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Turning up the heat: Ethical times are getting tougher
Written Materials

If there's one word that sums up the direction of the ethics code these days, it's "broadening." As technology evolves, as we emerge from a post-COVID world, and as events around the globe unfold the one constant is that the ethics authorities are broadening lawyers' ethical responsibilities. Ultimately, that means that the heat is being turned up on us all. In this program we'll explore several areas that are impacted. A bit of tech, a bit of lawyer/client relations, and a bit more. So let's get to it.

Part One:
New Headaches in Technology and Ethics

Upcoming changes in technology are sure to leave lawyers asking "What the heck?" If we don't stay competent there will be an ethics wreck. How do we keep it all in check? Read on as we discuss some of the how the ethical heat is being turned up in tech.

1. The more things change, the more they stay the same.

For years, I've been warning lawyers about the dangers of using bluetooth devices. And, listen it's not like it's some deep thought. Technology watchers of all kinds have been warning about the dangers of these "frictionless" devices. Recently, Forbes published an article which explained the concern. In "The Five Biggest Cyber Security Trends In 2022", Bernard Marr writes,

> The Internet of Vulnerable Things
>
> The number of connected devices – known as the internet of things (IoT) is forecast to reach 18 billion by 2022. One consequence of this is a hugely increased number of potential access points for cybercriminals looking to gain access to secure digital systems.
> The IoT has long been recognised as a specific threat – attacks that have been identified in the past include hackers using connected household appliances like fridges and kettles to get access to networks, and from there go on to access computers or phones where valuable data could be stored.
>
> As well as more widespread, in 2022 the IoT is also getting more sophisticated. Many organizations are now engaged in the development of "digital twins" – comprehensive digital simulations of entire systems or even businesses. These models are often connected to operational systems in order to model data gathered by them and may offer a treasure trove of data and access points to those with nefarious intentions.
> In 2022 we will undoubtedly continue to see attacks on IoT devices increase. Edge computing devices – where data is operated on as close as possible to the point it is collected – as well as centralized cloud infrastructure is all vulnerable. Once again, education and awareness are two of the most useful tools when it comes to protecting against these vulnerabilities. Any cybersecurity strategy should always include a thorough audit of every device that can be connected or given access to a network and a full understanding of any vulnerabilities it may pose.[1]

We all know that lawyers need to understand these types of dangers in order to exhibit our minimum levels of competence. This is all about Competence, Rule 1.1 which states:

> Rule 1.1. Competence.
> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
>
> But simply understanding the tech that affects the practice isn't enough. To a certain

extent, lawyers need to look into the future. Thus, similar to many ethical responsibilities, the

duty of competence is ongoing. That's why the commentary to the rules requires that lawyers

stay ahead of the curve and maintain their competence:

> [8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

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[1] https://www.forbes.com/sites/bernardmarr/2021/12/17/the-five-biggest-cyber-security-trends-in-2022/?sh=3e6df13e4fa3, last checked 1/12/2022.

This was reiterated in one of my favorite ethics opinions, California Opinion 2015-193. In that opinion the drafters address issues with E-Discovery. However, the opinion was really about the lawyer's broader duty to understand new technology. The opinion was about the discovery of electronically stored information ("ESI"), but it was actually much broader than that. It was really about the lawyers larger duty to stay on top of new technologies. To see what I mean, just read the digest of the opinion:

> An attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law. Attorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, including the discovery of electronically stored information ("ESI"). On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a matter, and the nature of the ESI. Competency may require even a highly experienced attorney to seek assistance in some litigation matters involving ESI. An attorney lacking the required competence for e-discovery issues has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation. Lack of competence in e-discovery issues also may lead to an ethical violation of an attorney's duty of confidentiality.

But I mentioned a few moments ago that this concern isn't "new," and that's the problem. I'm worried that, because the danger isn't new, lawyers won't appreciate the danger. What happens far too often in the world of attorney ethics is that lawyers hear about a dangerous issue, but then forget about it. Yes, they are initially concerned. When they are first exposed to the issue they might even be shocked about it. In the beginning they take their duty of competence seriously and make an effort to understand the issue. But then time goes by and they get complacent.

Lawyers tend to put dangerous issues in their rear view mirror and move on to the next part of their lives. The next file, the next client, the next ethical danger, whatever. When that happens, the lawyer gets desensitized to the ethics danger. That's why we educators constantly tell lawyers not to steal from their trust accounts and not to have sex with clients. It's because we know that those items are continuing dangers, but we also know that if lawyers aren't

consistently reminded of the danger, they will relegate it to a secondary concern and they'll get desensitized to the danger. Then, when the issue raises it's head in their practice, they won't see it. This is a particularly tough issue when it comes to tech.

An extension of the lawyers' duty of competence is a duty to understand, anticipate and act. We need to stay abreast of the issues (as the comment requires). In other words, we need to understand. We need to see how those technological dangers could cause problems in our practice. In other words, we need to anticipate the potential ethical breaches. And if we realize that there is a possible problem, we need to act so we avoid the ethical breach.

Being able to execute that continuing duty requires that a lawyer stay engaged. It's about making sure that we continue to pay attention to the issues, even when we were alerted to those issues at some point in the past. And we need to realize that the ethical sift spots often times get softer. That's what's happening with the Internet of Things.

Bluetooth and web-controlled devices are ubiquitous in the practice. The vulnerabilities that we learned about years ago have expanded. Our duty of competence requires that we stay engaged, understand that continuing danger, and keep it in the front of our mind.

2. When a writing doesn't have to be a writing per Rule 1.0.

Maybe I'm naive, but I was shocked to find out that a writing isn't really a writing. I figured that the word is self-explanatory, but apparently it's not. At least that's what Rule 1.0 reveals.

The rules of professional conduct have a definitional section and it's located in Rule 1.0. Subsection (n) sets for the definition of a "writing":

> (n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Clearly a writing is far more than the commonly known definition. Let's break it down to see the depth of this word. The rule refers to a "tangible or electronic record." That certainly makes sense given that most of our writing is done via electronic means. It's also understandable that the writing would be a record of a "communication or representation." I guess the drafters are trying to create an all-encompassing category. But then we get int the specific types of communications that are covered by the rule and that's where the rule stops making sense.

Handwriting, typewriting and printing are obviously considered "writings." But the following word — photostating? That is ridiculous. For those of you who aren't 100 years old, a photostat is an early form of photo copying. You know photo copying, right? The technology that is rapidly moving to be obsolete, given the popularity of scanning and paperless filing systems? Yeah, well photostating is the technology we used *before* photocopies. And for some ridiculous, nonsensical reason, the drafters chose to leave that term in. Why couldn't they just say "copy"? I'm not joking about this. Why couldn't they just use the more common and broader term " copy" instead of the more particular and outdated photostat? I mean, who even *uses* a photostat machine anymore? Seriously, I don't think there is any valid reason for using that term in Rule 1.0(n) and I wish the drafters would just "live in the now" and update the subsection.

