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## **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**

*Adopted July 10, 2021*

### ***Introduction and Scope***

When a client seeks advice or counsel in a transaction that the lawyer knows is criminal or fraudulent, the lawyer “shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent....” Colo. RPC 1.2(d). But what if the lawyer suspects, but does not actually know, that the client is seeking advice or counsel in such a transaction; must the lawyer inquire further into the client’s request? In April 2020, the American Bar Association (ABA) issued ABA Comm. on Ethics and Prof. Resp., Formal Op. 491, “Obligations Under Rule 1.2(d) to Avoid Counseling or Assisting in a Crime or Fraud in Non-Litigation Settings” (2020) (hereinafter ABA Opinion 491) detailing the existence of a duty to inquire. In this opinion, the Colorado Bar Association Ethics Committee (Committee) considers that question under Colorado law and describes the circumstances in which a lawyer has a duty to inquire.

### ***Syllabus***

This opinion primarily addresses the basis for and the scope of the duty to inquire, including governing rules and the definition of “knowledge.” The opinion concludes that Colorado lawyers should assume that “knowledge” under the Rules includes willful blindness.

In this respect, the lawyer’s obligation under the Rules encompasses a duty not to act with willful blindness or to commit or assist a client in committing criminal or fraudulent acts. When a lawyer knows the client seeks the lawyer’s services for criminal or fraudulent purposes, inquiry is necessary to confirm or dispel the lawyer’s knowledge of the client’s purpose. The opinion then notes how a lawyer who fails to inquire when the lawyer has knowledge that the client is seeking the lawyer’s services to advance criminal or fraudulent conduct might violate other rules, including Rule 8.4, as well as face potential civil or criminal exposure. The opinion concludes by considering examples where the duty to inquire is clear.<sup>1</sup>

### *Analysis*

## **I. THE DUTY TO INQUIRE**

### **A. APPLICABLE RULES**

Rule 1.2(d) of the Colorado Rules of Professional Conduct (Colo. RPC or the Rules) provides the primary basis for the duty to inquire. It states that a lawyer “shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent...” Colo. RPC 1.2(d). Colo. RPC 1.2(d) is virtually identical to Rule 1.2(d) of the ABA Model Rules of Professional Conduct (ABA Model RPC).

Although not authoritative, comment [13] to Rule 1.2 provides additional guidance. It explains that “[i]f a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the [Colo. RPCs] or other law ... the lawyer must consult with the

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<sup>1</sup> This opinion is limited to the transactional arena; it does not apply to litigation. This opinion also leaves for another day whether a lawyer has a duty to withdraw or disclose if the lawyer determines that the facts create a high probability that the client is seeking the lawyer’s services for criminal or fraudulent activity. *See* Colo. RPC 1.6(b) (listing the limited circumstances where a lawyer may reveal information). All this opinion addresses is whether a lawyer has a duty to look further under certain circumstances.

client regarding the limitations on the lawyer’s conduct.” In other words, under this comment, the lawyer is obligated to the client to identify limitations in the representation when the lawyer knows, *or reasonably should know*, the client is seeking services that encompass any criminal or fraudulent conduct. These consultations “will ordinarily include inquiry into whether there is some misapprehension regarding the relevant facts.” *See* ABA Opinion 491, p. 3.

When a lawyer knows or suspects a client may intend to engage in potentially criminal or fraudulent conduct, Rule 1.2(d) allows the lawyer to “discuss the legal consequences of any proposed course of conduct with a client and [the lawyer] may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.”<sup>2</sup> Consultation is not appropriate when a lawyer actually *knows* her assistance is requested in criminal or fraudulent conduct. In that case, the lawyer cannot take on the matter. This is consistent, too, with comment [9] to Rule 1.2, which explains that simply because a lawyer gives an opinion concerning actual legal consequences about a particular course of action, that counsel does not give rise to assisting criminal or fraudulent conduct. Rather, “[t]here is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.” Colo. RPC 1.2, cmt. [9].

