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# Ethics *Unmasked*

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# KNOW YOUR CLIENT



**A Lawyer's Role as Gatekeeper Against Money  
Laundering and Terrorist Financing and Related  
Ethical Rules**

# Fun Fact or Fiction?



- A. The term “money laundering” was coined because of mobsters in the 1920s and 1930s who masked their illegally gained funds through their laundromat businesses.
- B. The term “money laundering” was popularized when it was first appeared in a judicial context in the case of **United States v. \$4,255,625.39**.
- C. The term “money laundering” came into common parlance during media coverage of the Watergate scandal.
- D. The independent inter-governmental “Financial Action Task Force” noted “significant gaps” in the anti-money laundering and counter-terrorist financing regulatory framework in the United States.

# KNOW YOUR CLIENT



- Bank Secrecy Act (1970)
- **Money Laundering Control Act (1986)**
- Anti-Drug Abuse Act of 1988
- Annunzio-Wylie Anti-Money Laundering Act (1992)
- Money Laundering Suppression Act (1994)
- Money Laundering and Financial Crimes Strategy Act (1998)
- Uniting & Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorist Act of 2001 (**USA PATRIOT Act**)★
- Intelligence Reform & Terrorist Prevention Act of 2004

The US was one of the first countries to make money laundering illegal

# KNOW YOUR CLIENT



- [U.S.: Money Laundering Control Act (**1986**)]

## World Stage:

- United Nations: Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)
  - Illegality of money laundering in regard to the drug trade
- **Financial Action Task Force (FATF) (1989) @ G7 Summit**
  - Includes 30 countries
  - Analyze money laundering trends
  - 40 Recommendations to combat money laundering



# KNOW YOUR CLIENT



## GENERAL AML/CTF

- Compliance officer
- Risk management practices & internal controls
- Client due diligence measures
- Reporting
- Record keeping
- Screening of relevant employees & agents
- 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>.



# KNOW YOUR CLIENT



## 2016 FATF Mutual Evaluation Report for the United States:

- Analyzed level of compliance with the FATF 40 Recommendations
- Analyzed level of effectiveness of the AML/CTF system
- Makes recommendations to strengthen

“Well developed and robust”

**Regulatory  
framework has  
“some  
significant gaps”**

Financial sectors bear most of the burden

# KNOW YOUR CLIENT



## 2016 FATF Mutual Evaluation Report for the United States:

### ➤ Minimal coverage:

- Investment advisers
- ★ • **Lawyers**
- Accountants
- Real estate agents
- Trust and company service providers (other than trust companies)



U.S. regulatory framework has “some significant gaps”

### ➤ **Beneficial ownership information: inadequate, untimely**



# POLL

Were you aware that many countries outside the United States already directly include lawyers in AML/CTF regulations?

- **YES**
- **NO**



# KNOW YOUR CLIENT



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

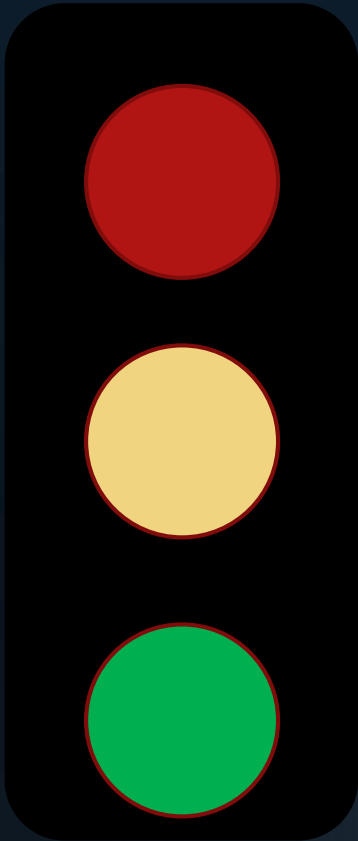


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# KNOW YOUR CLIENT



INDIRECT



Gatekeepers

## LAWYERS

DIRECT



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# KNOW YOUR CLIENT



## GENERALLY APPLICABLE SANCTIONS

- Bad People
- Bad Places
- Bad Activities



# KNOW YOUR CLIENT



## Vision

## Rules (1.2, 8.4)

### GATEKEEPER

- Rule of law
- Officers of the Court
- Guardians of the justice system
- No criminal acts
- No rule violations
- No dishonesty, fraud, deceit
- No assisting same

# KNOW YOUR CLIENT



## ABA Op. 491 (2020)

- **Duty to “inquire”**
- **Rule 1.2(d) +**
  - Competence [Rule 1.1]
  - Diligence [Rule 1.3]
  - Communication [Rule 1.4]
  - Honesty [Rule 8.4(b and c)]
  - Withdrawal [Rule 1.16(a)]

## GATEKEEPER

**“Depends on the circumstances”**

**“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 “**



# KNOW YOUR CLIENT



## ABA Opinion 491 **Circumstances that could trigger duty to inquire**

- identity of client
- familiarity with client
- nature of the matter
- relevant jurisdictions
- likelihood & gravity of harm
- nature & depth of lawyer's expertise in relevant field of practice
- other facts making trust in the client reasonable
- other factors traditionally associated with providing competent representation in the field

# KNOW YOUR CLIENT



ABA + International Bar Association + Council of Bars and Law Societies of Europe:  
“A **Lawyer’s Guide** to Detecting and Preventing Money Laundering”

Circumstances that might trigger a lawyer’s ethical duty to inquire further.

