
## I. KNOW YOUR CLIENT: A Lawyer's Role as Gatekeeper Against Money Laundering and Terrorist Financing and Related Ethical Rules

> Money laundering and terrorist financing represent serious threats to life and society and result in violence, fuel further criminal activity, and threaten the foundations of the rule of law (in its broadest sense). Given a lawyer's role in society and inherent professional and other obligations and standards, lawyers must at all times act with integrity, uphold the rule of law and be careful not to facilitate any criminal activity. This requires lawyers to be constantly aware of the threat of criminals seeking to misuse the legal profession in pursuit of money laundering and terrorist financing activities.
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> "A Lawyer's Guide to Detecting and Preventing Money Laundering," collaboratively published by the International Bar Association, the American Bar Association and the Council of Bars and Law Societies of Europe (October 2014).[1]

A United States "lawyer's role in society" has been consistently described as fundamental to the rule of law by the American Bar Association in the model rules it has adopted since as early

[1] https://www.actec.org/assets/1/6/A-Lawyers-Guide-to-Detecting-and-Preventing-Money-Laundering-October-2014.pdf?hssc=1

as the 1908 Canons of Professional Ethics.[2] That lofty vision carried through the 1969 Model Code of Professional Responsibility[3] and the Model Rules of Professional Conduct[4] first adopted in 1983 and as still in effect today. The 1969 Model Code of Professional Responsibility Article I Preamble puts it this way:

> In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the republic, to a great extent, depends upon our maintenance of justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.[5]

The Model Code of Professional Responsibility Preamble likewise charged lawyers to be guardians of the rule of the law and the justice system:

> The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.
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> Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.
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> In fulfilling his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which he may encounter can be foreseen, but fundamental ethical principles are always present to guide him. Within

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[2] https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/1908_code.pdf

[3] https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2011build/mod_code_prof_resp.pdf

[4] https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/?q=&fq=(id%3A%5C%2Fcontent%2Faba-cms-dotorg%2Fen%2Fgroups%2Fprofessional_responsibility%2F*)&wt=json&start=0

[5] *Supra* note 1.

> the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society. [6]

The Preamble, comment [1], to the ABA Model Rules of Professional Responsibility carries forward the same ideas, although its focus shifts to balancing the role of lawyer as "a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." The Preamble, cmt. 6, makes clear that a lawyer's role should go beyond practicing law:

> As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

*Accord* Preamble, cmt. 13 ("Lawyers play a vital role in the preservation of society."). On a less lofty note, the Preamble, comment [5], sets the bottom-line expectation that a "lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business ***and personal affairs***" (emphasis added).

If money laundering and terrorist financing represent serious threats to society, and a lawyer has a "vital role in the preservation of society," it is not surprising that lawyers may have a unique role relative to the threat. That role is defined by (i) laws and regulations that may be generally applicable to all persons, (ii) laws and regulations that may be directly and uniquely applicable to defined groups that include lawyers, or (iii) professional rules specifically applicable to lawyers.

### A. Generally Applicable Laws and Regulations

[6] *Supra* note 2.

There are anti-money laundering and terrorist financing laws that apply in jurisdictions around the globe, including the United States, and which are generally applicable. Using the United States as the example, criminal money laundering occurs when a person (or entity):

- Conducts a transaction with knowledge that the funds were the proceeds of criminal activity (federal, state, local, or foreign);

- The proceeds were derived from the unlawful activity specified in the statute (e.g., drug trafficking, violent crimes, terrorism, fraud, bribery, theft, smuggling, human trafficking, etc.); and

- The transaction is designed in whole or part to conceal or disguise the nature, location, source, ownership, or control of the criminal proceeds or to avoid a transaction reporting requiring under state or federal law.

See 15 U.S.C. §§ 1956, 1957; *see generally* the overview of United States money laundering laws available through the International Comparative Legal Guides at https://iclg.com/practice-areas/anti-money-laundering-laws-and-regulations/usa.

Of course, lawyers can be criminally liable just as non-lawyers for money laundering. *See, e.g.*, "German Attorney Pleads Guilty to Money Laundering," March 24, 2021 press release of the Department of Justice (E.D.N.Y.) at https://www.justice.gov/usao-edny/pr/german-attorney-pleads-guilty-money-laundering; "Former Partner at Prominent law Firm Convicted of Money Laundering, Fraud in $400M Investment Scam," by Jonathan Dienst, Nov. 22, 2019, at https://www.nbcnewyork.com/news/local/former-partner-at-prominent-law-firm-convicted-of-money-laundering-fraud-in-400m-investment-scam/2207838/; "Attorney Indicated on Charges of Laundering Drug Money," by Dan Herbeck, The Buffalo News, Nov. 22, 1997 at https://buffalonews.com/news/attorney-indicted-on-charges-of-laundering-drug-money/article_7d7d9d18-501e-5555-acb3-be35ae989b73.html.

Also generally applicable to all persons (or entities) in the United States are economic and trade sanctions based on United States foreign policy and national security goals, which target "foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economic of the United States." *See* Office of Foreign Asset Control ("OFAC") of the United States Department of the Treasury at https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information.[7] OFAC publishes lists of individuals, groups, and entities called "Specially Designated Nationals" ("SDNs"). The assets of SDNs are blocked, and persons (and entities) in the United States are prohibited from dealing with SDNs. In addition to bans on SDSs, some sanctions programs broadly target countries while others are more targeted to particular

[7] OFAC is an executive agency operating under the authority of the Trading with the Enemy Act (TWEA) of 1917, 12 U.S.C. §95 and 50 U.S.C. §4301), as amended by the Emergency Banking Act of 1933, and the International Emergency Economic Powers Act of 1977 ("IEEPA").

activities, such as terrorism or narcotics. OFAC publishes a list of its active sanctions programs, which as of September 2021 include:

| ACTIVE SANCTIONS PROGRAMS: | PROGRAM LAST UPDATED: |
|---|---|
| Balkans-Related Sanctions | 09/02/2021 |
| Belarus Sanctions | 08/09/2021 |
| Burma-Related Sanctions | 07/02/2021 |
| Burundi Sanctions | 06/02/2016 |
| Central African Republic Sanctions | 08/07/2020 |
| Chinese Military Companies Sanctions | 06/16/2021 |
| Countering America's Adversaries Through Sanctions Act of 2017 (CAATSA) | 03/02/2021 |
| Counter Narcotics Trafficking Sanctions | 05/14/2021 |
| Counter Terrorism Sanctions | 09/08/2021 |
| Cuba Sanctions | 09/02/2021 |
| Cyber-Related Sanctions | 04/15/2021 |
| Democratic Republic of the Congo-Related Sanctions | 03/10/2021 |
| Foreign Interference in a United States Election Sanctions | 04/15/2021 |
| Global Magnitsky Sanctions | 08/24/2021 |
| Hong Kong-Related Sanctions | 07/16/2021 |
| Iran Sanctions | 09/03/2021 |
| Iraq-Related Sanctions | 04/30/2021 |
| Lebanon-Related Sanctions | 07/30/2010 |
| Libya Sanctions | 08/06/2020 |
| Magnitsky Sanctions | 12/10/2020 |
| Mali-Related Sanctions | 02/06/2020 |
| Nicaragua-Related Sanctions | 06/09/2021 |
| Non-Proliferation Sanctions | 08/20/2021 |
| North Korea Sanctions | 12/08/2020 |
| Rough Diamond Trade Controls | 06/18/2018 |
| Russian Harmful Foreign Activities Sanctions | 08/20/2021 |
| Somalia Sanctions | 04/27/2021 |
| Sudan and Darfur Sanctions | 05/19/2021 |
| South Sudan-Related Sanctions | 02/26/2020 |
| Syria Sanctions | 07/28/2021 |
| Syria-Related Sanctions | 07/28/2021 |
| Transnational Criminal Organizations | 04/07/2021 |
| Ukraine-/Russia-Related Sanctions | 08/20/2021 |
| Venezuela-Related Sanctions | 09/10/2021 |
| Yemen-Related Sanctions | 05/20/2021 |
| Zimbabwe Sanctions | 08/05/2020 |

*See* https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information.

### B. Laws and Regulations Applicable to Defined Groups

There are anti-money laundering and terrorist financing laws that are directly and uniquely applicable to defined groups, most commonly financial institutions. For example, in the United States, the Bank Secrecy Act, 31 U.S.C. §5311, 12 U.S.C. §§1829b and 1951-1959, and its implementing regulations require specified financial institutions to adopt and maintain risk-based anti-money laundering programs with certain minimum requirements to guard against money laundering. Very generally, these requirements include:

- ✓ Reporting requirements (currency transactions, cash transactions, suspicious transactions, funds transfers);
- ✓ Information sharing;
- ✓ Customer due diligence;
- ✓ Recordkeeping; and
- ✓ Registration requirements.

*See generally* the overview of United States money laundering laws available through the International Comparative Legal Guides at https://iclg.com/practice-areas/anti-money-laundering-laws-and-regulations/usa.

The laws in the United States do not yet subject lawyers to the more specified types of anti-money laundering and terrorist financing laws that apply to financial institutions in the United States. However, in many other jurisdictions around the globe, anti-money laundering and terrorist financing laws directly impose heightened measures on lawyers that may include one or more of the following:

- The appointment of a reporting and/or compliance officer;
- The development of risk management practices and internal controls;
- Implementation of client due diligence measures;
- Reporting and record keeping;
- Screening of relevant employees and agents; and
- Training.

*See, e.g.*, the overview of anti-money laundering laws available through the International Comparative Legal Guides at https://iclg.com/practice-areas/anti-money-laundering-laws-and-regulations/usa.

The intergovernmental regulatory body known as the Financial Action Task Force (FATF)[8] noted in a 2016 report that the anti-money laundering laws in the United States have "significant gaps," one of which includes the lack of strict anti-money laundering regulations on lawyers, accountants, and other non-financial businesses and professions. See "Anti-money laundering and counter-terrorist financing measures," Mutual Evaluation Report, FATF, December 2016, p. 178, at http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-united-states-2016.html. The United States Congress has considered so-called gatekeeper bills that would require more from lawyers and others, including the potential submission of detailed information about businesses' beneficial owners or treating lawyers like financial institutions for purposes of some anti-money laundering requirements. *See* "Gatekeeper Regulations on Attorneys," ABA at https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/bank_secrecy_act/. However, the ABA has so far opposed key aspects of the gatekeeper bills, summarizing its position as follows:

> The ABA supports reasonable and necessary domestic and international measures designed to combat money laundering and terrorist financing. However, the Association opposes legislation and regulations that would impose burdensome and intrusive gatekeeper requirements on small businesses or their attorneys or

[8] See http://www.fatf-gafi.org/home/.

that would undermine the attorney-client privilege, the confidential attorney-client relationship, or the right to effective counsel.

https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/bank_secrecy_act/

### C. Professional Rules Governing Lawyers

Professional rules govern lawyers in the United States through their respective state of licensure. Along with the lofty vision of the lawyer's "role in society" comes the charge to abstain from conduct that would undermine the integrity of the profession and the justice system. Mostly directly pertinent are ABA Model Rules[9] (hereafter "Rule") 1.2 and 8.4. ABA Model Rule 8.4, dubbed "Maintaining the Integrity of the Profession," is the rule defining "professional misconduct," which has long included:

- Violating the Rules of Professional Conduct (or assisting other to do so);
- Committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; or
- Engaging in conduct that is prejudicial to the administration of justice.

In addition to being a crime, money laundering would undoubtedly be viewed as reflecting adversely on the lawyer's fitness to practice and as involving dishonesty, fraud, deceit or misrepresentation. Moreover, Rule 1.2 makes clear that a lawyer cannot counsel a client to engage in or assist a client to engage in conduct that the lawyer **knows** is criminal or fraudulent. This broadly stated boundary applies to anything criminal or fraudulent and certainly includes a prohibition against counseling a client to engage in or assisting a client to engage in money laundering.

