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Subject: John A. Terrill, II & Michael Breslow - ABA Standing Committee on Ethics and Professional Responsibility Issues Formal Opinion 491: Obligations Under Rule 1.2(d) to Avoid Counseling or Assisting in a Crime or Fraud in Non-Litigation Settings

"On April 29, 2020, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 491 ('Opinion 491'). Opinion 491 relates to an attorney's ethical obligations under the Model Rules of Professional Conduct (the 'Model Rules') to gather information about clients/potential clients, and potentially decline or withdraw from a representation if the attorney suspects that the attorney's services may be used in furtherance of a client's criminal or fraudulent conduct. Opinion 491 announces a version of an ethical obligation of lawyers to perform what is referred to as 'customer due diligence' (CDD) in the parlance of the international's community's effort to combat money laundering and terrorist financing.

Opinion 491 will be very important in the effort of the U.S. Bar to demonstrate to the international community through the Financial Action Task Force (FATF) that U.S. lawyers understand that they must perform at least some parts of the 'gatekeeper' role that that they are expected to perform as key actors in the global effort to combat money laundering and terrorist financing. This commentary follows-up on and relates in some measure to the authors' posts of May 11, 2016 and September 25, 2018, which related to the United States Treasury's Financial Crimes Enforcement Network (FinCEN) regulations imposing CDD obligations on banks and financial institutions when opening bank accounts for entities, such as corporations, limited liability companies and trusts."

Jack Terrill and **Michael Breslow** provide members with timely and important commentary on ABA Standing Committee on Ethics and Professional Responsibility Issues Formal Opinion 491.

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Here is their commentary:

EXECUTIVE SUMMARY:

On April 29, 2020, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 491

("Opinion 491").[i] Opinion 491 relates to an attorney's ethical obligations under the Model Rules of Professional Conduct (the "Model Rules") to gather information about clients/potential clients, and potentially decline or withdraw from a representation if the attorney suspects that the attorney's services may be used in furtherance of a client's criminal or fraudulent conduct. Opinion 491 announces a version of an ethical obligation of lawyers to perform what is referred to as "customer due diligence" (CDD) in the parlance of the international's community's effort to combat money laundering and terrorist financing.

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COMMENT:

Background on the International Community's View of U.S. Lawyers' Role in Anti-Money Laundering and Combating the Financing of Terrorism

Since 2003, in its effort to fight money laundering (AML) and to combat the financing of terrorism (CFT), the international community, led by the Financial Action Task Force (FATF) of which the United States is a founding member, has concluded that lawyers (members of the class of "Designated Non-Financial Business and Professions" (DNFBPs)), have a key "gatekeeper" role to play to protect the financial system from being accessed by criminals and terrorists. Among other requirements in FATF's so-called "Forty Recommendations," lawyers, when participating in most forms of transactional work, are expected to perform customer due diligence (CDD) and maintain records on new and existing client relationships to ensure that the lawyer knows whether his or her client is

potentially participating in or connected to criminal conduct.[iv] U.S. banks and financial institutions, and other actors in the financial system, already satisfy the Recommendations relating to CDD through know your customer (KYC) obligations, with which any practitioner who has tried to open a bank account in the last several years should be familiar.

Recently, U.S. lawyers have been subject to public criticism for apparent failures to honor CDD expectations. FATF, through its Mutual Evaluation process, judges its member nations on the compliance of various sectors of a nation's financial and gatekeeper systems with the Forty Recommendations.[v] In the 2016 Mutual Evaluation Report, FATF rated the United States as "non-compliant" (essentially a failing grade) with Recommendation 22 (the Recommendation imposing CDD obligations on lawyers and other DNFBPs) because there are no obligations imposed by statute or regulation on lawyers (and other DNFBPs) to perform CDD.[vi] More recently, lawyers in the U.S. have been embarrassed by several highly publicized episodes in which lawyers allowed or were willing to allow their legal services or their attorney trust accounts to be used by criminals to access the U.S. financial system.[vii]

In addition to a few attorney discipline matters and criminal cases, what seems to have inspired Opinion 491, summarized below, and its focus on a lawyer's ethical obligation of "further inquiry" (a flavor of CDD) to avoid participating in criminal conduct, was an undercover investigation into over a dozen New York lawyers' apparent willingness (and unfortunately, eagerness) to facilitate the movement and concealment of illicit funds into the U.S. financial system through the use of opaque limited liability entities. A CBS News 60 Minutes report, entitled "Anonymous, Inc.,"[viii] illustrated how nearly all of the lawyers investigated, when approached by an individual who was waving a variety of "red flags" – connections to a potentially corrupt foreign government who wanted his significant wealth to reach the U.S. financial system secretly – were quite willing to offer their services without asking probing questions. This type of conduct is inconsistent with the ethical practice of law, and it was the purpose of Opinion 491 to outline how a lawyer should discharge his or her ethical obligations under these circumstances.