ABA Opinion 491  
**Duty to inquire**

FATF: **40 Recommendations**

Gatekeepers = Designated Non-Financial Businesses and Professions (“DNFBP”)



RISK ASSESSMENT

Country/ Geographic Risk	Client Risk	Service Risk
<p>Countries subject to sanctions, embargoes or similar measures issued by, for example, the UN</p> <p>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:</p> <ul style="list-style-type: none"><li>• generally lacking appropriate AML laws, regulations and other measures;</li><li>• being a location from which funds or support are provided to terrorist organisations; or</li><li>• having significant levels of corruption or other criminal activity.</li></ul>	<p>Domestic and international PEPs</p> <p>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)</p> <p>Charities and "not-for-profit" organisations that are not monitored or supervised by authorities or SROs</p> <p>Use of financial intermediaries that are neither subject to adequate AML laws nor adequately supervised by authorities or SROs</p>	<p>Where lawyers, acting as financial intermediaries, actually handle the receipt and transmission of funds through accounts they control</p> <p>Services to conceal improperly beneficial ownership from competent authorities</p> <p>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)</p> <p>Transfer of real estate between parties in an unusually short time period</p>





# KNOW YOUR CLIENT

## Lawyer's Guide/ 40 Recommendations

Report!

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### Client Intake Procedure

- Identify and verify the identity of each client on a timely basis (particularly if the client identity changes)
- Identify, and take reasonable measures to verify the identity of, the beneficial owner
- Understand client's circumstances and business, depending on the nature, scope and timing of services to be provided. You can obtain this information from clients during the normal course of their instructions

### Proceed with engagement?

- After completing the client intake procedure consider whether there is a risk for the lawyer of committing the substantive offence of money laundering though assisting the client
- Make a risk assessment of any red flags present and clarifications sought from the client to decide whether to proceed, or continue, with the engagement

### Monitor

- Continue to monitor the client's profile for signs of money laundering and terrorist financing, particularly if the client is a PEP or from a higher risk country
- Adopt the risk-based approach of evaluating money laundering and terrorist financing risks by client, type of legal service, funds and client's choice of lawyer

### If required and/or permitted, making an STR

If there are grounds for suspecting criminal proceeds are being used in a transaction or in engaging the lawyer, the lawyer should, where required, make an STR to the FIU of the relevant jurisdiction

- Consider whether the client should be advised to make its own STR to avoid committing a principal money laundering offence
- Consider whether to stop acting for the client immediately after making the STR if the client is the subject of the STR or if the client insists on completing a transaction in violation of applicable law

### Avoid Tipping Off

- When an STR is filed with the FIU, refrain from disclosing to the client or related parties that an STR has been filed



## Service Risk

- Suspicions about client or transaction
- Buying & selling real estate
- Managing/handling client money, securities, accounts, or other assets
- Organization of contributions for the creation, operation or management of companies
- Creation, operation or management of legal persons or arrangements & buying and selling of business entities

- Conduct customer due diligence
- Keep related records



## Customer Due Diligence

- For new clients, service risks, and suspicious circumstances
- Individual identity verification (government-issued photo identification)
- Entity verification
  - ✓ Independent, reliable source to confirm existence, jurisdiction in which created, and principal place of business
  - ✓ Beneficial ownership
- Verification of authority to act for entity (confirm identity and authority)
- Consistency of intended service with customer business ★

RISK ASSESSMENT v. COMPLIANCE





## **Enhanced** Customer Due Diligence

- Potentially exposed person? (“PEP”)
- Is client from, or is transaction in, high-risk countries?
  - ✓ Sanctions lists
  - ✓ Deficiencies in AML/CTF regulatory framework
  - ✓ Additional internal approvals
  - ✓ Scrutiny of source of wealth or funds
  - ✓ Ongoing monitoring of relationship

# POLL



How will legal services clients in the United States respond to identity/authority verification measures?

- A. Clients will not care even if not a regulatory requirement
- B. Clients will get used to it eventually
- C. If not a regulatory requirement, clients will be insulted
- D. If not a regulatory requirement, clients will go elsewhere



## **Enhanced** Customer Due Diligence

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## Relationship between client & counterparties

- Close relationships that cast doubt on reason for transaction
- Repeat players in short period of time
- Disguise real owners/parties
- Unqualified representatives
- From high risk countries
- No apparent business reason for connection
- Unusual age
- Disconnect between parties & operators

## Client's behavior or identity

- Secretive, evasive about
  - ✓ Identity
  - ✓ Source of funds
  - ✓ Transaction structure
- Criminal history
- Criminal associates

## Concealment techniques

- Intermediaries
- Avoidance of contact
- Reluctance to disclose verification
- False/counterfeit documentation
- No internet presence





## Size of funds

No legitimate explanation for:

- Disproportionate amount of private funding or cash
- Significant capital increase for recently incorporated or short time period
- Injection of capital out of synch with business, market
- Excessively high or low price on securities transferred
- Large financial transaction not justified by business
- Use of significant cash collateral

## Source of Funds

Source of funds unusual because:

- Third party – no apparent connection
- Funds to/from foreign country without connection
- Funds to/from high-risk country
- Multiple or foreign bank accounts
- Funding private expenditure
- Collateral in high-risk country

## Mode of Payment

- Asset purchased w/cash, then used as collateral for a loan

No legitimate explanation for:

- Unusually short repayment
- Repeated, significantly early payoff
- Finance other than a credit institution

# POLL



Will lawyers in the United States engage in identity/authority verification measures?

- A. Lawyers will do so voluntarily
- B. Lawyers will do so only to the extent it becomes a regulatory requirement
- C. Lawyers will do so only in the face of a significant threat of liability/enforcement



## SUMMARY

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Do things  
make  
sense?

