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Basic Principles of Ethics and Professional Responsibility

RTI International & Guyana Justice
Sector Reform Project

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Basic Principles of Ethics and Professional Responsibility

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PowerPoint Presentation: Basic Principles of Ethics and Professional Responsibility

BASIC PRINCIPLES OF ETHICS AND PROFESSIONAL RESPONSIBILITY

RTI International & Guyana Justice Sector Reform Strategy

May 18-25, 2008

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I. INTRODUCTION

- Because of the importance of lawyers to society, democracy, and good governance, the state must regulate the practice of law.
- In every state a bar association or law society or some type of self-regulatory organization (SRO) takes responsibility for implementing the state laws concerning the conduct of lawyers.



I. INTRODUCTION (2)

- Every bar association or law society must have effective implementation of the code of ethics.
- Proper regulation of legal professionals includes controlling entry into the profession; and receiving, investigating, and adjudicating complaints against members of the legal profession (e.g., by a Disciplinary Committee).



I. INTRODUCTION (3)

- The bar association or law society must also regularly provide instruction to lawyers on the practice, especially developments in ethical issues.
- The bar association has a critical duty to the state and the public at large to show that it is capable and in fact is effectively regulating lawyers.



I. INTRODUCTION (4)

- With globalization, international organizations, such as the U.N. or informal groups, such as the Financial Action Task Force on Anti-Money Laundering (FATF), are increasingly promulgating international good practice standards applicable to lawyers and legal professionals in certain circumstances.



I. INTRODUCTION (5)

- Globalization has also led to the establishment of international bar associations, which in turn have issued ethics codes. For instance, in 1956 the International Bar Association adopted an International Code of Ethics, which was revised in 1988.



I. INTRODUCTION (6)

- A key issue when a legal professional participates in an international transaction is which code applies.
- Determining which code applies requires a lawyer to determine which jurisdiction is involved.
- In some cases the lawyer must apply a conflicts of law analysis to determine the code that is applicable.
- In some transactions or circumstances a lawyer may have to follow multiple codes.



II. IN RELATION TO THE PROFESSIONAL AND HIMSELF

- An attorney-at-law, whether in practice or not, is required at all times to abide by the standards set forth in the code of ethics.
- An attorney must maintain his integrity and honor and dignity of the legal profession and his own standing.
- An attorney must protect scrupulously preserve his independence in the discharge of his professional duties.



II. THE PROFESSIONAL AND HIMSELF (2)

- An attorney practicing on his own account or in partnership must not engage in any other business or occupation if doing so may cause him to have a conflict of interest.
- An attorney must protect the profession against the admission the thereto of any candidate who is unfit for such admission.



II. THE PROFESSIONAL AND HIMSELF (3)

- It is unprofessional:
 - (a) to solicit business by circulars or advisements or interviews not warranted by personal relations;
 - (b) to seek retainers through agents of any kind.



II. THE PROFESSIONAL AND HIMSELF (4)

- Special circumstances, such as a conflict of interest of the professional of relevant and confidential information, may justify a lawyer's refusal to accept a particular employment.



III. IN RELATION TO THE STATE AND THE PUBLIC

- An attorney owes a duty to the State to maintain its integrity, its constitution, and its laws and not to aid, abet, counsel or assist anyone to act in any way contrary to those laws.



III. THE STATE & THE PUBLIC (2)

- An attorney must not stir up strife or litigation by seeking out defects in titles, claims for personal injury or other causes of action for the purpose of securing a retainer to prosecute a claim therefore; or pay or reward any person directly or indirectly for the purpose of procuring him to be retained in professional capacity, and where it is in the interest of his client, he shall seek to obtain reasonable settlements of disputes.



IV. IN RELATION TO CLIENTS

- An attorney must always act in the best interests of his client, represent him honestly, competently and zealously and endeavor by all fair and honorable means to obtain for him the benefit of any and every remedy and defense which is authorized by law.
- The interest of his client and the exigencies of the administration of justice should always be the first concern of an attorney and rank before the right to compensation for his services.



IV. CLIENTS (2)

- Before advising on a client's cause an attorney should obtain full knowledge thereof and give a candid opinion of the merits or demerits and probable results of pending or contemplated litigation.
- An attorney must at the time of retainer disclose to his client all the circumstances of his relations to the parties and his interest in or connection with the controversy (if any) which might influence the client in his selection of an attorney.



IV. CLIENTS (3)

- An attorney must scrupulously guard and never divulge his client's secrets and confidences.
- An attorney may represent multiple clients only if he can adequately represent the interests of each and if each consents to such representation after full disclosure of the possible effects of multiple representations.



IV. CLIENTS (4)

- In all situations where a possible conflict of interest arises, an attorney must resolve all conflicts by leaning against multiple representation.
- An attorney must deal with his client's business with all due expedition and must, whenever reasonably so required by the client, provide him with full information as to the progress of the client's business.



IV. CLIENTS (5)

- Where an attorney engages a foreign colleague to advise on a case or to cooperate in handling it, he is responsible for the payment of the latter's charges except if there is express agreement to the contrary, but where an attorney directs a client to a foreign colleague he is not responsible for the payment of the latter's charges, nor is he entitled to a share of the fees of his foreign colleague.



IV. CLIENTS (6)

- An attorney may at any time withdraw his services:
 - (a) Where the client fails, refuses or neglects to carry out an agreement with, or his obligation to, the attorney as regards the expenses or fees payable by the client;
 - (b) Where his inability with colleagues indicates that the best interest of the client is likely to be served by his withdrawal;



IV. CLIENTS (7)

- (c) Where by reasons of his mental or physical condition or other good and compelling reason it is difficult for him to carry out his services effectively;
- (d) In cases of conflict.



V. IN RELATION TO THE COURTS AND THE ADMINISTRATION OF JUSTICE

- An attorney should never seek privately to influence directly or indirectly the Judges of the Court in his favor or in the favor of his client nor should he try to curry favor with juries by fawning, flattery, or pretended solicitude for their personal conduct.



V. THE COURTS (2)

- Any attorney must expose without fear or favor before a proper tribunal, unprofessional or dishonest conduct by any other attorney and must not lightly refuse a retainer against another attorney who is alleged to have wronged his client or committed any other act of professional misconduct.



VI. IN RELATION TO HIS FELLOW ATTORNEYS-AT-LAW

- A duty exists on every attorney to report improper or unprofessional conduct by another attorney to the Disciplinary Committee, save where the information relating to the improper or unprofessional conduct is received in professional confidence in which case he must respect the duty of silence imposed in such circumstances.



VI. HIS FELLOW ATTORNEYS-AT-LAW (2)

- An attorney must expose without fear or favor before the proper tribunal unprofessional or dishonest conduct by another attorney and must not lightly refuse a retainer against another attorney who is alleged to have wronged a client.



VI. HIS FELLOW ATTORNEYS-AT-LAW (3)

- An attorney must not in any way communicate upon request a subject in controversy or try to negotiate or compromise a matter directly with any party represented by another attorney except through such other attorney or with such other attorney or with his prior consent.



VII. GENERAL

- Where in any particular matter explicit ethical guidance does not exist, an attorney must determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.



VIII. MANDATORY PROVISIONS AND SPECIFIC PROHIBITONS

- An attorney must not practice as such unless he has been issued a practicing certificate in accordance with the Act.
- An attorney must never knowingly mislead the Court.
- An attorney must not withhold facts or secret witnesses in order to establish the guilt or innocence of the accused.



VIII. PROVISIONS & PROHIBITONS (2)

- An attorney must not in the carrying on of his practice or otherwise permit any act or thing which is likely or is intended to attract business unfairly or can reasonably be regarded as touting or advertising.
- Most ethical rules regulate the types of cards, office signs and directory listings may be used by an attorney.



VIII. PROVISIONS & PROHIBITONS (3)

- Where an attorney commits any criminal offense which in the opinion of the Disciplinary Committee is of a nature likely to bring the profession into disrepute, such commission of the offense shall constitute professional misconduct if:



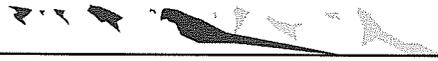
VIII. PROVISIONS & PROHIBITONS (4)

- (a) He has been convicted by any court, including a foreign court of competent jurisdiction, for the offense; or
- (b) Although he has not been prosecuted the Committee is satisfied of the facts constituting the criminal offense; or
- (c) He has been prosecuted and has been acquitted by reason of a technical defense or he has been convicted but such conviction is quashed by reason of some technical defense.



VIII. PROVISIONS & PROHIBITONS (5)

- An attorney must not acquire directly or indirectly by purchase, or otherwise a financial or interest in the subject matter of a case which he is conducting.
- An attorney must not enter into partnership or fee sharing arrangements concerning the practice of law with non-qualified bodies or persons.



VIII. PROVISIONS & PROHIBITONS (6)

- An attorney must not charge fees that are unfair or unreasonable.
- In determining the fairness and reasonableness of a fee the following factors may be taken into account:
 - (a) The time and labor required; the novelty and difficulty of the questions involved; and the skill required to perform the legal service properly;



VIII. PROVISIONS & PROHIBITONS (7)

- (b) The likelihood that the acceptance of the particular employment will preclude other employment by the attorney-at-law;
- (c) The fees customarily charged in the locality for similar legal services;
- (d) The amount, if any involved;
- (e) The time limitations imposed by the client or the circumstances;



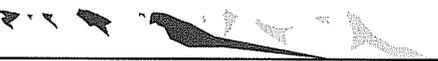
VIII. PROVISIONS & PROHIBITONS (8)

- (f) The nature and length of the professional relationship with the client;
- (g) The experience, reputation, and ability of the attorney concerned; and
- (h) Any scale of fees or recommend guide as to charges prescribed by law or by the Judicial Advisory Council.



VIII. PROVISIONS & PROHIBITONS (9)

- An attorney must not accept any fee or reward for merely introducing a client or referring a case or client to another attorney.
- Except with the specific approval of his client given after full disclosure, an attorney must not act in any manner in which his professional duties and his personal interest conflict or are likely to conflict.



VIII. PROVISIONS & PROHIBITONS (10)

- An attorney must not accept or continue his retainer or employment on behalf of two or more clients if their interests are likely to conflict or if his independent professional judgment is likely to be impaired.
- An attorney who withdraws must not do so until he has taken reasonable steps to avoid foreseeable prejudice or injury to the position and rights of his client including:



VIII. PROVISIONS & PROHIBITONS (11)

- (a) Giving due notice;
- (b) Allowing time for retaining another attorney;
- (c) Delivering to the client all documents and property to which he is entitled subject however to any lien which the attorney may have over the same;
- (d) Complying with such laws, rules or practice as may be applicable; and
- (e) Where appropriate, obtaining the permission where the hearing of the matter has started.



VIII. PROVISIONS & PROHIBITONS (12)

- An attorney who withdraws his services must refund promptly such part of the fees, if any, already paid by his client as may be fair and reasonable having regard to all the circumstances.
- An attorney must not retain money he received for his client longer than absolutely necessary.



VIII. PROVISIONS & PROHIBITONS (13)

- An attorney must withdraw forthwith his services or from a matter pending before a tribunal:
 - (a) Where the client insists upon his representing a claim or defense that he cannot conscientiously advance;
 - (b) Where the client seeks to pursue a course a conduct which is illegal or which will result in deliberately deceiving the Court;



VIII. PROVISIONS & PROHIBITONS (14)

- (c) Where a client has in the course of the proceedings perpetrated a fraud upon a person or tribunal and on request by the attorney has refused or is unable to rectify the same;
- (d) Where his continued service will involve him in the violation fo the law or a disciplinary rule;



VIII. PROVISIONS & PROHIBITONS (15)

- (e) Where the client by any other conduct renders it unreasonably difficult for the attorney to carry out his services as such effectively, or in accordance with the judgment and advice of the attorney, or the rules of law or professional ethics;
- (f) Where for any good and compelling reason it is difficult for him to carry out his service effectively.



VIII. PROVISIONS & PROHIBITONS (16)

- An attorney must never disclose, unless lawfully ordered to do so by the Court or required by statute, what has been communicated to him in his capacity as an attorney by his client and this duty not to not to disclose extends to his partners, to junior attorneys assisting him and to his employees provided however that an attorney may reveal confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against accusations of wrongful conduct.



VIII. PROVISIONS & PROHIBITONS (17)

- An attorney must not give, lend or promise anything of value to a judge, juror or official of a tribunal before which there is a pending matter in which he is engaged.



VIII. PROVISIONS & PROHIBITONS (18)

- An attorney must not pay or offer to pay or acquiesce in the payment of compensation to a witness for giving evidence in any cause or matter save as reimbursement for expenses reasonably incurred and as reasonable compensation for loss of time in attending for preparation and for testifying, and in the case of an expert witness a reasonable fee for his professional services.



VIII. PROVISIONS & PROHIBITONS (19)

- An attorney must not knowingly use perjured testimony or false evidence or participate in the creation of or, use of evidence which he knows to be false.



VIII. PROVISIONS & PROHIBITONS (20)

- An attorney must not counsel or assist his counsel or witness in conduct that the attorney knows to be illegal or fraudulent, and where he is satisfied that his client has in the course of the particular representation perpetrated a fraud upon a person or tribunal, he must promptly call upon him to rectify the same.



VIII. PROVISIONS & PROHIBITONS (21)

- An attorney must not knowingly make a false statement of law or fact.
- An attorney must keep such accounts as clearly and accurately distinguish the financial position between himself and his client as and when required.



VIII. PROVISIONS & PROHIBITONS (22)

- An attorney must comply with such rules as may be made the Judicial Advisory Council, but nothing will deprive an attorney of any recourse or right whether by right of lien, set-off, counterclaim, charge or otherwise against monies standing to the credit of a client's account maintained by that attorney.



VIII. PROVISIONS & PROHIBITONS (23)

- An attorney must reply promptly to any letter from the bar association relating to his professional conduct.
- Breach by an attorney of any rules contained in the mandatory provisions constitutes professional misconduct and an attorney who commits such a breach is liable to any of the penalties which the Disciplinary Committee recommends and which the Court of Appeal is empowered to impose.



VIII. PROVISIONS & PROHIBITIONS (24)

- Breach by an attorney of any of the provisions in the non-mandatory part of the Code, while not automatically amounting to punishable professional misconduct, is derogation from the high standards of conduct expected from an attorney and may, depending on the circumstances of the particular case, amount to punishable professional misconduct or form a material ingredient thereof.



IX. GUYANA LEGAL PRACTITIONERS ACT

- Compared to other codes of ethics, the Guyana Legal Practitioners Act (GLPA) is brief.
- For instance, the Barbados Legal Profession Code of Ethics (LPCE) has 90 rules while the GLPA has 37. Rules 25-37 concern discipline and the rules of discipline.



IX. GLPA (2)

- The American Bar Association's Model Rules of Professional Conduct (MRPC) contain 58 rules.
- In the U.S. each state bar enacts its old rules which are modeled on the MRPC.
- A very important feature of the state bar codes of ethics is that each state issues ethics opinions.



IX. GLPA (3)

- The ABA Standing Committee on Ethics and Professional Responsibility, charged with interpreting the professional standards of the Association and recommending appropriate amendments and clarifications, issues opinions interpreting the Model Rules of Professional Conduct and Code of Judicial Conduct.



IX. GLPA (4)

- The ABA publishes the opinions of the Committee in a series of hard-bound volumes containing opinions from 1924 through 1998, and the current loose-leaf subscription service, Recent Ethics Opinions, starting in 1999.



IX. GLPA (5)

- Compared to the Barbados LPCE, the GLPA has comparatively few provisions on the legal profession in relation to the profession and himself (Part II of the LPCE) and in relation to the state and the public (Part III of the LPCE).
- The GLPA appears not to provide for many of the basic principles of the rules of professional conduct.



IX. GLPA (6)

- In particular, the GLPA does not provide for:
 - (1) confidentiality of information;
 - (2) conflict of interest with respect to current clients;
 - (3) duties to former clients;
 - (4) declining or terminating representation;
 - (5) professional independence of a lawyer and the issue of sharing fees



IX. GLPA (7)

- (7) diligence;
 - (8) communication; and
 - (9) reporting professional misconduct.
- It appears that a substantial part of the GLPA was enacted many decades ago and could be modernized.



X. SUMMARY & CONCLUSION

- Legal codes of ethics necessarily must be reevaluated periodically with an eye to making them current in light of evolving trends in the jurisdiction where they are applicable.
- While model legal codes of ethics exist, each country's code of ethics must meet the exigencies and culture of the country in which they apply.



X. SUMMARY & CONCLUSION (2)

- Increasingly international regulatory developments, especially on topics such as anti-money laundering (AML) and counter-terrorism financial enforcement (CTFE), are requiring legal professionals to conform to new standards.



X. SUMMARY & CONCLUSION (3)

- A difficult aspect is that each country is implementing these standards in different ways, so that a disparity exists. For instance, while in the U.K. and many EU countries lawyers must make suspicious activity reports (SARs) to regulatory authorities, many countries have not yet required lawyers to make SARs.



X. SUMMARY & CONCLUSION (4)

- Most likely, the Caribbean Financial Action Task Force and CARICOM, especially in view of the CSME, will eventually act to harmonize the AML and CFTE standards with respect to lawyers.
- These standards are so compelling and far-reaching that I have included in my materials papers, materials, and hypotheticals on these emerging standards.



XI. ADDITIONAL READING MATERIALS

- Ronald D. Rotunda, Legal Ethics in a Nutshell (West Nutshell Series) (Paperback - May 12, 2007)
- Mortimer D. Schwartz, Problems in Legal Ethics (Nutshell Series) (Hardcover – Jan. 1988).
- Charles W. Wolfram, Wolfram's Hornbook on Modern Legal Ethics (Hornbook Series) (1986).



XI. READING MATERIALS (2)

- American Bar Association, *Annotated Model Rules of Professional Conduct* (5th ed. 2003),
- *Regulation of Lawyers, Statutes and Standards*, annual.
- American Bar Association, *Opinions of the Committee on Professional Ethics, with the Canons of Professional Ethics, Annotated, and the Canons of Judicial Ethics, Annotated*.



XI. READING MATERIALS (3)

- **State Bar Web Sites**, <http://www.abanet.org/cpr/links.html>. Alphabetical listing of all states, with bar associations and rules of professional conduct. These sites are very good for tracking changes to state codes.
- Robert H. Aronson & Donald T. Weckstein, *Professional Responsibility in a Nutshell* (2d ed. 2006).



XI. READING MATERIALS (4)

- Geoffrey C. Hazard & W. William Hodes, *The Law of Lawyering* (3d ed. 2001). This two-volume looseleaf treatise is a commentary on the Model Rules. It is updated annually.



XI. READING MATERIALS (5)

- American Law Institute, *Restatement of the Law Third: The Law Governing Lawyers* (2000).
- Although the title indicates that this is part of the Restatement Third, it is the first attempt to restate the law of legal ethics.
- The Restatement is intended to clarify and synthesize the common law applicable to the legal profession.



XI. READING MATERIALS (6)

- The topics covered include: Regulation of the Legal Profession; The Client-Lawyer Relationship; Client and Lawyer: The Financial and Property Relationship; Lawyer Civil Liability; Confidential Client Information; Representing Clients - In General; Representing Clients in Litigation; Conflicts of Interest.



XI. READING MATERIALS (7)

- **Web Sites:**
- The Internet provides an inexhaustible amount of legal ethics materials of both primary and secondary authority.
- An increasing number of government bodies, agencies, and special interest groups disseminate ethics materials via the Web.



XI. READING MATERIALS (8)

- I found the following sites to be useful when performing legal ethics research on the Net.
- **American Legal Ethics Library**, Cornell Law School Legal Information Institute Cornell's digital library contains ethics commentary and offers both the codes and rules for the professional conduct of lawyers organized by state. <http://www.law.cornell.edu/ethics/>



XI. READING MATERIALS (9)

- **Legalethics.com**
Offers links to articles, rules and information relating to Internet ethics issues. Includes links to other ethics resources available on the Internet. <http://www.legalethics.com>
- **ABA Center for Professional Responsibility**
Provides access to ABA publications, reports, opinions and headnotes. Also offers the ABA's online research



XI. READING MATERIALS (10)

- Service **ETHICSearch**, which analyses ethical dilemmas and assist inquirers identify appropriate standards and interpretive materials to resolve those dilemmas. <http://www.abanet.org/cpr/>
- **Findlaw**
Use Findlaw as a gateway to State Bar Associations and their ethics rules and opinions. This site also links to various articles, commentary, briefs and other documents on legal ethics. <http://www.findlaw.com/01topics/14ethics/index.html>



XI. READING MATERIALS (11)

- **Hieros Gamos**
Hieros Gamos acts as a comprehensive gateway offering links to an extensive number of articles, ethics commentary (some in audio), associations, rules, codes, and opinions. Also links to various discussion groups on legal ethics. <http://www.hg.org/practic.html>

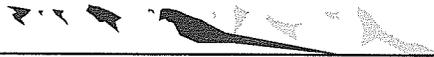


XI. READING MATERIALS (11)

- **The Virtual Chase**

The site Virtual Chase provides a basic overview of legal ethics and offers links to other Internet sites accessing legal ethics research.

<http://www.llrx.com/columns/ethics.htm>



XI. READING MATERIALS (12)

- Caribbean and English Ethics Materials
- Commonwealth **Caribbean Legal Literature: 1986-1995** by Velma Newton ... **Legal ethics** and lawyer advertising: A bibliography by Velma Newton.
- **Essential Professional Conduct: Legal Ethics**
by *Geoff Monahan, David Hipsley* Published 01/25/2007
- Accessible and student-friendly this new edition has been fully updated and revised and includes substantial new material and a comprehensive table of cases.



XI. READING MATERIALS (13)

- **Ethics of the Legal Profession (Hardcover)**

by Sir Fred Phillips (Author) (2004).



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Ethical Issues in Offshore Planning (2007)

ETHICAL ISSUES IN OFFSHORE PLANNING

**American Bankers Association -American Bar Association
Money Laundering Enforcement Conference**

Washington D.C.

Oct. 21-23, 2007

by Bruce Zagaris

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**American Bankers Association -American Bar Association
Money Laundering Enforcement Conference, Washington D.C., Oct. 21-23, 2007
ETHICAL ISSUES IN OFFSHORE PLANNING¹**

by Bruce Zagaris²

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Practitioners involved in international estate and tax planning work face a growing web of financial rules and regulations.⁴ This paper discusses ethical issues in international planning involving tax, business, and estate law issues. In particular, it examines the application of due diligence and “know-your-client” principles to lawyers involved in wealth planning and management. It reviews developments in anti-tax haven initiatives, particularly those emanating from the Organization for Economic Cooperation and Development (OECD), the Financial Action Task Force (FATF), and the Financial Stability Forum (FSF). The paper considers the limits of “bank secrecy” and changes in the ethical rules governing a practitioner’s ability to disclose fraud and wrongdoing by a client. Finally, the paper offers practical lessons for U.S. practitioners facing increasingly complex regulatory regimes.

I. FATF INITIATIVES: NON-COOPERATIVE COUNTRIES AND TERRITORIES, GATEKEEPERS, AND MISUSE OF CORPORATE VEHICLES

FATF has developed three initiatives that deal with ethical issues in offshore planning: one against non-cooperative countries and territories, another involving gatekeepers, and a third relating to the misuse of corporate vehicles. To some extent the initiatives overlap, although some target specific countries and territories while others target certain population sectors such as lawyers and accountants.

A. The Initiative Against NCCTs

On February 14, 2000, FATF released its report on non-cooperative countries or territories (NCCTs). In the report, FATF identified rules and practices that hinder the effectiveness of money laundering prevention and detection systems, as well as the results of members’ judicial enquiries in this arena, in order to determine criteria for defining NCCTs. FATF members also agreed on a process for identifying non-cooperative jurisdictions and on the necessary international action to encourage compliance by such jurisdictions.⁵

The principal objective of the NCCT initiative is to reduce the vulnerability of the financial system to money laundering by ensuring that all financial centers adopt and implement measures for the prevention, detection and punishment of money laundering according to internationally recognized standards.⁶

⁴ Much of this paper is a reprint of Bruce Zagaris, *Offshore Coming Onshore: How the Disparity of the Application of International Standards Has Created Prejudice*, which was prepared for 16th Oxford Offshore Symposium, Sept. 3-9, 2006. It has been updated and changed somewhat for this program.

⁵ FATF, *Report on Non-Cooperative Countries and Territories*, Feb. 14, 2000, at 1.

⁶ FATF, More information about the Non-Cooperative Countries and Territories Initiative (NCCT), FATF Web site (<http://www.fatf-gafi.org>), accessed Sept. 1, 2005.

1. *Recommendation 21*

FATF has indicated that for all jurisdictions on the NCCTs list, FATF Recommendation 21 applies. Recommendation 21 provides that: “Financial institutions should give special attention to business relationships and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply the FATF Recommendations. Whenever these transactions have no apparent economic or visible lawful purpose, their background and purpose should, as far as possible, be examined, the findings established in writing, and be available to help competent authorities. Where such a country continues not to apply or insufficiently applies the FATF Recommendations, countries should be able to apply appropriate countermeasures.”

In accordance with Recommendation 21, FATF recommends that financial institutions focus on activity coming from the “non-cooperative countries and territories” and in so doing take into account issues raised in relevant summaries of the annual NCCT reports and any progress made by these jurisdictions since being listed as NCCTs.

FATF itself does not determine what measures financial institutions must take. It is up to individual jurisdictions to determine specifically how to apply this recommendation; including whether or not to process a transaction or report it as a suspicious transaction. It is up to each country to issue its own specific guidance or regulations with which financial institutions must comply. Many countries have issued such guidance.⁷ The market access implications of the NCCT initiative arise out of Recommendation 21.

2. *The Review and Listing Process*

The February 2000 NCCTs report laid out the basic procedure for reviewing countries and territories as part of this initiative. FATF established four regional review groups (Americas, Asia/Pacific, Europe, Africa/Middle East) composed of representatives from the FATF member governments that serve as the main points of contact with the reviewed country or territory.

Countries were selected for review based on FATF members’ experience on a priority basis. The review groups gathered relevant laws, regulations and other information, analyzed this information against the 25 criteria, and drafted a report that was sent to the jurisdictions for comment. Each reviewed jurisdiction provided comments on their respective draft reports. These comments and the draft reports themselves were discussed by FATF and the jurisdictions during a series of face-to-face meetings. Subsequently, the draft reports were discussed and adopted by the FATF Plenaries.

A total of 47 countries or territories were examined in two rounds of reviews (in 2000 and 2001). 23 were subsequently listed as NCCTs – 15 in 2000 and eight in 2001. The FATF has

⁷ FATF, *NCCTs FAQ*, FATF website accessed on Sept. 1, 2005.

not reviewed any new jurisdictions since 2001. At its June 2006 Plenary meeting, the FATF removed Nigeria from the NCCT list.⁸ In October 2006, FATF removed the last remaining country, Myanmar, from the NCCT list.⁹

B. The Gatekeeper Initiative

Understanding the recommendations for gatekeepers requires a summary review of the FATF's revised recommendations. FATF is an informal international group formed in 1989 out of the G-7 meetings. Although it FATF has no legal personality and its recommendations are only "soft law" and hence not binding on governments or the private sector, it has developed an initiative against non-cooperative countries. The initiative and the FATF recommendations require governments and the private sector to give enhanced scrutiny and take other measures against transactions from jurisdictions whose laws and regulations do not comport with international standards. The U.S. Treasury has issued guidance and warnings to U.S. financial institutions to implement the FATF initiative against non-cooperative countries. Indeed, Sec. 311 of the USA PATRIOT Act requires the U.S. executive to monitor and take regulatory and enforcement measures against such transactions, financial institutions, and countries.

The International Monetary Fund (IMF) has used the evaluations to assess compliance with international anti-money laundering standards, although it has adopted the FATF Recommendations in devising its review procedure. As a result of the involvement of the IMF, the initiative against non-cooperative countries has gained additional legitimacy.

On June 23, 2003, FATF issued a new set of its Forty Recommendations. The Recommendations include: an expansion of predicate offenses, coverage of persons responsible for due diligence (e.g., casinos, real estate agents, dealers of precious metals/stones, accountants, lawyers, notaries and independent legal professionals, trust and company service providers), and the change to an objective standard of "suspicion" to make suspicious activity reports. The extension of many anti-money laundering requirements to cover terrorist financing bring enormous transformations of the law and will exert significant pressures and challenges on governments, international organizations, and the private sector to implement all the changes. All this takes place at a time when much of the world is still trying to adjust to the first generation of anti-money laundering standards. The FATF exercise was important because for the first time it allowed the private sector to have access to some of the documents in which the proposed recommendations were discussed. FATF also held two oral meetings with interested private sector groups to obtain comments on the proposed recommendations.

⁸ FATF, *Annual Report 2005-2006* (June 23, 2006).

⁹ Bruce Zagaris, *FATF Holds Vancouver Plenary, Removes Last Country from NCCT, and Issues Reports on New Payment Technologies and Corporate Vehicles*, 22 INT'L ENFORCMEENT L. REP. 459 (Dec. 2006).

The new recommendations, when combined with the nine special recommendations for counter-terrorism financial enforcement, create a comprehensive and strengthened international framework for combating money laundering and terrorist financing.

1. *Predicate Offenses*

Recommendation (Rec.) 1 provides that countries should criminalize money laundering on the basis of the 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the 2000 U.N. Convention on Transnational Organized Crime (the Palermo Convention). Countries are to “apply the crime of money laundering to all serious offenses, with a view to including the widest range of predicate offenses.” FATF suggests that countries describe predicate offenses by reference to all offenses, or to a threshold linked either to a category of serious offenses or to the penalty of imprisonment applicable to the predicate offense (threshold approach), or to a list of predicate offenses, or a combination of these approaches. If a threshold approach is used, the paper suggests the inclusion of offenses that are punishable by a maximum penalty of more than one year’s imprisonment. For those countries that have a minimum threshold for offenses in their legal system, predicate offenses should include all offenses punishable by a minimum penalty of more than six months imprisonment. In addition, the paper advises that predicate offenses for money laundering should cover conduct that occurred in another country, which constitutes an offense in that country, and which would have constituted a predicate offense had it occurred domestically.

2. *Intent and Knowledge*

Rec. 2 provides that the intent and knowledge required to prove the offense of money laundering should be consistent with the standards set forth in the Vienna and Palermo Conventions, including that such mental state may be inferred from objective factual circumstances (hence, a person can be convicted for being “willfully blind” or whatever the equivalent legal concept may be in a jurisdiction). Criminal and/or civil or administrative liability should apply to legal persons and should not preclude parallel criminal, civil or administrative proceedings with respect to legal persons in countries in which such forms of liability should apply to legal persons.

3. *Prevention Measures by Financial Institutions and Non-Financial Businesses and Professions*

Recs. 4 through 12 set forth measures to prevent money laundering and terrorist financing.

a. *Overriding Secrecy* – Rec. 4 requires countries to ensure that financial institution secrecy laws do not inhibit implementation of the FATF Recommendations.

b. *Customer Due Diligence and Record-keeping*. Rec. 5 requires that

financial institutions not keep anonymous accounts or accounts in obviously fictitious names.

Financial institutions must undertake customer due diligence (CDD) measures, including identifying and verifying the identity of their customers, when: establishing business relations; undertaking occasional transactions: (i) above the applicable designated threshold; or (ii) that are wire transfers in the circumstances covered by the Interpretative Note to Special Recommendation VII; (iii) a suspicion of money laundering or terrorist financing exists; or (iv) the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.

Financial institutions must undertake the following CDD measures: (i) identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information; (ii) identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner such that the financial institution is satisfied that it knows who the beneficial owner is; (iii) obtaining information on the purpose and intended nature of the business relationship; and (iv) conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds.

Although financial institutions should apply each of the CDD measures under (i) to (iv) above, they may determine the extent of such measures on a risk sensitive basis depending on the type of customer, business relationship or transaction. The measures taken should be consistent with any guidelines issued by competent authorities. For higher risk categories, financial institutions should perform enhanced due diligence. In certain circumstances, where low risks exist, countries may decide that financial institutions can apply reduced or simplified measures.

c. Politically Exposed Persons (PEPs) – In relation to PEPs financial institutions should, in addition to performing normal due diligence measures, (i) have appropriate risk management systems to determine whether the customer is a PEP; (ii) obtain senior management approval for establishing business relationships with such customers; (iii) take reasonable measures to establish the source of wealth and source of funds; and (iv) conduct enhanced ongoing monitoring of the business relationship.

d. International Correspondent Banking and Similar Relationships – Under Rec. 7 financial institutions should conduct enhanced due diligence with respect to cross-border correspondent banking and similar relationships (e.g., “payable-through-accounts”).

e. New or Developing Technologies – Rec. 8 requires financial institutions to pay special attention to any money laundering threats that may arise from new or developing technologies that may favor anonymity (e.g., cyber accounts or transactions) and take measures, if required, to prevent their use in money laundering schemes.

f. *Reliance on Intermediaries or Third Parties* – To perform elements (i) - (iv) of the CDD process or to introduce business, countries can allow financial institutions to rely on intermediaries or other third parties, although the ultimate responsibility for customer identification and verification remains with the financial institution relying on the third party. (Rec. 9).

g. *Maintenance of Records* – Financial institutions must maintain for at least five years all necessary records on transactions to enable them to comply swiftly with information requests from the competent authorities. (Rec. 10).

h. *Complex and Unusual Transactions* – Financial institutions must pay special attention to “all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose.” (Rec. 11).

i. *CDD for Designated Non-Financial Business & Professions* – The CDD and record-keeping requirements in Recommendations 5,6, and 8 to 11 apply to designated non-financial businesses and professionals in the following situations: (a) casinos when customers engage in financial transactions equal to or above the applicable designated threshold; (b) real estate agents when they are involved in transactions for their client concerning the buying and selling of real estate; (c) dealers in precious metals and dealers in precious stones when they engage in any cash transaction with a customer equal to or above the applicable designated threshold; (d) lawyers, notaries, other independent legal professionals and accountants 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; organization of contributions for the creation, operation or management of companies; creation, operation or management of legal persons or arrangements and buying and selling of business entities; and (e) trust and company service providers when they prepare for or carry out transactions for a client concerning the activities listed in the definition in the Glossary.

4. *Suspicious Transaction Reporting*

Rec. 13 states that, if a financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to terrorist financing, the institution be required directly by law or regulation, to promptly report its suspicions to the financial intelligence unit (FIU).

Under Rec. 14, financial institutions, their directors, officers and employees should be (a) protected by legal provisions from criminal and civil liability for breach of any restriction on disclosure of information imposed by contract or by any legislative regulatory or administrative provision, if they report their suspicions in good faith to the FIU, even if they did not report precisely what the underlying criminal activity was, and regardless of whether illegal activity actually occurred; and (b) prohibited by law from disclosing the fact that a suspicious transaction report (STR) or related information is being reported to the FIU.

Under Rec. 15 financial institutions should develop programs against money laundering and terrorist financing. The programs should include: (a) the development of internal policies, procedures and controls, including appropriate compliance management arrangements, and adequate screening procedures to ensure high standards when hiring employees; (b) an ongoing employee training program; and (c) an audit function to test the system.

Rec. 16 provides that Recs. 13 to 15 and 21 apply to all designated non-financial businesses and professionals, subject to some qualifications.

5. *Other Measures to Deter Money Laundering and Terrorist Financing*

Rec. 17 requires countries to ensure that effective, proportionate and dissuasive sanctions are available to deal with natural or legal persons covered by the Recommendations when they fail to comply with anti-money laundering (AML) or terrorist financing (TF) requirements. Rec. 18 says that countries should not approve the establishment or accept the continued operation of shell banks. Rec. 19 requires that countries consider implementing feasible measures to detect or monitor the physical cross-border transportation of currency and bearer negotiable instruments, subject to strict safeguards to ensure proper use of information and without impeding in any way the freedom of capital movements. Rec. 20 requires countries to consider applying the FATF Recommendations to businesses and professions, other than designated non-financial businesses and professions, that pose a money-laundering (ML) or TF risk.

6. *Measures for Countries Not in Compliance with FATF Recommendations*

Rec. 21 requires financial institutions to give special attention to business relationships and transactions with persons, including companies and financial institutions from countries that insufficiently apply the FATF Recommendations. Rec. 22 requires financial institutions to ensure that the principles applicable to financial institutions are also applied to branches and majority owned subsidiaries located abroad, especially in countries which do not apply or insufficiently apply the FATF Recommendations, to the extent that local applicable laws and regulations allow.

7. *Regulation and Supervision*

Under Rec. 23 countries must ensure that financial institutions are subject to adequate regulation and supervision and are effectively implementing the FATF Recommendations. Rec. 24 requires that designated non-financial businesses and professionals be subject to regulatory and supervisory measures set forth in the Recommendations. Rec. 25 requires competent authorities to establish guidelines, and provide feedback that will assist financial institutions and designated non-financial businesses and professions in applying national measures to combat ML and TF and especially in detecting and reporting suspicious transactions.

8. *Institutional Measures Necessary to Combat Money Laundering and Terrorist Financing*

Rec. 26 requires countries to establish a FIU that serves as a national center to receive and request analysis and dissemination of STR and other information concerning potential ML or TF. According to Rec. 27 countries should ensure that designated law enforcement authorities have responsibility for ML or TF investigations and are encouraged to support and develop special investigative techniques suitable for the investigation of ML, such as controlled delivery, undercover operations and other relevant techniques. Rec. 28 requires competent authorities to be able to obtain documents and information when conducting investigations of ML and underlying predicate offenses. Rec. 29 requires supervisors to have adequate powers to monitor and ensure compliance by financial institutions with requirements to combat ML and TF, including the authority to conduct inspections. Rec. 30 requires countries to provide their competent authorities involved in combating ML and TF with adequate financial, human and technical resources. Under Rec. 31 countries must ensure that policy makers, the FIU, law enforcement and supervisors have effective mechanisms in place that enable them to cooperate, and where appropriate coordinate domestically with each other concerning the development and implementation of policies and activities to combat ML and TF. Rec. 32 provides countries to ensure that the competent authorities can review the effectiveness of their systems to combat ML and TF systems by maintaining comprehensive statistics on matters relevant to the effectiveness and efficiency of such systems.