### ***B. The Knowledge Requirement***

Rule 1.2(d)’s prohibition focuses on conduct that a lawyer “knows” is criminal or fraudulent. But what does it mean to “know” something? In this context, “know” means actual

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<sup>2</sup> Nevertheless, a lawyer may advise a client concerning the “validity, scope, and meaning” of activities authorized by Colorado law but which remain illegal under federal law – i.e., counsel on marijuana-related activities – so long as the lawyer advises the client of the relevant federal laws and policies and the counsel concerns conduct “the lawyer reasonably believes is permitted” by Colorado law. *See* Colo. RPC 1.2, cmt. [14].

knowledge – including willful blindness to the facts or evidence presented. Notwithstanding comment [13] to Rule 1.2, the word “know” does not include information that a lawyer could or should have known. This is true even if the lawyer recklessly<sup>3</sup> or negligently failed to obtain actual knowledge.

### ***1. “Knowledge” under the Rules***

Colorado’s Rules specifically distinguish between knowledge a lawyer *actually* has and knowledge that a lawyer *reasonably should* have. Rule 1.0(f) provides that “‘Knowingly,’ ‘known,’ or ‘knows’ denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” In contrast, Rule 1.0(j) explains that, “‘reasonably should know’ when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.”

Rule 1.2(d) uses the term “knows,” not “reasonably should know.” The commentary to Rule 1.2(d) also uses “knows,” with one exception, as noted above. Specifically, Rule 1.2 comment [13] says, “If a lawyer comes to know *or reasonably should know* that a client expects assistance not permitted by” the Colo. RPC or other law, the lawyer must consult with the client regarding limitations on the lawyer’s counsel. Colo. RPC 1.2(d), cmt. [13] (emphasis added) (citing Colo. RPC 1.4(a)(5)).<sup>4</sup> Comment [13]’s “reasonably should know” language applies only where a lawyer is discussing limitations on the representation. Comment [13] does not expand Rule 1.2(d) by imposing a duty of inquiry based solely on matters a lawyer reasonably should

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<sup>3</sup> Although a “reckless state of mind” is ordinarily “equivalent to ‘knowing’ for disciplinary purposes,” Colo. RPC 1.0, cmt. [7A] (quoting *In the Matter of Egbune*, 971 P.2d 1065, 1069 (Colo. 1999)), recklessness is insufficient when, as in Rule 1.2(d), the text of a rule specifically requires knowledge. *Id.*

<sup>4</sup> Rule 1.4(a)(5) provides that a lawyer shall “consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted” by the Colo. RPC or other laws.

know. In that respect, comment [13] addresses a situation different than the active assistance Rule 1.2(d) itself forbids. On the contrary, comment [13] reinforces Rule 1.2(d)'s text and indicates that the Rule's prohibition is triggered by actual knowledge, not simply by what a lawyer reasonably should have known.

## 2. *Willful Blindness*

The Committee believes that Rule 1.2(d)'s actual knowledge standard is most likely to be interpreted to include "willful blindness." No direct Colorado precedent has interpreted "knowledge" as used in Rule 1.2(d) to include "willful blindness." For two reasons, however, the Committee understands "knowledge" to include "willful blindness" and cautions lawyers to proceed accordingly. Before explaining those reasons, however, it is important to point out that willful blindness is not recklessness. It is, instead, a form of actual knowledge.

For purposes of this opinion, the Committee uses the oft-cited formulation of willful blindness from 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). Willful blindness connotes having one's eyes wide shut – i.e., intentionally ignoring facts that are obvious indicators of the client's intent to use the lawyer to facilitate a criminal or fraudulent act. These requirements distinguish willful blindness from both recklessness and negligence. *Id.*

Using this definition of willful blindness, there are two good reasons for Colorado lawyers to assume willful blindness is a form of knowledge included in Rule 1.2(d). First, Rule 1.0(f) itself provides that knowledge "may be inferred from circumstances."<sup>5</sup> This conveys that a

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<sup>5</sup> See also, e.g., *United States v. Delreal-Ordonez*, 213 F.3d 1263, 1268 (10th Cir. 2000) (allowing government to rely on "circumstantial evidence" and the benefit of inferences drawn therefrom to establish deliberate ignorance).

lawyer can actually know something that is otherwise obvious – i.e., the lawyer cannot fail to know something obvious by intentionally failing to perceive it.