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# Risk Assessment – Red Flags

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Is your  
“spidey  
sense”  
tingling?

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# Risk Assessment – Red Flags

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INVESTIGATE

✓ Lawyer's Guide  
40 Recommendations

✓ ABA Opinion 491

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# POLL

Have you asked or been asked for identity/authority verification documents?

- **YES**
- **NO**



# POLL

Have you asked or been asked to verify source of funds?

- **YES**
- **NO**



# POLL

Do you predict that the United States will directly include lawyers in AML/CTF regulations?

- *No, never*
- *Not within my professional life*
- *Not in the next 10 years*
- *I think it is coming, though I don't know how soon*
- *I think it is coming within 10 years*
- *I think it is coming but it will take more than 10 years*





# Ethical Obligations Potentially Triggered

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KNOW YOUR CLIENT

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- Counsel as to consequences
- Do not counsel client to engage in unlawful conduct
- Do not assist crime/fraud (“I didn’t know” not good enough)
- Speak up
- Decline, terminate representation
- Report up the organizational chain
- Report “out”?
- Report lawyers involved to bar
- Beware of accepting payment with proceeds of criminal conduct

# Ethical Obligations Potentially Triggered



KNOW YOUR CLIENT

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(1.1 (competence); **1.2** (scope, authority); 1.3 (diligence); 1.4 (communicate), **8.4(b, c)** (professional misconduct))

# Ethical Obligations Potentially Triggered



## KNOW YOUR CLIENT

- Counsel as to consequences
- Do not counsel client to engage in unlawful conduct
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- **Speak up**
  - Decline, terminate representation
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  - Beware of accepting payment with proceeds

### Rule 4.1:

**Shall not fail to disclose material fact to avoid assisting crime/fraud subject to 1.6**

### Rule 1.6:

- **Using lawyer's services in furtherance of crime/fraud**
  - **Disclosure to prevent substantial injury**

# Ethical Obligations Potentially Triggered



## KNOW YOUR CLIENT

- Counsel as to consequences
- Do not counsel client to engage in unlawful conduct
- Do not assist crime/fraud ("I didn't know" not good)
- Speak up
- Decline, terminate representation
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  - Report lawyers involved to bar
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### Rule 1.16:

- Shall decline/terminate if representation **will result** in violation of law
- May decline/terminate if lawyer **reasonably believes** client has used or persists in using lawyer services to commit crime/fraud



# Ethical Obligations Potentially Triggered



## KNOW YOUR CLIENT

- Counsel as to consequences
  - Do not counsel client to engage in unlawful conduct
  - Do not assist crime/fraud ("I didn't know" not good)
  - Speak up
  - Decline, terminate representation
  - Report up the organizational chain
  - Report "out"?
  - Report lawyers involved to bar
  - Beware of accepting payment with proceeds of criminal conduct
- Rule 1.13:**

  - Lawyer **knows** client agent is violating law, duty
  - Substantial injury to the organization is likely
  - Report out is necessary to prevent

# Ethical Obligations Potentially Triggered



## KNOW YOUR CLIENT

- Counsel as to consequences
- Do not counsel client to engage in unlawful conduct
- Do not assist crime/fraud (“I didn’t know” not a defense)
- Speak up
- Decline, terminate representation
- Report up the organizational chain
- Report “out”?
- Report lawyers involved to bar
- Beware of accepting payment with proceeds of criminal conduct

### Rule 8.3:

- Lawyer **knows** lawyer “*has committed*” Rule violation (crime, fraud)
- Substantial question as to fitness
  - “Shall report” to Bar
- Disclosure of 1.6 information is not required

# Questions? Comments?



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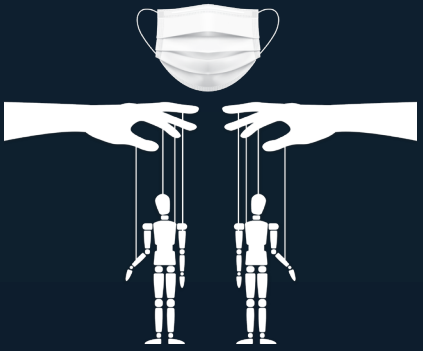


# DIVULGE YOUR CLIENT



When Lawyers Must Divulge Representative Capacity  
or Client Identity and the Related Ethical Rules

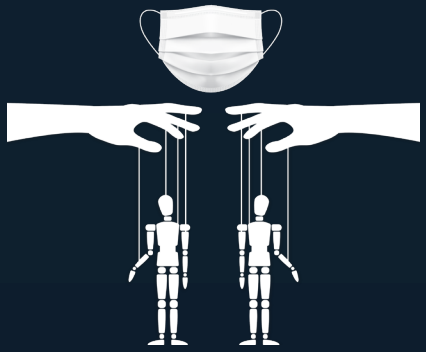




# DIVULGE YOUR CLIENT

Examples when anonymity or low profile might be desirable:

- FOIA request
- Inquiry to regulator for clarification, guidance
- Rule-, policy-, or law-making
- Factual investigation
- Real estate purchase