9. *Transparency of Legal Persons and Arrangements*

Rec. 33 requires countries to take measures to prevent the unlawful use of legal persons by money launderers, in part by ensuring that there exists adequate, accurate and timely information on the beneficial ownership and control of legal persons that competent authorities can obtain or access in a timely way. Under Rec. 34 countries should take measures to prevent the unlawful use of legal arrangements by money launderers, especially to ensure that there exists adequate, accurate and timely information on express trusts.

10. *International Cooperation*

Rec. 35 requires countries to immediately take steps to become part to and implement fully several international conventions on ML and TF. Rec. 36 requires countries to “rapidly, constructively and effectively” give the widest range of mutual legal assistance with respect to ML and TF investigations, prosecutions, and related proceedings. Countries should render mutual assistance notwithstanding the absence of dual criminality (Rec. 37). Countries must be able to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate laundered property, proceeds from money laundering or predicate offenses, instrumentalities used in or intended for use in the commission of these offenses, or property of corresponding value. (Rec. 38). Countries must recognize money laundering as an extraditable offense and facilitate the simplification of extradition. (Rec. 39).

11. Other Forms of Cooperation

Rec. 40 requires countries to ensure that their competent authorities provide the widest possible range of international cooperation to their foreign counterparts, including clear and effective gateways to facilitate the prompt and constructive exchange directly between counterparts.

12. Analysis

The revised recommendations constitute significant transformations of the law of anti-money laundering. The convergence of anti-TF and ML is a major transformation, especially since the nature of TF and the requirements to meet the methodologies of TF will require significant legal, technical, financial, and cultural changes among governments, international organizations, and the private sector. Can institutional infrastructure support the implementation of such considerable expansions of the law? The considerable costs of the technology to conduct software searches of all the names on TF alone is a substantial undertaking. Perhaps more importantly, in many parts of the world countries are still trying to make the significant legal and cultural changes required by the first generation of anti-money laundering laws. The international community faces a situation where it is not clear that the law, especially international law, can keep pace with technology and politics. A key factor to watch with respect to the politics will be whether the FATF methodology for making legislative policy passes muster with non-FATF member countries and the private sector. In any event, for professionals interested in AML and TF, the revised 40 recommendations are monumental and their implementation will be important to watch.

C. FATF Holds Gatekeeper Meeting

In November 2006, FATF convened a meeting with gatekeepers from over forty organizations, including bar and accounting associations and representatives of trust and company service providers (TCSPs).

Richard Chalmers, Advisor on Offshore Financial Centers and International Policy Coordination and EU Affairs, Financial Services Authority (FSA) and John Carlson (JC), Principal Administrator, FATF and a Canadian attorney, were the principal architects of the meeting. At the beginning of the meeting, Chalmers expressed his hope that FATF and the gatekeepers could identify two or three key issues to address going forward.

Chalmers acknowledged bar association concerns over the impact of the FATF standards on the attorney-client relationships. At the end of the meeting, however, Chalmers noted that FATF is not looking to renegotiate the standard, which is reviewed in a 5-7 year period. Instead, FATF is looking for areas where interpretation or clarifications can help professional implement the standards.

FATF's possible topics for future dialogue include:

1. Recommendations 5 and 9 and sharing of customer due diligence (CDD) information, reliance on third parties to perform CDD, and the "ultimate responsibility" requirement.
2. With references to Recommendations 12 and 16, where is the line drawn? What are "financial transactions," and how can the five bulleted activities be applied in practice? Who and what is covered by the "independent legal professionals" language?
3. Private sector consultation on the risk based approach as applied to attorneys, accountants, notaries, and trust and company service providers (TCSPs), to follow consultations with the banking and securities sector. Anticipated for after June 2007.
4. Comparative study of how different countries apply the legal professional privilege/professional secrecy, and the resulting potential for regulatory arbitrage and linkage to confidentiality more generally. FATF currently leaves this to national governments, but needs to understand the scope in different countries.
5. Protection for gatekeepers making suspicious activity reports.
6. Identifying best practices regarding education of professionals.
7. Effective regulation and oversight by SROs/competent authorities.
8. Is there effective and consistent implementation? Comparative study of mutual evaluation reports.

In the context of the recently released FATF typology on the misuse of corporate vehicles, including trust and company service providers, the November 2006 U.S. Treasury advisory on the abuse of shell companies, and the U.S. Senate hearings on incorporation procedures, there is significant pressure for stricter regulation of gatekeepers and TSCPs. FATF's recent meeting illustrates its efforts to improve private sector outreach, especially to regulated sectors. FATF convened two prior meetings, the most recent in April 2003, prior to the promulgation of the FATF revised standards.

D. FATF Issues Typology Report on Misuse of Corporate Vehicles

Corporate vehicle transparency requirements are closely related to the gatekeeper initiative. Both the FATF and OECD have standards on transparency of corporate vehicles. On these and other goals of AML and harmful tax practices the requirements overlap.

On October 13, 2006, FATF released a new typology report, *The Misuse of Corporate Vehicles, Including Trust and Company Service Providers*. The report, which seeks to identify

areas of vulnerability for money laundering and terrorist financing and evidence of misuse, examined a series of case studies of the misuse of corporate vehicles and noted key elements and patterns of abuse. The study also analyzed the results of a survey conducted to obtain a better picture of international diversity in the formation and administration of corporate vehicles. The report suggests a number of areas that may merit stricter regulation to prevent criminals from exploiting corporate vehicles.

1. Concerns and Methodologies

The principal concern is the ease with which corporate vehicles can be created and dissolved in some jurisdictions, allowing them to be misused by those involved in financial crime to conceal the sources of funds and their ownership of the vehicles. In February 2000, FATF found that shell corporations and nominees were widely used to launder criminal proceeds, especially bribery. The ability of competent authorities to obtain and share information regarding the identification of companies and their beneficial owner(s) was therefore essential to prevent and punish money laundering.

After establishing a team of experts on corporate vehicle formation and administration, especially the formation and administration of shell companies, and on regulatory action and law enforcement in this field, FATF conducted a survey to obtain a fuller picture of international diversity in the formation and administration of corporate vehicles. The team focused first on the most significant feature of the misuse of corporate vehicles – the hiding of the true beneficial ownerships.

2. Typologies

The study reviewed four typologies. The first, multi-jurisdictional structures of corporate entities and trusts, considers how such structures obfuscate money movements and can divert or conceal payments.

Typology two, specialized financial intermediaries/professionals, probes the involvement of a specialized financial intermediary or professional in facilitating the formation of an entity and exploiting the opportunities presented by foreign jurisdictions to employ various arrangements that can be used for legitimate purposes, but also can be used to help conceal true beneficial ownership, such as corporate shareholders, corporate director and bearer shares. The extent of complicity of these financial intermediaries and professionals varies widely, with some unknowingly facilitating illicit activities and others having greater knowledge of their clients' illicit purposes.

Typology three, nominees, examines the extent to which nominees may be used to mask the identities of beneficial owners. Typology three groups the use of nominees into three categories: nominee bank accounts, nominee shareholders, and nominee directors.

Typology four concerns the use of shell companies to launder criminal proceeds through real estate investment.

3. *Overall Findings and Conclusions*

The report concludes that the prevention of misuse of corporate vehicles for money laundering could be improved by determining a company's ultimate beneficial owners and a trust's trustees, settlors, and beneficiaries. States could also ascertain the purposes of using corporate vehicles, foreign jurisdictions for incorporation or administration, and complex structures. Because many structures are established and/or managed by trust and company service providers, it might be advisable to require TCSPs to gather and maintain such information.

The report also notes that as long as complete, current information on beneficial ownership exists, it does not matter who maintains it. The corollary to this conclusion is that competent authorities, especially across jurisdictional lines, must know where relevant information can be obtained in each jurisdiction. Both the OECD and IOSCO have emphasized that it is important for competent authorities to be able to cooperate domestically and internationally to share relevant information on beneficial ownership.

The report found that company registries are an important first step in obtaining information about the structure of suspicious corporate vehicles. Hence, such registries should be as comprehensive and as up-to-date as possible. Similarly, legal ownership information held by other public entities, such financial regulatory or stock exchange filings, should also be accurate and current.

The report concludes by noting the need to strike a balance between robust and unnecessary regulation. In developing further guidance for this area, regulators and international organizations should consider the potential impact of regulations on economic performance, market integrity, market efficiency, market transparency and incentives.

4. *Issues for Consideration*

The report suggests that FATF and international organizations, in preventing corporate vehicles and their activities from misuse by criminals, consider the following questions:

(1) Are the existing AML/CFT standards as a whole adequate to discourage the misuse of corporate vehicles?

(2) Are the specific FATF Recommendations 12, 16 and 24 sufficient as a basis for dealing with the issue of corporate vehicle misuse?

(3) What more can be done to ensure that adequate, accurate and timely information on the beneficial ownership and control of legal persons/legal arrangements may be obtained or accessed in a timely fashion by competent authorities?

(4) What can be done to ensure that those engaged in the formation and administration of

corporate vehicles are “fit and proper”? Is there a need for an international standard for TCSPs or professionals engaged in providing trust and company services?

(5) What steps can and should be taken to ensure that the actions of those engaged in the formation and administration of corporate vehicles are properly monitored or subject to investigation as necessary?

(6) Should TCSPs be regulated or should there be enhanced regulation or such service providers, including lawyers and accountants where they offer similar services?

(7) Should existing corporate governance standards (such as the OECD Principles) be extended to include factors relating to the role of TCSPs, lawyers and accountants in relation to the potential misuse of corporate vehicles?

(8) Should guidance in other forms be produced, such as risk assessment checklists, to help the competent authorities focus their risk-based approaches in relation to the different types of misuse of legal persons and legal arrangements:

(9) What beneficial ownership information should be held?

(10) What more needs to be done to enhance the effectiveness of company registers, and other publicly available information?

(11) Is there any practical action that needs to be or can be taken to enhance the information publicly available in respect of legal arrangement.

Regardless of the individual impact of the newest typology report, it appears that the November 2006 FATF gatekeeper meeting, coupled with the U.S. Treasury advisory on the misuse of shell companies and the Senate subcommittee hearing on company formation, is pressuring jurisdictions for stronger regulatory regimes for gatekeepers and TCSPs.

II. OECD HARMFUL TAX PRACTICES INITIATIVE

In May 1996, the OECD Council of Ministers requested that the OECD Committee on Fiscal Affairs “develop measures for countering harmful tax competition on investment and financing decisions and the consequences for national tax bases.” The OECD Committee on Fiscal Affairs established a task force known as the “Special Sessions on Tax Competition” to implement the request. At a meeting convened on April 8, 1998, the Council of Ministers adopted the Report and issued a series of recommendations to members.⁷ Luxembourg and Switzerland abstained and released statements, explaining their opposition to the report.

A. Purposes and Coverage

The OECD Report seeks to develop a better understanding of how tax havens and harmful preferential tax regimes affect the location of financial and other service activities. The OECD Report is directed expressly at tax havens. The OECD Report is meant to influence countries that are not members of the OECD.

⁷ OECD, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE (1998).

B. Definition of Harmful Tax Competition

In the absence of a definition of harmful tax competition, the OECD Report distinguishes between tax havens and harmful preferential tax regimes in otherwise high tax jurisdictions. According to the Report, the problem of harmful tax competition starts with no taxation or a low rate of taxation.

The Report concentrates on four key factors to identify tax havens: no or only nominal taxes; lack of effective exchange of information; lack of transparency; and no substantial activities. Four key factors also identify harmful preferential tax regimes in otherwise high tax countries: no or low effective tax rates; “ring fencing” of regimes; lack of transparency; and lack of effective exchange of information.

Eight other factors help determine the existence of harmful preferential tax regimes: artificial definition of the tax base; failure to adhere to international transfer pricing principles; exemption of foreign source income; negotiable tax rate or tax base; existence of secrecy provisions; access to a wide network of tax treaties; regimes which are promoted as tax minimization mechanisms; and the encouragement of purely tax driven arrangements.

C. Specific Measures Recommended

The OECD Report recommends fifteen action items. Seven concern domestic legislation and practices, seven concern tax treaties, and one concerns intensified international cooperation, including the establishment of a Forum on Harmful Tax Practices (“the Forum”). One recommendation is that countries undertake programs to increase the exchange of relevant information concerning transactions in tax havens and preferential tax regimes constituting harmful tax competition.⁸ The report calls for making greater use, *inter alia*, of the Multilateral Convention for Mutual Assistance in Tax Matters in force in Denmark, Finland, Iceland, the Netherlands, Norway, Poland, Sweden, and the U.S.

The OECD report recommends that countries consider terminating their tax conventions with tax havens and consider not entering into tax treaties with such countries in the future. The OECD report also calls for coordinated enforcement regimes in relation to income or taxpayers benefitting from practices constituting harmful tax competition.⁹

A sensible approach would seem to be a balanced treaty approach with responsible jurisdictions which, while having low-tax provisions, agree to cooperate on enforcement. One model would be the U.S. tax information exchange agreement (TIEA) program started during the Caribbean Basin Initiative (CBI). Unfortunately the CBI TIEA program, although theoretically

⁸ OECD, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 46 (1998).

⁹ *Id.* at 50-51.

providing economic carrots to CBI countries, was in reality quite short on appropriate carrots. President Reagan originally proposed investment tax credits. Eventually, Congress agreed only to offer North American convention deductions that allow Americans attending conventions in CBI TIEA countries to take deductions in a liberalized fashion as though they were attending conventions in North America. Since the 1980s, the alternative minimum tax has reduced the value of deductions. In any case, a person genuinely attending a convention can justify the deduction even if it is outside North America. Hence, the North American convention deductions have marginal relevance to the CBI countries.

D. Opposition of Luxembourg and Switzerland

In its statement of opposition, Luxembourg questioned the definition and basis of the OECD Report. It notes that the exclusion of industrial and commercial activities makes the Report “a partial and unbalanced approach” that does not fulfill the 1996 OECD mandate.

Luxembourg also protests that the Report gives the impression that, rather than countering harmful tax competition, it is directed at abolishing bank secrecy. In this connection, Luxembourg believes that “bank secrecy is necessarily a source of harmful tax competition.” Luxembourg objects to exchange of information serving as a criterion to identify a harmful preferential tax regime and a tax haven.

Luxembourg draws the line that international administrative assistance in tax matters must be subject to certain conditions and precise limits, in accordance with general legal principles and respective national legislation rather than broad and unfettered restrictions.¹⁰

Luxembourg believes that it is essential that the OECD Report require countries with dependencies to contribute actively so that these territories do not remain exempt from the fight against harmful tax competition. Similarly, harmful tax competition resulting from special ties that a country has with tax havens cannot remain out of bounds, especially since Luxembourg competes with such jurisdictions.

The Swiss Government also opposed the Report and felt it was partial and unbalanced. The OECD started with the aim of adopting a comprehensive approach to tax competition, but subsequently the scope of the work was restricted “to geographically mobile activities, such as financial activities and other services.” In addition, the Swiss statement correctly explains that financial and investment decisions depend on a multiplicity of economic, political, and social factors. Although the Report recognizes that other important non-tax factors play a role in economic competitiveness, it does not integrate them and hence, has made partial and erroneous evaluations of reality.

¹⁰ For an excellent review of the OECD study, see Richard J. Hay, *War of the (Offshore) Worlds: OECD Level Playing Field Report*, TAX PLANNING INT’L REVIEW (BNA Int’l June 2006).

The Swiss Government believes that “a certain degree of competition in tax matters has positive effects. In particular, it discourages governments from adopting confiscatory regimes, which hamper entrepreneurial spirit and hurt the economy, and it avoids alignment of tax burdens at the highest level.” Similarly, the Swiss Government focuses on the legitimacy and necessity of protecting the confidentiality of personal data. In this connection, the OECD Report and Recommendations are, in certain aspects, in conflict with the Swiss legal system.

The Swiss explain that the OECD Report, albeit recognizing that each State has sovereignty over its tax system and the variations of the level of taxation among states, presents the fact that tax rates are lower in one country than in another as a criterion to identifying harmful preferential tax regimes. The OECD Report thereby unacceptably protects countries with high levels of tax contrary to the economic philosophy of the OECD.

Setting the stage for a growing controversy, the Swiss Government is leading a robust defense against pressure from the European Union and the OECD to further reduce financial confidentiality to assist international tax enforcement.¹¹ Already the Swiss abstained from the adoption of the OECD Harmful Tax Competition Report and issued a strong statement that it would violate fundamental privacy rights among other reasons. The deal that it struck with the EU in the savings tax initiative has enabled them to both maintain some of its financial privacy.

E. Additional Developments

In response to opposition by small offshore financial centers (SOFCs) and many commentators, the OECD created a Global Tax Forum consisting in part of SOFCs and deferred the HTP initiative deadline. Due to the Bush administration’s intercessions, the mandatory components to define a tax haven were reduced to transparency and tax information exchange. The Global Forum has prepared and promulgated model TIEAs for use by countries.

1. OECD Global Forum 2005 Meeting in Melbourne¹²

In November 2005, more than 130 representatives of 55 governments, the Commonwealth Secretariat, and the European Commission met in Melbourne, Australia, to review progress towards a level playing field based on high standards of transparency and effective exchange of tax information.¹³ The meeting ended inconclusively with both the OECD

¹¹ William Hall, *Swiss Set to Defend Bank Secrecy Law*, FIN. TIMES, Apr. 20, 1999, at 2, col. 4.

¹² This section is taken from Bruce Zagaris, *OECD Global Forum Meeting in Melbourne a Standoff*, 22 INT’L ENFORCEMENT L. REP. 41 (Jan. 2006).

¹³ OECD, *Progress Towards a Level Playing Field: Outcomes of the OECD Global Forum on Taxation*, Melbourne, 15-16 Nov., 2005.

and the low tax jurisdictions claiming victory. Although a post-meeting release from the OECD lauded progress toward achieving a level playing field, many observers say that the meeting was essentially a standoff.

The two day discussions concerned the review of the legal and administrative frameworks on transparency and exchange of information in tax matters currently in place in more than 80 countries. The discussions identified a number of areas where further progress must be made.¹⁴

Since the Global Forum met in Berlin in 2004, other significant financial centers were invited to participate in the dialogue and carry out a review of countries' legal and administrative frameworks in the areas of transparency and exchange of information in tax matters.

According to the OECD, a growing number of non-OECD countries are negotiating tax information exchange agreements. In particular, Aruba, Bahrain, Bermuda, British Virgin Islands, Cayman Islands, Guernsey, Jersey, Isle of Man, Mauritius, the Netherlands Antilles and the Seychelles are listed as jurisdictions negotiating TIEAs. In addition, several countries – the British Virgin Islands, The Cook Islands, and Saint Kitts & Nevis – now require that bearer shares be immobilized or held by an approved custodian.¹⁵

For low tax jurisdictions, the fact that the statement mentioned concern over the way some countries have used the 2000 OECD list represented a potential victory. If a country chooses to use a list of countries derived from the OECD list, it should do so based on relevant current facts, taking into account each country's progress implementing the principles of transparency and effective exchange of information in tax matters.¹⁶

Some participants in the Global Forum believe it is premature to advance the OECD-managed tax havens initiative. Panama suggested that the OECD will find it hard to win widespread cooperation from offshore centers until it revokes its 2000 tax haven "blacklist." The list initially identified 35 offshore jurisdictions suspected of functioning as tax havens.

The OECD gave the initial 35 jurisdictions until July 31, 2001 to express a formal commitment to cooperate by 2005, under the threat of sanctions. Today, 33 jurisdictions are cooperating, while five offshore financial centers – Andorra, Liberia, Liechtenstein, the Marshall Islands, and Monaco – have refused.¹⁷

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*, para. 25.

¹⁷ For more information see Lawrence J. Speer, *Offshore Financial Centers Urged By OECD Nations to Boost Cooperation*, DAILY REP. FOR EXEC., November 16, 2005, at G-1.

Singapore apparently described itself as an observer to the talks, and refused to endorse or express any opinion on whether it would consider joining the OECD-led information exchange movement. Hong Kong gave cautious approval of the OECD initiative, but said it must “consult with the local business community” before making any commitment to the OECD. Hong Kong is reportedly concerned about losing business to Singapore if it signs on. China, while expressing support for the OECD initiative, did not make any firm commitment to increasing existing information exchange.

Malaysian delegates have said that their government supports the “consultative” nature of the OECD process, and is in favor of the information exchange of tax data for criminal investigations and prosecutions. However, Malaysian officials were less certain if their government would support information exchange on demand for civil tax matters, an issue that one delegate said still requires resolution in bilateral talks with the OECD.¹⁸

a. Australia-Bermuda TIEA Announced

On November 15, 2005, Australia announced the conclusion of a tax information exchange agreement with Bermuda, making it the third industrialized country to implement a key element of an ongoing tax havens initiative managed by the OECD.

The new bilateral agreement, signed November 10, 2005 in Washington, D.C. by Australian and Bermudan officials, was presented by Australian Treasurer Peter Costello during a speech to tax authorities and government officials from 60 nations attending the Nov. 15-16 Global Forum on Taxation.

The Australian pact with Bermuda is based on a model information exchange agreement drafted by OECD member states and jurisdictions cooperating with the harmful tax competition initiative.¹⁹

The new bilateral treaty largely follows the OECD model, but a key provision inserted at Bermuda’s insistence goes beyond language in the model, and provides indications of how future agreements could evolve. The agreement’s Article 11 binds both Australia and Bermuda to refrain from application of any “prejudicial or restrictive measures,” based on suspicion of harmful tax practices, against citizens of either country. Banned prejudicial or restrictive measures specifically mentioned include the denial of deductions, credits, or exemptions, the imposition of taxes, charges, or levies, or the mandatory use of special reporting requirements for citizens whose activities are suspected of benefitting from harmful tax competition, according to the document, which must be ratified by countries’ respective legislatures before entry into force.

¹⁸ *Id.*

¹⁹ For more information see Lawrence J. Speer, *Australia and Bermuda Agree To Exchange Tax Information*, DAILY REP. FOR EXEC., Nov. 16, 2005.

b. Other TIEAs and Mutual Benefits Announced

According to media reports the Isle of Man, Bermuda and the Cayman Islands trumpeted their willingness to engage in TIEAs, with the Isle of Man underscoring the benefits it had achieved. The Isle of Man signed a much-discussed TIEA with the Netherlands in October 2005, convincing Dutch authorities to include a range of topics usually covered in double taxation treaties, including preferential dispute resolution mechanisms for transfer pricing disputes, inclusion of rules on taxation of shipping and aircraft, and use of the participation exemption system for repatriated dividends.

The Netherlands also made a political commitment to eventually work toward negotiation of a full double taxation treaty with the Isle of Man, which aims to see the new pact ratified by the Tynwald, or parliament, as early as December. Inclusion of the so-called “Dutch participation exemption” in the TIEA was a major benefit for the Isle of Man’s financial sector, particularly given that the jurisdiction will move to a zero percent corporate tax rate in 2006, Couch said. The TIEA with the Netherlands will allow bank subsidiaries subject to the planned zero percent corporate tax rates in the Isle of Man to repatriate dividends to parent companies in the Netherlands without additional tax liabilities, Isle of Man Assessor Malcolm Couch said.²⁰

c. EU Will Provide Financial and Technical Assistance

On November 17, 2005, the media reported that the European Union plans to use its immense foreign aid budget to promote financial sector transparency and ensure wider information exchange in tax matters between authorities in developing countries and those in Europe.

European officials promoted increased transparency and information exchange during bilateral discussions with aid recipients, and supported their position with reinforced financial and technical assistance to support administrative improvement from 2006, according to a position paper presented by the European Commission during the Global Forum.²¹

European development funds will be earmarked for supporting good governance campaigns in developing countries in the financial, tax, and judicial areas, in particular with regard to transparency and effective exchange of information for tax purposes, the commission said. The commission also envisions “some concrete financial room to maneuver” during 2006

²⁰ For more information see Lawrence J. Speer, *Offshore Financial Centers See Benefits From Information Exchange Agreements*, DAILY REP. FOR EXEC., November 17, 2005, at G-3.

²¹ For more information see Lawrence J. Speer, *EU Pledges to Use Foreign Aid Discussions To Promote Improved Information Exchange*, DAILY REP. FOR EXEC., November 17, 2005, at G-3.

to assist improvements in the EU's overseas countries and territories, many of which participate in the OECD initiative.²²

d. Commonwealth Secretariat Reports on Need for Fairness in Tax Information Exchange

On May 4, 2007, the Commonwealth Secretariat issued a report calling for fairness in the use of tax information exchange, non-discrimination in the treatment of small and developing countries, and access to double tax treaties for small and developing countries.²³

The report discusses the evolution of the OECD's harmful tax competition initiative (also referred to as the harmful tax practices initiative). It focuses on the initial elaboration of the regime, in which the 47 small and developing countries were not consulted in the development of the OECD's criteria for unacceptable forms of tax competition, the OECD's unique criteria for "tax havens," or the determination of countries deemed to fit the criteria. As a result, the 41 "targeted" countries objected to both the procedural and substantive aspects of the OECD exercise. They asserted the right to a "level playing field", not only in terms of what was expected from them with regard to tax information exchange and standards for transparency relative to what was expected of OECD members or other competitor countries, but also in terms of a fair basis for financial services sector competition – one that was not biased in favor of OECD members.²⁴

In 2003, the OECD conceded that no "level playing field" existed and agreed to work with the targeted countries to develop one. In 2004, as part of the exercise, the relevant countries agreed to conduct a benchmarking exercise of the legal and administrative frameworks for exchange of tax information in all the OECD member states the small and developing countries targeted in the harmful tax competition exercise and a group of non-OECD countries which had significant financial services sector. In 2006, the findings were published.

The Commonwealth Secretariat starts with background to the 2006 Assessment and a review of the relevant academic literature, together with the results of an analysis of the legal and administrative frameworks of a sample of 25 countries selected from 82 countries which participated in the 2006 Assessment. The author selected the sample to reflect the geographic, population and GDP allocation of countries included in the 2006 Assessment. It includes member countries of the OECD, member countries of the International Trade and Investment

²² *Id.*

²³ Camille Stoll-Davey, *Assessing the Playing Field: International Cooperation in Tax Information Exchange*, Commonwealth Secretariat (May 4, 2007).

²⁴ Executive Summary, *Assessing the Playing Field: International Cooperation in Tax Information Exchange*, *id.*, at vii.

Organization (ITIO),²⁵ and non-OECD/non-ITIO countries. The data in the Assessment were correlated with publicly available data from international bodies such as the World Bank, the IMF and the FATF, as well as governmental sources.

The report's analysis shows that in virtually all the countries examined, whether they are OECD member states, ITIO countries or non-OECD/non-ITIO countries: (1) mechanisms exist for the exchange of information under certain conditions; (2) limitations exist to the manner and circumstances under which countries can provide tax information; and (3) limitations exist to the information which is available to be provided in relation to tax information exchange. Additionally, the analysis does not indicate that the legal and administrative frameworks available for tax information exchange in OECD countries are objectively superior to those in ITIO and non-OECD countries.

The findings also establish that, in most cases, the international instrument made available to small and developing countries is a stand-alone tax information exchange agreement (TIEA), which does not afford them the same economic advantages as are offered to more geopolitically influential countries which are able to use conventional double taxation countries (DTCs) to exchange information. As a result of this limitation to TIEAs, small and developing countries are excluded from the treaty network, placing them at an economic disadvantage and creating an "unlevel playing field" for competition in the global financial services sector.

The report concludes that, if the financial services sector is going to maintain a level playing field for small and developing countries, they will need either access to the treaty network or other means of removing the present, and potential future, discrimination. The report suggests that the use of fair treaty instruments and non-discrimination in the treatment of small and developing countries will provide a stable long-term basis on which a global community of cooperation in taxation matters will become sustainable.

e. Analysis

The Global Forum is facilitating dialogue about OECD standards, the need for a level playing field, and process fairness. While high-tax jurisdictions have gained some momentum, low-tax jurisdictions are obtaining mutual benefits by agreeing to TIEAs.

The Society of Trust and Estate Practitioners (STEP) has expressed concern that a number of major financial centers, including Austria, Belgium, Luxembourg, and Switzerland, refused to participate or endorse the goals of the Global Forum. In addition, STEP has expressed concern that there has been little effort to bring U.S. states such as Delaware and Wyoming into

²⁵ The ITIO is an organization formed to represent the interests of the targeted small and developing countries.

the process.²⁶ Similarly, STEP welcomed the Global Forum's acknowledgment that bilateral tax information exchange agreements “should be based on bringing benefits to both parties.”²⁷

2. *OECD 2006 Study on Tax Cooperation: Towards a Level Playing Field*

On May 29, 2006, the Organization for Economic Cooperation and Development released a report noting improved financial sector transparency and cross-border exchange of information in tax matters while saying that industrialized countries and offshore financial centers can do more to improve cooperation and help authorities crack down on tax cheats.

Tax Co-operation: Towards a Level Playing Field – 2006 Assessment by the Global Forum on Taxation, reviews the legal and administrative frameworks covering financial sector transparency and cross-border information exchange in 81 countries and jurisdictions, measuring their practices against a series of principles agreed by participants in the OECD’s Global Forum on Taxation. In 1998, the OECD established the global forum as its primary mechanism to achieve a level playing field and maximum compliance with the standards contained in the OECD’s harmful tax practices initiative.

According to the report thirty-three offshore financial centers once targeted by the tax havens initiative have agreed to work with OECD member countries in the global forum on coordinated plans to improve transparency – principally by doing away with bank secrecy laws – and increase effective information exchange in both civil and criminal tax matters.

Five offshore financial centers – Andorra, Liberia, Liechtenstein, the Marshall Islands, and Monaco – have refused to commit to the OECD’s transparency and information exchange standards. They risk collective sanctions from the OECD members and other countries.

Five non-OECD countries granted observer status during a November 2005 meeting of the forum in Melbourne, Australia – Argentina, Hong Kong, Macao, the Russian Federation, and South Africa – have endorsed the transparency and information exchange objectives.

Many of the countries and jurisdictions participating in the global forum and practitioners whose clients are impacted by the OECD initiative have expressed concern that the OECD is not forcing its own member countries to meet the same stringent information exchange standards applied to offshore financial centers. This group has regularly demanded that the OECD seek to create a “level playing field” among all countries on transparency and information exchange

²⁶ STEP's Nov. 21 policy statement on the OECD initiative is available at <http://www.step.org/showarticle.pl?id=1336;n=100>. For more information see Lawrence J. Speer, *Financial Services Sector Association Still Wary of OECD Tax Haven Initiative*, DAILY REP. FOR EXEC., November 25, 2005, at G-3.

²⁷ *Id.*

matters.²⁸

The Forum's work follows the 1996 establishment of the OECD's Harmful Tax Practices initiative. Initially, the Forum on Harmful Tax Practices, part of the OECD's Committee on Fiscal Affairs, was responsible for the bulk of the work. The Forum was responsible for (1) identifying and eliminating harmful tax practices of preferential tax regimes in OECD countries (2) identifying "tax havens" and requesting their commitments to the principles of transparency and effective exchange of information, and (2) encouraging other non-OECD countries to join the work.²⁹ In 2000, the OECD established the Global Forum on Taxation in response to criticism from the so-called tax havens who protested their inability to participate in the framing of the rules.

The Forum prepared the 2006 progress report to bring additional perspective to the "level playing field" debate by surveying transparency and information exchange practices in 82 countries worldwide. According to Jeffrey Owens, director of the OECD Center for Tax Policy and Administration, the report shows that there has been significant progress toward reaching a level playing field, both in OECD and non-OECD countries, in terms of achieving better transparency and more effective exchange of information. "It also highlights areas where more progress can be made," Owens said.

According to the report, both OECD and non-OECD countries have implemented or made considerable progress toward implementing the global forum's transparency and effective exchange of information standards. The report noted that most countries now share information and have almost full access to banking and financial sector information. "Given where we were even three years ago, today's situation represents significant progress," Owens said.³⁰

According to the report some countries must take additional steps to address constraints now placed on international cooperation aimed at countering criminal tax abuses. Further progress is also required to address those instances where countries require a domestic tax interest to obtain and provide information in response to a specific request for information related

²⁸ See, e.g., Stikeman Elliott, *TOWARDS A LEVEL PLAYING FIELD* (Society of Trust and Estate Practitioner Sept. 2002); STEP, *BEYOND THE LEVEL PLAYING FIELD: LOWERING BARRIERS TO TRADE IN FINANCIAL SERVICES BETWEEN INTERNATIONAL FINANCIAL CENTERS AND OECD STATES* (STEP 2005).

²⁹ Jeffrey Owens, *The Global Forum on Taxation's 2006 Progress Report: An Overview*, 2006 *WORLD WIDE TAX DAILY* 109-6 (June 7, 2006).

³⁰ See Lawrence J. Speer, *OECD Sees Some Progress in Project On Tax Havens, Says More Work Needed*, *DAILY REP. FOR EXEC.*, May 30, 2006, at G-1.

to a tax matter, the OECD said.³¹

Countries that have strict limits on access to bank information for tax purposes are encouraged to review their current policies and report the outcome of their review to the next forum meeting, tentatively slated for 2007. Similarly, the OECD suggested that some countries take steps to ensure that competent authorities have appropriate powers to obtain information for civil and criminal tax purposes.³²

Many countries lack access to beneficial ownership information and a large number of countries still allow bearer shares. These countries are also encouraged to review their current policies and report back during the next global forum meeting. Countries that do not require accounting records for international company regimes are also encouraged to review this policy with a view to meeting recognized best practices.³³

The OECD report offered a wide-ranging comparison of 81 jurisdictions surveyed in the information exchange area. All countries except Guatemala and Nauru have legal mechanisms in place to permit the exchange of information in criminal tax matters, under various circumstances, according to the report. All but 12 of the 81 jurisdictions surveyed have negotiated agreements that permit them to exchange information for both civil and criminal tax purposes. Countries that have never negotiated information exchange agreements include: Andorra, Anguilla, Cook Islands, Gibraltar, Guatemala, Liechtenstein, Nauru, Niue, Panama, Samoa, Turks and Caicos Islands, and Vanuatu.³⁴

Five countries – Cyprus, Hong Kong, Malaysia, Philippines, and Singapore – cannot respond to requests for information when they have no domestic tax interest, according to the report. Similarly, Andorra, Cook Islands, Samoa, and Switzerland apply the “dual incrimination” principle to all information exchange relationships, requiring some interest for the administration or enforcement of domestic tax law before exchange occurs.³⁵

Approximately 90 percent of double tax conventions have broad exchange of information provisions permitting information exchange where the request relates to the enforcement or application of domestic law, rather than being limited to cases where the correct application of

³¹ OECD, *Tax Co-operation: Towards a Level Playing Field – 2006 Assessment by the Global Forum on Taxation* 22-23, 41-42.

³² *Id.* at 11-12; 19-22.

³³ *Id.* at 12-14 and 22-35

³⁴ *Id.* at 15-19 and 41.

³⁵ *Id.* at 17-18.

the provisions of the particular double tax convention is at issue. However, it also underlined that a number of countries – for example, Switzerland and Austria – base information exchange mechanisms on mutual legal assistance treaties and/or restrictive domestic laws that only permit information exchange in criminal tax matters in a very narrow set of circumstances.³⁶

On the financial sector transparency side, the OECD noted that 77 of the 82 countries surveyed have access to bank information and/or information from other financial institutions for at least some tax information exchange purposes. Only Guatemala, Nauru, and Panama have indicated an inability to access information for any exchange of information purposes, according to the report. Another 17 countries grant access to bank information only for the purpose of responding to a request for exchange of information in criminal tax matters, according to the OECD. Of these, Andorra, Austria, the Cook Islands, Luxembourg, Samoa, San Marino, Saint Lucia, Saint Vincent and the Grenadines, and Switzerland apply the principle of dual criminality in connection with access to bank information for exchange of information purposes. The report relates that Cook Islands, Niue, and Vanuatu leave the question of whether to provide information to the discretion of a particular official, such as the attorney general.³⁷

On the question of beneficial ownership, 77 of the 81 countries surveyed – including all OECD countries – have powers to obtain information kept by a person subject to record keeping obligations, in response to a request for exchange of information in tax matters. In addition, 71 countries reported that they also generally have powers to obtain information from persons not required to keep such information, but who may be asked to respond to a request for information. Anguilla, Montserrat, Panama, and Turks and Caicos Islands have very limited powers to obtain information for criminal tax matters, the OECD said. Regarding reporting of ownership information, 77 of the 81 countries surveyed require companies to report legal ownership information to governmental authorities, or at the very least hold such information at the company level, according to OECD data.³⁸

Article 5, paragraph 4 of the Model TIEA provides that countries should have the authority to obtain ownership and identity information as well as information held by “persons acting in an agency or fiduciary capacity including nominees and trustees.”³⁹ All but five countries surveyed – Aruba, Guatemala, Hong Kong, Macao, and Singapore – indicated that applicable anti-money laundering legislation would normally require corporate service providers or other service providers to identify the beneficial owners of their client companies. The OECD said it remains concerned that 48 of the 81 jurisdictions surveyed continue issuing bearer shares,

³⁶ *Id.* at 16-17 and 41.

³⁷ *Id.* at 20-21.

³⁸ *Id.* at 42-43.

