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Hear No Evil; See No Evil = A Bad Plan For Lawyers

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Willful blindness to nefarious things going on around you can get a lawyer into big trouble. In the early 1960s, a New York lawyer named Martin Benjamin did professional responsibility and securities law professors a big favor by getting himself convicted in a case that allows us to illustrate to our students just how true this is.

Mr. Benjamin was convicted of willfully conspiring to violate federal securities law by selling unregistered securities in interstate commerce and defrauding investors in the process. Benjamin's role in the illegal scheme was two-fold. First, he provided his co-conspirators with a signed legal opinion stating, incorrectly, that the securities in question were exempt from the registration requirement of the Securities Act of 1933. Second, he prepared two letters stating "facts" that were untrue, thus facilitating the unlawful sale of the securities. On appeal from his conviction, Mr. Benjamin argued that the government produced insufficient evidence to support a finding that his opinion and sales letters were *knowingly* and *willfully* incorrect.[i]


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The government had not produced "smoking gun" to prove willfulness, but the Second Circuit found ample evidence to satisfy this element of the crimes. With the help of the record developed during an SEC investigation, the court found ample evidence demonstrating that Benjamin knew he was assisting illegal transactions.[ii] But the court went further. Relying on Supreme Court precedent, Judge Friendly, writing for a unanimous panel, said "the Government can meet its burden by proving that a defendant deliberately closed his eyes to facts he had a duty to see... or recklessly stated as facts things of which he was ignorant."[iii] To drive this point home, the court set out the following oft-quoted passage:

> "In our complex society, the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar. Of course, Congress did not mean that any mistake of law or misstatement of fact should subject an attorney or an accountant to criminal liability simply because more skillful practitioners would not have made them. But Congress equally could not have intended that men [sic][iv] holding themselves out as members of these ancient professions should be able to escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen or have represented a knowledge they knew they did not possess."[v]

For this proposition, the court might well have cited a verse from Woody Guthrie's *The Ballad of Pretty Boy Floyd*, recorded so poignantly (on seven-inch vinyl) by Joan Baez[vi] just shortly before *Benjamin* was decided:

> Yes, as through this world I've wandered
> I've seen lots of funny men;
> Some will rob you with a six-gun,
> And some with a fountain pen.[vii]

Judge Friendly's language (not Woody's) was picked up by the ABA Ethics Committee in 1982 when it issued Formal Opinion 346, addressing the role of lawyers in issuing opinions on behalf of tax shelter promoters seeking to assure their customers that the shelter is likely to receive favorable treatment from the IRS:

> "The lawyer who accepts as true the facts which the promoter tells him, when the lawyer should know that further inquiry would disclose that these facts are untrue... gives a false opinion... [L]awyers cannot 'escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen.' *United States v. Benjamin*... Recklessly and consciously disregarding information strongly indicating that material facts expressed in the tax shelter opinion are false or misleading involves dishonesty... We equate the minimum extent of the knowledge required for the lawyer's conduct to have violated the[] disciplinary rules with the knowledge required to sustain a Rule 10b-5 recovery,[viii]... rather than the lesser negligence standard.

It would be a mistake to read *Benjamin* or Opinion 346 to mean that, for lawyers, when a criminal statute or ethics rule contains a knowledge requirement, that requirement will be interpreted to mean "should have known." This is not what *Benjamin* holds. Rather, it holds that circumstantial evidence can suffice to support a fact-finder's conclusion that the defendant has *actual knowledge*. The Rules of Professional Conduct take the same approach. Rule 1.0(f) declares that whenever "knowingly," "known," or "knows" is an element in one of the Rules, that term "denotes actual knowledge of the fact in question."[ix] True enough, Rule 1.0(f) goes on to say that "[a] person's knowledge may be inferred from circumstances." But it is still *actual knowledge* that the fact-finder must search for, and the court must conclude that there is sufficient evidence in the record to sustain such a conclusion by the fact-finder. This is what happened in *Benjamin*.

However, in disciplinary matters and civil suits, a lawyer will not necessarily be off the hook even if disciplinary counsel or a private plaintiff cannot prove actual knowledge. Depending on the facts of the case, a lawyer's lack of knowledge could support a finding of negligence, leading to consequential damages. ABA Opinion 346 recognized this:

> "But even if the lawyer lacks the knowledge required to sustain a recovery under the [10b-5] standard, the lawyer's conduct nevertheless may involve gross incompetence, or indifference, inadequate preparation under the circumstances, and consistent failure to perform obligations to the client. If so, the lawyer will have violated [the competency requirement under what is now Rule 1.1]."[x]

If this sounds like you're damned if you know and damned if you don't know, you're getting the point. That won't always be the case, but there are situations where it is a distinct possibility. Next month's column will examine such a case.

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i *U.S. v. Benjamin*, 328 F.2d 854, 863 (2d Cir. 1964).
ii *Id.*
iii *Id.* at 862.
iv This opinion came down in 1964.
v *Id.* at 863.
vi Joan Baez, *Pretty Boy Floyd*, Fontana Records TFE.18008 (released in the U.K. in 1962). For nostalgic readers, you can hear Ms. Baez performing this Oklahoma-set ballad in 1962 at **http://www.youtube.com/watch?v=InWqYjQwrvU**. Woody himself can be heard singing it in 1944 at **http://www.youtube.com/watch?v=G4YKUJZI5Bg**.
vii Woody Guthrie, *The Ballad of Pretty Boy Floyd* (1939).
viii Citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).
ix Rule 1.0(f).
x ABA Formal Opinion 346 (Jan. 29, 1982).