

January 28, 2015

To: Global Witness

FROM: John Leubsdorf, Distinguished Professor of Law and Judge Frederick B. Lacey
Distinguished Scholar, Rutgers School of Law
William H. Simon, Arthur Levitt Professor, Columbia Law School, and
Gertrude and William Saunders Professor Emeritus, Stanford Law School

RE: Professional Responsibility Assessment of Lawyer Interview Transcripts

We have reviewed the transcripts you sent of interviews your investigator conducted in New York with Marc Koplik, John Jankoff, and Gerald Ross.

In our opinion, the conduct by the above-named lawyers shown in these interviews does not comply with the professional responsibilities of lawyers asked for assistance with potentially unlawful transactions. Initially, we note that the situation and the client your investigator described to the lawyers were fictitious, and we express no opinion as to how that fact might affect any actions that might be brought against the lawyers. Our opinion considers whether the conduct would have been an acceptable response to an actual request for assistance. Further, we note that the relevant doctrine contains ambiguities, and we do not expect that all lawyers will agree with us. Nevertheless, we believe that our conclusion rests on the most plausible interpretation of the doctrine.

Under the ethical rules of New York and every other American jurisdiction, lawyers are prohibited from counseling or assisting clients in illegal or fraudulent activity. These rules should be interpreted to apply to someone who seeks and receives advice from a lawyer even though neither has yet committed to a full-fledged representation. Certainly, the relevant public policies are equally at stake with prospective as well as accepted clients. Complying with the prohibition entails reasonable and good faith efforts to ascertain facts needed to determine the extent to which the assistance sought would further illegality. It also requires communicating clearly to a client, or to any prospective client that the lawyer advises, a refusal to assist in illegal activity when it appears that the client or prospective client contemplates using the lawyer's services in such activity.

We believe that the conduct shown in these interviews is not consistent with these duties. Your investigator's statements indicated a substantial possibility that the money the putative client was seeking to conceal was obtained in violation of his own country's laws and/or the U.S. Foreign Corrupt Practices Act. Large sums of money were involved, and the putative client was a government official anxious to conceal his identity. There was thus a further substantial possibility that the requested assistance

would violate the U.S. anti-money laundering statutes. The lawyers made scant effort to explore this possibility or to undertake necessary due diligence.

They presented themselves as willing enablers of transactions to conceal ownership of assets without exploring with the putative client the legal limits on such transactions. They offered advice to your investigator by volunteering various suggestions for designing such transactions and asserted their ability to design and implement them without making serious efforts to determine whether it would be lawful to do so for the putative client. They did not seek to learn about the relevant laws in the minister's country or even the identity of the country. They did not ask about the amounts of the payments, the identity of the payers, or what precisely the minister did in return for the payments. Further, they accepted ambiguous and unsubstantiated statements and characterizations from the intermediary without seeking clarification or support. The lawyers did not clearly indicate even that they would need to know the identity of the official before taking him on as a client. The lawyers were not obliged to conduct a full inquiry in this preliminary interview, but it was unreasonable not to ask for such basic information as the name of the client and the country and to make clear the scope of the further inquiry that would be necessary.

Perhaps, if the relation had matured, the lawyers would have sought the necessary information and made clear that they could not assist illegality. Even if we make this generous assumption, we believe that it was professionally irresponsible to give advice and to hold out the possibility of future assistance without demanding some basic information and communicating such a condition at the outset. Indeed, had your investigator and his asserted principal really been potential clients, these lawyers would have violated their duty to them by advising them without pointing out that their plans might well expose them to criminal prosecution if implemented.

In addition, the manner and tone of the interviews are jarringly inconsistent with the bar's ideals. Lawyers are supposed to uphold the law, and the premise of their ability to offer special confidentiality protection is that the advice confidentiality makes possible will tend to induce greater respect for and compliance with law. Yet, the lawyers in these interviews express a cynical and evasive attitude toward law. Their discussion of public authority is preoccupied almost entirely with the possibility of discovery.

Our views might be different if we thought the legal values implicated in the proposed representation were of small magnitude or were the subject of good faith moral protest. It is permissible to tell clients, for example, that the highway speed limits are not strictly enforced. It may sometimes be permissible to tell them how to circumvent a law that is widely and in good faith considered unjust. But we do not believe that the legal interests at stake in this case could reasonably be regarded as minor or illegitimate. None of the lawyers gave any indication that they so regarded them.

The professional responsibility rules in question are stated in general terms, and we are not aware of any cases in which enforcement agencies have applied them to the specific circumstances involved here. (The absence of close precedents is due to the fact

that lawyers and clients have strong interests in keeping these matters secret, and confidentiality norms usually permit them to do so.) Very likely, your investigator could have found other lawyers who would have behaved similarly. However, our opinion represents the most plausible understanding of the rules. It is also the only interpretation that is consistent with the bar's claims that professional regulation promotes respect for law. Nevertheless, it would be desirable for the authorities to revise current doctrine to remove any ambiguity about how it applies to such conduct. Among the desirable changes would be a revision to Rule 1.2(d) of the Rules of Professional Conduct that makes explicit that it applies to prospective as well as accepted clients.

Your investigation is of great public importance. It suggests a willingness on the part of prominent lawyers to assist corrupt officials to profit from betrayals of public trust. Regardless of the legality of such assistance, it will be considered deplorable by a large segment of the public, since it both rewards and encourages corruption in developing countries. Because the work of attorneys is usually shielded by confidentiality norms, conduct such as that of these lawyers would not normally come to light. Your exposure of it will subject such conduct to moral appraisal in public discussion. In addition, it is likely to promote consideration of reforms that might limit such conduct's unfortunate effects.

We have, of course, relied on your assurances that the transcripts are accurate and complete.

The views expressed here are ours and not endorsed by the Columbia, Rutgers, or Stanford law schools.