³⁹ *Id.* at 12.

while 52 jurisdictions issue bearer debt instruments. While many jurisdictions now have mechanisms allowing them to identify the owners of anonymous shares or debt instruments, a sizeable minority do not, according to the report.⁴⁰

Domestic companies are required to keep accounting records in 75 of the 81 jurisdictions surveyed, while mandatory accounting records retention periods of five years or more exist in 63 countries, the OECD said. No such requirements exist for international business companies in or for limited liability companies in three jurisdictions. In some countries only public companies are required to keep accounting records.⁴¹

The OECD noted that 54 of the 81 jurisdictions surveyed have trust laws. Of these, Macao and the Seychelles have no trust law applicable to residents, but have trust laws applicable to nonresidents. Information on the settlors and beneficiaries of domestic trusts is required by law to be held in 47 jurisdictions. In 36 of the countries with trust laws, a domestic trustee of a foreign trust would also be required to have information on the identity of settlors and beneficiaries in some or all cases. Of the 28 countries that do not have trust laws, 18 indicated that their residents may act as trustees of a foreign trust. In all of these, except for Luxembourg, there is a requirement on resident trustees to identify settlors and beneficiaries of foreign trusts. Of the 54 countries with trust laws, 45 reported requiring all trusts formed under their law to keep accounting records, according to the OECD study.⁴²

In addition to the need for financial sector transparency and information exchange policy improvements, the OECD said it is critical that member countries and other jurisdictions make progress concluding bilateral negotiations on improving information exchange.⁴³ A series of offshore financial centers are now negotiating new tax information exchange agreements (TIEAs) with industrialized nations, including Aruba, Bahrain, Bermuda, British Virgin Islands, Cayman Islands, Guernsey, Jersey, Isle of Man, Mauritius, the Netherlands Antilles, and the Seychelles.

All together, OECD and non-member countries are negotiating more than 40 separate tax information exchange agreements, many of which will be signed and ratified over the coming year, Owens said. Owens admitted that there has been little public progress on the TIEA front since the November 2005 meeting in Australia, but insisted that agreements would be signed in the coming year. “These agreements are not easy to negotiate,” Owens said, noting that resource limitations and logistical difficulties slow down talks between often remote offshore financial centers and OECD countries. “This is a pretty important step for some of these jurisdictions to

⁴⁰ *Id.* at 12-13, 42-43

⁴¹ *Id.* at 26-28.

⁴² *Id.* at 29-32, 43.

⁴³ Jeffrey Owens, *supra*.

take, and I think there is a feeling that they need to be careful, and be sure to see mutual benefits before signing,” Owens said.⁴⁴

The OECD report fails to address the corporate transparency problems identified in the GAO report (discussed above), a glaring omission.⁴⁵ Among the myriad of problems uncovered by the GAO, the report observes that the continued existence of bearer shares precludes in some instances the ability of states and the federal government to locate beneficial owners and adequately respond to domestic and law enforcement and regulatory requests.⁴⁶

In addition, the OECD continues its refusal to recognizing the necessity and utility of providing tangible benefits to offshore financial jurisdictions that agree to conclude TIEAs. Even though there is no international law obligation to conclude such agreements, the OECD apparently believes that by producing a series of studies and citing the importance of TIEAs, eventually most jurisdictions will agree to conclude them, especially if they are subject to countermeasures or the equivalent of economic sanctions.

Despite its flaws, the OECD 2006 LPF Progress Report serves as a useful working document for professionals interested in the contemporary operation and status of TIEAs, transparency of corporate vehicles, and related enforcement issues.

3. *OECD Launches Tax Intermediary Project*

On January 17, 2007, the Organization for Economic Cooperation and Development (OECD) announced a new work program to examine the role of tax intermediaries – law and accounting firms, other tax advisers and financial institutions – in tax systems, including in relation to unacceptable tax minimization arrangements.⁴⁷ The project seeks to study interactions between tax intermediaries and revenue authorities and strengthen relations between the two groups.

The program’s first task will be to produce a set of recommendations by November 30,

⁴⁴ Speer, *OECD Sees Some Progress in Project On Tax Havens, Says More Work Needed, supra.*

⁴⁵ GAO, COMPANY FORMATIONS: MINIMAL OWNERSHIP INFORMATION IS COLLECTED AND AVAILABLE (Apr. 2006) GAO-06-376.

⁴⁶ For background see Bruce Zagaris, *GAO Report on Company Formations Focuses on U.S. Shell Companies, Evidence Gathering Problems*, 22 INT’L ENFORCEMENT L. REP. 258 (July 2006).

⁴⁷ OECD, *OECD Tax Intermediaries Project - Terms of Reference*, Jan. 17, 2007 http://www.oecd.org/document/50/0,2340,en_2649_37427_37930802_1_1_1_37427,00.html.

2007 for discussion and endorsement at the fourth Forum on Tax Administration meeting in early January 2008.⁴⁸ The report will discuss the arrangements of tax authorities to manage their relationships with tax intermediaries, to minimize the risks and to develop an environment of mutual trust and confidence, and review: the role of tax intermediaries in promoting compliance and reducing non-compliance by their clients, and the risks they sometimes pose in developing tax minimization arrangements; the responsibilities of tax intermediaries and taxpayers with regard to those risks; and the role of international cooperation between revenue bodies in managing those risks.⁴⁹

Officials of HM Revenue and Customs in the U.K. and the OECD secretariat will lead the project. A small working group of tax commissioners from approximately ten countries will serve as a steering group, consulting with representatives of tax intermediaries, taxpayer representative bodies, the Business and Industry Advisory Committee, and other taxpayers.⁵⁰

The report is expected to support development of a recently established directory of aggressive tax planning schemes which the OECD is compiling. The directory identifies current abusive tax schemes, explain how and why they are successful in certain countries, describe their interaction with national tax law, and set forth measures that countries have taken or can take to counteract their impact. While information in the directory is shared between tax authorities, it has not been made available to the public.⁵¹

The OECD's ongoing harmful tax practices initiative, which began in 1998, targets countries. The new tax intermediaries project, in contrast, focuses on individuals and entities, although it also considers potential international cooperation between revenue bodies. Hence, in a sense the project will traverse in a different way a favorite hobby-horse: strengthening international tax enforcement cooperation. Insofar as the project tries to engage the private sector, it involves the politics of global governance – that is, the effort to develop an international regime through engaging the private sector as well as governments.⁵²

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Lawrence J. Speer, *OECD Launches New Initiative On Role of Tax Intermediaries*, DAILY REP. FOR EXEC, Jan. 18, 2007, at I-1.

⁵² See, e.g., THE POLITICS OF GLOBAL GOVERNANCE: INTERNATIONAL ORGANIZATIONS IN AN INTERDEPENDENT WORLD (Paul F. Diehl, ed.) (2005); GOVERNING GLOBALIZATION: POWER, AUTHORITY AND GLOBAL GOVERNANCE (David Held and Anthony McGrew, eds.) (2005).

The project may also establish a tax gatekeeper initiative similar to the Financial Action Task Force's gatekeeper initiative, which sets requirements and due diligence standards for attorneys, accountants, notaries, and other corporate and trust service company providers.

III. PROCESS ISSUES IN THE HTP AND NCCT INITIATIVES

A. Overview

Critics have challenged a number of aspects of the elaboration and implementation of the new international financial enforcement regime and OECD HTP, FATF NCCT, and FSF subregimes.⁵³ For instance, they argue that the process of the OECD harmful tax competition, FATF, and FSF initiatives⁵⁴ suffered from: (1) exclusion from most of the decision-process by the very countries that are the targets of the policy; (2) lack of adequate participation in policy-making and implementation by the private sector; (3) lack of transparency in the decision-making process; (4) the apparent use of economic sanctions and coercion in the way of blacklists without binding hard law; (5) differential and favorable treatment of its own members whose inadequacies have not resulted in blacklisting; (6) the apparent efforts to usurp critical policymaking from democratically elected governments without adequate participation by such governments; and (7) questionable substantive policy design, especially in the case of the OECD HTP initiative.⁵⁵

B. OECD HTP Initiative

1. Strategic Issues

While the OECD and its members characterize the initiative as recommendations and speak in terms of potential countermeasures, they have in effect acted to impose economic

⁵³ This presentation is directed at all the targeted states. Obviously, each jurisdiction has a separate set of interests and circumstances that may result in a customized approach. For additional discussion of strategy see Bruce Zagaris, *OECD Report on Harmful Tax Competition: Strategic Implications for Caribbean Offshore Jurisdictions*, 17 TAX NOTES INT'L 1507-19 (Nov. 16, 1998); Bruce Zagaris, *OECD Harmful Tax Competition Report and Related Initiatives Leave the Caribbean Offshore 'in Irons'*, 19 TAX NOTES INT'L 879-86 (Aug. 21, 2000).

⁵⁴ For additional discussion of the impact of these initiatives taken together, see Bruce Zagaris, *The Emergence of an International Money Movement Enforcement Regime in the New Economy: Implications for Practitioners and Policymakers*, 19 TAX NOTES INT'L 2401-06 (Nov. 20, 2000).

⁵⁵ For a critical discussion of the initial report, see Bruce Zagaris, *The Assault on Low Tax Jurisdictions: A Call for Balance and Debate*, 28 TAX MGMT INT'L J. 474-500 (Aug. 13, 1999).

sanctions. The combination of the three blacklists and implementation of some of the blacklists, such as the issuance of warnings by the U.S. Treasury in the aftermath of the FATF listing of non-cooperative countries, has restrained capital movement and has resulted in concrete steps by banks and financial institutions to close accounts or require depositors to visit in person to provide additional identification if they want to maintain their accounts. Other investors in the targeted countries have made decisions based on the potential for countermeasures by all three international organizations against the targeted countries. Clearly, in a practical and legal sense, the issuance of blacklists is not merely “naming and shaming,” but the imposition of economic sanctions.

Under international law the use of economic sanctions and economic coercion are reserved as a last resort to combat aggression or other similarly hostile acts that clearly violate international law and threaten the national security of a country. The missing element from the OECD HTP initiative is that there is no black letter law or other agreed international law of tax policy. Indeed, even the one economic group that constitutionally is equipped to make binding law on tax policy and procedure, the European Union, has struggled in an effort to agree on the taxation of savings. It is also struggling to agree on enhanced tax enforcement cooperation, even in the context of a single market. Hence, it is not surprising that among jurisdictions with dissimilar economies, legal systems, and tax structures, disagreement exists on some fundamental policies.

The OECD has made new tax policy and is attempting to impose such policy on the rest of the world – particularly the targeted countries – even though it has no mandate to act beyond its group. The targeted countries have appropriately argued that, as a matter of public international law, the OECD and its members have by propaganda and threatened sanctions, sought to violate the absolute sovereignty of states over their fiscal affairs. The targeted countries believe that the combination of threats of sanctions and propaganda have breached the principles of non-intervention and international law.⁵⁶ Although the OECD has conceded some missteps in process and has changed the emphasis of its harmful tax practices policy, the draft agenda for the High Level Consultations On HTP and the OECD Framework on Collective Memorandum of Understanding (OECD Collective MOU) on Eliminating Harmful Tax Practices indicate that it intends to continue to impose the bases of its policy, including the economic sanctions or countermeasures, notwithstanding the illegality and unfairness of its actions.

The targeted countries may want to focus on some strategic issues with respect to the potential memorandum of understanding between the OECD and the targeted countries:

⁵⁶ Albert Brandford, *AG: What's Our Sin?*, DAILY NATION (Barbados), Jan. 10, 2001, at 22A, col. 1. In connection with the use of adverse propaganda and threatened sanctions, the targeted countries have asked the OECD to identify the precise rule of international law (e.g., the international standard, established by law, as contradistinguished from the proposed guidelines and soft law in the OECD HTP initiative, it alleges the targeted countries have violated.

1. Continued participation in the harmful tax practices initiative (HTP) should be conditioned on the agreement by the OECD countries to refrain from engaging in practices to name and shame or impose countermeasures, both in the OECD and in the related fora, including specifically the FATF and FSF. In the future all parties (OECD and targeted countries) agree to utilize the United Nations as the appropriate forum to determine issues of tax policy, including the so-called HTP initiative, and any consequences of non-compliance with such tax policy. In November 2004, the United Nations (UN) General Assembly adopted Resolution E/2004/L.60, which reorganizes and continues the work of a tiny UN group on international tax cooperation.⁵⁷ The Resolution results in continuing the UN role, but with more input over its composition from UN members and without any expansion in the group's resources. The Resolution renames the group. Previously the Ad Hoc Group of Experts on International Cooperation in Tax Matters, it is now the Committee of Experts on International Cooperation in Tax Matters.⁵⁸

Indeed, some of the tax information exchange agreements condition the obligation to exchange information on the promise of OECD countries not to impose countermeasures. For instance, as mentioned above, the November 2005 TIEA between Bermuda and Australia incorporates such provisions. The agreement's Article 11 binds both Australia and Bermuda to refrain from application of any "prejudicial or restrictive measures" based on suspicion of harmful tax practices, against citizens of either country. Banned prejudicial or restrictive measures include the denial of deductions, credits, or exemptions, the imposition of taxes, charges, or levies, or the mandatory use of special reporting requirements for citizens whose activities are suspected of benefitting from harmful tax competition, according to the document, which must be ratified by countries' respective legislatures before entry into force.⁵⁹

2. Continued participation in the harmful tax practices initiative should be conditioned on the agreement by the OECD countries to sign or make the same commitments, especially since they have the economies and resources to absorb any necessary restructuring, and on procedures that practically make states, entities and transactions in those countries subject to the same oversight and sanctions as the SOFCs unless sanctions/countermeasures are withdrawn.⁶⁰ Just as

⁵⁷ UN Economic and Social Council, E/2004/L.60, Nov. 9, 2004.

⁵⁸ For background see Bruce Zagaris, *U.N. Role in Role in International Tax Cooperation Continues and Points to the Need for Better Regime-Building*, 38 Tax Notes Int'l 337 (Apr. 25, 2005).

⁵⁹ For more information see Lawrence J. Speer, *Australia and Bermuda Agree To Exchange Tax Information*, DAILY REP. FOR EXEC., Nov. 16, 2005, at G-2.

⁶⁰ Similarly, commitments in the Uruguay Round of the World Trade Organization (WTO) and the General Agreement on Trade in Services (GATS) are made on the basis of reciprocity. The targeted countries contend that the nature of the propaganda and threatened sanctions violate the principle of reciprocity within GATS and the WTO. Brandford, *supra*.

importantly, OECD countries should be subjected to the same mutual evaluation and implementation/enforcement measures. For instance, it is simply unfair that the SOFCs must run the gauntlet of IMF assessments, receive citations for deficiencies, and face pressure to take remedial steps while the U.S. – especially states such as Delaware – does not comply with OECD and/or FATF standards and is not graded by the IMF. In light of U.S. policy to use international organizations to pressure third countries to comply with international standards, the U.S.’ own reticence has the potential to undermine the legitimacy and effectiveness of international standards and the international process.

Already at least one authority has documented the fact that the U.S., Britain, and other OECD countries are serious tax havens and have tax incentive laws in serious breach of the HTP requirements. Nevertheless, the OECD has not documented those incentive laws and has not required larger OECD countries to commit to changing such laws.⁶¹ At least one legal opinion takes the view that, while the content and form of the OECD Collective MOU indicate that it is meant to be a political and not a legally binding document, it could still have legal consequences.⁶² Each of targeted jurisdictions and any other interested jurisdictions of the world should have an opportunity to fully participate in the formulation of the tax policy (e.g., HTP), the application of the policy to each country (e.g., which policies and laws meet or violate the HTP or alternative policies), and any implementation of such policies or enforcement (e.g., countermeasures).

3. Continued participation in the harmful tax practices initiative should be conditioned on signing an income tax or other form a tax treaty, including a mini-tax treaty⁶³ and/or obtaining, on a most favored nation basis, the exemption or reduction from withholding rates, both in tax treaties and through the operation of statutory law, and the exemption from capital gains tax in the OECD countries, or some combination of analogous benefits.⁶⁴

The Isle of Man-Netherlands treaty, signed on October 12, 2005, includes a shipping and

⁶¹ Marshall J. Langer, *Harmful Tax Competition: Who Are the Real Tax Havens?* 21 TAX NOTES INT’L 2831-39 (Dec. 18, 2000).

⁶² It is possible that the international law principle of estoppel or preclusion in the context of MOUs between states may apply and preclude the signatories from deviating from their undertakings. See, e.g., *Placing the OECD Initiative Within a Legal Context*, 1 BARBADOS GLOBAL E-LETTER 1 (Jan. 2001), referring to a legal opinion by Professor William Gilmore of the Univ. of Edinburgh.

⁶³ For a discussion of mini-tax treaties, see Marshall J. Langer, *Tax Agreements with Tax Havens and Other Small Countries*, BEYOND THE LEVEL PLAYING FIELD?, *supra*, 10, 16-22.

⁶⁴ See, e.g., Marshall J. Langer, *Tax Agreements with Tax Havens and Other Small Countries*, BEYOND THE LEVEL PLAYING FIELD, 10, 16-22 (STEP 2005)

aircraft taxation agreement, ensuring that a relevant business based in the Isle of Man will not be taxed in the Netherlands so long as it is conducting international trade; a ‘transfer pricing’ agreement, whereby the Isle of Man and the Netherlands will work together to ensure certainty of treatment when companies having operations in the two territories move goods and services between them; an agreement that Manx subsidiaries of Dutch companies will not experience any tax issues as the Isle of Man moves to its ‘0/10’ company tax system in 2006; and a commitment to work towards a full double taxation agreement.⁶⁵

The precedents of the EU Savings Directive and the U.S. Caribbean Basin Initiative enable developing countries that are so inclined to request incentives for concluding a broad TIEA that is separate from the income tax agreement. Although developing countries can ask for incentives to include additional articles on mutual assistance and collection of debts in an income tax treaty, a prospective treaty partner may respond that the treaty itself is an incentive.

The issue of whether it is useful and/or desirable for developed countries to provide incentives, such as sharing withholding revenue (e.g., the EU Savings Directive) or other incentives with developing countries that agree to conclude TIEAs or expanded information exchange, mutual assistance, and collection of tax debts in an income tax treaty, depend on whether the international community or individual countries believe that it is useful macroeconomic policy to provide incentives. Indeed, a prior UN report on the problem of offshore financial centers (OFCs) has recognized the utility of a quid pro quo incentives for cooperating OFCs, but did not specify any precise positive response, such as incentives.⁶⁶ Arguments can be made on both sides, depending on the perspective of the policy-maker. Indeed whether incentives are wise and, if so, the type, is beyond the scope of this paper. The UN Group of Tax Experts has adopted in its Model Tax Treaty Between Developed and Developing Countries the suggestion that at their discretion developing countries may request economic incentives of some type as a quid pro quo for concluding TIEAs.

4. Continued participation in the harmful tax practices initiative should be conditioned on obtaining, on a most favored nation basis, the right to visit without the need for visas into the OECD countries.

5. Continued participation in the harmful tax practices initiative should be conditioned on exclusion from the blacklists.⁶⁷ Again, the Bermuda-Australia TIEA is a precedent.

⁶⁵ Isle of Man Treasury Press Release, *Isle of Man - Netherlands Economic Agreements break new ground*, <http://www.gov.im> (accessed July 20, 2006).

⁶⁶ Jack A. Blum et al, *FINANCIAL HAVENS, BANKING SECRECY AND MONEY-LAUNDERING*, 15 UN Office for Drug Control and Crime Prevention (May 1998)

⁶⁷ For a useful discussion of problems with the national tax blacklists, see Jason Sharman, *Deconstructing National Tax Blacklists: Removing Obstacles to Cross-Border Trade*

6. Continued participation in the harmful tax practices initiative should be conditioned on the agreement by the OECD countries to refrain from engaging in practices to name and shame or impose countermeasures. In the future all parties (OECD and targeted countries) agree to utilize the United Nations as the appropriate forum to determine issues of tax policy, including the so-called HTP, and any consequences of non-compliance with such tax policy.

7. Continued participation in the harmful tax practices initiative should be conditioned on agreement by the OECD countries to sign or adhere to precisely the same commitments, especially since they should undertake the same legal obligations and they have the economies and resources to absorb any necessary restructuring.⁶⁸

2. *Level Playing Field*

The introduction of the OECD Collective MOU expresses the goal of ensuring jurisdictions have a “level playing field.” As stated above, however, a level playing field requires that all the participating countries start from the beginning on formulating policy. The OECD has already formulated the HTP policy and is deciding, presumably due to unanticipated implementation difficulties, to sprinkle ad hoc democracy into the process, where it will not unduly interfere with the goals of the HTP. If the OECD really intends to have a level playing field, it will transfer the process to an international organization that has universal representation (e.g., the United Nations). Thereafter, the international organization will undertake policy formulation, including, if it believes circumstances warrant, the goals of the HTP. Alternatively, the OECD will reform its own processes with respect to HTP to start anew with representation for all affected jurisdictions. Unless the OECD transfers or reforms its process, the entire exercise lacks legitimacy, notwithstanding its diplomatic representation of the goal of a “level playing field.”

Insofar as it seeks a level playing field, the OECD and its member countries must realize that already their superior resources and their control of the major international organizations provide obstacles to a level playing field unless measures are taken to counter the disproportionate power in favor of the OECD countries in tax and financial resources.

3. *Privacy and International Human Rights Concerns*

Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms protects the processing of personal data in the context of the right to

in Financial Services, BEYOND THE LEGAL PLAYING FIELD, *supra*, 128, 128-61.

⁶⁸ For a review of the OECD members preferences, those of tax havens and other strategic issues arising from the June 26, 2000 OECD report, see Bruce Zagaris, *The OECD Report Identifying Harmful Tax Practices and Tax Havens Solidifies the Momentum of the Harmful Tax Competition Initiative*, TAX MGMT INT’L J. 521-30 (2000).

privacy. As national governments take new unilateral extraterritorial initiatives, impose new reporting requirements, criminalize new areas of conduct in taxation, and agree to exchange a broad amount of information and provide mutual assistance, even where developing countries with questionable processes are involved, tax counsel can and should assert civil liberties and constitutional provisions to ensure the fundamental rights of taxpayers. The counterpart of constitutional protections internationally are the growing network of international human rights conventions.⁶⁹

The dynamic growth of substantive and procedural international tax laws combined with the rapid penalization of conduct means that taxpayers suddenly find traditional conduct no longer tolerated and find themselves the target of laws and regulations that can result in enormous new taxes, interest charges, and penalties, for which they can be imprisoned and have their assets forfeited, sometimes in a pre-judgment context. When this occurs internationally, taxpayers can be quite surprised and may have reasons to complain. Practitioners should assert these rights administratively and in litigation.

International human rights provisions increasingly impose substantive law obligations on revenue officials and confer rights on taxpayers. Canada is an example of a country whose Charter of Rights incorporates international human rights into its constitutional system. Taxpayers have invoked the Charter in several cases to prevent the introduction of evidence gathered in violation of the Charter.⁷⁰

⁶⁹ For background see TAXATION AND HUMAN RIGHTS, Proceedings of a Seminar held in Brussels in 1987 during the 41st Congress of the International Fiscal Association (1988).

⁷⁰ E.g., *R. v. Chas. Fidler and Son Ltd.*, Man. Prov. Ct., Jan. 8, 1986 (comment by businessman to Customs officer in dispute over proper tariff classification on goods was improperly used to obtain search warrants and conduct quasi-criminal case against businessman); *R. v. Norway Insulation Inc. et al.*, Ont. Ct. (G.D.) 95 D.T.C. 5328 (involvement of Special Investigations was criminal in nature and Revenue Canada should have treated evidence gathering as though taxpayer would be subject to criminal sanctions and obtain search warrant); *R. v. Tran*, Alberta Prov. Ct., Jan. 2., 1997 (information received by Revenue Canada from Edmonton City Police seized under police search warrants was improperly used by Revenue Canada which should have obtained a warrant and therefore violated taxpayer's privacy rights); *R. v. Jarvis*, Alberta Prov. Ct., Feb. 25, 1997 (evidence unlawfully obtained by Revenue Canada in a meeting with the taxpayer violated sections 7 and 8 of the Charter and must be excluded); *R. v. Siviak*, Ont.Ct. (P.D.), Oct. 24, 1996 (use of bank records were inadmissible in provincial sales tax case since search warrants should have been used and absence of the same violated taxpayer's expectation of privacy in the bank records); *R. v. Warawa*, Alta. Q.B., Oct. 10, 1997 (information obtained from taxpayer's accountants during an investigation was protected by taxpayer's right to privacy under sec. 7 of the Charter and should be excluded in a criminal tax case); but compare to *Javid Ahmad et al v. M.N.R.*, F.C.T.D., Feb. 27, 1998 (information supplied by taxpayer during tax audit did not violated his privacy and right against self-

On May 28, 1998, the Supreme Court of Canada overturned the judgment of the Federal Court of Appeal and held that the Canadian standard for the issuance of a search warrant was not required before the Canadian government submits a request to a foreign government for foreign banking records of a Canadian citizen.⁷¹ *Schreiber v. Canada (Attorney General)* [1998] S.C.J. No. 42, File No. 26039. The federal appeals court had affirmed the decision of the federal trial court on the Canadian constitutional issue of the applicability of search and seizure rights to Canadian legal assistance requests to foreign governments for foreign bank records of Canadian citizens. A majority of the Canadian Supreme Court held that the search and seizure provision of the Canadian constitution is not engaged by a request of the Canadian government to a foreign government for bank records in that foreign country. A Canadian citizen, Karlheinz Schreiber, had sued to block the Royal Canadian Mounted Police from access to Swiss bank account records in which Mr. Schreiber had an interest.

In early fall of 1995, the government of Canada sent a formal letter request to the government of Switzerland seeking their assistance with respect to a Canadian criminal investigation. In response to this request, the Swiss government, pursuant to Swiss law, issued an order for the seizure of the requested records. Pending resolution of the Canadian lawsuit, the Swiss government had not released the records to the Canadians.

In Mr. Schreiber's lawsuit, the parties agreed that prior to the delivery of the letter of request to the Swiss, no search warrant or other judicial authorization, supported by information on oath, was obtained in Canada with respect to the seizure of Mr. Schreiber's Swiss banking records. The Supreme Court rejected Mr. Schreiber contention that Section 8 of the Canadian *Charter of Rights and Freedoms* (the search and seizure provision) afforded protection to his off-shore bank records and instead agreed with the Canadian government that the *Charter* protections do not extend to records kept in a foreign country. The Supreme Court held that the government's action in sending a letter request to the Swiss government was not a search or seizure and thus the action was not proscribed by Section 8 of the *Charter*. The search and seizure undertaken by the Swiss authorities, on Swiss soil, are not subject to Section 8; the *Charter* does not apply extraterritorially to a foreign government even when the foreign authority is acting at the request of the Canadian government.⁷² The decision has important ramifications because, based on the lower and appellate court decisions in *Schreiber*, Revenue Canada had been requiring evidence sufficient to probable cause before making foreign requests and

incrimination where Revenue Canada used it after the case turned quasi-criminal).

⁷¹ For a discussion of the trial court decision see Munroe, *Canadian Court Rules Prior Judicial Authorization Necessary for Legal Assistance Request to Foreign Government*, 12 INT'L ENFORCEMENT L. REP. 311 (Aug. 1996).

⁷² For additional background, see Kirk W. Munroe, *Canadian Supreme Court Overrules Lower Court Requirement of Prior Judicial Authorization for MLAT Request*, 14 INT'L ENFORCEMENT LAW REPORTER 326 (Aug. 1998).

executing requests from their foreign counterparts. Hence, the new evidentiary standard had imposed a significant obstacle to both outgoing and incoming mutual assistance requests.

Proactive policing against transnational crime affords law enforcement enormous opportunities to obtain economic and business information about individuals and entities which can be transferred to tax enforcement officials for prosecutorial purposes. Legislation often lags behind and the borderline between what is permissible and what is not is indeterminate, especially in the non-tax area and in countries in transition. Effective monitoring and controls on law enforcement are absent internationally.

Difficulties in controlling proactive tax enforcement practices within one single national unit are encountered when cross-border proactive policing occurs. In the case of the “horizontal cooperation mechanisms” wherein central authorities, liaison magistrates, and mixed investigation teams cooperate, law enforcement officials remain accountable to their respective national authorities. If they have diplomatic status (as may be the case with liaison officers), they cannot be called as witnesses by courts in the state where they conducted investigations or participated in mixed investigation teams, and they cannot be prosecuted for illegal acts, unless their immunity is waived. There is no international supervising judicial authority that could supervise the transnational activities of law enforcement officials.⁷³

Tax counsel and bar associations should make the injustices known at the policy levels. They should inform legislators, think-tanks, international organizations, and non-government organizations of the need for justice, integrity, and fair play in the assessment, adjudication, and enforcement of taxation.

International cooperation in criminal and quasi-criminal matters, such as fiscal penal law, increasingly leads to situations where part of the investigations and even the trial may be conducted on the territories of more than one state. The transformations in the field of judicial cooperation in criminal matters involve the use of videolink, the practice of “traveling national courts” and the blurring of the distinction between “requesting” and “requested” states. From a human rights perspective, the accountability of states involved in the international cooperation process on tax matters should be assessed. Here a problem is that international fair trial rights available in domestic criminal procedures are usually not available in procedures in which the admissibility of acts of international cooperation (extradition, mutual assistance, seizure and confiscation) is decided in the requested state. These proceedings themselves do not, usually, qualify as criminal proceedings and hence are not within the scope of Art. 14 of the International Covenant on Civil and Political Rights and Art. 6 of the European Convention on Human

⁷³ Christine Van Den Wyngaert, *The Transformations of International Criminal Law As a Response to the Challenge of Organized Crime*, Preparatory Colloquium, Utrecht, International Association of Penal Law, 52 (May 13-17 1998).

Rights.⁷⁴ Moreover, national courts in some countries do not pay heed to these conventions, especially when the U.S. has not become a member to some of the main conventions (e.g., the American Convention on Human Rights).

On occasion, an international forum, such as an international human rights tribunal, may make an appropriate place to adjudicate these rights, since such fora may be more understanding of adjudicating these claims than tax fora.

Because of the importance of confidentiality, practitioners should look for ways to ensure that, if governments erode confidentiality, the rights of interested persons are protected. For instance, notice and an opportunity to contest requests for tax information by foreign governments should be required. When confidentiality laws are violated, governments should act to demonstrate their commitment to confidentiality by vigorously investigating and prosecuting persons guilty of violations.

There is a battle between revenue authorities and taxpayers with respect to the obligations of revenue authorities to notify taxpayers of evidence gathering requests and the right of taxpayers to receive notice.⁷⁵ For instance, U.S. domestic and nontax laws allow the IRS to obtain information situated abroad. U.S. officials have utilized additional creative methods, such as requiring taxpayers to make compelled consent directives and directing banks abroad to disclose account information. For the most part, these provisions operate outside treaties. However, some treaties, such as the Netherlands-U.S. tax treaty, at the initiative and insistence of the Dutch Government, require first use of the treaty before resorting to sanctions imposed under IRS section 6038. The inability of the German Government to obtain the consent of the U.S. to rely on evidence gathering in the Mutual Legal Assistance Treaty (MLAT) as the sole or primary means of evidence gathering has impeded the conclusion of an MLAT despite the large flow of criminal cases between the two countries. Since 1983, assistant U.S. attorneys in criminal cases must obtain the consent of the Criminal Division of the Office of International Affairs (OIA) at the U.S. Justice Department before they request the issuance of subpoenas extraterritorially on third parties.

Taxpayers have won some victories recently. In *United States v. Kao*,⁷⁶ the court vacated a lower court order enforcing third-party summonses compelling taxpayers to sign consent directives without following special statutory procedures governing third-party summonses.

⁷⁴ Wyngaert, *id.* at 71.

⁷⁵ For additional discussion on the material in this section, see Bruce Zagaris, *Selected Aspects of U.S. International Exchange of Tax Information*, 18 TAX NOTES INT'L 1725 (April 26, 1999).

⁷⁶ 81 F.3d 114 (9th Cir. 1996).

In *Colello v. SEC*,⁷⁷ a U.S. court held that a freeze on Swiss assets in a Securities and Exchange Commission (SEC) enforcement action against an alleged fraud was improper and an unconstitutional seizure in violation of the Fourth Amendment of the U.S. Constitution. The court was bothered that the freezing under the U.S.-Switzerland MLAT was permitted on “reasonable suspicion,” whereas the Fourth Amendment requires “probable cause.” The court expressed concern about the absence of implementing legislation and regulations, although legislation was initially contemplated. The court explained that, while the Department of Justice Attorney General’s Manual governs the conduct of the SEC and Justice Department, it does not require them to notify the subject of a treaty request or to provide a hearing before or after making the request. The court also noted that the manual contains no standards. Instead, it contains a disclaimer that it provides only internal Justice guidance and is not intended to, does not, and may not be relied on to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It states that no limitations are imposed on otherwise lawful prerogatives of Justice.⁷⁸

In the 1980s, U.S. MLATs began incorporating language limiting their use to treaty partner governments, explicitly excluding individuals and third parties. Increasingly, courts outside the U.S. are restricting national and treaty laws to comply with provisions in international human rights treaties. For instance, in the *Ferreira* case,⁷⁹ a French court overturned penalties against a person for failure to pay vehicle registration charges, holding that rulings from the European Court of Human Rights require that anyone accused of a penal infraction has the right to a “fair trial” before a judge.⁸⁰ Because the U.S. has ratified the International Covenant on Civil and Political Rights, many of these courts holdings arguably apply in U.S. courts.⁸¹

IV. LIMITS ON BANK SECRECY AND FINANCIAL PRIVACY

The differing standards of secrecy and financial privacy that results from differing laws and cultures make advising clients in international matters a challenge. International conventions increasingly require governments to apply gateways to override secrecy and financial privacy.

⁷⁷ 908 F.Supp. 738 (C.D. Cal. 1995).

⁷⁸ *Id.* at 751-52.

⁷⁹ Cour de Cassation Arret No. 1,068, April 29, 1997.

⁸⁰ *Contra, see Schreiber v. Canada* (Attorney General)[1998] S.C.J. No. 42, File No. 26039 (search and seizure provisions of the Canadian Constitution are not engaged by a request of the Canadian government to a foreign government for bank records in that country).

⁸¹ For further discussion on recent developments, see B. Zagaris, *Developments in Mutual Cooperation, Coordination and Assistance Between the U.S. and Other Countries in International Tax Enforcement*, 27 T.M.I.J. 506-18 (Oct. 9, 1998).

For example:

Article 7(5) (Mutual Assistance) of the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which provides as follows:

A Party shall not decline to render mutual legal assistance under this article on the ground of bank secrecy.

1990 40 Recommendations of FATF:

Financial institution secrecy laws should be conceived so as not to inhibit implementation of the recommendations of the group (Principle 2).

Financial institutions should not keep anonymous accounts or accounts in obviously fictitious names... (Principle 12)

Financial institutions should take reasonable measures to obtain information about the true identity of the persons on whose behalf an account is opened or transactions on their behalf, in particular, in the case of domiciliary companies (i.e. institutions, corporations, foundations, or trusts, that do not conduct any commercial or manufacturing business or any other form of commercial operation in the country where their registered office is located) (Principle 13).

Similarly, FATF requirements obligate financial institutions and other covered persons to identify customers and make suspicious activity reports (SARs) to FIUs, while requiring FIUs to both on request and spontaneously exchange SARs information. The Revised FATF Recommendations further consolidate the requirements to increase transparency and information exchange. They provide far greater detail concerning know your customer and related due diligence measures such as identifying and reporting SARs.⁸²

More recently the OECD has issued reports on improving access to bank information for tax purposes⁸³ and on the misuse of corporate vehicles for illicit purposes.⁸⁴ The latter report focuses on the misuse of corporate vehicles for money laundering, bribery/corruption, improper insider dealing, illicit tax practices, and other misconduct. It focuses on the development of mechanisms for regulators/supervisors and law enforcement authorities in the so-called tax

⁸² FATF, *The Forty Recommendations* (June 20, 2003).

⁸³ OECD, *Improving Access to bank Information for Tax Purposes*, April 12, 2000 (available at www.oecd.org//daf/fa/evasion/accessbankinf.htm).

⁸⁴ OECD Steering Group on Corporate Governance, *Misuse of Corporate Vehicles for Illicit Purposes* (May 2001) (for more information on the report see www.oecd.org).

havens to obtain information on beneficial ownership and control (for companies), and on the identity of settlors (and protectors and beneficiaries) for trusts. The report discusses possible mechanisms for information sharing between tax authorities, including those in the so-called tax havens.

In 1998 and 2000 the Edwards Report⁸⁵ and the KPMG Report,⁸⁶ commissioned by the United Kingdom, recommended increasing the authority of the regulatory bodies and other authorities in so-called tax havens to investigate companies and trusts, and share information with other authorities through information “gateways.”

Starting in 1998, the OECD initiated its harmful tax competition initiative. The report focused on geographically mobile activities such as financial services. Its purpose was to counter the erosion of tax bases in many countries due to alleged improper tax competition through a lack of transparency and the availability of preferential tax regimes, such as zero or low tax rates. Two of the principal components in the initiative were increased transparency and increased exchange of tax information among national tax authorities. While part of the initiative was reduced at the strong request of the Bush Administration, the components on transparency and exchange of information remain. In that regard, the OECD has started a Global Tax Forum and developed model exchange of information agreements.

Meanwhile, international organizations, including the OECD, Council of Europe, the United Nations, and the Organization of American States have elaborated anti-corruption conventions that also call for, *inter alia*, increased transparency and gateways on financial confidentiality in order to cooperate internationally.

