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The New Sheriffs: The International Private Client Attorney Faces Anti-Money Laundering, Tax Transparency, Ethical, and Related Issues

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I. INTRODUCTION

International private client lawyers are increasingly faced with pressures to raise the level of their due diligence with respect to law enforcement, regulatory, and ethical aspects relating to tax transparency, anti-money laundering (AML), anti-corruption, and sanctions.

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Beginning in section II, this article discusses private client lawyers handling ethical issues arising out of AML obligations in various situations. It starts by discussing FinCEN's customer due diligence (CDD) rules. It then looks at issues such as when clients have undeclared offshore accounts; noncompliance with the foreign clients' tax or related obligations, including the U.K. Criminal Finances Act and undeclared wealth orders; abiding by soft international law; ethical issues; the application of Circular 230; and then the application of selected fact issues. In particular, the discussion looks at the types of criminal proceeds, the types of information posing red flags, tax misconduct, and potential criminal liability.

Section III considers the American Bar Association's opposition to federal legislation on entity transparency and gatekeeper obligations.

Section IV discusses the future of the private client industry regarding AML, tax transparency, anti-corruption, and sanctions. In particular, the section considers the future of AML by reviewing the U.S. presidency of the Financial Action Task Force (FATF). In this regard, the section discusses operations and streamlining the FATF: strengthening the governance and accountability of the FATF. The section also reviews FATF's major strategic initiatives, such as combating the financing of terrorism, future work on proliferation financing, future work on digital identity, and the outcomes of the meeting of the FATF Forum of Heads of Financial Intelligence Units (FIUs). The new attack on the legal professional privilege is discussed.

Section V has a hypothetical.

II. PRIVATE CLIENT LAWYERS HANDLING ETHICAL ISSUES ARISING OUT OF AML OBLIGATIONS

Many of the rules concerning ethical questions on international private clients require practitioners to adhere to a combination of U.S. laws, Circular 230, the professional rules of ethics in the state with jurisdiction over the matter, and the American Bar Association's voluntary good-practice guidance on detecting and combating money laundering and terrorist financing. The ABA adopted its current guidance after the Financial Action Task Force 40 (FATF 40) recommendations and meetings between the FATF and bar associations around the world.[1] At the time of this writing, the FATF is completing a new Risk Based Assessment for Legal Professionals, which will trigger the ABA to prepare a revised voluntary

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good-practice guidance. Another important consideration in international private client work is that in some cases the laws and ethical rules of another jurisdiction may apply. Hence, in the aftermath of UBS AG's 2009 settlement with the U.S. Department of Justice regarding the allegations of conspiracy to help U.S. taxpayers evade U.S. tax, the Swiss financial regulator FINMA promulgated certain rules. These included requiring financial institutions and professors working with international private clients to comply with the laws, regulations, and ethical requirements not only of Switzerland, but also of the countries where their clients are located.

Most of the foreign laws concerning practitioners involved in cross-border trust and estate advice follow the same FATF recommendations and international enforcement conventions with provisions on anti-money laundering. One of the principal ways by which the FATF endeavors to ensure that all countries adhere to the standards is through periodic mutual evaluation reports, which are published. As a result, all countries and interested persons, such as financial regulators, institutions, practitioners, and civil society, can follow them.

In 2006 and 2016, the FATF found the United States noncompliant in its implementation of both the gatekeeper and entity transparency rules, creating pressure on the United States to fulfill its obligations to comply with the standards.

A. FinCEN Customer Due Diligence Rules

On May 6, 2016, the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) announced that it was making public a final rule requiring financial institutions to know and verify the identities of the natural persons (also known as beneficial owners) who own, control, and profit from companies when those companies open accounts.[2]

This rule also amends existing regulations under the Bank Secrecy Act (BSA) to enhance transparency and protect the integrity of the financial system by clarifying and strengthening the customer due diligence obligations of financial institutions. The CDD Final Rule advances the implementation of the BSA by helping to make available to law enforcement valuable information needed to disrupt illicit finance networks. This will in turn increase financial transparency and augment the ability of financial institutions and law enforcement to identify the assets and accounts

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of criminals as well as national security threats. This will also facilitate compliance with sanctions programs and other measures that cut off financial flows to these actors.[3]

The CDD Final Rule adds a new requirement that financial institutions—including banks, brokers or dealers in securities, mutual funds, futures commission merchants, and introducing brokers in commodities—collect and verify the personal information of the real people (also known as beneficial owners) who own, control, and profit from companies when those companies open accounts. The CDD Final Rule also amends existing BSA regulations to clarify and strengthen the obligations of these entities.

The CDD Final Rule harmonizes BSA regulations and makes explicit several components of customer due diligence that have long been expected under existing regulations, as well as incorporating a new requirement for covered financial institutions to collect beneficial ownership information. Specifically, the rule contains three core requirements:

(1) identifying and verifying the identity of the beneficial owners of companies opening accounts;

(2) understanding the nature and purpose of customer relationships to develop customer risk profiles; and

(3) conducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information.

With respect to the new requirement to obtain beneficial ownership information, financial institutions will have to identify and verify the identity of any individual who owns 25% or more of a legal entity, and an individual who controls the legal entity. Based upon comments received in response to the proposed rule published in August 2014, the final rule extends the proposed implementation period from one year to two years, expands the list of exemptions, and makes use of a standardized beneficial ownership form optional as long as a financial institution collects the required information.

The CDD Final Rule advances the BSA by making available to law enforcement valuable information needed to disrupt illicit finance networks.[4]

Some civil society organizations have criticized the final rule. Mark Hays of Global Witness criticized provisions in the proposed regulations dealing with

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escrow accounts established by lawyers for their client because they exclude accounts set up in escrow by lawyers from being covered. He referred to an investigation his organization carried out last year into the role played by U.S. lawyers in money laundering, which was carried by the television program *60 Minutes*. He noted that one lawyer suggested using escrow accounts as a way to avoid money laundering checks.[5] Meanwhile, the bar associations have fought to exclude escrow accounts from the final rule.

Another criticism of one civil society organization is the ability of owners to dilute holdings below the 25% threshold to avoid disclosure.[6]

CDD rules have made financial institutions more vigilant in developing customer profiles, leading them to ask more questions of their clients and gatekeepers, especially in the case in which the client is overseas but the gatekeeper is in the same jurisdiction as the financial institution. For instance, in some cases banks and financial institutions whose clients are law firms engaged in wealth planning are asking the law firms for their AML due diligence plan. In addition, banks and financial institutions are inquiring more of potential and new clients about their structure and refusing to open accounts where the structure or profile raises risks.

B. When a Client Has Undeclared Foreign Accounts[7]

A common occurrence is that a U.S. practitioner learns facts that seem to indicate the client has an undeclared foreign account. The attorney then describes the various programs the client can enter to become compliant. The client responds that he will take care of the account himself and that he wants the attorney to continue to advise him on estate planning but not advise further with the offshore account.

One issue is whether the attorney can continue to represent the client. If the attorney advises the client on estate planning, especially if it involves the offshore account, the attorney risks legal and ethical liability, unless the attorney confirms that the client has become tax-compliant.

An attorney who advises a taxpayer whom she has reason to know might not have properly corrected his omission would potentially violate section 10.22 of IRS Circular 230 (diligence concerning accuracy), because a practitioner must exercise due diligence in preparing, or assisting in the preparation of, approving, and filing tax returns and other papers concerning IRS matters. If the attorney

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continues to advise the client on international trust and estate planning matters, she risks violating section 10.22 and could subject herself to suspension or disbarment, after notice and opportunity for a proceeding, under 31 U.S.C. § 330.

What About the Potential Need for the Lawyer to Conduct More Due Diligence?

Circular 230 section 10.34(d) (standards for tax returns and documents, affidavits, and other papers) permits an attorney to generally rely on the information supplied by a client without verification. An attorney "must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete."

Section 10.37(a)(2) (requirements for written advice) requires that a practitioner not rely on the representations, statements, findings, or agreements of a taxpayer or any other person if reliance would be unreasonable. The attorney's reliance on the taxpayer's representation would be risky in the hypothetical circumstances above.

When the attorney relies on her client's representation, the reliance could be construed as unreasonable under section 10.27(a)(2) if the attorney does not make reasonable inquiries to verify that the information supplied by her client is accurate. For example, the attorney could inquire of the taxpayer for a copy of the filings he made in handling the matter himself. In this way, she could ascertain if the client properly handled the matter.

In a similar circumstance, in the context of an offshore voluntary disclosure, which ended in September 2018, Question 47 of Frequently Asked Questions for the 2014 Offshore Voluntary Disclosure Program states that "[a] practitioner whose client declines to make full disclosure of the existence of, or any taxable income from, a foreign financial account during a taxable year, may not prepare the client's income tax return for that year without being in violation of Circular 230."[8] In addition, unless the practitioner verifies that her client has properly become compliant, she may violate Rule 8.4(a) and (c) of the ABA's rule on professional conduct (misconduct), which advises it is professional misconduct for a lawyer to violate or try to violate the rules of professional conduct, knowingly help or induce another to do so, or do so through the acts of another; or engage in dishonest, fraudulent, deceptive, or misrepresentative conduct.[9]

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If a practitioner does not find out if the client has become compliant, she can be deemed to have failed to adhere to Circular 230 section 3.1 (customer due diligence) under guidance on good practices for detecting and combating money laundering and terrorist financing. The guidance specifically requires private client practitioners to be aware of the source and use of funds. If the practitioner does not advise or handle further the offshore account and does not verify that the client has become compliant, she might be deemed a violation of the customer due diligence requirements because the adviser would not be aware of the source of the funds.

An important potential legal issue is that knowledge that estate-planning funds involve criminal proceeds or instrumentalities could implicate counsel in the violation of money laundering laws. In this regard, 18 U.S.C. § 1957(a) criminalizes knowingly engaging or trying to engage "in a monetary transaction in criminally derived property." Offenses of money laundering under 18 U.S.C. §§ 1956 and 1957 concern a "specified unlawful activity," while knowing that the proceeds were earned through illegal activity. The list of specified activities includes more than 200 crimes. While it does not include title 26 (tax crimes), the jurisprudence under *Pasquantino v. United States* incorporates tax offenses if they constitute wire or mail fraud offenses.[10]

C. Foreign Noncompliance

U.S. practitioners must follow U.S. and applicable foreign laws when they advise private clients. Both in the United States and in many foreign countries, foreign tax and money laundering laws apply extraterritorially. Advisers of private clients must look to hard law, such as the many international enforcement agreements (*e.g.*, tax, anti-corruption, anti-money laundering, and sanctions), requiring government implementation through the enactment of criminal laws, anti-money laundering, anti-corruption, and anti-sanction due diligence laws, many of which apply extraterritorially.

For instance, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the U.N. Convention Against Corruption, the OAS Inter-American Convention Against Corruption, the Council of Europe Criminal Convention on Corruption, and the Council of Europe Civil Law Convention on Corruption require signatory governments to require their private sector to take measures to prevent corruption and corruption-based

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money laundering. Most of these conventions have mutual evaluation reviews, which are available to the public and often trigger scrutiny and comments from civil society.

Similarly, the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes also examines whether its members have in place measures to require the private sector to collect and furnish tax information, both on request and automatically. The U.S. laws include various types of tax and financial reporting laws and regulations. The OECD Common Reporting Standard (CRS) requires countries to adopt some of the implementation provisions. More than 100 jurisdictions have agreed to automatically exchange financial account information beginning in September 2017 and 2018.

On May 5, 2017, the OECD established a facility to disclose CRS avoidance schemes. The facility enables interested parties to report potential schemes to circumvent CRS. The expectation is that the facility will help increase CRS effectiveness.