Second, although the Colorado Supreme Court has never explicitly adopted “willful blindness” in the context of Rule 1.2(d), it has twice explained that deliberately closing one’s eyes satisfies the mental state of “knowledge” for ethics violations. In *People v. Rader*, 822 P.2d 950, 953 (Colo. 1992), the court explained that a lawyer acted “knowingly” for an ethics violation – DR-102(A)(4) – when he “‘deliberately closed his eyes to facts he had a duty to see ... or recklessly stated as facts things of which he was ignorant.’” *Id.* (emphasis added) (quoting *United States v. Benjamin*, 328 F.2d 854, 862 (2d Cir. 1964)). In doing so, the *Rader* court drew a distinction between knowledge as deliberately closing one’s eyes, on the one hand, and recklessness, on the other; particularly in asserting facts of which the lawyer was ignorant.<sup>6</sup> *Id.*

Citing *Benjamin*, 328 F.2d at 862, the *Rader* court explained that the “government could meet its burden of proving willfulness in a prosecution for conspiracy to defraud in sale of unregistered securities by showing that defendant auditor had deliberately closed his eyes to facts that were plainly to be seen or recklessly stated as facts things of which he was ignorant.” *Rader*, 822 P.2d at 953. *Benjamin*, in turn, held that a lawyer had the requisite intent for securities fraud when he “deliberately closed his eyes to facts he had a duty to see ... or recklessly stated as facts things of which he was ignorant.” 328 F.2d at 862.

*Rader* does not, however, stand for the proposition that recklessness is a sufficient mens rea for a Rule 1.2(d) violation. Comment [7A] to Colo. RPC 1.0 cites *Rader* and other Colorado cases to explain that, in general, either knowledge or recklessness can satisfy the scienter

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<sup>6</sup> See *People in Interest of J.O.*, 383 P.3d 69, 72 (Colo. App. 2015) (explaining that the word “or” is usually a “disjunctive which ‘reflects a choice of equally acceptable alternatives’”) (quoting *Willhite v. Rodriguez-Cera*, 274 P.3d 1233, 1238 (Colo. 2012)).

requirement for most Rules violations. The comment goes on to say, “where a Rule of Professional Conduct specifically requires the mental state of ‘knowledge,’ recklessness will not be sufficient to establish a violation of that rule....” Because Rule 1.2(d) specifically requires that a lawyer “know” conduct is criminal or fraudulent, reckless conduct will not violate the rule.

Since deciding *Rader*, the Colorado Supreme Court reiterated that an “attorney cannot close her eyes to obvious facts.” *Waters v. District Court*, 935 P.2d 981, 988 (Colo. 1997) (analyzing whether lawyer violated Colo. RPC 3.3(a)(2)).<sup>7</sup> There, the court explained that “an attorney will not be held responsible for failing to inform the court of material information of which the attorney is unaware,” so although the “attorney cannot close her eyes to obvious facts” that lawyer does not have an obligation to “undertake an affirmative investigation.” *Id.* While *Waters* did not use the specific words “willful blindness,” it explained that the lawyer could not be “unaware” simply by closing her eyes. *Id.*

The Committee discerns no difference between stating that a lawyer “cannot close her eyes to obvious facts” to escape knowledge and the more common formulation that “willful blindness” is a form of knowledge, particularly when the Colorado Supreme Court has distinguished the former from reckless conduct. To “close one’s eyes to obvious facts” provides no meaningful distinction from “willfully avoiding an obvious fact” – i.e., a lawyer cannot willfully blind herself to obvious facts.

