

Continuing to act after filing suspicious activity report

The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT Act) requires lawyers to make suspicious activity reports (SARs). Lawyers who have made a SAR will be faced with some difficult questions about whether they can or must continue acting for their client.

Chapter 4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (RCCC) relating to availability of lawyers to the public and retainers and the “tipping off” provisions of the AML/CFT Act will need careful consideration.

The fact that a lawyer has grounds to suspect their client may be involved in money laundering or financing terrorism does not mean that their duty to complete the retainer no longer exists. It will depend on the individual circumstances such as the nature of the suspicion, the stage a particular transaction is at, any risk of ‘tipping off’ and the lawyer’s professional obligations in the particular case.

A lawyer may, of course, seek to be discharged from an engagement by a client. Alternatively, the lawyer could seek an agreement with the client that the lawyer no longer acts on the matter.

However, before seeking to be discharged from the retainer, a lawyer would need to consider the anti “tipping off” provisions of the AML/CFT Act.

A lawyer must promptly disclose “all information that the lawyer has or acquires that is relevant to the matter in respect of which the lawyer is engaged by the client”. However, the duty of candour to clients recognised in rule 7 of the RCCC is excepted when disclosure of information to a client would be a breach of the law.

Section 46 of the AML/CFT Act specifically provides that a reporting entity must not disclose information related to a SAR, except to certain named people, such as a member of the Police’s Financial Intelligence Unit (FIU). Lawyers will make suspicious activity reports to the FIU through the FIU’s online reporting tool GoAML (see <http://www.police.govt.nz/advice/businesses-and-organisations/fiu/goaml>).

There is risk for a lawyer in advising a client that they are no longer prepared to act, as this may effectively “tip off” the client to the fact that the lawyer is suspicious and is filing a SAR. Section 46 of the AML/CFT Act prohibits disclosure of this and section 94 creates an offence in relation to unlawful disclosure of a SAR.

ANTI-“TIPPING OFF” MEASURES

A lawyer satisfied that there are concerns relating to “tipping off” may consider ending the relationship with their client. However, if a lawyer is contemplating terminating a retainer, consideration must be given to whether there is “good cause” to terminate, as required under RCCC rule 4.2.

GOOD CAUSE FOR TERMINATION WHERE SUSPICION

Rule 4.2.1 lists the grounds that would be “good cause” to terminate a retainer. Three of the grounds for “Good cause” in rule 4.2.1 may be relevant in the circumstances of a client whose conduct or instructions raise a suspicion. These are:

(a) instructions that require the lawyer to breach any professional obligation;

- (c) the client misleading or deceiving the lawyer in a material respect;
- (e) except in litigation matters, the adoption by the client against the advice of the lawyer of a course of action that the lawyer believes is highly imprudent and may be inconsistent with the lawyer's fundamental obligations.

There will be times when the need to file a SAR also coincides with the client providing good reason to terminate a retainer. For example, if the client begins to shape the retainer in a way that involves concealing an illegal activity, then the lawyer would have "good cause" to terminate.

Concealing illegal activity is "inconsistent with the lawyer's fundamental obligations" and would breach a professional obligation. This is clearly provided in RCCC rule 2.4, which says that "a lawyer must not knowingly assist in the concealment of fraud or crime".

Lawyers may in exceptional situations face questions about how they should, or should not, act. If in any doubt, lawyers should take advice from an experienced colleague. They could also discuss the matter with an officer from the Police's Financial Intelligence Unit.

RED FLAGS

There are some "red flags" that lawyers may wish to consider at the start of an instruction, which may lead the lawyer to not accept the instruction in the first place.

For example, the client may not provide the required information to verify a prospective client's identity, as required by the AML/CFT Act's customer due diligence provisions (see sections 14, 18 and 22 of the AML/CFT Act). A failure to promptly provide this information could be good cause to refuse to accept instructions. It would effectively be an instruction that could require a lawyer to breach a professional obligation (see RCCC rule 4.1).

If a lawyer does decline instructions, they "must give reasonable assistance to the person concerned to find another lawyer," RCCC rule 4.1.3 says. The lawyer could, of course, also explain to the client that they would likely have difficulty engaging another lawyer given the legal obligation on all professionals covered by the AML/CFT regime to conduct customer due diligence.

If in doubt about obligations under the AML/CFT Act or the RCCC, a lawyer should consider taking advice from a senior colleague or a member of the Law Society's National Friends Panel.

FURTHER INFORMATION

This guide has been prepared by the New Zealand Law Society to assist the legal profession with its preparation for becoming reporting entities under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 from 1 July 2018.

Further information on AML/CFT requirements is available on the Law Society website at <https://www.law-society.org.nz/practice-resources/practice-areas/aml-cft>.