On December 11, 2017, the OECD issued a consultation document seeking input on model mandatory disclosure rules. The model rules target promoters and service providers with a material involvement in the design, marketing, or implementation of a CRS avoidance arrangement or offshore structure. It envisioned rules that would require intermediaries to disclose information on the scheme to their local tax authority.

On February 19, 2018, the OECD issued a document on preventing misuse of residence by investment schemes (residence by investment/citizenship by investment) to circumvent CRS.

OECD member countries must enact laws and regulations to enforce the OECD disclosure facilities. The U.K. Criminal Finances Act 2017 is an example of the type of legislation enforcing the CRS and other tax transparency requirements.

U.K. Criminal Finances Act 2017

The U.K. Criminal Finances Act became effective in September 2017.[11]

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(1) Corporate Facilitation of Tax Evasion

The law criminalizes only acts by a legal entity, such as a company or partnership, wherever incorporated or organized and not an individual. Hence, non-U.K. firms (*e.g.*, U.S. firms) can commit offenses, especially since the law has extraterritorial effect.

The law contains two new failure-to-prevent offenses:

(a) the failure to prevent facilitation of domestic tax evasion[12] and

(b) the failure to prevent facilitation of foreign tax evasion.[13]

If a person who is "associated with" a relevant body commits a foreign or U.K. tax facilitation evasion offense, the relevant body will be vicariously liable.

The law defines an "associated person" to include an employee, agent, or any other person performing services on behalf of the relevant body.

"Associated with" is quite broad. In this regard:

> A person (P) acts in the capacity of a person associated with a relevant body (B) if P is—
>
> (a) an employee of B who is acting in the capacity of an employee,
>
> (b) an agent of B (other than an employee) who is acting in the capacity of an agent, or
>
> (c) any other person who performs services for or on behalf of B who is acting in the capacity of a person performing such services.[14]

(1)(a) U.K. Offense

Section 45 of the Criminal Finances Act criminalizes: (i) being knowingly concerned in, or acting with a view to, the fraudulent evasion of tax by another person, and (ii) aiding, abetting, counseling, or procuring the commission of a tax evasion offense.

In practice, evidence of dishonesty could include concealment, misrepresentation, non-disclosure, or even reckless disregard of circumstances and willful blindness.

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(1)(b) Foreign Offense

Section 46 criminalizes a "foreign tax evasion facilitation offense," meaning non-U.K. tax evasion by a U.K. company. It applies where the relevant entity has a nexus with the United Kingdom, and it consists of conduct that:

(i) amounts to an offense under the law of a foreign country;

(ii) relates to the commission by another person of a foreign tax evasion offense under that law; and

(iii) would, if the foreign tax evasion offense were a U.K. tax evasion offense, amount to a U.K. tax evasion facilitation offense.[15]

(2) Jurisdictional Reach

With respect to the U.K. offense, a relevant body incorporated or located anywhere outside the United Kingdom (*e.g.*, the United States) will be liable if an associate person located outside the United Kingdom has facilitated U.K. tax evasion.

With respect to a foreign offense, the nexus for a foreign criminal offense is narrower. The foreign offense can be either committed if (i) the relevant entity is incorporated or situated in the United Kingdom or (ii) an act facilitating the foreign tax evasion occurs in the United Kingdom.

In that regard, the U.K. link can be as small as having money pass through a U.K. bank account.

(3) Reasonable Preventive Procedures Defenses

The Criminal Finances Act provides for a reasonable prevention procedures defense:

> If a relevant body can demonstrate that it has put in place a system of reasonable prevention procedures that identifies and mitigates its tax evasion facilitation risks, then prosecution is unlikely as it will be able to raise a defense.[16]

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(4) Due Diligence

Entities that engage in tax advice will need to review and enhance their compliance controls to ensure that they adequately address the risk of involvement in tax evasion.

In October 2016, Her Majesty's Revenue and Customs (HMRC) issued draft guidance, stating that it will look at:

(a) risk assessment;

(b) proportionality of risk-based prevention procedures;

(c) high-level commitment;

(d) due diligence;

(e) communication and training; and

(f) monitoring and review.[17]

In 2018, HMRC issued codes of practice, exploratory documents in relation to its powers, and guidance on the use of its asset recovery powers.[18]

(5) Unexplained Wealth Orders

In January 2018, unexplained wealth orders (UWOs) were introduced as part of the Criminal Finances Act. UWOs permit U.K. enforcement authorities, such as HMRC, to request orders to investigate the way in which property was acquired. UWOs are primarily designed to prevent tax evasion and money laundering in the United Kingdom. However, the orders also apply to suspects residing outside the United Kingdom, as well as to any properties located abroad. Prior to UWOs, the enforcement authorities of British law enforcement were limited, unless the person under suspicion was convicted in his or her country of origin.

If authorities suspect that the source of funds used to buy property was illegal, UWOs permit authorities to request that owners explain how they took ownership of the property. If the owners fail to provide sufficient and convincing information, the property can be seized through the Proceeds of Crime Act.[19]

One can imagine that U.S. gatekeepers may represent a person subject to a UWO, including the target and/or one of his associates, including U.S. persons and the gatekeeper herself.

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Unexplained Wealth Orders

UWOs apply well beyond tax matters. The UWOs arise under the powers and codes of practice issued under part 8 of the Proceeds of Crime Act 2002 (POCA).[20] On January 31, 2018, the new authorities of UWO and the supporting "interim freezing orders" started. A UWO is an investigation order issued by the High Court on fulfillment of a number of tests.

A UWO requires a person who is reasonably suspected of involvement in, or of being connected to a person involved in, serious crime to explain the nature and extent of his or her interest in specific property. It also requires that the person explain how the property was acquired, as well as where reasonable grounds exist to suspect that the respondent's known lawfully obtained income would be insufficient to permit the respondent to obtain the property. The test for involvement with serious crime is by reference to part 1 of the Serious Crime Act 2007.[21]

Before it issues a UWO, the court must be satisfied of the following:[22]

(1) reasonable cause exists to believe the respondent has the property;

(2) the value of the property is more than £50,000;

(3) reasonable grounds exist to suspect that the known sources of the respondent's lawfully obtained income would have been inadequate to enable the respondent to obtain the property; and

(4) the respondent is

  (a) a politically exposed person (PEP), which is defined in POCA as "an individual who is, or has been, entrusted with prominent public functions by an international organisation or by a State other than the United Kingdom or another EEA State"[23] and includes family members, known close associates, or persons otherwise connected with such an individual; or

  (b) reasonable grounds exist to suspect that the respondent or a person connected with the respondent is or has been involved in serious crime (whether in the United Kingdom or elsewhere.)[24]

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A UWO can also apply to politicians or officials from outside the European Economic Area (EEA), or those associated with them, *i.e.*, politically exposed persons. A court can authorize a UWO in relation to a non-EEA PEP that would not require suspicion of serious criminality.

A UWO is a civil power and an investigative mechanism. It requires the respondent to provide information on certain matters (there lawful ownership of a property, and the means by which it was obtained). As an investigation authority, a UWO is not by itself a power to recover assets. It supplements a number of mechanisms already available in POCA to investigate and recover the proceeds of crime and should therefore not be viewed in isolation.

The agencies able to apply for a UWO are the following enforcement authorities in England and Wales: the National Crime Agency, Her Majesty's Revenue and Customs, the Financial Conduct Authority, the Serious Fraud Office, and the Crown Prosecution Service.

If evidence is furnished in response to a UWO, then a decision is made on how to proceed using that material. The subsequent use of the information may include referring the evidence to another body to consider criminal or civil action. However, the evidence compelled under a UWO cannot normally be used against the person who provided it in any subsequent criminal prosecution.

A failure to provide a response to a UWO may give rise to a presumption that the property is recoverable under any subsequent civil recovery action. Civil recovery is a procedure in the High Court (Court of Session in Scotland) to recover the proceeds of crime.[25] Civil recovery authorities are also only available to the enforcement authorities listed above.

A person commits an offense if, in purported compliance with a requirement under a UWO, the person makes a statement that he or she knows to be false or misleading in a material way, or recklessly makes a state that is false or misleading in a material way. A person guilty of an offense is liable to conviction or indictment to imprisonment not exceeding two years and/or a fine, or on summary conviction, to imprisonment not exceeding twelve months and/or a fine.[26]

The first UWO case concerned Zamira Hajiyeva, the wife of an Azerbaijani banker who was jailed for defrauding the state-owned bank for which he worked. Hajiyeva spent £16.3 million at Harrods between 2006 and 2016. The Court of

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Appeal adjudicated a UWO involving Hajiyeva, who allegedly used money stolen by her husband to buy two U.K. properties, together worth £22 million. The National Crime Agency (NCA) requested a UWO from her.[27]

On October 18, 2018, the High Court in London dismissed a legal challenge to the United Kingdom's first ever UWO, thereby requiring Hajiyeva to explain to the NCA how she was able to buy £22 million worth of U.K. property. The properties in question are frozen. If she either fails to respond or makes an inadequate response, the NCA can use this lack of inadequate response as grounds to pursue confiscation of the properties through civil proceedings.[28]

In its decision, the High Court rejected Hajiyeva's arguments, including (1) that the order violated her rights under article 1 of Protocol 1 of the European Convention on Human Rights (Protection of Property); and (2) that her husband (who was chairman at a bank whose shareholders included the Ministry of Finance of Azerbaijan, which held between 50.2% and 60.6% of shares at the relevant time) was not in fact a PEP.

The Court also rejected Hajiyeva's arguments that complying with the order would violate her privilege against self-incrimination and spousal privilege because she is the subject of an ongoing criminal investigation in Azerbaijan. Additionally, she unsuccessfully argued that since her husband is now in custody in Azerbaijan, compliance with the order would put him in jeopardy for further charges. The Court found that these privileges only apply to criminal offenses in the United Kingdom and held, among other things, that the evidence placed before it did not show a "real and appreciable risk that Mrs. Hajiyeva and her husband would be prosecuted for offenses in the UK" and that, since the UWO proceedings were civil proceedings, the privilege against self-incrimination did not apply.[29]

Proving unlawful conduct concerning business transactions outside the United Kingdom has various challenges. U.K. authorities must show on a balance of probabilities that those deals, which may have occurred far in the past, were unlawful. A twenty-year statute of limitations exists for recovery proceedings under part 5 of POCA. Additionally, establishing that the property in question constitutes proceeds of unlawful conduct normally requires a tracing exercise, which is not easy.[30]

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An exception to what is defined as recoverable property applies if a person disposes of recoverable property and the person who obtains it on that disposal does so in good faith, for value, and did so without notice that the property was recoverable. In those circumstances, the property no longer is recoverable property.[31]

Although the above discussion concerns UWOs in the United Kingdom, Australia and Ireland have also used UWOs.[32]

D. Abiding by International Soft Law

Advisers must also adhere to international soft law that exists in international action plans and guidelines. For instance, the FATF 40 AML standards, including the provisions applicable to designated nonfinancial businesses and professions (DNFBPs, also known as gatekeepers). The FATF standards require gatekeepers to adhere to "know your customer" (KYC) and customer due diligence, report suspicious activities and not tip off their clients of such reports, and have prevention measures. The ABA and other bar associations have developed good-practice guidelines that should be followed. Unlike some regulatory organizations, U.S. state bars have yet to develop and enforce procedures to ensure their members are implementing the good-practice guidance. Until now, the U.S. Department of Treasury has not applied AML laws to gatekeepers notwithstanding the non-compliance rating in 2006 and 2016 by the FATF merit evaluation report (MER) with respect to gatekeepers.