Indeed, several decisions by the Office of the Presiding Disciplinary Judge (PDJ) have reached the same conclusion when considering whether a lawyer violated other Rules based on “knowledge.” See *People v. Underhill*, 353 P.3d 936, 950 (Colo. O.P.D.J., June 29, 2015)

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<sup>7</sup> The version of Rule 3.3(a)(2), which was the Rule the court considered in *Waters*, has since been withdrawn and redrafted. That withdrawal does not change the rationale behind preventing a lawyer from avoiding knowledge by intentionally ignoring obvious facts.

(recognizing that knowledge includes willful blindness in the context of Colo. RPC 4.2); *People v. Mason*, 212 P.3d 141, 146 (Colo. O.P.D.J., June 15, 2009) (applying willful blindness theory to find that lawyer knowingly engaged in the unauthorized practice of law).<sup>8</sup> In *Underhill*, the PDJ considered Rule 4.2, which likewise requires “knowledge” in terms of actual knowledge (and not recklessness); more specifically, “actual knowledge may be inferred from the circumstances.” Colo. RPC 4.2 & cmt. [8]. In *Mason*, the PDJ considered the unauthorized practice of law in violation of Rule 5.5(a). Rule 5.5(a) does not explicitly speak to knowledge, but rather speaks in the absolute terms that a lawyer “shall not” practice without a license. In that context, “willful blindness” would trigger “knowledge” that a lawyer was violating Rule 5.5(a)’s “shall not” directive.

Further, interpreting “willful blindness” as “knowledge” is consistent with the U.S. Supreme Court’s interpretation of “willful blindness” as “deliberately shielding [oneself] from clear evidence of critical facts that are strongly suggested by the circumstances.” *Global-Tech*, 563 U.S. at 766. In its opinion, the Court referred to the “long history of willful blindness and its wide acceptance in the Federal Judiciary” before concluding that the concept applied in civil patent infringement lawsuits. *Id.* at 768. The Court explained that “persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts.” *Id.* at 766 (citing *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976)).

As discussed in Section I(C) below, this interpretation is consistent with virtually every ethics opinion from other jurisdictions to have considered “willful blindness” and “knowledge,”

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<sup>8</sup> “The rationale of the Hearing Board in a particular case can neither serve as stare decisis precedent for future cases nor constitute the law of the jurisdiction.” *In re Roose*, 69 P.3d 43, 48 (Colo. 2003).



as well as with federal law.<sup>9</sup> It also is consistent with other state courts' interpretations of "willful blindness" as a form of "knowledge" in attorney discipline cases. *See, e.g., In re Goldstone*, 839 N.E.2d 825, 830 (Mass. 2005) (even if lawyer "did not have actual knowledge that the billings he sent [to the client] were false and that he was not entitled to the fees and costs claimed, he consciously avoided obtaining readily available information that would have put him on actual notice, and thus his actions constituted willful blindness and intentional misconduct"); *In re Skevin*, 517 A.2d 852, 857 (N.J. 1986) (holding that knowledge can be established by demonstrating "willful blindness" in discipline case concerning misappropriation of client funds and defining "willful blindness" as a "situation where the party is aware of the highly probable existence of a material fact but does not satisfy himself that it does not in fact exist").

Finally, outside of the ethics context, Colorado's appellate courts have affirmed that willful blindness constitutes knowledge. *E.g., Tibbetts v. Terrill*, 44 Colo. 94, 105-06, 96 P. 978, 981-82 (1908) (in the context of fraudulent real property transaction, knowledge includes willful blindness); *Meadow Homes Development Corp. v. Bowens*, 211 P.3d 743, 746-47 (Colo. App. 2009) (in the context of securities law, willful blindness constitutes knowledge).