Incidentally, to show you how ridiculous it is to have that word in the rule, consider that when I typed the word in these written materials, it wasn't recognized by the spellchecker. The ghost of Steve Jobs wanted to separate the apparently unknown compound word "photostating" into two separate words, "photo stating." But even though the whole photostat business is highly unusual, there is actually an even bigger reason that the rule makes no sense. And that's because of the next set of terms.

The rule states that the type of communication that constitutes a "writing" is an "…audio or video recording…".

Huh?

Since when is something that is *heard* considered a *writing*? The average definition of t a writing wouldn't be so inclusive. Consider the definition given by the Apple word processing software I'm using right now. According to the New Oxford American Dictionary:

> writ·ing | ˈrīdiNG |
> noun
> 1 the activity or skill of marking coherent words on paper and composing text: *parents want schools to concentrate on reading, writing, and arithmetic*.
> • a sequence of letters, words, or symbols marked on paper or some other surface: *a leather product with gold writing on it* | *he asked them to put their complaints* ***in writing***.
> • handwriting: his writing looked crabbed.
> 2 the activity or occupation of composing text for publication: *she made a decent living from writing*.
> • written work, especially with regard to its style or quality: *the writing is straightforward and accessible*.
> • (**writings**) books, stories, articles, or other written works: *he was introduced to the writings of Gertrude Stein*.
> • (**the Writings**) the Hagiographa.

The definition in the ethics rule makes no sense. A writing is not an audio recording. I mean, listen, if the rules say an audio recording is a writing, then according to the rules an audio recording counts as a writing. But that definition bears no connection with the real world that normal human beings live in.

I don't understand why the drafters had to do it this way. If they wanted a writing to include things that aren't actually writings, then change the term. Call these communication something other than a "writing."

Allow me to clarify one other point about 1,0(n), One might think that the last sentence of that rule is equally ridiculous, but it's really not. That language reads:

> A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing." RPC 1.0(n)

I believe the drafters included that section because they are addressing the world of digital signatures.

3. The invasive nature of technology.

I have become relatively obsessed with the issue of privacy lately. I think it's because every time I think I've heard it all, there's some bit of evidence that makes me shake my head. Take, for example, this excerpt from an article in Forbes by Bernard Maar entitled, "The 5 Biggest Technology Trends In 2022."

> Artificial Intelligence everywhere
>
> "Smart" really just used to mean connected – smartphones, smart TVs, and the plethora of other smart devices were really just the same old toys but connected to the internet. Today, "smart" increasingly means powered by artificial intelligence (AI) – generally machine learning algorithms – and capable of helping us in increasingly innovative ways. Smart cars use facial recognition algorithms to detect whether we are paying attention to the road and alert us if we're getting tired. Smartphones use AI algorithms to do everything from maintain call quality to help us take better pictures, and of course, they are packed with apps that use AI to help us do just about anything. Even smart toilets are on their way – capable of helping to diagnose gastrointestinal issues by using computer vision to analyze stool samples![2]

Yes, it's scary to think about how much data these devices collect. But the question lawyers need to also ask is "what does this new technology do with the data it collects?" Many of these device manufacturers share the data with either their internal programmers or third party contractors. Those employees/vendors review the data in order to correct algorithms and improve the software that operates the device. But that sharing of information is where lawyers can run into a problem.

What if the data being shared comes from a device that a lawyer uses in their practice and the data that's shared ends up being client data? We know we have a duty to protect confidential information per Rule 1.6 Specifically, Rule 1.6(c) is part of the rule on confidentiality

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[2] https://www.forbes.com/sites/bernardmarr/2021/09/27/the-5-biggest-technology-trends-in-2022/?sh=4bafc07c2414, last checked 1/12/2022.

and it states: “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

Of course, we could simply disallow the collection and/or dissemination of that data. But there are two problems with that. (1) trusting the tech companies to honor that pledge and (2) forgetting to end the collection/dissemination altogether.

Regarding the first, you’ll have to forgive me for not trusting big tech, but consider the following excerpt from the website The Verge in their article, “Amazon confirms it holds on to Alexa data even if you delete audio files being used’ by Makena Kelly and Nick Statt:

> Amazon has admitted that it doesn’t always delete the stored data that it obtains through voice interactions with the company’s Alexa and Echo devices — even after a user chooses to wipe the audio files from their account. The revelations, outlined explicitly by Amazon in a letter to Sen. Chris Coons (D-DE), which was published today and dated June 28th, sheds even more light on the company’s privacy practices with regard to its digital voice assistant.[3]

Regarding the second — forgetting to deny/end the collection and dissemination of that information — it’s really just a question of lawyers not having that heightened sense of awareness I’m always talking about.

We are inundated with requests to share information. Every device/program we use asks us if we can share data and we simply click “yes” oftentimes without even thinking. The constant barrage of such requests is likely desensitizing us to the dangers of granting those request. At some point we’re going to end up sharing data for a device or system that is going to provide out client data to someone who shouldn’t be seeing it.

Maybe the problem won’t appear when when the toilet in our house shares that info, but maybe it will make a difference when the security camera does that same thing. What if you agree to share info for the security camera that you installed in your home. But now we are all #WFH (working from home). If a client comes to meet you there and their presence is picked up

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[3] https://www.theverge.com/2019/7/3/20681423/amazon-alexa-echo-chris-coons-data-transcripts-recording-privacy, last checked 1/14/2022.

on the ring camera, that's a data point that can be used against your client. The increased danger is that there will be — and I'm SURE there already is — other devices that collect data about out clients and send it off to humans to review and we don't even realize it's happening. As technology become more invasive, as it reads and analyzes all different sorts of data, there is a greater risk that some data about our clients will be released. Now, I don't think the toilet referred to in the Forbes quote is going to be the culprit, but it illustrates an important point. It can be anything.

This really is a great example of what I mean when I say "there's nothing new under the sun, except there's everything new under the sun." The idea that our devices might share information which could cause a 1.6(c) or privilege problem is something that we've been talking about for years. But look at how more widespread it's become. It means that lawyers need to be ever vigilant.

To a large part being vigilant is an extension of Rule 1.3 diligence. That rule states, "A lawyer shall act with reasonable diligence and promptness in representing a client." Diligence is about a consistent pursuit of our client's interest. But it's also about a consistent application of our efforts, generally. There's a bit of intersection here with competence— to be truly competent, one must be diligent in maintaining one's competence.

4. Attorney ethics in the meta verse.

The future is the metaverse. At least, that's what Facebook thinks. I mean, they changed their name to Meta in anticipation of the growth of that part of the internet. Since it appears to be a large part of life in the not-to-distant future, Rule 1,1 (Competence) demands that we understand what it is and the ethical implications that are posed to lawyers.