Increasingly in the late 1990s and more recently, the IMF and World Bank Group have called for greater transparency. They have argued for more transparency in response to problems including the contagion effect of financial abuses and crises, corruption issues, and the new international financial architecture. More recently, they have explicitly cited anti-money laundering as a reason for increasing transparency.⁸⁷

⁸⁵ Review of Financial Regulation in the Crown Dependencies (also known as the Edwards Report) (Nov. 1998). The report owes its name to Andrew Edwards CB, a retired UK civil servant and formerly Deputy Secretary at the Treasury, who took over the review from January to November 1998. The review was done to reassure ministers and others as to whether the Crown dependencies were respectable financial centers. For background *see* Tim Bennett, INTERNATIONAL INITIATIVES AFFECTING FINANCIAL HAVENS 37 (2001).

⁸⁶ Review of Financial Regulation in Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Montserrat, and Turks & Caicos (known as the KPMG Report) (Nov. 2000).

⁸⁷ See, e.g., Paul Allan Schott, REFERENCE GUIDE TO ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM (World Bank 2003)

The above provisions show that since the early 1990s international conventions and international standards have required gateways to overcoming secrecy. Even where these requirements are only “soft law,” international organizations, such as FATF and the IMF have developed initiatives, such as black lists and requirements whereby financial institutions must give enhanced scrutiny to transactions from countries whose anti-money laundering systems and standards do not conform to international standards. The combination of soft and hard law mean that real sanctions exist for countries, financial institutions, and categories of transactions or laws that do not meet international standards.

Much of the loss of financial confidentiality and secrecy emanates from national laws. For instance, in 2000, the U.S. Department of Treasury proposed a new U.S. withholding tax regime – the Qualified Intermediary Rules – which took effect January 1, 2001.⁸⁸ The new regulations supplant the “last address” system for receiving dividend and interest payments. Instead, the recipients must fully disclose to either the IRS or a Qualified Intermediary (QI) the name, address, and other details of the “beneficial owner” of U.S. financial assets held offshore.

An important exception to the disclosure obligations occurs when the international bank or financial institution effectively assures the IRS that they and their jurisdiction can be trusted, and is then accorded QI status. A bank or financial institution becomes a QI when it concludes a six-year QI agreement with the IRS to undertake certain due diligence with its customers. In return, the IRS substantially reduces disclosure and reporting requirements. In addition, the QI can keep the identity of its non-U.S. customers and account holders confidential from the IRS. The QI regime indicates one of the recent unilateral initiatives to override financial secrecy and confidentiality. These are discussed further in the following section.

The enactment of the Sarbanes-Oxley Act in the U.S. requires the management of public companies to detect and precisely report material changes in the financial mechanisms of their corporations. This law imposes new pressures to detect, correct and report defects in a company’s accounting, tax, anti-money laundering, and anti-corruption programs, as well as other programs affecting good governance.

The European Union has adopted instruments to protect individuals with regard to the processing and transfer of personal data. In particular, Common Position (EC) No./ 95 adopted by the Council on February 20, 1995 with a View to Adopting Directive 94/ /EC of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, Directive 95/ /EC of the European Parliament and of the council of On the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data, and Directive 95/46/EC of the European parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data are examples of the

⁸⁸ See, e.g., IRS Notices 2001-4, Notice 2001-11, and IRS Announcements 2000-48 and 2001-15.

steps taken in the EU to protect personal data.

V. IMPLEMENTATION OF GATEKEEPER STANDARDS

Throughout the international community implementation of the gatekeeper standards has been very uneven.⁸⁹

A. United States

Despite a series of reports from the U.S. government, international organizations, and non-governmental organizations showing that it is not complying with the FATF gatekeeper and OECD standards on transparency in corporate vehicles, the U.S. executive and legislative branches as well as the private sector continue to lag behind most other jurisdictions.

1. FATF Rates U.S. as Non-Compliant with Gatekeeper Standards

In 2006, the FATF gave the U.S. a non-compliant rating for the implementation of the gatekeeper requirements. In fact, as the FATF summary report of the mutual evaluation of the US states: “Accountants, lawyers, other legal professionals, real estate agents, and trust and company service providers (other than trust companies, which are subject to the same requirements as banks) are not currently subject to AML/CFT requirements (other than the large cash transaction reporting requirements).”⁹⁰

For example, accountants in the U.S. are not defined as “financial institutions” under the Bank Secrecy Act (BSA). Accordingly they are not currently subject to most of the AML requirements under the BSA (other than the obligation to file Form 8300s). Since accountants have access to companies’ operations and financial records, there have been discussions in Congress on how existing accounting standards can incorporate AML safeguards.⁹¹

⁸⁹ See, e.g., Bruce Zagaris, *EU Issues Survey of Legal Profession Implementation of Anti-Money laundering Directive*, 23 INT’L ENFORCEMENT L. REP. 42 (Feb. 2007), discussing Commission of the European Communities, *The Application to the Legal Profession of Directive 91/308/EEC on the Prevention of the Use of the Financial System for the Purpose of Money Laundering*, SEC(2006)1793, Dec. 19, 2006..

⁹⁰ FATF, Summary of the Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism United States of America 10-11 (June 23, 2006).

⁹¹ FATF, Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism United States of America 10-11 Paragraph 878 on p. 201 (June 23, 2006).

Similarly, lawyers in the U.S. are not defined as “financial institutions” and neither the U.S. government nor any of the states have acted on the gatekeeper requirements.⁹²

As of March 17, 2007, there is no change. Hence, almost four years after the FATF revised standards, the U.S. government has taken no action to subject its large numbers of financial services providers and its large financial services market to any regulation whatsoever, except reporting of large cash transactions.

2. *GAO Report on Company Formations Underscores Problems with U.S. Shell Companies, Evidence Gathering*⁹³

On April 25, 2006, the General Accounting Office released *Company Formations: Minimal Information Is Collected and Available*.⁹⁴ The report found that most states do not require ownership information during company formation, that few states require ownership information in annual or biennial reports, and that law enforcement officials fear that criminals are using shell companies to conceal illicit activities. In the context of international transparency efforts, the report has a number of potentially important policy implications.

The Permanent Subcommittee on Investigations (PSI), Committee on Homeland Security and Government Affairs, U.S. Senate, requested the GAO investigation. Approximately two weeks before the report was released, PSI chair Senator Norman Coleman and Carl Levin, ranking PSI minority member, publicly expressed concern about the issues that the report addresses.

A prior investigation of foreign individuals laundering money through U.S. corporations incorporated in Delaware had already found that the state required limited information during company formation.⁹⁵ The GAO investigation was “to determine what types of information are routinely obtained and made available regarding the ownership of nonpublicly traded companies formed in each state.”

⁹² *Id.* at para. 878 on p. 200.

⁹³ This section is taken from Bruce Zagaris, *GAO Report on Company Formations Focuses on U.S. Shell Companies, Evidence Gathering Problems*, 22 INT’L ENFORCEMENT L. REP. 258 (July 2006).

⁹⁴ U.S. General Accounting Office, *Company Formations: Minimal Information Is Collected and Available*, GAO-06-376, a report to the Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Senate, April 25, 2006.

⁹⁵ See GAO, *Suspicious Banking Activities: Possible Money Laundering by U.S. Corporations Formed for Russian Entities*, GAO-01-120 (Washington, D.C. Oct. 31, 2006).

In addition to the above-mentioned findings about ownership information, the GAO found that almost all state officials reported that they do not screen names against criminal watch lists or verify identities of company officials provided in company formation or periodic report filings. Some officials claimed that they do not take such action because they do not have the legal authority or means to do so. Fewer than half the states require names and addresses of company management or directors on company formation documents.

While third-party agents may transmit formation and other documents on behalf of a company, they rarely collect ownership information or verify the information they collect. Individuals may also transmit their own company filing documents. States have little oversight over either company formation agents or agents for service of process.

Law enforcement officials have told the GAO of their concerns about the use of shell companies in the U.S. that facilitate individuals to hide their identities and conduct criminal activity. They have faced problems investigating these shell companies because they cannot confirm ownership.

Shell companies can afford access to the U.S. financial system through U.S. bank accounts or offshore accounts in banks that have correspondent relationships with U.S. banks. In December 2005, the Financial Crimes Enforcement Network (FinCEN) determined that the New York branch of Dutch bank ABN AMRO lacked sufficient anti-money laundering controls and had failed to monitor approximately 20,000 funds transfers – with an aggregate value of approximately US \$3.2 billion – involving U.S. shell company accounts and institutions in Russia or other former Soviet Union republics.

The GAO report said it was difficult to determine the number of shell companies, especially because establishing such companies is not illegal. Law enforcement officials told GAO that many domestic and international investigations involve suspects that have used U.S. shell companies to facilitate billions of dollars of illicit activity. Law enforcement officials argue that, while state information had been useful because names on corporate documents generate additional leads, state records do not reveal who controls companies.

Department of Justice officials indicated that foreign law enforcement officials are increasingly asking for help locating the owners of U.S. shell companies. The absence of ownership information is obstructing their investigations. For instance, in 2005 Russian authorities made 30 requests for assistance and Ukrainian authorities made 75 requests involving U.S. shell companies. These requests typically seek assistance identifying individuals affiliated with the U.S. companies. Justice's efforts to collect information in responses to these requests on the companies are hindered by the lack of information maintained by states and agents. The requests often involve serious crimes occurring in other countries, but implicate a U.S. shell company.

According to OFAC, shell companies can be used to facilitate transactions with

individuals, entities, or countries targeted by U.S. economic sanctions. For instance, when the U.S. had sanctions against the former Yugoslavia, a U.S. company formation agent filed incorporation papers for a Serbian entity, which then opened bank accounts in the U.S. as a U.S. company to transfer money through the U.S.

The FBI currently has more than 100 ongoing cases investigating market manipulation, the majority of which involve the use of shell companies. The FBI also expressed concern about the use of third-party agents to form thousands of shell companies in the U.S. for criminals operating in other countries. The criminals then use the shell companies to open U.S. bank accounts. The FBI believes that U.S. shell companies are used to launder as much as \$36 billion from the former Soviet Union. The FBI reports that third-party agents often register the shell company using nominee officers to keep the foreign beneficial owner anonymous and use companies created at an earlier date – “aged shelf companies” – to give banks and regulatory authorities the impression the company has longevity.

IRS investigations have found the use of U.S. shell companies in tax evasion schemes. For instance, two co-conspirators used nominee names to open bank accounts and form U.S. corporations in Florida, hiding assets and income to avoid tax liabilities.

The GAO looked at the experiences of Jersey and Isle of Man in implementing the regulation of firms that provide services such as company formation. Company service providers in both jurisdictions must be licensed, and are subject to periodic monitoring and inspections by government agencies. Company service providers must conduct due diligence to verify the identity of their clients and obtain company ownership information to form a new company. While the ownership information is not maintained in the public record, it is maintained at the registry in Jersey and with company service providers in the Isle of Man and is available only to law enforcement.

Despite strong initial resistance, the company service provider industries in both jurisdictions are now viewed as successful because licensed companies have remained profitable, and industry professionalism has been strengthened. Government and private sector officials confirmed that implementing the regulations resulted in some service providers going out of business, increased time and costs to register and maintain companies.

According to the GAO, state officials and service providers claim that collecting more company ownership information would be difficult. The cost of filings and the time required to approve them could increase, potentially delaying business dealings or even derailing them. A few states and agents said they might lose business to other states, countries, or agents with less stringent requirements. Additionally, state officials and agents noted the difficulties of collecting information when companies are being formed or on periodic reports since ownership can change frequently. The report says state officials, agents, and other experts suggested internal company records, financial institutions, and the IRS as alternative sources of ownership information for law enforcement investigations. However, obtaining information from these sources could

present many of the same difficulties.

Given recent public statements by the chair and ranking minority members of the Senate Permanent Investigative Subcommittee, oversight hearings on this problem are the likely next step. Countries that have changed their corporate transparency legislation and regulations to meet OECD standards are likely to now insist that the U.S. and other non-complying OECD countries conform their own laws to OECD standards to ensure a level playing field.⁹⁶

3. U.S. Treasury Issues Advisory on Potential Risks of Shell Companies

On November 9, 2006, the U.S. Department of Treasury's Financial Crimes Enforcement Network (FinCEN) issued an advisory to U.S. financial institutions on the potential risks associated with accounts maintained for shell companies.⁹⁷ An accompanying report discussed the potential dangers of the use of limited liability companies due to their lack of transparency, both in the formation process and thereafter due to the inability to identify beneficial owners.⁹⁸ For practitioners, it is important to note that this report suggests potentially imminent regulatory action.

The purpose of the advisory is to remind financial institutions of the importance of managing potential risks associated with providing financial services to shell companies.⁹⁹ The advisory defines the term "shell company" as non-publicly traded corporations, limited liability companies (LLCs), and trusts that typically have no physical presence (other than a mailing address) and generate little to no independent economic value.

The advisory notes that 3.8 million LLCs – the most popular type of corporate entity –

⁹⁶ With respect to the debate about a level playing field for harmful tax practices and transparency of corporate vehicles, see Bruce Zagaris, *OECD Global Forum Meeting in Melbourne a Standoff*, 22 INT'L ENFORCEMENT L. REP. 41 (Jan. 2006); STEP, *Beyond the Legal Playing Field* (2006 www.step.org); STEP, *Towards a Level Playing Field: Regulating Corporate Vehicles in Cross-Border Transactions* (2d ed. 2005).

⁹⁷ U.S. Department of the Treasury Financial Crimes Enforcement Network, *FinCEN Advises Financial Industry on Potential Risks of Shell Companies*, Press Release, Nov. 9, 2006.

⁹⁸ U.S. Department of the Treasury Financial Crimes Enforcement Network, *The Role of Domestic Shell Companies in Financial Crime and Money Laundering: Limited Liability Companies* (Nov. 2006).

⁹⁹ U.S. Department of the Treasury Financial Crimes Enforcement Network, *Guidance FIN-2006-G014, Potential Money Laundering Risks Related to Shell Companies* (Nov. 9, 2006).

were registered nationwide in 2004. The report observes that ownership and transactional information on these entities can be concealed from regulatory and law enforcement authorities. While all states have laws governing LLC, most do not collect or otherwise require disclosure of ownership information at formation or thereafter.

Additionally, several methods exist, consistent with state laws, in which organizers of shell companies may obscure company structure, ownership, and activities. For instance, under many states' laws corporations, general partnerships, trusts, and other business entities may own and manage LLCs. Hence, state statutes allow an individual or business to further conceal involvement in the activities of a shell LLC. Owners and advisors can devise layers of ownership making it highly unlikely that relationships among various individuals and companies can be ascertained, even if one or more of the owners is actually known or discovered.¹⁰⁰

The report highlighted the important role of agents, also known as intermediaries or nominee incorporation services (NIS), in the establishment and maintenance of shell companies. NIS firms are often employed because they can legally and efficiently organize state business entities. Many agents and NIS firms advertise a wide range of services for shell companies, such as serving as a resident agent and providing mail-forwarding services. Organizers of shell companies can also buy corporate office "service packages" to appear to have established a more significant local presence. Such packages provide a state business license, a local street address, an office that is staffed during business hours, a local telephone listing with a receptionist, and 24-hour personalized voicemail. International NIS firms have marketing and customer referral arrangements with U.S. banks to offer financial services such as Internet banking and funds transfer capabilities to shell companies and foreign citizens. U.S. banks that participate in these arrangements may have increased levels of money laundering risk.¹⁰¹

According to the advisory, nominee services offered by some agents and NIS forms further client anonymity in connection with the formation and operation of shell companies. Such services include the following: (1) incorporators provide the shell company with nominee officers and directors; (2) a beneficial owner may use nominee stockholders to further ensure privacy and anonymity while maintaining control through an irrevocable proxy agreement; and (3) a nominee appointed as the company fiduciary, such as a lawyer or accountant, can open bank accounts in the name of the shell company. The nominee receives instructions from the beneficial owners and transmits them to the bank without needing to disclose the names of the beneficial owners.

The advisory explains that shell companies provide an opportunity for foreign or domestic entities to move money, whether directly or through correspondent banking relationships, without having to disclose the nature or purpose of transactions or the identities of

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

company owners.¹⁰²

The advisory observes that providing services to shell companies involves varying degrees of risk, depending on the ownership structure, nature of the customer, the services provided, purpose of the account, the location of services, and other factors. Financial institutions must be vigilant in monitoring potentially vulnerable companies on an ongoing basis. Financial institutions should assess the risks involved in each shell company relationship and take steps to ensure that the risks are appropriately identified and managed in accordance with Bank Secrecy Act obligations. Hence, all financial institutions subject to the BSA should review their anti-money laundering and suspicious activity reporting programs to ensure that internal policies, procedures, controls, systems and training programs are designed to combat potential money laundering and other financial crime involving shell companies.¹⁰³

The FinCEN report explains that domestic shell companies, such as LLCs, have been used for common financial crimes including credit card, purchasing, and loan fraud. Company formation agents and similar service providers play a central role in the establishment, maintenance and support of domestic shell companies, some of which appear to be used for illicit purposes domestically and abroad. States, the report claims, are not imposing effective safeguards on company formation agents and service providers to ensure that the business entities they create and support are not violating state laws. In addition, neither federal nor state governments require that service providers report suspicious activity concerning shell companies, nor are there requirements or procedures to identify beneficial owners in certain jurisdictions if illicit activity is suspected.¹⁰⁴

FinCEN is taking three initiatives with respect to shell companies. As mentioned above, it issued an advisory to financial institutions, reminding them of the importance of identifying and managing risks associated with such entities. In addition, FinCEN is involved in outreach efforts to state governments and private sector groups to discuss and explore ways to address vulnerabilities in state incorporation processes, especially with respect to shell company transparency and beneficial owner identification. FinCEN is collecting information and studying how best to address the role of certain businesses specializing in the formation of business entities in its effort to reduce money laundering and related vulnerabilities in the financial system through the promotion of greater transparency.¹⁰⁵

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ U.S. Department of the Treasury Financial Crimes Enforcement Network, *The Role of Domestic Shell Companies in Financial Crime and Money Laundering: Limited Liability Companies, supra.*

¹⁰⁵ *Id.*

4. *Senate Permanent Subcommittee on Investigations Holds Hearing on Abuse of Company Formation Process*

On November 14, 2006, the Permanent Subcommittee on Investigations, U.S. Senate Committee on Homeland Security and Government Affairs, held a hearing entitled *Failure to Identify Company Owners Impedes Law Enforcement*. The hearing examined allegations that U.S. states incorporated thousands of private companies without identifying corporate owners, and related law enforcement concerns with respect to money laundering, tax evasion, and terrorist financing.

Opening the hearing, Senator Normal Coleman (R-Minn.), subcommittee chair, said he would work with Senator Levin (D-Mich.) on the steps need to solve the problems associated with shell companies. Levin, in turn, noted that while most shell companies were legitimate, many were exploited by criminals, and claimed that states were competing by lowering regulatory standards, to the detriment of law enforcement.

According to Levin, investors use U.S. shell companies for anonymity, exploiting the lack of state requirements on owner identity disclosures. As a result, U.S. law enforcement officials are often unable to identify the true owners of companies. In many cases, authorities cannot pursue money laundering cases due to shareholder anonymity and their inability to trace owners.

Levin referred to FATF Recommendation 33 that financial institutions should verify the identity of company owners. Noting the U.S. leadership in FATF, Levin argued that while many offshore jurisdictions comply, the group cited U.S. non-compliance in 2006. Consequently, the U.S. risks expulsion from the group if it fails to correct the problem. Levin also believes that lax U.S. standards are creating international problems. For example, while the U.S. has been a leading critic of the lack of transparency in international markets, state non-compliance undermines U.S. credibility on the issue.

a. *Panel One: U.S. Regulatory and Law Enforcement Officials*

Stuart G. Nash, Associate Deputy Attorney General & Director, Organized Crime Drug Enforcement Task Force, U.S. Department of Justice, testified that corporate processes may be misused for many purposes. According to Nash, foreigners are establishing U.S. shell companies and opening bank accounts in the names of shell companies. When law enforcement officials try to investigate such companies, their efforts are stymied by their inability to obtain ownership information.

Use of U.S. shell companies has frustrated U.S. efforts to cooperate with foreign governments through mutual assistance in criminal matters. Nash noted that the U.S. has received an increasing number of MLAT requests from Central and Eastern European countries, but in most cases the Office of International Affairs (OIA), Criminal Division, U.S. Department

of Justice, has had to respond that ownership information is unavailable. In 2006, FATF determined that the U.S. was non-compliant with respect to access to company formation information, while other countries formerly on the non-compliant country and territory (NCCT) listed had resolved similar problems.

K. Steven Burgess, Director of Examinations, Small Business/Self Employed Division, Internal Revenue Service, testified that transparency gaps in U.S. state laws impede U.S. law enforcement and enables tax evaders to escape reporting obligations. The IRS considers three states especially accommodating to tax evasion: Delaware, Nevada, and Wyoming. Nevada and Wyoming are the only U.S. states that still permit bearer ownership. (According to the IRS, the user of bearer shares and nominees facilitate tax evasion). On the international level, Burgess said that many tax information exchange requests involve U.S. shell companies used to evade VAT taxes. When the U.S. receives such requests, it is unable to respond properly.

Yvonne Jones, Director, Financial Markets & Community Investment Team, U.S. Government Accountability Office, testified that criminals exploit law ownership information requirements for company formation. While some states require ownership information at formation and in periodic reports, many agents do not collect such information because their states do not require it. Additionally, many states fail to verify the information they collect, and statutes often preclude sharing such information with law enforcement agencies. Jones also cited the need to balance concern about increased costs and potential economic impact.

Jamal El-Hindi, Associate Director for Regulatory Policy and Programs, Financial Crimes Enforcement Network, said that the key to promoting transparency is to deter and prosecute money laundering and terrorist financing. Lack of reporting poses potential risks for money laundering and terrorist financing. The misuse of corporate entities presents a problem domestically and internationally. FinCEN is taking steps to correct the problem. FinCEN issued an advisory and is studying the role of financial intermediaries in the misuses of corporate entities.

Responding to a query from Coleman, El-Hindi confirmed that the problems involve money laundering, terrorist financing, and hence national security. Coleman then asked if the Congress could do something to establish a level playing field, in response to which Burgess suggested outreach to states. El-Hindi said FinCEN is focusing on its authority within the statutory framework, mentioning outreach and BSA regulations. In terms of legislative changes, El-Hindi noted that FinCEN's preliminary studies suggest that changing states laws would not necessarily result in a flight of businesses.

To Levin's queries, Nash and Burgess said the problem of company information has existed since the creation of limited liability company legislation in the late 1970s. Nash mentioned a multi-agency task force was established after the FATF evaluation's finding of U.S. non-compliance with Rec. 33. Levin asked for when recommendations may be forthcoming. Nash said recommendations should be forthcoming in the next year.

Burgess said that the IRS is reviewing the problem and that Treasury hopes to make legislative recommendations in the next year. Burgess suggested that it may be possible to force entities to have taxpayer identification numbers, and notify the IRS of any identification changes. Levin pressed agencies to quickly recommend changes to protect U.S. national security.

Fielding a question from Sen. Thomas Carper (D-De.) about increased costs, Jones said that increasing information requirements for company formation would increase the time and cost necessary to form companies, and cause states to lose incorporation business. El-Hindi mentioned that Delaware has increased regulation of corporate and trust formation. Nash said Delaware is especially used by persons in Central and Eastern Europe.

Robert Northcutt, Small Self-Employed Business Unit, IRS, said that under IRC §6700, the IRS is investigating company formation promoters. They have a cooperating promoter. The IRS has discovered compliance and enforcement problems, including non-filing. Northcutt explained that the shell companies and nominees present a number of problems, including collection issues, non-filing, the use of offshore credit cards, and parallel corporations.

Nash said the lack of ownership information causes problems with respect to the OFAC list. A terrorist organization on the OFAC list will want to establish a non-designated alter ego to engage in financial transactions undetected.

b. Panel Two: Secretaries of State

Richard J. Geisenberger, Assistant Secretary of State, Delaware, took exception to FATF's conclusions about problems with state incorporation procedures and ownership operation. Geisenberger noted that Delaware leads the country in regulation of commercial agents and online agents, and argued that raising ownership information disclosure would raise costs for legitimate companies. Increased regulatory costs, in turn, hurt U.S. competitiveness as a place of incorporation. Geisenberger suggested that the federal government study the costs and benefits of requiring states to increase regulation of company formation and management.

Scott W. Anderson, Deputy Secretary of State for Commercial Recordings, Office of the Secretary of State, Nevada, discussed Nevada's leading role as a corporate domicile. In Nevada, no beneficial ownership information has been required, and no verification of beneficial ownership occurs. 85,000 companies are currently formed in Nevada; such companies are often formed via electronic filing. While Nevada does not currently regulate corporate formation agents, Anderson noted that Nevada was likely to introduce new requirements. Additionally, Anderson said that the state will introduce laws criminalizing the filing of fraudulent information. Anderson also pointed out that Nevada has not received law enforcement requests or complaints about its company formation requirements, except as mentioned in the GAO and FATF reports. The Nevada Attorney General is working to hold a meeting with the state bar and company formation agents to discuss law enforcement concerns.

Laurie Flynn, Chief Legal Counsel, Office of the Secretary of the Commonwealth of Massachusetts, said her state had just adopted a revised company law based in part on the ABA's Model Corporation Act. According to Flynn, Massachusetts departed from the ABA model in terms of the Secretary of State's authority, allowing the Secretary to hold hearings if the information used during company formation is inaccurate or incomplete. Articles of incorporation include additional record keeping requirements for the names and addresses of all shareholders, and prohibit the issuance of bearer shares or the use of nominee directors or officers. The Massachusetts Limited Liability Company Act and Uniform Limited Liability Partnership Act include similar requirements. Flynn said that these requirements show Massachusetts' attempt to balance economic and regulatory requirements, and noted that the state has a host of regulatory requirements concerning company agents.

Geisenberger said that Delaware banned bearer shares in 2002, and Anderson confirmed that Nevada is proposing the elimination of bearer shares. Geisenberger said in LLCs and private companies, nominee shareholders, officers and directors are allowed in Delaware and are cost-effective. Anderson said that while common practice in Nevada is to allow nominee officers, the state is thinking of changing regulations on this issue.

Coleman cited the alleged terrorism requests associated with shell companies. Geisenberger mentioned that there are 37,000 registered agents in Delaware, 96 percent of whom represent only one organization, and noted that a proposed law strengthening registered agent requirements would only affect 237 agents.

Flynn said Massachusetts requires registered agents to retain information on beneficial ownership of companies. To Levin's question asking why Delaware does not require such information, Geisenberger pointed out that Delaware has far more companies. Geisenberger said requiring such information must be balanced against efficiency, privacy, and costs. Levin responded that Massachusetts has the same interests and Delaware should consider emulating the laws of Massachusetts. Delaware is concerned that, if company ownership information is increased, it can lead to misuse, such as identity theft.

Geisenberger discussed a new law concerning registered agents to obtain and retain corporate ownership information and allowing the Chancery Office of Delaware to take enforcement action against violations of these provisions.

Flynn suggested that Nevada and Delaware consider doing more than a ministerial review of corporate formation documents.

c. Analysis

The Senators' questions and panelists' responses indicate that state agencies are under pressure to tighten rules and record keeping requirements related to company formation and operation. The subcommittee, and especially Senators Levin and Coleman, seem determined to

pursue the issue, and will likely continue their work in this area.¹⁰⁶

5. *Senate Finance Committee Hearing on Offshore Tax Evasion*

On May 3, 2007, the Senate Committee on Finance held a hearing on “Offshore Tax Evasion: Stashing Cash Overseas.” While offshore tax evasion is currently a high-profile legislative issue, the hearing was relatively short on substantive proposals.

John Harrington, Acting International Tax Counsel, United States Department of the Treasury, Washington, DC, said Treasury is taking a multi-faceted approach to deal with the problem of offshore tax evasion. Harrington’s statement says Treasury is very concerned about the use of offshore jurisdictions to evade U.S. tax and is aggressively pursuing such abuses. However, cross-border transactions are standard business operations and the U.S. must ensure that its tax rules reflect the current economic environment, without hurting the competitiveness of U.S. workers and business. The U.S. Treasury has improved compliance that target potential areas of abuse, including foreign tax credits, transfer pricing, and private annuity contracts involving offshore issues. Treasury is targeting source issues and does not want to overact. He described action Treasury has taken with respect to tax information exchange.

Reuven S. Avi-Yonah, Irwin I. Cohn Professor of Law, University of Michigan Law School, Ann Arbor, MI, said we know that financial activities not covered by withholding, such as offshore activities, are subject to tax evasion. He noted that option contracts for offshore annuities illustrate how U.S. persons use offshore trusts to conduct transactions in the U.S. The key issue is that the trusts used the Cayman Islands for secrecy purposes.

While the hearing provides a review of current U.S. policies on offshore tax evasion, it did not offer any in depth analysis or proposals. The few Senators who attended were not especially well prepared. Nevertheless with S. 681 and other anti-tax haven bills introduced in Congress, the hearing may facilitate eventual enactment of those bills, especially in the current budgetary environment.¹⁰⁷

B. The U.K. AML Regime

The British AML Regime has affected solicitors and accountants in a number of areas, especially in the tax planning arena. The British regulatory and law enforcement authorities have taken the position that laundering applies to domestic and overseas tax crimes.

¹⁰⁶ For additional information, see Karen L. Werner, *Lack of Company Owner Data Poses Problem For Law Enforcement, Security, Officials Say*, DAILY REP. FOR EXEC., Nov. 15, 2006, at A-39.

¹⁰⁷ For more information see Bruce Zagaris, *U.S. Senate Finance Committee holds Hearing on Offshore Tax Evasion*, 23 INT’L ENFORCEMENT L. REP. 288, 288-91 (July 2007).

The Proceeds of Crime Act 2002 (POCA) sought to consolidate existing laws on the confiscation of criminal proceeds and laws relating to money laundering, to improve the efficiency of the recovery process and to increase the amount of illegally obtained assets recovered.

The key aspects of POCA include:

- a. Broadening of the definition of the regulated sector (which had covered mostly financial institutions) to include estate agents, lawyers, accountants, insolvency lawyers, tax advisors, auditors, company and trust formation agents, and businesses dealing in any good where a transaction involves cash payment of €15,000 or more.
- b. Extension of the definition of criminal conduct for the predicate offenses and terrorist offenses to all crimes.
- c. Establishment of a new “failure to report” offense for the regulated sector.

The Law Society has published over 300 pages of anti-money laundering guidance. The English have a robust gatekeeper regulatory regime.¹⁰⁸

C. Bar Associations Challenge Anti-Money Laundering Laws

Nearly four years after the Financial Action Task Force (FATF) issued its revised Forty Recommendations on Anti-Money Laundering, incorporating customer due diligence, suspicious activity reporting, and anti-tipping off requirements, bar associations continue to actively challenge the Recommendations throughout the world. As a result of extensive litigation, a number of governments have decided to exempt attorneys from suspicious activity reporting and no-tipping off requirements, while others are considering similar steps.

1. Pending Challenges

The Polish Bar has filed a petitioned in the Polish Constitutional Tribunal, challenging the

¹⁰⁸ Law Society of England and Wales, Prevention of the use of the financial system for the purpose of money laundering and terrorist financing 22 March 2006 (Law Society response to the Working Document on possible implementing measures to Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005). Law Society of England and Wales, Comments submitted by the Law Society to the European Commission during the pre-legislative stages of the Third Money Laundering Directive (Oct. 21, 2005). *See also* Peter Camp, SOLICITORS AND MONEY LAUNDERING (288 pp., 2004 Law Society of England and Wales) ISBN 1853289205.

constitutionality of Poland's anti-money laundering laws and regulations. The Polish Bar argues that the laws threaten the vital interests of lawyers, persons seeking assistance from lawyers, and the bar, as well as the security of legal transactions, the concept of a democratic state ruled by law, the structure of the state, and the rights and freedoms of citizens guaranteed by the Constitution.¹⁰⁸

The French Bars have made multiple challenges to AML laws. In May 2003, the French Bars petitioned the European Parliament (EP) concerning attorney reporting obligations in the Second ML Directive.¹⁰⁹ The Petitions Committee of the EP has referred the matter to the European Parliament Committee on Civil Liberties, Justice and Home Affairs, and the European Parliament Committee on Legal Affairs. The Committee has also asked the legal Service of the European Parliament for its opinion. The petition could be resolved by June 2007. Although the French government has enacted some of the remaining sections of the directive in the French Penal Code in June, French lawyers believe that the directive has many defects.

The French Conseil National des Barreaux (CNB) has challenged the implementation of the Third Directive on the basis that it is inconsistent with core legal principles. The CNB argued that the directive's broad scope compromises and opposes certain client confidentiality aspects of French law.¹¹⁰

The Belgian Bar's August 2004 challenge to the Second EU Money Laundering Directive is pending in the Belgium Constitutional Court. On July 13, 2005, the Court referred the matter to the European Court of Justice to determine whether the directive's attorney reporting obligations violated due process rights. On December 14, 2006, the Advocate General delivered his opinion, suggesting that the directive is valid, provided it is not interpreted so as to require lawyers to provide information that they obtain before, during, or after a legal proceeding or in the course of providing legal advice.¹¹¹

On June 26, 2007, the ECJ ruled against the bar, explaining that the requirement of suspicious transactions report do not infringe on the right to a fair trial as guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 6(1). The ECJ reasoned that lawyers are exempt from reporting in the context of litigation and

¹⁰⁸ For background on Polish AML, see IBA, *The Lawyers Guide to Legislation and Compliance*, February 19, 2007.

¹⁰⁹ For a copy of the petition see http://www.cnb.avocat.fr/Newletters_speciales/2005-04-06_vepetition.pdf.

¹¹⁰ For more on the French bar challenges, see Bruce Zagaris, *French Bar Challenges European Money Laundering Directive*, 23 INT'L ENFORCEMENT L. REP. 171 (May 2007).

¹¹¹ For more information see Minutes of the Anti-Money laundering Legislation Implementation Group Meeting, Jan. 25, 2007.

preparing for litigation. The requirement to make suspicious activities reports only arises in the context of lawyers providing financial services. In this regard, the requirements do not impinge on the right to a fair trial.¹¹²

2. Exemptions

On February 1, 2007, after a long dialogue with the Japanese Federation of Bar Associations (JFBA), the Japanese National Police Agency decided to exempt lawyers, accountants, and notaries from suspicious activity reporting requirements contained in Japanese money laundering legislation.¹¹³ The JFBA has strenuously opposed SAR requirements, arguing that they prevent lawyers from fulfilling their duties and responsibilities as set forth in the Basic Principles on the Role of Lawyers adopted by the Eighth UN Crime Prevention Congress.

After a series of successful challenges brought by the Federation of Law Societies of Canada and local bar associations, the Canadian government plans to introduce legislation excluding the legal profession from SAR requirements, consistent with lawyers' obligations with respect to solicitor-client privilege.¹¹⁴

3. Implementation Issues

The European Commission report on the impact of the Second Directive on the legal profession shows the difficulty of evaluating the Directive's effectiveness: the Commission received few responses to its efforts to survey the legal community regarding the Directive. The Commission has observed that the number of suspicious activity reports made by independent legal professionals is very low in most EU countries, especially compared to the number of reports made by financial institutions. The one exception to this rule is the U.K., where attorneys made 10,000 reports in 2005.¹¹⁵

Nearly four years after the debut of the attorney gatekeeper standards, implementation efforts continue to trouble governments, bar associations, and international organizations. A successful international vertical network – that is, a network between international organizations,

¹¹² Judgment of the Court (Grand Chamber), Case C-305/05 (June 26, 2007).

¹¹³ *Id.*

¹¹⁴ Bill C-25, amending the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, which received Royal Assent in Dec. 2006.

¹¹⁵ Commission of the European Communities, Commission Staff Working Document, *The Application to the Legal Profession of Directive 91/308 EEC on the Prevention of the use of the Financial System for the Purpose of Money Laundering*, Dec. 19, 2006 (SEC (2006) 1793 (http://ec.europa.eu/internal_market/company/docs/financial-crime/lawyers_en.pdf).

governments, and other participants – requires close cooperation in the design of the policies and standards.¹¹⁶ The whole idea of a global network is to construct and implement policies, here an anti-money laundering, outside the framework of the traditional nation-state. Building such a network requires including the regulated community, effectively integrating them into the design and implementation. Without participant agreement on the design of the policy, implementation will be quite difficult.

The fact that many bar associations still question the constitutionality of SAR reporting requirements for attorneys reflects fundamental questions about the role of lawyers in democratic societies. It remains to be seen whether the various national and regional courts will agree on where to draw the lines.

D. French Bar Challenges European Money Laundering Directive

On February 16, 2007, the French Bar filed a petition before the European Parliament, challenging Directive 2005/60/EC (“Third Money Laundering Directive”) because the Parliament allegedly failed to fulfil its underlying obligations under Article 2 of the Second Money Laundering Directive. In particular, according to the French Bar, the European Parliament did not conduct an independent assessment of the effects of the directive on lawyers and other independent legal professionals within three years, as required by the Second Directive.¹¹⁷

The French Bar’s petition argues that the European Parliament is trying to increase the legal profession’s compliance obligations without completing the required report. By adopting a new directive without the evaluation, the Parliament, the petition argues, has failed to fulfil its oversight obligation. Hence, the European legislature has committed a serious infringement of the principle of legitimate trust.

The petition explains that the Third Money Laundering Directive fosters a society based on suspicions by expanding the scope of the two previous Directives and by increasing the role of lawyers as auxiliary agents of the government. Insofar as it punishes criminal offenses, the Directive should have taken account of the principle of proportionality and the legality of offenses and sentences.

As the petition observes, the third money laundering directive increases attorneys’ due diligence obligations. Article 30 requires lawyers to maintain copies of documents for the police for five years after the end of business relationships.

¹¹⁶ For a discussion of international networks, *see* Anne Marie Slaughter, *A NEW WORLD ORDER* 20-21 (2004).

¹¹⁷ French Bar, *Petition of the French Bar Against the Directive of 26 October 2005 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing*, *European Parliament*, Feb. 16, 2007.