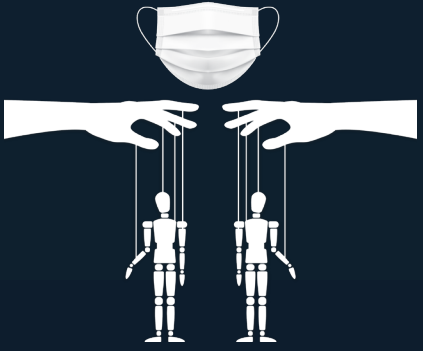
# DIVULGE YOUR CLIENT

POLL

I have asked/been asked to do legal work  
without divulging client identity

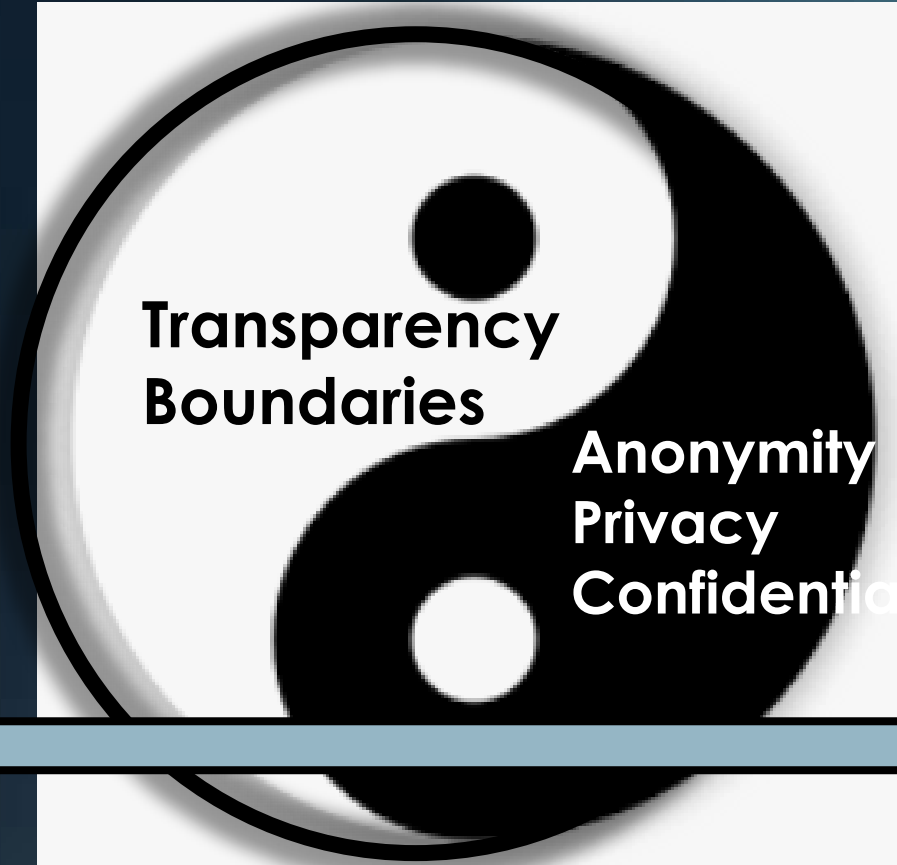
YES

NO



# DIVULGE YOUR CLIENT

Societal



“Sunlight is the best disinfectant.”

Gatekeeper –  
Guardians of the  
Justice System

“There is no freedom  
without the freedom to  
be anonymous.”

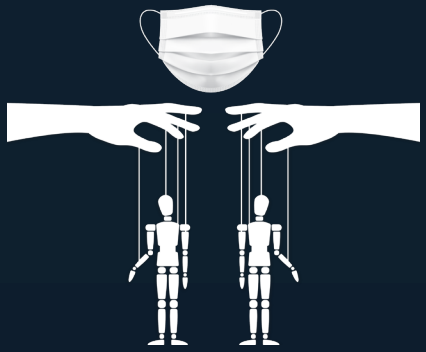
Privacy  
Backbone of the legal  
profession

Government  
Corporations

Individuals

Professional

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# DIVULGE YOUR CLIENT

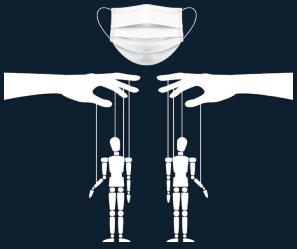
## Client Identity

Generally not privileged

Would the net effect of disclosure of identity be to reveal the nature of a client communication?

*Confidential*, but not absolute

Client & lawyer preferences at times must give way to requirement to disclose either representative capacity or client identity



# DIVULGE YOUR CLIENT

## *Allowing disclosure*

### ABA Rule 1.6

- Consent
- Impliedly authorized
- Prevent death/substantial harm
- Prevent, mitigate injury from client crime/fraud using lawyer services
- Secure legal advice for lawyer
- Establish claim or defense of lawyer
- To comply with law or court order
- To detect and resolve conflicts

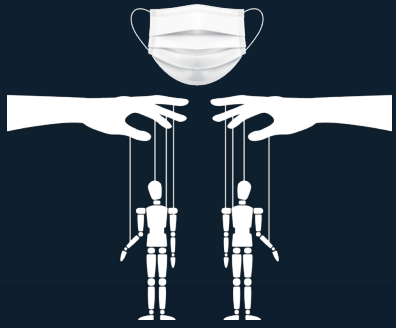
## *Requiring disclosure*

### Rule 1.6 in some states

- Prevent criminal act = death/substantial harm
- To comply with law or court order
- Prevent, mitigate injury from client crime/fraud using lawyer services
- To comply with Rules 3.3, 4.1

**Foreign Agents Registration Act (FARA)**

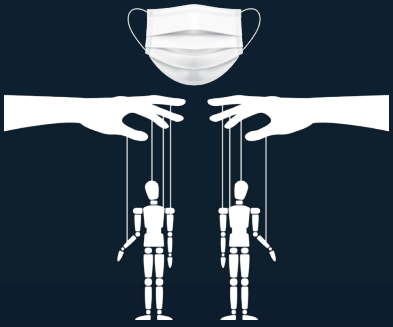




# DIVULGE YOUR CLIENT

- But what if they ask who is your client?
- Or reveal misunderstanding or assumption about client?