What is the metaverse? It's basically an alternate reality that exists on line. I gathered a few excerpts from some reputable online sources to explain the metaverse:

According to a Fast Company article, Dan Eckert, managing director, AI and emerging technology, PwC explained:

> An extended reality metaverse is still 3-5 years out: The metaverse—or should we say metaverses—has been around since the time of multiplayer computer games and even Second Life/AOL/Compuserve.
> Yes, plural–there will not be just one–there will be many, each designed for focused communities, capabilities, and experiences. The Metaverse, as being shouted by everyone, is not shipping (yet), but we are starting to see the building blocks released every day.[4]

Bernard Marr explained in Forbes:

> Digitization, datafication and virtualization
>
> During 2020 and 2021, many of us experienced the virtualization of our offices and workplaces, as remote working arrangements were swiftly put in place. This was just a crisis-driven surge of a much longer-term trend. In 2022, we will become increasingly familiar with the concept of a "metaverse" – persistent digital worlds that exist in parallel with the physical world we live in. Inside these metaverses – such as the one proposed recently by Facebook founder Mark Zuckerberg – we will carry out many of the functions we're used to doing in the real world, including working, playing, and socializing. As the rate of digitization increases, these metaverses will model and simulate the real world with growing accuracy, allowing us to have more immersive, convincing, and ultimately valuable experiences within the digital realm. While many of us have experienced somewhat immersive virtual realities through headsets, a range of new devices coming to the market will soon greatly improve the experience offering tactile feedback and even smells. Ericsson, which provided VR headsets to employees working from home during the pandemic, and is developing what it calls an "internet of senses," has predicted that by 2030 virtual experiences will be available that will be indistinguishable from reality. That might be looking a little further ahead than we are interested in for this article. But, along with a new Matrix movie, 2022 will undoubtedly take us a step closer to entering the matrix for ourselves.[5]

Finally, from a CNBC article - "Investors are paying millions for virtual land in the metaverse" by Chris DiLella and Andrea Day:

> It's no secret the real estate market is skyrocketing, but the Covid pandemic is creating another little-known land rush. Indeed, some investors are paying millions for plots of land — not in New York or Beverly Hills. In fact, the plots do not physically exist here on Earth.

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[4] https://www.fastcompany.com/90704618/the-biggest-tech-trends-of-2022, last checked 1/12/2022.

[5] https://www.forbes.com/sites/bernardmarr/2021/09/27/the-5-biggest-technology-trends-in-2022/?sh=4bafc07c2414, last checked 1/12/2022.

> Rather, the land is located online, in a set of virtual worlds that tech insiders have dubbed the metaverse. Prices for plots have soared as much as 500% in the last few months ever since Facebook announced it was going all-in on virtual reality, even changing its corporate name to Meta Platforms.
>
> "The metaverse is the next iteration of social media," said Andrew Kiguel, CEO of Toronto-based Tokens.com, which invests in metaverse real estate and non fungible token-related digital assets.[6]

The connection to attorney ethics goes beyond merely the need to be competent and understand the concept. It can also apply to our actions when we use the meta verse ourselves. Lawyers will surely participate, in a professional and personal capacity. I could envision lawyers having a virtual presence of some sort in the metaverse, I must admit that I don't know how that would look, but I'm sure it's going to happen. In addition, lawyers will participate in the metaverse in ways that were unrelated to the practice of law. The thing to remember is that no matter what type of presence we have in the metaverse, the ethics rules will still apply to your behavior.

Your behavior in the metaverse is going to be regulated by the disciplinary system in the real world. Any action you take as a practicing lawyer that occurs in the metaverse will be governed by the rules of attorney ethics. And it doesn't stop there. Even actions that are not related to the practice could be covered by the rules. If you steal something in the metaverse, you'll need to answer to Rule 8.4(b): "It is professional misconduct for a lawyer to (b) commit a criminal act that reflects adversely on the lawyers honesty, trustworthiness, or fitness as a lawyer in other respects." This isn't an alien concept- we all know that our personal behavior is within the purview of the ethics authorities. This is simply another part of our personal life, and we need to be aware that the long arm of the disciplinary system reaches into alternate universes as well as the real world.

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[6] https://www.cnbc.com/2022/01/12/investors-are-paying-millions-for-virtual-land-in-the-metaverse.html, last checked 1/17/2022.

Here's an interesting quirk that might arise in the metaverse. What if you assume an alternate personality. I'm going to guess that a lot of people who participate in the metaverse will become a character that's different from their true persona. It's just speculation on my part, but I have to believe that there are a lot of people who are looking forward to the metaverse as a way to escape from the life that they currently lead. But lawyers need to beware. Taking on an alternate identity could end up somehow violating Rule 8.4(c) — "It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation…"

5. Should lawyers take a larger role in opposing AI?

Lawyers have a large role in society. We don't just owe a duty to our clients, rather the codes of professionalism in every state acknowledge that we also owe a duty to our communities and even society as a whole. That's why we champion things like Access to Justice, Diversity and Inclusion, and other similarly important ideals. It's because we know that our special role allows us to have an oversized impact in realizing those concepts. Plus, the privilege that we have to practice law demands that we take responsibility for making such important paradigms become a reality. I believe that the same obligation exists with AI powered facial recognition technology.

Facial recognition technology is apparently being used in relatively nefarious ways in society today. In Nature.com authors Richard Van Noorden & Davide Castelvecchi wrote an article in 2019 entitled. "Science publishers review ethics of research on Chinese minority groups":

> Two science publishers are reviewing the ethics of research papers in which scientists backed by China's government used DNA or facial-recognition technology to study minority groups in the country, such as the predominantly Muslim Uyghur population.
>
> Springer Nature (which publishes Nature) and Wiley want to check that the study participants gave informed consent, after researchers and journalists raised concerns that the papers were connected to China's heavy surveillance operations in the northwestern province of Xinjiang. China has attracted widespread international condemnation — and US sanctions — for mass detentions and other human-rights violations in the province. The Chinese government says that it is conducting a re-education campaign in the region to quell what it calls a terrorist movement.
>
> 'We are very concerned about research which involves consent from vulnerable populations…'[7]
>
> It's become clear that there needs to be some larger restriction on this type of AI.

Bernard Marr explained in Forbes:

> Governments, too, clearly understand that there is a need for a regulatory framework, as evidenced by the existence of the EU's proposed Artificial Intelligence Act. The proposed

[7] https://www.nature.com/articles/d41586-019-03775-y, last checked 1/17/2022.

> act prohibits authorities from using AI to create social scoring systems, as well as from using facial recognition tools in public places.[8]

It makes me wonder — should lawyers be talking a larger role in monitoring artificial intelligence throughout society? I mean beyond considering the disciplinary implications. I'm talking about a larger role throughout society. It seems that our ethics rules mandate that we take a larger role. Consider these sections of the Preamble to the rules:

> [1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.
>
> [5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.
>
> [6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education.

It appears that the use of facial recognition technology is being used to take advantage of vulnerable people. When one combines the other dangerous uses of artificial intelligence, then very serious concern for society as a whole. Maybe it's time for lawyers to add this issue to the roster of societal issues that we, as a profession confront. The need to do so seems to stem quite clearly from the obligations set forth above from the Preamble.

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[8] https://www.forbes.com/sites/bernardmarr/2021/09/27/the-5-biggest-technology-trends-in-2022/?sh=4bafc07c2414, last checked 1/12/2022.