ABA Formal Opinion 491

Opinion 491 is divided into three substantive sections and one section of hypotheticals that analyze and explain important conclusions about a lawyer's ethical obligations under the Model Rules to conduct further inquiry when faced with a client who could potentially be seeking to use the lawyer's services for criminal purposes. Through a well-reasoned and thorough analysis of the Model Rules, relevant case law, disciplinary proceedings and other ethics opinions, Opinion 491 concludes that, under Rule 1.2(d), and through other Model Rules, if a lawyer suspects that the client is seeking to use the lawyer's services for criminal purposes, the lawyer must gather more information about and from the client, and must reject or withdraw from the representation if the lawyer's suspicions are confirmed, or must reject or withdraw from the representation if the client refuses to produce information to the lawyer.

Section II – Model Rule 1.2(d)

It is clearly unethical under Model Rule 1.2(d) for a lawyer to **knowingly** assist a client in criminal or fraudulent conduct. Opinion 491 states the uncontroversial conclusion that, if the lawyer already has facts to establish that his or her services are being used for criminal purposes, the lawyer has an obligation to explain to the client that he or she cannot participate, and if the client wishes to continue his or her criminal/fraudulent conduct, the lawyer must withdraw. The key question presented in this Section is whether there is an obligation on the part of the lawyer when there are suspicions or indicia of criminal activity to further inquire and gather facts to avoid unwittingly participating in a crime or fraud and thereby violating Model Rule 1.2(d). In other words, would a lack of knowledge about the nature of the client's actions/conduct be a defensible explanation if the lawyer's services ended up being used to assist a client's criminal or fraudulent conduct?

Opinion 491 concludes that a lawyer may not ignore risks, and that "willful blindness" is not consistent with ethical legal representation, and specifically rejects a view that "actual knowledge" is prerequisite for a lawyer to have violated Rule 1.2(d). Opinion 491 cites to several previous ethics opinions,[ix] and judicial disciplinary opinions,[x] for its conclusion that deliberate or conscious avoidance of facts is unethical (and sometimes illegal), and therefore, a lawyer must ***affirmatively*** make further inquiry and gather facts if there is a "high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity."[xi]

Section III – Other Model Rules

In addition to Rule 1.2(d), Opinion 491 analyzes the further inquiry question through the lens of a few other Model Rules. Taken together, Opinion 491 concludes that these Model Rules impose an ethical obligation of further inquiry. Lawyers have duties of competence, diligence, communication, honesty, and withdrawal under the Model Rules,[xii] which may be violated if the lawyer does not engage in further inquiry to develop facts and knowledge to achieve the client's objectives, even in ordinary, lawful circumstances. If the lawyer discovers unlawful aims, then the lawyer must attempt to persuade a client to avoid such conduct.[xiii]

Opinion 491 explains that lawyers must consider a variety of factors for providing competent legal representation in ordinary circumstances, but which serve also to assist the lawyer in evaluating whether the particular engagement engenders the risk that the lawyer's services may be used for illicit conduct. These factors include: "(i) the identity of the client, (ii) the lawyer's familiarity with the client, (iii) the nature of the matter (particularly whether such matters are frequently associated with criminal or fraudulent activity), (iv) the relevant jurisdictions (especially whether any jurisdiction is classified as high risk by credible sources), (v) the likelihood and gravity of harm associated with the proposed activity, (vi) the nature and depth of the lawyer's expertise in the relevant field of practice, (vii) other facts going to the reasonableness of reposing trust in the client, and (viii) any other factors traditionally associated with providing competent representation in the field."[xiv]

The approach taken in this Section of Opinion 491 to evaluate all factors to determine the level of inquiry required is consistent with, and in some ways amplifies, the ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing (the "Good Practices Guidance").[xv] The Good Practices Guidance provides lawyers with a framework for taking a "risk-based approach" and to develop further information if necessary to avoid participating in money laundering or terrorist financing. The ABA's Formal Opinion 463[xvi] also stands for the proposition that following the Good Practices Guidance, and conducting further inquiry (or CDD) when circumstances require, is a necessary condition precedent to ethical legal representation. Opinion 491 concludes that a lawyer has an ethical obligation to meet every client engagement by

taking a risk-based approach to evaluate whether he or she must perform additional CDD to ensure that the client has lawful purposes.

