

## Ethical Obligations of Transactional Lawyers Where Clients May Be Engaging in Criminal or Fraudulent Activity

By Carole J. Buckner\*

Have you ever had a bad feeling that a legal transaction you are working on may involve fraudulent or criminal activity? There are many circumstances in which a client may use a lawyer's services to assist in criminal or fraudulent activity in connection with a diverse range of transactional matters. Some engagements may at first appear legitimate but a myriad of transactional matters may present a duty to inquire further, for example to avoid assisting in money laundering, terrorist financing or other fraudulent or criminal activity.<sup>1</sup> ABA Formal Opinion 491 (Opinion 491) addresses the ethical obligations of lawyers handling transactions where the client may be using the lawyer's services to engage in a crime or fraud. Ethics opinions are generally considered advisory. The ABA Model Rules and ethics opinions may be looked to by California lawyers for guidance on ethics questions where California has not adopted a contrary policy.<sup>2</sup> Although Opinion 491 does provide important guidance, a California lawyer's ethical duties in this context may differ in several important respects.

Avoiding assisting in criminal or fraudulent activity implicates a host of ethical duties. At the most fundamental level, California lawyers have a duty to uphold the laws and Constitution of the United States and the State of California.<sup>3</sup> Lawyers cannot counsel a client to engage in or assist a client in conduct that the lawyer "knows" is criminal, fraudulent or a violation of any law, rule or ruling of a tribunal.<sup>4</sup> California has located provisions similar to ABA Model Rule 1.2(d) in a separate standalone version, California Rule 1.2.1. Knowledge is defined to include actual knowledge, which may be inferred from the circumstances.<sup>5</sup>

Opinion 491 provides that the lawyer has a duty to inquire if the facts create a "high probability" that a lawyer's services will be used in a transaction to further criminal or fraudulent activity. Opinion 491 provides that a lawyer's willful blindness of the facts fails to satisfy this duty.<sup>6</sup> In addition, situations involving criminal or fraudulent conduct can also trigger a lawyer's duties of honesty, integrity, competence, diligence, and communication, and can also trigger duties to organizational clients. Ultimately, the duty to withdraw may also come into play.

### Duty to Inquire?

Opinion 491 indicates that a duty to inquire to avoid assisting a crime or fraud can arise from actual knowledge of criminal or fraudulent activity, in which case, unless there is a misunderstanding, the lawyer must withdraw from the engagement.<sup>7</sup> Short of actual knowledge, Opinion 491 addresses the criminal law doctrine of willful blindness. Where facts known to the lawyer show a high probability that

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<sup>1</sup> ABA Formal Op. 491 (April 29, 2020), p. 2, 4 (for example, a request for a power of attorney for the relative of a frail principal may involve a possible fraud).

<sup>2</sup> *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal.4th 839, 852 (2006); *State Compensation Ins. Fund v. WPS, Inc.* 70 Cal.App.4th 644, 656 (1999).

<sup>3</sup> Cal. Bus. & Prof Code § 6068(a).

<sup>4</sup> Cal. Rules of Prof'n'l Conduct, rule 1.2.1.

<sup>5</sup> Cal. Rules of Prof'n'l Conduct, rule 1.0.1(f).

<sup>6</sup> ABA Formal Op. 491 (April 29, 2020).

<sup>7</sup> *Id.* at 3.

the lawyer's services are being used for criminal or fraudulent purposes, the law provides that a conscious, deliberate failure to inquire, in essence, willful blindness, amounts to "knowing assistance."<sup>8</sup> Where a lawyer is aware of serious questions about the legality of the transaction and renders assistance without further inquiry, Opinion 491 indicates that conscious avoidance is tantamount to knowledge.<sup>9</sup>

At the same time, a lawyer may credit a trustworthy client's information, particularly where the lawyer has previously represented the client, knows the client personally, professionally or socially, or knows the other persons or entities involved in the transaction.<sup>10</sup> Overall familiarity with the context of the transaction, including the location or jurisdiction, can also trigger the duty of inquiry.<sup>11</sup> As long as the lawyer makes reasonable inquiry, a lawyer's conclusions about the circumstances may be reasonable, even if some doubt remains or information from other sources fails to fully resolve the issues.<sup>12</sup>

Circumstances that may trigger the duty to inquire may change over the course of the representation. Some factors identified in Opinion 491 include money in a foreign bank in the name of an unidentified corporation, employment outside the US that is not fully disclosed, failure to disclose information to governmental authorities or include amounts in foreign tax returns, undisclosed beneficial owners, agents from high risk jurisdictions who seek to remain anonymous, and vagueness regarding the source of funds.<sup>13</sup> Who pays for the inquiry can be a delicate consideration. Opinion 491 indicates that where a client refuses to pay, the lawyer may choose to conduct the inquiry without payment, or alternatively, may decline or terminate the representation.<sup>14</sup>

#### The Limited Scope Solution

May a lawyer agree to limit the scope of representation in order to address this issue? Yes and no. Like the ABA Model Rules, California allows a lawyer to limit the scope of representation as long as the limitations are reasonable under the circumstances.<sup>15</sup> The California rule also requires that the representation is not otherwise prohibited by law, and the client must give informed consent. A lawyer may advise in good faith on the validity, scope, meaning or application of the law, as well as potential consequences of disobedience, as well as legal procedures available to determine invalidity.<sup>16</sup> California lawyers may also advise regarding California law, even where California law conflicts with federal or tribal law, but must advise clients about the conflict.<sup>17</sup>

Opinion 491 provides that a lawyer may limit the scope of the engagement to lawful objectives, or exclude objectives that are too expensive or are repugnant or imprudent.<sup>18</sup> However, a lawyer may not

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 5.