Part Two
A New Paradigm Across the Globe in Lawyer/Client Relations

There is some ethical heat being turned up in a way that I bet you never considered. It has to do with the area of lawyer/client relations and communication. It's a global movement that has ethical repercussions for us all.

1. The expanding duty to inquire and ABA Opinion 491

Burying your head in the sand could be pretty lucrative for a lawyer. Some lawyers over the years got pretty wealthy that way. They were the kind of lawyers who talked to a shady client and said things like, "I didn't hear you say that," or, "Don't tell me anything. If you tell me I can't continue to represent you, so I don't want to know."

Lawyers who are willing to put on earmuffs like that are pretty popular with a particular kind of client. Criminals. That includes international criminals like terrorists.

The worldwide danger of terrorism has put interesting pressures on lawyers. In particular, we need to worry about our ethical duties when we represent someone who is committing a crime. Recently the ABA issued an ethics opinion that made it clear that the days where a lawyer could ignore a client's bad deeds are a thing of the past. While the opinion contains an interesting ethics analysis, the reason it is truly notable is because it signals a paradigm shift. The opinion makes it clear that lawyers can't bury our heads in the sand anymore.

To make the ethics issue even more apparent, consider the alternate name I was considering for this program: "The duty to inquire about fraud - it's real and it's spectacular."

a. The opinion

ABA Formal Opinion #491 (April 2020) deals with a lawyer's obligation to avoid counseling or assisting a client in the commission of a crime or fraud. The issue appears to have gained importance recently because of an increased risk to lawyers. Governments around

the world are putting more pressure on terrorist groups and other nefarious actors. That pressure has created a greater need for the bad guys to try to conceal their financing, and that increases their need for elaborate money laundering transactions. Oftentimes those bad guys will need a lawyer to help them carry out their scheme, and that's when the lawyer can have problems. That's when a lawyer might be put in the position to assist that client in committing a crime.

There is no question that lawyers can't assist in their client's illegal activities. Rule 1.2(d)[9] explains that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." So if a lawyer knows that the client is engaging in a crime, they need to withdraw at the very least. But what if a lawyer isn't sure? The client's tactics might smell like money laundering — maybe they're paying for an asset sale with a large amount of cash or routing money through a jurisdiction where money laundering is common. And in many situations there might not be much more evidence than that. In that type of case there might not be enough evidence on the surface to confirm that the client's objectives are fraudulent. The lawyer might not "know" the conduct is criminal which means that Rule 1.2(d) wouldn't be triggered. The question the ABA is wrestling with in Opinion 491 is, *does a lawyer have to dig deeper?* Does a lawyer have a duty to ask the client whether the objectives that *smell* bad are *actually* bad? Put in other words, does the lawyer need to ask questions to acquire the requisite "knowledge" to make their obligations under 1.2(d) clear? The answer is yes.

b. The state of mind

In explaining their reasoning, the opinion starts with the easy stuff. If the lawyer "knows" that they are getting involved in a client fraud — if the facts are so strong that the fraud is obvious — a lawyer has an obligation to talk to the client about it. That's clear from Rule 1.2(d),

[9] Note that in Missouri the rule is 4-1.2(f), but it's the same basic text as the ABA's 1.2(d)

and it's been confirmed over the years. Both the rules and advisory opinions have established that lawyers aren't allowed to avoid the obvious.

But the opinion went further. It explained that a lawyer has to make an inquiry even if the facts aren't so strong that the fraud is obvious. A lawyer is required to check into the matter if there's a "high probability" that the client is engaging in fraudulent conduct. The opinion explained that, "When a lawyer deliberately or consciously avoids knowledge that a client is or may be using the lawyer's services to further a crime or fraud, discipline is imposed." Op. 491 at 5, citation omitted.

And the opinion didn't stop there. Yes, a lawyer needs to inquire if she *knows* the client is pursuing a fraud. Yes, a lawyer also needs to inquire if there is a *high probability* that the client is pursuing a fraud. Well, the opinion further noted that some cases held that a lawyer should make an inquiry if there is a *suspicion* that the client's actions might be fraudulent. And some jurisdictions have an even broader requirement. States like South Carolina require a lawyer to consult with a client if they "reasonably should know" that the client is getting the lawyer to assist in a crime or fraud. Op. 491 at 5.

c. Where is the trigger?

All of that begs the question — when is a lawyer deemed to have a "suspicion" sufficient to require further inquiry? When can it be said that a lawyer "should have known"? The answer, as usual, is that it depends on the circumstances. Unfortunately the drafters don't give us a clear explanation of when this duty to investigate is triggered. It seems like they're saying, "if it smells bad, ask." But while the trigger might be murky, there is one thing that's clear. The lawyer's obligation to inquire about whether a client is asking the lawyer to assist in a fraud exists. And Opinion 491 states clearly that a lawyer would be facing disciplinary action if an inquiry is required and they don't do it.

Interestingly, I don't think the unanswered questions here are so concerning. That's because I don't think this opinion is really about defining when a lawyer must make this inquiry. I think this opinion is really about sending a message.

Think about it— the actual ethics issue is pretty basic and not all that controversial. A lawyer can't assist in a client's fraud, they should talk to the client about whether they are engaging in a fraud, and if they learn the client is doing so the lawyer should withdraw. Not exactly earth shattering. But consider the "feel" of the opinion.

d. The ethical justifications for the decision

The opinion spends a tremendous amount of time establishing the ethical justifications for requiring the lawyer inquiry. They explain the nuances of Rule 1.2, they talk about criminal law, and they note a variety of other rules which can be read to require that a lawyer inquire further. That effort — which goes on for several pages — is extensive. They put a lot of effort into a pretty basic concept. It's almost like the drafters are making their case. It seems as if they know that the audience will be skeptical. They know that lawyers will question whether this duty is real. Maybe the drafters realized that they would face resistance, so they felt the need to go to great lengths to make it abundantly clear that the duty to inquire exists. They nearly overdo it with the justifications. It's as if they are saying, "let there be no mistake about it. This duty exists. It's real."

Why would they need such overkill? Maybe it's because they are signaling a paradigm shift. The drafters seem to be saying that the game-playing days are over. The days where you could bury your head in the sand and remain willfully ignorant are a thing of the past.