Rule	Context	
3.3(b)	Adjudicative Proceeding	Remedial measures (including disclosure to the tribunal) for crime/fraud related to the proceeding
3.9	Legislative body Administrative agency ★	Disclose <u>representative capacity</u> , comply with 3.3(a-c) (candor rule), 3.4(a-c) (fairness), 3.5 (impartiality of the tribunal)
4.1	In representing client ★	Disclose material fact to avoid assisting crime/fraud unless prohibited by R 1.6
4.3	Dealing with unrepresented person ★	Correct misunderstanding regarding lawyer's role (typically need to identify client, explain if interests are opposed)
6.4	Participation in law reform organization	Disclose if client may be materially benefitted by a decision in which the lawyer participates (not required to identify client)
8.3	Reporting professional misconduct	Does not require disclosure of information otherwise protected by Rule 1.6



# DIVULGE YOUR CLIENT

## IS ANONYMITY POSSIBLE UNDER ETHICAL RULES?

### LITIGATION

Pseudonym  
possible though  
unlikely

### AGENCY / LEGISLATIVE (NON- ADJUDICATIVE)

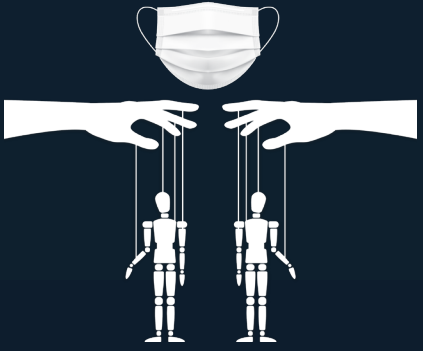
Representative  
capacity disclosed;  
may avoid identity  
disclosure

### VIS-À-VIS THIRD PARTIES

### CORPORATE ENTITIES

### ASSOCIATIONS, GROUPS, CONSORTIUMS

- No lies
- Disclose  
representative  
capacities
- Correct  
misunderstanding to  
avoid crime/fraud
- Correct  
misunderstanding as  
to representative  
capacity



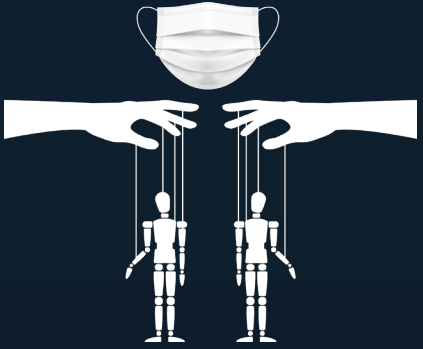
# DIVULGE YOUR CLIENT

DISCLOSURE TO COMPLY WITH LAW

R. 1.4 Duty to  
Communicate

## Foreign Agent Registration Act

- Registration, disclosure requirement
- Agent of foreign principal
- Engaged in identified activities
- Some exemptions
- Transparency regarding foreign influence in the U.S.
- Address threats to national security



# DIVULGE YOUR CLIENT

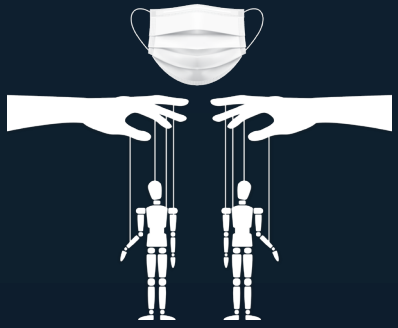
DISCLOSURE TO COMPLY WITH LAW

FARA

## Agent of Foreign Principal?

- Foreign government; political party
- Place of incorporation (formation); Principal place of business
- Citizenship; residency
- *Supervised, directed, controlled, financed, or subsidized by foreign principal*

Any person who acts at the order, request, or under the direction or control of any of these



## DIVULGE YOUR CLIENT

POLL

I am/have been a foreign agent (that is, am acting/have acted) for someone who would meet the definition of “foreign principal”).

YES

NO





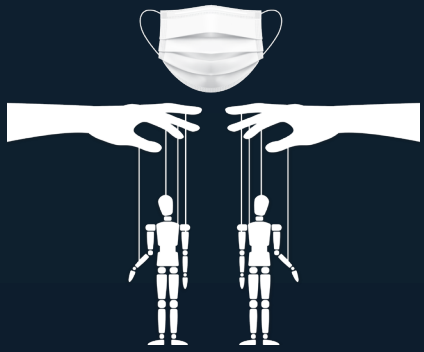
# DIVULGE YOUR CLIENT

DISCLOSURE TO COMPLY WITH LAW

FARA

## Activities that trigger registration, disclosure by “foreign agent”

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



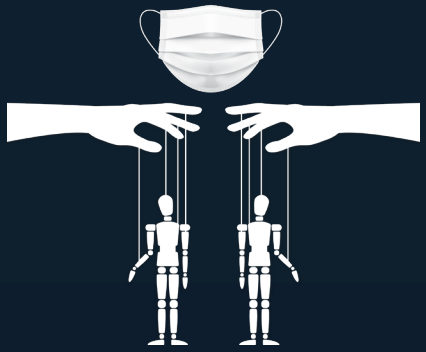
# DIVULGE YOUR CLIENT

DISCLOSURE TO COMPLY WITH LAW

FARA

## Activities that trigger registration, disclosure by “foreign agent”

- **Political activities** —————→ Seeking to influence any agency of official on domestic or foreign policies of the US or on political or public interests, policies, or relations of a foreign government, country, or political party
- Acts as public relations counsel, press employee or political consultant
- Solicits, disburses, or dispenses contributions or things of value for or in the interest of the foreign principals
- Represents the interests of the foreign principal before any agency or official of the Government of the United States