In short, although there is no binding precedent directly on point, the Committee believes that a lawyer who is willfully blind has the knowledge required to violate Rule 1.2(d) by assisting in criminal or fraudulent conduct. Recklessness, however, does not amount to "willful blindness" in this context. *See Colo. RPC 1.0, cmt. [7A]* (explaining that a "reckless" state of

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<sup>9</sup> *E.g., Global-Tech*, 563 U.S. at 766-69; *see also* Tenth Circuit Court of Appeals Pattern Criminal Jury Instruction 1:37 (2018) (Knowingly—Deliberate Ignorance: "Although knowledge on the part of the defendant cannot be established merely by demonstrating that he was negligent, careless, or foolish, *knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.* Knowledge can be inferred if the defendant was aware of a high probability of the existence of a fact, unless the defendant did not actually believe the fact.") (emphasis added).

mind satisfies the “knowing” mental state requirement for disciplinary purposes, except where the particular Rule requires knowledge); *see also* Colo. RPC 1.2(d) (imposing knowledge requirement).

Notably, willful blindness is measured at the time of a lawyer’s determination, not after the fact. Thus, a lawyer is not deemed to “know” either facts or the significance of facts that only become evident with the benefit of hindsight. *See* N.Y.C. Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2018-4, “Duties When an Attorney Is Asked to Assist in a Suspicious Transaction,” p. 4 n.3 (2018) (citing New York Rule of Professional Conduct 1.2(d)) (hereinafter N.Y.C. Op. 2018-4).

A lawyer should be aware that the knowledge that may be inferred from the circumstances might include information that the lawyer reasonably should have known or information to which the lawyer was willfully blind; in other words, circumstances may indicate that the lawyer had actual knowledge or was willfully blind. In hindsight, the line between what a lawyer “reasonably should know” and information as to which a lawyer is “willfully blind” may be difficult to discern. A client’s intention to use a lawyer to advance a crime or fraud may be unclear, particularly at the commencement of the engagement before significant information is readily available. Therefore, even though Rule 1.2(d) does not require inquiry where all the lawyer has is a suspicion short of knowledge or where the lawyer reasonably should know (but does have such duty in circumstances in which the lawyer is willfully blind), inquiring further is not prohibited by the Rules and could help prevent violation of the Rules. *See also* Colo. RPC 1.3 (providing that a lawyer “shall act with reasonable diligence and promptness in representing a client”).

### 3. *Failure to Inquire*

As discussed above, a lawyer who does not know or is not willfully blind to the fact that the client seeks the lawyer's assistance in criminal or fraudulent conduct does not have a duty to inquire. 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. When a lawyer does have such knowledge, however, that lawyer has a duty to confirm or dispel that knowledge. A lawyer who intentionally fails to conduct such inquiry would be considered to be 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.

For instance, a lawyer commits professional misconduct if she commits "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness[,], or fitness as a lawyer." Colo. RPC 8.4(b); *see also* C.R.C.P. 251.5(b) (providing that a lawyer may be subject to discipline for criminal acts which reflect adversely on "the lawyer's honesty, trustworthiness[,], or fitness as a lawyer .... [and] that conviction thereof in a criminal proceeding shall not be a prerequisite to the institution of disciplinary proceedings, and .... acquittal in a criminal proceeding shall not necessarily bar disciplinary action"). Likewise, a lawyer who "engage[s] in conduct involving dishonesty, fraud, deceit[,], or misrepresentation" commits professional misconduct. Colo. RPC 8.4(c); *see also* *People v. Mitchell*, 969 P.2d 662, 665 (Colo. 1998) (lawyer violated Rule 8.4(c) for submitting fraudulent loan and liquor license materials). And a lawyer who violates or attempts to violate the RPCs, knowingly assists or induces another to violate the RPCs, or does so through the acts of another, also commits professional misconduct. *See* Colo. RPC 8.4(a); *see*

also Colo. RPC 8.4(h) (providing that it is professional misconduct to “engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer’s fitness to practice law”).