Maybe they spent so much time talking about the duty to inquire because that's the only way they can make it obvious that they want us to behave differently — they want us to shed the old ways. They're saying, *times have changed and we really mean it. Look. We put a lot of ink on the paper. That shows we're serious. We gave you all of this research because we want to send a clear message. The old days are over. Get with the program. In today's practice we expect more from you.*

There are other opinions which confirm this shifting paradigm and they've got to do with enhanced obligations being put on lawyers because of international money laundering. But let's talk about that on another day…

e. Another look at the problem

The New York City Bar Association opined on this topic as well and they came to a similar conclusion. Here is that opinion, in it's entirety:

Formal Opinion 2018-4: Duties When an Attorney Is Asked to Assist in a Suspicious Transaction[10]

July 18, 2018

TOPICS: Client Due Diligence, Confidentiality, Duty of Candor, Duty to Refrain from Counseling Fraudulent or Illegal Conduct**.**

DIGEST: The New York Rules of Professional Conduct (the "Rules") prohibit a lawyer from knowingly assisting a client's crime or fraud but do not explicitly address a lawyer's duty when the lawyer merely has doubts about the lawfulness of the client's conduct; nor do the Rules explicitly require a lawyer to investigate in such circumstances in order to ascertain whether the legal services would in fact assist a crime or fraud before assisting the client. Nevertheless, when a lawyer is asked to assist in a transaction that the lawyer suspects may involve a crime or fraud, a duty of inquiry in some circumstances is implicit in the Rules. First, in order to render competent representation as required by Rule 1.1, a lawyer has a duty to the client in some circumstances to undertake an inquiry into suspicious transactions to render reasonable and candid advice to the client about whether to undertake the proposed conduct and the consequences of doing so. Second, notwithstanding the absence of an explicit requirement, a duty to inquire into suspicious transactions under some circumstances is implicit in the duty to avoid knowingly assisting wrongful conduct. The lawyer's inquiry must be consistent with the confidentiality duty of Rule 1.6, which governs disclosures the lawyer may make to third parties during the inquiry, as well as with the duty to keep the client informed during the representation. If the lawyer concludes that the client will engage or is engaging in a crime or fraud, the lawyer must not assist, or further assist, the wrongdoing. The lawyer may undertake remedial measures to the extent permitted by the exceptions to the confidentiality rule.

RULES: 1.1, 1.2, 1.6, 1.16, 2.1, 8.4

QUESTION: When an individual client asks a lawyer to provide legal assistance in a transaction, and the lawyer suspects that the legal services may assist the client's crime or fraud, to what extent must the lawyer investigate to allay or confirm the suspicions, and what other conduct must the lawyer undertake under the Rules?[1]

OPINION:

I. Introduction

In the context of the following scenario, this opinion addresses lawyers' obligations under the Rules when the lawyer is retained to assist an individual client in a transaction that appears to the lawyer to be suspicious.

> A lawyer represents a client in the sale of a business in New York. The client advises the lawyer that the proceeds of the transaction will be used to purchase a different business. The client directs that after the first transaction closes, all payments be sent to a bank in a well-known secrecy jurisdiction. The client then asks the lawyer to proceed with the

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[10] https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2018-4-duties-when-an-attorney-is-asked-to-assist-in-a-suspicious-transaction, last checked by the author on October 1, 2020.

> purchase. In preparing the documents and doing general due diligence, the lawyer realizes that the proposed purchase price is much more than the business is worth. The lawyer also learns inadvertently that the client has two passports, each from a secrecy jurisdiction different than the one in which the bank is located. The lawyer suspects, but does not know, that the transaction will involve a fraud or crime, such as money laundering or tax evasion, on the part of the client.[2]

As set forth below, a number of Rules and considerations bear on whether a transactional lawyer has a duty to investigate the client's conduct in this scenario and whether there are other steps that must be taken. These include the lawyer's duties of competence [Rule 1.1], of confidentiality [Rule 1.6], and to refrain from assisting a client in conduct that the lawyer knows is illegal or fraudulent [Rule 1.2(d)].

II. A Transactional Lawyer May Have a Duty to Inquire When Serious Questions are Raised Regarding Whether the Lawyer is Assisting the Client in a Crime or Fraud

A. The duty of competence may require the lawyer to conduct due diligence into the client's potentially fraudulent conduct

Rule 1.1(a) requires a lawyer to provide "competent representation to a client." In many contexts, the very purpose of the representation is to provide advice about the lawfulness of a client's proposed course of conduct or to assist the client in structuring a proposed transaction in a manner that conforms to the law. Rule 1.2(d) authorizes a lawyer to "discuss the legal consequences of any proposed course of conduct with a client," and in such cases, Rule 1.1 presupposes that the lawyer will provide competent advice about whether the proposed conduct would be unlawful or about how to achieve the client's objectives within the law.

Regardless of the client's objectives, competent representation presupposes that the lawyer is rendering assistance in carrying out a client's *lawful* objectives. Committing a crime or engaging in other illegal or fraudulent conduct is not a lawful objective. Rule 1.2(d) forbids a lawyer from assisting the client in conduct that the lawyer *knows* to be illegal or fraudulent. But even if the lawyer does not have the requisite knowledge under Rule 1.2(d), furthering a client's illegal or fraudulent transaction – thereby subjecting a client to criminal or civil liability – may run afoul of the Rules if the lawyer did not act competently under Rule 1.1(a). In general, assisting in a suspicious transaction is not competent where a reasonable lawyer prompted by serious doubts would have refrained from providing assistance or would have investigated to allay suspicions before rendering or continuing to render legal assistance.

Further, Rules 1.4 and 2.1 require lawyers to render reasonable, candid advice. Unless the lawyer inquires in response to serious suspicions, the lawyer will not be in a position to advise the client about the attendant risks of civil or criminal liability. Thus, the duty of competence not only protects the client, but also in some situations requires the lawyer to take the steps necessary, including additional inquiry, to ensure that she is providing competent advice.

What constitutes a suspicion sufficient to trigger inquiry will depend on the circumstances. In many representations, there is no reason for the lawyer to doubt the lawfulness of the client's proposed actions. On the other hand, there may be representations where the circumstances raise suspicions or questions. For example, in the hypothetical above, the lawyer may have a duty to inquire of the client as to the reasons for a purchase of a business at a higher-than-

market price and for running the funds through a bank in a secrecy jurisdiction to determine whether the transaction is being used to launder money, to avoid legitimate taxes, or for some other criminal or fraudulent purpose. Depending upon the answer, the lawyer may conclude that the transaction is legitimate, that she needs to make further inquiry, or that she must not provide further assistance in the transaction.

These conclusions are consistent with Comment [5] to Rule 1.1 which notes that "[c]ompetent handling of a particular matter includes inquiry into an analysis of the factual and legal elements of the problem," and with other authorities. *See, e.g.,* N.Y. City 2015-3 (2015) (a lawyer who believes he is the victim of a scam by a purported prospective client has a duty of competence to investigate further before proceeding with the matter); ABA Informal Op. 1470 (1981) ("Opinion 1470") ("[A] lawyer should not undertake representation in disregard of facts suggesting that the representation might aid the client in perpetrating a fraud or otherwise committing a crime."); *cf.* N.Y. City 2018-2 (2018) ("The duty of competence under Rule 1.1 establishes additional duties in the post-conviction context, including, in some cases, a duty to investigate new potentially exculpatory evidence regardless of whether Rule 3.8(c) is triggered.").