Perhaps looking to deflect some of the efforts to directly subject lawyers to anti-money laundering laws, the ABA in a 2020 formal opinion made clear that a lawyer already has an ethical duty of due diligence under Rule 1.2(d)'s general prohibition against assisting a client in conduct the lawyers "knows" is criminal or fraudulent. *See* Formal Opinion 491 ("Obligations Under Rule 1.2(d) to Avoid Counseling or Assisting in a Crime or Fraud in Non-Litigation Settings") (April 29, 2020). According to Opinion 491, a lawyer's obligation to inquire in certain circumstances is "well-grounded in authority interpreting Rule 1.2(d) and in the rules on competence [Rule 1.1], diligence [Rule 1.3], communication [Rule 1.4], honesty [Rule 8.4(b and c), among others], and withdrawal [Rule 1.16(a)]."

As is fairly typical of the professional rules – and likely the law in general – whether or not the lawyer has a duty to make further inquiry "will depend on the circumstances." Opinion

[9] References to the "Rules" means the most current version of the ABA Rules of Professional Conduct, which rules can vary as adopted in each of the United States' jurisdictions.

491. More specifically, a "lawyer who has knowledge of facts that create a high probability that a client is seeking the lawyer's services in a transaction to further criminal or fraudulent activity has a duty to inquire further to avoid assisting that activity under Rule 1.2(d)." *Id.* Opinion 491 points out that "actual knowledge" is defined in Rule 1.0(f), which provides that "[a] person's knowledge may be inferred from circumstances." If a client refuses to provide information or if the information confirms that providing services would assist in a crime or fraud, Opinion 491 states that the lawyer must decline or withdraw from the representation. Finally, Opinion 491 discusses five hypothetical scenarios to clarify when circumstances might require further inquiry, although in three of the five scenarios, Opinion 491 advises that the "duty to inquire depends on contextual factors, most significantly, the lawyer's familiarity with the client and the jurisdiction."

The introduction section of Opinion 491 gives some additional insight into the types of concerns to which a lawyer should be alert, citing counter-terrorism and money-laundering laws and related reports, proceedings, and prosecutions. Although "dishonest clients" can be dishonest in a variety of ways not limited to terrorist or money laundering schemes, the professional rules mentioned above are still the relevant rules to consider. The recent Opinion 491 should wake lawyers up to the fact that "I didn't know" will not be a sufficient defense even if the standard is "knowledge." More is expected of a profession considered to be a "gatekeeper" profession. And in terms of managing liability risk arising from dishonest clients, conducting diligence "further inquiries" will go a long way toward eliminating Monday-morning quarterbacking what the lawyer should have known.

ABA Opinion 491 speaks in terms of "facts that create a high probability that a client is seeking the lawyer's services in a transaction to further criminal or fraudulent activity." *Id.* at p. 2. Anti-money laundering and terrorist financing laws typically require client due diligence and risk assessments and may also specifically define the types of transactions identified as presenting risk (e.g., the buying and selling of real property or business entities; the managing of client money, securities or other assets; the opening or management of bank, savings or securities accounts; the organization of contributions necessary for the creation, operation or management of companies; or the creation, operation or management of trusts, companies, foundations or similar structures). Neither ABA Opinion 491 nor the ABA Rules on which it relies can be viewed as a mandate to conduct the "Know Your Client" diligence that may be required of some lawyers outside the United States or financial institutions within the United States. Nevertheless, these regulatory schemes focus lawyers on the types of "circumstances" or "contextual factors" of which competent and diligent lawyers should be aware. Opinion 491 strongly suggests this:

> In the wake of media reports, disciplinary proceedings, criminal prosecutions, and reports on international counter-terrorism enforcement and efforts to combat money-laundering, the legal profession has become increasingly alert to the risk that a client or prospective client might try to retain a lawyer for a transaction or other non-litigation matter that could be legitimate but which further inquiry would reveal to be criminal or fraudulent.

Opinion 491 at pp. 1-2 (citations omitted).

ABA Opinion 491 lists the kinds of facts and circumstances that would trigger a duty to inquire further to meet duties of competence, diligence, communication, honesty, and withdrawal under Rules 1.1, 1.3, 1.4, 1.13, 1.16, and 8.4:

> (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.

The ABA has collaborated with the International Bar Association and the Council of Bars and Law Societies of Europe to compile "A Lawyer's Guide to Detecting and Preventing Money Laundering" ("Lawyer's Guide").[10] The Lawyer's Guide imposes no specific obligation on a lawyer, but provides guidance on, among other things, "the vulnerabilities of the legal profession to misuse by criminals in the context of money laundering," "a risk-based approach to detecting red flags, red flag indicators of money laundering activities and how to respond to them," and "case studies to illustrate how red flags may arise in the context of providing legal advice." Lawyer's Guide, p. 2. In short, the "Lawyer's Guide" elaborates on the kinds of circumstances that might trigger a lawyer's ethical duty to inquire further as explained in Opinion 491.

The Lawyer's Guide discusses internationally endorsed global standards called the "40 Recommendations," which FATF drew up originally for the financial sector in 1990 but expanded to "gatekeepers," such as lawyers in 2003. *See* FATF 40 Recommendations (October 2003) at https://www.fatf-gafi.org/media/fatf/documents/fatf%20standards%20-%2040%20recommendations%20rc.pdf. The 40 Recommendations focus on preventative measures, such as customer due diligence, and reporting of suspicious activity. The Lawyer's Guide observes that the intent of the 40 Recommendations is consistent with lawyer's role even though the "reporting" recommendations raise concerns about overreaching into the lawyer-client relationship:

> The basic intent behind the 40 Recommendations is consistent with what lawyers, as guardians of justice and the rule of law, and professionals subject to ethical obligations, have always done – namely to avoid assisting criminals or facilitating criminal activity.

[10] *See* https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/abaguide-preventing-money-laundering.pdf?logActivity=true.

> Some of the underlying ethical principles that the legal profession upholds, namely to avoid supporting criminal activity and being unwittingly involved in the pursuit of criminal activity, support the role that lawyers need to play in the fight against money laundering and terrorist financing. Notwithstanding these common ethical underpinnings, serious concerns remain about the obligation in the 40 Recommendations to report suspicious activity, particularly in jurisdictions where lawyers do not benefit from any relevant exceptions concerning the confidentiality created in a lawyer-client relationship. Importantly for lawyers, the Recommendations include a key interpretive note to Recommendation 23 that states that [gatekeepers] are not required to report suspicious transactions 'if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege'. However, even putting the 40 Recommendations to one side, it is at present an unanswered question in some jurisdictions as to what lawyers should ethically do if they become aware that their clients are misusing them for criminal purposes. For example, is it sufficient for the lawyers to stop acting or does this merely push the criminals to use the services of the lawyer next door (or in the next jurisdiction)?

Lawyer's Guide, p. 6.

The 40 Recommendations charge gatekeepers to conduct customer due diligence and keep related records when they prepare for or carry out transactions for their client concerning the following activities:

- buying and selling of real estate;
- managing of client money, securities or other assets;
- management of bank, savings or securities accounts;
- organization of contributions for the creation, operation or management of companies; and
- creation, operation or management of legal persons or arrangements, and buying and selling of business entities.

Recommendation 23(a). For an individual client, customer due diligence generally means asking to view the individual's government-issued photo identification (e.g., driver's license or passport). For an entity client, customer due diligence means:

- Checking an independent and reliable source to confirm the existence of the entity as well as the jurisdiction in which it was created and its principal place of business;
- Identifying and verifying the identity of the beneficial owners of the entity; and

- Obtaining independent and reliable confirmation that any individual has authority to act on behalf that entity.

Recommendation 12 advises implementation of risk-management systems to determine whether a client or a beneficial owner of a client is a "politically exposed person" ("PEP"), which is a person who is or has been entrusted with prominent public functions, or a close family member or business associate of a PEP. If so, the gatekeeper is directed to conduct a risk assessment of the business relationship to determine the need for enhanced customer due diligence. According Recommendation 12, the rationale for applying enhanced customer due diligence to PEPs and their associates "is the influence that PEPs have, which puts them in positions that can be misused to launder money and finance terrorism, as well as to facilitate predicate offences, such as corruption and bribery."

Recommendation 19 calls for enhanced customer due diligences for clients from countries that FATF designates as higher risk. *See* FATF High-risk and other monitored jurisdictions at: https://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/?hf=10&b=0&s=desc(fatf_releasedate).

Most controversial for lawyers is Recommendation 21's reporting requirement. Gatekeepers are supposed to report any knowledge or suspicion that a client is engaging in money laundering or terrorist financing activities and avoid tipping off the client to the potential report to authorities. The Lawyer's Guide confronts the tension between imposing reporting requirements on lawyers and a lawyer's duty of confidentiality and loyalty to a client:

> A public interest underlies both [anti-money laundering ("AML")] measures and the duties of confidentiality that lawyers owe to clients. However, as mentioned above in the context of Recommendation 21, there is a tension between compliance with AML obligations and the duties of confidentiality and loyalty that the legal profession owes to its clients. In requiring lawyers to file [reports] on their clients, the 40 Recommendations risk compromising the independence of the profession, because by reporting on their clients' suspect transactions and activities to the authorities, lawyers are effectively becoming agents of the state. The "no-tipping off rule", which forbids lawyers who file [reports] from informing their client that they have done so, may further damage the clients' confidence in their lawyers' services and impact the administration of justice.
>
> Traditionally, communications between lawyers and clients in the provision of legal advice and representation in current and future litigation have been protected by legal professional privilege (a common law concept) and professional secrecy (a continental law concept), which are only abrogated in certain countries under certain circumstances by statute, ethical rule, or because the arrangement between lawyer and client is criminal in nature. As mentioned [above], the tension between simultaneous compliance with AML and confidentiality obligations is addressed through the

Interpretative Note to Recommendation 23, which excludes lawyers from the obligation to report suspicious transactions where they obtain information about them in privileged circumstances or subject to professional secrecy. The Interpretative Notes, like the Recommendations themselves, are also directed at countries implementing the Recommendations, rather than at lawyers. Further, the Interpretative Note to Recommendation 23 also states that "[i]t is for each country to determine the matters that would fall under legal professional privilege or professional secrecy". Accordingly, knowledge of national laws relating to privilege or professional secrecy is key for lawyers concerned about breaching confidentiality when making [a report], as national laws will determine whether there is a concept of privilege or professional secrecy in the relevant jurisdiction and what circumstances it covers. As an example, the U.K. has a specific "privileged circumstances" defence to the requirement to report suspicions of money laundering. Lawyers should consult guidance published by their local bar association to determine the existence, and extent, of any privilege or professional secrecy exception in their jurisdiction.

Where national legislation does not provide an answer, the following three factors should help reduce the perceived tension between AML compliance and confidentiality obligations and highlight the common ground between the two duties:

(i) AML obligations mostly arise in the context of activities that are criminal;

(ii) the goal behind the FATF 40 Recommendations of trying to prevent lawyers from assisting clients in money laundering and terrorist financing activities is consistent with the ethical obligations of lawyers; and

(iii) the ethical obligation to act in accordance with the client's interests as the overriding imperative guiding professional behaviour is not necessarily absolute.