Finally, engaging in an act or assisting a client in committing an act that the lawyer knows to be criminal or fraudulent could lead to potential civil liability to a third party<sup>10</sup> or even criminal charges against the lawyer for conspiracy or based on complicitor liability<sup>11</sup> for the underlying criminal or fraudulent conduct. However, discussion of specific criminal offenses or civil liabilities is beyond the scope of this opinion.

### ***C. ABA Opinions and Other States’ Treatment***

In ABA Opinion 491, the ABA explained that a lawyer has a duty to inquire when the lawyer knows, or should know, that the client is seeking the lawyer’s services in a transaction in advising or assisting in criminal or fraudulent conduct. Combating money laundering and preventing terrorist financing prompted ABA Opinion 491, although its discussion is not limited to just these two topics.<sup>12</sup> Its purpose was to ensure clients do not “retain a lawyer for a

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<sup>10</sup> Lawyers generally are not liable to nonclients for consequences of the legal services the lawyer provides, except where there is fraud, malicious conduct, or negligent misrepresentation. *See Baker v. Wood, Ris & Hames, PC*, 2016 CO 5, ¶¶ 1-2, 35.

<sup>11</sup> Complicitor liability provides that a “person is legally accountable as principal for the behavior of another committing a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense.” C.R.S. § 18-1-603 (2020); COLJI-Crim. J:03 (2020); *see also People v. Childress*, 363 P.3d 155, 164 (Colo. 2015) (discussing complicitor liability).

<sup>12</sup> The role of lawyers in preventing money laundering has long been the subject of federal regulations and “best practices” guidance. *See, e.g.*, 31 CFR 103.110, 37 FR 6912 - Financial Recordkeeping and Reporting of Currency and Foreign Transactions, A Lawyer’s Guide to Detecting and Preventing Money Laundering, available at <https://www.actec.org/assets/1/6/A-Lawyers-Guide-to-Detecting-and-Preventing-Money-Laundering-October-2014.pdf>; *see also* Trip Mackintosh, Lizbeth Rodriguez, and Stephen G. Masciocchi, *Federal Anti-Terrorism Laws and Law Firm Clients*, 33-OCT. COLO. LAW. 10, p. 117 (Oct. 2004).

transaction or other non-litigation matter that could [appear] legitimate but which further inquiry would reveal to be criminal or fraudulent.” ABA Opinion 491, pp. 1-2.

Colorado’s Rules are consistent with the ABA Rules in this context. The ABA’s conclusion therefore carries significant weight in addressing this question for Colorado. Like ABA Opinion 491, this opinion restricts its analysis to the transactional (i.e., non-litigation) arena. However, while this opinion confirms that, under the Colorado RPCs, a Colorado lawyer has a duty to inquire, 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. As discussed above, Colorado’s RPC do not impose such an obligation to inquire where knowledge cannot be inferred from the circumstances or where knowledge is not willfully avoided. Colorado’s Rule 1.2(d) provides only for actual knowledge.

Prior ABA opinions buttress the conclusion that Colorado’s RPC 1.2 imposes a duty to inquire based upon a lawyer’s actual knowledge. The ABA previously stated that lawyers should undertake “Client Due Diligence” to “avoid facilitating illegal activity or being drawn

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Most recently, a lawyer’s responsibility with respect to anti-money-laundering activities of clients may have increased with the adoption of the Federal Corporate Transparency Act (Title LXIV of the Congress: National Defense Authorization Act for Fiscal Year 2021 Public Law 116-283, adopted January 1, 2021). Under this statute, any individual who either files an application to form a domestic corporation or LLC or register a foreign corporation or LLC with the secretary of state has the obligation to file a report with the Financial Crimes Enforcement Network of the Department of the Treasury identifying each of the individuals who directly or indirectly exercise control over the entity or owns or controls not less than 25% of the ownership interests in the entity (“beneficial owners”) of the entity. The entity has the obligation to update this information. While lawyers are not explicitly identified as having duties under the statute, the identification of the individual who files the application to form or register the organization will probably be further clarified in the regulations explaining the application of the statute. The reporting requirements take effect on the issuance of Treasury regulations, which must be promulgated by January 1, 2022.