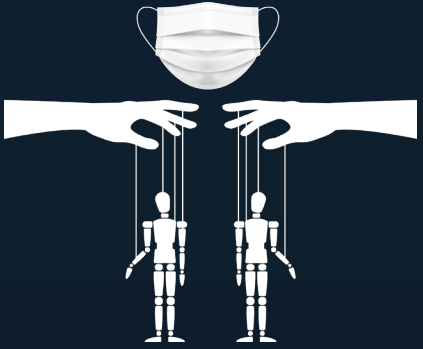
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- Represents the interests of the foreign principal before any agency or official of the Government of the United States



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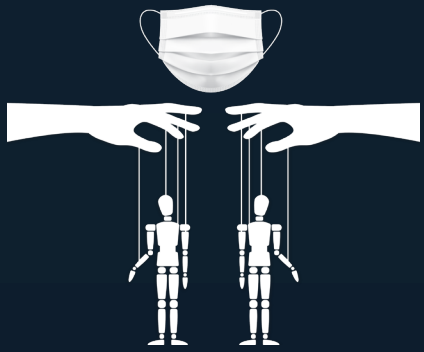
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- Represents the interests of the foreign principal before any agency or official of the Government of the United States

No elaboration in the statute or regulations



# DIVULGE YOUR CLIENT

DISCLOSURE TO COMPLY WITH LAW

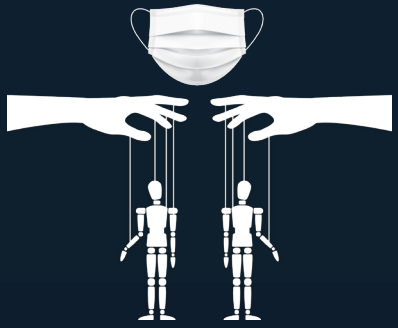
FARA

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- Solicits, disburses, or dispenses contributions or things of value for or in the interest of the foreign principal
- Represents the interests of the foreign principal before any agency or official of the Government of the United States

No elaboration in the statute or regulations, but see “exemptions” from registration for “legal representation” in “on the record” proceedings





## DIVULGE YOUR CLIENT

POLL

I am engaging/have engaged in FARA triggering activities for a “foreign principal”.

YES

NO



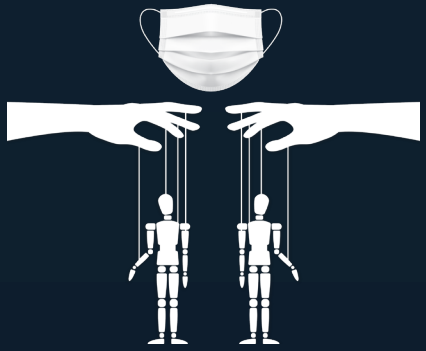
# DIVULGE YOUR CLIENT

DISCLOSURE TO COMPLY WITH LAW

FARA

## 8 exemptions to registration, disclosure requirements

- Diplomatic or consular officers
- Officials of foreign government
- Staff members of diplomatic or consular officers
- Private and nonpolitical activities & solicitation of funds (a/k/a “commercial exemption”) ★
- Religious, scholastic, or scientific pursuits
- Defense of foreign government vital to the United States defense;
- Persons qualified to practice law ★
- Agents of foreign principals who register under the Lobbying Disclosure Act ★



# DIVULGE YOUR CLIENT

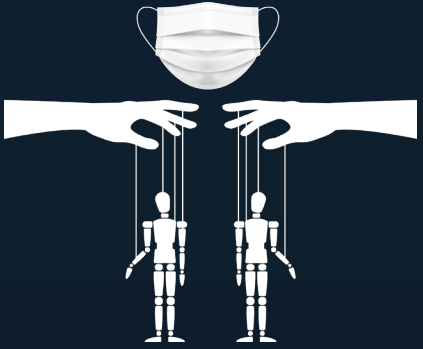
## Commercial Exemption ★

FARA

Exemption for persons who engage only in:

- 1) private and nonpolitical activities in furtherance of the bona fide trade or commerce of such foreign principal; **or**
- 2) other activities not serving predominantly a foreign interest

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.”



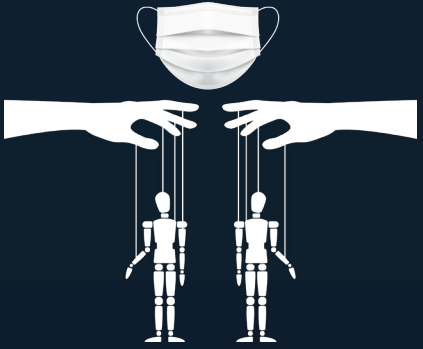
# DIVULGE YOUR CLIENT

## ★ Legal Representation Exemption

FARA

Exemption for practitioners in legal representations of:

- A “disclosed foreign principal before any court of law or any agency of the Government of the United States”
- 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.”