The IBA's International Principles on Conduct for Lawyers make it clear that the principle of treating client interests as paramount is qualified by duties owed to a court and the requirement to act in the interests of justice. The same concept is found in ABA Model Rule of Professional Conduct 3.3, in which certain specific obligations to the tribunal take precedence over obligations to the clients. The CCBE Code of Conduct lays down similar principles for European lawyers. The ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 463 in May

> 2013 dealing with the ethical dimensions of the ABA's voluntary AML good practice guidance and noting the tensions between compliance with AML obligations and the duty of confidentiality that lawyers owe to their clients. While guidance from the IBA, CCBE and the ABA is not binding, it does underscore the fact that members of the legal profession are also guardians of justice and are expected by society to uphold the rule of law. Any duties owed by lawyers by virtue of the fact that they are lawyers should be interpreted in light of the role that members of the legal profession are expected to play in society – such expectation does not include creating barriers that can be abused by persons engaging in money laundering and terrorist financing for their criminal gain. Although there seems to be a global consensus that lawyers owe obligations to multiple constituencies, there is great variation in how these competing interests are balanced in any particular country. All agree that a lawyer should not assist a client in criminal activities, but the details of how these obligations are implemented vary from country to country. The resolution is often the result of detailed policy considerations, input from stakeholders and consideration of the context and history within the jurisdiction. Accordingly, one can agree on the overarching principle that lawyers should not assist criminals in illegal activity, as FATF has sought to promulgate, but implementation should be appropriate to each jurisdiction. The key point is that it is vital that lawyers are not facilitating criminal financial flows and that, instead, they uphold the law.

Lawyer's Guide, pp. 20-22.

The Lawyer's Guide explains that its risk-based approach guidance for lawyers divides risk into three categories and summarizes a number of factors for consideration as follows:

| Country/ Geographic Risk | Client Risk | Service Risk |
|---|---|---|
| *Countries subject to sanctions, embargoes or similar measures issued by, for example, the UN*<br>*Countries identified by credible sources (i.e., well-known bodies that are regarded as reputable, e.g., International Monetary Fund, The World Bank, and OFAC) as:*<br>• *generally lacking appropriate AML laws, regulations and other measures;*<br>• *being a location from which funds or support are provided to terrorist organisations; or*<br>• *having significant levels of corruption or other criminal activity.* | *Domestic and international PEPs*<br>*Entity, structure or relationships of client make it difficult to identify its beneficial owner or controlling interests (e.g., the unexplained use of legal persons or legal arrangements)*<br>*Charities and "not-for-profit" organisations that are not monitored or supervised by authorities or SROs*<br>*Use of financial intermediaries that are neither subject to adequate AML laws nor adequately supervised by authorities or SROs* | *Where lawyers, acting as financial intermediaries, actually handle the receipt and transmission of funds through accounts they control*<br>*Services to conceal improperly beneficial ownership from competent authorities*<br>*Services requested by the client for which the lawyer does not have expertise (unless the lawyer is referring the request to an appropriately trained professional for advice)*<br>*Transfer of real estate between parties in an unusually short time period* |

| | | |
|---|---|---|
| | *Clients who:*<br>• *conduct their business relationships or request services in unconventional circumstances;*<br>• *are cash-intensive businesses (e.g., money service businesses and casinos), that are not usually cash-rich but generate substantial amounts of cash;*<br>• *have no address, or multiple addresses; or*<br>• *change settlement or execution instructions.* | *Payments from un-associated or unknown third parties and payments for fees in cash where this would not be typical*<br>*Consideration is inadequate or excessive*<br>*Clients who offer to pay extraordinary fees for services that would not warrant such a premium* |

Lawyer's Guide, pp. 28-29.

The Lawyer's Guide summarizes the "red flags" associated with the client, which should be viewed with consideration of where the client is from as well as the nature of the proposed representation.

| Client's behaviour or identity | Concealment techniques | The relationship between the client and counterparties |
|---|---|---|
| **Client is secretive or evasive about:**<br>• *its identity or that of its beneficial owner;*<br>• *the source of funds or money; or*<br>• *why it is doing the transaction in the way it is*<br>**Client is:**<br>• *known to have convictions, or to be currently under investigation for, acquisitive crime or has known connections with criminals;*<br>• *related to or a known associate of a person listed as being involved or suspected of involvement with terrorists or terrorist financing operations;*<br>• *involved in a transaction that engages a highly technical or regulatory regime that imposes criminal sanctions for breaches (increasing the risk of a predicate offence being committed); or*<br>• *unusually familiar with the ordinary standards provided for by the law in satisfactory customer identification, data entries and STRs, or asks repeated questions on related procedures* | • *Use of intermediaries without good reason*<br>• *Avoidance of personal contact for no good reason*<br>• *Reluctance to disclose information, data and documents that are necessary to enable the execution of the transaction*<br>• *Use of false or counterfeited documentation*<br>• *The client is a business entity that cannot be found on the Internet* | • *Ties between the parties of a family, employment, corporate or any other nature generate doubts as to the real nature/ reason for transaction*<br>• *Multiple appearances of the same parties in transactions over a short period of time*<br>• *The parties attempt to disguise the real owner or parties to the transaction*<br>• *The natural person acting as a director or representative does not appear to be a suitable representative*<br>**The parties are:**<br>• *native to, resident in, or incorporated in a higher-risk country;*<br>• *connected without apparent business reason;*<br>• *of an unusual age for executing parties;*<br>• *not the same as the persons actually directing the operation* |

Lawyer's Guide, p. 33.

Moreover, the Lawyer's Guide summarizes the "red flags" associated with funds involved in any transaction:

| Size of funds | Source of funds | Mode of payment |
|---|---|---|
| **There is no legitimate explanation for:**<br>• *a disproportionate amount of private funding, bearer cheques or cash (consider individual's socio-economic, or company's economic, profile);*<br>• *a significant increase in capital for a recently incorporated company or successive contributions over a short period of time to the same company;*<br>• *receipt by the company of an injection of capital or assets that is high in comparison with the business, size or market value of the company performing;*<br>• *an excessively high or low price attached to securities being transferred;*<br>• *a large financial transaction, especially if requested by a recently created company, where it is not justified by the corporate purpose, the activity of the client or its group companies; or*<br>• *the client or third party contributing a significant sum in cash as collateral provided by the borrower/debtor rather than simply using those funds directly.* | **The source of funds is unusual because:**<br>• *third party funding either for the transaction or for fees/taxes involved with no apparent connection or legitimate explanation;*<br>• *funds are received from or sent to a foreign country when there is no apparent connection between the country and the client;*<br>• *funds are received from or sent to higher-risk countries;*<br>• *the client is using multiple bank accounts or foreign accounts without good reason;*<br>• *private expenditure is funded by a company, business or government; or*<br>• *the collateral being provided for the transaction is currently located in a higher-risk country.* | • *The asset is purchased with cash and then rapidly used as collateral for a loan.*<br>**There is no legitimate explanation for:**<br>• *an unusually short repayment period having been set;*<br>• *mortgages being repeatedly repaid significantly prior to the initially agreed maturity date; or*<br>• *finance being provided by a lender, either a natural or legal person, other than a credit institution.* |

Lawyer's Guide, p. 36.

Although lawyers in the United States are not yet bound to specific set of requirements, there is ample guidance from which lawyers can conclude that a gatekeeping function is expected as it relates to money laundering and terrorist financing. The body of recommendations across the globe would undoubtedly serve as a reference point for what circumstances might give rise to a duty to inquire and what measures could become the yardstick for measuring whether the inquiry was reasonable.

## II. DIVULGE YOUR CLIENT: When Lawyers Must Divulge Representative Capacity or Client Identity and the Related Ethical Rules

There are times when a client might like to remain anonymous or at least "under the radar" of publicity for a variety of reasons. For example, a client attempting to shape proposed new industry-affecting regulations may not want to become the focal point for the opposition and may fear backlash from unpopular advocacy, such as boycotts or even heightened scrutiny for enforcement or by a competitor. Or a lawyer investigating factual information for a client might believe that witnesses would be more forthcoming if they did not know the client's identity. For example, a witness might allow a social media connection that would otherwise be denied if the lawyer revealed his or her representative role or the identity of the lawyer's client. Although client identity is not generally protected by the attorney-client privilege (subject to some exceptions),[11] it is covered by a lawyer's duty of confidentiality under Rule 1.6. That duty is not

[11] *See, e.g.,*1 Kenneth S. Broun et al., McCormick on Evidence §90 (7th ed. 2013) (general rule is that a client's identity is not protected by the attorney-client privilege unless "the net effect of the disclosure would be to reveal the nature of a client communication").

absolute, and client and lawyer preferences at times must give way to a requirement to disclose either representative capacity or client identity.

### A. The Presumption of Confidentiality and Exceptions Under Professional Rules

The presumption of confidentiality is set by Rule 1.6, under which a lawyer "shall not reveal information relating to the representation of a client." The duty extends to prospective clients under Rule 1.18 and survives the termination of the attorney-client relationship (Rule 1.6, comment [20]) and the client's death. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §60 cmt. E (2000). A lawyer "may" ethically reveal what would otherwise be confidential when (i) the client gives informed consent, (ii) the disclosure is impliedly authorized in order to carry out the representation, or (iii) the disclosure is permitted by Rule 1.6(b). The paragraph 1.6(b) exceptions to the general duty of confidentiality are:

1) to prevent reasonably certain death or substantial bodily harm;
2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
4) to secure legal advice about the lawyer's compliance with these Rules;
5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
6) to comply with other law or a court order; or
7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Although ABA Model Rule 1.6 states the exceptions to the duty of confidentiality with the permissive "may reveal" language, lawyers parsing their confidentiality obligations should remember the potential for jurisdictional variation on both the formulation of the confidentiality obligation as well as its exceptions. For example, these jurisdictions include the mandatory "shall reveal" language in their respective versions of Rule 1.6 (all emphasis added):

- **Arizona** ("*shall reveal* such information to the extent the lawyer reasonably believes necessary to ***prevent*** the client from committing ***a criminal act*** that the lawyer believes is ***likely to result in death or substantial bodily harm***.");
- **Connecticut** ("*shall reveal* such information to the extent the lawyer reasonably believes necessary to prevent the client from committing ***a criminal or fraudulent act*** that the lawyer believes is ***likely to result in death or substantial bodily harm***.");
- **Georgia** ("*shall reveal* information under paragraph (b) as the ***applicable law requires***");
- **Hawaii** ("*shall reveal* information that clearly establishes a ***criminal or fraudulent act*** of the client in the furtherance of which the lawyer's services had been used, to the extent reasonably necessary to ***rectify*** the consequences of such act, where the act has resulted in ***substantial injury to the financial interests or property of another*****"**);
- **Illinois** ("*shall reveal* information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent ***reasonably certain death or substantial bodily harm***");
- **Iowa** ("*shall reveal* information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent ***imminent death or substantial bodily harm***");
- **Mississippi** ("*shall reveal* information to the ***Lawyers and Judges Assistance Committee***");
- **Nevada** ("*shall reveal* information relating to the representation of a client to the extent the lawyer reasonably believes necessary ***to prevent a criminal act*** that the lawyer believes is ***likely to result in reasonably certain death or substantial bodily harm***");
- **New Jersey** ("*shall reveal* such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to ***prevent*** the client or another person (1) from committing a ***criminal, illegal or fraudulent act*** that the lawyer reasonably believes is ***likely to result in death or substantial bodily harm or substantial injury to the financial interest or property*** of another; (2) from committing a ***criminal, illegal or fraudulent act*** that the lawyer reasonably believes is likely to perpetrate ***a fraud upon a tribunal***");
- **Ohio** ("*shall reveal* information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer reasonably believes necessary to ***comply with Rule 3.3 or 4.1***");
- **Pennsylvania** ("*shall reveal* such information if necessary to comply with the duties stated in ***Rule 3.3***");
- **Tennessee** ("*shall reveal* information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary: (1) to ***prevent reasonably certain death or substantial bodily harm***; (2) to ***comply with an order of a tribunal*** requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law; or (3) to ***comply with RPC 3.3, 4.1, or other law.***");

- **Texas** ("*shall reveal* confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the ***criminal or fraudulent act*** . . . [or] when required to do so by ***Rule 3.03(a)(2), 3.03(b), or by Rule 4.01(b)***");
- **Washington** ("*shall reveal* information relating to the representation of a client to prevent ***reasonably certain death or substantial bodily harm***"); and
- **Wisconsin** ("*shall reveal* information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a ***criminal or fraudulent act*** that the lawyer reasonably believes is ***likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another***").