In many countries, a financial services commission (FSC) precludes persons from engaging in international wealth management services unless the commission determines they are fit and proper to perform those services. In the event the FSC learns that a requirement has been violated, the FSC can investigate and discipline, if necessary. Hence, if a U.S. adviser does business in a foreign country, even from the United States (*e.g.*, through email, phone, or fax), she must understand and adhere to its legal and ethical requirements.

U.S. practitioners must adhere to U.S., state, foreign, and international laws. Wealth planners must pay special attention to money laundering laws, wire and mail fraud laws, and laws against conspiring to help violate stolen asset laws. Increasingly, foreign jurisdictions are adopting laws to criminalize conspiracy and/or the assisting of taxpayers to violate tax and related reporting law.

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The ABA good-practice guidance has a risk-based standard that prohibits U.S. attorneys from receiving money from clients on the U.S. Treasury's specially designated nationals (SDNs) and blocked-persons listed. U.S. persons must block any payments from those persons who do not have a license from Treasury. Some law firms use software that screens names against the SDN list and prints the results, so that they have in their files a printout showing the results of its search. The printouts show that practitioners have performed the requisite due diligence in checking the clients against the SDN list. U.S. practitioners should at least ensure that they are not assisting clients move criminal proceeds, because those kinds of activities constitute money laundering under U.S., foreign, and international law.

E. Ethical Rules[33]

In the United States, state rules of professional responsibility are modeled on the ABA Model Code of Professional Responsibility. There is variation from state to state, and the rules for the particular state involved apply. Selected principles concern jurisdiction, identifying the client, and the attorney's duties to the client.

This section discusses some of the fundamentals of the ethical considerations. In particular, it considers jurisdictional issues in transnational legal matters and identifying the client. The section then explores selected duties of the lawyer to the client in a transnational practice: the duty of competence; the duty of zeal; the duty of confidentiality, including the different duties of lawyers in different roles; and the problem of multinational standards for international lawyers and international lawyering, as illustrated by recent instances of disciplinary action against attorneys for counseling clients engaged in conduct those attorneys knew to be illegal or fraudulent.

(1) Jurisdiction

A threshold issue is to which jurisdiction does a Florida or U.S. lawyer owe responsibility. Lawyers should pay attention to the jurisdictional reach of the ethical requirements of the jurisdiction in which they are based.[34] Although some lawyers with ethical boards take the parochial position that a U.S. lawyer is only responsible for the ethical requirements of the jurisdiction in which he or she practices, lawyers increasingly must be aware of the broad reach of other rules of ethics of other countries. The best and modern approach in complying with ethical rules of multiple jurisdictions in international business is to be aware of the

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potential reach of the ethical rules of a jurisdiction other than your own in matters involving international and foreign law. A conflicts-of-law perspective is the best means to analyze a problem and determine whether the interest of a specific jurisdiction may be sufficient to pay attention.[35] This is the same approach that a Florida lawyer would have to take to determine a jurisdictional overlap in ethics between Florida and New York.

An example is that a client, X Corporation from the United States, has received a notice of tax deficiency from the government of Zinterlandia. It requests your help. It believes the opportunity for recovery is very remote and therefore has told you that it will retain you only if you agree to work on a contingency fee basis. It is willing to pay a contingency of up to 50% of the recovery. However, after checking your correspondent office in Zinterlandia, you realize that one of the name partners is representing the Director of Inland Revenue and that his office is willing to represent your client. Among the potential ethical issues is whether, since it is not ethical to take the case on contingency in Zinterlandia, you can represent X Corporation. An additional issue is the ethical and even legal propriety of having a name partner of a firm work on a case while he is employed in the government, especially since he will have a financial interest in the matter. A choice-of-law analysis should be done and then advice on the legal and ethical issues should be obtained before the U.S. lawyer decides whether to be involved in this matter, and, if so, under what circumstances (*e.g.*, through an hourly fee or through a contingency fee, but only with work on the U.S. aspects, and considerations of another foreign counsel).

(2) Identifying the Client

While the identity of a client might not raise any problem when dealing with individuals, the same is not necessarily true with corporate clients.[36] When representing one or more members of a group of related corporations located in various countries, determining the identity of the lawyer's exact client becomes complex.

The ABA Model Code of Professional Responsibility (CPR) provides some guidance in the representation of corporate entities:

> A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the

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> entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. . . .[37]

The main focus in identifying the client is to avoid potential conflict of interest between the corporate client itself and some person or persons involved in its management or board. Indeed, in the general course of conduct, the corporate entity is very often identified with its management, its executives (with whom the lawyer is accustomed to deal), or its board. In the international arena, the lawyer may deal with international vice presidents, presidents of operating subsidiaries, the parent company's officers, other executives or in-house general counsel. Since the international lawyer owes his/her allegiance to the specific corporate entity, he may well have to look beyond the individual executives or corporate agents with whom he is generally in contact, whenever the corporate entity is being mismanaged or badly served by such executives or agents. In case of mismanagement or misconduct, the international lawyer has not only the right, but even in some cases the duty, to report the same to a higher corporate authority, even though, by doing so, he would disregard agents' or executives' instructions. The bottom line is that an international lawyer may not forget that management, whether local or foreign, is not his/her ultimate client and that the interest of the corporate entity itself remains "paramount."

The problems confronted in this regard by international lawyers are even more complicated. Indeed, a lawyer generally represents either a foreign subsidiary of a U.S. parent company or a U.S. subsidiary of a foreign parent company. In that context, he may be dealing on a day-to-day basis with the subsidiary's management and even being paid by the subsidiary. Yet, it may well be that initially that same lawyer was engaged by the subsidiary. In those situations, the lawyer may possibly find himself in a conflict-of-interest position, since both parent and subsidiary are two distinct entities with potentially different and conflicting interests.

This situation is somewhat similar to the simultaneous representations of multiple clients, governed by ECs 5-15 and 5-16 of the CPR. Under these ethical canons, the simultaneous representation of multiple clients is permitted as long as the potential conflict of interest is disclosed to both parties and the lawyer's "independent professional judgment" is not "adversely affected."

The lawyer's "independent professional judgment" is not likely to be "adversely affected" when he represents both a parent and a 100%-owned subsidiary. In such

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a case, should a conflict of interest arise between the two entities, the lawyer would be justified in respecting the parent company's instructions, as the 100% shareholder of the subsidiary. Similarly, should the subsidiary's management commit any mismanagement or misconduct, the lawyer would have the right, and presumably also the duty, to report the same to the parent.

The situation, however, is not as easy in the event the subsidiary is not 100% owned by the parent. This is particularly true whenever the subsidiary is a 50-50 joint venture, in which case potential conflicts of interest between the parent company and the subsidiary's other owner are foreseeable. Generally speaking, it is advisable for the lawyer to refer the representation of the joint venture to another legal advisor.

(3) The Duties of the Lawyer to a Client

(3)(a) The Duty of Competence

State Rules of Professional Conduct, the ABA Model Rules of Professional Conduct (MRPC), and the CPR require that a lawyer provide competent representation of his/her client.[38] Competence involves legal knowledge, skill, thoroughness, preparation, and efficiency reasonably necessary for the specific representation.[39] Hence, a lawyer may not handle a legal matter that he/she knows or should know he/she is not reasonably competent to handle on his/her own. This is especially true in the case of matters in specialized technical fields, such as niches of international corporation taxation and/or aspects of tax controversy work.

According to the comments to Rule 4-1.1 of the Florida Rules of Professional Conduct (FRPC) (comments on legal knowledge and skill), a lawyer does not necessarily have to possess special training or prior experience to handle legal problems of a type with which the lawyer before has been unfamiliar. A lawyer can give adequate representation in a new legal area by undertaking the requisite amount of study. Another means by which a lawyer can obtain the needed legal knowledge and skill is through associating a lawyer of established competence of the legal area at issue.

One important threshold issue when approached by a potential new client or even an existing client is whether the lawyer has or can attain the requisite competence to handle the matter. The issue can be difficult in dealing with international

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transactions because many times the client, unless such person has done a lot of international business, may not be aware of many of the particular traps for the unwary, let alone even some of the issues.

To meet the requirements of thoroughness and preparation, a lawyer must make sufficient inquiry into, and analysis of, the factual and legal elements of the situation, use methods and procedures fulfilling the standards of competent practitioners, and consult with the client as to the degree of thoroughness and the level of preparation required as well as the estimated costs involved for the circumstances.[40] The level of required attention, preparation, use of methods and procedures may be determined by the significance and complexity of the particular transaction.

For instance, if a client is involved in challenging a jeopardy assessment in U.S. District Court in the Southern District of Florida, a lawyer in Miami may not have such a difficult time representing a client based in Florida. However, a lawyer in San Francisco, who is the lead lawyer on the case for a client who for business or personal reasons must spend one year in East Africa on business, has a much more difficult job effectively representing the client. If you add to the facts that the client is a foreign national who has little contact with and knowledge of the U.S. legal system and even the English language—albeit obviously having been in the United States long enough to have a tax problem—then to the distance and logistical problems you add communication and understanding. If you add that the bulk of the taxpayer's records are in Africa and in a foreign language, then the degree of skill and attention to provide competent representation has risen considerably.

When a lawyer lacks expertise in a certain area, he or she ought to either transfer the case or request the assistance of a specialist without undue expense to the client. At the very least, a lawyer should not undertake a legal representation in an unfamiliar field without disclosing to his/her client the degree of his/her experience.[41]

(3)(b) Advising on International and Foreign Law

The duty of competence becomes broader in the international area. Very often in international matters, a lawyer is asked to give advice on foreign law. Traditionally, American lawyers are deemed to have the necessary skill to know and understand foreign laws, but neither the MRPC nor the CPR offers guidance as

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to the necessary level of their preparation or thoroughness with regard to foreign laws and regulations. Hence, each international lawyer has an individually fundamental duty to know the limits of his/her own competence. For instance, he/she should not give advice on a foreign transaction without first obtaining advice from a competent local practitioner. Similarly, an international lawyer should not advise on international transactions if he/she has not acquired sufficient competence in international conflict of laws, arbitration procedures, standard patterns of international commercial contracts, international financing devices, or licensing. When requesting advice from foreign local lawyers, the American lawyer's duty of competence requires that he/she verify and investigate to his/her satisfaction that the foreign lawyers are themselves competent.[42]

In many cases, whether the case concerns an American investing abroad or a foreigner investing in the United States, clients often will seek advice on the law of a foreign jurisdiction, especially on its interaction with either U.S. law and/or international law. The case may even involve the interaction of the law of two foreign countries. The latter situation is especially becoming commonplace in the context of economic integration in which a foreign investor wants to take advantage of an opportunity to invest in Mexico or the Caribbean, but for the purpose of exporting to North America, in which case the client has questions about the potential for the North American Free Trade Agreement, the existing bilateral investment treaty between the United States and Mexico, the Canada-U.S. Free Trade Agreement, and U.S. and Canadian law. It may be that for the same investment the client is intending to also export to Europe, perhaps to take advantage of the Economic Partnership Agreement (EPA) by the EU and CARIFORUM, in which case the client has questions about qualifying for the benefits of the EPA, and the application of the laws of several European and CARIFORUM countries, since either joint venture partners and/or technical and financial assistance are potentially from Europe.

