

Caution is warranted; scams are afoot

During the recession of 2008, lawyers lost jobs and suffered economic loss. Some lawyers, due to their own economic straits, poor judgment or a combination of both, found themselves embroiled in improper loan modification schemes and other debt-relief actions that were basically consumer scams. Several lawyers were disciplined as a result. The 2020 pandemic is again creating economic havoc for lawyers and consumers. With economic strife come more scams and more opportunities for lawyers to get caught, both wittingly and unwittingly, in schemes that serve no purpose but to defraud. Please be cautious.

Nationwide regulatory counsel are already seeing covid schemes, the first wave of which has comprised targeted phishing attempts directed at lawyers and law firms. Other than an increase in frequency, however, such attacks should be well-known to lawyers and law firms, and hopefully your guard is already up. It is never too late to brush up on your cybersecurity practices, but that is not the purpose of this article.



SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Security Board. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

✉ SUSAN.HUMISTON@COURTS.STATE.MN.US

The ABA Center for Professional Responsibility recently sent an alert to regulatory counsel warning of a potential increase in money laundering schemes. This caught my attention. For the last couple of years, efforts to combat money laundering have focused on the role lawyers may be playing (or not playing, as the case may be) in such transactions.

Due to client confidentiality and the legal nature of the transactions, it is not surprising that lawyers are involved in such activity. The last thing you want to be involved with is anyone's criminal conduct, whether knowingly or unknowingly. How do you avoid this? Let's review the rules and a recent ABA opinion on point.

Rule 1.2(d), Minnesota Rule of Professional Conduct, is pretty straightforward:

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 determinate the validity, scope, meaning, or application of the law.

You should note the word "knows" is doing a lot of lifting in the rule. Per Rule 1.0(g), "knows" "denotes actual knowledge of the fact in question," and, more broadly, "knowledge may be inferred from circumstances." The first part is easy: When the facts before you demonstrate "actual knowledge" of criminal or fraudulent activity, your obligation is clear. You must explain to your client that professional ethics do not allow you to assist in such conduct, and you must withdraw if the client persist in the course of conduct.¹

Clients rarely confide their criminal or fraudulent intent, however. What does it mean for knowledge to be inferred from the circumstances? In April 2020, the ABA issued Formal Opinion 491, entitled "Obligations Under Rule 1.2(d) to Avoid Counseling or Assisting in a Crime or Fraud in Non-Litigation Settings." In the opinion, the ABA cautions lawyers to inquire when known facts indicate a *high probability* that a client is seeking to use the lawyer's services

for criminal or fraudulent activity. The duty to inquire is important because a lawyer's conscious, deliberate failure to inquire (willful blindness) can amount to knowing assistance of criminal or fraudulent conduct. The ABA opinion cites noted ethics scholar Charles Wolfram in this regard: "[A]s in the criminal law, a lawyer's studied ignorance of a readily ascertainable fact by consciously avoiding it is the functional equivalent of knowledge of the fact.... As a lawyer, one may not avoid the bright light of a clear fact by averting one's eyes or turning one's back."²

Opinion 491 takes care to explain that the ethical duty is not "reasonably should have known," but does reject a standard that imposes no duty of inquiry as contrary to well-settled ethics principles. Thus, you cannot avoid "knowledge" by not looking too closely. A duty to inquire in high-probability situations is an important safeguard—and a wise course of action even if it were not ethically required. The last thing a lawyer wants to do is get caught up in allowing a client to use their legal services to further a client's potentially criminal or fraudulent conduct. There are pitfalls enough in the practice of law to add the risk of flying that close to sun.

Opinion 491 provides some examples of situations that would impose a duty of inquiry, and refers to another good ABA resource: a 2010 guide entitled "Voluntary Good Practice Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing." The latter resource includes a description of numerous red flags that suggest your client may be engaged in money laundering. If you engage in transaction work, particularly involving cross-border transactions, you should review these resources to refine your ability to spot red flags, particularly as they relate to money laundering.

As in-house counsel for a corporation that engaged in international sales of highly controlled goods, I'm no stranger to due diligence or red flags, both by training and natural skepticism.

I'm frequently surprised in my current position to find that is not universally true. I have seen too many lawyers who either do not have good instincts for when a transaction may be "off," or more frequently, choose not to care if there is something "off" about a transaction, due to their own financial interest in being retained for the work. Do not be that person. Do not let economic pressures—from the pandemic or otherwise—cause you to ignore your instincts or to set aside your natural skepticism that something that is too good to be true. Liability for ethical misconduct is the least of a lawyer's worries in these situations, because law enforcement is often involved, looking to hold individuals accountable. (Or, if you are a victim, you can suffer significant losses not covered by insurance.)

There is no doubt that tough economic times are likely ahead for the profession due to the pandemic. Prior experience has taught us that during such times lawyers are vulnerable, as targets of scams or witting or unwitting participants in the scams of clients. These scams continue to grow in sophistication, and more and more are involving lawyers outside of large cities. Ethically, you cannot assist a client in any fraudulent or criminal activity, and you cannot close your eyes to evidence of such activity. The ABA is pursuing a website to consolidate known pandemic schemes targeting or involving lawyers, and we will be sure to include a link to the site on our website if it gets up and running. Economic uncertainty brings out the scammers. Caution is warranted. ▲

Notes

¹ Rule 1.4(a)(5), MRPC ("A lawyer shall... consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law."); Rule 1.16, MRPC.

² ABA Opinion 491 at 4 fn. 13.