*See* chart illustrating variations of the ABA Model Rules as adopted in jurisdictions of the United states at: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_6.pdf.

In addition to the jurisdictional variation, there are circumstances when other Rules would operate to require disclosure (even against client preference) of otherwise confidential information notwithstanding the Rule 1.6 "may reveal" language or the absence of specific referrals to other rules within Rule 1.6. Sometimes the disclosure required would include client identity (or enough information from which client identity could be inferred) and sometimes it includes disclosing that the lawyer is acting in a representative capacity. Some circumstances require even more fulsome disclosures to avoid or correct wrongful conduct or false or misleading statements or circumstances. For example:

- Rule 3.3(b) requires a "lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding [to] take reasonable remedial measures, including, if necessary, disclosure to the tribunal." While Rule 3.3(b) is not written to say that a lawyer "shall disclose," it is clear that this is a mandatory requirement "if necessary."

- Under Rule 3.9, "[a] lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5."

- Under Rule 4.1, "in the course of representing a client a lawyer shall not knowingly . . . (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." The Rule 1.6 "may disclose" scenarios become "shall disclose" scenarios when necessary to "avoid assisting a criminal or fraudulent act by a client."

- Under Rule 4.3, a lawyer "shall make reasonable efforts to correct [a] misunderstanding" when an "unrepresented person misunderstands the lawyer's role in the matter." To "avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client

and, where necessary, explain that the client has interests opposed to those of the unrepresented person." Rule 4.3 comment [1]; *accord* ABA Formal Ethics Op. 91-359 (1991) (Rule 4.3 requires lawyer to clearly explain his role, his client's identity, and fact that interviewee is adverse party).

- Under Rule 6.4, a "lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client."

Even though there are a variety of circumstances in which some of the professional rules override the Rule 1.6 duty of confidentiality, reporting the professional misconduct of another lawyer is not one of them under the ABA version of the rules. Even though a lawyer "shall inform the appropriate professional authority" of another lawyer's rule violation "that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness in other respects" under Rule 8.3(a), subpart (c) of Rule 8.3 makes clear that this duty of disclosure does not "require disclosure of information otherwise protected by Rule 1.6." It also does not require disclosure of "information gained by a lawyer or judge while participating in an approved lawyer's assistance program." As with other rules, there is jurisdictional variation in how Rule 8.3 treats the interaction of the duty to report professional misconduct and the duty of confidentiality to clients. While much of the variation relates to references to or descriptions of the lawyer's assistance program, there are some jurisdictions that require reporting of "unprivileged" knowledge or evidence, thus overriding the duty of confidentiality in favor of reporting for that which may be "confidential" information under Rule 1.6 so long as it does not rise to the level of privileged information. See, e.g., Alabama and Ohio versions of Rule 1.6. South Dakota contains no exception for Rule 1.6 information in its version of Rule 8.3.

### B. Disclosures Required to Comply with the Foreign Agents Registration Act

There are also circumstances in which a lawyer must disclose otherwise confidential information "to comply with other law." Rule 1.6 phrases this as an option ("may reveal"). But when the "other law" requires disclosure, it is the "other law" that converts this to a mandatory obligation. This happens, for example, when a lawyer receives a subpoena and after making all "nonfrivolous arguments that the information is protected from disclosure." See Rule 1.6, comment [15] and ABA Formal Ethics Op. 473 (2016). Other statutes have been considered and determined to override a lawyer's duty of confidentiality, for example:

- Legal aid organization required to give client names to auditors under appropriations act. *United States v. Legal Servs. For N.Y.C.*, 249 F3d 1077 (D.C. Cir. 2001); and

- Internal Revenue Code compels lawyers to disclose through IRS Form 8300, the identities of clients and the amounts and payment dates of all cash fees in excess of $10,000. *See United States v. Goldberger & Dubin, P.C*,, 935 F.2d 501 (2d Cir. 1991).

Comment [12] to Rule 1.6 makes clear that when "other law" requires that a lawyer disclose information about a client, "the lawyer must discuss the matter with the client to the extent required by Rule 1.4."

The Foreign Agents Registration Act (FARA), 22 USC § 611 *et seq.,* is an example of "other law" that could require a lawyer to disclose client identity in certain circumstances. FARA generally requires registration with the Department of Justice ("DOJ") for any person or entity who is an "agent" of a "foreign principal," which means that the person is acting at the direction or control of the foreign principal to engage "within the United States" in four types of activities (described below) on behalf of the foreign principal.

**1. Foreign Principal**

"Foreign principal" is defined at 22 USC § 611(b). It has three components:

- Foreign government or political party.
- "Person" (including an individual, partnership, association, corporation, organization, or any other combination of individuals) "outside of the United States" (unless it is established that the "person" is a citizen of AND domiciled within the U.S. or if not an individual that it is organized under U.S./U.S. state law AND with principal place of business in the U.S.).
- Partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.

Consistent with 22 USC § 611(c) (defining what it is to be an "agent of a foreign principal"), the regulations implementing FARA clarify that "foreign principal includes a person any of whose activities are directed or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal as that term is defined in section 1(b) of the Act." 28 CFR §5.100(a)(8).

**2. Agent of Foreign Principal**

Section 611(c) of FARA defines "agent of a foreign principal" as "any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal." If a lawyer's client meets the definition of "foreign principal," then a lawyer would be an agent of a foreign principal and would need to determine if the nature of the representation would include the activities that trigger a reporting requirement under FARA.

**3. Activities Triggering Reporting Requirement**

There are four types of activities that trigger a reporting requirement for an "agent of a foreign principal" ***absent an exemption***. Each involves specifically defined terms and acts "within the United States" at the "order, request, or under the direction or control of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal." 22 USC § 611(c). Those four types are:

- Political activities;
- Acts as public relations counsel, publicity agent, information-service employee or political consultant;
- Solicits, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of the foreign principals; or
- Represents the interests of the foreign principal before any agency or official of the Government of the United States.

These four types of triggering activities are discussed further below to the extent that further guidance is available in the statutes or regulations.

- ***Political activities***

"Political activities" are "any activity that the person engaging in believes will, or that the person intends to, in any way influence any agency or official of the Government of the United States or any section of the public within the United States with reference to formulating, adopting, or changing the domestic or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party." 22 USC § 611(o).

The regulations clarify that the "terms formulating, adopting, or changing, as used in section 1(o) of the Act, shall be deemed to include any activity which seeks to maintain any existing domestic or foreign policy of the United States. They do not include making a routine inquiry of a Government official or employee concerning a current policy or seeking administrative action in a matter where such policy is not in question." 28 CFR § 5.100(e).

"Domestic or foreign policy of the United States" is further defined in the regulations as relating to "existing and proposed legislation, or legislative action generally; treaties; executive agreements, proclamations, and orders; decisions relating to or affecting departmental or agency policy, and the like." 28 CFR § 5.100(f).

- ***Acts as public relations counsel, publicity agent, information-service employee or political consultant***

Each of these terms is specifically defined as follows in the statute and without elaboration in the regulations. Engaging in these "acts" is a trigger for registration.

The term ‘‘public-relations counsel’’ includes any person who engages directly or indirectly in informing, advising, or in any way representing a principal in any public relations matter pertaining to political or public interests, policies, or relations of such principal. 22 USC § 611(g).

The term ‘‘publicity agent’’ includes any person who engages directly or indirectly in the publication or dissemination of oral, visual, graphic, written, or pictorial information or matter of any kind, including publication by means of advertising, books, periodicals, newspapers, lectures, broadcasts, motion pictures, or otherwise. 22 USC § 611(h).

The term ‘‘information-service employee’’ includes any person who is engaged in furnishing, disseminating, or publishing accounts, descriptions, information, or data with respect to the political, industrial, employment, economic, social, cultural, or other benefits, advantages, facts, or conditions of any country other than the United States or of any government of a foreign country or of a foreign political party or of a partnership, association, corporation, organization, or other combination of individuals organized under the laws of, or having its principal place of business in, a foreign country. 22 USC § 611(i).

The term ‘‘political consultant’’ means any person who engages in informing or advising any other person with reference to the domestic or foreign policies of the United States or the political or public interest, policies, or relations of a foreign country or of a foreign political party. 22 USC § 611(p). This reference to the domestic or foreign policies of the United States has the same definition as mentioned above for “political activities” (relating to “existing and proposed legislation, or legislative action generally; treaties; executive agreements, proclamations, and orders; decisions relating to or affecting departmental or agency policy, and the like,” 28 CFR § 5.100(f)).

- ***Solicits, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of the foreign principals.***

  There is no elaboration in the statute or regulations on these activities.

- ***Represents the interests of the foreign principal before any agency or official of the Government of the United States.***

Neither the statute nor the regulations have further direct authority on what it is to represent the interests of a foreign principal “before any agency or official” of the U.S. government. However, there are exemptions to the registration requirement, which clarify that registration is not required for “legal representation” for “on the record” agency proceedings, among other exemptions.

**4. Exemptions**

Section 613 of FARA sets eight exemptions to registration:

(a) Diplomatic or consular officers;

(b) Officials of foreign government;

(c) Staff members of diplomatic or consular officers;

(d) Private and nonpolitical activities and solicitation of funds;

(e) Religious, scholastic, or scientific pursuits;

(f) Defense of foreign government vital to the United States defense;

(g) Persons qualified to practice law; and

(h) Agents of foreign principals (registration under the Lobbying Disclosure Act).

As discussed below, there are three exemptions where attorneys are most likely to find applicable exemptions, if any: commercial exemption, legal representation, and Lobbying Disclosure Act registrants.

***Commercial Exemption.*** Section 613(d) exempts persons who engage only "(1) in private and nonpolitical activities in furtherance of the bona fide trade or commerce of such foreign principal; or (2) in other activities not serving predominantly a foreign interest." For the purpose of the second part of this exemption, it is not "serving predominantly a foreign interest" if "the political activities are *directly* in furtherance of the bona fide commercial, industrial, or financial operations of the foreign corporation, so long as the political activities *are not directed by a foreign government* or foreign political party *and* the political activities *do not directly promote the public or political interests of a foreign government* or of a foreign political party." 21 C.F.R. §5.304(c).

There are seventeen Advisory Opinions addressing the commercial exemption dating from 1984 (with four of those in the 1984-2012 time period and the remaining thirteen from 2017 through the present).

In a January 20, 1984 Advisory Opinion, see https://www.justice.gov/nsd-fara/advisory-opinions, the DOJ Registration Unit rejected the use of the commercial exemption for advertising services to promote tourism on behalf of a foreign government, finding that these "cannot be construed as private and nonpolitical activities. On the contrary, tourism creates an influx of capital and a host of jobs for the indigenous population, both of which are obviously in the political and public interests of [foreign country]." The opinion went on to note that tourism advertisements are dissemination of political propaganda as that is defined in FARA, which automatically precludes a commercial exemption. That definition appears to have been repealed in 1995, so the applicability of the logic in this Opinion could be affected. Nevertheless, it is significant that at some point, the DOJ viewed the promotion of the economic interests of the foreign country as rising above the realm of the purely private and nonpolitical when the foreign government is controlling the activities.

In the more recent February 9, 2018 Advisory Opinion, see https://www.justice.gov/nsd-fara/advisory-opinions, the DOJ FARA Registration Unit rejected the availability of the

commercial exemption for the activities of a compliance and consulting firm for a foreign state bank that included:

> (1) an initial assessment of [foreign state bank]'s cybersecurity programs and its policies and programs concerning antimoney laundering and combating the financing of terrorism, including their key components of the aforementioned programs and identifying gaps and assessing how to address them; (2) limited outreach arranged by [U.S. law firm] with officials of U.S. banks and financial institutions as well as with officials of federal regulatory agencies such as the Federal Reserve Board and the Comptroller of the Currency, including strategic advice but no advocacy in either meetings; and (3) direct outreach with the above described financial institutions and federal agencies to familiarize them with [foreign state bank]'s programs to demonstrate its suitability for establishing commercial relationships with U.S. financial institutions, but does not include efforts to influence U.S. government policy.