The trend over time has been that when an attorney advises on foreign law, a higher level of professional responsibility is required.[43]

A lawyer faced with a potential that foreign law matters may be germane to a transaction or case should first call them to the attention of the client and do so in writing. If the lawyer does not believe he or she is competent, the lawyer should require the client to seek counsel. If the client refuses and local law is critical, the lawyer should consider withdrawing. In some cases, it may be appropriate for a

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lawyer to advise on some very elementary points of the foreign law, especially if the client plans to have the elementary advice confirmed by competent foreign counsel. Defensive lawyering requires the U.S. lawyer to document that he or she is not qualified to practice in the laws of the foreign jurisdiction and that the client should seek competent foreign counsel. If a U.S. lawyer advises on foreign law, he or she potentially could be liable to laws that prohibit engaging in the unauthorized practice of law in foreign countries. Some treaties of friendship, commerce, and navigation allow lawyers of one contracting state to engage in practice in the other contracting state on a national treatment basis.

Advising on the laws of foreign jurisdictions presents issues and problems analogous to the situations of advising on areas outside a lawyer's competence (discussed further below). A U.S. lawyer, in addition to the normal problems of identifying the issues and finding the law, must know the legal culture, the method of implementing the law, and a myriad of other variables, many of which the U.S. lawyer may not even be able to identify. For instance, a U.S. lawyer may not be aware that the deputy minister in charge of enforcing tax laws changed in a country and therefore the administration of the written law is completely different, even though the written law is essentially unchanged. A problem in some developing countries is that the law may not have been codified for decades. Therefore, without actually visiting the foreign country or talking with one or two persons in the country that have physical possession of the law, the U.S. lawyer cannot even begin to advise. Advising on implementation may sometimes involve knowing how to ensure prompt service and the dividing line between when a payment or gift to a foreign official is proper or criminal under the Foreign Corrupt Practices Act in the United States and how it is treated under the laws of foreign country or countries.

(3)(b)(i) Responsibility for Hiring and Supervising the Work of Foreign Lawyers

In many cases a client will request the assistance of U.S. counsel in finding a foreign counsel to work on a matter. If you are only referring a client to foreign counsel, there may be no responsibility. However, to be on the safe side, especially vis à vis the duty of competence in a continuing relationship with a client, it is important to qualify your knowledge (and lack of knowledge) of the country, substantive area, experience working with foreign counsel, and the limitations of your information on him and other potential professionals. Authority in at least

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one state is that a lawyer can be subject to discipline merely by not meeting the "competence" standards of Rule 4-1.1 in referring a client to a foreign counsel even if the lawyer does not provide any counsel on the substantive legal area.[44]

If an attorney will be not just recommending but hiring and supervising foreign counsel, then the lawyer owes reasonable due diligence in supervising the foreign counsel under Rule 4.5-1 of FRPC.

Before retaining new foreign counsel, assuming you are not familiar with that counsel or their work, it may be useful to test more than one counsel by making a small request for clarification or some aspect of the assignment or in some way putting them to the test of giving you some substance. Clarifying the assignment, the expectations, and their fee can be very important. Another critical element is whether the foreign counsel is being retained by you and your firm or your client. It may affect matters such as the ability and responsibility to supervise, the financial liability, the quality of the work, and the attorney-client and work-product privileges.

In working with foreign legal counsel, lawyers should pay attention to Rule 4-5.1(c)(1)–(2) of the FRPC. It makes a lawyer responsible for another lawyer's violation of the rules if the lawyer orders or, knowing of the specific conduct, ratifies the conduct, or if the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the lawyer and knows of the conduct at a time when he can avoid or mitigate its consequences but fails to take action.

Inexperienced U.S. lawyers who deal with international transactions or with a vanilla U.S. transaction for a person with foreign nationality or residence may fall below the competence standards merely by not identifying and advising their client of certain substantive legal issues or aspects of dealing with foreign legal counsel. Sometimes, it may be important to advise a client that, because of the lawyer's unfamiliarity with a given jurisdiction and/or legal area, the lawyer is aware of some issues, but that only a more comprehensive review by a lawyer from the home country can more thoroughly apprise him of the local treatment. This may be the case, for instance, with money movement questions and legal ethics on arranging fees.

An important way to reduce the amount of potential difficulty is for the U.S. lawyer to document the amount of work and advice rendered on the matter.

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(3)(b)(ii) Advising on Areas Outside Your Competence

The problem of the duty of competence can become tricky when a practitioner specializing in international tax planning and transactions has to advise on reporting requirements and complying with money movement laws and regulations not only of the country in which the counselor practices, but other jurisdictions whose laws may apply. For instance, if a client visits your office in the United States, but you know the client owns a closely held company in Vargenzuelaiz, a country with strict exchange controls, and is transferring money from trusts and other entities in the so-called secret low-tax jurisdictions, the duty of competence may arise in the context of money movement laws. The extent of one's duty may depend on the context of the transaction.

(3)(b)(iii) Advising on International Estate Planning

The practice of international estate planning may cause ethical issues.[45] For instance, few lawyers have access to the text of current laws of most jurisdictions involved in international estate planning. Even if they do, without knowledge of the foreign country's culture and jurisprudence, the lawyer may not be able to properly advise by reading the laws. Therefore, comparative analysis is not always easy. In many instances, knowledge of political, economic, or legal developments in each individual jurisdiction is required in addition to legal knowledge. Unless a lawyer spends a considerable amount of time in each jurisdiction, he is unlikely to have this knowledge.[46]

(3)(b)(iv) Serving as a Member of a Corporate Client's Board of Directors

Another aspect of the duty of competence relates to whether a lawyer should serve as a member of his/her corporate client's board of directors.[47] Such participation is not currently prohibited by either the MRPC or the CPR, but it is not recommended in view of the potential conflict of interest between the lawyer's duties to provide independent counsel and its fiduciary obligation as a member of the board. American international practitioners should refrain from serving on the boards of directors of either an American or foreign subsidiary while at the same time representing the parent company. The same principle should guide international lawyers whose corporate client asks them to serve on the board of its foreign holding company or foreign operating subsidiary. In addition to the conflict between the duty of competence and the fiduciary duty as members of

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the board, lawyers in that position may also be caught between fears of personal liabilities as a board member under local law and their advice to the parent with regard to adhering to local legal norms.

(3)(c) The Duty of Zeal: Avoiding Illegal/Criminal Acts

Pursuant to EC 7 of the CPR, a lawyer must serve his/her client "zealously within the bounds of the law." In other words, a lawyer, in fulfilling his/her duty of zeal, must do whatever is appropriate in advising his/her client. However, he is limited in such zealous representation by another ethical limitation, namely, EC 7-5 of the CPR. Under this ethical canon, a lawyer may "never encourage or aid (the) client to commit criminal acts." In representing his/her client, a lawyer may not "conceal or knowingly fail to disclose that which he is required by law to reveal," or "knowingly make a false statement of law or fact," or "counsel or assist his/her client in conduct that the lawyer knows to be illegal or fraudulent."[48]

While these rules offer some guidelines in cases of clear violation of the law or clear fraudulent behavior, they provide no help in borderline situations. Yet, in international practice, those borderline situations frequently occur as a result of differences in the perception of behavior or transaction under different legal systems. Is the client's behavior or transaction judged by the lawyer's country's own ethical country rules or instead by those in effect in the country in which the behavior or the transaction occurs or will be executed? In this regard, the Swiss financial regulatory body FINMA issued a regulation in 2009, shortly after the UBS deferred prosecution agreement, requiring Swiss financial institutions to comply with international criminal and regulatory standards.

In international estate planning, questions have been raised with regard to the course of conduct to be followed by a lawyer whenever it appears to the lawyer that his/her client will be pursuing an objective that the lawyer considers illegal, fraudulent, criminal, or even repugnant or imprudent. Should he withdraw? Must he withdraw? What kind of advice can he give?

If conduct sought by the client is repugnant or imprudent, the lawyer *may* withdraw as long as doing so does not cause material adverse effect to his/her client, unless otherwise permitted by the MRPC.[49] For instance, if the lawyer reasonably believes his/her client's behavior to be criminal or fraudulent (as opposed to merely repugnant), he may withdraw regardless of any adverse effect on his/her

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client. Similarly, if the lawyer knows or reasonably believes that a potential client is seeking legal advice in order to commit some illegal or fraudulent act, he must decline the representation.[50]

A more complicated situation exists when the lawyer does not know that his/her client is pursuing a fraudulent or illegal activity but merely has reason to believe he is. In that case, does the lawyer have a duty to further inquire in order to ascertain that a fraud is being or will be committed? This issue is particularly relevant in international estate planning where lawyers may often have suspicion as to the hiding of assets or transfer of assets from one jurisdiction to another in order to escape taxation. Although Rule 1.2 of the MRPC does not deal specifically with these issues, it is generally understood that even though there is no general duty for a lawyer to investigate his/her client's purposes and affairs, he is generally required to make some inquiry when the nature of his/her employment or the surrounding circumstances indicate that failure to make further inquiry would be "unreasonable."[51]

Assuming the client reveals that his/her objectives are fraudulent and the lawyer does wish to withdraw, what can he do for his/her client? Very little. Of course, he cannot participate in the fraud, but he could counsel or advice in a good-faith effort to determine the validity, scope, and meaning of the law as well as advise on the consequences of the client's conduct.[52]

On the other hand, if the lawyer finds out that the client is already involved in the fraudulent activity—for example, has already set up a tax avoidance scheme—all further assistance must cease immediately. However, the lawyer remains bound by his/her client's confidence.

Now assuming the client's objective is not to violate U.S. laws but instead some foreign tax regulations, may an American lawyer advise him/her/it on how to achieve such goal? After the decision in *Pasqauntino v. United States*,[53] the U.S. counsel may have criminal liability if he/she assists the client to violate a criminal tax law of a foreign country. Although lawyers are not expected to know all the nuances of foreign laws, they cannot abandon their professional canons merely because they are advising on foreign laws. Also, if lawyers are subject to conflicting ethical rules because of their multi-jurisdiction advice, principles of conflicts of law would apply.

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(3)(d) Duty of Confidentiality

One of the ethical duties of an attorney is to safeguard confidentiality of information regarding a client.[54] In particular, a lawyer must not reveal information concerning his/her representation of a client unless the client consents after consultation. An exception is made for disclosures that are implicitly authorized to carry out the representation. Another exception exists if a lawyer must disclose information that the lawyer reasonably believes is necessary to prevent the client from committing a crime the lawyer believes is likely to result in imminent death or substantial bodily harm or to establish a claim or defense on behalf of the lawyer in a controversy with the client, to establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Although this article discusses three selected aspects of confidentiality, others exist (e.g., intra-family privileges and privilege for physicians and psychotherapists). When the client is foreign and/or when the transaction has a large foreign element, special duty may exist to consider and communicate the application of these ethical and legal considerations to the client and others involved.