In addition, the new directive removes the Bar's ability to filter suspicious activity reports (SARs). Instead, Article 23 of the new directive requires prompt, unfiltered transmission of SARs to the Financial Intelligence Unit. While clients could previously be informed of SARs, Art. 28 now prohibits "tipping off." The new "tipping off" language also raises questions about the appropriate role of bar associations and other self-regulatory organization, especially where the roles, resources, and laws concerning such organizations vary from country to country.

The French Bar asserts that by forcing lawyers to follow obligations more appropriate for the police, the new money laundering directive challenges attorneys' independence. The Directive significantly changes the role of the lawyer: instead of an adviser and defender of his client, the lawyer becomes an agent of the State, obliged to betray his client's trust without limit. The petition also argues that the Directive ignores the role of regulatory authorities such as bar associations and, in France, the system CARPA system of attorney payment regulations.¹¹⁸

Bar associations throughout the EU have filed similar challenges to the Third Directive. The bar associations' argument is analogous to, and an extension of, the argument made by the bar associations before FATF. In promulgating the gatekeeper initiative that serves as the basis for the EU's own gatekeeper initiative, FATF ran the regulatory process without meaningful input from the bar associations. After inviting selected bar associations to participate on two occasions, FATF then finalized the recommendations in a non-public session, without a record of its deliberations. Bar associations believe that neither FATF nor the EU understood the purported violations of fundamental law and the attorney-client relationship resulting from the new regulations.

Pending litigation by the Belgian bar in the European Court of Justice will likely resolve whether the Directive sufficiently takes into account the principles of proportionality and the legality of offenses and sentences.

VI. IMPLEMENTATION OF INTERNATIONAL TAX ENFORCEMENT INITIATIVES: NEW U.S. TAX LEGISLATION TARGETS OFFSHORE JURISDICTIONS

Three new pieces of U.S. legislation target transactions involving "tax haven" or "offshore secrecy" jurisdictions as part of efforts to close the growing U.S. tax gap. The bills – S. 396, which has been incorporated in S. 554, the budget resolution, and S. 681, the Stop Tax Haven Abuse Act – target "offshore secrecy jurisdictions" and include lists of specifically named countries. As Congress searches for revenue to fund international and domestic projects in a pay-as-you-go budget environment, legislators are increasingly working to limit the ability of U.S. citizens and companies to obtain tax benefits from doing business abroad.

¹¹⁸

Id.

A. Limiting Deferral

As proposed, S. 396¹¹⁹ (and incorporated as Sec. 212 in S. 554),¹²⁰ would deny deferral benefits to companies that locate subsidiaries in so-called tax haven jurisdictions simply for the purpose of avoiding their U.S. tax responsibilities.

Introduced Jan. 25, 2007 by Sens. Byron Dorgan (N.D.), Chairman of the Senate Budget Committee, and Sens. Carl Levin (D-Mich.) and Russ Feingold (D-Wis.), S. 396 would treat controlled foreign corporations (CFCs) established in “tax haven countries” as domestic companies for tax purposes. The bill lists 40 “tax haven countries,” including: Andorra, Anguilla, Antigua and Barbuda, Aruba, the Bahamas, Bahrain, Belize, Bermuda, Barbados, the Cayman Islands, the British Virgin Islands, the Cook Islands, Cyprus, Dominica, Gibraltar, Grenada, Guernsey, Isle of Man, Jersey, Liberia, Liechtenstein, the Maldives, Malta, Mauritius, Monaco, the Netherlands Antilles, Montserrat, Nauru, Niue, Panama, Samoa, San Marino, St. Kitts and Nevis, St. Lucia, St. Vincent, Tonga, Turks and Caicos, and Vanuatu.

The bill would exempt CFCs only if they earn “substantially all” of their income for the tax year from active trade or business activities in the jurisdictions where they were organized or created. The measure does not define what would qualify as “substantially all.” The provisions also give the treasury secretary authority to add or remove a foreign jurisdiction from the list.¹²¹

B. The Stop Tax Haven Abuse Act

On February 17, 2007, Senators Levin, Barrack Obama (D-Ill.), and Norm Coleman (R-Mn) introduced the Stop Tax Haven Abuse Act (STHA), which would dramatically change U.S. tax rules with respect to offshore secrecy jurisdictions.¹²²

The STHA contains presumptions concerning certain offshore secrecy jurisdictions by allowing the U.S. tax and securities law enforcement authorities to presume that non-publicly traded offshore companies or trusts are mere nominees for those who establish them and can be disregarded, unless the taxpayer can prove otherwise. The three presumptions are as follows: (1) money or property transferred to an offshore account or entity represents previously unreported income of the transferor, taxable in the year of transfer; (2) transfers of money or property from

¹¹⁹ For the text of S. 396, see <http://www.opencongress.org/bill/110-s396/show>.

¹²⁰ For the text of S. 554, see <http://www.opencongress.org/bill/110-s554/show>.

¹²¹ For more information see *Alison Bennett, Momentum Increasing for Tax Haven Limits As Budget Writers Eye Dorgan Bill for Offset*, DAILY REP. FOR EXEC., March 23, 2007, at G-5.

¹²² For the text of S. 681, see <http://www.opencongress.org/bill/110-s681/show>.

the offshore account or entity constitute income of the transferee taxable in the year of receipt; and (3) a U.S. person who formed, transferred assets to or from, or was a beneficiary of, an offshore entity is presumed to exercise control over it. (Sec. 101).

The STHA creates a presumption concerning reportable financial accounts: It applies with respect to any account with a financial institution formed, domiciled, or operating in an offshore secrecy jurisdiction. The rebuttable presumption is that any such account contains funds in an amount that is at least sufficient to require a report prescribed by regulations under 31 U.S.C. 5315 (part of the Bank Secrecy Act).

The bill directs Treasury to add or remove jurisdictions from the initial list. The criteria for inclusion are that a jurisdiction has “corporate, business, bank, or tax secrecy rules and practices which, in the judgment of the Secretary, unreasonably restrict the ability of the United States to obtain information relevant to the enforcement of this title [the Internal Revenue Code], unless the Secretary also determines that such country has effective information exchange practices.” (Sec. 101).

Additional reporting requirements apply to U.S. persons who use secrecy jurisdictions. They include the jurisdictions mentioned in S. 396, as well as Hong Kong, Singapore, and Switzerland. For practitioners, it is somewhat surprising that a number of the listed jurisdictions have concluded tax information exchange agreements (TIEA) or income tax treaties with the United States. For example, Switzerland and Cyprus and U.S. tax treaties, while Barbados has both a tax treaty and a TIEA.

Sec. 102 authorizes Treasury to apply sanctions to counter perceived threats to U.S. tax enforcement. Treasury can apply the same sanctions currently available with respect to foreign jurisdictions, financial institutions, or transactions of “primary money laundering concern” to foreign jurisdictions, financial institutions and transactions found to be “impeding U.S. tax enforcement.” Treasury would impose requirements and sanctions on U.S. financial institutions which deal with a designated jurisdiction or offshore financial institution, and would also be authorized to instruct U.S. financial institutions to block credit card transactions.

Under Sec. 103 the IRS has an additional three years beyond the usual three-year statute of limitations to audit or assess tax on transactions involving an offshore secrecy jurisdiction. Section 201 amends the Securities Exchange Act of 1934, the Securities Act of 1933, the Investment Company Act of 1940 and the Investment Advisers Act of 1940. The penalties are increased for failure to disclose offshore holdings (not limited to offshore secrecy jurisdictions). Section 202 requires Treasury to promulgate final regulations directing hedge funds and private equity funds to comply with various anti-money laundering requirements. It imposes anti-money laundering obligations on company formation agents.

Section 204 of the bill changes the procedures under Code Sec. 7609 relating to third party (“John Doe”) summons, authorizing information gathering for unnamed taxpayers. The

provisions establish an exception for summons which are limited to information regarding a U.S. correspondent account or a U.S. payable-through account (both as defined in Section 5318A(E) of Title 31 [part of the Bank Secrecy Act]) of a financial institution in an offshore secrecy jurisdiction. In any case in which a person or class of persons subject to the summons have financial accounts in, or transactions related to, offshore secrecy jurisdictions, a presumption exists of a reasonable basis for believing that such person or persons may fail or may have failed to comply with provisions of internal revenue law.

The bill also creates an exception to ordinary procedural requirements for John Doe summonses relating to an approved project. A project can only be approved after a court proceeding. However, once a project is approved, the IRS may issue a summons to any member of an ascertainable group or class of persons included in the project for a period of three years. A court may further extend the time for issuing such summonses for additional three-year periods. Approved projects under these rules are subject to ongoing court oversight.

These new rules are designed to allow the IRS to present an investigative project, as a whole, to a single judge to obtain approval for issuing multiple summons related to that project over a period of three years or more.¹²³ The unnamed taxpayers in each class would be presumed to be reasonably likely to have failed to comply with tax laws if the class involves financial accounts or transactions in offshore secrecy jurisdictions.

Section 205 of the bill makes changes to portions of The Bank Secrecy Act (31 U.S.C. §. 1051 et. seq.) concerning the enforcement of foreign bank account reporting requirements and suspicious activity reports. Title III of S.681 concerns combating domestic and offshore tax shelters. Title IV concerns the requirement of economic substance for both domestic and offshore transactions.

C. Analysis

Ironically, U.S. efforts to crack down on transactions in “tax haven” and “offshore secrecy” jurisdictions ignores the U.S.’s role as the largest market for international investors seeking secrecy and tax incentives. For example, interest earned by U.S. bank accounts held by foreign nationals is exempt from U.S. taxation. The U.S. only regularly exchanges information on earnings from such accounts with Canada. The Bush administration has not made final¹²⁴ a proposed Clinton administration regulation to extend regular reporting of such earnings to OECD

¹²³ 153 CONG. REC. S2212 (daily ed. February 17, 2007) (statement of Sen. Levin).

¹²⁴ Daniel J. Mitchell, *How the IRS Interest-Reporting Regulation Will Undermine the Fight Against Dirty Money*, III PROSPERITAS (July 2003) <http://www.freedomandprosperity.org/Papers/irsreg-dm/irsreg-dm.shtml>

countries.¹²⁵

The dynamic growth of foreign investment in the U.S. is due in part to the international emergence of hedge funds. In 2005, more than 8,000 hedge funds managed an estimated \$1.1 trillion dollars. A substantial number of these funds are based in the U.S. Hedge fund managers are not required to report information on foreign investors in U.S. hedge funds to any government body, although industry sources estimate that more than 40% of these funds – worth \$400 billion – are foreign investment.¹²⁶

In the same vein, for over three years the U.S. has failed to comply with the FATF Forty Recommendations. In 2006, FATF gave the U.S. a non-compliant rating because the U.S. failed to implement gatekeeper requirements. As the FATF summary report of the mutual evaluation of the U.S. states: “Accountants, lawyers, other legal professionals, real estate agents, and trust and company service providers (other than trust companies, which are subject to the same requirements as banks) are not currently subject to AML/CFT requirements (other than the large cash transaction reporting requirements).”¹²⁷

Further, U.S. accountants are not defined as “financial institutions” under the Bank Secrecy Act (BSA). Accordingly, they are not currently subject to most of the BSA’s AML requirements, other than the obligation to file Form 8300s. Because accountants have access to companies’ operations and financial records, Congress is considering how to incorporate AML safeguards into existing accounting standards.¹²⁸

The absence of corporate formation laws and lax money laundering laws have made the U.S. a center for investment by Russian, Central, and Eastern European organized crime groups. In a number of cases, U.S. law enforcement authorities were not able to effectively respond to

¹²⁵ Regulation 133254-02 is a revised version of the original Clinton-era proposal (REG - 126100-00). The only difference between the two regulations is that the revised version applies to interest paid to depositors from 15 specific nations, while the original regulation would have applied to interest paid to all nonresident aliens. The revised regulation can be reviewed at <http://www.treasury.gov/press/releases/reports/po33011.pdf>

¹²⁶ Leonard Schneidmann, U.S. TAXATION OF FOREIGN PORTFOLIO INVESTMENTS, Ch. 4 (2006).

¹²⁷ FATF, Summary of the Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism United States of America 10-11 (June 23, 2006).

¹²⁸ FATF, Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism United States of America 10-11 Paragraph 878 on p. 201 (June 23, 2006).

foreign requests for mutual assistance because there was no legal requirement that service providers collect the information the foreign governments were seeking.¹²⁹

Certain members of Congress are trying to use the U.S.'s superpower status to avoid the level playing field (LPF) requirements of the OECD's harmful tax practices initiative.¹³⁰ The LPF requirements prohibit the imposition of "greylists" or "blacklists" against targeted countries until and unless there is a level playing field, and FATF and STEP reports have shown there is not a level playing field because of U.S. non-compliance.¹³¹ The tax haven bills also contradict President Bush's statement that the U.S. has a competitive advantage in services and is trying to liberalize trade in services. The President's Annual Economic Report complains of regulatory barriers and investment restrictions.¹³²

The growing U.S. tax gap is the engine of the new tax legislation. U.S. lawmakers have traditionally focused on increasing tax enforcement before finally confronting the reality that they need to trim spending or raise taxes. The new bills continue the U.S. government policy of trying to persuade foreign countries to negotiate TIEAs without providing tax benefits to treaty countries and with threats of discriminatory provisions targeting countries that do not accede. This policy is the source of some diplomatic strife, and markedly contrasts Canada's 2007 budget and recent TIEAs such as the agreement between the Netherlands and the Isle of Man.¹³³ In a related example, the Australia-Bermuda TIEA, Australia agreed not to enact blacklists or graylists targeting Bermuda.

The Senate bills violate the principle in Article II of the GATS that prohibit countries from discriminating among foreign trading partners on the basis of nationality and require that rules and regulations be based on objective, non-discriminatory criteria. The bills are constructed in a clearly arbitrary and discriminatory manner because the anti-money laundering and tax/corporate

¹²⁹ Bruce Zagaris, *GAO Report on Company Formations Focuses on U.S. Shell Companies, Evidence Gathering Problems*, 22 INT'L ENFORCEMENT L. REP. 258 (July 2006); Bruce Zagaris, *GAO Report on Russian-U.S. Money Laundering Fuels Calls for Strengthening U.S. Anti-Money Laundering Laws*, 17 INT'L ENFORCEMENT L. REP. 42 (Feb. 2001).

¹³⁰ See, e.g., OECD, *OECD's Project on Harmful Tax Practices: the 2004 Progress Report* (<http://www.oecd.org/dataoecd/60/33/30901115.pdf>).

¹³¹ Jason Sharmon and Gregory Rawlings, *Deconstructing National Tax Blacklists: Removing Obstacles to Cross-Border Trade in Financial Services* (Set. 19, 2005).

¹³² White House, *ECONOMIC REPORT OF THE PRESIDENT*, 171 http://www.whitehouse.gov/cea/2007_erp.pdf

¹³³ See Bruce Zagaris, *Canadian Budget Provides Tax Benefits for TIEAs*, 23 INT'L ENFORCEMENT L. REP. 180 (May 2007).

transparency laws show that many of the targeted countries meet international standards, while the U.S. does not. In this connection, in light of the U.S. government's protracted non-compliance of the WTO ruling in the online gaming case filed by Antigua and Barbuda, the Caribbean trade delegation in the WTO Doha negotiations also shared their concerns about the enforcement of the rights of small and vulnerable economies (SVEs) in the multilateral trading system. Enactment of the anti-tax haven bills is likely to land the U.S. in another WTO case.

On June 25, 2007, the international business media reported that Canada, Costa Rica, and Macao have requested talks with the United States to seek compensation for the U.S. decision to alter its World Trade Organization commitments in order to specifically ban the cross-border provision of Internet gambling services.

The three WTO members joined the European Union, India, Japan, and Antigua and Barbuda in submitting consultation requests by the June 22 filing deadline. Canada filed its request June 22 while Costa Rica and Macao filed their requests June 21.

Antigua also announced June 20 it will seek WTO authorization to impose more than \$3.4 billion in annual trade sanctions against the United States for failing to comply with an earlier trade body dispute ruling against the U.S. ban.¹³⁴

On May 4, 2007, the U.S. announced that it will modify its General Agreement on Trade in Services (GATS) schedule to specifically exclude any market access commitments on gambling services and to correct what U.S. officials described as a drafting "oversight" made at the end of the Uruguay Round negotiations in 1993.

According to U.S. officials, the scheduling change was the only way the United States could comply with the WTO ruling in the complaint brought by Antigua against the U.S. Internet gambling ban. The WTO ruled that U.S. market access commitments under subsector 10.D of its General Agreement on Trade in Services (GATS) schedule covering "other recreational services" include gambling services, despite U.S. claims that it never intended to open its market to foreign gambling firms.

Article XXI of GATS requires a WTO member proposing to modify its schedule of services commitments to negotiate with any WTO member affected by the changes "with a view to reaching agreement on any necessary compensatory adjustment" in market access for services. If they cannot achieve an agreement, the affected members may call for WTO arbitration to determine the appropriate level of compensation. The WTO member making the scheduling changes will be prevented from doing so "until it has made compensatory adjustment in

¹³⁴ For more information see Daniel Pruzin, *Canada, Costa Rica, Macao Request Talks With U.S. in Gambling Dispute*, DAILY REP. FOR EXEC., June 25, 2007, at A-1.

conformity with the findings of the arbitration.”¹³⁵

VII. APPLICATION OF DUE DILIGENCE AND KNOW-YOUR-CLIENT PRINCIPLES TO LAWYERS INVOLVED IN WEALTH PLANNING AND MANAGEMENT

At present, due diligence and know-your-client regulations for estate planning attorneys are transitioning from an older *laissez faire* regime to a newer, stricter standard.

Hard law requirements depend on the nature of the transaction and the laws of the controlling jurisdiction. Although FATF and the OECD have set forth soft law requirements with respect to the conduct of gatekeepers and corporate transparency respectively, some countries, including the United States, have not implemented them. Other countries, such as Canada, have not required that lawyers identify and report suspicious transactions.

Many U.S. law firms and lawyers do not have internal due diligence standards for dealing with international wealth, tax, and business planning. When they deal with other jurisdictions that have anti-money laundering, tax evasion, and corporate transparency vehicle standards and they run afoul of them, they risk prosecution. For many years foreign governments were relatively inactive in implementing such laws, especially extraterritorially. However, they are maturing in the application of these laws, partly due to training and modernizing these laws and regulations. In addition, when U.S. professionals are targets, many prosecutors are aware that the U.S. aggressively applies its laws extraterritorially. When foreign governments conduct extraterritorial enforcement initiatives, they usually request assistance from the U.S. In many cases these requests trigger U.S. criminal investigations and, if warranted, prosecutorial actions.

VIII. NEW BAR RULES FOR REPORTING WRONGDOING

As a result of the international debate surrounding attorney due diligence requirements, the American Bar Association (ABA) has discussed and revised its rules of professional conduct to allow broader disclosure of client confidences under certain circumstances.

A. The ABA Model Rules of Professional Conduct

State ethics rules vary but are generally based on the ABA’s Model Rules of Professional Conduct. If an attorney violates a state’s ethics rules, he can be subject to sanctions, normally imposed by courts.¹³⁶

¹³⁵ *Id.*

¹³⁶ For a useful discussion see Edward J. Krauland and Troy H. Cribb, *The Attorney-Client Privilege in the United States An Age-Old Principle Under Modern Pressures*, A GLOBAL DIALOGUE: PROTECTING THE ATTORNEY-CLIENT RELATIONSHIP AND THE RULE OF LAW IN THE

ABA Model Rule 1.6 limits the circumstances in which an attorney can reveal confidential communications. In the absence of the client's informed consent, a fundamental principle in the client-lawyer relationship requires that a lawyer not reveal information concerning the representation. The principle contributes to the trust that is the cornerstone of the attorney-client relationship. The confidentiality encourages a client to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. Without such frank communications, the lawyer cannot represent the client effectively, including to advise the client to refrain from wrongful conduct.¹³⁷

Under Rule 1.6 the attorney must not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to undertake the representation, or under the enumerated limited circumstances in which the attorney may reveal information relating to the representation to the extent the lawyer believes is necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to obtain legal advice about the lawyer's compliance with these Rules;
- (3) 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; or
- (4) to comply with other law or a court order.

Notwithstanding its strict limits on revealing confidential communications, the Model Rules prohibit a lawyer from counseling a client to engage in, or assisting a client, in conduct the lawyer knows is criminal or fraudulent. However, a lawyer can discuss the legal consequences of any proposed course of conduct with a client and to counsel or help the client to make a good faith effort to determine the validity, scope, meaning, or application of the law.¹³⁸

If a lawyer's representation will result in violation of the law or Rules of Professional Conduct, the lawyer must withdraw from representation.¹³⁹ If the client has used the lawyer's

FIGHT AGAINST INTERNATIONAL FINANCIAL CRIMES (American Bar Assoc. Sec. Of Int'l Law and Practice 2004 Annual Meeting), on which this section relies heavily.

¹³⁷ ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.6, Comment 2.

¹³⁸ ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.2(d).

¹³⁹ *Id.*, Rule 1.16(a).

services to commit a crime or fraud, the lawyer may, but is not required, to withdraw.¹⁴⁰ If the lawyer discovers that the client, or the client's witness, has offered false evidence before a court, or if the client otherwise engages in a fraud upon the court, such as bribing a witness, Model Rule 3.3 requires the lawyer to disclose otherwise confidential information. A lawyer must disclose confidential information if s/he discovers that the client, or the client's witness, has offered false evidence before a court, or if the client engages in a fraud upon the court, such as bribing a witness.¹⁴¹

If not covered by the exceptions mentioned above, Rule 1.6 requires strict confidentiality by the attorney. It requires the attorney to keep confidential information that is not necessarily protected by the attorney-client privilege. The Rule applies to all information related to the representation, regardless of whether the client communicated such information. Under Rule 1.6 the attorney must maintain confidences in all circumstances, not only when evidence is sought through compulsion of law, such when the attorney-client privilege applies.

Unless covered by one of the exceptions, an attorney is required by Rule 1.6 to a strict rule of confidentiality. S/he must keep confidential information even if it is not protected by the attorney-client privilege. The Rule covers all information related to the representation, regardless of whether it was communicated by the client. Rule 1.6 requires the attorney to maintain confidences in all circumstances, not only when evidence is sought through compulsion of law (the latter governs the circumstances in which the attorney-client privilege applies).

In 2000, the ABA liberalized Rule 1.6. It considered but did not adopt provisions that would permit disclosure "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" if the lawyer's services have been used in furtherance of that activity, or to "prevent, mitigate, or rectify" such financial or property damage "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."¹⁴²

A lawyer can voluntarily make disclosures under these circumstances. Additional efforts to liberalize Rule 1.6 engendered controversy. Opponents of revising the rules contended lawyers would incur increased liability and legal inquiries into whether the lawyer "should have known" of the crime or fraud when in reality the lawyer is likely to have knowledge only after the fact. In addition, the proposed rule has a whistleblower element to the ethics rules that may result in a lawyer disclosing for fear of guessing wrong about the client's activities or intentions. Another problem is that expanding the circumstances in which the lawyer could disclose client confidences

¹⁴⁰ *Id.*, Rule 1.16(b)(3).

¹⁴¹ *Id.*, Rule 3.3.

¹⁴² *Id.*, Proposed Rule 1.6 at 42.

would create an additional impediment to trust between lawyer and client, reducing the likelihood that the lawyer would be able to counsel the client to comply with the law.¹⁴³

B. Developments in State Ethics Rules

The trend in states is towards greater voluntary – and in some cases mandatory – disclosure. Like the ABA Model Code, the ethics codes of the fifty states and the District of Columbia prevent an attorney from revealing client confidences, except under enumerated limited exceptions. Seventeen states follow the Model Code, permitting disclosure to prevent a client from committing a criminal or fraudulent act (which the lawyer believes is likely to lead to death or substantial bodily harm, under the rules of six of these states).

Twenty-five states permit voluntary disclosure to prevent or to reveal the intention of a client to commit “a crime” or “criminal act,” without explicit guidance as to how serious the crime should be in order for the attorney to believe disclosure is appropriate. Georgia allows disclosure to prevent “harm ... as the result of criminal conduct” without expressly defining the extent of harm within the text of the rule. Virginia requires the attorney to first advise the client of the legal consequences, urge the client not to commit the crime, and advise the client that the attorney must reveal the client’s intentions unless the client relinquishes.

Ten states provide that voluntary disclosure embraces circumstances in which the attorney believes that criminal or fraudulent acts of the client will lead to substantial financial injury to the financial or property interest of another. Wisconsin requires an attorney to reveal information under these circumstances. Most states have a rule similar to ABA Model Rule 4.1, requiring that a lawyer disclose a material fact to a third person when disclosure is required to avoid “assisting” a criminal or fraudulent act by the client. In addition, these states qualify the requirement by making it inapplicable if disclosure is prohibited by the state-equivalent to Rule 1.6.

At least 15 states have rules permitting lawyers to disclose confidential communications to “rectify” the consequences of a client’s criminal or fraudulent act when the lawyer’s services have been used in the commission of that act. Two states require disclosure in certain circumstances in which the client has used the lawyer’s services in furtherance of a criminal or fraudulent act.

Developing state ethics rules trend toward enlarging the situations in which an attorney may – or in some case must – reveal client confidences. It remains to be seen whether these changes will be sufficient to persuade legislators on the state and federal levels that they do not need to enact legislation requiring more disclosure by lawyers.

¹⁴³ *Id.*, Minority Report at 8.

IX. PRACTICAL IMPLICATIONS OF INCREASINGLY COMPLEX TAX AND REGULATORY REGIMES, ESPECIALLY FOR U.S. PRACTITIONERS

The most important U.S. AML development was the U.S. Supreme Court's 2005 *Pasquantino* decision, which makes U.S. professionals who help foreigners commit tax crimes potentially liable for wire and mail fraud in the U.S.

U.S. government guidance on anti-money laundering due diligence awaits action by the executive branch. The U.S. Money Laundering Strategy Reports advise that the U.S. government intends to take action on the gatekeeper initiative. The ABA has held regular meetings with the U.S. government to discuss the initiative. In the near future the U.S. government will likely announce plans to move forward, including new legislative proposals.

From a practical perspective U.S. laws and ethical canons on foreign tax avoidance are murky. If U.S. counsel is merely helping a person avoid a foreign tax, he should be compliant with U.S. laws and ethics. Indeed, ethical canons require that counsel zealously represent clients. The difficulty is distinguishing between foreign tax crimes and tax avoidance. As noted above, U.S. persons have been convicted of U.S. money laundering violations using the predicate crimes of wire and mail fraud for helping foreigners evade Russian taxes.

Many practitioners pay only cursory attention to the evolution of tax and money laundering enforcement, which has created new ethical demands and constraints. Failure to properly monitor related developments can create major ethical or even criminal problems. Hopefully, staying up-to-date with enforcement trends will enable practitioners to avoid legal trouble, and to provide meaningful advice to their own clients and to professional colleagues.

American lawyers with internationally-focused practices are often confronted with multiple, sometimes conflicting, ethical standards, with no guidelines as to which ones prevail. In the absence of international ethical standards, international lawyers should refer, for guidance purposes, to the principles set forth in both the U.S. Code of Professional Responsibility ("CPR") and the draft Model Rules of Professional Conduct ("MRPC").¹⁴⁴

A. Routine Legal Representations

Routine legal representations where lawyers help structure investments or transactions involving assets can now be prosecuted as money laundering violations. For instance, the formation of entities such as philanthropic organizations or corporations that are dealing with the proceeds or instrumentalities of crime now can be prosecuted as money laundering violations.

¹⁴⁴ For a more comprehensive discussion of ethical issues in relation to international estate planning, see Bruce Zagaris, *Money Laundering, the Gatekeeper Initiative, the Patriot Act, and Ethical Issues Concerning Foreign Tax Avoidance*, INTERNATIONAL ESTATE PLANNING INSTITUTE E-1, E-31-E47 (NYSBA STEP 2005)

Similarly, engaging in real estate transactions on behalf of persons who are Office of Foreign Asset Controls Specially Designated Nationals (SDNs) or who are trying to invest or otherwise deal with proceeds or instrumentalities of crime can create criminal liability.

In fact, if the sources of the proposed legal transaction are proceeds of crime, then virtually any proposed transaction can run afoul of AML laws. Indeed, as the scope of predicate crimes sweeps in all crimes punishable by imprisonment of six months or more, gatekeepers, especially lawyers and accountants, face a formidable task. Unless international organizations and governments exercise caution in their implementation of the new policies, they risk blurring the line between legal and illegal conduct until it is almost unrecognizable.

Some transactions that are routine in one country may be high-risk in another. Attorneys who provide tax and business advice to persons who then violate exchange controls are particularly at risk. Attorneys and accountants in London, long a jurisdiction for international investment, are now reluctant to advise clients from countries – particularly Russia – with high levels of tax evasion.

These type of transactions used to be routine in major U.S. metropolitan areas. In fact, in New York, Miami, and other U.S. metropolitan areas, advising foreign investors and immigrants on tax and business planning is a staple professional activity. The normal scenario is that foreigners develop interest in a host country, begin to make investments, and subsequently being to spend time physically in the host area. Domestically, the U.S. has prosecuted people, including attorneys, for money laundering arising out of providing tax and business advice.

Some of the early cases concerned drug-related proceeds. However, in the Bank of New York case Lucy Edwards and Peter Berlin pleaded guilty to money laundering for mail and wire fraud. The underlying crimes were helping persons evade Russian income tax. As a result, U.S. gatekeepers should no longer treat giving international and even domestic tax and business advice as routine. Even the dividing line between domestic and international may be gray. For example, if a U.S. taxpayer makes a domestic transaction, but receives the source of funds from a foreigner, the transaction should be treated as an international transaction.

The gatekeeper initiative and the realities of anti-money laundering create a situation where there will no longer be many routine transactions, as such transactions will eventually be targeted by money launderers.

B. High-Risk Transaction Areas

While no list is all-encompassing, the easiest high-risk transactions to identify are dealing with persons on the SDN lists and engaging in transactions that the U.S. government (FinCEN, OFAC, State, Commerce, and Defense), international organizations (FATF, the European Union, OAS CICAD, regional FATFs, and Basle Group), or non-governmental organizations have flagged as suspicious. For instance, gatekeepers must pay special attention to “all complex,

unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose.” (FATF, Rec. 11).

Other high-risk transactions include transactions involving politically exposed persons (PEPs), cross-border correspondent banking and similar relationships (e.g., “payable-through-accounts”) and new or developing technologies that may favor anonymity (e.g., some electronic payment systems). For U.S. professionals, high-risk transactions include international transactions involving risky countries, persons, and types of transactions identified by FATF and regulators, whether they are mergers and acquisitions, business or tax advice, real estate, or some other transaction.

In this context, practitioners should be aware of the “balloon effect.” Skilled money launderers work to identify new techniques to conceal or move illegal proceeds. They tend to identify and utilize jurisdictions, persons, and transactions that are comparatively unregulated from an AML perspective. Because money launderers are always innovating, gatekeepers can never rely on a static set of typologies.

C. Red Flags for Lawyers

The red flags for attorneys will depend on the transaction. For instance, the red flags vary depending on whether lawyers are engaging in a transaction for a security broker-dealer, a bank or savings and loan institution, a life insurance and/or annuity, real estate, or some other client.

International transactions require lawyers to take into consideration the typologies published annually by FATF and regional FATFs. They include, for instance, problems experienced by gatekeepers, cyber transactions, dealing with jurisdictions on the list of non-cooperative countries and territories, and AML due diligence for gatekeepers.

Normal red flags include: transactions with countries whose standards fall below international standards; persons wanting anonymity, bearer shares, and secrecy when the circumstances indicate high risks (e.g., an apparent PEP and transactions with blacklisted countries and/or persons); and transactions with insufficient information about the beneficial owners and/or the sources of money.

As governments such as the U.S. and international organizations broaden AML laws, trade associations must identify issues and promulgate guidance for practitioners. For instance, the Wolfsberg Group, an informal group of multinational banks, has issued guidelines for AML due diligence in private banking. In addition, law and accounting firms will need to develop compliance programs customized to meet the needs of their practices. Bar (and accounting) associations, working together with national and state governments and hopefully international organizations, will be able to develop balanced guidelines and constantly update them to meet the needs of the practice.

X. ANALYSIS

Offshore regulations and enforcement laws have come onshore, harming major stakeholders in the international investment and financial services arena. These stakeholders, including SOFCs, service providers, clients, regulators, and enforcement officials, as well as the rule of law and the legitimacy of international regulatory and enforcement standards, are at risk.

The vast majority of stakeholders want international standards to apply consistently across jurisdictions. To the extent that regulators seek continued participation from the private sector, regulators and international organizations to enlarge the private sector's role in the process. The private sector impact of regulations should be considered at the early stages of the policy making and implementation process. Similarly, the OECD and FATF need to become more inclusive, engaging SOFCs at each stage of their work. Finally, OECD countries must practice what they preach by subjecting themselves to the same regulatory standards that they advocate for SOFCs.

In the current environment, SOFCs face very real harm from the uneven application of international standards. Investors are leaving SOFCs and moving to U.S. states, such as Delaware, Nevada and Wyoming, where information sharing with tax authorities is less strict. U.S. government protection from pressure to comply with international standards enables these jurisdictions to prosper at the expense of the SOFCs.¹⁴⁵ Because of their small size and lack of resources, the economic and political viability of SOFCs are called into question.

Perhaps most importantly, the integrity of the standards and the standard-making process is at stake. To the extent that serious problems with rule-making and implementation go unaddressed, the integrity and legitimacy of the entire exercise is undermined. For example, the above-mentioned GAO report, the recent FATF mutual evaluation of U.S. anti-money laundering standards, and the STEP level playing field reports indicate that while anonymously owned companies have become rare in the SOFCs, they are quite prominent in the U.S. The continued presence of such companies flies in the face of the primary purposes of the OECD Harmful Tax Practices initiative and the FATF standards.¹⁴⁶

There are, however, ways forward. The recent Bermuda-Australia and Isle of Man-Netherlands agreements illustrate ways in which bilateral agreements can strengthen the balance and fairness of international tax enforcement cooperation arrangements. Ultimately, in the struggle between OECD countries and low tax jurisdictions, all stakeholders must work to establish a true level playing field – everyone on the same beach.

¹⁴⁵ Lucy Warwick-Ching, *Tax Haven Money Migrates to the U.S.*, FIN. TIMES, June 10/11, 2006.

¹⁴⁶ See, e.g., Hay, *War of the (Offshore) Worlds: OECD Level Playing Field Report*, supra, at 5.

Practitioners will need to strengthen their own due diligence. For instance, the American College of Trust and Estate Counsel (ACTEC) has issued AML due diligence good practice standards.¹⁴⁷ The ABA and other bar groups have engaged in a dialogue with the U.S. governments. The ABA has held a number of continuing legal education programs on the dangers of money laundering. The ABA has also changed its non-binding ethical standards to facilitate attorney reporting of certain types of wrongdoing. Increasingly, unless lawyers and professionals self-regulate, they will face mandatory regulatory and enforcement rules from the state and federal governments.

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¹⁴⁷ Recommendations of Good Practices for ACTEC Fellows Seeking to Detect and Combat Money Laundering, 31 ACTEC JOURNAL 315 (2006).

Hypotheticals from ABA Meeting (2006)

In the hypotheticals and in the implementation of anti-money laundering standards what are the roles of the state/local vs. national (in the U.S. the federal) authorities? What are the roles, if any, of international organizations, such as the International Monetary Fund and Financial Action Task Force, and the Egmont Group?

1. Mr. A recently graduated from law school and was admitted to practice law in a U.S. state. He has established his own firm and is very interested in international business. One of his parents is from Rubanga, a small African nation. Although economically depressed, Rubanga has recently discovered and began developing its natural resources. One of Mr. A's parents' friends, Ms. X, has excellent ties with Mr. R, Rubanga's head of state. Mr. R, who has been in power for decades, has a reputation for ruthlessly suppressing political dissent, especially in the area of Rubanga that has experienced low-intensity conflict, and for corruption.

Ms. X, who is a business attorney in Rubanga, recently visited Mr. A and asked him to help form U.S. companies for Mr. R's family. According to Ms. X, Mr. R's family plans to start a number of restaurants and night clubs featuring Rubangan food and music. Once these companies are formed, they will want bank accounts. They also want financial confidentiality, as is customary, for their investments. Because Mr. R's family has majority ownership and control of one of Rubanga's major indigenous banks, they are interested in a correspondent banking relationship with a U.S. bank. Specifically, they want private international banking services, where banks, in exchange for threshold deposits – \$1 million, for example – help form and manage private international companies, trusts, and investments. Ms. X says that the family is anxious to start these projects, and is willing to pay Mr. A a monthly fee to manage its accounts.

What are the anti-money laundering (AML) due diligence requirements for Mr. A in terms of company formation, starting and managing accounts, and working for Mr. R's family? What are the AML requirements for a bank to provide the services wanted by Mr. R? What if Mr. R wants to conduct similar activities in Europe, starting first in London? What if Ms. X approached a London law firm with U.S. offices in New York and Los Angeles to undertake the legal and business work in Europe and the U.S.?

What if the facts were changed and Mr. R had ceased serving as head of state ten years ago and was retired? What if his only positions were serving as a board member on some state enterprises?

Would it matter if Mr. A had read Amnesty International or Human Rights Watch reports alleging that Mr. R's administration had tortured dissidents and committed crimes against humanity?

2. The ABC Law Firm is a small general practice firm in the Midwest. It is in a county seat of a rural area. Mr. A, a U.S. client, requests tax planning advice from one of the ABC attorneys whose practice includes tax. Mr. A has not been a client of the firm, but his restaurant is a client.