The DOJ FARA Unit disagreed with the characterization of the activities as not intended "to influence a U.S. audience with 'reference to formulating, adopting, or changing' U.S. domestic or foreign policy," as "nonpolitical," and as not constituting advocacy for "change in U.S. domestic or foreign policy, including legislation, executive agreements, or decisions related to departmental or agency policy." The DOJ FAR Unit pointed to the appearances in front of the Federal Reserve Board and the Comptroller of the Currency as "squarely within those activities outlined in" FARA. Likewise, the DOJ FARA Unit disagreed that the activities are "private and non-political activities in furtherance of the principal's bona fide trade or commerce," and that these activities also are exempt from registration under 613(d)(2) because they do not serve predominantly a foreign interest." Instead, the DOJ FARA Unit determined that the commercial exemption does not apply because the activities would directly promote the public interests of the foreign country:

> The purpose and intent of [company] providing strategic advice and recommendations, as well as the direct outreach to U.S. federal financial regulatory agencies on behalf of [foreign state bank], the central bank of [foreign country], would be to "demonstrate [foreign state bank]'s suitability for establishing commercial relationships with U.S. financial institutions." As such, these activities directly promote the public interests of [foreign country]. For the same reason, these activities would not qualify for the exemption in Section 613(d)(2) because they do serve predominantly a foreign interest in that they directly promote the public interests of [foreign country]. See 28 C.F.R. §5.304(c).

***Legal Exemption***. Section 613(g) exempts legal practitioners engaging in legal representation of a "disclosed foreign principal before any court of law or any agency of the Government of the United States," but the exemption does not extend to "attempts to influence or persuade agency personnel or officials other than in the course of judicial proceedings, criminal or civil law enforcement inquiries, investigations, or proceedings, or agency proceedings required by statute or regulation to be conducted on the record."

There are nine Advisory Opinions addressing the legal representation exemption dating from 2003. It is a mixed bag in terms of whether the legal representation exemption did or did not apply. Even when the DOJ FARA Unit found that the "legal representation" exemption applied, it was careful to note the fact-specific nature of the opinion and cautioned that "the question of obligation or exemption must be revisited as the nature of the relationship changes from time to time." See September 10, 2013 Advisory Opinion; see also July 27, 2011 Advisory Opinion ("Please note that the question of obligation or exemption must be revisited as the nature of the relationship changes from time to time. Because the question of obligation or exemption depends on your firm's relationship with any foreign principal, this opinion is limited to the facts as represented. If the facts concerning your relationship should change, you may wish to ask us to reexamine whether your firm has an obligation to register under the Act."), both at https://www.justice.gov/nsd-fara/advisory-opinions, with a similar message commonly repeated throughout the Advisory Opinions.

With respect to the legal representation exemption, there is recognition that representations that within established agency proceedings are exempt. In the September 10, 2013 Advisory Opinion, the DOJ FARA Unit considered the legal representation of a foreign agent who sought removal from an Entity List of the Department of Commerce's Bureau of Industry and Security (BIS) through a civil law enforcement proceeding. Based on the representation that the representation was disclosed to the BIS in an informal meeting and the activities would not involve "political activities" or "attempts to influences federal officials outside of established agency proceedings," the legal exemption applied subject to reconsideration if the relationship or scope of activities change. However, this Advisory Opinion gives no insight into how to reconcile the reference to an "informal meeting" with the admonition to stay within the bounds of "established agency proceedings." The key point seems to be that there is a recognized process for removal from the Entity List, and the representation was aimed at that outcome.

The DOJ FARA Unit has also recognized that the legal representation exemption may apply even prior to the commencement of a proceeding. In the February 16, 2011 Advisory Opinion, the DOJ FARA Unit recognized the legal representation exemption as applicable to pre-suit activities described as follows:

> Your letter indicates that [U.S. firm] entered into a contract with [foreign government] on October 14, 2010, to provide legal services to the [foreign government] and to [foreign nationals]. [U.S. firm] will provide legal services in and related to litigation involving alleged violations of the rights of [foreign nationals] in the United States. These legal services provided to [foreign government] will be in connection with "significant legal impact cases" in multiple areas of the law. The firm will identify cases appropriate for litigation. Once identified, [U.S. firm] may then engage in pre-litigation discussions with relevant federal, state or local government officials in an attempt to avoid judicial action. These pre-litigation discussions may involve advocacy on behalf of the [foreign government] and/or on behalf of [foreign nationals] who currently reside in the United States or have been in the United States at some time. The goal of

> the pre-litigation discussions will be to persuade these government officials to enforce existing policies or to change existing policies or practices affecting the legal rights of [foreign nationals] in the United States.
>
> Your letter contends that in circumstances where there are actions of government officials believed to be in violation of the legal rights of [foreign nationals], then attorneys, acting as legal representative to [foreign government], may urge that particular policies affecting the legal rights of [foreign nationals] be enforced as required, or where necessary, changed to protect the legal rights of [foreign nationals]. You argue that "[d]iscussions prior to filing, in the course of settlement negotiations of pending lawsuits, regarding the enforcement of court judgments, and at other appropriate points in the adversarial process are all within the framework of the 'course of judicial proceedings' contemplated by FARA."

Although the DOJ FARA Unit agreed that these pre-litigation discussions were included "within the 'course of judicial proceedings'," the DOJ FARA Unit cast a shadow on the applicability of the legal representation exemption to the aspect of the representation that was aimed at changing policies and practices. On that point, the DOJ FARA Unit said:

> We are not clear on what, if any, activities your firm may conduct which may seek to "change existing policies and practices." In addition, other than "significant legal impact cases," your letter is not specific as to the types of cases that your firm plans on litigating for the [foreign government] or [foreign nationals]. We are not certain what you contemplate as the scope of a settlement discussion, or with whom you may attempt to negotiate a settlement. "Political activity" is defined, in pertinent part, in Section 611(o) of FARA as activity which is intended to influence U.S. Government officials or a section of the public, with reference to either formulating, adopting, or changing the domestic or foreign policies of the United States or with reference to the political, or public interests, policies, or relations of a government of a foreign country. Please provide this Unit with clarification of the "significant legal impact cases," and cases which will "change existing policies and practices" in the state and federal context

There is no obvious follow up available in the Advisory Opinions to resolve what pre-litigation activities might be "within the course of judicial proceedings" versus those that would be deemed to fall outside the legal representation exemption.

In the December 3, 2012 Advisory Opinion, the DOJ FARA Unit rejected reliance on the legal representation exemption, stating that the "anticipated activities . . . exceed the activities permitted under the legal exemption." Although the December 3, 2012 Advisory Opinion notes that details were lacking in the request for the advisory opinion, it described the scope of representation of a foreign company as assisting the foreign principal "in acquiring a U.S. company, in navigating the [Committee on Foreign Investment in the United States (CFIUS)] process, and in educating U.S. policymakers about [foreign company]'s business operations and proposed acquisition of a U.S. company."

***Lobbying Act Exemption***. Section 613(h) exempts an agent from registration under FARA if it represents either foreign individuals or foreign corporations and the agent has engaged in lobbying activities and registered under the Lobbying Disclosure Act in connection with such representation. FARA's regulations (at 28 CFR 5.307) also provide that the LDA exemption is not applicable where a foreign government is "the principal beneficiary" of any lobbying activities.

"Lobbying" may not involve an attorney-client relationship or legal services. If that is the case, there may not be a Rule 1.6 confidentiality concerns related to an LDA or FARA registration requirement. However, legal representation may include some lobbying or lobbying may be "law-related services" for which the lawyer's duties are set out in the professional rules. Rule 5.7 states that a lawyer shall be subject to the professional rules in providing law-related services if the law-related services are provided:

> (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
>
> (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

Rule 5.7(a)(1-2).

### 5. Disclosure Considerations When Registration Required

If the firm registers under FARA, the entire registration statement will be publicly available via the FARA Unit's website: https://efile.fara.gov/ords/fara/f?p=1235:10. The required forms for filing are found here: https://www.justice.gov/nsd-fara/fara-forms. The registration statement requires, among other things, that the registrant attach a copy of the engagement letter or contract with the foreign principal; that the agent disclose the fees it has received from the foreign principal; and that any individual partner or employee of the registrant who engages in registerable activities on behalf of the foreign principal must file a Short Form Registration Statement.

28 CFR § 5.2 (known as "Rule 2") allows for potential agents of foreign principals to request that the FARA unit provide an opinion letter on whether specific activities require registration. The Rule 2 request must set out the identities of the agent and foreign principal, the nature of the agent's activities, etc.; the FARA unit will then respond within 30 days to provide its opinion or request more details. There is a nominal fee ($96) for making such a request.

A lawyer's duty of competence under Rule 1.1 requires the lawyer to at least understand when FARA registration should be evaluated. If the lawyer lacks the experience under FARA to make the determination, either the lawyer must gain competence through preparation and study or associate or consult with a lawyer competent in that field. See Rule 1.1 comment [1]. When FARA requires registration and disclosure, a lawyer must heed Rule 1.4's call to explain the

requirement and the necessary disclosures "to the extent reasonably necessary to permit the client to make information decisions regarding the representation." The client might choose to forego representation, or the client might limit the nature of the representation to avoid a FARA disclosure of client identity, the engagement terms, and the fees.

When FARA does not require registration, a lawyer should nevertheless keep in mind that Rule 3.9 (not adopted in North Carolina or Virginia) could require the lawyer to disclose that he or she is acting in a representative capacity even if the lawyer does not have to disclose the specific client identity, the engagement terms, and the fees.

There is a recent example of a Department of Justice enforcement against a law firm for failing to register under FARA. In January 2019, the DOJ announced a settlement with Skadden, Arps, Slate, Meagher & Flom LLP under which the law firm agreed to register under FARA and to pay more than $4.6 million in fines. *See*, "Prominent Global Law Firm Agrees to Register as an Agent of a Foreign Principal," Department of Justice, Office of Public Affairs press release, January 17, 2019 at https://www.justice.gov/opa/pr/prominent-global-law-firm-agrees-register-agent-foreign-principal. According to the settlement agreement, Skadden acted as an agent of the Government of Ukraine within the meaning of FARA when Paul Manafort of Skadden assisted the Ukraine Ministry of Justice in preparing a report on the evidence and procedures used during the 2011 prosecution and trial of a former Prime Minister and addressing various questions regarding the fairness of the trial (the "Report"). The settlement agreement indicates that Skadden:

> became aware that Ukraine intended to use the Report as part of a public relations campaign to influence U.S. policy and public opinion toward Ukraine. After that point, Skadden's lead partner for the Ukraine engagement took steps to advance the public relations campaign. In the fall of 2012, shortly after a meeting in New York with Manafort and a representative from Ukraine's public relations firm to finalize the Report and discuss the media strategy for its rollout, the lead partner contacted a journalist at a national newspaper and asked whether the journalist would take a call from a lobbyist for Ukraine about the Report in advance of its release. Then, shortly before Ukraine released the report on December 13, 2012, the lead partner again contacted the journalist and arranged for delivery of the Report to the journalist, both via email and in person. On December 12, 2012, the lead partner spoke with the national newspaper about the Report and provided a quotation for attribution.
>
> The lead partner's pre-release outreach to the journalist was consistent with Ukraine's media strategy for the Report, which including leaking the Report prior to its official release so as to "effectively set the agenda for subsequent coverage.