(3)(d)(i) Attorney-Client Privilege

The protection accorded to certain confidential communication may be vital in a tax controversy matter. Normally, the taxpayer's paramount interest may be to prevent the IRS from having access to documents or testimony by asserting any applicable evidentiary privileges. In many cases a taxpayer may be able to assert a claim of privilege in response to an IRS summons[55] or a grand jury subpoena.[56] Unless a taxpayer asserts an applicable privilege at the initial stage of an investigation, he/she may waive that privilege at a later stage, including trial. Although most courts hold that a waiver of the attorney-client privilege does not have to be intentional, to the extent that the client may be held to have waived the privilege by disclosing privileged information even if he/she did not intend such disclosure to serve as a waiver,[57] a waiver will not occur if disclosure was coerced or involuntary.[58]

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(3)(d)(ii) Work-Product Immunity

An area somewhat related to the attorney-client privilege is the immunity for attorneys' work product. The doctrine applies to civil and criminal litigation, as well as to grand jury investigations[59] and IRS summonses.[60] The work-product immunity protects from disclosure documents prepared by an attorney in anticipation of litigation, even if no litigation is pending at the time he/she prepares the documents.[61] The standard is whether "the document can fairly be said to have been prepared or obtained because of the prospect of litigation."[62] After a government agency starts an investigation, the prospect of litigation becomes imminent enough that the work-product doctrine will apply to any documents prepared related to such an investigation.[63] Similarly, documents prepared by attorneys conducting an internal investigation of potential wrongdoing will qualify.[64] Documents prepared in anticipation of litigation before an administrative tribunal are also privileged.[65]

Among the protected work-product materials are included: preliminary drafts of legal documents; attorneys' memoranda or notes analyzing a party's position or containing summaries of conferences and legal research; intra-office notes and memoranda;[66] and statements from third-party witnesses.[67] The work-product immunity includes interviews of third parties conducted by the attorney's investigator[68] and work papers of an accountant assisting the attorney.[69]

The client, in addition to the attorney, can assert the product immunity.[70] Even if the client has waived the attorney-client privilege, an attorney may still assert the immunity of his/her own work product.[71]

Some courts have held that the client completely loses his/her right to claim the protection for the work-product immunity if the client consults an attorney with the intent to perpetrate a future crime or fraud. In such case, the attorney can claim the protection only to the extent of his/her own mental impressions, conclusions, opinions, and legal theories.[72] In cases in which an attorney is guilty of illegal or unethical conduct, some cases have held that the attorney may thereby forfeit his/her right to claim the work-product privilege, but the client may still assert the privilege in such a case.[73]

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(3)(d)(iii) Accountants' Work Papers

Since 1985, there is no work-product privilege for tax accrual work papers.[74] The reasoning is that the role of a certified public accountant is not analogous to that of an attorney. A CPA is not an advocate, but rather is "independent," owing duties to "the investing public" and to the client's "creditors and stockholders."[75] The Court in *United States v. Arthur Young & Co.* also reasoned that the auditor is ethically and professionally bound to ascertain that the corporation's tax accrual reserves are adequate. Without access to sufficient data to make that decision, the auditor would be unable to make an unqualified opinion as to the accuracy of the corporation's financial statements.

One planning mechanism resulting from the *Arthur Young* case is that some corporations will ask their lawyers, not their accountants, to render an opinion on the adequacy of their tax accruals, thereby protecting those work papers under the attorney-client privilege.[76]

(4) Enforcement of Ethical Rules[77]

On January 15, 2019, the Attorney Grievance Committee for the First Judicial Department, New York State Bar, censured Marc S. Koplik for his conduct in participating in counseling a client to engage in conduct he knew was illegal or fraudulent during a 2016 undercover sting operation organized by the civil society organization Global Witness. The CBS program *60 Minutes* broadcast the undercover sting operation on multiple occasions.[78]

The Attorney Grievance Committee started the disciplinary proceeding by a petition of charges[79] alleging that Koplik was guilty of certain misconduct in violation of the Rules of Professional Conduct[80] for counseling a client to engage in conduct he knew was illegal or fraudulent and suggesting to the client that lawyers in the United States can act with impunity. In particular, Koplik met with a potential client who represented himself as appearing on behalf of a West African government minister.[81]

A purported attorney representing the minister stated that his client (the minister) wanted to buy real property in the form of a brownstone, an airplane, and a yacht in the United States. Koplik was under the impression that the money involved was in the tens of millions. The purported attorney's explanation of the source of the money suggested that the money was from potentially illegal

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sources. The purported attorney stated that "companies are eager to get hold of rare earth or other minerals. . . . And so they pay some special money for it. I wouldn't name it briber; I would say facilitation money."

Koplik informed the purported attorney they would need to hide the true source of the money by establishing different corporations to own the properties the minister allegedly wanted to buy. Koplik also gave assurances concerning protection of the attorney-client privilege. He stated that "[t]hey don't send the lawyers [in the United States] to jail because we run the country."[82]

Koplik and the New York Bar agree on the stipulated facts, including the admission to the acts of professional misconduct and the violation of Rules 1.2(d) and 8.4(h) of the Rules of Professional Conduct, the relevant factors in mitigation, and on the discipline. They now jointly move pursuant to 22 NYCRR 1240.8(a)(5) for discipline by consent and request the imposition of a public censure.

In support of the joint motion for discipline by consent, the parties relied on *In re Jankoff*,[83] and agreed that the circumstances in that case were analogous and should be followed. Due to the significant factors in mitigation, including Koplik's cooperation, admitted conduct, and acceptance of responsibility, as well as the fact that the misconduct was aberrational and happened in the context of a single, open-ended conversation during a meeting with a potential client after which Koplik took no further action, the parties agreed that a public censure was appropriate.

Accordingly, the court granted the parties' motion for discipline by consent and censured Koplik. The parties' motion for discipline by consent was granted and Koplik publicly censured.

The censure illustrates the ethical discipline that can result when a member of the bar encounters a potential or existing client that seeks investment advice and help to invest potentially illegal proceeds of transnational corruption, namely corruption-based money laundering.

Overall, Global Witness met with sixteen lawyers at thirteen firms. Neither Koplik nor any of the others ultimately agreed to be retained by the fictitious official. Nevertheless, most of them gave informal advice to the supposed adviser, according to the nonprofit. Only one—Jeffrey Herrmann—refused outright to help, saying, "This ain't for me."[84]

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Koplik is the latest of at least two lawyers caught up in the Global Witness sting to have received a public censure. The First Department issued that same sanction in September 2018 to John Jankoff, a lawyer who was told by the undercover investigator that the mining official's funds were "gray money" or "black money."[85]

F. Circular 230

To the extent practitioners are practicing before the Treasury and IRS, they are bound by Circular 230,[86] which establishes various duties of tax professionals who practice before the IRS. Examples of provisions are the following:

> **§ 10.21 Knowledge of client's omission.**
>
> A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error, or omission. The practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error, or omission.
>
> **§ 10.22 Diligence as to accuracy.**
>
> (a) *In general.* A practitioner must exercise due diligence—
>
> (1) In preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters;
>
> (2) In determining the correctness of oral or written representations made by the practitioner to the Department of the Treasury; and
>
> (3) In determining the correctness of oral or written representations made by the practitioner to clients with reference to any matter administered by the Internal Revenue Service.

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Section 330 of title 31 of the U.S.C. provides that after notice and opportunity for a proceeding, the Secretary of the Treasury may suspend or disbar from practice before the Treasury, or censure, a representative who "(1) is incompetent; (2) is disreputable; (3) violates regulations prescribed under this section; or (4) with intent to defraud, willfully and knowingly misleads or threatens the person being represented or a prospective person to be represented."

The same provisions authorize the Secretary to

> impose a monetary penalty on any representative described in the preceding sentence. If the representative was acting on behalf of an employer or any firm or other entity in connection with the conduct giving rise to such penalty, the Secretary may impose a monetary penalty on such employer, firm, or entity if it knew, or reasonably should have known, of such conduct. Such penalty shall not exceed the gross income derived (or to be derived) from the conduct giving rise to the penalty and may be in addition to, or in lieu of, any suspension, disbarment, or censure of the representative.

The Office of Professional Responsibility (OPR) administers Circular 230.[87] In addition to imposing administrative sanctions, including debarment and monetary penalties, OPR can also make referrals for criminal prosecution.

G. Selected Issues[88]

(1) The Types of Criminal Proceeds

The international standard in deciding whether a potential or existing client's funds are tainted is "all serious crimes." In this regard, Interpretive Note 2 to Recommendation 3 of the FATF requires that

> [c]ountries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences. Predicate offences may be described by reference to all offences, or to a threshold linked either to a category of serious offences or to the penalty of imprisonment applicable to the predicate offence (threshold approach), or to a list of predicate offences, or a combination of these approaches.

Section 2.8 of the ABA good-practice guidance provides that clients with specific criminal convictions are considered high risk and require enhanced due dil-

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igence. Section 3.2 requires trust and estate practitioners to be cognizant of the source and use of the funds. Sections 4.3 and 4.11 state that the reputation and publicly available information can be important sources of information.

(2) Types of Information Posing Red Flags

One issue is: What are the sources of information that should constitute red flags for practitioners? For instance, one newspaper article may not be enough, depending on the author and the newspaper, but it does put a practitioner on notice and would require investigation. In this regard, section 2.8 of the good-practice guidance makes assisting clients with specific convictions a red flag. Once a practitioner is put on notice, a practitioner should investigate further. He may want to ask the client or potential client for information and try to verify such information by checking public databases, inquiring of prior counsel or accountants, and use open-source intelligence.

Another data point may be one or more prior court proceedings, especially criminal ones or civil ones arising out of alleged criminal activities. For instance, a potential client may have been sued for receiving stolen property. There may be a criminal case in another country against the person from whom the potential client received the money. Perhaps the potential client has won the civil case, but the criminal case against the person from whom the potential client received the money (*e.g.*, beneficiary of a trust, settlement of a divorce, or proceedings from a corporate sale or reorganization) may still be ongoing. In such cases, the practitioner may need to conduct significant due diligence before being able to make a decision and may well decide to defer taking the potential client until the litigation resolves itself. It may depend on the details of the current litigation, the allegations against the source of the proceeds, and the potential client.

(3) Tax Misconduct

A major red flag concerns tax transparency and potential tax misconduct. Because of *Pasquantino*, the U.S. practitioner must conduct due diligence on a risk-based assessment, scrutinizing the country or jurisdiction, client, and service risk to determine whether to do standard, enhanced, or reduced customer due diligence.

If the potential client is a politically exposed person, the practitioner must conduct enhanced due diligence under the ABA guidance and the FATF recommen-

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dations. Although U.S. anti-money laundering laws do not require gatekeepers, such as lawyers, accountants, jewelers, and auction houses, to follow anti-money laundering due diligence rules, increasingly financial institutions are requesting gatekeepers to conduct due diligence. Increasingly, banks and financial institutions are declining the opening of new accounts due to potential risks.

With respect to a potential client, the practitioner may ask the potential client whether he is compliant with his taxes wherever he resides and does business. Depending on the circumstances—and especially in view of the OECD and EU CRS mandatory disclosure and aggressive tax planning initiatives—the practitioner may want confirmation in the form of a letter from the client's counsel and accountant, provided they can show they have the experience, competence, and client relationship to provide a letter that enables the U.S. adviser to properly evaluate the risk.

In the event the practitioner decides to inquire about foreign tax compliance, the practitioner should know the name of the local tax adviser and use the local adviser's credentials, experience, and comments in the assessment of the risk. Section 4.7 of the ABA guidance advises that the local or special counsel's experience and relationship with the referring to local counsel can significantly affect risk. If the practitioner knows the foreign counsel well and the latter has a good reputation for ethics and professionalism, and all other facts do not give cause for concern, the practitioner may be able to treat the matter as a reduced risk.

Under circumstances such as uncertainty and fairly high risk, the practitioner may request written advice, especially if the foreign adviser can show the experience and opportunity to comment on the potential or existing client's compliance with local law.

(4) Potential Criminal Liability

In the aftermath of the publication by the International Consortium of Investigative Journalists (ICIJ) of the Panama Papers on May 18, 2016, a number of prosecutions of gatekeepers and politicians have occurred.[89]

On December 4, 2018, U.S. law enforcement announced the unsealing of an indictment in the U.S. District Court for the Southern District of New York, charging four individuals with wire fraud, tax fraud, money laundering,

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and other crimes for their alleged roles in a decades-long criminal scheme perpetrated by Mossack Fonseca & Co., a Panamanian-based international law firm, and related entities.[90]

The eleven-count indictment charges Ramses Owens, 50, a Panamanian citizen; Dirk Brauer, 54, a German citizen; Richard Gaffey, a U.S. citizen, of Medfield, Massachusetts; and Harald Joachim von der Goltz, 81, a German citizen.[91] Owens, Gaffey, and von der Goltz are charged with one count of conspiracy to commit tax evasion, one count of wire fraud, and one count of money laundering conspiracy. Owens and Brauer are charged with one count of conspiracy to defraud the United States and one count of conspiracy to commit wire fraud. Gaffey and von der Goltz are also charged with four counts of willful failure to file a Report of Foreign Bank and Financial Accounts (FBAR). In addition, von der Goltz is charged with two counts of making false statements.

