

PRESENTED AT

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“Ethics on the Edge”

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“Ethics on the Edge”
Counseling clients beyond the known bounds of the law

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Outline

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Background

Innovative technologies that change the business and economic paradigm often also push the bounds of what the law contemplates, or permits. New ventures often exploit an area where the applicable law is unclear, and sometimes companies’ business models are so disruptive they are—at least arguably, or in selected jurisdictions—illegal. Consider some of the recent developments and conflicts in sectors as diverse as cryptocurrency, generative AI, and robotics, and some of the fights that have played out over the past decade in fields like ridesharing, vacation rentals and legalized marijuana. Less sensational but perhaps even more germane to technology practitioners are the everyday uncertainties around things like the enforceability of online consumer agreements, covenants not to compete, and common contractual indemnification provisions.

Clients (especially clients trained as engineers or computer scientists) often want binary answers from their lawyers: can I do it, or not? When the answer is unclear or ambiguous, they may focus on what’s clearly prohibited or permitted, or they may want a more nuanced gradation of risk. And sometimes when the answer is a clear and unambiguous “no” that identifies an express legal prohibition on what the business wants to do, the client will want the lawyer to help them change the law—maybe by breaking it first. Consider the corporate civil disobedience of the rideshare companies in Austin and elsewhere a decade ago, the cannabis companies who provided technology related to business that were legal under state law but felonious under federal law, and the crypto companies who took issue with the SEC’s aggressive position on the application of the securities laws to virtual currencies, smart contracts and NFTs.

Our training as lawyers tends to assume the law is reasonably ascertainable, but it often is not, especially in emerging technology fields. When the law is not clear, or when the law is clearly prohibitive but the client wants to push further, what guidance do the ethical rules that govern our practice provide us? Do we have a duty to try to get our clients to abide by the law? Do we have some role as “agent of the state,” or are we merely mediators of access to knowledge of what the law says? Are we as free as our clients to advocate, and even actively participate in, the violation of laws we think are applicable, and valid, but stupid and in need of change? If we think the law is bad, how can we ethically and lawfully go about trying to change it?

Discussion

What does a lawyer do when her client's business model clearly violates a local 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:

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