*Id.* The FARA Unit reached out to Skadden for information five days after new articles about the Report appeared in the press. According to the settlement agreement, Skadden told FARA

that it provided a copy of the Report to the press only in response to requests from the media and spoke to correct misinformation about the Report. Based on that representation from Skadden, the FARA Unit initially determined that Skadden did not have a registration obligation. *Id.* The DOJ learned that the information was not accurate in the context of investigating Manafort's representation of and alleged connections between the United States and the former Ukrainian President. That investigation has extended to scrutiny of Rudy Giuliana, formerly President Donald Trump's personal lawyer, regarding any role he had relative to the Trump administration's decision to fire Marie Yovanovitch, former ambassador to Ukraine. One of the questions under investigation is whether Giuliani was acting as agent of one or more Ukrainian nationals when advocating regarding the former ambassador. *See, e.g.*, "F.B.I. Searches Giuliani's Home and Office, Seizing Phones and Computers," by William K. Rashbaum, et al., The New York Times, April 28, 2021 and updated May 4, 2021, at https://www.nytimes.com/2021/04/28/nyregion/rudy-giuliani-trump-ukraine-warrant.html.

## III. WHO IS YOUR CLIENT?

Clearly identifying who your clients are and who they are not as well as managing your entry into and exit from a lawyer-client are critical to meeting your professional obligations. A lawyer's professional duties attach even before a client becomes a client and even extend past the time when a client stops being a client. The attorney-client privilege will not attach unless that relationship exists and unless the communications occur between the right persons. A lawyer can only manage those duties and privileges if the lawyer gets and maintains clarity regarding who that client is, and in many cases, isn't. Unfortunately, client identity is often not a simple question. There are many challenging "client identity" scenarios and clients often need counseling about the ramifications of the "client identity" on confidentiality, privilege, conflicts, and file ownership. It is the lawyer's job to provide that counseling and get clarity on the very fundamental issue of "who is my client?"

### A. Professional Rules Important to Getting Clarity on Client Identity

There are many of the professional rules important on the issue of client identity since the bulk of the professional duties addressed in the rules flow to the client. With respect to forming the attorney-client relationship, Rules 1.1 and 1.4 require competence and consultation.

With respect to Rule 1.1's call to "competence," there are a host of issues on which the lawyer must have competence relative to client identity. That includes competence regarding the nature of organizations such as partnerships, corporations, associations, and the like, and how those types of entities are governed and make decisions. Rule 1.13 states that a lawyer "employed or retained by an organization represents the organization acting through its duly authorized constituents." Some basic knowledge of how organizations function is necessary to understand when the lawyer is interacting with "authorized constituents" or to understand when authorization should be verified or confirmed. Because many organizations have affiliates with varying degrees of overlap or separation, a lawyer needs competence in understanding the ways those affiliate relationships can affect the lawyer's professional duties to one or more of the

affiliates. A lawyer likewise needs competence in understanding how his or her professional duties can be fulfilled when representing more than one client on the same matter.

Rule 1.4 calls on the lawyer to consult with the client and explain the significance of defining who is and who is not the client, including any relevant limitation on the lawyer's conduct in light of the defined client. To fulfill the Rule 1.4 duty to explain and consult, a lawyer should consider:

- Who is paying? (R. 1.8(f))
- Who is directing your work, making decisions? (R. 1.2, 1.13)
- If your client is an entity, who are its "duly authorized constituents"? (R. 1.13)
- Who must you share information with? (R. 1.4, 1.6, 1.13, 1.16)
- Who must you shield information from? (R. 1.6)
- Who gets to fire you? (R. 1.16(a)(3))
- Who gets to sue you? (R. 1.1, 1.2)
- Whose information are you getting and how are you getting it? (R. 1.6)
- If they ask, who has the right to demand your file? (R. 1.16(d))
- Who are you going to avoid conflicts with as a result of this work? (R. 1.7, 1.8, 1.9)
- Who have you worked for in the past?
- Who do you think you will work for in the future?
- Whose name is on the signature block? Case style?
- Will a new entity be created in the course of this work? (R. 1.13)
- If there is an entity with a managing agent, is the legal work related to the duties and responsibilities of the managing agent or is it related to the entity's legal rights or obligations? If the former, the managing agent is the client in its own right with the entity as a potentially adverse other party. If the latter, then the client is the entity with the managing agent acting as the "duly authorized constituent" directing your work.

With answers to these questions, a lawyer can advise and consult about structuring the attorney-client relationship in ways that protect confidentiality and privilege, avoid conflict issues, and otherwise fulfill both the client's goals and the lawyer's professional duties.

## B. Challenging Client Identity Scenarios

### 1. Corporate affiliates

One of the most common challenges relative to organizations as clients relates to the status of the corporate affiliates. Organizations may have multiple affiliates with variation in whether those affiliates are wholly owned or whether the affiliates are partly owned by other persons or organizations. The affiliates may have management or employees with roles for multiple affiliates. There may be service agreements between and among the affiliates. Those within the corporate family may not remember to highlight for the lawyer when their "employer" is an entity different from the presumed "client." In short, the corporate or organizational lines can get quite blurred, and as a result, so can expectations.

One of the most common issues associated with the challenge of representing an organization within a larger corporate or organization family relates to conflicts of interest. As Rule 1.13 states, "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." That simple statement suggests that lawyers can rely on corporate or organizational separation and would not owe a duty to avoid representations impacting corporate affiliates. However, that issue is not so simple either. As explained in "Conflicts of Interest in the Corporate Family Context," ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-390 (Jan. 25, 1995), whether a lawyer must treat a corporate affiliate as a client for conflicts analysis purposes depends on the corporate client's reasonable expectation that the affiliates will be treated as clients, either generally or for purposes of avoidance of conflicts, and that the lawyer is aware of the expectation. If a lawyer agrees to treat affiliates of a client as a client, then the lawyer must do so regardless of whether any actual work has been or is to be performed for the affiliate.

Consistent with Rule 1.4's duty to explain and consult, ABA Opinion 95-390 emphasizes that a lawyer should inquire about an organizational client's expectations about its affiliates. In the absence of clarity on the affiliates issue at the outset of a lawyer-client relationship, ABA Opinion 95-390 identifies a variety of factors that will impact the extent to which a lawyer may owe a professional duty to avoid conflicts with affiliates:

- Has the corporate client apprised the lawyer of changes in the corporate family?
- What is the nature of the work performed (does it benefit all affiliates?)?
- Is confidential information obtained from affiliates?
- What is the relationship of corporate client and affiliate -- are they alter egos (not in the strict sense, but look to overlap of management or board, disregard of corporate formalities, shared legal department, controlling ownership relationship)?

Rule 1.7(a)(1) prohibits representations "directly adverse to another client." When a lawyer is considering representation adverse to an affiliate of a corporate client, the lawyer must consider whether there is impact on the legal rights or obligations of the affiliate. Representation adverse

to the affiliate of a corporate client is not "directly adverse" to the corporate client by virtue of the potential adverse economic impact on the corporate client itself. There is room for dispute, but according to ABA Opinion 95-390, the "better view" is that this is indirect adversity.

A lawyer must also consider whether representation adverse to the corporate affiliate may be materially limited by the lawyer's responsibilities to the corporate client (or conversely, the representation of the corporate client would be materially limited by the representation of the client adverse to the affiliate). For example, a lawyer does not necessarily have a duty to protect the corporate client's financial resources. But, if a lawyer's independent judgment and zeal might be clouded by concern for the welfare of one or both client, then the lawyer may run afoul of Rule 1.7(b).

When a lawyer represents multiple affiliates as clients, the lawyer must still be on the lookout for conflicts and attend to confidentiality, privilege, and file ownership issues. *See* "All in the Family? In-House Counsel Representing Parents/Subs/Affiliates: Conflicts and Confidentiality," by Peter R. Jarvis and Rene C. Holmes of Hinshaw and Culbertson for the ACC at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAAahUKEwiIp4zC_9vHAhXHn4AKHaEQD40&url=http%3A%2F%2Fwww.acc.com%2Fvl%2Fpublic%2FArticle%2Floader.cfm%3FcsModule%3Dsecurity%2Fgetfile%26pageid%3D15957&usg=AFQjCNHyghnLfn3KLTssPEnr_dz8VPReew. Conflict issues can arise even between and among corporate affiliates, though this potential may be less likely when the affiliate is wholly owned and solvent than when the affiliate is less than wholly owned or facing insolvency. In circumstances in which a lawyer needs a consent to represent an organization along with an organization's affiliate (or director, officer, employee, member, etc.), the lawyer must obtain consent must come from appropriate officials of the organization other than the constituent to be represented. See Rule 1.13(e).

Consistent with the requirement of Rule 1.1 diligence and Rule 1.4 consultation, a lawyer representing a client but communicating with affiliates or other individual constituents must be aware of and communicate about the impact on evidentiary privileges. While the degree of affiliation and overlap in interests may be important factors, *see U.S. v. American Telephone & Telegraph Co*., 86 F.R.D. 603 (D.D.C. 1980), evidentiary privilege is a very jurisdiction-specific and fact-specific issue, making generalizations difficult.

### 2. Individuals vs. Entities

Distinguishing between individuals and entities as clients is also a common challenge for lawyers. A client may be an individual who also happens to own some entities. Or an entity may be a client with the individuals as the principal contacts acting for the entity client. Since an entity can act only through duly authorized constituents who ultimately are individuals, lawyers must be on guard against allowing an individual to believe that he or she is also a client if that is not the case. Restatement Section 14 defines a "client" as a person who manifests an intent for the lawyer to provide legal services *if* the lawyer knows that the person reasonably relies on the lawyer to provide legal services but the lawyer fails to disclaim an intent to do so. Under this formulation, the lawyer who carries the burden of bringing clarity to the topic of clients and non-clients.

### 3. Managers/fiduciaries vs. Entity/Trust/Beneficiary

Just as a lawyer must get clarity as to whether an entity or a constituent is or is not a client, a lawyer must take care to bring clarity to a request for representation coming from a manager or fiduciary for another entity, trust, or beneficiary. The question is whether the manager/fiduciary is coming in its capacity as such for guidance on its obligations vis-à-vis the managed entity or the trust/beneficiary or whether the manager or fiduciary is coming as the "duly authorized agent" to retain the lawyer on behalf of the managed entity or the trust/beneficiary. *See, e.g.,* as to trusts*: Bain v. McIntosh*, 597 F. App'x 623, (Mem)-624 (11th Cir. 2015) (citing statute specifying client is "only the person or entity acting as a [trustee]," rule that "the personal representative is the client rather than the estate or the beneficiaries," and ABA ethics opinion statement that the majority rule is that a fiduciary's lawyer "does not also represent the beneficiaries") (alteration in original) (citation and quotation marks omitted); *Kentucky Bar Ass'n v. Fernandez*, 397 S.W.3d 383, 392 (Ky. 2013) (citing Kentucky Bar ethics opinion statement that a fiduciary's lawyer has an attorney-client relationship "with the fiduciary and not with the trust or estate, nor with the beneficiaries of a trust or estate") (citation and quotation marks omitted); *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.*, 131 Cal. App. 4th 802, 829, 32 Cal. Rptr. 3d 325, 344 (2005), *as modified on denial of reh'g* (Aug. 25, 2005) (referencing statement in ABA ethics opinion, "The fact that the fiduciary client has obligations toward the beneficiaries does not impose parallel obligations on the lawyer," which "undercuts any suggestion" in ABA Model Rules' comments that a fiduciary's attorney "may have 'special obligations' to the beneficiary in the trust situation"). *See, e.g.*, as to "managing members": *Estate of Ginor v. Landsberg*, 960 F. Supp. 661, 667, 672 (S.D.N.Y. 1996) *aff'd sub nom. Ginor v. Landsberg*, 159 F.3d 1346 (2d Cir. 1998) (stating in suit by limited partner, who owned 99% of the partnership, against attorney for limited partnership and its general partner, "It is well-settled that an attorney owes no fiduciary duty to a third party with whom the attorney is not in privity," and therefore, the attorney's "fiduciary duties ran only to those entities") (citing cases); *McClure v. Tremaine*, 77 Wash. App. 312, 316-17, 890 P.2d 466, 468 (1995) (citing cases illustrating that courts "are divided on the issue of whether an implied attorney-client relationship exists between the attorney for the general partner and the limited partners"); *In re Hickory Mill Apartments of Columbus, Ltd.*, 133 B.R. 898, 900–02 (Bankr. S.D. Ohio 1991) (recommending separate counsel for general partner and partnership, noting a partnership's lawyer represents it alone under Bankruptcy Code's partnership "entity theory," and citing cases finding conflict of interest where attorney seeks to represent both general partner and limited partnership, many of which involved only one bankruptcy-debtor party).

