

Lawyers, Don't Be Willfully Blind to Suspected Client Fraudulent Conduct

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It's one of the most gut-wrenching events in a lawyer's practice when they suspect the client is lying about the facts to cover up fraudulent or criminal activity. The client may be hiding liabilities when applying for a loan or negotiating a deal. Or, the client provides the lawyer with intentionally vague information about their finances to avoid reporting the information to the IRS or other governmental agency. Or worse, the lawyer may suspect the client is using the representation to launder money. *Wink-winks* may be involved.

Last July, the Colorado Bar Association Ethics Committee adopted [Formal Opinion 142](#), addressing a lawyer's duty to inquire when the lawyer knows a client is seeking advice on a transactional matter that may be criminal or fraudulent. Like the Model Rules of Professional Conduct counterpart, Colorado's rule 1.2(d) provides that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent"

The opinion specifically discusses what happens when the lawyer *suspects* but does not *actually know*, that the client may be using the legal services to engage in criminal or fraudulent conduct. While the term "know" denotes "actual knowledge of the fact in question" under Colorado Rule 1.0(f), the Committee interpreted the actual knowledge standard to include "willful blindness."

The Committee adopted the definition of willful blindness adopted by the U.S. Supreme Court: "a lawyer is willfully blind when she (1) subjectively believes that there is a high probability that a fact exists; and (2) takes deliberate actions to avoid learning that fact." *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011). The Committee purposefully distinguished willful blindness from both recklessness and negligence.

Acknowledging that it is difficult to discern the line between what a lawyer "reasonably should know" and information about which the lawyer is "willfully blind," the Committee said it would measure willful blindness at the time of the lawyer's determination – not after the fact ["a lawyer is not deemed to 'know' either facts or the significance of facts that only become evident with the benefit of hindsight"].

The opinion breaks down the duty to inquire as follows:

- A lawyer has an ethical duty to inquire only when the lawyer actually knows facts that are obvious indicators of the client's intent to use the lawyer to facilitate a criminal or fraudulent act.
- However, when a lawyer does have such knowledge, that lawyer has a duty to confirm or dispel that knowledge.
- A lawyer who intentionally fails to conduct such inquiry would be considered willfully blind and would be chargeable with knowledge for purposes of Rule 1.2(d).
- A lawyer who provides legal services when the lawyer knows (or is willfully blind to the fact) that those services will be used for criminal or fraudulent purposes risks a range of undesirable consequences, including professional sanction or even criminal or civil liability.

The Committee expressly confirmed that it “parts ways with ABA Opinion 491 with respect to the ABA's determination that the duty to inquire extends to every situation where a lawyer should know of the client's improper use of a lawyer's service.”

Colorado is not the first jurisdiction to tackle this issue. Here are a few more ethics opinions that offer guidance for a lawyer's duty to inquire:

- American Bar Association Formal Opinion 491 - Obligations Under Rule 1.2(d) to Avoid Counseling or Assisting in a Crime or Fraud in Non-Litigation Settings
- [Indiana State Bar Association Opinion No. 2 for 2001](#) - facts suggested that the client's true objective could be fraudulent
- [New York City Bar Formal Opinion 2018-4](#) - Duties When an Attorney Is Asked to Assist in a Suspicious Transaction
- [The State Bar of California Formal Opinion 1996-146](#) - What are a lawyer's ethical obligations when she knows or should know her client is committing an ongoing or future fraud upon the public?

In closing, be mindful that the Model Rules of Professional Conduct and most ethics opinions serve only as a guide for ethical lawyering. Always consult the professional conduct rules of your state to determine whether and to what extent your rules and laws differ from the resources listed above.

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