

**Investigating the Client
An Ethical Dilemma
with Professor Peter Joy**

- ABA Model Rules
 - Rule 1.2 Scope of Representation & Allocation of Authority Between Client & Lawyer
 - *(d) 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.*
 - Comment 9: (d) does not preclude lawyer from giving honest opinion about consequences from client conduct.
 - Comment 10: Lawyer must withdraw from representation if lawyer discovers client conduct is criminal or fraudulent.
 - Rule 1.0 Terminology
 - *(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.*
 - *(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.*
 - Duty to withdraw
 - Model Rule 1.16(a)(1): duty to withdraw from representation if it will result in violation of ethics rules or laws.
 - Duty to report
 - Model Rule 1.6(b): lawyer may reveal client information (2) to prevent client from committing a crime of fraud reasonably certain to result in substantial financial or property injury to another or (3) to prevent, mitigate, or rectify substantial financial or property injury.
 - E.g., New Jersey requires mandatory disclosure when lawyer believes necessary to prevent criminal, illegal, or fraudulent activity likely to result in death or substantial bodily or financial injury. See NJ RPC 1.6(b)(1).
 - E.g., FL requires mandatory disclosure when lawyer believes necessary to prevent client from committing a crime or to prevent death or substantial bodily harm. See FL RPC Rule 4-1.6.
- Do lawyers have to duty to investigate clients?

- Question typically arises in context of money laundering, corporate fraud, and terrorism.
- ABA Formal Opinion 491 (2020), Obligations Under Rule 1.2(d) to Avoid Counseling or Assisting in a Crime or Fraud in Non-Litigation Settings¹:
 - Examples highlighted in the opinion
 - Series of purchases and sales of properties
 - All-cash deal in large amounts with proceeds deposited in accounts in jurisdictions where such transactions are commonly used to conceal illegal activities
 - Employment outside of US that is fully disclosed
 - Undisclosed beneficial owners
 - Opines the following:
 - Lawyer has duty to inquire further when lawyer has knowledge of facts that create “high probability” that client is seeking lawyer’s services to further criminal or fraudulent activity.
 - Duty limited to non-litigation, transactional matters
 - Lawyer’s conscious, deliberate failure to inquire amounts to *knowing* assistance of criminal or fraudulent conduct.
 - Requires *reasonable evaluation*.
 - Duty to withdraw when client does not provide information or if lawyer determines services would assist criminal activity.
 - Finds duty to inquire further in other rules, re. competence, diligence, communication, honesty, and withdrawal under Rules 1.1, 1.3, 1.4, 1.13, 1.16, and 8.4. Duty may be triggered under certain kinds of facts and circumstances, including:
 - Client identity
 - Lawyer’s familiarity with client
 - Nature of matter
 - Relevant jurisdictions
 - Likelihood and gravity of harm
 - Nature and depth of lawyer’s expertise
 - Florida Rule 1.2(d) includes “should have known” standard.
 - Restatement (THIRD) OF THE L. GOVERNING LAWS. § 94(2): *Under the actual knowledge standard . . . a lawyer is not required to make a particular kind of investigation in order to ascertain more clearly what the facts are, although it will often be prudent for the lawyer to do so.*
- Open questions raised by the Opinion
 - Persuasive authority
 - If such a duty exists, how it would affect the attorney-client relationship

¹ https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-491.pdf

- How lawyer would bill for time taken to investigate client
- What *reasonable evaluation* requires