ABA Formal Op. 13-463
American Bar Association Formal Ethics Opinion 13-463

American Bar Association

CLIENT DUE DILIGENCE, MONEY LAUNDERING, AND TERRORIST FINANCING

May 23, 2013

*The Model Rules of Professional Conduct and the ABA **Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing** ("Good Practices Guidance") are consistent in their ethical principles, including loyalty and confidentiality. The Good Practices Guidance provides information to help lawyers recognize and evaluate situations where providing legal services may assist in money laundering and terrorist financing. By implementing the risk-based control measures detailed in the Good Practices Guidance where appropriate, lawyers can avoid aiding illegal activities in a manner consistent with the Model Rules.* [FN1]

In an effort to combat money laundering and terrorist financing, intergovernmental standards-setting organizations and government agencies have suggested that lawyers should be "gatekeepers" to the financial system. [FN2] The underlying theory behind the "lawyer-as-gatekeeper" idea is that the lawyer has the capacity to monitor and to control, or at least to influence, the conduct of his or her clients and prospective clients in order to deter wrongdoing. [FN3] Many have taken issue with this theory [FN4] and with the word "gatekeeper." The Rules do not mandate that a lawyer perform a "gatekeeper" role in this context. [FN5] More importantly, mandatory reporting of suspicion about a client is in conflict with Rules 1.6 and 1.18, and reporting without informing the client is in conflict with Rule 1.4(a)(5). In this opinion we examine the contours of a lawyer's ethical obligations under the Model Rules of Professional Conduct with regard to efforts to deter and combat money laundering.

In August 2010 the ABA's policymaking House of Delegates adopted the ***Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing*** ("Good Practices Guidance"), [FN6] along with a resolution stating that the Association "acknowledges and supports the United States Government's efforts to combat money laundering and terrorist financing." The approved Good Practices Guidance states that it is not intended to be, nor should it be construed as, a statement of the standard of care governing the activities of lawyers in implementing a risk-based approach to combat money laundering and terrorist financing, but rather is intended to serve as a resource that lawyers can use in developing their own voluntary approaches. [FN7]

Good Practices Guidance policy supports a "risk-based" approach in accord with guidelines developed by the Financial Action Task Force on Money Laundering ("FATF") created by the U.S. and other leading industrialized nations. [FN8] This approach differs from a rules-based approach that requires compliance with every element of detailed laws, rules, or regulations irrespective of the underlying quantum or degree of risk. The Good Practices Guidance urges lawyers to assess money-laundering and terrorist financing risks by examining the nature of the legal work involved, and where the business is taking place. [FN9]

The Model Rules neither require a lawyer to fulfill a gatekeeper role, nor do they permit a lawyer to engage in the reporting that such a role could entail. It would be prudent for lawyers to undertake Client Due Diligence ("CDD") [FN10] in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity. This admonition is consistent with Informal Opinion 1470 (1981), where we stated that "[a] lawyer cannot escape

responsibility by avoiding inquiry. A lawyer must be satisfied, on the facts before him and readily available to him, that he can perform the requested services without abetting fraudulent or criminal conduct and without relying on past client crime or fraud to achieve results the client now wants." [FN11] Further in that opinion we stated that, pursuant to a lawyer's ethical obligation to act competently, [FN12] a duty to inquire further may also arise. [FN13]

An appropriate assessment of the client and the client's objectives, and the means for obtaining those objectives, are essential prerequisites for accepting a new matter or continuing a representation as new facts unfold. Rule 1.2(d) prohibits a lawyer from *knowingly* counseling or assisting a client to commit a crime or fraud. A lawyer also is subject to federal laws prohibiting conduct that aids, abets, or commits a violation of U.S. anti-money laundering laws (*e.g.*, 18 U.S.C. Sections 1956 and 1957) or counter-terrorist financing laws. [FN14] Thus, for example, lawyers should be mindful of legal restrictions applicable to all persons in the U.S. to avoid providing certain legal services to, and receiving money from, individuals or entities publicly identified by the U.S. Department of the Treasury on its Specially Designated Nationals List ("SDN List"). [FN15] In certain circumstances, checking a client's identity internally within the firm against the SDN List can avoid the risk of unlawful conduct by the lawyer.

The level of appropriate CDD varies depending on the risk profile of the client, the country or geographic area of origin, or the legal services involved. [FN16] For example, the fact that clients are deemed to be """"Politically Exposed Persons," (*e.g.*, domestic or foreign senior government, judicial, or military officials) may justify enhanced due diligence on the part of the lawyer because of the potential for corruption. Clients or legal matters associated with countries that are subject to sanctions or embargoes issued by the United Nations, or those identified by credible sources as having significant levels of corruption or other criminal activity or that provide funds or support to terrorist organizations, may require greater examination. Furthermore, clients who ask that the lawyer handle actual receipt and transmission of funds or those who request accelerated real estate transfers for no apparent reason may also require an extra level of scrutiny.

