ABA's Money Laundering Resolution Is A Balancing Act

By **Peter Hardy, Andrew D'Aversa and Siana Danch** (September 11, 2023)

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On Aug. 8, the American Bar Association's House of Delegates voted overwhelmingly,[1] 216-102, to pass revised Resolution 100,[2] which in turn revised ABA Model Rule of Professional Conduct 1.16 and its comments[3] to explicitly recognize a lawyer's duty to assess the facts and circumstances of a representation at the time the lawyer is engaged and throughout the representation to ensure that the lawyer's services are not used to "commit or further a crime or fraud."

The comments to the rule clearly illustrate that the ABA is concerned with the use of a lawyer's services to — wittingly or unwittingly — assist clients in laundering money. The resolution itself acknowledges this, stating:

> [T]he impetus for these proposed amendments was lawyers' unwitting involvement in or failure to pay appropriate attention to signs or warnings of danger ... relating to a client's use of a lawyer's services to facilitate possible money laundering and terrorist financing activities.

And the ABA's press release[4] echoes this concern, noting the rule was revised "because of concern that lawyers' services can be used for money laundering and other criminal and fraudulent activity."

Passage of the resolution preserves — for now — state-based, judicial regulation of the legal profession and prevents federal regulators from attempting to take action.

But the resolution now explicitly recognizes in the Rules of Professional Conduct a lawyer's ethical duty to reject or discontinue a representation that would commit or further a crime or fraud.

The Resolution's Revisions to the Rule

The resolution addresses these concerns by imposing an obligation on lawyers to inquire into and assess the facts and circumstances of the representation of their client, and requiring or permitting — depending upon what is uncovered — the lawyer to withdraw their representation of the client. The resolution revises the rule in the following ways:

- The rule now explicitly requires lawyers to "assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation";

- The rule now explicitly requires lawyers to reject or discontinue the representation if, after advising the client or prospective client that the lawyer cannot perform the

services asked, the client "seeks to use or persists in using the lawyer's services to commit or further a crime or fraud"; and

- The rule now explicitly permits lawyers to reject or discontinue the representation if the "client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent."

The resolution also revises the comments to the rule to explain that:

- A lawyer has "an obligation ... to inquire into and assess the facts and circumstances of the representation before accepting it."

- The lawyer has a continuing obligation to inquire if the facts and circumstances of the representation change during the representation, which can include a change in historic client behavior or the addition of a new party or entity.

- The obligation to inquire is "informed by the risk that the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud ... [which] means that the required level of a lawyer's inquiry and assessment will vary for each client or prospective client, depending on the nature of the risk posed by each situation."

The Rule's Risk-Based Inquiry

As indicated above, the rule leaves the level of inquiry to be determined on a case-by-case basis dependent upon the risks presented by the representation. The rule of reason now written into the rule is flexible, depending upon a list of five nonexclusive factors added to the comments. These five factors provide a rough guide to lawyers on what to inquire about and how deeply to do so. The factors include:

1. The identity of the client, including the beneficial owners of the client if it is an entity;

2. The lawyer's "experience and familiarity with the client";

3. The "nature of the requested legal services";

4. The "relevant jurisdictions involved in the representation," and specifically, "whether a jurisdiction is considered at high risk for money laundering or terrorist financing"; and

5. The "identities of those depositing into or receiving funds from the lawyer's client trust account, or any other accounts in which client funds are held."

In addition to these factors, the comments point to a number of documents to assist

lawyers in assessing risk, including the Financial Action Task Force's Guidance for a Risk-Based Approach for Legal Professionals,[5] the Organization for Economic Cooperation and Development's Due Diligence Guidance for Responsible Business Conduct,[6] the U.S. Department of the Treasury's Specially Designated Nationals and Blocked Persons List, and ABA publications on the topic.

U.S. Efforts to Regulate Lawyers Spurred Passage of the Resolution

At least some members of the ABA House of Delegates believed that making the rule more explicit was unnecessary. Back in April 2020, the ABA issued Opinion 491,[7] which provided guidance to lawyers that closely mirrors the newly revised Model Rule 1.16.

For some House of Delegates members, what was implicit in former Model Rule 1.16 and explicit in Opinion 491 need not be rehashed again: A lawyer's ethical duty was clear. The revised report appended to the resolution largely supports a part of that perception, stating that the resolution does not impose new obligations.[8]

The resolution is part of a larger conversation by U.S. lawmakers and regulators with the legal profession on how gatekeepers can close the so-called gates of the U.S. financial system to would-be money launderers.