### 4. Insurers

When a client has insurance that will cover attorney's fees, among other things, the insurer may seek a prominent role in communications and decisions affecting the claim. Depending on the terms of the insurance contract, the insurer may have the right to "select" counsel and may be obligated to pay counsel. It is common for insurers to seek to establish the terms of engagement with counsel, which may include restrictions on rates, an identification of things that the insurer will not pay for, and requirements for pre-approval of expenses or settlements. Insurers often inquire about whether the law firm represents clients adverse to the insurer and may attempt to state a condition that the lawyers retained by the insurance company

cannot advise the client on coverage issues. The insurer may seek to require communications while imposing on the lawyer the duty to avoid privilege waiver.

Lawyers must take care to make clear that the insurer is not the client but instead a third party payor if that is the case. State laws governing insurance companies might impact whether there is even an option for an attorney retained by the insurer to have a lawyer-client relationship with the insurer. The intrusion of the insurer into the attorney-client relationship between the attorney and the insured requires the lawyer to take great care in clearly identifying client and then acting consistent with the duties owed to the client (or clients). *See, e.g.*, *Juneau Cnty. Star-Times v. Juneau Cnty.*, 345 Wis. 2d 122, 129, 140–46, 824 N.W.2d 457, 460–61, 466–69 (2013), *reconsideration denied*, 347 Wis. 2d 115, 829 N.W.2d 752 (discussing tripartite relationship and determining that lawyer had attorney-client relationship only with insured and contractual relationship existed between lawyer and insurer); *Roberts & Schaefer Co. v. San-Con, Inc.*, 898 F. Supp. 356, 357–58 (S.D.W. Va. 1995) (reciting, in ruling on attorney disqualification motion, that attorney hired by subcontractor's insurer to evaluate dispute over subcontractor's work represented the insured); *Greenfield v. Giambalvo*, 36 Misc. 3d 1209(A), 954 N.Y.S.2d 759 (Sup. Ct. 2012) ("It is well settled that the client of attorneys retained by an insurer pursuant to an insurance policy is not the insurer but the insured."); 3-16 New Appleman on Insurance Law Library Edition § 16.04 (discussing relationship among insured, insurer, and defense counsel, noting generally insurer has strong, sometimes near-unfettered ability to control the litigation, stating that insurer in most jurisdictions has choice to be co-client with insured but noting limitations, and discussing conflicts of interest between insured and insurer and their implications); *see* Jean Fleming Powers, *Advantages of the One-Client Model in Insurance Defense,* 45 N.M. L. Rev. 79 (2014) (advocating for an approach in which only the insured is the client and discussing cases illustrating the merits of that approach over one in which the insurer also is a client); James M. Fischer, *Insurer-Policyholder Interests, Defense Counsel's Professional Duties, and the Allocation of Power to Control the Defense*, 14 Conn. Ins. L.J. 21 (2007) (discussing the "multilateral relationship" between the insured, attorney, and the insurer, the implications of the insurer's right to control the defense, and that the "delegation of control accomplished by the insurance contract and by the tender affects the relationship between the policyholder and defense counsel").

### 5. Indemnitors and Indemnitees

Often lawyers are asked to represent co-defendants in a lawsuit in circumstances in which an indemnitee tenders its defense to an indemnitor who accepts it. So long as the lawyer takes no role for either with respect to the issue of whether indemnification is owed, the lawyer likely can navigate the issues associated with representing joint clients in advancing their common interest in defending the claim. Again, the lawyer must take responsibility to gain clarity on the client identities, who directs the work, who shares in communications, who owns the file, and how any potential conflicts will be handled. The lawyer should determine whether any of the joint clients object to advancing defenses for one that are not available to the other and what might happen if a settlement offer comes to one but not the other. If a conflict arises that cannot be cured with consent, then the lawyer needs to have discussed expectations on whether the lawyer must withdraw from representing both.

### 6. Deponents and Third Party Discovery Targets

Lawyers representing a client in litigation may be asked to also represent a deponent or third party target of discovery in the litigation. This may be for economic efficiency or in circumstances in which the primary client has an employment or indemnification relationship with the deponent or third party discovery target. Sometimes the primary concern is privilege protection or contact from the litigation opponents. There are risks to undertaking representation of the "accommodation" client, and lawyer must discuss those risks and options to adequately address concerns such as cost, privilege and opponents' contact in another way. The risks of undertaking a client relationship in the same matter with a deponent or third party discovery target include:

- The lawyer may be faced with conflicting professional and fiduciary duties to someone other than the primary litigant client, which can interfere with what the lawyer can do for the litigant client or the relationship with the litigant client.

- The lawyer must share information with anyone who is a client related to the subject matter of the representation (that is, the litigation) unless the lawyer can limit those duties with consent of the affected clients (and assuming it is reasonable to do so).

- The lawyer must avoid conflicts with any current client (What if the deponent tells you something and asks you not to share it? What if the deponent changes his/her mind and decides he/she doesn't want to testify but the litigant client needs him/her to do so and the lawyer needs to subpoena the witness? Even if the deponent is a past client, a subpoena would be adverse in a related matter and therefore a conflict requiring consent, which may not be forthcoming.).

- The lawyer will not be paid any more money for forming another attorney-client relationship (and taking on these extra professional and fiduciary duties), but the lawyer will be multiplying the people to whom the lawyer owes duties.

- The lawyer for the litigant is already entitled to attend the deposition and interject privilege claims to the extent the litigant client controls the privilege.

- The lawyer may not really know what the deponent will say and so cannot adequately assess risk that interests will diverge between deponent and litigant.

Are the reasons typically cited for forming an attorney/client relationship really compelling enough to overcome these risks? If the answer is yes, the attorney must counsel both clients as to the ramifications of the joint representation and document the engagement and consent to proceed notwithstanding the potential risks.

### 7. **Derivate Claims.**

A comprehensive discussion of a variety of cases considering client identity and conflicts in the derivative litigation scenario can be found at "Freivogel on Conflicts" at http://www.freivogelonconflicts.com/derivativeactions.html. This is territory without clear boundaries if a lawyer has represented the entity and then seek to represent either a majority or

minority position. Lawyers should proceed with extreme caution and consideration of any cases in the relevant jurisdiction.

### 8. Association, working group, or consortium

When a lawyer is engaged to represent a group, coalition, consortium, or other unincorporated association without an independent legal existence, there is first and foremost the fundamental question of whether the lawyer has a single "group" client or an aggregate of individual members/participants as joint clients. The lawyer must establish clarity on this question.

Under Rule 1.13(a), a "lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Comment 1 to this rule refers to an organizational client as a "legal entity." In this way, Rule 1.13 sets a baseline expectation that entities with independent legal existence – e.g., a corporation, partnership, limited partnership, limited liability partnership, or limited liability corporation -- are presumptively "the client." *See also, Restatement (Third) of the Law Governing Lawyers §* 96(1) cmt. (b) (2000) ("The so-called 'entity' theory of organizational representation . . . is now universally recognized in American law, for purposes of determining the identity of the direct beneficiary of legal representation of corporations and other forms of organizations.").

*Presumptively* is the key word here, since there are numerous scenarios in which a lawyer can also be found to have acquired members or constituents of those legal entities as clients, whether intentionally or unintentionally. For example, in a closely held corporation, decision-making authority may be controlled by one or two shareholders that look to the lawyer to provide advice on a broad range of topics for which there is substantial identity of interest between the entity and the shareholder. Section 14 of the Restatement of the Law Governing Lawyers defines a "client" as a person who manifests an intent for the lawyer to provide legal services *if* the lawyer knows that the person reasonably relies on the lawyer to provide legal services but the lawyer fails to disclaim an intent to do so. The lawyer may believe that advice is sought by and for the closely held corporation but the shareholder asking the questions may not make that distinction. *See generally,* Darian M. Ibrahim, *Solving the Everyday Problem of Client Identity in the Context of Closely Held Businesses*, 56 Ala. L. Rev. 181 (Fall 2004). *See also,* William Freivogel, *Freivogel on Conflicts: A Guide to Conflicts of Interest for Lawyers (Corporations)* at http://www.freivogelonconflicts.com/corporations.html (identifying cases in which the court found that the lawyer did have a duty to constituents of a close corporation client).

Those who come together outside of an entity with independent legal existence may presumptively be viewed as an aggregate of individuals in a joint client status. However, comment 1 also notes that the "duties defined in this Comment apply equally to unincorporated associations." Moreover, ethics opinions have recognized that "lawyers for other types of entities do not necessarily represent the constituents." Annotated Model Rules of Professional Conduct (Eighth Ed.), Ellen J. Bennett, Elizabeth J. Cohen, Helen W. Gunnarsson, p. 237, citing among other things ABA Formal Ethics Op. 92-365 (1992) (trade association's lawyer does not automatically represent individual members, although circumstances in particular instance may support finding that lawyer-client relationship with individual member has arisen); DC Ethics Op. 305 (2001) (lawyer for trade association generally not prohibited from representing

association or another client in matter adverse to member association, unless circumstances support member's expectation of lawyer-client relationship); Or. Ethics Op. 2005-27 (2005) (lawyer for trade association may also represent one association member against another member, who is not present or former client, in matter unrelated to lawyer's representation of association). *See also*, William Freivogel, *Freivogel on Conflicts: A Guide to Conflicts of Interest for Lawyers, Trade (and Other) Associations* at http://www.freivogelonconflicts.com/tradeassociations.html.

Because an organization without separate legal existence can be represented as an "enterprise" or as an "aggregate" of individuals, a lawyer can consider the group itself as the client or the aggregate of individuals that make up its membership as the joint clients. As is generally true, the lawyer must make this clear and explain the significance of making the organization or the "aggregate of individuals" the client in terms of conflicts, confidentiality, privilege, decision-making, and file ownership. If the unincorporated association (or working group or consortium or the like) lacks organizational documents, the lawyer's engagement letter can address topics that might otherwise have been addressed in bylaws or in a partnership agreement. Or the lawyer may assist the group in forming organizational documents that will be well worth the "ounce of prevention" in managing expectations and the lawyer's professional duties.

Just as partnership or LLC agreements should anticipate and address how decisions are made and the comings and goings of partners or members and even dissolution of the entity itself, some combination of the engagement letters and organizational documents should likewise anticipate and address similar issues. Although not all advisable topics for a partnership or LLC agreement are necessary for "unincorporated" issue or industry groups, lawyers are well advised to review samples and checklists for forming partnerships, LLCs, and the like to draw from the collective experience on the types of issues to anticipate and address. See, e.g.,

- Partnership Agreement Checklist at: https://www.gabar.org/committeesprogramssections/programs/lpm/upload/pac.pdf
- Nellie Akalp, *7 Things Every Partnership Agreement Needs to Address,* Forbes (October 8, 2016) at https://www.forbes.com/sites/allbusiness/2016/10/08/7-things-every-partnership-agreement-needs-to-address/#3263bc323373, and Nellie Akalp, *What Should Your LLC's Operating Agreement Include?,* Score (June 1, 2017) at https://www.score.org/blog/what-should-your-llcs-operating-agreement-include

The level of detail required to anticipate and address issues will likely depend on whether the group will be a short- or long-lived group. Is the group coming together only to file an amicus brief? Then an engagement letter that addresses information sharing, payment terms, and what happens on conflict issues will suffice. Is the group coming together on a more sustained basis to monitor, report on, and engage in long-term advocacy on industry-impacting issues? Then, ensuring that the group has more detailed plans for addressing the longer list of issues through organizational documents and engagement letters will ensure that the lawyer's representation of the group stands up to a lawyer's duties under professional rules and persists over time as a group.