B. A lawyer who fails to investigate potentially fraudulent conduct may also violate Rule 1.2(d), depending on the circumstances

Rule 1.2(d) prohibits a lawyer from assisting a client in conduct that the lawyer *knows* to be criminal or fraudulent. "Knowledge" under the Rules is defined as "actual knowledge of the fact in question . . . [which] may be inferred from the circumstances." Rule 1.0(k). However, consistent with the criminal law standard of "conscious avoidance," a lawyer may be deemed to have knowledge that the client is engaged in a criminal or fraudulent transaction if the lawyer is aware of serious questions about the legality of the transaction and renders assistance without considering readily available facts that would have confirmed the wrongfulness of the transaction. *See* N.Y. City 2018-2 (2018) ("Conscious avoidance of the fact in question may also constitute knowledge under the Rules, as under criminal law") (citing N.Y. City 99-02 (1999) ("Lawyers have an obligation not to shut their eyes to what was plainly to be seen … A lawyer cannot escape responsibility by avoiding inquiry.")).[3]

Opinion 1470 similarly recognized that when lawyers are aware that the client's proposed course of conduct is likely to be illegal, they "cannot escape responsibility by avoiding inquiry" but "must be satisfied, on the facts before [them] and readily available to [them], that [they] 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"; if lawyers are not satisfied that the client's conduct is lawful, they have "a duty of further inquiry" before rendering assistance. Thus, while Rule 1.2(d) does not require lawyers to inquire when there is no ground for suspicion, they cannot ignore "red flags." *Cf.* Rebecca Roiphe, *The Ethics of Willful Ignorance*, 24 Geo. J. Legal Ethics 187 (2011), citing *In re Blatt*, 63 324 A.2d 15, 17-19 (N.J. 1974) (holding that "a lawyer committed misconduct by helping a client effect a purchase after failing to investigate its suspicious nature"); *In re Dobson*, 427 S.E.2d 166, 166-68 (S.C. 1993) (sanctioning "an attorney for helping his client while remaining deliberately ignorant of his client's criminal conduct" and holding that the court would " not countenance the conscious avoidance of one's ethical duties as an attorney").[4]

III. Limits on the Lawyer's Duty to Inquire

Ordinarily, a lawyer will begin an inquiry by seeking information from the client before turning to other sources. After concluding a reasonable inquiry, the lawyer may ordinarily credit the client when there are doubts. Whether a particular inquiry is adequate will vary with the circumstances.

To the extent that the lawyer must seek information from others, the Rules may impose conditions or limits. In general, the duty under Rule 1.4 to keep the client reasonably informed will require the lawyer to explain why there are doubts about the legality of the transaction and what steps the lawyer proposes to take to allay or confirm suspicions. If suspicions are sufficiently serious to give rise to a duty of inquiry under Rule 1.2(d), then the lawyer would render further assistance at her peril. A lawyer's fear that a client may seek to cover up his actions does not eliminate the duty of communication. Rule 1.4(a)(5). If the lawyer does suspect a cover-up and cannot persuade the client to be forthcoming, she may choose to terminate the representation. Rule 1.16(c)(2). Similarly, if the client will not authorize such an inquiry, the lawyer may have no realistic choice other than to cease assisting in the particular transaction, because to continue the representation may put her in jeopardy of violating Rule 1.2(d). And, needless to say, a client's refusal to authorize and assist in an inquiry into the lawfulness of the client's proposed conduct will ordinarily constitute an additional, and very significant, "red flag."

If the client green-lights an inquiry but refuses to pay for the time required to conduct it, the lawyer must decide whether to conduct the inquiry at her own expense or terminate the representation. The lawyer may discontinue the representation based on concerns as to the legality of the transaction. *See* Rule 1.2(f) (permitting a lawyer to refuse to participate in conduct that the lawyer believes to be unlawful, even if there is support for an argument that the conduct is legal); Rule 1.2, Cmt. [15].[5]

Further, any inquiry must be undertaken consistently with the confidentiality duty under Rule 1.6. Ordinarily, without client consent, the lawyer cannot conduct the inquiry in a manner that discloses client confidences to third parties. *See* NYCBA Formal Op. 2015-3.

IV. Remedial Obligations

If a lawyer gains knowledge during the course of representation that a client is engaged in unlawful conduct (or plans to be), the lawyer has a range of options. The lawyer's remedial steps should be dictated by such factors as the lawyer's knowledge of the facts at hand, the seriousness of the client's misconduct, and the extent of the lawyer's involvement in the client's misconduct. When the lawyer has actual knowledge of prospective wrongdoing, the lawyer may not assist in the wrongdoing and, further, must counsel the client against the illegal course of conduct under Rule 1.4(a)(5). This counseling obligation derives from the duty of competence under Rule 1.1. Despite the challenges involved in "persuading a client to take necessary preventive or corrective action" under Rule 1.4, such communications are appropriate not only to assist the client but to mitigate any risks the attorney is assuming by continuing to represent the client. Rule 1.2(d), Cmt. [10].

In our hypothetical situation, if the lawyer determines that the client may be engaged in tax fraud or tax evasion, the lawyer may choose to counsel the client to pay the appropriate taxes or take

other corrective action. There may also be circumstances in which corrective action is not possible and the lawyer may have no alternative but to resign.[6] Rule 1.16(b)(1).

If it becomes clear during a lawyer's representation that the client has failed to take necessary corrective action, and the lawyer's continued representation would assist client conduct that is illegal or fraudulent, Rule 1.16(b)(1) mandates that the lawyer withdraw from representation. Comment [10] to Rule 1.2(d) states that the lawyer's obligations are "to avoid assisting the client" and to "remonstrate with the client" when the representation will result in violation of the Rules or other law. Withdrawal alone may be insufficient in some circumstances, for example, where the lawyer believes there is continued third-party reliance on an inaccurate opinion or representation. In that case, the lawyer may engage in "noisy withdrawal," which permits the attorney to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. Rule 1.2(d), Cmt [10]; *see* Rule 1.6(b)(3); Rule 4.1, Cmt. [3]. The lawyer must also decide whether and how to prevent any serious harm that will result from the client's conduct, including whether to reveal the client's confidential information to accomplish that end. In general, the potentially applicable exceptions to the ordinary confidentiality duty provide that the lawyer may disclose confidences to prevent criminal conduct or for other specified purposes, but not that the lawyer must do so. *See* Rule 1.6(b)(1), (2) & (3).[7]

Throughout the process described above, the prudent lawyer would be well advised to keep a record of the decision making process and the basis for the steps she has (or has not) taken.

V. Conclusion

When asked to represent a client in a transaction that a lawyer believes to be suspicious, the lawyer has an implicit duty under some circumstances to inquire into the client's conduct. If the lawyer believes that her client is entering into a transaction that is illegal or fraudulent, the lawyer ordinarily must attempt to inquire in order to provide competent representation to the client under Rule 1.1. Further, under Rule 1.2(d), which forbids knowingly assisting a client's illegal or fraudulent conduct, a lawyer has the requisite knowledge if the lawyer is aware of serious questions about the legality of the transaction and renders assistance without considering readily available facts that would have confirmed the wrongfulness of the transaction. Implicit in the rule, therefore, is the obligation to take reasonably available measures to ascertain whether the client's transaction is illegal or fraudulent. The lawyer's inquiry must be consistent with the confidentiality duty of Rule 1.6, which governs disclosures the lawyer may make to third parties during the inquiry, as well as with the duty to keep the client informed during the representation. If the lawyer concludes that the client's conduct is illegal or fraudulent, the lawyer must not further assist the wrongdoing and may undertake remedial measures to the extent permitted by the exceptions to the confidentiality rule.