In July 2022, the U.S. House of Representatives attempted, but failed, to pass a scaled-back Establishing New Authorities for Businesses Laundering and Enabling Risks to Security, or ENABLERS, Act[9] that could have required lawyers to comply with aspects of the Bank Secrecy Act. And the ABA noted that it was successful in persuading Congress to remove the regulation of lawyers in initial versions of the Corporate Transparency Act.[10]

In April, in United States v. Wise, federal prosecutors were successful in securing a guilty plea against a New York attorney accused of money laundering conspiracy in connection with an indicted Russian oligarch in the U.S. District Court for the Southern District of New York.[11] The same month, they were also successful in defending, on appeal to the U.S. Court of Appeals for the Fourth Circuit in United States v. Ravenell, a money laundering conspiracy conviction won against a Baltimore attorney accused of assisting two drug dealers in laundering funds.[12]

While prosecutions involving attorneys are rare and U.S. lawmakers and regulators have not imposed additional requirements on lawyers, the ABA has felt public pressure to impose additional regulations on legal professionals mounting.

Ultimately, however, it appears that the Treasury Department forced the ABA's hand to pass the resolution. In a speech to the ABA House of Delegates[13] prior to the vote, Kevin Shepherd, the ABA's treasurer and representative to the Treasury Department and the FATF, explained the impetus for passing the resolution. He stated that a failure to pass the resolution would invite

> federal regulation of the legal profession. ... [I]f this House does not adopt Resolution 100, Treasury will press Congress to enact the ENABLERS Act. The ENABLERS Act will regulate lawyers as banks, meaning lawyers would have to file suspicious activity reports on their clients, and the lawyers would be forbidden from telling their clients they have done so. ... As a wake-up call, Treasury informed me last Friday that the failure of the ABA to adopt Resolution 100 will cause Treasury to explore every means available in its regulatory toolkit to impose anti-money laundering regulations on the legal profession.

As Shepherd put it, the "political reality" was that if the ABA House of Delegates didn't pass the resolution, the system the ABA has long supported of state-based, judicial regulation of lawyers would be dismantled by the Treasury Department via regulation or passage of the ENABLERS Act.

Passage of the resolution preserves — for now — the status quo that lawyers need not report to federal regulators or law enforcement on their clients or engage in client due diligence for every engagement, regardless of potential risk.

That said, the new rule explicitly imposes an ethical duty on lawyers to withdraw from representation when clients wish to use their services to further a crime or fraud, and a duty to complete a risk-based inquiry commensurate with the particulars of the situation.

Due Diligence in Practice

It can be easy to declare the principle that a lawyer should apply a risk-based approach and perform adequate due diligence in regard to a client or transaction. However, operationalizing those abstract concepts in the real world can be more daunting, particularly given potentially competing duties such as the need for zealous representation, client confidentiality and loyalty.

ABA Opinion 491, referenced above, attempts to provide some guidance to lawyers about what concrete steps they might take to satisfy their ethical and legal obligations to avoid helping clients engage in illegal or fraudulent activity by providing specific hypotheticals of possible representations that easily could cross over into facilitating money laundering or other offenses.

For example, Opinion 491 presents a hypothetical client who has overseas income and funds held in a foreign bank in the name of an unnamed corporation, but the funds have not been disclosed to taxing authorities. Further, the client refuses to provide any detail about the source of the funds, the name of the bank or the nature of his employment.

Similar to Revised Rule 1.16, ABA Opinion 491 also references the guidelines developed by the FATF and the need to apply a risk-based approach to legal engagements to screen for potential money laundering activity. The FATF guidelines in turn outline 42 risk indicators of potential money laundering; some indicators include a client's reluctance to provide information, data or documents in order to facilitate the transaction.

Opinion 491 provides that "as long as the lawyer conducts a reasonable inquiry, it is ordinarily proper to credit an otherwise trustworthy client where information gathered from other sources fails to resolve the issue, even if some doubt remains."

Conclusion

It remains an open question whether U.S. lawmakers and regulators see the revisions to Rule 1.16 as only one part of a broader regulatory push. The so-called Paradise Papers,[14] Panama Papers,[15] Pandora Papers[16] and FinCEN Files[17] scandals have pushed legislators and regulators closer to acting upon further regulation of the legal profession as gatekeepers of the U.S. financial system.

Although lawyers are subject to discipline and prosecution, those cases remain rare and may be perceived as insufficient by lawmakers and the Treasury Department — even

though they carry disastrous consequences like disbarment or even jail time.