Whether in an engagement letter or some type of organizational document such as a membership agreement, for a lawyer to have authority to act for the group, the group needs to have "duly authorized constituents" (see Rule 1.13(a)) who can direct the lawyer's work on behalf of the group. Under Rule 1.2, a "lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." As comment [2] to Rule 1.2 recognizes, lawyers and clients may sometimes disagree about the means to be used to accomplish the client's objectives. If a lawyer is representing a group – whether on an enterprise basis or as an aggregate of individuals – the potential for disagreement about objectives and means multiplies. Notwithstanding the acknowledgement about the potential for disagreements, Rule 1.2 does little to chart a course for resolving disagreements: "Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved." Comment 2 to Rule 1.2. Thus the lawyer who fails to specify from whom or how the lawyer will take direction from "duly authorized constituents" will by "default" need to communicate with all members and on all questions regarding the objectives of the representation, the expense to be incurred, and how to navigate concern for third person who might be adversely affected and seek unanimous decision-making from the client. *Id.*

In terms of having a group that can effectively make decisions and direct a lawyer's work, a key issue is whether the group chooses to require unanimity or merely requires consensus to take action. A group that requires unanimity allows each member of the group a "veto power" that can effectively thwart action. A group may require "unanimity" if members prioritize control of the advocacy and fear serious consequences for association with a group from which its interests diverge. But a group that prioritizes unanimity should likewise provide for member "exits" – voluntary or involuntary – or risk paralysis and frustration of the purpose for which the group formed. For a group that will exist over time, consensus decision-making through a defined process is more workable. However, a group that selects consensus decision-making should consider defining some basic criteria for membership to safeguard against the risk that the "majority" will have materially different priorities than the minority. For example, a group formed to monitor legal developments or to advocate industry-based positions would want to specify that members must have a particular role in that industry to maximize the likelihood that the member interests will generally align. For example, a group focused on rules that affect the electric power industry may want to specify that members must be power generators, or power distributors, or similar such qualifications.

Because the group dynamic amplifies the challenges associated with potential disagreement and decision-making between and among the lawyer and client or clients, a lawyer necessarily plays a proactive role. Rather than more passively following the client's direction, the lawyer must proactively shape decisions in close consultation with the group's members or "authorized constituents." Indeed, lawyers may be catalysts for the group's formation to begin with, demonstrating how clients with similar interests can more economically monitor and impact development of the law as it affects their interests and providing clients a forum to harness a more powerful voice in shaping the law. The Preamble to the ABA Model Rules of Professional Conduct, cmts. [6], envision a proactive role for lawyers as members of a "learned profession" to "seek improvement of the law" and "employ that knowledge in reform of the

law." The Preamble, cmt. [1], recognizes that in service of clients, a lawyer will function as a counselor, advisor, advocate, negotiator, and evaluator in order to advance the group's mission.

*See* further discussion in Freivogel on Conflicts at:
http://www.freivogelonconflicts.com/tradeassociations.html

### 9. Representation of the "To-Be-Formed" Entity

Who is the client when a lawyer is approached by two or more would-be shareholders, members, or other type of equity owners (founders) to select and form an entity with independent existence, such as a corporation, limited liability company ("LLC"), limited liability partnership ("LLP"), or the like? As discussed above with respect to organizations without an independent existence under the law, the professional rules seem to recognize the ability to represent a "group" as an enterprise rather than as an aggregate of individuals. Again, this issue requires the lawyer to counsel the potential clients on the pros and cons associated with defining who is the client and then establish clarity in the engagement terms.

Nancy J. Moore in "Forming Start-Up Companies: Who's My Client?," 88 Fordham Law Review 1699 (2020) at http://fordhamlawreview.org/wp-content/uploads/2020/04/Moore_April_C_7.pdf, explains and evaluates three possible approaches to this scenario:

- Represent only one of the would-be shareholders;
- Represent the founders as joint clients (aggregate of individuals mentioned above), possibly with the understanding that the lawyer would later represent the resulting business entity;
- Represent the de facto partnership or "enterprise" in converting into a different entity that is legally recognized as a separate enterprise; or
- Represent the founders as joint clients in the formation stage but "retroactively convert" them to constituents of the entity instead of former clients after the entity has been established.

Moore explores the advantages and disadvantages of each approach, noting that few jurisdictions have addressed whether some form of "entity" representation is available preformation. *Id.* at 1700. Ultimately, Moore advocates that founders "are better off when the lawyer represents them individually in a joint representation, where appropriate." *Id.* at 1700-1701.

Here is an example of language that can be used in an engagement letter to address the client identity and scope of work as a "joint representation" on a pre-incorporation basis with an intent to convert to representation of the entity:

> Your intent is for us to represent the to-be-formed entity. Until that entity is formed, we will represent you jointly in your capacity as the equity owners (or founders) of that entity on the limited basis set forth below. Once the entity is formed, we will represent

the entity acting through its duly authorized agents, and our representation of each of you in your capacity as the equity owners (or founders) of that entity will cease.

By representing you jointly as equity owners (or founders) in the formation of the contemplated entity, we do not represent any of your respective individual separate interests vis-à-vis the other. You may wish to retain separate counsel for that purpose. Once the entity is formed, our representation of the entity will not create an attorney-client relationship with or representation of any point of contact individually, nor any parents, subsidiaries, affiliates, members, employees, officers, directors, managers, shareholders, partners, or other constituents or representatives of the contemplated entity.

Pre-incorporation, we will assist in the preparation of the formation documents for the to-be-formed entity. We will provide each of you with drafts, and on request, our legal analysis about the effect of any particular form of business entity and the general pros and cons of its structure relative to the goals of the contemplated business as a whole. We will also answer specific questions posed by one or more of you about the effect of any particular provision of the contemplated structure or governing documents. If we do so, we will convey our assessment to each of you in your capacity as representatives of the to-be-formed entity.

We will not negotiate or advocate on behalf of any one of you against any other relative to the business arrangement among you, including issues about relative ownership interest or control issues. To the extent that any of you wish to strategize or obtain legal advice that cannot be shared with the other, each agrees to seek counsel that is separate and independent from us, which counsel shall provide any separate legal advice that either of you may require without an obligation to share with us or the other. Each remains free to negotiate with the other directly or through their own separate and independent counsel.

As you agree to the principal business terms that determine the form of the business entity and its key attributes of ownership and governance, we will prepare or revise the applicable documents to reflect the business agreement and provide legal services to you jointly as anticipated equity members in connection with documenting these arrangements. We cannot carry out any direction relative to preparing the formation documents without the agreement of all of you.

> Once formed and upon request, we will represent the contemplated entity acting by and through its authorized agents as established in the formation documents. We will undertake that representation only after entering into an engagement letter with the new entity.
>
> You are not relying on us for, and we are not providing, any business, investment, insurance or accounting decisions or any investigation of the character or credit of persons with whom you may be dealing. We will perform all services normally and reasonably associated with this type of legal engagement that are consistent with our ethical and professional obligations.

There are many other terms to address in the engagement letter, but this captures the pre-incorporation joint representation as to the client identity and scope. The lawyer will also have to address the risks and benefits, including the potential for conflict issues, the sharing of information, file ownership, and payment terms. As to the payment terms, the lawyer should keep in mind that the founders may be expecting to pay with funds of the to-be-formed entity. The lawyer is well advised to draft the engagement to make the joint clients jointly and severally liable for the lawyer's fees to account for the potential that the entity will not be formed or adequately funded. The founders can then address the issue of reimbursement for those fees from the entity once formed and funded, and the lawyer then may not face a "third party payor" situation.

10. "**Joint Ventures**"

The term "joint venture" is often used loosely and imprecisely. One may use it in reference to a commercial enterprise undertaken jointly by two or more parties that otherwise retain their distinct identities. Alternatively, one may use the term to refer to an entity such as a partnership, LP, LLP, or LLC, formed by two or more entities or persons for a special purpose, specific project, or specific business transaction. There is not a ***predetermined*** right or wrong answer to who the lawyer represents but a lawyer who fails to gain clarity about whether the client is the "venture" – that is, both joint venturers together or the entity if an entity was formed – or a single participant in the "venture" is asking for unintended clients. *See* discussion in Freivogel on Conflicts of Joint Representations and Unintentional Joint or Multiple Representations at http://www.freivogelonconflicts.com/jointmultiplerepresentation.html.

In addition, consider, discuss, and counsel the potential clients on the possible scenarios and the impact on the questions identified in Section III(A) above. *See also, Norman v. Arnold*, 57 P.3d 997, 1001–02 (Utah 2002) (holding trial court erred in determining as a matter of law that a joint venture's attorney did not owe fiduciary duties to joint venturers, because record both indicated and undermined an implied attorney-client relationship even though individuals testified they understood he represented the joint venture and not their interests); *Turkey Creek, LLC v. Rosania*, 953 P.2d 1306, 1310–12 (Colo. App. 1998) (affirming summary judgment for lawyers on breach of fiduciary claim because they represented only one joint venturer, not other joint venturer or the joint venture, and stating that joint ventures are governed by the law of partnerships, under which a lawyer representing partnership does not automatically represent the partners); *Bauermeister v. McReynolds*, 253 Neb. 554, 566, 571 N.W.2d 79, 88 (1997) *opinion*

*modified on denial of reh'g*, 254 Neb. 118, 575 N.W.2d 354 (1998) (determining joint venture's lawyer did not have an attorney-client relationship with individual joint venturers); *Steinfeld v. Marks*, No. 96 CIV. 0552 (PKL), 1996 WL 438159, at *2–3 (S.D.N.Y. Aug. 2, 1996) (dismissing malpractice claim against joint venture's lawyer who, working with one joint venturer, negotiated licensing agreement on joint venture's behalf because plaintiff, by entering the joint venture, "appointed" the other "his agent" and therefore the joint venture's lawyer, "by definition, negotiated on behalf of" the complaining party by virtue of representing the joint venture itself); *Al-Yusr Townsend & Bottum Co. v. United Mid Est Co.*, No. CIV.A.95-1168, 1995 WL 592548, at *3 (E.D. Pa. Oct. 4, 1995) (stating that joint venturers' individual interests are so "intertwined . . . with those of the joint venture as a whole that it certainly would be reasonable" for joint venturer to expect the venture's attorney "is representing the individual member as well. Under Pennsylvania law, such an expectation is sufficient to form the basis of an implied attorney-client relationship"); *see also* William W. Horton, *Serving Two (or More) Masters: Professional Responsibility Challenges for Today's in-House Healthcare Counsel*, 3 J. Health & Life Sci. L. 187, 205–211 (2010) (discussing problems awaiting lawyer representing one party to a joint venture when the other joint venturer is not represented by his own counsel, including expectation by other joint venturer that the lawyer is his lawyer as well).

**The Project**: Often lawyers associate their representation with a particular project in which there are multiple stakeholders. Lawyers and clients may even describe their role as counsel for "the project" – whatever it may be. For example, joint venturers (see above) may come together to develop and operate a power plant. Multiple entities may be involved with differing roles. Subsidiaries may be created. Special purpose entities may be formed. All the various entities may have a common interest in the development and operation of the power plant and so the same lawyers may handle licensing or regulatory issues for the entity that holds any license to construct or operate. The same lawyers may handle the documents that create the various entities and memorialize service or ownership arrangements. Clients may want the convenience and efficiency of sharing common counsel in light of the common goals. The discussion above regarding "joint ventures" also applies to this particular scenario. That is, consider, discuss, and counsel the potential clients on the possible scenarios and the impact on the questions identified in Section III(A). Recognize the need to do so on an evolving basis and as new entities are created and as roles evolve or as participants enter and exit the "project," considering and reconsidering the conflict issues, and how information is shared and files kept. It is critically important for conflicts management to ensure that the names of all entities involved and their respective roles are captured.