American Bar Association

DUTY OF LAWYER TO INQUIRE INTO FRAUDULENT OR CRIMINAL CONDUCT AND DISCLOSE PAST ACTIVITIES OF A PROSPECTIVE CLIENT

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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. A lawyer may have a duty to urge the client to reveal past improprieties.

The Committee is asked whether, in the circumstances stated below, a lawyer has a professional duty to make further inquiry and to make disclosure to authorities concerning the past activities of a prospective client.

A person, while employed abroad, received substantial payments from sources other than his employer. He caused the payments to be deposited in foreign bank accounts held in the names of foreign corporations. He has brought part of the funds into the United States. He has not disclosed the payments to his employer, or to any governmental authority, or to anyone else, and has not included the amount of payments in his United States income tax returns. He now consults the lawyer for advice as to a lawful means of bringing the balance of the funds to the United States in a manner than will avoid or minimize his United States tax liability.

The prospective client has not revealed facts sufficient to enable the lawyer to determine the legality of the transactions surrounding the payments, but the lawyer suspects that the payments may have been unlawful bribes or kickbacks, and that in taking the payments the prospective client may have breached duties to his employer. The lawyer believes that the payments are no longer continuing. The lawyer knows no facts indicating that the prospective client is now involved in any unlawful transaction. The lawyer has not yet done more than initially confer with the prospective client.

The specific questions put to the committee are: (1) Does the lawyer have a duty to inquire into the circumstances surrounding receipt of the funds by the client or may the lawyer assume the funds were legally acquired and assist the client in aggressive tax planning? (2) To what extent has the lawyer a duty to disclose any client fraud or criminal conduct to governmental agencies?

No Disciplinary Rule of the Model Code of Professional Responsibility specifically addresses a duty of factual inquiry as a predicate to undertaking representation. Nevertheless, 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 should not participate in a transaction to effectuate a criminal or fraudulent escape of tax liability. Counseling or assisting a client 'in conduct that the lawyer knows to be illegal or fraudulent' violates DR 7-102(A). A lawyer should not counsel his client on how to violate the law and escape punishment therefore. EC 7-5. See also DR 1-102(A)(4). Lawyers have an obligation not to 'shut their eyes to what was plainly to be seen . . .' United States v. Benjamin, 328 F.2d 854, 863 (2d Cir. 1964). 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. Otherwise, the lawyer has a duty of further inquiry. See ABA Formal Opinion 335 (1974). A duty to inquire further may also arise separately under DR 6-101(A)(2), which requires a lawyer to be adequately prepared—and thus adequately informed—to represent a client competently.

Here the prospective client may not only have received illegal payments but also have filed fraudulent United States income tax returns. At the least, the lawyer has a duty to inquire further into the circumstances surrounding the receipt of the funds in order to prepare properly and to avoid aiding the client in perpetrating further fraudulent or criminal conduct.

Even after inquiry adequate to represent the client competently and to assure the lawyer that the client is not engaging in illegal or fraudulent conduct, the lawyer still must be assured that the requested services will not be predicated upon the client's past fraud or other criminal conduct. Otherwise, the lawyer may have a duty to urge the client to reveal the past improprieties. See DR 7-102(B)(1). If the client refuses, the lawyer should decline to undertake the representation. See DR 7-102(A)(7); DR 2-110(B)(2); DR 2-110(C)(1)(b), (c). See also ABA Formal Opinion 314 (1965), applying these standards in circumstances where a lawyer represented a client in an adversarial proceeding before the Internal Revenue Service.

Even if the facts reveal the commission of a crime, the lawyer may have no duty of disclosure to authorities. Information received by a lawyer from a client as to the client's past crime is privileged and should not be divulged. DR 4-101(B); ABA Formal Opinion 341 (1975). A lawyer may disclose a client's intention to commit a crime. DR 4-101(C)(3). See also EC 7-6. [FN1]

[FN1]. The fact that the questions arise with respect to a prospective client does not change the analysis of the lawyer's ethical obligations. EC 4-1 clearly contemplates circumstances of prospective employment as well as actual employment.

ABA Informal Op. 1470

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