Once a representation has commenced, a lawyer may terminate it in a number of circumstances in which the lawyer does not *know* for certain the client's plans or whether the client is engaged in criminal or fraudulent activities, but the lawyer has reason to believe that the client is engaging, or plans to engage, in such improper activities. Rule 1.16(b)(2) (Declining or Terminating Representation) states that a lawyer may withdraw from representing a client if "the client persists in a course of action involving the lawyer's services that the lawyer *reasonably believes* is criminal or fraudulent." (Emphasis added). [FN17]

The Committee believes that the advice derived from the Good Practices Guidance is consistent, and not in conflict, with the ethical obligations of lawyers under the Model Rules. Indeed, the Good Practices Guidance states that """"when faced with a situation where the lawyer is compelled to decline or terminate the relationship, the lawyer should comply with the requirements of the applicable rules of professional conduct." [FN18] Accordingly, lawyers should be conversant with the risk-based measures and controls for clients and legal matters with an identified risk profile and use them for guidance as they develop their own client intake and ongoing client monitoring processes. When in a lawyer's professional judgment aspects of the contemplated representation raise suspicions about its propriety, that lawyer's familiarity with risk-based measures and controls will assist in avoiding unwitting assistance to unlawful activities. Indeed, the usefulness of the Good Practices Guidance is an example of the declaration in the Model Rules that "[t]he Rules do not ... exhaust the moral and ethical considerations that should inform a lawyer...." [FN19]

[FN1]. This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2013. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[FN2]. Kevin L. Shepherd, *The Gatekeeper Initiative and the Risk-Based Approach to Client Due Diligence: The Imperative for Voluntary Good Practices Guidance for U.S. Lawyers*, 2010 J. PROF. LAW 83, 88 (lawyers are considered """"""gatekeepers" because they have the ability to furnish access to the various functions that might help criminals move or conceal funds).

[FN3]. *See* Press Center, *Treasury Deputy Secretary Stuart Eizenstat House Committee on Banking and Financial Services*, U.S DEPARTMENT OF THE TREASURY (Mar. 9, 2000), http://www.treasury.gov/press-center/press-releases/Pages/ls445.aspx (stating that "[w]e are aggressively pursuing programs aimed at the lawyers, accountants and auditors who function as "gatekeepers' to the financial system. While legal rules properly insulate professional consultations from overly broad scrutiny and create a zone of safety within which professionals can advise their clients, those rules should not create a cover for criminal conduct.").

[FN4]. *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2013 BCCA 147 (2013), *available at* http://www.canlii.org/en/bc/bcca/doc/2013/2013bcca147/2013bcca147.html (striking down Canadian legislation as violating the solicitor-client privilege and interfering with the independence of the Bar).

[FN5]. *But see* Rutheford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers*, 56 RUTGERS L. REV. 9 (2003).

[FN6]. Resolution & Report 116, ***Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing***, AMERICAN BAR ASSOCIATION (2010), http:// www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/116.authcheckdam.pdf. *See generally* Shepherd, *supra* note 2.

[FN7]. Resolution & Report 116, *supra* note 6, at 7.

[FN8]. *Federation of Law Societies of Canada v. Canada, supra* note 4.

[FN9]. *See* Michael A. Lindenberger, *Into the Breach: Voluntary Compliance on Money Laundering Gets a Boost from the ABA and Treasury*, ABA JOURNAL (Oct. 2011), *available at* http://www.abajournal.com/magazine/article/into_the_breach_ voluntary_compliance_on_money_laundering_gets_a_boost/ (quoting the ABA President to encourage lawyers to be more vigilant about combating money laundering by following the Good Practices Guidance so that gatekeeper legislation regulating the legal profession will be unnecessary).

[FN10]. The Good Practices Guidance encourages all lawyers to perform basic CDD by (1) identifying and verifying the identity of each client; (2) identifying and verifying the identity of any "beneficial owner" of the client, defined as the natural person(s) with ultimate control of a client, when such an analysis is warranted from a risk-based standpoint; and (3) obtaining enough information to understand a client's circumstances, business, and objectives. Resolution & Report 116, *supra* note 6, at 9-11.

[FN11]. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1470 (1981) [hereinafter ABA Informal Op. 1470]. *See also*, GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.6:403, 199-200 (2d ed. 1990 & Supp. 1998). *Cf.* Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 200 (1978) (warning lawyers against "assum[ing] the worst regarding the client's desires").

[FN12]. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 6-101 (1979) (now Rule 1.1).

[FN13]. ABA Informal Op. 1470, *supra* note 11.

[FN14]. These laws include, for example, the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272; Exec. Order No. 13224, 66 Fed. Reg. 49079 (Sept. 23, 2001).

[FN15]. *Specially Designated Nationals List*, U.S. DEPARTMENT OF THE TREASURY, http://www.treasury.gov/resourcecenter/sanctions/SDN-List/Pages/default.aspx (last visited May 20, 2013).

[FN16]. *Supra* note 10.

[FN17]. Moreover, Model Rule 1.16 (b)(4) allows a lawyer to withdraw when """"the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."

[FN18]. Resolution & Report 116, *supra* note 6, at 38.

[FN19]. MODEL RULES OF PROF'L CONDUCT, SCOPE, cmt. 16. *See also* MODEL RULES OF PROF'L CONDUCT R. 2.1 (explaining that "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 335 (1974) (stating that in the context of writing opinions for transactions involving sales of unregistered securities, a lawyer should not "accept as true that which he does not reasonably believe to be true.").
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