

# Ethical Considerations in Corporate Matters

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1

## TOPICS

1. Attorney Obligation to Investigate Misconduct
2. Internal Investigations
  1. Clarity of Client Representation (Who's the Client?)
  2. Joint Representation, Pool Counsel
  3. Maintaining Confidentiality, Privilege
3. Attorney Obligation to Report Misconduct

2

# ATTORNEYS AS GATEKEEPERS

- What duties are owed by attorneys to ensure client compliance? Potentially to proactively disclose client info?
  - Legislation
  - Professional Responsibility Rules
- Will a gatekeeper (ie. attorney) who fails end up as a co-defendant in a civil and/or criminal case?
- ABA Statement on “Gatekeeper Regulation and the Legal Profession”
  - Focused on money laundering
  - Seeks to deputize attorneys

3

## Attorney Obligation to Investigate/Inquire

- Where **facts known** to the lawyer establish a **high probability** that a client seeks to use the lawyer’s services for criminal or fraudulent activity, the lawyer has a **duty to inquire further** to avoid advising or assisting such activity.
- Even if information learned in the course of a preliminary interview or during a representation is insufficient to establish “knowledge” under Rule 1.2(d), other rules may require the lawyer to inquire further in order to help the client avoid crime or fraud, to avoid professional misconduct, and to advance the client’s legitimate interests. These include the duties of competence, diligence, communication, and honesty.

4

## Attorney Obligation to Investigate/Inquire

- Attorney knowledge may be inferred from the circumstances, including a lawyer's **willful blindness** to or conscious avoidance of facts.
- If the client or prospective client refuses to provide information necessary to assess the legality of the proposed transaction, the lawyer must ordinarily decline the representation or withdraw under Rule 1.16.

5

## Attorney Obligation to Investigate/Inquire

- A lawyer's reasonable evaluation after inquiry and based on information reasonably available at the time does not violate the rules.

6

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[eSupplement to the 18th Annual Mergers and Acquisitions Institute](#)

First appeared as part of the conference materials for the

7<sup>th</sup> Annual Government Enforcement Institute session

"Ethical Issues Facing In-House Counsel"