

Focus | Criminal Law/Government Law

How Lawyers Can Avoid Implication in Client Criminal Activity

BY MARTIN MERRITT AND MAZIN SBAITI

The road to achieving a client's goal sometimes winds near the jailhouse door. Clients may be surprised to find themselves criminally liable, depending on the nature of the offense, and lawyers their unwitting accomplices.

Obviously criminal conduct, such as murder or theft, is called a *malum in se* offense. Clients who engage in this type of conduct are rarely surprised by the criminal nature of their acts, and lawyers can easily identify these acts as criminal in nature, and avoid participation.

However, with respect to *malum prohibitum* crimes—acts criminal by virtue of statute—their criminal nature is not so apparent; in these cases, it is important for lawyers to be aware of crimes a client might accidentally wander into. That is because *malum prohibitum* crimes may not be intuitively wrong. For example, conduct that is permissible in one

industry can often be illegal—with striking consequences—if taken in another industry.

Lawyers must be wary of counselling clients in areas that may involve criminal conduct. For example, under 18 U.S.C. §2(a) “aiding and abetting,” the mere act of “counseling,” is the very thing the statute forbids—providing that anyone who “counsels” a person in the commission of a crime is punishable as a principal. Establishing a “conspiracy” under 18 U.S.C. §371 requires little more than a conversation, paired with one overt act taken by any party to the conversation.

As an example, consider, Michael Avenatti and Michael Cohen, two former lawyers imprisoned for different reasons while representing opposing parties to the same civil litigation. Cohen was convicted of violating election laws, while Avenatti was convicted of defrauding his client and of attempted extortion.

The Preamble to the Texas Disciplinary

Rules of Professional Conduct makes it clear that lawyers are “officer[s] of the legal system” and “guardians of the law,” with a “special responsibility for the quality of justice.” It is perhaps for this reason the Rules cite variations of the words “crime” and “fraud” more than 130 times.

Comment 7 to Rule 1.02, titled “Criminal, Fraudulent and Prohibited Transactions,” further explains: “There 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*. . . the lawyer also *must avoid furthering the client’s unlawful purpose*, for example, by *suggesting how it might be concealed*. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. *Withdrawal from the representation, therefore, may be required.*”

Where lawyers should never intentionally help clients commit crimes, they do have a heightened duty to competently provide advice. If lawyers are recklessly unaware their advice will thrust a client

headlong into a crime, could they be guilty of aiding and abetting? The likely answer is “yes.” A lawyer should consider all potential crimes, especially the *malum prohibitum* ones, to avoid “aiding and abetting” by counselling a client to engage in criminal conduct. The disciplinary rules governing competent and diligent representation require such consideration.

Potential criminality may also depend on the legal practice or client industry area. Lawyers representing elected officials may encounter different criminal prohibitions than those representing business clients. Business lawyers, in turn, may consider what it means to “steal” trade secrets, and which cyber “wires” cannot be “tapped.” Family lawyers must know what it means to “cyberstalk” someone.

If ethical questions arise, the Texas Bar Ethics Hotline can help, available at (800) 532-3947 or on the state bar’s website under “Texas Ethics Resources.” **HN**

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