unwittingly into a criminal activity.” ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 463, “Client Due Diligence, Money Laundering, and Terrorist Financing,” pp. 2-3 (2013) (hereinafter ABA Opinion 463). ABA Opinion 463 explained that “appropriate assessment of the client and the client’s objectives ... are essential prerequisites” for accepting or continuing representation and that a lawyer’s ethical duty “to act competently” under ABA Rule 1.1 could trigger a “duty to inquire further” in certain circumstances. *Id.*

Still, the lawyer should start by trusting the client. *See* ABA Opinion 491, p. 2. It is only when facts indicate that criminal or fraudulent activity motivates the representation that the lawyer must inquire further to avoid assisting conduct the lawyer knows is criminal or fraudulent. For this reason, appropriate due diligence could include identifying and verifying the identity of each client, identifying and verifying the identity of any “beneficial owner” of the client (i.e., the person with “ultimate control” of the client), and obtaining sufficient information to “understand a client’s circumstances, business, and objectives.” ABA Opinion 463, p. 2 n.10. It also could consider the “risk profile of the client, the country or geographic area of origin, or the legal services involved.” *Id.* at 3. Such due diligence would “avoid facilitating illegal activity or [finding the lawyer] drawn unwittingly into a criminal activity.”<sup>13</sup> *Id.* at 2. These examples of due diligence inquiries are not exhaustive, but rather constitute some of the available avenues to satisfy the duty to inquire once the duty has been triggered.

Even before adoption of the ABA Model Rules – or Colorado’s RPCs – the ABA explained that “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.”

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<sup>13</sup> Reporting general client intent to engage in wrongdoing may run afoul of Rules 1.6 and 1.8 (providing for confidentiality of information and duties to prospective clients, respectively). This opinion takes no position on such a remedy.

ABA Comm. on Ethics and Prof'l Resp., Informal Op. 1470, "Duty of Lawyer to Inquire Into Fraudulent or Criminal Conduct and Disclose Past Activities of a Prospective Client," p. 1 (1981).<sup>14</sup> For this reason, a lawyer "cannot escape responsibility by avoiding inquiry." *Id.* On the contrary, the 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." *Id.* (emphasis added).

Other states' bar association ethics committees have come to similar conclusions, based on language of similar professional rules. *See, e.g.*, Ga. Formal Advisory Op. 05-10 (2006) (applying "willful blindness" standard to Model Rule 5.1(c) and concluding that "knowledge" includes "willful blindness" where a lawyer, suspicious about potential ethical misconduct, "sought to avoid acquiring actual knowledge of the conduct" and thus "display[ed] the same level of culpability as actual knowledge"); Ind. State Bar Ass'n Comm. on Legal Ethics, Op. 2, p. 4 (2001) (when facts suggested that the client's true objective could be fraudulent, the lawyer "had an ethical responsibility to find out whether the proposal was above-board," and by "failing to make further inquiry, [the lawyer] violated Rule 1.2"); Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 2003-104, pp. 1-2 (2003) (where facts suggested purpose of client transaction was to conceal assets from creditors, the lawyer "must evaluate whether the transfer of the realty . . . was fraudulent" under state law); Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 91-22 (1991) (explaining that lawyers cannot turn a blind eye to an obvious fraudulent transfer, but noting no independent duty to investigate a client's intent, although specific facts could give rise to a duty to seek additional information to avoid committing or

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<sup>14</sup> This informal opinion considered ABA Model Code provision 7-102(A)(7), which prohibited a lawyer from "[c]ounsel[ing] or assist[ing] his client in conduct that the lawyer knows to be illegal or fraudulent."

assisting in fraud); *see also* N.Y.C. Opinion 2018-4, pp. 2-3 (explaining that a lawyer must inquire further when the lawyer is retained to represent a client in a transaction that appears suspicious, since “assisting in a suspicion transaction is not competent where a reasonable lawyer prompted by serious doubts would have refrained from providing assistance or would have investigated to allay suspicions”).