It offers Lebanese cuisine and has done well over the last ten years. Mr. A and his family have been model citizens in the community. Mr. A wants to minimize his tax base by making some donations, including some appreciated stock. One of the potential donees is the Islamic Foundation in Houston, Texas. To this donee he will make some large donations (e.g., \$100,000). The other donees are family members, including his parents in Lebanon. Mr. A is asked to advise on the tax and business planning aspects. Mr. A does not want the ABC Law Firm to spend much time and specifically asks for a quote before ABC starts to bill. Should any of these facts require anti-money laundering due diligence and, if so, what kinds? E.g., should the circumstances constitute “suspicious circumstances?” What if Mr. A was practicing in another state, such as Delaware or even another city and country, for instance, Exeter, England (Devonshire)? Would there be any difference in terms of the law?

3. Later Mr. A returns to the ABC Law Firm and requests the attorney who specializes in international business to review arrangements for an exchange program whereby his two sons will study abroad in his home country of Lebanon for one year. As part of the program, Mr. A has to sign some agreements on housing and the contract for enrollment in the school in Lebanon. Should any of these facts require anti-money laundering (AML) due diligence?” What if the country is Pakistan? Or Saudi Arabia? Or Yemen? Or Egypt? Does ABC Law Firm have to inquire about the type of study? Does it matter if the school is a strictly religious school? Again would it matter if this was Delaware or England?

4. Later Mr. A returns to the ABC Law Firm and requests help in acquiring a school in Pakistan. The school is going to provide secondary education. He explains that he wants help in structuring the transaction and he will use his own family funds to make the acquisition. It will cost only \$750,000. Does ABC Law Firm need to do Know Your Customer or any other gatekeeper due diligence? Does it matter if he will make the acquisition on behalf of a U.S. Islamic charity? Does it matter if the school is in Saudi Arabia? Egypt? Colombia? Indonesia? What if the school were an Islamic school in Canada? Or St. Vincent and the Grenadines? Or Paraguay? Or New York? What if it was a primary school (a *madrassa* in Pakistan)? What if the money transaction was to do a start-up foundation in Pakistan to be devoted to public policy, especially international relations? What if the foundation was to be in Gaza? Or Washington, D.C.? Or Beirut? What if the foundation was, in addition, to holding conferences and academic endeavors, to conduct humanitarian work, especially in the Middle East and Africa in the aftermath of the rise of atrocities and violence? What if the initial capital of the start-up foundation was only \$250,000? Would it matter if this occurred in Delaware or Exeter, England?

5. XYZ Law Firm in New York City is hired by a Canadian tax lawyer. He has a very good reputation and is known to an XYZ practitioner. The Canadian lawyer says his client in Hong Kong will transfer as a gift \$500,000 to his two brothers in the U.S. He wants to know the best way to do that from a U.S. tax perspective. His client has heard a lot about the USA PATRIOT Act and U.S. reporting requirements. The Canadian lawyer wants to ensure that the proposed transaction meets the reporting requirements. This is likely a one-off transaction. The Canadian lawyer says that the client is concerned about legal fees and wants an estimate of the cost before he approves retaining the firm. Does the XYZ practitioner have to meet AML gatekeeper requirements and, if so, which ones. What if the amount is only \$100,000 ? \$50,000? What if

the donor is in Brazil? Indonesia? Pakistan? The Ukraine? What if the XYZ practitioner does not know the Canadian lawyer very well? What if XYZ firm was in London rather than New York City and the transfer was to his brothers in the UK?

6. OED law firm in Buenos Aires asks XYZ Law Firm in New York City for advice on remitting to the child of a Ms. Y decedent who was an American national \$250,000 inheritance in a Swiss bank account. OED is especially concerned about any applicable U.S. laws, especially laws on the international transfer of funds. OED has heard that the U.S. has passed a lot of laws lately, especially the USA PATRIOT Act. OED did a few routine legal matters for Ms. Y, but nothing substantial. SSS, a Spanish firm, did the probate. OED specializes in international work and is handling some specialized international aspects of the transaction. Because of the small amount of money and the use of two law firms already, OED asks for an estimate prior to starting the work. Does XYZ Law Firm have to undertake AML due diligence in providing the advice? If so, what kind? What if the amount was \$1 million? Or \$50,000? What if Ms. Y was a Russian national? Or an Iranian national? What if she was a dual national (Argentine and American)? What if she was a dual national, Argentine and American, but moved to Spain in 1985 and shortly thereafter expatriated? What if she expatriated in 1997? What if she was a dual national, Argentine and Russian? What if Ms. Y had lived for many years in Russia? Or the Ukraine? Or the Philippines? Or Indonesia? Does it matter if Ms. Y was domiciled and the probate occurred in Spain? Or Thailand? What if XYZ Law Firm is in London and the transfer was for a British national or resident?

7. EDF Law Firm in Omaha is contacted by Mr. B, a Trinidadian-American who wants to form a U.S. non-profit to help in a broad range of public affairs in Trinidad. They will raise funds and send them to various non-profit organizations in Trinidad. Mr. B wants EDF to advise on forming a corporation, doing the required corporate and tax work to obtain a designation as a charitable organization under IRC, Sec. 501(c)(3). What if any AML due diligence obligations does EDF have? Does it matter if Mr. B is a Muslim? What if he is Catholic? What if he was raised in both the Muslim and Catholic faiths because one parent was Muslim and the other Catholic? Does it matter that he has attended both churches and mosques and socializes in both communities? What if the EDF Law Firm was in Oxfordshire, England (i.e., Oxford)?

8. CCH Law Firm in Washington is contacted by Mr. P, who was formerly Minister of Health in Ecuador. He wants some help in tax and business work. Part of the business work is to establish some corporations and trusts, and obtain intellectual property protection for a start-up business for his son who has recently graduated from college and will do an on-line publication dealing with sciences. He says he has assets of about \$500,000, so it will be nothing too sophisticated or expensive. He does consulting for an international financial institution. What AML due diligence applies to CCH? What if his assets are \$5 million? Or \$250,000? What if he discloses that there is an Interpol warrant out for him? What if he discloses that, notwithstanding the warrant, the U.S. authorities in Miami did not honor it because he has a UN *laissez passez* and hence immunity? He also says it is a political witch hunt that often happens in his country. What if he was from the Ukraine? Or the Philippines? Or Peru? Or Lebanon? Or Afghanistan? What if CCH Law Firm is in London?

Answers to ABA Hypotheticals

Gatekeeper Panel ABA/ABA Money Laundering Enforcement Panel
 by © Bruce Zagaris

In the hypotheticals and in the implementation of anti-money laundering standards what are the roles of the state/local vs. national (in the U.S. the federal) authorities? What are the roles, if any, of international organizations, such as the International Monetary Fund and Financial Action Task Force, and the Egmont Group?

1. Mr. A recently graduated from law school and was admitted to practice law in a U.S. state. He has established his own firm and is very interested in international business. One of his parents is from Rubanga, a small African nation. Although economically depressed, Rubanga has recently discovered and began developing its natural resources. One of Mr. A’s parents’ friends, Ms. X, has excellent ties with Mr. R, Rubanga’s head of state. Mr. R, who has been in power for decades, has a reputation for ruthlessly suppressing political dissent, especially in the area of Rubanga that has experienced low-intensity conflict, and for corruption.

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What are the anti-money laundering (AML) due diligence requirements for Mr. A in terms of company formation, starting and managing accounts, and working for Mr. R’s family?

	FATF	US	UK
Co. Formation		Varies	CDD/LawSoc. Guidelines
Starting	R.33	GAO report	Art. 9, EU3rd Dir. Verific. of identity before busin relationship
Mng Accts	R.21 special attention to Busin relationships & transactions		ML Regs 2003 conducting any “relevant business” for a client,
Working For Family	Art. 13 cust. not phys present PEP A.13(4)	Sec. 352 PEP	

Europe

What are the AML requirements for a bank to provide the services wanted by Mr. R? What if Mr. R wants to conduct similar activities in Europe, starting first in London? What if Ms. X approached a London law firm with U.S. offices in New York and Los Angeles to undertake the legal and business work in Europe and the U.S.?

Bank

EDD

Private int'l banking (\$1 m. or over)

correspondent banking (Sec. 312 of the USA PATRIOT Act)

Activities in London?

London Law firm with offices in NY and LA

would need to follow UK law and Law Society rules

What if the facts were changed and Mr. R had ceased serving as head of state ten years ago and was retired? What if his only positions were serving as a board member on some state enterprises?

10 years ago

--board member on

--some state enterprises

Would it matter if Mr. A had read Amnesty International or Human Rights Watch reports alleging that Mr. R's administration had tortured dissidents and committed crimes against humanity?

Yes. He would have knowledge. Depending on the publicity, he may have knowledge on the basis of being wilfully blind or having consciously disregarded the facts.

2. The ABC Law Firm is a small general practice firm in the Midwest. It is in a county seat of a rural area. Mr. A, a U.S. client, requests tax planning advice from one of the ABC attorneys whose practice includes tax. Mr. A has not been a client of the firm, but his restaurant is a client. It offers Lebanese cuisine and has done well over the last ten years. Mr. A and his family have been model citizens in the community. Mr. A wants to minimize his tax base by making some donations, including some appreciated stock. One of the potential donees is the Islamic Foundation in Houston, Texas. To this donee he will make some large donations (e.g., \$100,000). The other donees are family members, including his parents in Lebanon. Mr. A is asked to advise on the tax and business planning aspects. Mr. A does not want the ABC Law Firm to spend much time and specifically asks for a quote before ABC starts to bill. Should any of these facts require anti-money laundering due diligence and, if so, what kinds? E.g., should the circumstances constitute “suspicious circumstances?” What if Mr. A was practicing in another state, such as Delaware or even another city and country, for instance, Exeter, England (Devonshire)? Would there be any difference in terms of the law?

1. Cost Although many clients want economical services, the ABC should not undertake the project unless it is willing to spend the time to conduct proper due diligence. If it thinks the potential business is worthwhile, it may want to consider subsidizing some of the due diligence work.

2. Should any of these facts require anti-money laundering due diligence and, if so, what kinds?

Yes, although really CTF enforcement/regulation. On Sept. 29, 2006, the U.S. Department of the Treasury issued updated Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-based Charities (Guidelines). The Guidelines urge charities to take a proactive risk-based approach to protecting against illicit abuse and are intended to be applied by those charities vulnerable to such abuse in a matter that is commensurate with the risks they face and the resources with which they work.

The Guidelines state that adherence to these Guidelines shall not be construed to preclude any criminal charge, civil fine, or other action by Treasury or the Department of Justice against persons who engage in prohibited transactions with persons designated pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, as amended, or with those that are designated under the criteria defining prohibited persons in the relevant Executive orders issued pursuant to statute, such as the International Emergency Economic Powers Act, as amended.

The United States relies on a wide array of federal criminal statutes in fighting the threat of terrorist financing. Charities should be particularly aware that in its efforts against the financing of terrorism, the U.S. relies on, among others, the federal statutes that prohibit:

- 1• the financing of terrorism (18 U.S.C. § 2339C),
- 2• providing material support or resources to terrorists (18 U.S.C. § 2339A), and
- 3• providing material support or resources to designated terrorist organizations (18 U.S.C. § 2339B).

E.g., should the circumstances constitute “suspicious circumstances?” If the Islamic Foundation were on a OFAC SDN list. Perhaps it would be useful to inquire some facts about the Islamic Foundation and whether it meets Voluntary Best Practices for U.S.-based Charities (Guidelines). These include standards of governance, accountability, and transparency.

Should the circumstances constitute “suspicious circumstances?”

Not on its face unless the Islamic Foundation in Houston has problems. There has been cases in Houston involving other Islamic charities, such as the Holy Land Foundation for Relief and Development. It brought a lawsuit against the U.S. Department of Justice, State, and Treasury in the U.S. District Court for the District of Columbia, challenging its listing in December 2001 as a financier of terrorism and the freezing of its assets.

What if Mr. A was practicing in another state, such as Delaware or even another city and country, for instance, Exeter, England (Devonshire)? Would there be any difference in terms of the law?

3. Later Mr. A returns to the ABC Law Firm and requests the attorney who specializes in international business to review arrangements for an exchange program whereby his two sons will study abroad in his home country of Lebanon for one year. As part of the program, Mr. A has to sign some agreements on housing and the contract for enrollment in the school in Lebanon. Should any of these facts require anti-money laundering (AML) due diligence?" What if the country is Pakistan? Or Saudi Arabia? Or Yemen? Or Egypt? Does ABC Law Firm have to inquire about the type of study? Does it matter if the school is a strictly religious school? Again would it matter if this was Delaware or England?

- a. Not on their face.
- b. If the country is Pakistan (or possibly S.Arabia, Yemen, or Egypt) and it involves schools where terrorism or propaganda is disseminated, it may require more diligence
- c. It would be worthwhile to inquire about the type of study both in terms of CTF and also as good client service.
- d. If it is a madrassas school, it may matter.
- e. If it is in Delaware or any other U.S. state, the federal laws apply.

4. Later Mr. A returns to the ABC Law Firm and requests help in acquiring a school in Pakistan. The school is going to provide secondary education. He explains that he wants help in structuring the transaction and he will use his own family funds to make the acquisition. It will cost only \$750,000. Does ABC Law Firm need to do Know Your Customer or any other gatekeeper due diligence? Does it matter if he will make the acquisition on behalf of a U.S. Islamic charity? Does it matter if the school is in Saudi Arabia? Egypt? Colombia? Indonesia? What if the school were an Islamic school in Canada? Or St. Vincent and the Grenadines? Or Paraguay? Or New York? What if it was a primary school (a *madrassa* in Pakistan)? What if the money transaction was to do a start-up foundation in Pakistan to be devoted to public policy, especially international relations? What if the foundation was to be in Gaza? Or Washington, D.C.? Or Beirut? What if the foundation was, in addition, to holding conferences and academic endeavors, to conduct humanitarian work, especially in the Middle East and Africa in the aftermath of the rise of atrocities and violence? What if the initial capital of the start-up foundation was only \$250,000? Would it matter if this occurred in Delaware or Exeter, England?

- a. Does ABC Law Firm need to do Know Your Customer or any other gatekeeper due

diligence?

Yes, because the prop. transaction concerns the acquisition of a school in Pakistan and the U.S. and other countries have criticized the roles of certain schools in Pakistan in terms of giving material aid to terrorists groups, ABC should inquire about the nature of the school and, if necessary, have someone in Pakistan verify the information.

b. Does it matter if he will make the acquisition on behalf of a U.S. Islamic charity?
Does it matter if the school is in Saudi Arabia? Egypt? Colombia? Indonesia?

If he makes the acquisition on behalf of a US Islamic charity, then he will need to more due diligence about the US Islamic charity, but the nature of the school in Pakistan is the key.

It may matter where the school is and its current and proposed used. It is very fact-specific.

c. What if the school were an Islamic school in Canada? Or St. Vincent and the Grenadines? Or Paraguay? Or New York?

Although there may be less need for due diligence, it remains fact-specific

d What if it was a primary school (a *madrassa* in Pakistan)?

This would require more due diligence.

e. What if the money transaction was to do a start-up foundation in Pakistan to be devoted to public policy, especially international relations?

Still requires due diligence because it could still be a radical org. urging violence, etc.

f. What if the foundation was to be in Gaza? Or Washington, D.C.? Or Beirut?

What if the foundation was, in addition, to holding conferences and academic endeavors, to conduct humanitarian work, especially in the Middle East and Africa in the aftermath of the rise of atrocities and violence?

Some of the NGOs on the SDN list (like Hamas) do humanitarian work. Esp. A problem in ME and Africa after atrocities and violence.

g. What if the initial capital of the start-up foundation was only \$250,000? Would it matter if this occurred in Delaware or Exeter, England

5. XYZ Law Firm in New York City is hired by a Canadian tax lawyer. He has a very good reputation and is known to an XYZ practitioner. The Canadian lawyer says his client in Hong Kong will transfer as a gift \$500,000 to his two brothers in the U.S. He wants to know the best way to do that from a U.S. tax perspective. His client has heard a lot about the USA PATRIOT Act and U.S. reporting requirements. The Canadian lawyer wants to ensure that the proposed transaction meets the reporting requirements. This is likely a one-off transaction. The Canadian lawyer says that the client is concerned about legal fees and wants an estimate of the cost before he approves retaining the firm. Does the XYZ practitioner have to meet AML gatekeeper requirements and, if so, which ones. What if the amount is only \$100,000 ? \$50,000? What if the donor is in Brazil? Indonesia? Pakistan? The Ukraine? What if the XYZ practitioner does not know the Canadian lawyer very well? What if XYZ firm was in London rather than New

York City and the transfer was to his brothers in the UK?

a. Does the XYZ practitioner have to meet AML gatekeeper requirements and, if so, which ones?

Not really

i. CDD (KYC)

(a) identifying and verifying the identity of their customers when establishing business relations and making occasional transactions

(i) identifying customer and verifying the identity using reliable, independent source documents, data or information

(ii) identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner such that the financial institution is satisfied that it knows who the beneficial owner is;

(iii) obtaining information on the purpose and intended nature of the business relationship;

(iv) conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of the funds.

Altho the financ. institutions should apply each of the CDD measures under (i) to (iv) above, they may determine the extent of such measures on a risk sensitive basis depending on the type of customer, business relationship or transaction.

– The measures taken should be consistent w. any guidelines issued by competent authorities.

ii. Can XYZ rely on his Canadian counsel to perform some or all of the CDD process

iii. Maintenance of records for at least 5 years.

ii. Recordkeeping

b. What if the amount is only \$100,000 ? \$50,000?

c. What if the donor is in Brazil? Indonesia? Pakistan? The Ukraine?

d. What if the XYZ practitioner does not know the Canadian lawyer very well?

U.S. law allows reliance on third parties in some cases, but usually requires that in such cases financial institutions inquire about and document AML and CDD of the third party

e. What if XYZ firm was in London rather than New York City and the transfer was to his brothers in the UK?

6. OED law firm in Buenos Aires asks XYZ Law Firm in New York City for advice on remitting to the child of a Ms. Y decedent who was an American national \$250,000 inheritance in a Swiss bank account. OED is especially concerned about any applicable U.S. laws, especially laws on the international transfer of funds. OED has heard that the U.S. has passed a lot of laws lately,

especially the USA PATRIOT Act. OED did a few routine legal matters for Ms. Y, but nothing substantial. SSS, a Spanish firm, did the probate. OED specializes in international work and is handling some specialized international aspects of the transaction. Because of the small amount of money and the use of two law firms already, OED asks for an estimate prior to starting the work. Does XYZ Law Firm have to undertake AML due diligence in providing the advice? If so, what kind? What if the amount was \$1 million? Or \$50,000? What if Ms. Y was a Russian national? Or an Iranian national? What if she was a dual national (Argentine and American)? What if she was a dual national, Argentine and American, but moved to Spain in 1985 and shortly thereafter expatriated? What if she expatriated in 1997? What if she was a dual national, Argentine and Russian? What if Ms. Y had lived for many years in Russia? Or the Ukraine? Or the Philippines? Or Indonesia? Does it matter if Ms. Y was domiciled and the probate occurred in Spain? Or Thailand? What if XYZ Law Firm is in London and the transfer was for a British national or resident?

a. Does XYZ Law Firm have to undertake AML due diligence in providing the advice?

Not under US federal law

Under state bar ethics or its own firm's good practice standards XYZ may wish to undertake KYC.

See upon under FATF – what about for just advice?

Why not inquire about relationship between OED law firm in B.A. and Ms. Y decedent and source of her estate? Esp. if amount is larger (\$1 m)

b. If so, what kind?

FATF CDD

c. What if the amount was \$1 million? Or \$50,000?

The more the amount, the more XYZ may have to undertake CDD.

d. What if Ms. Y was a Russian national?

Useful to know source of the money, esp. due to AML problems of Russia and various AML cases, such as BoNY

Or an Iranian national? SDN and Iranian sanctions

What if she was a dual national (Argentine and American)?

What if she was a dual national, Argentine and American, but moved to Spain in 1985 and shortly thereafter expatriated?

Should inquire from which country expatriated and why.

What if she expatriated in 1997?

What if she was a dual national, Argentine and Russian?

What if Ms. Y had lived for many years in Russia? Or the Ukraine? Or the Philippines? Or Indonesia? Each of these countries has various AML/CTF enforcement issues.

Does it matter if Ms. Y was domiciled and the probate occurred in Spain? Or Thailand?

What if XYZ Law Firm is in London and the transfer was for a British national or resident?

7. EDF Law Firm in Omaha is contacted by Mr. B, a Trinidadian-American who wants to form a U.S. non-profit to help in a broad range of public affairs in Trinidad. They will raise funds and

send them to various non-profit organizations in Trinidad. Mr. B wants EDF to advise on forming a corporation, doing the required corporate and tax work to obtain a designation as a charitable organization under IRC, Sec. 501(c)(3).

a. What if any AML due diligence obligations does EDF have? US Treas. CFT Guidelines: Voluntary Best Practices for U.S.-Based Charities.

b. Does it matter if Mr. B is a Muslim? No

c. What if he is Catholic? NO

d. What if he was raised in both the Muslim and Catholic faiths because one parent was Muslim and the other Catholic? No

e. Does it matter that he has attended both churches and mosques and socializes in both communities? May be useful to ascertain more information.

f. What if the EDF Law Firm was in Oxfordshire, England (i.e., Oxford)?

8. CCH Law Firm in Washington is contacted by Mr. P, who was formerly Minister of Health in Ecuador. He wants some help in tax and business work. Part of the business work is to establish some corporations and trusts, and obtain intellectual property protection for a start-up business for his son who has recently graduated from college and will do an on-line publication dealing with sciences. He says he has assets of about \$500,000, so it will be nothing too sophisticated or expensive. He does consulting for an international financial institution. What AML due diligence applies to CCH? What if his assets are \$5 million? Or \$250,000? What if he discloses that there is an Interpol warrant out for him? What if he discloses that, notwithstanding the warrant, the U.S. authorities in Miami did not honor it because he has a UN *laissez passez* and hence immunity? He also says it is a political witch hunt that often happens in his country. What if he was from the Ukraine? Or the Philippines? Or Peru? Or Lebanon? Or Afghanistan? What if CCH Law Firm is in London?

a. What AML due diligence applies to CCH? PEP rules do not apply. Just whatever the state bar requirements are.

b. What if his assets are \$5 million? The higher the amount of money, the more EDD may apply if EEH was a financial institution
Or \$250,000?

c. What if he discloses that there is an Interpol warrant out for him? Then CCH is on notice that a government has charged Mr. P with a felony and helping with structures to move money could be a violation of ML and other statutes.

d. What if he discloses that, notwithstanding the warrant, the U.S. authorities in Miami did not honor it because he has a UN *laissez passez* and hence immunity? Still would be an issue for ML and other criminal statutes if he is dealing with proceeds of crime.

e. He also says it is a political witch hunt that often happens in his country. What if he was from the Ukraine? Or the Philippines? Or Peru? Or Lebanon? Or Afghanistan? What if CCH Law Firm is in London?

Hypotheticals on IBC Money Laundering

Hypothetical

Mr. B is retired from a Big Four Accounting Firm, where he had a successful practice and used to head the firm's Latin American practice. He retired to the Bahamas where he still consults for clients. He also has a flat in London from where he works periodically. He was approached by Mr. A, the adviser of Mr. Rodriguez, a high-net-worth individual who currently lives in Lebanon. The individual also has ranches in Colombia, currency exchange shops on the Brazilian-Paraguayan border, export-import businesses throughout the world, and restaurant and discotecas. Mr. A originally wanted to visit Mr. B when he heard Mr. B would be in London, especially because Mr. A and his wife wanted to attend the theater. However, when Mr. B heard of the nature of the consulting, he said he would prefer to defer the meeting to when he returned to the Bahamas, since it could be more leisurely and face fewer potential regulatory issues.

Mr. A requests help in structuring about \$10 million worth of investments, including some U.S. investments. He is very concerned about financial privacy. In particular, he notes that he is accustomed to using multi-tiered corporations in jurisdictions like the Bahamas that have traditionally protected privacy and using bearer shares. He also expressed concern about minimizing taxes and avoiding the bureaucracy of filing reports to governments. In particular, he says he needs privacy because he is a prominent entrepreneur and active politically in Lebanon, his son was kidnaped last year by Israeli security or intelligence sources, and he is estranged from his wife but not divorced yet. Mr. A promises that, because Mr. Rodriguez and his cohorts are "cash cows," there will be many of more investments and much more money if Mr. A is successful, at least at the privacy goal.

Because Mr. Rodriguez is originally from Colombia, he has been confused with someone else who is on an OFAC list. Because he comes from Lebanon, he is concerned about potential discrimination against persons from the Middle East. Additionally the kidnaping of his son together with the OFAC issue has made Mr. Rodriguez request Mr. A for a referral to a U.S. lawyer who knows a lot about the operation of U.S. law enforcement and financial intelligence.

Mr. A heard that in the 1970s Mr. B structured a trust in the Bahamas, using an accommodation settlor. The trust required a Bahamian trustee and protectors. The trust held shares of a Bahamian company which successfully invested in some very profitable ventures and simultaneously kept anonymity of the investors. The trustees even refused the requests of the settlor and others for information when tax authorities demanded information from the settlors.

Mr. B says he can help. He contacts his longstanding friend at one of the leading investor advisor firms and seeks their help for using their investment documents and having them manage the funds.

Mr. B consults his longstanding friend at one of the UK law firms to advise on some aspects of the deal. Because Mr. A wants some U.S. investments and has asked for legal advice on the intelligence issues, Mr. B calls his friend at one of the US law firms to advise about structuring U.S. investments.

Please discuss the privacy, anti-money laundering, ethical, and related issues.

Money Laundering from ABA Tax Section Meeting (2008)—Presentation



American Bar Association, Tax Section
Civil & Criminal Tax Penalties Committee
Washington, D.C.
May 2008 Meeting

Transaction Monitoring Systems: How Small Transactions Can Become Large Media Cases

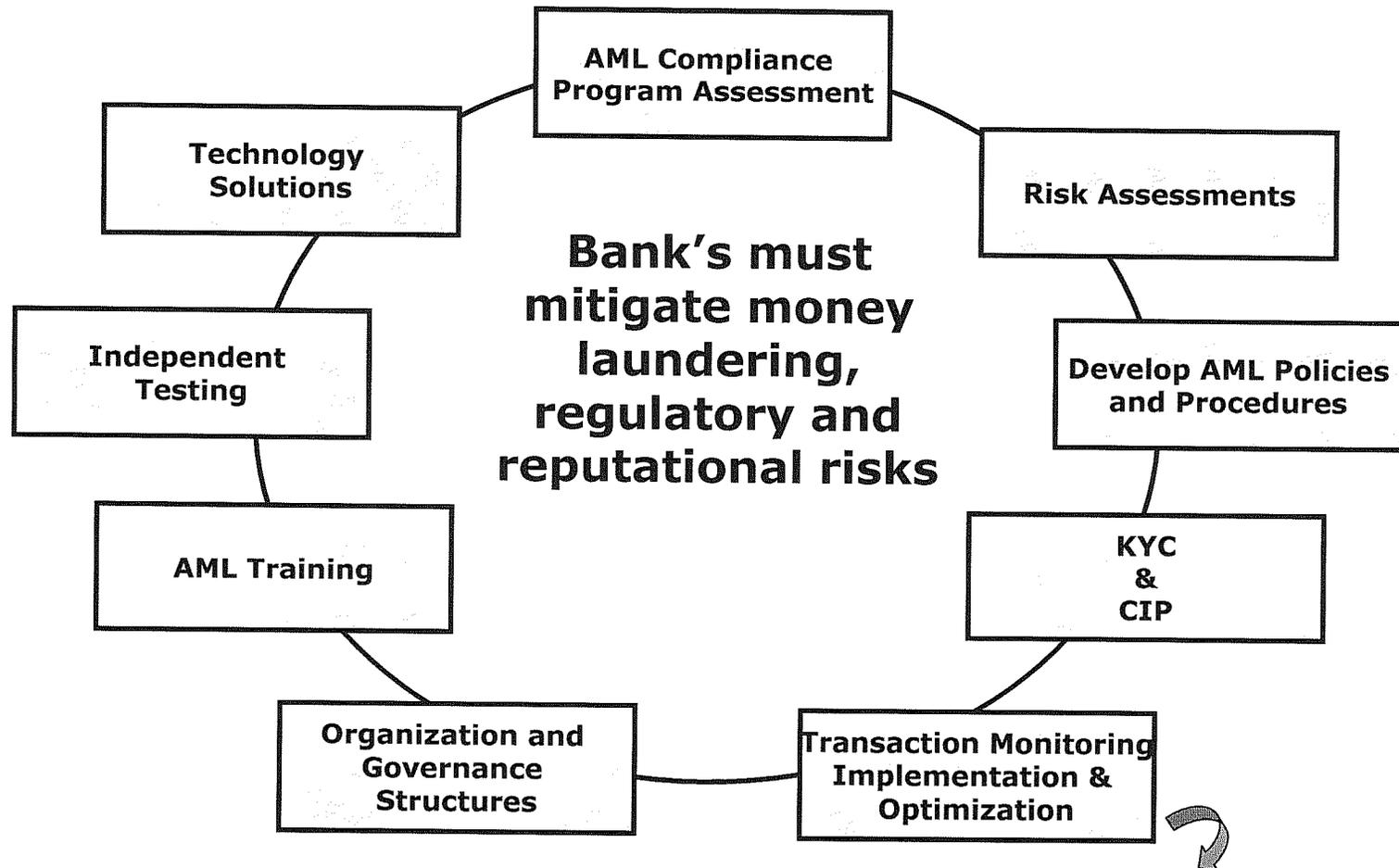
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AML Program Overview

A bank's AML program typically consists of multiple core competencies working together to mitigate risk



Let's Explore....

Transaction Monitoring Component

Many banks employ a sophisticated approach to customer account opening, monitoring, and analysis using a combination of technologies.

1) Customers are on-boarded and their information is typically entered into a bank's KYC/CIP database. The data is matched against public and private information to search for risk factors including, but not limited to, PEP status.

2) After the new customer completes the KYC/CIP process, accounts are opened and the risk scores are populated within the customer database.

3) All account activity is periodically monitored through the bank's Transaction Monitoring application where risk factors are analyzed in connection with transactional patterns in search of anomalous activity at both customer and account levels.

AML Transaction Monitoring

- **Comprehensive enterprise-wide account monitoring systems enable the bank to detect unusual & potentially suspicious activity that may indicate the need for additional internal money laundering investigations.**
- **Monitors account activity for unusual transaction patterns or events that exceed statistical thresholds within pre-defined scenarios. The systems typically utilize temporal analysis to evaluate transactions over multiple dimensions of time.**
- **Alerts generated are typically clustered with other intelligence data and reviewed by a bank's Financial Intelligence Unit ("FIU"). The FIU's mission is to bring a focused and proactive approach to the operational aspects of financial crimes deterrence, detection, and reporting. The result can be an enterprise view of risk from across the organization.**

Sample Retail Transaction Monitoring Scenarios

- **Structured Cash**

- Frequent cash deposits under the reporting threshold (e.g., patterns between \$8 to \$10k) or instances of periodic round dollar transactions

- **High Velocity Wires**

- Instances of frequent wire activity within an account that exceeds a behavioral threshold

- **High Risk ATM**

- Instances of unusual ATM withdrawal activity in high risk locations or geographies

- **Dormant Accounts**

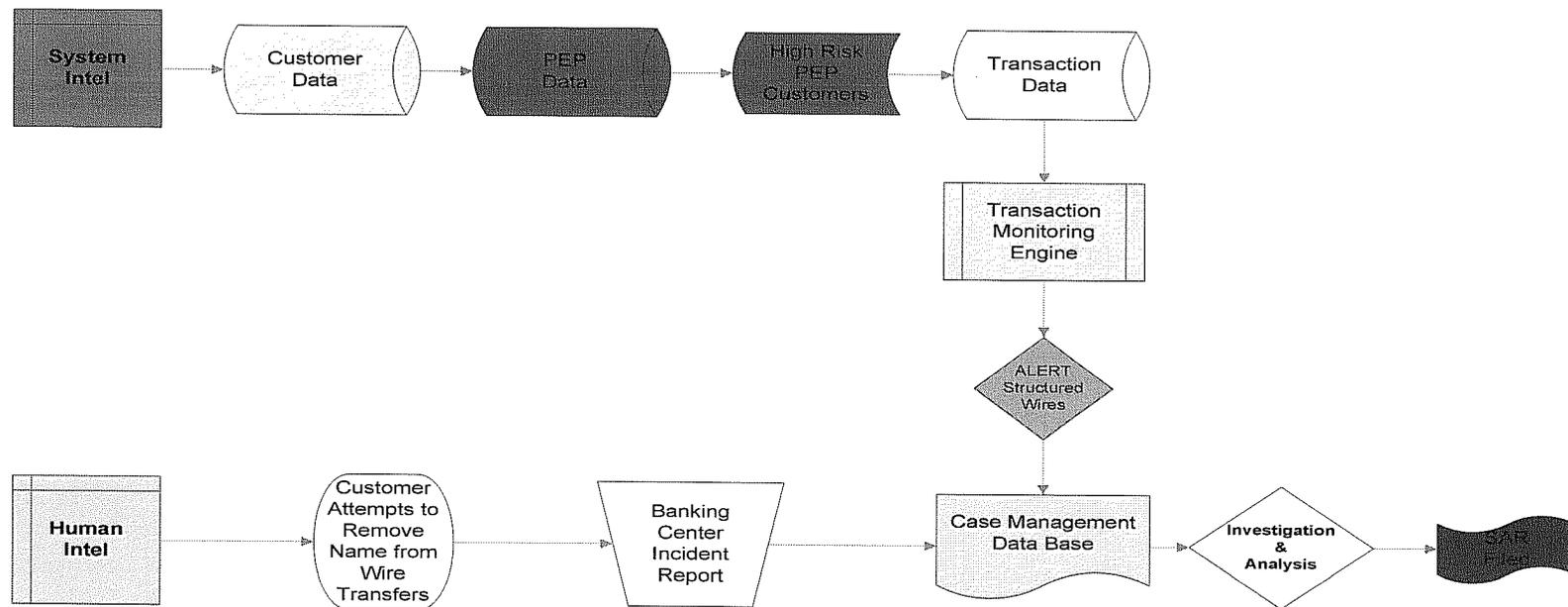
- Instances of sudden spikes in an account's activity which was previously dormant

- **Large Incoming/Outgoing Wire**

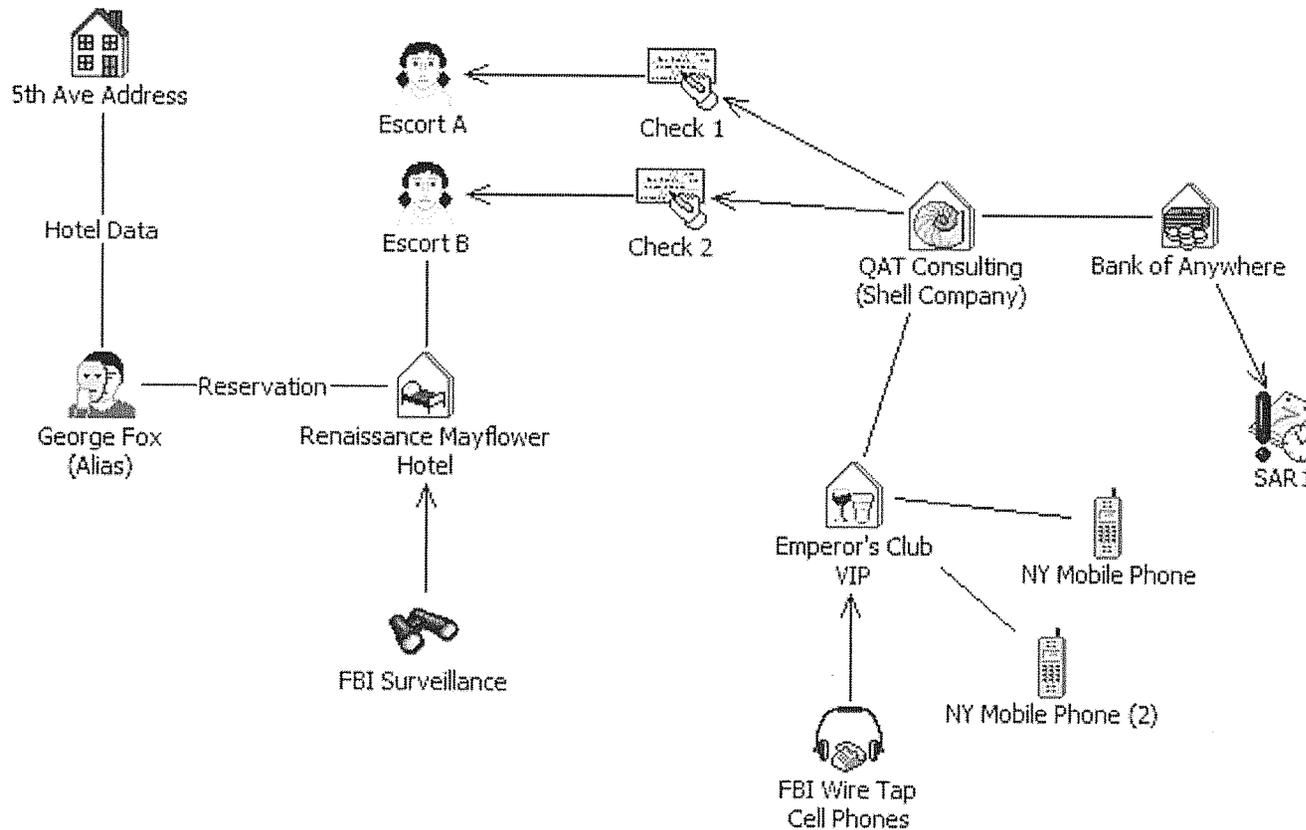
- Instances where an account receives or sends a large wire that is outside the predefined threshold for that customer segment

“Ripped from the Headlines”

This situation involved a trigger within a bank’s wire structuring scenario. Most people typically associate structuring with cash deposits; however, this logic is commonly modified to apply to wire transfer activity in high risk customer populations, such as for PEPs. Intelligence data flows from across the organization resulting in a SAR.