On November 15, 2018, in Paris, French authorities arrested Brauer, who worked as an investment manager for Mossfon Asset Management, S.A., an asset management company closely affiliated with Mossack Fonseca. On December 3, 2018, in London, British authorities arrested von der Goltz, a former U.S. resident and taxpayer. On December 4, in Boston, Massachusetts, U.S. authorities arrested Gaffey, a U.S.-based accountant. Owens, a Panamanian attorney who worked for Mossack Fonseca, remains at large.

The indictment alleges that, from at least in or about 2000 through in or about 2017, Owens and Brauer conspired with others to help U.S. taxpayer clients of Mossack Fonseca hide assets and investments, as well as the income generated by those assets and investments, from the IRS through fraudulent, deceitful, and dishonest means. Owens and Brauer allegedly worked to establish and manage opaque offshore trusts and undeclared bank accounts on behalf of U.S. taxpayers who were clients of Mossack Fonseca. Owens and Brauer allegedly marketed, created, and serviced sham foundations and shell companies formed under the laws of jurisdictions such as Panama, Hong Kong, and the British Virgin Islands, to conceal from the IRS and others the ownership by U.S. taxpayers of accounts established at overseas banks, as well as the income generated in those accounts. Typically, the sham foundations "owned" the shell companies that nominally held the undeclared assets on behalf of the U.S. taxpayer clients of Mossack Fonseca.[92]

In exchange for additional fees, Owens and Brauer allegedly helped clients who had bought the sham foundations and related shell companies by preparing

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corporate meeting minutes, resolutions, mail forwarding, and signature services. Owens and Brauer are also alleged to have intentionally established the bank accounts in jurisdictions with strict bank secrecy laws, thereby impeding the ability of the United States to obtain bank records for the accounts. Additionally, Owens and Brauer allegedly instructed U.S. taxpayer clients of Mossack Fonseca about how to repatriate funds to the United States from their offshore bank accounts in a manner designed to keep the undeclared bank accounts concealed. Among other things, Owens and Brauer instructed clients to use debit cards and fictitious sales to repatriate their funds covertly.

Von der Goltz was allegedly one of Mossack Fonseca's U.S. taxpayer clients. Von der Goltz was a U.S. resident and was subject to U.S. tax laws requiring him to report and pay income tax on worldwide income, including income and capital gains generated in domestic and foreign bank accounts. As a U.S. taxpayer, von der Goltz was required to file an FBAR. Von der Goltz allegedly evaded his tax reporting obligations by establishing a series of shell companies and bank accounts and hiding his beneficial ownership of the shell companies and bank accounts from the IRS. These shell companies and bank accounts allegedly made investments worth tens of millions of dollars. Owens and Gaffey, a partner at a U.S.-based accounting firm, helped von der Goltz in this scheme. Von der Goltz, Gaffey, and Owens allegedly falsely claimed that von der Goltz's elderly mother was the sole beneficial owner of the shell companies and bank accounts at issue because, at all relevant times, she was a Guatemalan citizen and resident, and, unlike von der Goltz, was not a U.S. taxpayer.

The indictment alleges Gaffey, besides helping von der Goltz evade U.S. income taxes and reporting requirements, also worked closely with Owens to help another U.S. taxpayer client (Client-1) of Mossack Fonseca defraud the IRS. Client-1 allegedly maintained a series of offshore bank accounts, which Mossack Fonseca helped Client-1 conceal from the IRS for years. The indictment also alleges that, on the advice of Owens and Gaffey, Client-1 covertly repatriated approximately $3 million of Client-1's offshore money to the United States by falsely stating on Client-1's federal tax return that the money represented proceeds from the sale of a company. After Client-1 repatriated approximately $3 million in this way, approximately $1 million still remained in Client-1's offshore account, the existence of which remained hidden from the IRS.[93]

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The indictment alleges that during 2008 and 2009, Owens and Gaffey helped Client-1 conceal his money from the IRS instead of participating in the offshore voluntary disclosure and secretly repatriate $3 million to the United States without paying tax or declaring the funds.[94]

The indictment alleges that in 2014 a Swiss bank used by von der Goltz encouraged him to participate in the IRS Offshore Voluntary Disclosure Program (OVDP), but Owens declined. Instead, he developed a new strategy to evade U.S. taxes on the earnings of his offshore foundation.[95]

Eventually, von der Goltz gave an interview with the Assistant U.S. Attorney, but allegedly made false statements.[96]

The indictment states that Client-3, who cooperated with the U.S. Department of Justice and is now deceased, introduced Brauer to an undercover law enforcement official, who recorded conversations. The work by Mossack Fonseca with Client-3 dated to 2005, continued after the enactment in 2010 of the Foreign Account Tax Compliance Act, including in 2017, when Brauer allegedly told the undercover official he could help with efforts to launder money and evade U.S. taxes, including through two Bahamian banks.

The indictment illustrates the trend by law enforcement in the United States and around the world to investigate and prosecute law firms, asset managers, accountants, and other enablers for their key roles in the global financial system. Assistant Attorney General Benczkowski said, "the charges . . . demonstrate our commitment to prosecute professionals who facilitate financial crime across international borders and the tax cheats who utilize their services."[97] IRS Criminal Investigations Chief Don Fort said the indictments send a message that "more investigations are on the way."[98]

With respect to prosecuting tax enablers, on July 2, 2018, the heads of tax crime and senior tax officials of the United States, United Kingdom, Canada, the Netherlands, and Australia announced an alliance on tax enforcement cooperation. At their first meeting, they agreed to develop tactical plans and identify opportunities to pursue enablers of international tax crime.[99] This new indictment shows a tangible result.

The indictment also is the latest of many indictments brought by tax authorities and prosecutors arising out of the publication on April 3, 2016, by the International Consortium of Investigative Journalists of the Panama Papers inves-

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tigation. As of December 1, 2018, governments in more than seventy countries have started over 150 investigations, inquiries, audits, and probes into the affairs of thousands of people and corporations linked to the Panama Papers.

Tax Division Directive No. 128 requires approval for any criminal charge if the conduct at issue arises under the internal revenue laws, regardless of the criminal statute(s) used to charge the defendant. Tax Division authorization is required before charging mail fraud, wire fraud, or bank fraud alone or as the predicate to a RICO or money laundering charge for any conduct arising under the internal revenue laws, including any charge based on the submission of a document or information to the IRS.[100] The reason for requiring Tax Division approval is that wire fraud charges enable prosecutors to forfeit proceeds and gain an advantage.

According to Directive 128:

> [f]raud charges should be considered if there is a significant benefit at the charging stage (*e.g.*, supporting forfeiture of the proceeds of a fraud scheme; allowing the government to describe the entire scheme in the indictment); at trial (*e.g.*, ensuring that the court will admit all relevant evidence of the scheme; permitting flexibility in choosing witnesses); or at sentencing (*e.g.*, ensuring that the court can order full restitution).[101]

The criminal charges are the first brought by the U.S. Department of Justice in the investigations arising out of the Panama Papers.[102] The charges are the second law enforcement action in the United States that have arisen out of the Panama Papers. The German police conducted a search of the headquarters of the Deutsche Bank as a result of the Panama Papers.[103]

Owens worked more than twenty years at Mossfon. His name is associated with 73,010 emails in the Panama Papers and 97,178 documents overall.[104] He left Mossfon in 2011, apparently after he realized the firm would never promote him to partner.[105]

Given the intelligence the Department of Justice has from the documents in the Panama Papers and the U.S. OVDP, in which taxpayers had to divulge the name of their advisors and corporate structures, as well as cooperate with DOJ, including giving interviews about the professionals involved in the structuring and implementation of the conspiracy to evade taxes, the potential for the DOJ to prosecute more cases arising out of the Panama Papers is quite high.

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III. THE U.S. BAR'S OPPOSITION TO FEDERAL LEGISLATION ON ENTITY TRANSPARENCY AND GATEKEEPER OBLIGATIONS

Since 2006, several bills to provide for entity transparency have been introduced in Congress but made little progress. In 2018, seven hearings occurred, and the bills had support.[106]

The leading bills were H.R. 3089 (the Corporate Transparency Act of 2017 (the CT Bill)) and its companion bill, S. 1454 (the True Incorporation Transparency for Law Enforcement Act (the TITLE Bill)).

The CT Bill requires the U.S. Treasury Department to issue regulations requiring corporations and limited liability companies formed in a state that does not already require basic disclosure to file information about their beneficial owners. In the event a state decides not to gather beneficial ownership information, the Treasury will collect it as a backup. The CT Bill provides minimum beneficial-ownership information disclosure requirements. The entity must provide the beneficial owner's name, current address, and a non-expired passport or state-issued driver's license.

The information will only be available to law enforcement and financial institutions, with customer consent, for the purpose of complying with their KYC requirements under anti-money laundering law.

Civil penalties are imposed for persons who transmit false or fraudulent beneficial ownership information, or who fail to provide complete or updated beneficial ownership information.

Due in part to the international trend towards stricter regulations of gatekeepers and entity transparency, the ABA's Task Force on the Gatekeeper and the Profession has prepared and circulated a new ABA Model Rule of Professional Conduct that would impose basic "client due diligence" requirements on lawyers. Clearly, due diligence for lawyers will increasingly be on the radar of banks, financial institutions, and law firms.

Kevin Shepherd, the past President of the Task Force, has opined that lawyers would need to perform reasonable, proportional, risk-based due diligence on prospective clients and certain new legal matters brought by existing clients and

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would have to monitor their clients during the scope of their services in order to determine whether the clients are engaging in money laundering or terrorist financing. If the ABA was to adopt these rules, a lawyer who does not comply may be subject to potential disciplinary action by the state disciplinary authority.

On June 30, 2017, the ABA Standing Committee on Ethics and the Professional Responsibility rejected the proposed change recommended by the ABA Task Force on the Gatekeeper and the Profession as unnecessary.

Meanwhile, the New York State Bar Association issued guidance in response to an inquiry concerning "(a) client who is a citizen and resident of a foreign country" consulting with an attorney "about a proposed transaction ('Transaction') in which the client would open a bank account in his name at a New York bank, or create a wholly-owned corporation in a zero tax jurisdiction ('Offshore Corporation') and have the Offshore Corporation open a bank account at a bank in New York." The attorney learns that the client does not want to report the transaction in the foreign country because reporting would result in tax or other legal liability. In New York State Bar Inquiry No. 14-08 (Oct. 8, 2008), the New York State Bar opined that DR 7-102(A)(7), which requires a lawyer not to counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent, encompasses conduct that is "illegal or fraudulent" under the laws of jurisdictions other than New York.

Until now, state bars in the United States have only periodically engaged in compliance and enforcement with respect to AML due diligence. Normally, this occurs through some type of audit. Regulatory agencies conduct audits through both offsite and onsite examinations. In this regard voluntary self-regulatory organizations, such as the Canadian and Jamaican Bar Associations, have developed procedures to audit law firms with respect to their compliance with the standards.[107]

On July 24, 2017, the United Kingdom Financial Conduct Authority (FCA) issued proposed guidance on a sourcebook for professional body supervisors on anti-money laundering supervision. The proposed guidance was issued pursuant to Articles 17, 18(4), or 48(1) of the fourth money laundering directive.[108]

Until now the American Bar Association has been unified in its opposition to bills on entity transparency. On February 1, 2018, the ABA President, Hilarie Bass, in a letter to the Senate Judiciary Committee on the TITLE Bill, expressed

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concern that the bill would interfere with the attorney-client privilege and impose burdensome and intrusive regulations on small business, its lawyers, and other agents, and states. Bass continued that the costly reporting requirements in the TITLE Bill are not required because the federal government, finance institutions, and the legal professional have taken other steps that are much more effective at combating money laundering and terrorist financing.

