

**A TEACHING EXERCISE FOR LAW SCHOOLS,
POST-GRADUATE PROFESSIONAL EDUCATION PROGRAMS AND
CONTINUING PROFESSIONAL DEVELOPMENT FOR LAWYERS
ON ANTI-MONEY LAUNDERING OBLIGATIONS,
LEGAL ETHICS AND PROFESSIONAL JUDGMENT**

Developed by

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Roles:

Nigel Grayson, Solicitor, partner in a small firm in Durham, played by Nigel Duncan
Emma Patrick, Client – Estate Agent in Durham, played by Emma Oettinger

When:

Friday, October 28 at 2:30pm

Where:

Solicitor's office in Durham, England

PART ONE (2:41 minutes)

Begin by exchanging appropriate small talk that shows they have a professional relationship of several years' extent and are also friends.

Solicitor: I made time in my schedule this afternoon after getting your message that you wanted to close on a residential property next Wednesday. So what's the rush?

Client: I'm getting a great deal because these are very motivated sellers, but they want to close as soon as possible.

Solicitor: What's the property like?

ANTI-MONEY LAUNDERING, ETHICS AND PROFESSIONAL JUDGMENT Page 2 of 6

Client: It's a tidy little renovation in Darlington.

Solicitor: What is the asking price?

Client: £ 40, 000.

Solicitor: That's an amazing price! Any idea of what they paid for it?

Client: Well, actually I handled their purchase three years.

Solicitor: For how much?

Client: £ 83,000

Solicitor: Well, I know property is cheaper than here in Durham, but prices have really been going up in Darlington over the past few years. What do you think it's worth now?

Client: Maybe as much as £ 150,000. But as I say, they need to sell by next week, so I'm in the right place at the right time. It's been a good year for me, so I've got the cash on hand to invest.

Solicitor: Well of course I don't need any ID from you since we've worked together so long, but I will from the sellers.

Client: I'll fax copies of their passports to you next Monday. If you can then get me the standard contracts by the end of business Monday, I will set up to close at my office on Wednesday morning. Since I know the property from the prior sale, I don't need any of the normal searches done.

STOP.

For use at IBA 2011: Ask audience to form small groups to discuss whether at this point the lawyer should proceed to handle the matter. Should the lawyer represent the estate agent without asking further questions about the sellers and why they are so eager to sell below value? If the lawyer goes ahead without further investigation, in your jurisdiction could the lawyer be subject to (a) criminal prosecution (2) civil liability and/or (3) risk of losing the license to practice law?

For use in the UK: Is Solicitor obliged to make a disclosure to the Serious Organised Crime Agency (SOCA) regarding suspicion of money laundering and seek consent to proceed before closing the sale? Would the exception for "receipt of information in privileged circumstances" apply?

PART TWO (3:50 minutes)

Picking up directly from end of Part One.

Solicitor: What are the names of the sellers?

Client: Paul and Lisa Donaldson.

Solicitor: Those names ring a bell. I read something in the papers last week about a couple from Darlington getting convicted for drug dealing and I think the name was Donaldson. Could it be the same people?

Client: Yes, it is.

Solicitor: Does their rush to sell have anything to do with their conviction?

Client: Well, I happen to know they are worried that at the upcoming sentencing there will be an effort to confiscate the house.

Solicitor: How do you know that?

Client: Well, since I had handled the prior sale, the police asked me to value the property for the confiscation proceedings. That's why I know the present value is at least £ 150,000.

Solicitor: Emma, I can understand your being tempted to buy the property, but I strongly advise you to reconsider. If the Donaldson's bought that house with drug money, then you might be prosecuted for money laundering.

Client: That's ridiculous. I know when they bought the house, they both had legitimate incomes that provided more than enough money for the purchase.

Solicitor: What were their income sources?

Client: Lisa owns and operates a small jewelry store and Paul runs a very successful motorcycle repair shop.

Solicitor: OK, well it's your call Emma, but I have to tell you that before the closing I will be filing what's called a "suspicious transaction" report with the police.

Client: What does that mean?

Solicitor: It doesn't mean that I actually know that I'm about to be involved in potential money laundering. But I do have to make such a report if I have reasonable grounds to

be suspicious, and I'm afraid I do at this point.