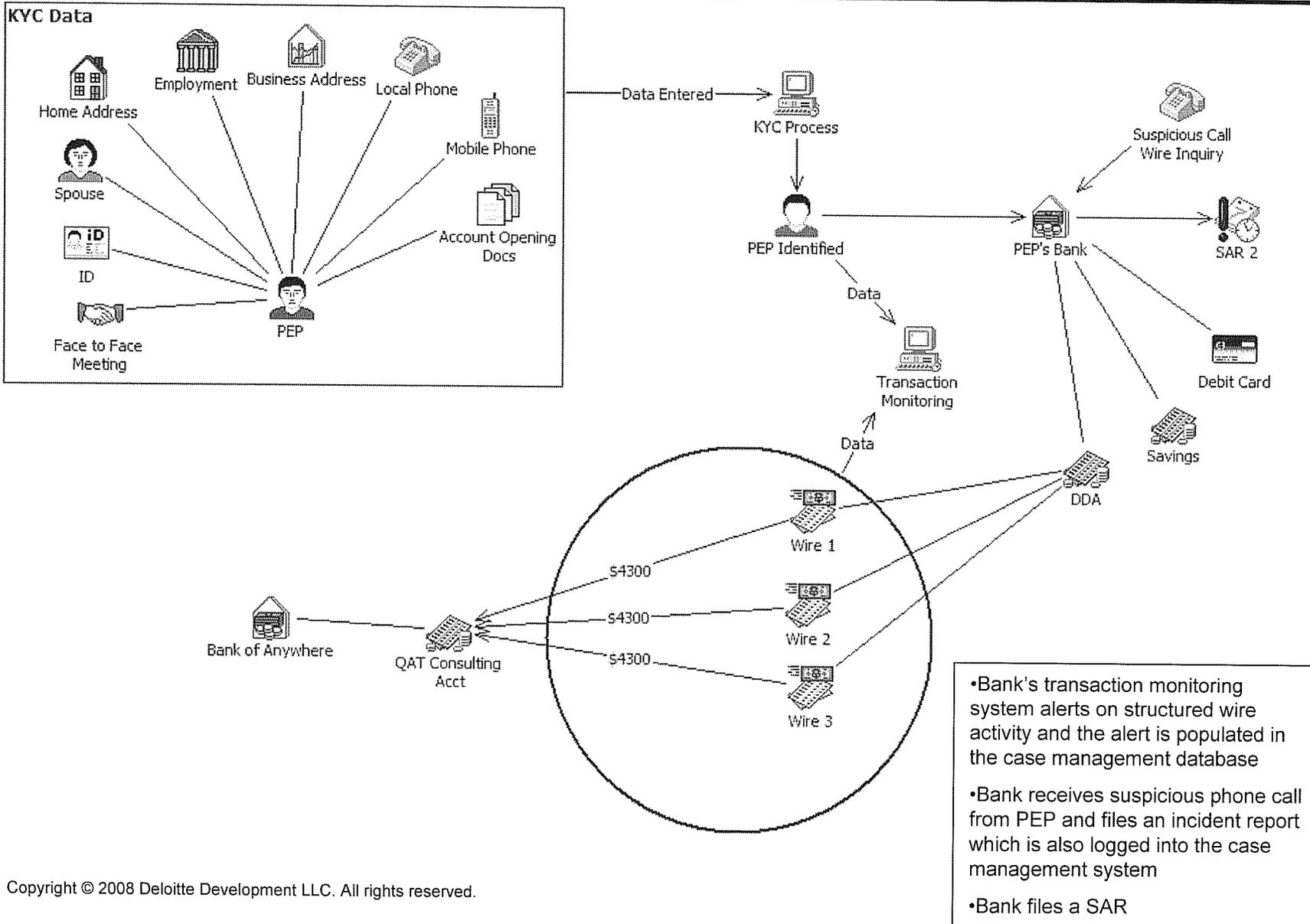


What Does Law Enforcement See?

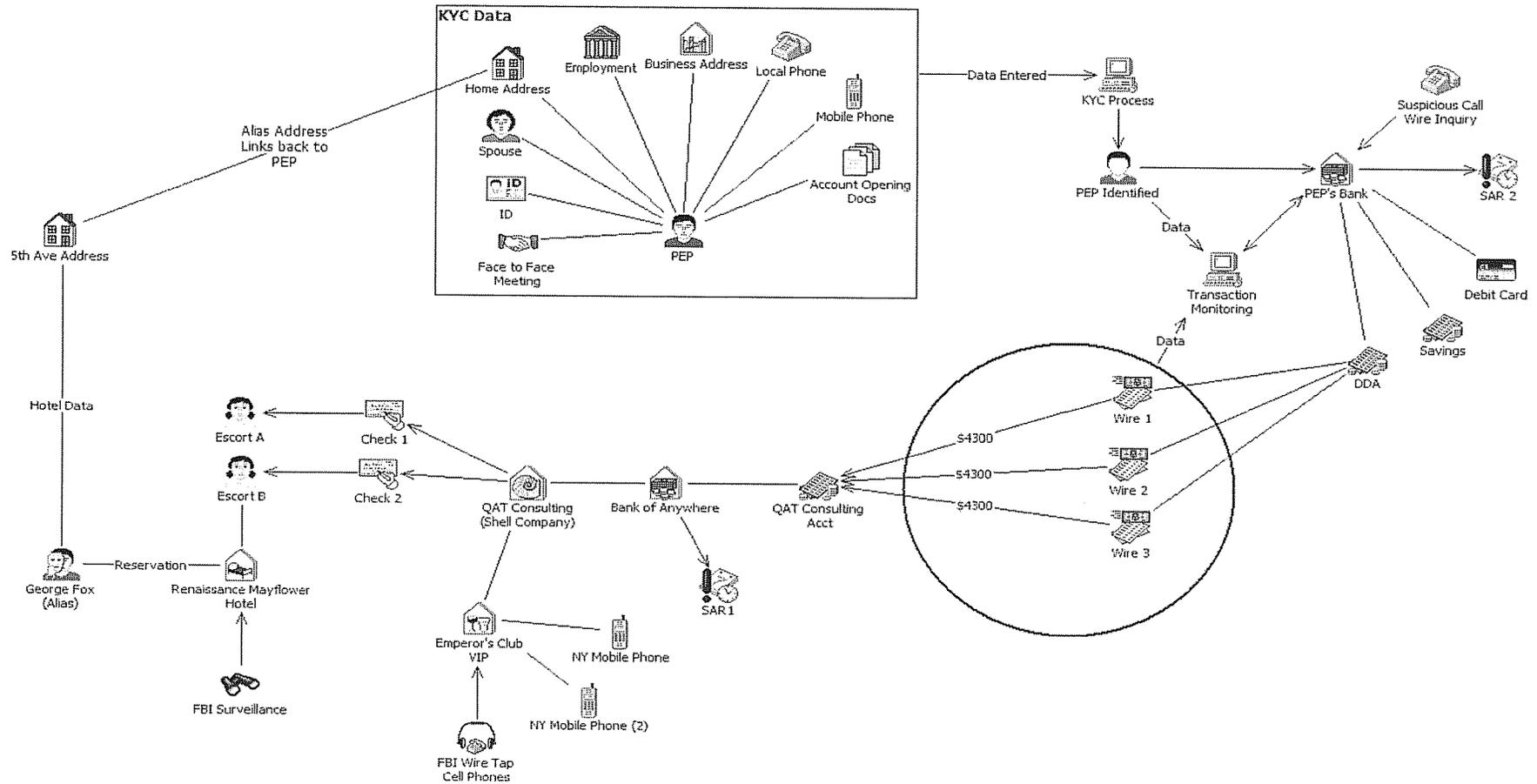


- Law Enforcement reviews another bank's SAR about unusual check payment patterns to certain customers
- Conducts interviews with informants revealing information about large scale prostitution ring
- Conducts physical surveillance and obtains wiretap warrants for mobile phones

What Does the Bank See?



What Does It All Look Like?



•Law Enforcement receives SAR filed from PEP's bank and is now able to connect PEP to the prostitution ring via funds wired to shell company account as well as via the address used to check into the hotel under an alias

Deloitte.

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Conflicts of Interest Packet from ABA Tax Section Meeting (2008)

Joint Session of Standards of Tax Practice, Civil & Criminal Tax
Penalties and Young Lawyer Forum

**Conflicts Check: Who's Your Client? What's the
Scope? Should You Take the Work?**

Moderator:

Larry A. Campagna, Chamberlain Hrdlicka White Williams & Martin, Houston, TX

Panelists:

Katherine E. David, Oppenheimer Blend Harrison & Tate Inc, San Antonio, TX

Natalie Fay Green, Caplin & Drysdale Chartered, Washington, DC

Professor Bradley T. Borden, Washburn University School of Law, Topeka, KS

Nathan J. Hochman, Assistant Attorney General, Tax Division, Department of Justice,
Washington, DC

Saturday, May 10, 2008
12:30 PM – 1:30 PM
Constitution CDE, Level 3B

Model Rules of Professional Conduct

Rule 1.6 Confidentiality of Information

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (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; or
 - (6) to comply with other law or a court order.

Rule 1.7 Conflict Of Interest: Current Clients

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing.

Rule 1.9 Duties To Former Clients

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
 - (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;unless the former client gives informed consent, confirmed in writing.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
 - (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
 - (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 3.7 Lawyer As Witness

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
 - (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case;or
 - (3) disqualification of the lawyer would work substantial hardship on the client.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called

CONFLICTS OF INTERESTS: SPOUSES

Katie

Scenario #1

You have an appointment to meet with a gentleman, Mr. Singleton, about a possible dissolution of his marriage. His wife, Mrs. Singleton, learns of the scheduled appointment and calls your office before her husband arrives. She informs you that her last personal tax return was prepared by an accountant employed through your firm. You have not seen her tax return, have no knowledge of its contents, and did not know that the staff accountant had prepared her return.

Somewhat pleased with herself, Mrs. Singleton divulges that she brought the tax return to your staff accountant specifically to “poison the well.” Her marriage has been troubled for some time, and she wanted you and your firm to be confronted with a conflict if her husband tried to engage you incident to a divorce.

After the call ends, you ascertain that the services your firm provided were limited to the accountant’s preparing Mrs. Singleton’s personal tax return on one occasion. In fact, the accountant merely entered numbers that Mrs. Singleton provided onto the appropriate forms and did not do any independent investigation or analysis. Your firm does not have a continuing relationship with Mrs. Singleton and the firm’s last contact with her occurred when she came to the office to sign her return and tender payment for the accountant’s services.

You decide to represent Mr. Singleton, and you and Mrs. Singleton’s attorney proceed with finalizing the divorce settlement. Mrs. Singleton’s attorney provides you with a list of Mrs. Singleton’s assets, which your staff accountant reviews as part of your regular office procedures. Because he is familiar with Mrs. Singleton’s last tax return, he recognizes that Mrs. Singleton may have failed to disclose certain assets.

Scenario #2

You are approached jointly by Mr. and Mrs. Lovebyrd, a newlywed couple. The Lovebyrds would like you to prepare reciprocal wills for the two of them, pursuant to which each devises his or her estate to the other.

You accept the engagement and have the Lovebyrds sign a waiver acknowledging that information provided by one client could become available to the other. The waiver does not explicitly authorize you to disclose one spouse's confidential client communications to the other. You prepare the wills as requested. As drafted, the devises create the possibility that one spouse's issue (whether legitimate or illegitimate) eventually would acquire the other spouse's property.

Unbeknownst to you and Mrs. Lovebyrd, Mr. Lovebyrd recently fathered an illegitimate child. By coincidence, before the Lovebyrds sign their wills, the child's mother hires your firm to institute a paternity action against Mr. Lovebyrd. Because of a clerical error (your clerk opened the estate planning file under the name "Lovebird"), your firm's computer check does not reveal the conflict of interest inherent in representing the mother against Mr. Lovebyrd. Upon learning of the conflict, your firm withdraws from its representation of the mother.

From your dealings with Mrs. Lovebyrd, you know that her testamentary desires would be different if she knew of the existence of Mr. Lovebyrd's illegitimate child. Clearly, the existence of the child would be material to Mrs. Lovebyrd's estate planning decisions. You discuss this matter with your law partner. He believes you have an ethical obligation to inform Mrs. Lovebyrd about the existence of the child and that you have an obligation to inform Mrs. Lovebyrd that her current estate plan could result in a portion of her assets ultimately passing to the child. Your partner drafts a letter to Mr. Lovebyrd advising him that if he does not inform his wife about the child, the firm will.

Scenario #3

Mr. and Mrs. Tufluck request your assistance with an Internal Revenue Service audit. You believe that Mrs. Tufluck may have an innocent spouse defense with respect to certain of the proposed adjustments, so you are reluctant to represent both the Tuflucks. The couple explains that they cannot afford to hire two attorneys and are willing to sign whatever waivers are necessary to permit you to represent both of them.

You accept the engagement and have each of the Tuflucks sign a waiver. You take the case to Appeals. The Tuflucks do not attend the Appeals conference with you, but at your clients' direction, you explain that if Mr. Tufluck were there, he would support his wife's innocent spouse claim. For purposes of settlement, the Appeals Officer agrees to treat Mrs. Tufluck as an innocent spouse on the relevant items. The settlement is not final, and the case is docketed.

The audit process has taken its toll on the Tuflucks, and they divorce before the settlement is finalized. Embittered, Mr. Tufluck abandons his prior position and claims that Mrs. Tufluck is not at all an innocent spouse.

Conflicts of Interests: Exempt Organizations

Scenario #1

The Board of Directors of a large hospital engaged you to represent the organization in an IRS examination. The IRS agent has conducted numerous on-site interviews, and the hospital has complied with over 20 Information Document Requests. The audit appears to be focusing on whether the hospital is providing a community benefit that justifies its tax-exempt status under section 501(c)(3) and other exempt organization issues.

Throughout the course of the examination, you have been closely working with the hospital's financial office, including the CFO, to provide the IRS with the information responsive to the agency's requests.

Six months into the audit, the IRS agent indicates to you that she is interested in the amount of compensation paid to hospital executives, including the CFO of the organization.

Section 4958 provides that, if a "disqualified person" with respect to a public charity receives excessive compensation, the disqualified person will be subject to an excise tax of 25% on the transaction and must repay the "excessive" amount to the charity. The CFO is a disqualified person of the hospital. Furthermore, any "organization manager" (including the Board of Directors) who knowingly approves excessive compensation is subject to an excise tax under section 4958 as well. The Board of Directors approved the CFO's compensation package two years ago.

Scenario # 2

You were contacted to provide a museum advice about whether some of the museum's activities generate unrelated business income subject to tax under section 511. Specifically, you provided a written legal opinion that the income generated from some of the activities did not generate unrelated business income, and therefore, the museum did not need to file a Form 990-T or pay any tax on the income. Relying on your advice, the museum has not treated the income as taxable. Since the time that you delivered the opinion, you have discovered that your team missed an obscure line of authority (including an ancient revenue ruling and several non-precedential private letter rulings that followed it), which would have changed your conclusion.

The IRS recently began an audit of the museum and is challenging whether the program results in unrelated business income. Furthermore, the agent suggested that the museum's failure to report the income may subject the organization to an accuracy related penalty.

Conflicts of Interests: Small Business Owners

A and B are considering forming a partnership. They ask you to help them with the formation. A will contribute Warehouse to AB LLC, and B will contribute \$220,000 of cash. A has a \$100,000 basis in Warehouse, and Warehouse has 20 years of recovery period remaining. Warehouse is worth \$220,000. AB will have \$20,000 of rental income each year after formation. Under the operating agreement, the limited liability company will allocate profits and losses equally to A and B. Depending upon the method AB adopts, it will allocate depreciation and other tax items as follows.

Allocation of Warehouse Depreciation

Traditional Method:

	<u>Book Depreciation</u>	<u>Tax Depreciation</u>	<u>Rental Income</u>
AB	(\$11,000)	(\$5,000)	\$20,000
A	(\$5,550)	\$0	\$10,000
B	(\$5,500)	(\$5,000)	\$10,000

Traditional Method with Curative Allocations:

	<u>Book Depreciation</u>	<u>Tax Depreciation</u>	<u>Rental Income</u>
AB	(\$11,000)	(\$5,000)	\$20,000
A	(\$5,500)	\$0	\$10,500
B	(\$5,500)	(\$5,000)	\$9,500

Remedial Allocation Method:

Year 1-20 [Book depreciation = $(\$100,000/20 + \$120,000/39) \approx \$8,000$]

	<u>Book Depreciation</u>	<u>Tax Depreciation</u>	<u>Remedial Allocation</u>
AB	(\$8,000)	(\$5,000)	\$0
A	(\$4,000)	(\$1,000)	\$0
B	(\$4,000)	(\$4,000)	\$0

Year 21-39 [Book depreciation = $(\$120,000/39) \approx \$3,000$]

	<u>Book Depreciation</u>	<u>Tax Depreciation</u>	<u>Remedial Allocation</u>
AB	(\$3,000)	\$0	\$0
A	(\$1,500)	\$0	\$1,500
B	(\$1,500)	\$0	(\$1,500)

A's and B's interests may conflict because the different methods produce different results. All else being equal, the partners will have the following preferences

<u>Preference</u>	<u>A</u>	<u>B</u>
1	remedial	trad'l w/ curative
2	trad'l	trad'l
3	trad'l w/ curative	remedial

Can you represent A and B in the formation of this limited liability company?

CONFLICT OF INTERESTS: CRIMINAL CASE

Scenario #1

As part of its crackdown on abusive tax shelters, the IRS launched a parallel civil and criminal investigation of AB Use, LLC (“LLC”) and its two members, Simon La Greedy (“La Greedy”) and Walter “Mo” Money (“Money”). The IRS believed that La Greedy and Money, through the LLC, structured illegal tax shelter transactions for over 1,000 clients involving over \$5 billion that were based on a series of lies and fraudulent documents. In particular, the IRS asserted that La Greedy and Money touted the structure called Forward Leveraged Investment Partnership of Foreign Currency Futures (aka “FLIPOFFS”) and told clients that though the investment was supposedly for 10 years and exploited various loopholes in the IRS Code, they could get their tax losses, equal to the tax gains they had that year, within 90 days. No client stayed in the investment more than 90 days, and the LLC’s fees were a percentage of the clients’ tax savings. The LLC prepared all the paperwork for the transactions, including setting up numerous partnerships and trusts for each client in the Cayman Islands and Isle of Man, and worked with a Big Three accounting firm and prestigious New York law firm to obtain opinion letters attesting to the validity of the transactions.

As part of the civil investigation, the IRS issued summonses to the LLC for documents and separately to La Greedy and Money for testimony. The LLC hired one of the nation’s top tax law firms, Tax Gladiators, LLP, and its star litigator, Buster Chops (“Chops”) to represent it. The LLC also paid for separate counsel for La Greedy and Money to advise them individually. Prior to Money testifying during the civil deposition, Chops sat in on several sessions with Money and Money’s lawyer, helping to prepare Money for the civil deposition.

Several years later, La Greedy and Money were indicted on various federal criminal tax charges, including conspiracy and aiding and abetting the filing of false tax returns. La Greedy retained Chops to be his lawyer for the criminal case. Two years after the indictment and one month prior to the start of trial, after La Greedy had spent millions of dollars on Chops and his law firm to prepare for the trial, Money negotiated a plea deal with the government and agreed to testify against La Greedy.

Chops obtained a copy of Money’s interview with the government and learned that Money told the government that: (i) Chops had been present and had helped him prepare for his civil deposition; (ii) Money had lied during the civil deposition about the business purpose of the transactions; (iii) Money had told Chops during these preparation sessions about his doubts about the validity of the transactions; and (iv) Money told Chops about certain important documents that Money had overseas that were responsive to the LLC’s summons but had not been given to the IRS. Chops disputes Money’s account of what happened during these preparation sessions.

Questions:

1. Does Chops have an obligation to bring this potential conflict of interest to the court's attention?
2. If Chops does not, does the government have an obligation to bring this potential conflict of interest to the court's attention?
3. What information and what Rules of Professional Conduct should the court consider in evaluating the conflict of interest weighed against the defendant's Sixth Amendment right to counsel?
4. Would a waiver of a conflict of interest by La Greedy and/or Money make any difference?
5. If Chops is recused, does his law firm have to be recused as well? Can Chops participate at all in the trial or in trial preparation with new counsel?

Scenario #2

After a three year investigation, on April 15, 2006, a grand jury indicted two women, Christina Bucks (“Bucks”) and Julie Dollars (“Dollars”) for conspiring to defraud the IRS. The alleged scheme entailed the defendants setting up Bermuda-based corporations (aka “Tax Havens, LLC”) for their clients who would then send or transfer their money and assets to these corporations and receive loans back from these corporations. The clients would not report any of the money received as income and the total amount of alleged underreported income from 2000-2002 was over \$20 million.

The indictment alleged that the defendants told the clients they would not have to repay the loans and that given the secrecy of the Bermuda system, no one would know about the amount of monies transferred to the offshore corporations or be able to question the “loans” coming back. The defendants took care of all the paperwork, including the formation of the entities, transfers and loan documents, and informed the clients that their money would be available to them whenever they needed it.

Having heard of his national reputation, Bucks hired Buster Chops (“Chops”) to represent her during the criminal investigation and for the trial. Chops worked with Dollars’ counsel as part of a joint defense agreement during the investigation.

Once Bucks learned about the criminal investigation in 2003, Bucks and Money sent letters out to all clients demanding repayment of the “loans” or else they would be issued 1099s for debt forgiveness. This contradicted what the clients had been told by the defendants all along and the clients told IRS agents that they felt threatened and intimidated by such letters.

Significantly, in a failed effort to get a plea deal prior to trial, Money’s counsel told the government that according to Money, Chops told Money and Bucks that he approved of these letters before they went out.

In addition to being possibly involved in the transmission of these letters, Chops was also purportedly involved in responding to clients’ requests to get their money back after news of the investigation broke. According to a letter sent by Bucks to these clients, she stated in the letter that she had consulted with Chops, and the clients could get their money or assets back if they agreed to substantiate the “loan” transactions as valid “loan” transactions first.

Also, just prior to the indictment, Bucks had sent an email to a client in which she said that the IRS’ investigation was going to go away so that the client need not respond to the IRS’ efforts to contact that client. Bucks suggested in the email that the client take an “extended vacation” because the IRS agents would not believe that client if he told the “truth” about the loans and would seek to put that client in jail. Bucks copied this email to Chops, who was known to the client to be Bucks’ attorney at the time.

Questions:

1. What are Chops' or the government's obligations regarding bringing this potential conflict of interest to the Court's attention and can either side delay bringing this issue for tactical advantage?
2. What type of analysis should the court perform in deciding whether the conflict of interest outweighs the Sixth Amendment right to counsel?
3. Can the court wait to see how the trial plays out before it makes its decision? Does Chops have to be called as a witness in order for the court to find an impermissible conflict of interest?
4. Would a waiver of conflict of interest by Bucks make a difference in the analysis?
5. What role can Chops and/or his law firm play at trial if he is recused?

International Bar Association International Code of Ethics

International Bar Association

International Code of Ethics

First adopted 1956; this edition 1988



the global voice of
the legal profession

The International Bar Association is a federation of national Bar Associations and Law Societies and individual members. Most of the organisational members have established Codes of Legal Ethics as models for or governing the practice of law by their members. In some jurisdictions these Codes are imposed on all practitioners by their respective Bar Associations or Law Societies or by the courts or administrative agencies having jurisdiction over the admission of individuals to the practice of law.

Except where the context otherwise requires, this Code applies to any lawyer of one jurisdiction in relation to his contacts with a lawyer of another jurisdiction or to his activities in another jurisdiction.

Nothing in this Code absolves a lawyer from the obligation to comply with such requirements of the law or of rules of professional conduct as may apply to him in any relevant jurisdiction. It is a re-statement of much that is in these requirements and a guide as to what the International Bar Association considers to be a desirable course of conduct by all lawyers engaged in the international practice of law.

The International Bar Association may bring incidents of alleged violations to the attention of relevant organisations.

Rules

- 1** A lawyer who undertakes professional work in a jurisdiction where he is not a full member of the local profession shall adhere to the standards of professional ethics in the jurisdiction in which he has been admitted. He shall also observe all ethical standards which apply to lawyers of the country where he is working.
- 2** Lawyers shall at all times maintain the honour and dignity of their profession. They shall, in practice as well as in private life, abstain from any behaviour which may tend to discredit the profession of which they are members.
- 3** Lawyers shall preserve independence in the discharge of their professional duty. Lawyers practising on their own account or in partnership where permissible, shall not engage in any other business or occupation if by doing so they may cease to be independent.
- 4** Lawyers shall treat their professional colleagues with the utmost courtesy and fairness. Lawyers who undertake to render assistance to a foreign colleague shall always keep in mind that the foreign colleague has to depend on them to a much larger extent than in the case of another lawyer of the same country. Therefore their responsibility is much greater, both when giving advice and when handling a case.

For this reason it is improper for lawyers to accept a case unless they can handle it promptly and with due competence, without undue interference by the pressure of other work. To the fees in these cases Rule 19 applies.

- 5** Except where the law or custom of the country concerned otherwise requires, any oral or written communication between lawyers shall in principle be accorded a confidential character as far as the Court is concerned, unless certain promises or acknowledgements are made therein on behalf of a client.
- 6** Lawyers shall always maintain due respect towards the Court. Lawyers shall without fear defend the interests of their clients and without regard to any unpleasant consequences to themselves or to any other person. Lawyers shall never knowingly give to the Court incorrect information or advice which is to their knowledge contrary to the law.
- 7** It shall be considered improper for lawyers to communicate about a particular case directly with any person whom they know to be represented in that case by another lawyer without the latter's consent.
- 8** A lawyer should not advertise or solicit business except to the extent and in the manner permitted by the rules of the jurisdiction to which that lawyer is subject. A lawyer should not advertise or solicit business in any country in which such advertising or soliciting is prohibited.
- 9** A lawyer should never consent to handle a case unless: (a) the client gives direct instructions, or, (b) the case is assigned by a competent body or forwarded by another lawyer, or (c) instructions are given in any other manner permissible under the relevant local rules or regulations.
- 10** Lawyers shall at all times give clients a candid opinion on any case. They shall render assistance with scrupulous care and diligence. This applies also if they are assigned as counsel for an indigent person. Lawyers shall at any time be free to refuse to handle a case, unless it is assigned by a competent body. Lawyers should only withdraw from a case during its course for good cause, and if possible in such a manner that the client's interests are not adversely affected. The loyal defence of a client's case may never cause advocates to be other than perfectly candid, subject to any right or privilege to the contrary which clients choose them to exercise, or knowingly to go against the law.
- 11** Lawyers shall, when in the client's interest, endeavour to reach a solution by settlement out of court rather than start legal proceedings. Lawyers should never stir up litigation.
- 12** Lawyers should not acquire a financial interest in the subject matter of a case which they are conducting. Neither should they, directly or indirectly, acquire property about which litigation is pending before the Court in which they practice.

- 13** Lawyers should never represent conflicting interests in litigation. In non-litigation matters, lawyers should do so only after having disclosed all conflicts or possible conflicts of interest to all parties concerned and only with their consent. This Rule also applies to all lawyers in a firm.
- 14** Lawyers should never disclose, unless lawfully ordered to do so by the Court or as required by Statute, what has been communicated to them in their capacity as lawyers even after they have ceased to be the client's counsel. This duty extends to their partners, to junior lawyers assisting them and to their employees.
- 15** In pecuniary matters lawyers shall be most punctual and diligent. They should never mingle funds of others with their own and they should at all times be able to refund money they hold for others. They shall not retain money they receive for their clients for longer than is absolutely necessary.
- 16** Lawyers may require that a deposit is made to cover their expenses, but the deposit should be in accordance with the estimated amount of their charges and the probable expenses and labour required.
- 17** Lawyers shall never forget that they should put first not their right to compensation for their services, but the interests of their clients and the exigencies of the administration of justice. The Lawyer's right to ask for a deposit or to demand payment of out-of-pocket expenses and commitments, failing payment of which they may withdraw from the case or refuse to handle it, should never be exercised at a moment at which the client may be unable to find other assistance in time to prevent irreparable damage being done. Lawyers' fees should, in the absence or non-applicability of official scales, be fixed on a consideration of the amount involved in the controversy and the interest of it to the client, the time and labour involved and all other personal and factual circumstances of the case.
- 18** A contract for a contingent fee, where sanctioned by the law or by professional rules and practice, should be reasonable under all circumstances of the case, including the risk and uncertainty or the compensation and subject to supervision of a court as to its reasonableness.
- 19** Lawyers who engage a foreign colleague to advise on a case or to cooperate in handling it, are responsible for the payment of the latter's charges except where there has been express agreement to the contrary. When lawyers direct a client to a foreign colleague they are not responsible for the payment of the latter's charges, but neither are they entitled to a share of the fee of this foreign colleague.
- 20** Lawyers should not permit their professional services or their names to be used in any way which would make it possible for persons to practice law who are not legally authorised to do so. Lawyers shall not delegate to a legally unqualified person not in their employ and control any functions which are by the law or custom of the country in which they practice only to be performed by a qualified lawyer.
- 21** It is not unethical for lawyers to limit or exclude professional liability subject to the rules of their local Bar Association and to there being no statutory or constitutional prohibitions.

Barbados Bar Association Code of Ethics

LEGAL PROFESSION

LEGAL PROFESSION CODE OF ETHICS 1988 CAP 370A

Authority: this Code of Ethics was made on the 12th December, 1988 by the Disciplinary Committee under section 18 of the Legal Profession Act.

Commencement: 12th December, 1988.

PART 1 PRELIMINARY

- 1. This Code may be cited as the Legal Profession Code of Ethics, 1988.**
- 2. In this Code
“Tribunal” includes the Disciplinary Committee.**
- 3. Every attorney-at-law shall uphold at all times the standards set out in this Code.**
- 4. A breach of the rules in Parts 11, to V11 may constitute professional misconduct and in Part V111 shall constitute professional misconduct.**

PART 11 IN RELATION TO THE PROFESSION AND HIMSELF

- 5. (1) An attorney-at-law whether in practice or not shall uphold at all times the standards set out in this Code.
(2) An attorney-at-law shall maintain his integrity and the honour and dignity of the legal profession and of his own standing as a member of it and shall encourage other attorneys-at-law to act similarly both in the practice of his profession and in his private life and shall refrain from conduct which is detrimental to the profession or which may tend to discredit it.**
- 6. (1) An attorney-at-law shall scrupulously preserve his independence in the discharge of his professional duties.
(2) An attorney-at-law practicing on his own account or in partnership shall not engage in any other business or occupation if doing so may cause him to have a conflict of interest.**
- 7. An attorney-at-law shall protect the profession against the admission thereto of any candidate who is unfit for such admission.**
- 8. (1) An attorney-at-law shall not endeavour by direct or indirect means to attract the clients of another attorney-at-law and where one attorney refers a client to another attorney-at-law, the client remains the client of the referring**

- attorney-at-law and the attorney-at-law to whom the client is referred shall act with due deference to the relationship between the client and the referring attorney-at-law.
- (2) Where a referred client offers other work to the attorney-at-law to whom he was referred and the offer is sufficiently proximate to the referral, that attorney-at-law shall not accept that offer unless it has been brought to the attention to the referring attorney-at-law.
9. An attorney-at-law may speak in public or write for publication on the legal topics provided that he does not thereby emphasize his own professional competence.
 10. The best advertisement for and attorney-at-law is the establishment of a well merited reputation for personal integrity, capacity, dedication to work and fidelity to trust and it is unprofessional.
 - (a) to solicit business by circulars or advisements or interviews not warranted by personal relations
 - (b) To seek retainers through agents of any kind.
 11. An attorney-at-law shall defend the interests of his client without fear of judicial disfavour or public unpopularity and without regard to any unpleasant consequences to himself or to any other person.
 12. An attorney-at-law is obliged to act, either as adviser or advocate in the field in which he proposes to practice, for very person who may wish to become his client on payment of the proper professional fee charged in accordance with rule 68. Special circumstances such as a conflict of interest of the profession of relevant and confidential information may justify his refusal to accept a particular employment.
 13. No client is entitled to receive nor should any attorney-at-law render, any service or advice involving disloyalty to the State or disrespect for judicial office or the corruption of any persons exercising a public or private trust or deception or betrayal of the public.
 14. Every attorney-at-law should bear in mind that the oath of office taken on his admission to practice is not a mere form but is a solemn undertaking to be strictly observed on his part.
 15. An attorney-at-law should also bear in mind that he can only maintain the high traditions of his profession by being a person of high integrity and dignity.
 16. (1) The dress of an attorney-at-law appearing in open Court should be unobtrusive and compatible with the wearing of robes.

(2) Suits and dresses should be of dark colour. Dresses or blouses should be long sleeved and compatible with the wearing of bands and collarettes. Shirts and blouses should be predominantly white or other unemphatic appearance. Collars should be white and shoes dark.

(3) No conspicuous jewellery or ornaments should be worn.

(4) Attorneys should at all times, both in Court and when seeing clients, dress in a manner appropriate to and compatible with the status of their profession.

PART 111
IN RELATION TO THE STATE AND THE PUBLIC

17. An attorney-at-law owes a duty to the State to maintain its integrity, its constitution and its laws and not to aid, abet, counsel or assist anyone to act in any way contrary to those laws.
18. When engaged as a public prosecutor the primary duty of an attorney-at-law is not to secure a conviction but to see that justice is done and to that end he shall not withhold the facts tending to prove either the guilt or innocence of the accused.
19. An attorney-at-law shall endeavour by lawful means where the needs of society require, to promote and encourage the modernization, simplification and reform of the laws.
20. An attorney-at-law shall not by his actions, stir up strife or litigation by seeking out defects in titles, claims for personal injury or other causes of action for the purpose of securing a retainer to prosecute a claim therefore; or pay or reward any person directly or indirectly for the purpose of procuring him to be retained in professional capacity, and where it is in the interest of his client, he shall seek to obtain reasonable settlements of disputes.
21. An attorney-at-law shall not be deterred from accepting proffered employment owing to the fear of dislike of incurring disapproval of officials, other attorneys-at-law or members of the public.
22. Where an attorney-at-law consents to undertake the provision of legal services and he is appointed by the Director of Community Legal Services, by any Legal Aid and Advisory Authority or is requested by the Bar Association and consents to undertake the representation of a person unable to afford such representation or to obtain legal aid, the attorney-at-law shall not, except for compelling reasons, seek to be excused from undertaking such representation.

23. An attorney-at-law in undertaking the defence of persons accused of crime shall use all fair and reasonable means to present every defence available at law.

**PART IV
IN RELATION TO CLIENTS**

24. (1) An attorney-at-law shall always act in the best interests of his client, represent him honestly, competently and zealously and endeavour by all fair and honourable means to obtain for him the benefit of any and every remedy and defence which is authorized by law, steadfastly bearing in mind that the duties and responsibilities of the attorney-at-law are to be carried out within and not without the bounds of the law.

(2) The interests of his client and the exigencies of the administration of justice should always be the first concern of an attorney-at-law and rank before the right to compensation for his services.

25. (1) Before advising on a client's cause an attorney-at-law should obtain full knowledge thereof and give a candid opinion of the merits or demerits and probable results of pending or contemplated litigation.

(2) An attorney-at-law should beware of proffering bold and confident assurances to his client (especially where employment may depend on such assurances) always bearing in mind that seldom are all the laws and facts on the side of his client.

(3) Whenever the controversy admits of fair adjustment, an attorney-at-law should inform his client accordingly and advise to avoid or settle litigation.

26. (1) An attorney-at-law shall at the time of retainer disclose to his client all the circumstances of his relations to the parties and his interest in or connection with the controversy (if any) which might influence the client in his selection of an attorney-at-law.

(2) An attorney-at-law shall scrupulously guard and never divulge his client's secrets and confidences.

27. An attorney-at-law shall treat adverse witnesses, litigants and other attorneys-at-law with fairness and courtesy refraining from all offensive personal references and shall avoid imparting to his professional duties his client's personal feelings and prejudices.

28. It is the right of an attorney-at-law to undertake the defence of a person accused of crime regardless of his own personal opinion as to the guilt of the accused and having undertaken such defence he is bound by all fair and honourable means to present every defence that the law of the land permits, so that no person may be deprived of life or liberty except by the due process of the law.

29. (1) An attorney-at-law may represent multiple clients only if he can adequately represent the interests of each and if each consents to such representation after full disclosure of the possible effects of multiple representation.
(2) In all situations where a possible conflict of interest arises, an attorney-at-law shall resolve all conflicts by leaning against multiple representation.
30. (1) AN attorney-at-law shall deal with his client's business with all due expedition and shall, whenever reasonably so required by the client, provide him with full information as to the progress of the client's business.
(2) It is improper for an attorney-at-law to accept instructions in a matter unless he can handle it without undue delay.
31. Where an attorney-at-law determines that the interest of his client requires it, he may with the specific or general consent of the client, refer his business or part of it to another attorney-at-law whether or not a member of his own firm.
32. (1) An attorney-at-law on the record may instruct one or more attorneys-at-law to appear as advocates, in the same way as a solicitor on the record prior to 31st March, 1973, instructed Counsel.
(2) Queen's Counsel shall be entitled to accept instructions, appear or do any work without a junior, except where he would be unable properly to carry out his instructions or conduct his case if he were to do so.
(3) Where more than one attorney-at-law appears as advocate for the same party in the same proceedings, who shall lead the conduct of that party's case shall, subject to the instructions of the client be settled by the attorneys-at-law representing that party before they appear in court and shall not be altered during the course of the proceedings and the leader shall have all authority over the conduct of the case.
33. An attorney-at-law including a Queen's Counsel who appears with the leader is entitled to negotiated fee appropriate for his conduct of the case.
34. (1) An attorney-at-law is entitled to reasonable compensation for his services but should avoid charges which either over estimate or undervalue the services rendered.
(2) The ability of a client to pay cannot justify a charge in excess of the value of the service rendered, though the client's indigence may require a charge that is below such value or even no charge at all.
35. An attorney-at-law should avoid controversies with clients regarding compensation for his services as is compatible with self-respect and his right to receive reasonable compensation for his services.
36. The right of an attorney-at-law to ask for a retainer or to demand payment of out-of-pocket expenses and commitments, failing payment of which he may withdraw from the case or refuse to handle it, shall not be exercised where

the client, may be unable to find other assistance in time to prevent irreparable damage being done.