<sup>10</sup> *Id.* at 10-11.

<sup>11</sup> *Id.* at 12.

<sup>12</sup> *Id.* at 10-11.

<sup>13</sup> *Id.* at 7.

<sup>14</sup> *Id.* at 11-12.

<sup>15</sup> Cal. Rules of Profn'l Conduct, rule 1.2.1(b).

<sup>16</sup> Cal. Rules of Profn'l Conduct, rule 1.2.1, *comment* [3].

<sup>17</sup> Cal. Rules of Profn'l Conduct, rule 1.2.1, *comment* [6].

<sup>18</sup> ABA Formal Op. 491 (April 29, 2020), p. 11.

limit the scope of representations by excluding the duty of inquiry into the transaction.<sup>19</sup> In addition, a lawyer must advise the client on the ethical limitations on the lawyer's conduct in the event that client seeks assistance that is not ethically permitted.<sup>20</sup>

### Duty to Withdraw

Once a lawyer makes inquiry in order to evaluate the legality of the transaction, a client may refuse to provide information. Opinion 491 indicates that if the client does not provide the requested information or provides incomplete information, the lawyer must remonstrate with the client, and in the absence of complete information, must withdraw.<sup>21</sup> Where the client provides information, if the lawyer concludes that the services requested would assist criminal or fraudulent activity, the lawyer must discuss the matter further with the client, and depending on the outcome of those discussions, Opinion 491 indicates the lawyer should decline the representation or withdraw.<sup>22</sup>

### Disclosure

While the ABA Model Rule on withdrawal may permit a lawyer with discretion to disclose information,<sup>23</sup> the duty of confidentiality in California allows reporting a violation of law by a constituent to an organizational client under certain narrow circumstances,<sup>24</sup> but generally prohibits disclosure of criminal or fraudulent activity beyond the attorney client relationship.<sup>25</sup>

### Collateral Consequences

Lawyers engaging in willful blindness to client fraud or criminal conduct may face several serious collateral consequences. In the context of lawyer discipline, conscious avoidance of knowledge that a lawyer is assisting a crime or fraud supports imposition of discipline including disbarment.<sup>26</sup> Numerous cases illustrate that willful blindness also triggers criminal liability of lawyers,<sup>27</sup> and can support sanctions,<sup>28</sup> as well as potential liability for legal malpractice.<sup>29</sup> At the same time, Opinion 491 reminds us that lawyer conduct should not be evaluated based on clairvoyance or hindsight.<sup>30</sup>

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<sup>19</sup> *Id.* at 11.

<sup>20</sup> Cal. Rules of Profn'l Conduct, rule 1.2.1, *comment* [5].

<sup>21</sup> *Id.* at 9-10.

<sup>22</sup> *Id.* at 10.

<sup>23</sup> *Id.* at 10.

<sup>24</sup> Cal. Rules of Profn'l Conduct, rule 1.13.

<sup>25</sup> Cal. Rules of Profn'l Conduct, rule 1.2.1, *comment* [2]; Cal. Bus & Prof. Code § 6060(e)(1); Cal. Rules of Profn'l Conduct, rule 1.6.

<sup>26</sup> ABA Formal Op. 491 (April 29, 2020), p. 5, and fn. 20, citing authorities including *In re Bloom*, 44 Cal.3d 128 (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); and n. 28, citing *In re Berman*, 48 Cal.3d 517 (1989) (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").

<sup>27</sup> See, e.g., *U.S. v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976) (when accused consciously avoids acquiring the requisite statutory knowledge, knowledge may be established if "a person is aware of a high probability of the existence of the fact in question.").

<sup>28</sup> *In re Girardi*, 611 F.3d 1027, 1036-1038 (9th Cir. 2010) (attorneys' course of conduct involved several "crucial moments where a reasonable attorney would have, at a minimum, inquired further about the bona fides" of enforcement of a judgment such that, at some point, "failing to do so becomes willful blindness.")

## Conclusion

Lawyers assisting clients under these circumstances must conduct a careful and nuanced analysis to avoid willful blindness and to conform with all applicable ethical standards.

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<sup>29</sup> ABA Formal Op. 491 (April 29, 2020), p. 6, and fn. 26, citing authorities including *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).

<sup>30</sup> ABA Formal Op. 491 (April 29, 2020), p. 9 & n. 35.