Section IV – Other Obligations Incident to the Duty to Inquire

It should be no surprise that clients or potential clients with untoward aims are likely to be less than forthcoming. Section IV of Opinion 491 addresses a lawyer's obligation in a situation in which a client refuses to provide information in response to the lawyer's inquiry. In that situation, the lawyer must explain to the client the lawyer's ethical duty to gather information. If the client refuses to provide information, the lawyer must decline or withdraw from the representation.[xvii] If the client does not produce the necessary information, the lawyer must protest ("remonstrate") with the client, and if that does not result in the production of the necessary information, then, again, the attorney must withdraw from the representation.[xviii] In other words, it would not be an excuse for participating in a client's crime or fraud if the lawyer says that he or she tried to gather information about the client's aims, but the client was not forthcoming with that information.

Section V – Hypotheticals

The final section of Opinion 491 walks through a few hypothetical scenarios to illustrate the circumstances in which further inquiry may be required. Each of the hypotheticals, much like the Good Practices Guidance, requires the lawyer to take a "risk-based approach" and to consider all factors and circumstances about a particular client and representation in determining whether it is necessary to make a further inquiry.

The first two hypotheticals indicate a high probability of criminal conduct and require further inquiry. These hypotheticals introduce risk factors, such as evasiveness by the client, a lack of details, uncertain sources of wealth, a relationship with a "high risk" jurisdiction or with government officials, and a desire for secrecy that goes beyond privacy concerns of ordinary individuals. Although any one of these factors alone may not necessarily result in a duty to inquire further, taken as a whole, the combination of factors can generate a risk scenario, and the lawyer would be ethically obligated therefore to conduct further inquiry (or CDD).

The next three hypotheticals are somewhat neutral taken at face value. The key differentiating factor for those hypotheticals, and the determination as to whether the lawyer will have a duty to conduct further inquiry, will depend on the lawyer's familiarity with the client and the jurisdiction. For example, in hypothetical #3, a lawyer is contacted to create an LLC for the purposes of purchasing a ranch. For a long-term client with whom the lawyer is well acquainted, no further inquiry is probably necessary. For a brand new client, the lawyer would have to consider other contextual factors to determine whether he or she has a duty of further inquiry. For example, during the intake call, if the client gave an evasive answer, or telegraphed that there is information that the client is withholding, these factors would weigh in favor of conducting further inquiry before accepting the representation.

Conclusion

Despite criticism from the international community and a few troubling episodes of unethical conduct, the U.S. Bar continues to affirm that U.S. lawyers do indeed take seriously their role in the effort to fight money laundering and the financing of terrorism. Although there are no statutory or regulatory requirements that lawyers must perform CDD, the U.S. Bar has attempted to explain to FATF that such formal requirements are unnecessary because CDD is already part of a lawyer's ethical obligations, and a lawyer will be disqualified from the practice of law in the United States for failing to meet his or her ethical obligations. The Good Practices Guidance and Formal Opinion 463 initially announced these principles, and in the 2016 Mutual Evaluation Report, FATF did recognize that the U.S. Bar had some useful guidance in place.[xix]

The conclusion of Opinion 491 that U.S. lawyers are subject to an ethical requirement to gather information about clients (i.e., perform CDD) using a risk-based analysis will further bolster the U.S. Bar's argument to the international community that U.S. lawyers are required to perform CDD in circumstances that give rise to concerns about money laundering and terrorist financing. That Opinion 491 is well-reasoned and researched, and clearly reaches its principled conclusions, only strengthens the U.S. Bar's argument. Although this is unlikely to improve the United States' grades in the next round of mutual evaluations by FATF because of the requirement in the Forty Recommendations that CDD obligations on lawyers and other gatekeepers be mandatory by statute or regulation, Opinion 491 very much

helps U.S. lawyers make the case to the international community that CDD is a key component of the practice of law in the United States.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Jack Terrill
Michael Breslow

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CITATIONS:

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[i] ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, Opinion 491 (2020), available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-491.pdf [hereinafter, the "OPINION 491"].