37. Where an attorney-at-law engages a foreign colleague to advise on a case or to co-operate in handling it, he is responsible for the payment of the latter's charges except there is express agreement to the contrary, but where an attorney-at-law directs a client to a foreign colleague he is not responsible for the payment of the latter's charges, nor is he entitled to a share of the fees of his foreign colleague.
38. An attorney-at-law may at any time withdraw his services
- (a) Where the client fails, refuses or neglects to carry out an agreement with, or his obligation to, the attorney-at-law as regards the expenses or fees payable by the client;
 - (b) Where his inability with colleagues indicates that the best interest of the client is likely to be served by his withdrawal;
 - (c) Where his client freely assents to the termination of his services;
 - (d) Where by reasons of his mental or physical condition or other good and compelling reason it is difficult for him to carry out his services effectively; or
 - (e) In cases of conflict as contemplated in Rule 29 or Rule 68.
- 39 (1) An attorney-at-law should not appear as a witness for his own client except as to merely formal matters or where such appearance is essential to the ends of justice.
- (2) If an attorney-at-law is a necessary witness for his client with respect to matters other than such as merely formal, he should entrust the conduct of the case to another attorney-at-law of his client's choice.

PART V

IN RELATION TO THE COURTS AND THE ADMINISTRATION OF JUSTICE

40. (1) An attorney-at-law shall maintain a respectful attitude towards the court and shall not engage in undignified or discourteous conduct which is degrading to the court.
- (2) An attorney-at-law shall encourage respect for the courts and the judges
 - (3) An attorney-at-law shall support judges and magistrates against unjust criticisms.
 - (4) Where there is ground for complaint against a judge or magistrate an attorney-at-law may make representation to the proper authorities and in such cases, the attorney-at-law shall be protected.
41. An attorney-at-law shall endeavour always to maintain his position as an advocate and shall not either in argument to the court or in address to the jury, assert his personal belief in his client's innocence, or in the justice of his

cause or his personal knowledge as to any of the facts involved in the matter under investigation.

42. An attorney-at-law should never seek privately to influence directly or indirectly the Judges of the Court in his favour or in the favour of his client, nor should he attempt to curry favour with juries by fawning, flattery or pretended solicitude for their personal comfort.
43. An attorney-at-law shall be punctual in attendance before the Courts and concise and direct in the trial and disposition of causes.
44. An attorney-at-law shall expose without fear or favour before a proper tribunal, unprofessional or dishonest conduct by any other attorneys-at-law and shall not lightly refuse a retainer against another attorney-at-law who is alleged to have wronged his client or committed any other act of professional misconduct.

PART VI
IN RELATION TO HIS FELLOW ATTORNEYS-AT-LAW

45. (1) The conduct of an attorney-at-law towards his fellow attorneys shall be characterized by courtesy, fairness and good faith and he shall not permit ill-feeling between clients to affect his relationship with his colleagues.
(2) All personal conflicts between attorneys-at-law should be scrupulously avoided as should colloquies between them which cause delay and promote unseemly wrangling.
46. (1) An attorney-at-law shall reply promptly to letters from other attorneys-at-law making inquiries on behalf of their clients.
(2) An attorney-at-law shall endeavour as far as is reasonable to suit the convenience of the opposing attorney-at-law when the interest of his client or the cause of justice will not be injured by so doing.
47. An attorney-at-law shall not give a professional undertaking that he cannot fulfill, and he shall fulfill every such undertaking that he gives.
48. (1) There is a duty on every attorney-at-law to report improper or unprofessional conduct by another attorney-at-law to the Disciplinary Committee, save where the information relating to the improper or unprofessional conduct is received in professional confidence in which case he must respect the duty of silence imposed in such circumstances.
(2) An attorney-at-law shall expose without fear or favour before the proper tribunal unprofessional or dishonest conduct by another attorney-at-law and shall not lightly refuse a retainer against another attorney-at-law who is alleged to have wronged a client.

49. Where an attorney-at-law has been sent money, documents or other things by another attorney-at-law which, at the time of sending, are expressed to be sent only on the basis that the attorney-at-law to whom they are sent will receive them on his undertaking to do so or refrain from doing some act, the receiving attorney-at-law shall forthwith return whatever was sent if he is unable to accept them on such undertaking, otherwise he must comply with the undertaking.
50. An attorney-at-law shall not in any way communicate upon request a subject in controversy or attempt to negotiate or compromise a matter directly with any party represented by another attorney-at-law except through such other attorney-at-law or with his prior consent.
51. (1) An attorney-at-law shall not ignore the customs or practices of the legal profession even when the law expressly permits it, without giving timely notice to the opposing attorney-at-law.
(2) An attorney-at-law should avoid all sharp practices and should refrain from taking any paltry advantage when his opponent has made or overlooked some technical error or matter, bearing in mind that no client has a right to demand that an attorney-at-law representing shall be illiberal or shall do anything repugnant to his own sense of honour and propriety.
52. An attorney-at-law shall not accept instructions to act in Court proceedings in which to his knowledge the client has previously been represented by another attorney-at-law, unless he first notifies the other attorney-at-law of the change, and makes reasonable efforts to ensure that attorney has been paid for his services, but shall be deemed to have notified the other attorney-at-law if he has made reasonable efforts to notify him.
53. An attorney-at-law shall not accept instructions to act in proceedings (other than Court proceedings) in which to his knowledge another attorney-at-law has previously represented the client unless he makes reasonable efforts to ascertain that the retainer of that attorney-at-law has been determined by the client, or that the client wishes both attorneys-at-law to represent him.
54. An attorney-at-law who instructs another attorney-at-law to act on behalf of his client unless otherwise agreed shall pay the proper fee of such attorney-at-law whether or not he has received payment from his client.
55. In undertaking to render assistance to a foreign colleague, an attorney-at-law shall remember that his responsibility is much greater both when giving advice and handling a case, than it would be had he undertaken to assist a colleague in Barbados.

56. Where in any particular matter explicit ethical guidance does not exist, an attorney-at-law shall determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

**PART V111
MANDATORY PROVISIONS AND SPECIFIC PROHIBITIONS**

- 57. An attorney-at-law shall not practice as such unless he has been issued a practicing certificate in accordance with the Act.**
- 58. (1) An attorney-at-law shall never knowingly mislead the Court.
(2) An attorney-at-law shall not withhold facts or secrete witnesses in order to establish the guilt or innocence of the accused.**
- 59. An attorney-at-law shall not hold out any person who is not qualified to practice law as a partner associate, consultant or attorney.**
- 60. An attorney-at-law shall not solicit business or consent to become involved in a matter at the request of a party thereto, but it is proper to him for an attorney-at-law to become involved in matters assigned to him by the Director of Community Legal Services or referred by the Bar Association or by another attorney-at-law or for which he is snagged in any other manner not consistent with these Rules.**
- 61. An attorney-at-law shall not in the carrying on of his practice or otherwise permit any act or thing which is likely or is intended to attract business unfairly or can reasonably be regarded as touting or advertising.**
- 62. (1) An attorney-at-law shall not in any way make use of any form of advertisement calculated to attract clients to himself or any firm with which he is associated and he shall not permit, authorize or encourage anyone to do so or reward anyone for doing so on his behalf.
(2) An attorney-at-law shall not permit his professional standing to be used for the purpose of advertising any particular product, service or commercial organization.
(3) An attorney-at-law shall not advertise for business indirectly by furnishing or inspiring newspaper comment concerning cases or causes in which an attorney-at-law has been or is connected or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the attorney-at-law's position and any similar self-laudations.
Provided however that:
(a) An attorney-at-law may permit limited and dignified identification of himself as an attorney-at-law.**

- (i) In political advertisement relevant to the course of a political campaign or issue;
 - (ii) In public notices where the announcement of his professional status is required or authorized by law, or is reasonably necessary for a purpose other than the attraction of potential clients;
 - (iii) In reports and announcements of bona fide commercial, civic, professional or political organizations in which he serves as a director or officer;
 - (iv) In and on legal textbooks, articles, professional journals and other legal publications and in a dignified and restrained advertisements thereof;
 - (v) In announcements of any public address, lecture, or publication by him on legal topics, provided that such announcements do not emphasize his own professional competence and are not likely to be regarded as being concerned with the giving of individual advice by him;
- (b) An attorney-at-law may speak in public or write for publication on legal topics so long as he does not thereby emphasize his own professional competence;
- (c) The following cards, office signs, letterheads or directory listings may be used by an attorney-at-law but in a restrained and dignified form.
- (i) A professional card or brochure identifying the attorney-at-law by name and as an attorney-at-law giving his decorations and degrees, legal or otherwise, his legal areas of work, his addresses, telephone numbers and the name of his law firm or professional associates so however that such cards are not published in the news media;
 - (ii) A brief professional announcement card to be delivered to attorneys-at-law clients, personal friends and relations and government bodies and stating new or changed associations or addresses, changes of firm name or like professional matters;
 - (iii) A sign or a size and design compatible with the existing practice of the profession, on or near the door of the office and in the building directory identifying the law office;
 - (iv) A letterhead identifying the attorney-at-law by name and as an attorney-at-law and giving his decorations and degrees, legal or otherwise, his addresses, telephone numbers and the name of his law firm and of his associates.
 - (v) A listing in a telephone directory, a reputable law list, legal directory or biographical reference giving brief biographical or other relevant information; and any such professional card, office sign, letterhead or listing may state the attorney-at-law is also a notary public or a Justice of the Peace.

63. Where an attorney-at-law commits any criminal offence which in the opinion of the Disciplinary Committee is of a nature likely to bring the

- profession into disrepute, such commission of the offence shall constitute professional misconduct if :
- (a) He has been convicted by any court, including a foreign Court of competent jurisdiction, for the offence; or
 - (b) Although he has not been prosecuted the Committee is satisfied of the facts constituting the criminal offence; or
 - (c) He has been prosecuted and has been acquitted by reason of a technical defence or he has been convicted but such conviction is quashed by reason of some technical defence.
64. An attorney-at-law shall not acquire directly or indirectly by purchase, or otherwise a financial or other interest in the subject matter of a case which he is conducting.
65. (1) An attorney-at-law shall not enter into partnership or fee sharing arrangements concerning the practice of law with non-qualified bodies or persons.
- (2) An attorney-at-law shall not enter into agreement for or charge or collect a fee in contravention of this or any other law.
66. (1) An attorney-at-law shall not charge fees that are unfair or unreasonable.
- (2) In determining the fairness and reasonableness of a fee the following factors may be taken into account.
- (a) The time and labour required the novelty and difficulty of the questions involved and the skill required to perform the legal service properly;
 - (b) The likelihood that the acceptance of the particular employment will preclude other employment by the attorney-at-law;
 - (c) The fees customarily charged in the locality for similar legal services;
 - (d) The amount, if any involved.
 - (e) The time limitations imposed by the client or by the circumstances;
 - (f) The nature and length of the professional relationship with the client;
 - (g) The experience, reputation and ability of the attorney-at-law concerned;
 - (h) Any scale of fees or recommend guide as to charges prescribed by law or by the Judicial Advisory Council.
- (3) An attorney-at-law shall not accept any fee or reward for merely introducing a client or referring a case or client to another attorney-at-law.
67. (1) Except with the specific approval of his client given after full disclosure, an attorney-at-law shall not act in any manner in which his professional duties and his personal interest conflict or are likely to conflict.
- (2) An attorney-at-law shall not accept or continue his retainer or employment on behalf of two or more clients if their interests are likely to conflict or if his independent professional judgement is likely to be impaired.
68. (1) An attorney-at-law who withdraws his services under Rule 38 shall not do so until he has taken reasonable steps to avoid foreseeable prejudice or injury to the position and rights of his client including:

- (a) Giving due notice;
 - (b) Allowing time for retaining of another attorney-at-law;
 - (c) Delivering to the client all documents and property to which he is entitled subject however to any lien which the attorney-at-law may have over the same;
 - (d) Complying with such laws, rules or practice as may be applicable; and
 - (e) Where appropriate, obtaining the permission of the Court where the hearing of the matter has commenced.
- (2) An attorney-at-law who withdraws his services shall refund promptly such part of the fees, if any, already paid by his client as may be fair and reasonable having regard to all the circumstances.
69. An attorney-at-law shall withdraw forthwith his services or from a matter pending before a tribunal:
- (a) Where the client insists upon his representing a claim or defence that he cannot conscientiously advance;
 - (b) Where the client seeks to pursue a course of conduct which is illegal or which will result in deliberately deceiving the Court;
 - (c) Where a client has in the course of the proceedings perpetrated a fraud upon a person or tribunal and on request by the attorney-at-law has refused or is unable to rectify the same;
 - (d) Where his continued service will involve him in the violation of the law or a disciplinary rule;
 - (e) Where the client by any other conduct renders it unreasonably difficult for the attorney-at-law to carry out his services as such effectively, or in accordance with the judgement and advice of the attorney-at-law, or the rules of law or professional ethics;
 - (f) Where for any good and compelling reason it is difficult for him to carry out his service effectively.
70. An attorney-at-law shall not retain money he received for his client longer than absolutely necessary.
71. An attorney-at-law shall never disclose, unless lawfully ordered to do so by the Court or required by statute, what has been communicated to him in his capacity as an attorney-at-law by his client and this duty not to disclose extends to his partners, to junior attorneys-at-law assisting him and to his employees provided however that an attorney-at-law may reveal confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against accusations of wrongful conduct.
72. An attorney-at-law shall not permit his professional services or his name to be used in any way which would make it possible for any persons who are not legally authorized to so to practice law.

- 73. An attorney-at-law shall not delegate to a person not legally qualified and not in his employ or under his control, any functions which are by the laws of Barbados only to be performed by a qualified attorney-at-law.**
- 74. In the performance of his duties an attorney-at-law shall not act with inexcusable or undue delay, negligence or neglect.**
- 75. An attorney-at-law shall not engage in undignified or discourteous conduct which is degrading to the Court or his profession.**
- 76. An attorney-at-law shall not willfully make false accusations against a Judge or Magistrate.**
- 77. An attorney-at-law who holds a public office shall not use his public position to influence or attempt to influence a tribunal to act in favour of himself or of his client.**
- 78. An attorney-at-law shall not accept private employment in a matter upon the merits of which he previously acted in a judicial capacity or for which he had any responsibility while he was in public employment.**
- 79. An attorney-at-law shall not give, lend or promise anything of value to a Judge, juror or official of a tribunal before which there is a pending matter in which he is engaged.**
- 80. In any proceedings in a Court an attorney-at-law shall not communicate or cause any other person to communicate with a juror as to the merits of such proceedings, and shall only do so with a Judge or person exercising judicial functions:
 - (a) In the normal course of the proceedings; or**
 - (b) Where authorized by law, or the practice of the Courts.****
- 81. An attorney-at-law shall not for the purpose of making any person available as a witness, advise or cause that person to secrete himself or leave the jurisdiction of the Court.**
- 82. An attorney-at-law shall not pay or offer to pay or acquiesce in the payment of compensation to a witness for giving evidence in any cause or matter save as reimbursement for expenses reasonably incurred and as reasonable compensation for loss of time in attending for preparation and for testifying, and in the case of an expert witness a reasonable fee for his professional services.**
- 83. An attorney-at-law shall not knowingly use perjured testimony or false evidence or participate in the creation of or, use of evidence which he knows to be false.**

- 84. An attorney-at-law shall not counsel or assist his client or witness, in conduct that the attorney-at-law knows to be illegal or fraudulent, and where he is satisfied that his client has in the course of the particular representation perpetrated a fraud upon a person or tribunal, he shall promptly call upon him to rectify the same.**
- 85. An attorney-at-law shall not knowingly make a false statement of law or fact.**
- 86. (1) An attorney-at-law shall not commit a breach of an undertaking given by him to a Judge, a Court or other Tribunal or a official thereof, whether such undertaking relates to an expression of intention as to future conduct or is a representation that a particular state of facts exists.**
(2) An attorney-at-law shall not knowingly represent falsely to a Judge, a Court or other Tribunal or to an official of a Court or other Tribunal or to an official of a Court or other Tribunal that a particular state of facts exists.
- 87. In pecuniary matters as an attorney-at-law shall be most punctual and diligent, he shall never mingle funds of others with his own and he shall at all times be able to refund money he holds for others.**
- 88. (1) An attorney-at-law shall keep such accounts as clearly and accurately distinguish the financial position between himself and his client as and when required.**
(2) AN attorney-at-law shall comply with such rules as may be made by the Judicial Advisory Council under section 13 of the Act, but nothing contained in this Rule or Rule 89 shall deprive an attorney-at-law of any recourse or right whether by right of lien, set-off, counterclaim, charge or otherwise against monies standing to the credit of a client's account maintained by that attorney-at-law.
- 89. An attorney-at-law shall reply promptly to any letter received from the Disciplinary Committee or the Barbados Bar Association relating to his professional conduct.**
- 90. (1) Breach by attorney-at-law of any Rules contained in this Part shall constitute professional misconduct and an attorney-at-law who commits such a breach shall be liable to any of the penalties which the Disciplinary Committee recommends and which the Court of Appeal is empowered to impose.**
(2) Breach by an attorney-at-law of any of the provisions of Parts 11 to V11 of this Code while not automatically amounting to punishable professional misconduct is derogation from the high standards of conduct expected from an attorney-at-law and may, depending on the circumstances of the particular case, amount to punishable professional misconduct or form a material ingredient thereof.

Made by the Disciplinary Committee under section 18 of the Legal Profession Act, Cap. 370A this 12th day of December, 1988.

C.A. Blackman Deputy Chairman

M.E. Bourne-Hollands Chairman

C. Nicholls Secretary

Attorneys-at-law

M.E. Hewitt

T. Carmichael

Fred Gallop

Yolande Bannister

O.M. Browne

C. Nicholls

A Model of Rules of Professional Responsibility



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ABA Model Rules of Professional Conduct

[This table of contents provides access to both the version of the Model Rules adopted by the ABA House of Delegates, February 5, 2002, in response to the recommendations of the Ethics 2000 Commission, as subsequently amended (the "Current Version") and the prior version of the Model Rules (the "Pre-2002" version). Both versions link to one another.]

The ABA Model Rules of Professional Conduct, including Preamble, Scope, Terminology and Comment, were adopted by the ABA House of Delegates on August 2, 1983, and amended in 1987, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1997, 1998, 2000, and 2002.

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ABA Model Rules of Professional Conduct (2004)

American Bar Association Model Rules of Professional Conduct (2002 edition)*

As passed by the American Bar Association, House of Delegates February 5, 2002 and amended in August 2002.

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Edition Notes

[This edition incorporates the changes adopted by the ABA House of Delegates, February 5, 2002, in response to the [recommendations of the Ethics 2000 Commission](#), and the further [amendments adopted by the ABA House of Delegates in August 2002](#). There is following each rule a link to the pre-2002 language, at this date still the model for most state rules.]*

Select one of the following starting points by double-clicking on it:

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PREAMBLE, SCOPE AND TERMINOLOGY

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., [Rules 1.12](#) and [2.4](#). In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity.

For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See [Rule 8.4](#).

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] 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. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] 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.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's

independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under [Rule 1.6](#), that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See [Rule 1.18](#). Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

[Pre-2002 version]

Rule 1.0: TERMINOLOGY

(a) "**Belief**" or "**believes**" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "**Confirmed in writing**," when used in reference to the informed consent of a person, denotes informed consent that is given in [writing](#) by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "[informed consent](#)." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a [reasonable](#) time thereafter.

(c) "**Firm**" or "**law firm**" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "**Fraud**" or "**fraudulent**" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "**Informed consent**" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and [reasonably](#) available alternatives to the proposed course of conduct.

(f) "**Knowingly**," "**known**," or "**knows**" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "**Partner**" denotes a member of a partnership, a shareholder in a [law firm](#) organized as a professional corporation, or a member of an association authorized to practice law.

(h) "**Reasonable**" or "**reasonably**" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "**Reasonable belief**" or "**reasonably believes**" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the [belief](#) is [reasonable](#).

(j) "**Reasonably should know**" when used in reference to a lawyer denotes that a lawyer of [reasonable](#) prudence and competence would ascertain the matter in question.

(k) "**Screened**" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a [firm](#) that are [reasonably](#) adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "**Substantial**" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "**Tribunal**" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "**Writing**" or "**written**" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "**signed**" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

[\[Comment\]](#) *[\[Pre-2002 version\]](#)*

CLIENT-LAWYER RELATIONSHIP

Rule 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation [reasonably](#) necessary for the representation.

[\[Comment\]](#) *[\[Pre-2002 version\]](#)* *[\[State Narratives\]](#)*

Rule 1.2: Scope of Representation and Allocation of Authority between Client and Lawyer

(a) Subject to paragraphs (c) and (d), 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. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is [reasonable](#) under the circumstances and the client gives [informed consent](#).

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer [knows](#) is criminal or [fraudulent](#), but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

[Comment][Pre-2002 version][State Narratives]

Rule 1.3: Diligence

A lawyer shall act with [reasonable](#) diligence and promptness in representing a client.

[Comment][Pre-2002 version][State Narratives]

Rule 1.4: Communication

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's [informed consent](#), as defined in [Rule 1.0\(e\)](#), is required by these Rules;
- (2) [reasonably consult](#) with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client [reasonably](#) informed about the status of the matter;
- (4) promptly comply with [reasonable](#) requests for information; and
- (5) [consult](#) with the client about any relevant limitation on the lawyer's conduct when the lawyer [knows](#) that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent [reasonably](#) necessary to permit the client to make informed decisions regarding the representation.

[Comment][Pre-2002 version][State Narratives]

Rule 1.5: Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in [writing](#), before or within a [reasonable](#) time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee

agreement shall be in a [writing signed](#) by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same [firm](#) may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is [confirmed in writing](#); and

(3) the total fee is [reasonable](#).

[Comment][Pre-2002 version][State Narratives]

[Note: Rule 1.15, as recommended by the Ethics 2000 Commission, would have required that communication of fees and expenses, and changes in them, be communicated to the client in writing unless the "it is reasonably foreseeable that total cost to a client, including attorney fees, will be [\$500] or less." In February 2002 the House of Delegates deleted the requirement of a writing, stating that fee communications be "preferably in writing." As of 2002, five jurisdictions require a written fee agreement for all new clients: Connecticut, District of Columbia, New Jersey, Pennsylvania, and Utah. Two additional states require a written fee agreement in many representations: Alaska (fees in excess of \$500), California (fees for all non-corporate clients in excess of \$1,000).

Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives [informed consent](#), the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer [reasonably believes](#) necessary:

(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; or

(6) to comply with other law or a court order.

[Comment][Pre-2002 version][State Narratives]

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer [reasonably believes](#) that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a [tribunal](#); and

(4) each affected client gives [informed consent, confirmed in writing](#).

[Comment][Pre-2002 version][State Narratives]

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or [knowingly](#) acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and [reasonable](#) to the client and are fully disclosed and transmitted in [writing](#) in a manner that can be reasonably understood by the client;

(2) the client is advised in [writing](#) of the desirability of seeking and is given a [reasonable](#) opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives [informed consent](#), in a [writing signed](#) by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives [informed consent](#), except as permitted or required by these Rules.

(c) A lawyer shall not solicit any [substantial](#) gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in [substantial](#) part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives [informed consent](#);

(2) there is no interference with the lawyer's independence of professional judgement or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by [Rule 1.6](#).

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives [informed consent](#), in a [writing signed](#) by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in [writing](#) of the desirability of seeking and is given a [reasonable](#) opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a [reasonable](#) contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a [firm](#), a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

[\[Comment\]](#) *[\[Pre-2002 version\]](#)* *[\[State Narratives\]](#)*

Rule 1.9 Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives [informed consent](#), [confirmed in writing](#).

(b) A lawyer shall not [knowingly](#) represent a person in the same or a substantially related matter in which a [firm](#) with which the lawyer formerly was associated had previously represented a client,

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer has acquired information protected by [Rule 1.6](#) and [1.9\(c\)](#) that is material to the matter; unless the former client gives [informed consent](#), [confirmed in writing](#).

(c) A lawyer who has formerly represented a client in a matter or whose present or former [firm](#) has formerly represented a client in a matter shall not thereafter:

- (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally [known](#); or
- (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

[/Comment/](#)[/Pre-2002 version/](#)[/State Narratives/](#)

Rule 1.10 Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a [firm](#), none of them shall [knowingly](#) represent a client when any one of them practicing alone would be prohibited from doing so by [Rules 1.7](#) or [1.9](#), unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a [firm](#), the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the [firm](#) has information protected by [Rules 1.6](#) and [1.9\(c\)](#) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in [Rule 1.7](#).

(d) The disqualification of lawyers associated in a [firm](#) with former or current government lawyers is governed by [Rule 1.11](#).

[/Comment/](#)[/Pre-2002 version/](#)[/State Narratives/](#)

Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

- (1) is subject to [Rule 1.9\(c\)](#); and
- (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its [informed consent, confirmed in writing](#), to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a [firm](#) with which that lawyer is associated may [knowingly](#) undertake or continue representation in such a matter unless:

- (1) the disqualified lawyer is timely [screened](#) from any participation in the matter and is apportioned no part of the fee therefrom; and
- (2) [written](#) notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer [knows](#) is confidential government information about a person acquired when the lawyer was a

public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A [firm](#) with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely [screened](#) from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to [Rules 1.7](#) and [1.9](#); and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its [informed consent](#), [confirmed in writing](#); or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by [Rule 1.12\(b\)](#) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

[Comment](#)//**[Pre-2002 version](#)**//**[State Narratives](#)**

Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give [informed consent](#), [confirmed in writing](#).

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a [firm](#) with which that lawyer is associated may [knowingly](#) undertake or continue representation in the matter unless:

(1) the disqualified lawyer is [screened](#) from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) [written](#) notice is promptly given to the parties and any appropriate [tribunal](#) to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not

prohibited from subsequently representing that party.

[Comment][Pre-2002 version][State Narratives]

Rule 1.13 Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

[Comment][Pre-2002 version][State Narratives]

Rule 1.14 Client With Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

[Comment][Pre-2002 version][State Narratives]

Rule 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

[Comment][Pre-2002 version][State Narratives]

Rule 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the Rules of Professional Conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

- (3) the client has used the lawyer's services to perpetrate a crime or [fraud](#);
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given [reasonable](#) warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a [tribunal](#) when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent [reasonably](#) practicable to protect a client's interests, such as giving [reasonable](#) notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

[Comment][Pre-2002 version][State Narratives]

Rule 1.17 Sale of Law Practice

A lawyer or a [law firm](#) may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

- (a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted;
- (b) The entire practice, or the entire area of practice, is sold to one or more lawyers or [law firm](#);
- (c) The seller gives [written](#) notice to each of the seller's clients regarding:
 - (1) the proposed sale;
 - (2) the client's right to retain other counsel or to take possession of the file; and
 - (3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

- (d) The fees charged clients shall not be increased by reason of the sale.

[Comment][Pre-2002 version][State Narratives]

Rule 1.18 Duties to Prospective Client

- (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a

prospective client shall not use or reveal information learned in the consultation, except as [Rule 1.9](#) would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a [firm](#) with which that lawyer is associated may [knowingly](#) undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given [informed consent, confirmed in writing](#), or:

(2) the lawyer who received the information took [reasonable](#) measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely [screened](#) from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) [written](#) notice is promptly given to the prospective client.

[\[Comment\]](#) *[\[Pre-2002 version\]](#)* *[\[State Narratives\]](#)*

COUNSELOR

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

[\[Comment\]](#) *[\[Pre-2002 version\]](#)* *[\[State Narratives\]](#)*

Rule 2.2 Intermediary

{Deleted}

[\[Pre-2002 version\]](#) *[\[State Narratives\]](#)*

Rule 2.3 Evaluation for Use by Third Persons

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer [reasonably believes](#) that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer [knows](#) or [reasonably should know](#) that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives [informed consent](#).

(c) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by [Rule 1.6](#).

[\[Comment\]](#) *[\[Pre-2002 version\]](#)* *[\[State Narratives\]](#)*

Rule 2.4 Lawyer Serving as Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer [knows](#) or [reasonably should know](#) that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

[Comment] [Pre-2002 version] [State Narratives]

ADVOCATE

Rule 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

[Comment] [Pre-2002 version] [State Narratives]

Rule 3.2 Expediting Litigation

A lawyer shall make [reasonable](#) efforts to expedite litigation consistent with the interests of the client.

[Comment] [Pre-2002 version] [State Narratives]

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not [knowingly](#):

(1) make a false statement of fact or law to a [tribunal](#) or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the [tribunal](#) legal authority in the controlling jurisdiction [known](#) to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer [knows](#) to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take [reasonable](#) remedial measures, including, if necessary, disclosure to the [tribunal](#). A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer [reasonably believes](#) is false.

(b) 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 shall take [reasonable](#) remedial measures, including, if necessary, disclosure to the [tribunal](#).

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by [Rule 1.6](#).

(d) In an *ex parte* proceeding, a lawyer shall inform the [tribunal](#) of all material facts [known](#) to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

[/Comment/Pre-2002 version/State Narratives/](#)

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client; and
 - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

[/Comment/Pre-2002 version/State Narratives/](#)

Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate; or
 - (3) the communication involves misrepresentation, coercion, duress or harassment; or
- (d) engage in conduct intended to disrupt a tribunal.

[/Comment/Pre-2002 version/State Narratives/](#)

Rule 3.6 Trial Publicity

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (b) Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
 - (2) information contained in a public record;
 - (3) that an investigation of a matter is in progress;
 - (4) the scheduling or result of any step in litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto;
 - (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
 - (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (i) the identity, residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in the apprehension of that person;
 - (iii) the fact, time and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- (d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

[Comment][Pre-2002 version][State Narratives]

Rule 3.7 Lawyer as Witness

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
- (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

[Comment][Pre-2002 version][State Narratives]

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information [known](#) to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the [tribunal](#) all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor [reasonably believes](#):

(i) the information sought is not protected from disclosure by any applicable privilege;

(ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(iii) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a [substantial](#) likelihood of heightening public condemnation of the accused and exercise [reasonable](#) care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under [Rule 3.6](#) or this Rule.

*[\[Comment\]](#)**[\[Pre-2002 version\]](#)**[\[State Narratives\]](#)*

Rule 3.9 Advocate in Nonadjudicative Proceedings

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](#).

*[\[Comment\]](#)**[\[Pre-2002 version\]](#)**[\[State Narratives\]](#)*

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not [knowingly](#):

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or [fraudulent](#) act by a client, unless disclosure is prohibited by [Rule 1.6](#).

*[\[Comment\]](#)**[\[Pre-2002 version\]](#)**[\[State Narratives\]](#)*

Rule 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer [knows](#) to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

*[\[Comment\]](#)**[\[Pre-2002 version\]](#)**[\[State Narrative\]](#)*

Rule 4.3 Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall

not state or imply that the lawyer is disinterested. When the lawyer [knows](#) or [reasonably should know](#) that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make [reasonable](#) efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

[Comment][Pre-2002 version][State Narratives]

Rule 4.4 Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no [substantial](#) purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and [knows](#) or [reasonably should know](#) that the document was inadvertently sent shall promptly notify the sender.

[Comment][Pre-2002 version][State Narratives]

LAW FIRMS AND ASSOCIATIONS

Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

(a) A [partner](#) in a [law firm](#), and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make [reasonable](#) efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make [reasonable](#) efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

- (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
- (2) the lawyer is a [partner](#) or has comparable managerial authority in the [law firm](#) in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and [knows](#) of the conduct at a time when its consequences can be avoided or mitigated but fails to take [reasonable](#) remedial action.

[Comment][Pre-2002 version][State Narratives]

Rule 5.2 Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's [reasonable](#) resolution of an arguable question of professional duty.

[Comment][Pre-2002 version][State Narratives]

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a [partner](#), and a lawyer who individually or together with other lawyers possesses comparable

managerial authority in a [law firm](#) shall make [reasonable](#) efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make [reasonable](#) efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a [partner](#) or has comparable managerial authority in the [law firm](#) in which the person is employed, or has direct supervisory authority over the person, and [knows](#) of the conduct at a time when its consequences can be avoided or mitigated but fails to take [reasonable](#) remedial action.

[Comment][Pre-2002 version][State Narratives]

Rule 5.4 Professional Independence of a Lawyer

(a) A lawyer or [law firm](#) shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's [firm](#), [partner](#) or associate may provide for the payment of money, over a [reasonable](#) period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of [Rule 1.17](#), pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or [law firm](#) may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a [reasonable](#) time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

[Comment][Pre-2002 version][State Narratives]

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
- (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
 - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
- (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
- (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
 - (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
 - (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
 - (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
- (d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
- (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or
 - (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

*[\[Comment\]](#)**[\[Pre-2002 version\]](#)**[\[State Narratives\]](#)*

Rule 5.6 Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

- (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
- (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

*[\[Comment\]](#)**[\[Pre-2002 version\]](#)**[\[State Narratives\]](#)*

Rule 5.7 Responsibilities Regarding Law-Related Services

- (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), 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.

(b) The term "law-related services" denotes services that might [reasonably](#) be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

[Comment][Pre-2002 version][State Narratives]

PUBLIC SERVICE

Rule 6.1 Voluntary Pro Bono Publico Service

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a [substantial](#) majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

[Comment][Pre-2002 version][State Narratives]

Rule 6.2 Accepting Appointments

A lawyer shall not seek to avoid appointment by a [tribunal](#) to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

[Comment][Pre-2002 version][State Narratives]

Rule 6.3 Membership in Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization, apart from

the [law firm](#) in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not [knowingly](#) participate in a decision or action of the organization:

- (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under [Rule 1.7](#); or
- (b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

*[\[Comment\]](#)**[\[Pre-2002 version\]](#)**[\[State Narratives\]](#)*

Rule 6.4 Law Reform Activities Affecting Client Interests

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.

*[\[Comment\]](#)**[\[Pre-2002 version\]](#)**[\[State Narratives\]](#)*

Rule 6.5 Nonprofit and Court-Annexed Limited Legal Services Programs

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

- (1) is subject to [Rules 1.7](#) and [1.9\(a\)](#) only if the lawyer [knows](#) that the representation of the client involves a conflict of interest; and
- (2) is subject to [Rule 1.10](#) only if the lawyer [knows](#) that another lawyer associated with the lawyer in a [law firm](#) is disqualified by [Rule 1.7](#) or [1.9\(a\)](#) with respect to the matter.

(b) Except as provided in paragraph (a)(2), [Rule 1.10](#) is inapplicable to a representation governed by this Rule.

*[\[Comment\]](#)**[\[Pre-2002 version\]](#)**[\[State Narratives\]](#)*

INFORMATION ABOUT LEGAL SERVICES

Rule 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

*[\[Comment\]](#)**[\[Pre-2002 version\]](#)**[\[State Narratives\]](#)*

Rule 7.2 Advertising

(a) Subject to the requirements of [Rules 7.1](#) and [7.3](#), a lawyer may advertise services through [written](#), recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

- (1) pay the [reasonable](#) costs of advertisements or communications permitted by this Rule;
- (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral

service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; and

(3) pay for a law practice in accordance with [Rule 1.17](#); and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or [law firm](#) responsible for its content.

*[\[Comment\]](#)**[\[Pre-2002 version\]](#)**[\[State Narratives\]](#)*

Rule 7.3 Direct Contact with Prospective Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by [written](#), recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made [known](#) to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every [written](#), recorded or electronic communication from a lawyer soliciting professional employment from a prospective client [known](#) to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not [known](#) to need legal services in a particular matter covered by the plan.

*[\[Comment\]](#)**[\[Pre-2002 version\]](#)**[\[State Narratives\]](#)*

Rule 7.4 Communication of Fields of Practice and Specialization

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

- (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and
- (2) the name of the certifying organization is clearly identified in the communication.

[Comment][Pre-2002 version][State Narratives]

Rule 7.5 Firm Names and Letterheads

(a) A lawyer shall not use a [firm](#) name, letterhead or other professional designation that violates [Rule 7.1](#). A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of [Rule 7.1](#).

(b) A [law firm](#) with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of the [law firm](#), or in communications on its behalf, during any [substantial](#) period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

[Comment][Pre-2002 version][State Narratives]

Rule 7.6 Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

A lawyer or [law firm](#) shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

[Comment][Pre-2002 version]

MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.1 Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

- (a) [knowingly](#) make a false statement of material fact; or
- (b) fail to disclose a fact necessary to correct a misapprehension [known](#) by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by [Rule 1.6](#).

[Comment][Pre-2002 version][State Narratives]

Rule 8.2 Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer [knows](#) to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

[Comment][Pre-2002 version][State Narratives]

Rule 8.3 Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

[Comment][Pre-2002 version][State Narratives]

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

[Comment][Pre-2002 version][State Narratives]

Rule 8.5 Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

[Comment][Pre-2002 version][State Narratives]