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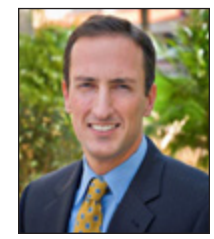
Q&A

LAWYER LIABILITY AND ETHICS

The Lawyer and the Ostrich



Joseph Brophy

Judge Richard Posner once wrote, "the ostrich's posture is not a seemly one for a lawyer." To prevent lawyers from assuming that posture, lawyers have duties of inquiry/investigation in a wide variety of situations across many practice areas.

It's a story as old as time. A lawyer is minding his own business when he is introduced to potential new client from South America who wants to invest $1 million cash for the production of a movie, with a goal to use that money to leverage an additional $5 million from lenders to be used for the marketing of the movie. All the new client needs from the lawyer is to deposit the money in the firm's trust account. Well those were easy billable hours, no?

Fast forward a couple years and the lawyer learns, when he is indicted under 18 USC § 1960(a) for operating an unlicensed money transmitting business (colloquially known as money laundering), that the money in the firm trust account was drug money. No, this is not autobiographical. But, in June 2020, the appellate division of the Supreme Court of New York recently upheld a three-year suspension of a lawyer on exactly those facts.

ER 1.2(d) prohibits a lawyer from advising or assisting a client in conduct the lawyer "knows" is criminal or fraudulent. Which begs the question: what does "know" mean? Some states, such as New York, attribute to a lawyer any facts he "should have known." In contrast, Arizona has declined to read a "should have known" standard into ER 1.2(d). In re Tocco, 984 P.2d 539, 543 (Ariz. 1999) ("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.")

But there may be less to the difference between New York and Arizona's approaches than meets the eye. While Arizona adheres to an "actual knowledge" standard, a lawyer's knowledge may be inferred from the surrounding circumstances. See Arizona ER 1.0(f). This raises the issue of a lawyer's duty to inquire to ensure that he is not advising or assisting a client in a transaction or other non-litigation matter the lawyer "knows" is criminal or fraudulent.

As the New York lawyer learned the hard way, failure to make a reasonable inquiry is willful blindness punishable under the actual knowledge standard of the rule. The New York appellate court observed: "People usually don't walk into an office with a million dollars in cash and ask that it be converted into another form," and therefore, the court said, the lawyer "should have been on notice that this was not a legitimate transaction."

The State Bar of Arizona has not issued any opinions regarding the duty of inquiry under ER 1.2(d). But a 2001 opinion by the Legal Ethics Committee of the Indiana State Bar Association illustrates how, even under facially mundane circumstances, a lawyer is obligated to investigate to make sure transaction with which the lawyer is assisting is not criminal or fraudulent. A transaction need not be inherently suspicious, like the New York fact pattern, to trigger a lawyer's duty to inquire.

The Indiana committee addressed the following facts. A lawyer was asked to create a "new" sole power of attorney for a prospective client on behalf of her wealthy grandfather in matters concerning his estate. According to the committee, those facts, on their face, trigger a duty of inquiry. The opinion emphasized: (1) 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 lawyer had not consulted; (2) the possibility that the grandfather would not wish to grant sole power of attorney to his granddaughter; and (3) the possibility that the grandfather might lack the capacity to consent to such an arrangement. The committee concluded that "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."

Because of the duty of inquiry, the distinction between states like New York (attributing to the lawyer knowledge of facts he "should have known") and Arizona (requiring "actual knowledge") may be one without a difference in most cases. Although Arizona's ethics opinions do not say much on this subject, ABA Formal Opinion 491 provides additional information. For you ostrich lovers out there, Judge Posner's criticism notwithstanding, the news is not all bad. While imitating the bird's posture will get you into trouble, the Rules of Professional Responsibility do not place any limits on being tall or running fast. ■

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