# DIVULGE YOUR CLIENT

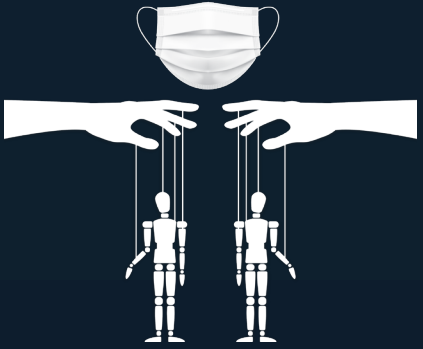
FARA



## Lobbying Disclosure Act Exemption

- Representation of foreign individuals or foreign corporations
- Registered under LDA
- Not applicable if foreign government is “principal beneficiary”

***Privilege, Confidentiality may or may not apply to lobbying activities (Rule 5.7, Law-related services)***



# DIVULGE YOUR CLIENT

FARA

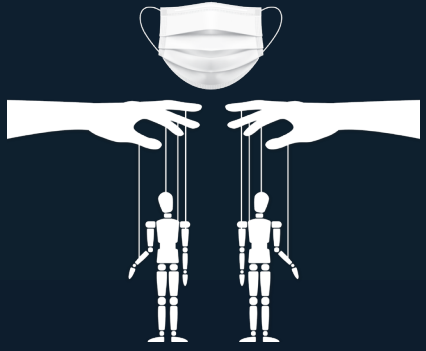
## Registration Considerations

- Registration statement will be publicly available
  - Includes engagement letter or contract
    - Fees received
  - Individuals register via short form
    - Opinion letters available

***Rules 1.1, 1.4, 1.6 (and 3.9 where adopted)***

- **Spot the issue**
- **Counsel the client**





# DIVULGE YOUR CLIENT

## Questions? Comments?



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# WHO IS YOUR CLIENT?



- Entity - Individual
- “Joint Venture”
- Affiliates
- Preformation
- Manager/Fiduciary
- Unincorporated Entities
- Insurers
- Indemnitors
- Third Party  
Discovery Targets
- The Project

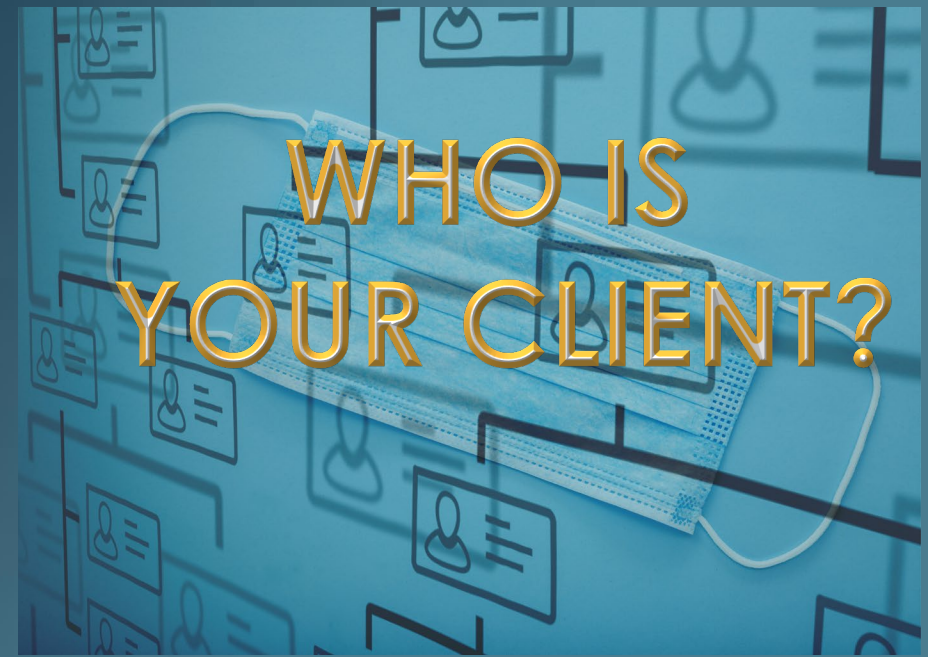


# WHO IS YOUR CLIENT?



- Fiduciary duties
- Professional duties
- Confidentiality
- Privilege
- Direction, decision-making
- Conflicts now & later
- File ownership

- Entity acting through “duly authorized constituents”
  - *Beware governance disputes*
- Closely held entities
  - Beware constituents -- may be or become clients
- Nature of the organization, how it is governed, who makes decisions, how are decisions made
- Individuals most likely to be confused
  - “Upjohn Warning”
  - *Bevill* factors
- Respect corporate separateness



Entity –  
Individuals,  
Constituents

Rules 1.1, 1.4, 1.13



# WHO IS YOUR CLIENT?

## Affiliates

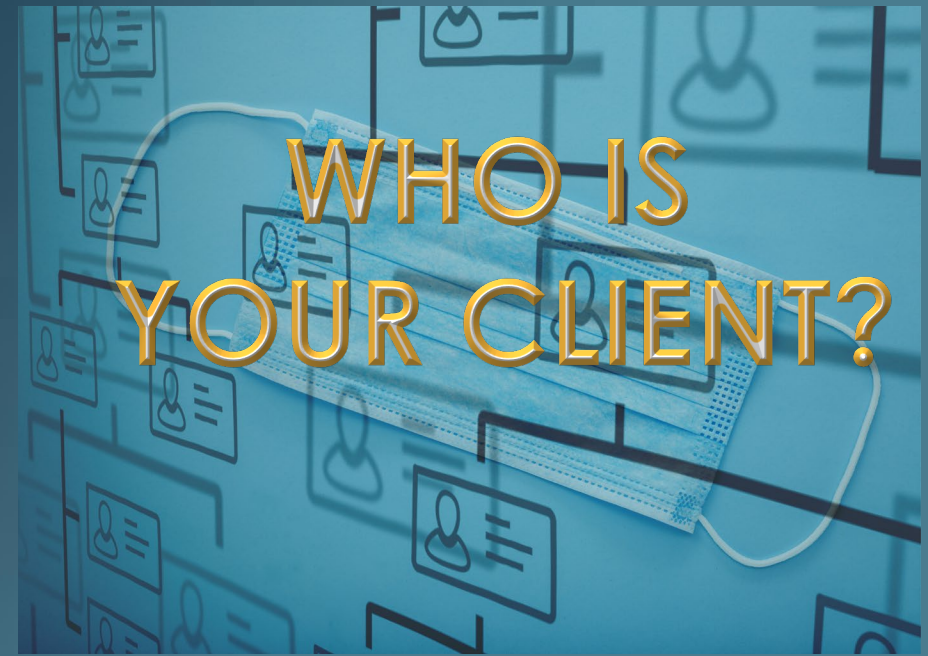
Rules 1.13, 1.4, 5.6  
ABA Opinion 95-390  
N.Y. Formal Op. 2007-3