Finally, the Committee believes it is important to note that other Colorado RPCs may give rise to related duties to inquire such as Roles 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 1.13 (Organization as Client),<sup>15</sup> 3.3 (Candor Toward the Tribunal),<sup>16</sup> the duties of honesty and integrity identified in RPC 8.4(b) and (c),<sup>17</sup> and the duty to withdraw under Rule 1.16(a). The duties of inquiry that may arise under those roles is beyond the scope of this opinion.

Regardless, Rule 1.2(d) prohibits a lawyer from engaging or assisting a client in engaging in conduct the lawyer knows is criminal or fraudulent. The duty to inquire appropriately ensures that a lawyer’s services are not misused for criminal or fraudulent ends.

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<sup>15</sup> Rule 1.13 imposes a duty to inquire with respect to representation of an entity or organization, particularly where the lawyer learns of an act, omission, or planned activity that could violate the organization’s legal obligations and result in substantial injury to the organization.

<sup>16</sup> Rule 3.3 requires candor to the court, as well as remedial measures. For further discussion on this Rule, see CBA Formal Op. 123, “Candor to the Tribunal and Remedial Measures in Civil Proceedings” (2011).

<sup>17</sup> Rule 8.4(b) & (c) explain, respectively, that it is professional misconduct to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness[,] or fitness as a lawyer” and that a lawyer may not “engage in conduct involving dishonesty, fraud, deceit[,] or misrepresentation[.]” If a lawyer is providing advice with the intent to produce criminal or fraudulent conduct, by definition she violates Rule 8.4(b) and (c).



## II. ILLUSTRATIONS

Finally, the Committee provides some examples to illustrate the principles and analysis identified in this Opinion. These examples describe circumstances in which a lawyer likely has sufficient information to trigger a duty of inquiry.

1. A lawyer is assisting a current client in the client's efforts to obtain a loan for the client's business. The lawyer assists the client in negotiating and drafting the documentation for a loan from a bank. The bank rejects the loan because the client's business has significant contingent liabilities. The client applies for a loan from a second bank and asks the lawyer to draft a cover letter for the submission of financial documents to the bank. The financial documents that will accompany the letter omit information on the contingent liabilities. The lawyer, because of her knowledge of the contingent liabilities,<sup>18</sup> would have a duty to inquire further to ensure she is not assisting in criminal or fraudulent conduct. The lawyer's failure to inquire in this instance would constitute willful blindness. If the lawyer did not have knowledge of the contingent liabilities based on the negotiations with the first bank, the lawyer would have no obligation to review or inquire about the information being submitted to the second bank.

2. A lawyer has represented a corporation for several years. The lawyer is asked to represent the corporation in the purchase of a business asset from a subsidiary of the corporation. The lawyer is aware that the asset is the principal asset of the subsidiary and is aware that the subsidiary has substantial debts. The lawyer also knows a third party recently offered to buy the asset at a significantly greater price than the price in the proposed sale to the parent corporation. In this circumstance, the lawyer must inquire about the sales price in the transaction. If the client

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<sup>18</sup> Simply because the lawyer was given copies of these documents does not mean the lawyer had a duty to review them to ensure no such discrepancies. This example presupposes that the lawyer did, in fact, review them and become aware of the discrepancies.

plausibly explains the apparent pricing discrepancy, the lawyer would not have a duty to independently investigate into the transaction. The client could provide a plausible explanation by showing the lawyer a fairness opinion or appraisal by a third party or information indicating the prior third-party offer was not bona fide. If, however, the client does not provide a plausible explanation for the discrepancy, then the lawyer would have an obligation to inquire or to withdraw from the representation.<sup>19</sup>

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<sup>19</sup> If the lawyer believes his or her contact in the corporation is not acting in the interest of the corporation, the lawyer may have an obligation to the corporation under Colo. RPC 1.13. As noted above, the obligations imposed by Rule 1.13 are not within the scope of this opinion.