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"Ethics on the Edge"
Disruptive Technology and Compliance

Christopher T. Brown

Author Contact Information:
Christopher T. Brown
Attorney at Law PLLC
Austin, TX

www.brownlawatx.com

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Outline

Christopher T. Brown
Attorney at Law PLLC
www.brownlawatx.com

Background

Recent headlines are full of stories about innovative companies who collide with government agencies when it becomes apparent that their business models are so disruptive they are—at least arguably, or in selected jurisdictions—illegal. Many involve municipal governments applying local ordinances—like livery licensing for rideshare programs, hotel regulation for short-term vacation rentals, and speed limits, helmet requirements and sidewalk rules for app-based scooter rentals. At the other extreme are federal criminal prosecutions of cryptocurrency innovators for facilitating money laundering and other illegal activity by failing to follow the federal and state laws governing money services businesses. And consider the entrepreneurs and investors working in the legal marijuana business—where the activity may be permitted under state law, but a felony under federal law.

The media coverage often gushes with admiration for entrepreneurial disruptors, especially when they provide services that are wildly popular with middle-class consumers. Sometimes there are contrarian stories, like Ben Wear's pieces in the Austin American-Statesman griping about the hubris of Uber and Lyft's "corporate civil disobedience," or the recent Wall Street Journal coverage of how regulatory capture can be a better model for tech's disruptors, but it's often hard to complain about hot new tech services that render antiquated and inefficient predecessors obsolete, without coming off like a curmudgeon.

What about the lawyers who advise these companies through their legal challenges? What is their role? Do they have a duty to try to get their clients to abide by the law? Do they have some role as "agent of the state"? Or are they as free as their clients to advocate, and even actively participate in, the violation of laws they think are applicable, and valid, but stupid and in need of change? If they think the law is bad, how do they go about trying to change it?

Most if not all of these companies have lawyers, in many cases experienced in-house lawyers or reputable outside firms. When the client's business model operates at the bleeding edge of law and regulation, lawyers must balance an array of competing ethical duties. And experienced business law practitioners know these sorts of issues have been around for much longer than the smartphone-based sharing economy.

Discussion

What does a lawyer do when her client's business model clearly violates a local transportation ordinance, but management wants to go ahead—arguing that the benefits of grabbing market share and revenue far outweigh the potential costs?

Lawyers have a duty to zealously represent their clients, but they also have a duty not to help their client break the law.

The latter duty is well-established, but ambiguously articulated. Consider Model Rule of Professional Conduct 1.2(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.

…closely tracked by Texas Rule of Professional Conduct 1.02(c):

> A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law.

And by California Rule of Professional Conduct 3-210, with some notable variations (emphasis added):

> A member shall not advise the violation of any law, rule, or ruling of a tribunal *unless the member believes in good faith that such law, rule, or ruling is invalid*. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.

Prior to the adoption of the Model Rules in 1983, the duty was articulated somewhat differently, in Disciplinary Rule 7-102(A):

> "A lawyer shall not…counsel or assist his client in conduct that the lawyer knows to be *illegal* or fraudulent."

Does that mean it's now entirely permissible to advise a client to proceed with conduct that is illegal, so long as it's not criminal or fraudulent?

One treatise notes that:

> "conduct that is 'illegal' may not rise to the level of being criminal. Thus, the lawyer will not be disciplined for advising the client in unlawful acts unless those acts are also criminal or fraudulent."[1]

Does that mean a lawyer can help her client violate the laws of contract, tort, or property? The treatises are short on definitive answers.

When it adopted the Model Rules, the ABA specifically rejected a proposed clause of R. 1.2(d) that would have prevented a lawyer from using prohibited terms or unconscionable provisions in contracts. But the treatises are quick to note that this exclusion doesn't mean such a practice is permitted.

Can you ethically help management handicap the likelihood that your conduct will be deemed illegal? Analyze the likelihood of enforcement? Help figure out how much upside there is than potential sanction?

If you have concluded the business plan is illegal, but the client has decided to go ahead, can you use your legal skills to help them minimize the likelihood of enforcement and sanction?

How does the analysis work if, as is the case with many regulations administered by executive agencies, the law imposes both civil sanctions and criminal penalties, but civil enforcement is the norm?

How do the provisions of Model Rule 1.16(a)(1) play into the analysis, requiring that:

> "…a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the representation will result in violation of the rules of professional conduct or *other law*." (emphasis added) (see also Texas Rule of Professional Conduct 1.15(a))

And how do the provisions of Model Rule 2.1 factor, in their articulation of the duties of lawyer as counselor:

> "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as more, economic, social and political factors, that may be relevant to the client's situation."

(Note that in the Texas version of DR 2.1, the second sentence is omitted.)

[1] Biernat & Mason, *Legal Ethics for Management and Their Counsel* (1995), §4.4(d)

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