[1] This opinion addresses the straightforward situation in which a lawyer for an individual in a transactional representation suspects that the client's conduct may be criminal or fraudulent. It does not address a lawyer's duties with regard to a client's potentially illegal conduct in the context of litigation. Rule 3.3 (Conduct Before a Tribunal) may establish additional, or different, obligations in that context. This opinion is relevant to the representation of an entity as well as an individual but it does not address additional or different obligations that in-house counsel or outside counsel may have when representing an entity, including under Rule 1.13 (Organization as Client). Finally, this opinion does not address obligations that may be established by law

other than the Rules, such as obligations that may have to be undertaken to satisfy a legal standard of care under professional negligence law.

[2] Many U.S. lawyers and law firms conduct due diligence before accepting a new client, and they are well-advised to do so. *See* ABA Formal Op. 463 (2013) ("It would be prudent for lawyers to undertake Client Due Diligence ('CDD') in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity."). However, there is no uniform legal requirement that US lawyers undertake due diligence. This contrasts with the law in a number of non-US jurisdictions that have well-developed anti-money laundering and other due diligence requirements. *See generally* John A. Terrill, II & Michael A. Breslow, *The Role of Lawyers in Combating Money Laundering and Terrorist Financing: Lessons from the English Approach*, 59 N.Y.L. Sch. L. Rev. 433, 440 (2014-2015) (discussing UK anti-money-laundering law requiring lawyers, among others, to undertake client due diligence, including identifying a beneficial owner who is not the customer and obtaining information on the purpose of the representation).

[3] The knowledge standard differs from the "should know" or "should have known" standard of several other Rules. *See* Rules 4.4(b), 5.1(d)(2)(ii), 5.3(b)(2)(ii). Under the knowledge standard of Rule 1.2(d), a lawyer is not deemed to "know" facts, or the significance of facts, that become evident only with the benefit of hindsight. As Justice Stevens observed in a different context, after a representation ends, "a particular fact may be as clear and certain as a piece of crystal or a small diamond," but lawyers "often deal with mixtures of sand and clay. Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel." *Nix v. Whiteside*, 475 U.S. 157, 189, 106 S. Ct. 988, 1005 (1986) (Stevens J, concurring).

[4] This opinion focuses on situations where a lawyer recognizes that a transaction is suspicious at the outset or at some later time before the transaction is completed. It does not address a lawyer's duty of inquiry, if any, after assisting in a potentially fraudulent or criminal transaction that is completed. We note, however, that Rule 8.4(h), which prohibits a lawyer from "engag[ing] in any other conduct that adversely reflects on the lawyer's fitness as a lawyer," has been found to require inquiry after assisting a completed transaction if the lawyer then suspects that the transaction was fraudulent or criminal. *See Matter of Reno*, 147 A.D.3d 8, 12 (1st Dep't 2016) (sanctioning lawyer under Rule 8.4(h) for assisting and not then remedying a fraudulent transaction, because the lawyer had strong reasons to suspect that his client was defrauding a vulnerable seller and "at a minimum, had a duty to confirm that his client tendered the agreed consideration . . . to ensure that the transaction was 'legitimate.'"). The implication of the *Reno* opinion is that, if the lawyer concluded upon inquiry that the transaction he assisted was fraudulent, the lawyer would have had some remedial obligation.

[5] Whether a lawyer should continue to work on the potentially illegal or fraudulent matter while conducting the inquiry depends on the circumstances. Even if the transaction is never completed, a lawyer is subject to discipline for knowingly *attempting* to assist a client's illegal or fraudulent conduct. *See* Rule 8.4(a) (providing that a lawyer or law firm may not attempt to violate the Rules). But certain tasks may be peripheral to the transaction and unrelated to any potential wrongdoing. And preliminary work on the transaction may not constitute a knowing "attempt" to assist a client's illegal or fraudulent conduct if the lawyer is concurrently investigating with an eye toward ending assistance if suspicions are confirmed.

[6] If, for example, the lawyer learns that the transaction is being used to launder the proceeds of a crime, it is unlikely that counseling the client not to act unlawfully will be successful.

[7] This opinion does not address whether there are circumstances where a lawyer *must* undertake remedial measures to prevent or rectify wrongdoing in a transactional context and, if so, what measures must be undertaken. We assume that, in the transactional context, whether, and in what circumstances, such an obligation exists will largely be determined by substantive law rather than the Rules. *See* ABA Model Rules of Professional Conduct, Rule 4.1, Cmt. [3] (observing that: "In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid assisting a client's crime or fraud.").

Author(s): Professional Ethics Committee
Subject Area(s): Ethics

2. The ethical issues of making referrals to another firm for what might very likely be representation that breaks the rules

Imagine that a client approaches you and discusses some financial deal they'd like to pursue. Now imagine that the scheme they're trying to pursue seems a bit sketchy. But in this scenario you're going to be in the clear. That's because the client is going to engage in this deal in a jurisdiction where you don't practice. So the client isn't asking you to do the work, they're asking you to refer them to a lawyer and accounting firm that could assist them in the deal in this other jurisdiction. Finish off the hypo by assuming that you made a referral, the other professionals were retained by the client, and the deal was consummated. Oh, and it turns out that the deal they pursued was, in fact, a crime or fraud. Did you assist them in committing that crime by making the referral to firms who helped them achieve their nefarious goals?

The best discussion of this topic was set forth in a law review article written by Prof. Heather M. Field in the St. Louis University Law Journal. That article follows, and it's reprinted with permission of the Saint Louis University Law Journal (© 2017, St. Louis University School of Law, St. Louis, Missouri).

3. The May-to-a-Must Layering

Consider the following hypothetical:

> You're representing a real estate developer who is constructing a building. The builder has financing from a bank that he uses to develop the project. The bank is a small institution and this builder's loan is the largest in it's lending portfolio. Every time he completes a portion of the project (plumbing, electrical, etc) he requisitions a portion of the contraction loan which he then uses to pay the construction costs. It's a common situation— he makes periodic "requisitions" in which he draws from the available construction loan.
>
> In order for the bank to provide the requisitions they need certain documentation. In addition to the reports from the builder which certify what work has been completed, they need an opinion from counsel that attests to the fact that all of the permits for the project continue to be in full force an effect. According to the loan documents, that opinion must be renewed every 9 months.

> In January the builder provided all of the documentation you needed to produce the opinion attesting to the status of the approvals, and you did so. However, shortly after you provide the opinion in January you learned that the builder allowed one of the key land use permits to expire at the end of the previous year. He fraudulently altered the prior approval documentation to make you believe that the approval had been renewed. Thus, your opinion — the one he is now using to obtain financing from the bank — is now inaccurate.
>
> You've asked the client to stop using your opinion and to tell the truth about the expired permit to the lender. They have refused to do both.