[ii] *John Terrill & Michael Breslow: FinCEN Issues Final Customer Due Diligence Regulations Requiring Financial Institutions to Gather Beneficial Ownership Information on Entity Bank Accounts* (May 11, 2016), available at http://leimbergservices.com/openfile.cfm?filename=d%3A%5Cinetpub%5Cwwwroot%5Call%5Clis%5Fapp%5F321%2Ehtml&criteria=FinCEN

[iii] *John Terrill & Michael Breslow: FinCEN Issues Frequently Asked Question Guidance on Final Customer Due Diligence Regulations Requiring Financial Institutions to Gather Beneficial Ownership Information on Entity Bank Account*s (September 25, 2018), available at http://leimbergservices.com/openfile.cfm?filename=d%3A%5Cinetpub%5Cwwwroot%5Call%5Clis%5Fnotw%5F2667%2Ehtml&criteria=FinCEN

[iv] FIN. ACTION TASK FORCE, THE FATF RECOMMENDATIONS (Feb. 15, 2012), Recommendation 22, available at http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html.

[v] FIN. ACTION TASK FORCE – MUTUAL EVALUATIONS, http://www.fatf-gafi.org/publications/mutualevaluations (last visited May 1, 2020.

[vi] FINANCIAL ACTION TASK FORCE, ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCING MEASURES: UNITED STATES MUTUAL EVALUATION REPORT 221 (December 2016), http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf. [hereinafter, the "2016 U.S. MUTUAL EVALUATION REPORT"].

[vii] For just a few examples, American law firms were identified as having connections to the Panama Papers leak. Brian Baxter, *Dozens of Big Firms to Appear in New 'Panama Papers' Database*, AM. LAW. DAILY (May 8, 2016), available at https://www.law.com/almID/1202757101004/Dozens-of-Big-Firms-to-Appear-in-New-Panama-Papers-Database/. It has been alleged that several prominent U.S. law firms' trust accounts were used to move the proceeds of foreign corruption into the U.S. financial system and to disguise their criminal origin. Randazzo, Sara. *Law Firm Account held 1MDB Funds.* WALL STREET JOURNAL, July 21, 2016, available at http://www.wsj.com/articles/law-firm-account-held-1mdb-funds-1469141647; Ensign, Rachel Louise and Ng, Serena, *Law Firms' Accounts Pose Money-Laundering Risk.* THE WALL STREET JOURNAL, December 26,

2016, available at http://www.wsj.com/articles/law-firms-accounts-pose-money-laundering-risk-1482765003;

[viii] *Anonymous, Inc.* CBS News (January 31, 2016). http://www.cbsnews.com/news/anonymous-inc-60-minutes-steve-kroft-investigation/

[ix] *See e.g.,* N.Y.C BAR ASS'N COMM. ON PROF'L ETHICS, Formal Op. 2018-4 (2018); IND. STATE BAR ASS'N COMM. ON LEGAL ETHICS, Op. 2 (2001); and ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, Informal Op. 1470 (1981).

[x] *See* OPINION 491, at fns. 20-22.

[xi] *Id.* at pg. 7.

[xii] *See e.g.* AM. BAR ASS'N MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (competence), Rule 1.3 (Diligence), Rule 1.4 (Communications/Honesty), Rule 1.16 (Declining or Terminating Representation) and Rule 8.4 (Misconduct).

[xiii] OPINION 491, at page 7.

[xiv] *Id*.

[xv] AM. BAR ASS'N TASK FORCE ON GATEKEEPER REGULATION AND THE PROFESSION ET AL., VOLUNTARY GOOD PRACTICES GUIDANCE FOR LAWYERS TO DETECT AND COMBAT MONEY LAUNDERING AND TERRORIST FINANCING (2010), available at https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_taskforce_gtfgoodpracticesguidance.authcheckdam.pdf.

[xvi] AM. BAR ASS'N FORMAL OP. 463, CLIENT DUE DILIGENCE, MONEY LAUNDERING, AND TERRORIST FINANCING, dated May 23, 2013, available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_463.authcheckdam.pdf.

[xvii] OPINION 491, at page 10.

[xviii] *Id.*

[xix] 2016 U.S. MUTUAL EVALUATION REPORT, at page 149.