Various parts of the bar are dissenting from the ABA opposition. For instance, Matthew Stephenson, a professor at Harvard Law School, wrote in a blog post that the official explanations for opposing the TITLE Bill do not make much sense. In particular, Stephenson disputed the ABA's reliance on unnecessary costs and impinging the attorney-client relationship as reasons to oppose the bill. Other ABA members have written op-ed pieces, urging the ABA to stop its opposition to transparency bills.

The ABA Business Law Section has adopted a policy that would more easily support bills to collect and disclose beneficial ownership information by business entities.

It would not be surprising if in the near future the ABA modifies its position to become more accommodating to entity transparency and AML due diligence rules for lawyers.

IV. THE FUTURE FOR THE PRIVATE CLIENT INDUSTRY OF AML, TAX TRANSPARENCY, ANTI-CORRUPTION, AND SANCTIONS

A. Overview

The future for the private client industry of anti-money laundering, tax transparency, anti-corruption, and sanctions is likely to follow the vicissitudes of international politics.

Much of U.S. international tax and related enforcement cooperation arises from regulatory transnational networks that have developed for many decades.[109] Global multilateralism has been replaced by diverse more modest regional clubs such as the European Union (EU) and the Association of Southeast Asian Nations (ASEAN) to more geographically diverse initiatives like the G-7, the

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Basel Committee on Banking Supervision, the Financial Stability Board (FSB), the Financial Action Task Force, and the FATF regional style bodies (FSRBs). Cooperation enforcement has increased and become more varied and nuanced. More recently, financial regulatory and enforcement cooperation has shifted from a multilateral system of governance to varied "minilateral" approaches of diplomacy. The increasing multipolarity of the international system is leading to more, not less, institution building and cross-border cooperation. As globalization becomes more entrenched, the old institutions are supplemented and/or replaced with alternative mediums and diplomatic tools in order to respond to the more varied interests, preferences, and power shifts. These alternative mediums and diplomatic tools come in different shapes and sizes and are referred to as "minilateral diplomacy."[110]

An example is the Joint Chiefs of Global Tax Enforcement (known as the J5). They are committed to combating transnational tax crime through increased enforcement collaboration. The members work together to gather information, share intelligence, conduct operations, and build the capacity of tax crime enforcement officials.

The J5 comprises the Australian Criminal Intelligence Commission (ACIC) and Australian Taxation Office (ATO), the Canada Revenue Agency (CRA), the Fiscale Inlichtingen- en OpsporingsDienst (FIOD), HM Revenue & Customs (HMRC), and Internal Revenue Service Criminal Investigation (IRS-CI).

In particular, the J5, which was established on July 2, 2018,[111] is engaged in the following activities:

- developing shared strategies to gather information and intelligence that will strengthen operational cooperation in matters of mutual interest, as well as targeting those who seek to commit transnational tax crime, cybercrime, and launder the proceeds of crime;
- driving strategies and procedures to conduct joint investigations and disrupting the activity of those who commit transnational tax crime, cybercrime, and also those who enable and assist money laundering; and
- collaborating on effective communications that reinforce how the J5 are working together to tackle transnational tax crime, cybercrime, and money laundering.[112]

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Examples of minilateral diplomacy in the international tax enforcement arena have included the U.S. agreement with four countries to develop a FATCA International Government Agreement (IGA) to meet the objections that FATCA would override fundamental domestic legislation and the decision by the international community to form the G20 to deal with the financial crisis of 2008. The bulk of the minilateral diplomacy arises from long-term relations among professionals, such as tax, anti-money laundering, anti-corruption, and other professionals. They come together regularly over meetings of the international and information organizations. They attend similar conferences held by think-tanks, non-governmental organizations, and the like. They share articles in professional journals and over time develop shared values and approaches to financial enforcement compliance and enforcement.

B. Trump Administration

Since the beginning of the Trump administration, U.S. engagement in the international initiatives, such as tax transparency, anti-money laundering, and anti-corruption, has lagged. Nevertheless, at the staff levels, the work continues. As Brexit, trade protectionism, and nativism increase, the pace of globalization and transnational regulatory and enforcement is spotty and irregular. Nevertheless, these setbacks are temporary.

Current FATF Initiatives Under the U.S. Presidency[113]

Until June 21, 2019, the FATF president was Marshall Billingslea of the United States. On October 19, 2018, he chaired the FATF-XXX meeting in Paris.

Operations and Streamlining the FATF: Strengthening the Governance and Accountability of the FATF

Among the FATF priorities is to strengthen FATF governance and accountability through increasing the engagement of ministers and senior officials of FATF. The goal is to support a more cohesive view of the various issues related to anti-money laundering and counter-terrorist and proliferation financing, provide greater political awareness of the FATF's work, reinforce members' commitment to implement effective strong regimes, and help direct global resources in more risk-based and results-oriented ways.

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Major Strategic Initiatives

(1) Combating the Financing of Terrorism

Combating the financing of terrorism (counter-financing of terrorism, or CFT) remains a top priority for the FATF under the U.S. presidency. The Plenary agreed to focus its work on three areas:

(1) implementation: to ensure that countries can prosecute and convict terrorist financiers, FATF will prioritize work on the effective investigation and prosecution of this crime;

(2) guidance: to help countries better identify and understand the terrorist financing risks they face so that they can appropriately resource counter-terrorist financing efforts; and

(3) training: to build knowledge across the Global Network on terrorist financing risks, asset freezing, information sharing, and disrupting terrorist financing.

The FATF Plenary discussed and adopted amendments to the FATF Standards to respond to the increasing use of virtual assets for money laundering and terrorist financing, and at the request of the G20 ministers. This includes an amendment to the FATF Recommendations and glossary to clarify to which businesses and activities the FAFT requirements apply in the case of virtual assets. Exchanges and wallet providers will be required to implement AML/CFT controls, and to be licensed or registered and supervised or monitored by national authorities. Strengthening the standards is part of a comprehensive approach that the FATF has developed to prevent the misuse of virtual asset activities for money laundering and terrorist financing.

As a next step, the FATF will update its guidance to assist countries with the full and effective implementation of these requirements of the FATF Standards. All countries are encouraged to swiftly take the necessary steps to prevent the misuse of virtual assets. Given the speed of innovation, and to ensure that the FATF Standards remain relevant, the FATF agreed to review its standards as they apply to the virtual asset sector in twelve months. In June 2019, the FATF Plenary has issued the Interpretative Note to Recommendation (INR) 15, which applies in detail the FATF Standards and binding measures for the regulation and supervision of virtual asset activities and service providers.

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(2) Future Work on Proliferation Financing

The FATF has started a project that will consider the feasibility of expanding the FATF Recommendations applicable to proliferation financing as well as enhancing implementation of existing obligations. The project will explore the degree to which there is support for revisions and will develop and consider detailed proposals for amendments in these areas within the framework of FATF and U.N. mandates. The project will also consider developing best practices on combating proliferation financing and consider how such best practices can help countries strengthen implementation of the existing FATF requirements.

(3) Future Work on Digital Identity

The FATF will develop guidance on digital identity. The guidance will consider endorsement by national authorities as a key test for the acceptability of digital ID. It will focus mainly on the reliability and independence features of digital IDs that are not issued on the basis of a process that is agreed, regulated, or supervised by a national authority. Further, the guidance will consider and describe potential risks as well as opportunities for their mitigation in the context of digital IDs.

Outcomes of the Meeting of the FATF Forum of Heads of Financial Intelligence Units (FIUs)

FATF heads of FIUs met in the margins of the FATF Plenary to discuss how to enhance the effectiveness of suspicious transaction reporting and the quality of financial intelligence, with participation from private sector participants. The forum agreed to two reports—one addressing how large international financial institutions identify suspicious activity, and the other describing the practical considerations in setting up public-private partnerships. These reports will be disseminated through the FATF Global Network.

The Plenary also agreed that the forum take on new projects relating to virtual asset risks and effective approaches to detection and analysis, and on enhancing FIU strategic analysis.

Analysis

That FATF work on regulation of virtual assets is of critical importance as virtual assets are increasingly in vogue, on the one hand, for legitimate activi-

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ties, but also on the other hand, increasingly used by criminals to disguise illegal transactions and move the proceeds of crime. In this regard, the FATF work on FinTech and RegTech is critical to proper regulation of AML/CFT. In the area of virtual assets, the challenge for the international community and national authorities is for the law to keep up with the dynamic technology.

The efforts for FATF to improve its governance are important, although the summary notes did not refer to ways in which FATF can engage more with the private sector.

C. Legal Professional Privilege Under Attack

On November 15–16, 2018, an international expert group meeting on preventing abuse of legal professional privilege (LPP) explored the problems and potential remedies to responding to gaps in achieving transparency in beneficial ownership.[114] Approximately thirty stakeholders, primarily in law enforcement officials and FATF officials, attended the meeting.[115]

The convening organizations were the United Nations Office on Drugs and Crime (UNODC) and the Stolen Asset Recovery (StAR) Initiative of the World Bank/UNODC. The meeting discussed, among other things, a paper prepared by StAR as well as international standards in anti-money laundering and anti-corruption, in particular the standards required by the U.N. Convention Against Corruption and the Financial Action Task Force Recommendations 22 and 23.

The discussion paper observed that recent developments demonstrate that the problem of lack of beneficial ownership transparency still persists. In particular, the paper cites the publication of 11.5 million leaked documents of Panamanian law firm Mossack Fonseca in 2016 (the "Panama Papers"), as well as recent cases, such as the abuse of Interest on Lawyer Trust Accounts (IOLTA), which involved Malaysia's sovereign wealth fund 1MDB, a case involving La Cosa Nostra, and the 2016 investigation by Global Witness documenting the vulnerability of Manhattan lawyers to money laundering as evidence. Instead of promoting transparency, LPP facilitates laundering and simultaneously acts as a barrier to the successful recovery of beneficial ownership information.

The paper argues LPP is based on a person's fundamental right to a fair trial, and the associated rights to counsel and to legal representation, which are generally recognized as aspects of the right to access to justice enshrined in the Uni-

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versal Declaration of Human Rights. General agreement exists that LPP is not absolute. In most countries, LPP does not extend to all communications between a lawyer and her client, and often stops short of purely commercial, non-legal advice. It also does not protect communications between lawyer and client that are conducted for the purpose of committing or covering up a criminal act (*e.g.*, the "crime-fraud exception" to LPP).

The paper also discusses how a number of countries and the EU limit LPP to the "traditional" activities of legal representation, criminal defense, and giving legal advice. They exclude LPP when the lawyer is involved in tax planning, conducting internal corporate investigations, establishing and managing legal persons and arrangements on behalf of clients, and giving financial advice that does not bear any relation to legal representation and does not constitute legal advice.

The paper explains how in 2003 the FATF included legal professionals into the scope of the FATF recommendations. FATF recommendations 22 and 23 require lawyers to meet the same AML requirements as financial institutions, including filing suspicious transaction reports (STRs),

> when they prepare for or carry out transactions for their client concerning the following activities: buying and selling of real estate; managing of client money, securities or other assets; management of bank, savings or securities accounts; organization of contributions for the creation, operation or management of companies; creation, operation or management of legal persons or arrangements, and buying and selling of business entities.

