurs, the dishonest clients usually don't tell their lawyers about their illicit intent. The lawyers may begin to suspect, however, that their work is being used by the clients for improper purposes. The ABA issued an ethics opinion earlier this year examining this always uncomfortable situation. In this column, we'll first survey the new ABA opinion, Formal Opinion 491 (2020), which focuses on ABA Model Rule 1.2(d). We'll then briefly touch on associated considerations under the "crime-fraud" exception to the attorney-client privilege.

ABA Formal Opinion 491

ABA Model Rule 1.2(d) states an unremarkable proposition: "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."

Before focusing on how the new ABA opinion applies Model Rule 1.2(d) to suspected client criminal activity, there are three areas it does not address. First,

it assumes that a lawyer is not knowingly assisting a client in a crime or fraud. That is a short path to a new line of work—or worse. Second, the opinion does not discuss the emerging issue of state decriminalization of marijuana while it remains prohibited under federal law. This dichotomy has most often been addressed by state level RPC amendments or ethics opinions. Finally, the new opinion does not discuss lawyer advice or assistance to a client regarding completed conduct. That does not typically present problems for the lawyer as long as the legal services do not amount to assisting the client in covering-up an ongoing crime or fraud.

Instead, Formal Opinion 491 wrestles with the difficult question of what constitutes reasonable suspicion. The opinion begins with the text of Model Rule 1.2(d), which frames the prohibition around the word "knows." ABA Model Rule 1.0(f) defines the latter: "'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances."

Formal Opinion 491 examines "knowledge" principally through the duty to inquire under Model Rule 1.2(d). In doing so, the opinion also relies on the duty of competence under Model Rule 1.1 and the obligation to avoid misconduct under Model Rule 8.4. The opinion notes that in most circumstances we will not have a duty to inquire because the client's activities are clearly legal. It then outlines two broad guidelines for assessing reasonable suspicion and the

corresponding duty to inquire. First, if the facts as they develop reveal what reasonably appears to be ongoing criminal or fraudulent conduct, the opinion counsels that the lawyer must ask the client directly about the activities involved. If the client admits the misconduct and the intent to proceed, Formal Opinion 491 concludes that the lawyer must withdraw. Second, Formal Opinion 491 notes (at 4) that "a lawyer may not ignore the obvious." The opinion reasons that willful ignorance can amount to knowing assistance if the facts point to a high probability that the client is using the lawyer's services for criminal or fraudulent activity. In that instance, the lawyer must inquire and, if the lawyer's suspicion is confirmed (or the client offers no plausible explanation), the lawyer must with withdraw. With either scenario, attendant questions of whether the lawyer may reveal the crime or fraud are governed largely by state variants of the "confidentiality rule"—ABA Model Rule 1.6.

In reaching its conclusions, Formal Opinion 491 draws on both ABA Formal Opinion 463 (2013) on client use of legal services for money laundering and New York City Bar Association Opinion 2018-4 (2018) that discusses lawyer assistance of suspicious client activity generally. Although these are always difficult conversations with clients, Formal Opinion 491 stresses that they are discussions that must occur because lawyers otherwise face the risk of criminal and civil liability along with bar discipline.

Crime-Fraud Exception

The Supreme Court in *United States v. Zolin*, 491 U.S. 554, 563, 109 S. Ct. 2619, 105 L. Ed.2d 469 (1989) (citation omitted) summarized the crime-fraud exception: "[T]he purpose of the crime-fraud exception to the attorney-client privilege [is] to assure that the 'seal of secrecy' . . . between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." The exception applies in both criminal and civil litigation. *Grassmueck v. Ogden Murphy Wallace, P.L.L.C.*, 213 F.R.D. 567 (W.D. Wash. 2003), for example, applied the exception against the backdrop parallel criminal and civil proceedings for securities fraud involving the defendant law firm's former client.

Amusement Industry, Inc. v. Stern, 293 F.R.D. 420, 427 (S.D.N.Y. 2013), notes that the communications triggering the exception must both relate to the crime or fraud involved and be made at a time when they are in furtherance of that activity. *United States v. Chen*, 99 F.3d 1495, 1504 (9th Cir. 1996), in turn, underscores that the lawyer does not need to know of the client's wrongful intent for the exception to apply.

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