Client: Well, Nigel I've enjoyed doing business with you, but I'm not about to let this opportunity pass me by. I may look around for a solicitor who is a bit more practical and not so fussy about these silly rules.

Solicitor: Emma, this is not a question of being fussy. Lawyers don't just represent clients; we are also guardians of the law. And I'm also being practical. Sometimes lawyers have to give clients advice they don't want to hear. But it's still sound advice and it's meant to keep you from getting into trouble.

Client: That's all well and good, but I've brought you a lot of business over the years and I expected you to be on my side for this deal, not a spy for the police.

Solicitor: Well you make a good point. Everything a client tells a solicitor is protected by what we call "professional privilege," and the only reason I might have suspicions about this sale is from you you've told me in my office. And I think there's actually a professional privilege exception to this reporting requirement.

Client: Now you're making more sense.

Solicitor: Tell you what. When you fax me the passports next Monday, can you also fax me an affidavit from the Donaldson's identifying the source of money they used to purchase the house three years ago. If I get that affidavit, then I wouldn't have real ground for any continuing suspicion about this deal, and I won't have to file any kind of report, and we get on with getting you this house.

Client: Great. I'll get to work on this right away and you'll hear from me Monday

STOP

- A) Does Solicitor have obligation to report at this point even if Client does not retain him to do the closing? What if he finds out that some other solicitor has handled it?
- B) Has Solicitor engaged in prohibited "tipping off"?
- C) If Solicitor does not file a suspicious transaction report and goes ahead with the closing, is he potentially guilty himself of money laundering?
- D) Does professional privilege provide an exemption and/or defense in any of these situations?

Part 3 (5:14 minutes)

So how should the interview have proceeded?

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Solicitor: How do you know that?

Client: Well, since I had handled the prior sale, the police asked me to value the property for the confiscation proceedings. That's why I know the present value is at least £ 150,000.

Solicitor: Emma, I can understand your being tempted to buy the property at such a good price, but you're an estate agent, you would have received training on your obligations under the anti-money laundering laws. Surely you appreciate that if the property was purchased with the proceeds from the drug sales then it becomes criminal property and dealing with it will be money laundering.

Client: But when they purchased it they had legitimate incomes – she had a jewelry business and he had a motor cycle repair shop – you can't prove that the money came from the drug sales.

Solicitor: The problem is that you could be convicted of money laundering, or at least of failing to report money laundering, simply on the basis of suspicion. Criminal property also has a very wide definition and includes indirect benefits – so if the money from the drug sales went into either of the businesses or was used to pay for any bills, mortgage payments or repairs to the house – then the house is likely to encompass the criminal property. It just is not so easy to say – this definitely is not criminal property.

Client: wait a moment ... you just mentioned reporting money laundering ... you are not

going to tell anyone about this are you? I mean you are my lawyer so this is all confidential – right?

Solicitor: I will have to consider my own obligations and I am not sure at this point what they will actually be – it will really depend on what basis you leave this office. Because yes, our communications are privileged, but not if you are trying to involve me in a crime – which puts me in a bit of a difficult position here.

In addition to money laundering, there are a few other legal issues you need to consider. If you know the prosecution are going to apply for a confiscation order, they have probably put a restraining order on the property which means there are contempt of court issues to consider if they have.

Selling a property to escape confiscation, could raise a perverting the course of justice charge.

And finally if it is sold at a significant undervalue, the property will be deemed to have been gifted to you under the proceeds of crime act and that means the full value of the property would be included in the confiscation order – and the Donaldson's may try to sue you for taking advantage of them to get back the full price of the house.

Client: wow – all that over one little property sale?

Solicitor: Emma – I won't be able to act for you on this property purchase at this point. My advice to you is to not attempt to go through with the purchase at this point. Once the confiscation proceedings are finalized, there will probably be a restraint order in place and we can discuss with law enforcement and the court the appropriate process for purchasing the property with the funds going towards the confiscation order – that is if you still really want the property, but I doubt you will be able to get it for such a good deal.

Client: I just had not realized the money laundering laws were so far reaching If I had gone ahead with this I could have gone to jail, lost my job or ended up in expensive litigation. Upon reflection – I don't think this is as 'good' a deal as it looked to start with. Nigel - thank you for properly explaining it all to me – I think I have to tell them that I cannot help them out.