It is very unclear whether Congress can conceive of legislation, and pass it, or the Treasury Department can write regulations that can control money laundering risk while preserving the careful balance of judicial, state-based regulation of the legal profession and the sanctity of the attorney-client relationship and its corresponding privileges.

For the time being, the resolution has not changed much: Each state must still adopt it. And once they do, state disciplinary bodies and state courts must work through the new rule, its commentary and ABA Opinion 491 on a case-by-case basis

Unlike federal courts and regulators who have subject matter expertise on money laundering and its typologies, state disciplinary bodies and state courts likely will have to learn on the fly. The broad language and flexibility of the new rule should provide disciplinary bodies ample opportunity to search out these answers and determine the appropriate amount of diligence attorneys must engage in when alerted to concerning facts about the use of their services.

Practicing attorneys already should be motivated by a desire to prevent their services from being used to commit or further a crime and to avoid criminal charges for — or at least accusations of — assisting in the commission of a crime.

The new rule will not change much in situations where attorneys know clients are trying to break the law. Attorneys have long had an ethical duty to discontinue representation. But the new rule now makes explicit that a lawyer's reasonable belief that a client is trying to use the lawyer's services is grounds for the lawyer to discontinue representation.

Writing this ethical option explicitly into the new rule — instead of keeping it in a 13-page ethical opinion — conceivably provides clearer ethical cover for lawyers wishing to discontinue or reject a representation based on reasonable concerns about their client or would-be clients' activities.

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[1] Am. Bar Ass'n, HOD strengthens rule on duty of lawyers to review clients, other new policies (Aug. 8, 2023), https://www.americanbar.org/news/abanews/aba-news-archives/2023/08/hod-actions-annual-meeting/.

[2] Am. Bar Ass'n House of Delegates Revised Res. 100 (2023), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/20230805-revised-resolution100report.pdf.

[3] Model Rules of Pro. Conduct r. 1.16 (Am. Bar Ass'n Apr. 14,

2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_16_declining_or_terminating_representation/.

[4] Am. Bar Ass'n, supra note 1.

[5] Fin. Action Task Force, Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals (2013), https://www.fatf-gafi.org/content/dam/fatf-gafi/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf.coredownload.pdf.

[6] OECD, OECD Due Diligence Guidance for Responsible Business Conduct (May 31, 2018), https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm.

[7] ABA Comm. On Ethics & Pro. Resp., Formal Op. 491 (2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-491.pdf.

[8] Am. Bar Ass'n, supra note 2.

[9] National Defense Appropriations Act, H.R. 7900, 117th Cong., Waters Amendment (Comm. Print 117-54 2022), https://amendments-rules.house.gov/amendments/GATEKEEPERS_NDAA_xml%20v3220711190941114.pdf.

[10] Am. Bar Ass'n, supra note 2. See also Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498 (Sept. 30, 2022) (final FinCEN Corporate Transparency Act rule concerning beneficial ownership reporting requirements to be codified at 31 C.F.R. Part 1010), https://www.govinfo.gov/content/pkg/FR-2022-09-30/pdf/2022-21020.pdf.

[11] S.D.N.Y. U.S. Att'y's Off., New York Attorney Pleads Guilty To Conspiring To Commit Money Laundering To Promote Sanctions Violations By Associate Of Sanctioned Russian Oligarch (Apr. 25, 2023), https://www.justice.gov/usao-sdny/pr/new-york-attorney-pleads-guilty-conspiring-commit-money-laundering-promote-sanctions.

[12] United States v. Ravenell, 66 F.4th 472 (4th Cir. 2023).

[13] Am. Bar Ass'n, Annual Meeting 2023 – House of Delegates Resolution 100 (last visited Aug. 30, 2023), https://www.americanbar.org/news/reporter_resources/annual-meeting-2023/house-of-delegates-resolutions/100/.

[14] Int'l Consortium of Investigative Journalists (ICIJ), Paradise Papers: Secrets of the Global Elite (last visited Aug. 30, 2023), https://www.icij.org/investigations/paradise-papers/.

[15] ICIJ, The Panama Papers: Exposing the Rogue Offshore Finance Industry (last visited Aug. 30, 2023), https://www.icij.org/investigations/paradise-papers/.

[16] ICIJ, Pandora Papers (last visited Aug. 30, 2023), https://www.icij.org/investigations/pandora-papers/.

[17] ICIJ, FinCEN Files (last visited Aug. 30, 2023), https://www.icij.org/investigations/fincen-files/.