- Entity acting through “duly authorized constituents”
- Representation of 1 entity does not mean lawyer acts for all affiliates
- Client’s “reasonable expectation?”
- Duty to communicate, explain impact of decision on affiliates
- Respect corporate separateness



# The challenge of government clients

- Entity acting through “duly authorized constituents”
  - Legislature
  - Executive
  - Agencies
    - ❖ Consider Constitutional and statutory authority to make decisions or select and direct counsel
- Level of government varies (like “affiliates” analysis)



Government  
Clients

Rules 1.1, 1.4, 1.13

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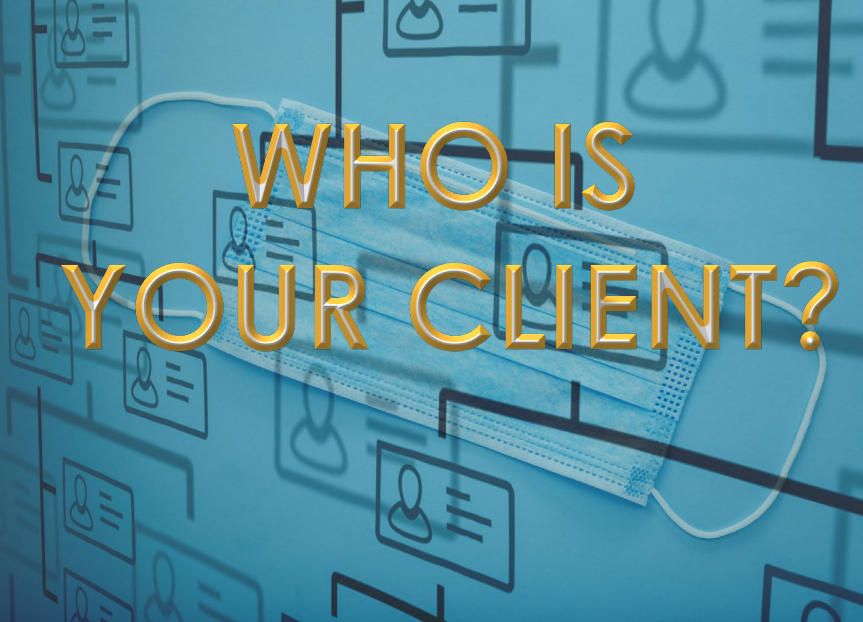




Single group?

Aggregate of individual  
members? **Joint clients!**

Unincorporated  
Entities



# WHO IS YOUR CLIENT?

WHAT DOES THIS MEAN?

What type of entity, if any?

“Joint  
Venture”

- Acting for the “entity”?
- Acting for the “venture partners”?
- Acting for one of the venture partners?



## Preformation

- Represent only one of the would-be shareholders
- Represent the founders as joint clients (aggregate of individuals)
  - Possibly represent resulting entity later
- Represent the de facto partnership or “enterprise” in in conversion to a different entity
- 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



# WHO IS YOUR CLIENT?

Manager/Fiduciary

Manager/Fiduciary  
as client

Obligations vis-à-vis the managed entity

v.

“Duly authorized agent” to retain the  
lawyer on behalf of the managed entity  
or the trust/beneficiary

Managed entity  
as client



- Right to “select” counsel?
- Pays counsel
- Set terms of engagement with counsel
- Approval of expenses
- Approval of settlement
- Insistence on loyalty from counsel
- Impose condition that the lawyers cannot advise the client on coverage issues
- Require communications while imposing on the lawyer the duty to avoid privilege waiver
- Check state laws governing insurance companies



Insurers

Rules 1.1, 1.4, 1.7, 1.8

- Providing common defense
- Plan for but take no role in disputes on indemnification terms
- Address:
  - Communications, decision-making
  - Potentially unique defenses
  - Third party payor
  - Approval of expenses
  - Approval of settlement
  - Potential for conflict
  - File ownership, privilege
- If you sign the pleading, it's a client
- Agreement terms vs. professional obligations
  - Even if a client is breaching a contract, a lawyer's professional duty is to the client



Indemnitors

Rules 1.1, 1.4, 1.7, 1.8





Third Party Discovery Targets

- **Reasons?**

- Economic efficiency
- Managing access
- Indemnification or employment obligation
- Protecting “privilege”

- **Risks!**

- Scope
- Conflicts
- Information sharing
- Payment



# WHO IS YOUR CLIENT?

The Project,  
The Deal

- Various unknowns at the outset
- Need advice before choosing structures
- When structures evolve, client identity may shift
- New participants may get added



Questions? Comments?

HUNTON  
ANDREWS KURTH