The paper also notes a number of other trends to limit LPP, namely the Sixth Session in 2015 of the Conference of the States Parties to the U.N. Convention against Corruption, the London Anti-Corruption Summit in 2016, the United Kingdom's corporate registry, industry-specific requirements, such as FinCEN's Geographic Targeting Orders (GTOs) pilot schemes that require U.S. title insurance companies to identify the natural persons behind shell companies used for all-cash purchase of luxury real estate in various parts of the United States, and the changes the IBA has proposed to the commentary of their International Principles on Conduct for the Legal Profession. The latter states, as governments have increasingly acted on tax evasion, tax avoidance and financial crimes, an increasing number of stakeholders have expressed disquiet about the extent to which confidentiality/professional secrecy shields wrongdoers from discover. As a result,

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lawyers are increasingly exposed to the charges that the long-held LPP values are disproportionately abused. The IBA recommends that, in view of actions taken "(b)ars are encouraged to ensure that they have measures in place to satisfy themselves that the public can have full confidence that lawyer-client confidentiality is not being abused."

The meeting reviewed the application of LPP in sixteen countries and the Middle East/North Africa (MENA). A session considered from an investigator's perspective the challenges posed by LPP to identifying beneficial owners during investigations, namely, the legal and practical challenges, national and cross-border investigations, and real case examples.

A session considered from the lawyers' perspective the "core" meaning of LPP and client identification in the context of investigations. Among other things the session considered the core meaning of LPP, the distinction between lawyers acting "as advocates" and lawyers acting in non-advocate roles, *e.g.*, as financial advisors, the vulnerability of legal protections under LPP to criminal exploitation, the crime-fraud exception and its applications, and client identification and LPP protection.

During Day 2 of the meeting, a session reviewed the scope of LPP and associated risks of money laundering, corruption, and fraud. Among the issues the session considered were:

- whether it is appropriate to limit LPP to the area of competence that is specific to lawyers, and whether it is necessary to more clearly distinguish between legal and non-legal services provided by lawyers or whether these activities are "complex and indivisible," as some bar associations argue;
- whether the expansion of lawyers' services has resulted in a de facto increase of the risk of abuse of LPP by persons seeking to hide criminal activity from authorities;
- how investigators/regulators/legislators/SSBs/legal professional associations should deal with the expansion of the field of activities in which lawyers engage;
- whether competition aspects should be afforded any weight in the consideration of these questions, given that LPP affords lawyers a competitive advantage over non-lawyers offering the same non-legal services; and

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- whether certain groups of legal professionals (or certain financial products or asset classes) present the highest risks in terms of criminal abuse of LPP—the session asked whether these high-risk groups (or high-risk financial products/asset classes) could be specifically targeted without touching LPP.

A session focused on what to do about the abuse of LPP, as well as identifying measures and solutions to prevent the criminal abuse of LPP. This session considered what measures can be taken to prevent or combat the criminal abuse of LPP, while preserving what is protectable as the "core" of LPP. In particular, it inquired what a risk-based approach to preventing criminal abuse of LPP would look like. Among the categories of measures/solutions reviewed were: international solutions; national-level legislation or regulation; non-binding guidelines and professional ethics rules; informal practical measures, procedures, good practices; innovative legal strategies (*e.g.*, insolvency proceedings); innovative technological tools; international cooperation; and industry-specific beneficial ownership transparency rules.

On May 31, 2019, the International Bar Association and the Secretariat of the Organization for Economic Co-operation and Development published the Report of the Task Force on the Role of Lawyers and International Commercial Structures.[116] The Report sets forth eight principles without prejudice to the rule of law and related legal conventions, a lawyer's duty of confidence, and laws relating to privilege. The Task Force recommends the Statement of Principles to national bar associations and law societies with a view to encouraging them to adopt the principles and engage with their governments to explain the role of the principles in ensuring the proper administration of justice and in upholding the rule of law.

The perception of the LPP's abuse illustrates a difficulty with the soft-law AML standards on gatekeepers. Their implementation has wide differences, in part because the fundamental laws and constitutions, as well as legal cultures differ among countries. The FATF standards require national governments to implement the FAT standards, insofar as the fundamental law in the respective countries allow. A practical problem is that some of the countries, in which lawyers have the broadest practice areas, namely the common law countries, especially the United States, are not in compliance with the gatekeeper standards and informal groups, such as FATF, and international organizations, such as UNODC and

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StAR, are challenged to enforce the standards against the United States and large countries. In some countries, such as Canada, the courts have ruled in favor of lawyers when regulators have tried to impose international standards on lawyers. One of the problems is that FATF continues to strengthen the gatekeeper standards, even though the reports showed a low level of compliance with the preceding standards. As a result, a growing gap exists in the implementation of the standards, further eroding the theoretical level playing field.

The discussions about the abuse of LPP occur as FATF and the legal profession are finalizing risk-based AML guidance for the legal profession. The guidance will result in bar associations, regulators, and courts holding gatekeepers to the standard of care expressed in the guidance.

As evidence of abuse of the LPP continues to grow, so does the likelihood that international and non-governmental organizations recommend actions to reinforce gatekeeper standards. Consequently, gatekeepers in some countries may be subject to countermeasures. A challenge in the United States is whether the federal and state governments, in combination with the state bar associations and voluntary bar associations, such as the American Bar Association and the American College of Trust Counsel, can act timely to avoid what may be more drastic steps than they would like. Litigation is likely over some of the regulations that arise from international standards.

With respect to state action in the United States, on November 20, 2018, the Delaware Department of State, Division of Corporations issued a final order pursuant to section 8703(7) of title 29 of the Delaware Code, requiring registered agents to establish customer entity verification requirements.

V. HYPOTHETICAL

The following hypothetical illustrates the interplay of tax transparency, anti-corruption, and money laundering laws with the professional standards of conduct.

Mr. Smooth, a partner of the international law firm of Mega Pound and Cruzeiro (MPC), communicated last year with Rushmore and Billem (RB), a South Dakota law firm, to move a trust and other assets there. MPC saw advertisements on the Internet about the various financial products offered in South Dakota, as well as confidentiality provisions. MPC has recently restructured the assets of a family whose patriarch, Mr. P, is a former minister of finance and governor of the

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central bank for Kirzanstan, a former Soviet state in the Caucusus. Mr. P has been out of government for twenty years. His estate is over $1 billion. Because a rival group came to power in Kirzanstan and accuses him of wrongdoing, and due to political instability there, in June 2018, he and his family became citizens of St. Lucia under its Citizenship by Investment program.

MPC also referred Mr. N, a nephew and close business associate of Mr. P. He expresses interest in purchasing a $50 million property in Southern California. The proceeds come from the recent sale of property in London that Mr. N bought ten years ago from Mr. S, Mr. P's son (the cousin of Mr. N.).

Mr. P has also expressed interest in obtaining an EB-5 visa by making an investment.

Meanwhile, RB has just learned that a court in the United Kingdom, based on the HMRC's investigation and request, has issued a UWO to Mr. P and Mr. N for their property in the United Kingdom and elsewhere. They both tell RB that they want to resist the UWO, at least for their property in South Dakota and the United States, especially since they came to the United States and South Dakota, in part because it is stable and also due to its confidentiality.

What should RB do? Are there any implications for automatic exchange of information?

Mr. P has requested RB to help it mount a public relations campaign in the United States to counter "fake news," alleging that he earned his fortune through illicit means. Are there any regulatory implications of RB's assisting with a public relations campaign in the United States?

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NOTES

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22. *See* POCA, *supra* note 20, § 362B.
23. *Id*. § 362B(7)(a).
24. *See* Anne-Marie Ottaway, Barry Vitou & Gareth Hall, *Prove It or Lose It! Part I: Unexplained Wealth Orders*, Greenberg Traurig (Nov. 14, 2018), www.gtlaw.com/en/insights/2018/11/prove-it-or-lose-it---part-i---unexplained-wealth-orders.
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35. *See, e.g.*, Fla. Bar Op. 88-10 (May 1, 1988) (concerning the correctness of contingent fee arrangements involving complex litigation involving complex litigation matters having contacts with other states).
36. *See* Goebel, *Professional Responsibility Issues in International Law Practice*, 29 Am. J. Comp. L. 1–58 (1981) (providing a useful discussion of the aspects of identifying the client).
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44. *See, e.g.,* Bluestein v. State Bar of Cal., 529 P.2d 599 (Cal. 1974).
45. *See* Hendrickson, *Ethical Issues in International Estate Planning*, International Estate Planning tab V (ABA Nat'l Inst. 1990) (for a useful discussion of ethical issues in international estate planning).
46. *Id.*
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51. *Id.* r. 1.2(d).
52. *Id.* r. 2.43.
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56. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 346 (1974); Branzburg v. Hayes, 4098 U.S. 665, 668 (1972); *In re* Lochiatto, 487 F.2d 803, n.3 (1st Cir. 1974); *In re* Evans, 452 F.2d 1239, 1245 (D.C. Cir. 1971), *cert. denied*, 408 U.S. 929(1972); Fed. R. Evid. 1101(c)(d)(2).
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58. *See* Fed. R. Evid. prop. Rule 511.
59. *See In re* Grand Jury Subpoena (John Doe), 599 F.2d 504 (2d Cir. 1979); *In re* Grand Jury Proceedings (Duffy), 473 F.2d 840 (8th Cir. 1973).
60. *See* Upjohn Co. v. United States, 449 U.S. 383, 397–99 (1981).
61. *In re* Hughes, 633 F.2d 282, 285 (3d Cir. 1980).
62. Hercules v. Exxon Corp., 434 F. Supp. 136, 151 (D. Del. 1977).
63. *In re* LTC Sec. Litig., 89 F.R.D. 595, 612 (N.D. Tex. 1981).
64. *See Upjohn*, 449 U.S. 383.
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66. *Id.* at 151.
67. *See Grand Jury Subpoena (John Doe)*, 599 F.2d at 509–10.
68. *See Hughes*, 633 F.2d at 285–86.
69. *See* United States v. Arthur Young & Co., 496 F. Supp. 1152, 1157–58 (S.D.N.Y. 1980), *rev'd on other grounds*, 677 F.2d 211 (2d Cir. 1982), *aff'd in part and rev'd in part*, 465 U.S. 805 (1984); *In re* Grand Jury Subpoena Dated July 13, 1979, 478 F. Supp. 368, 375–76 (E.D. Wis. 1979).
70. *See, e.g.*, *In re* Antitrust Grand Jury, 805 F.2d 155, 164 (6th Cir. 1986); *In re* Grand Jury, 106 F.R.D. 255, 256 (D.N.H. 1985).

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71. Duplan Corp. v. Moulinage et Retorderies, 487 F.2d 480, 483 (4th Cir. 1973); *Grand Jury Subpoena (John Doe)*, 599 F.2d at 509.
72. *See In re* Grand Jury Proceedings (Doe), 867 F.2d 539, 541 (9th Cir. 1989); Antitrust Grand Jury, 805 F.2d at 164; *In re* Sealed, 676 F.2d 783, 812 (S.C. Cir. 1982); *In re* Special Sept. 1978 Grand Jury II, 640 F.2d 49, 63 (7th Cir. 1980).
73. *See* Moody v. IRS, 654 F.2d 795, 799–801 (D.C. Cir. 1981), *opinion after remand*, 683 F.2d 266 (D.C. Cir. 1982); *see also In re* Doe, 662 F.2d 1073 (4th Cir.), *cert. denied*, 455 U.S. 1000 (1981); *In re* Grand Jury Subpoena, 773 F.2d 204, 206 (9th Cir. 1985).
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