The concern with this hypo is that the builder is using your opinion to commit a fraud upon the lender. Worse yet, because you created that opinion you are assisting in the commission of that fraud. We know, of course, that the rules don't allow us to do that sort of thing. So what could we do? Or maybe the better question is what MUST we do? That's where the layering of the rules comes in. Here's how the rules intersect in this example:

— We know that we can't assist a client in the commission of a crime or fraud per Rule 1.2(d).

> Rule 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.

So what is the obligation of the lawyer if we think we are doing so? Well, one option is to get the client to stop committing the crime or fraud, because then we are no longer assisting in such an act. In the hypo above, however, the client has told you that they are not going to do that. Incidentally, even if they said they would stop. Could you believe them?

In this situation, the rules say that we might have to withdraw. It's spelled out in the comment to Rule 1.2:

> 1.2 Comment [10]:
> When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue

> assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. **The lawyer must, therefore, withdraw from the representation of the client in the matter.** See Rule 1.16(a). In some cases, withdrawal alone might be insufficient…. [emphasis added]

But withdrawing might not be enough. That's because, in our hypo, if we withdraw and keep quiet the= client is still going to use our inaccurate opinion to fraudulently obtain the requisitions. Remember, the opinion only has to be updated every 9 months. The builder, will be using that opinion letter over and over at each requisition over the 9 month period, even if we have withdrawn. Sure, we can demand that they not do so…but they're probably going to do it anyway. So is withdrawing and walking away from the representation enough? The last part of Comment [10] to Rule 1.2 says *maybe not.*

> …It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

Since the comment sends us to the next layer (the next rule) let's look at it:

> Rule 4.1: Truthfulness in Statements to Others
> In the course of representing a client a lawyer shall not knowingly:
> (a) make a false statement of material fact or law to a third person; or
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Here, Rule 4.1(b) is implicated. Your failure to say something to the bank about the inaccuracy of your opinion could mean that you are failing to disclose a material fact that is necessary to ayvaoi assisting in a fraud. So Rule 4.1 seems to say that you should reveal. But there's that last part of 4.1(b) that seems to throw a monkey wrench into this machine. What about that reference to Rule 1.6 (Confidentiality)? The commentary to Rule 4.1 tries to clear it up:

> Rule 4.1, Comment [3]:
> Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation.

> Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. **If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6** (emphasis added).

Okay, so what does the next layer say….Rule 1.6? Let's look at it, then I'll provide the narrative that weaves them all together…

> Rule 1.6: Confidentiality of Information
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
> (1) to prevent reasonably certain death or substantial bodily harm;
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

By the way, here's where a key part of the facts comes into play. If this loan is the biggest in the lender's portfolio then any default or problem is likely to cause substantial injury to the bank. Thus, if we apply Rule 1.6 to our facts, the lawyer has the ability to reveal. That's because, per Rule 1.6(b)(2), the lawyer is permitted to reveal to prevent the client from committing the fraud since it is likely to result in substantial inputs to the bank and because the client is using the lawyer's opinion in furtherance of the fraud. But Rule 1.6 says "may reveal," meaning it's permitted but not required. Ah…that's where the layers come in. The layers turn a "may" into a "must." Here's how it all works together:

- You can't assist a client in a crime or fraud.
- If you are doing so, you must withdraw.
- But if withdrawing won't stop your assisting the fraud, you might have to say something.
- To determine whether you have to say something, you go to Rule 1.6. If Rule 1.6 *allows* you to say something, then you are now *required* to say something. It turns the "may" into a "must." In other words, uf the only way you could avoid assisting is by disclosing, then if 1.6(b)(2) says you MAY reveal, now you actually MUST reveal.

4. The EU's 6th AMLD

There is some law out of the EU that's relevant to the issue we're discussing in these materials. The European Union understood that money laundering is a problem throughout the continent. They also understood that it's the secrecy of financial transactions that poses one of the greatest concerns. As a result, the EU adopted a series of anti-money laundering directives designed to combat the problem. Dow Jones ex[plained, "In the European Union, the first AML directive was adopted in 1990 in order to prevent the misuse of the financial system to conduct money laundering. It implied obligations for entities to apply customer due diligence (CDD) requirements when entering into a business relationship."[11]

As the danger and complexity of money laundering evolved, so too has the EU's directives. "As and when newer money laundering crimes and trends come about in the financial services industry, the directive is recalibrated to safeguard banks and financial firms from the evolving threats."[12] The most recent iteration of the law is the 6th AMLD. "Recognizing that the prime concern is the non-standard approach across member states in criminalizing the offenses (for instance, tax crimes are not unlawful in some member states), the EU introduced the sixth AML directive…"[13]

The 6th AMLD is important because it vastly broadens both the scope of criminal behavior covered, as well as the actors who are subject to the law. For instance, "it's the first time that time cybercrime has been featured in this context in an EU Money Laundering Directive. 6AMLD also lists as offences insider trading, aiding and abetting money laundering, environmental crime, and human trafficking and migrant smuggling. This makes it much easier for member states to investigate and prosecute these offences."[14]

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[11] https://professional.dowjones.com/risk/glossary/anti-money-laundering/amld4-definition/, last checked by the author on 5/25/2021.

[12] https://www.finextra.com/blogposting/19916/are-you-ready-for-6amld, last checked ny the author on 5/25/2021.

[13] https://www.tcs.com/blogs/6th-anti-money-laundering-directive, last checked 5/25/2025.

[14] https://www.finextra.com/blogposting/19916/are-you-ready-for-6amld, last checked ny the author on 5/25/2021.

Lawyers, however, will most likely be concerned with the added language addressing who is covered by the law. In the past the AMLD only applied to individuals. But the 6th directive expanded liability to legal persons, like companies. But it also extends to people acting on the company's behalf, like lawyers. It shows the expansion of liability to those that aid and abet. Article 7 of that law reads as follows:

> Liability of legal persons
>
> 1. Member States shall take the necessary measures to ensure that legal persons can be held liable for any of the offences referred to in Article 3(1) and (5) and Article 4 committed for their benefit by any person, acting either individually or as part of an organ of the legal person and having a leading position within the legal person, based on any of the following:
>
> (a) a power of representation of the legal person;
> (b) an authority to take decisions on behalf of the legal person; or
> (c) an authority to exercise control within the legal person.
>
> 2. Member States shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 of this Article has made possible the commission of any of the offences referred to in Article 3(1) and (5) and Article 4 for the benefit of that legal person by a person
> under its authority.
> 3. Liability of legal persons under paragraphs 1 and 2 of this Article shall not preclude criminal proceedings from being brought against natural persons who are perpetrators, inciters or accessories in any of the offences referred to in Article 3(1) and (5) and Article 4.

Here's the bottom line: The extension of liability in the 6th AML Directive, the existence of ABA's Opinion 491, and the emerging "duty to inquire" all signal a paradigm shift. There is a duty among professionals to inquire about the legality of our clients' behavior.