Synopsis of Presentation

In 1983, Rule 11 of the Federal Rules of Civil Procedure was amended. Subsection (b) provided:

> By presenting to the court a pleading, written motion, or other paper – whether by signing, filing, submitting, or later advocating it – an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances…. (Emphasis added.)

The Advisory Committee Note for the 1983 amendment stated in relevant part:

> The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. [Citation omitted.] This standard is more stringent than the original good faith formula and thus it is expected that a greater range of circumstances will trigger its violation. [Citation omitted]
>
> The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

American Bar Association Model Rule of Professional Conduct 1.1 focuses on competent representation, and the Comment notes that:

> Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.

In the Bankruptcy world, Rule 9011(b) of the Federal Rules of Bankruptcy Procedure provides in relevant part:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written

> motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, ….

The 1983 Advisory Committee Note for the 1983 Amendment to Rule 11, Fed.R.Civ.P., is not repeated for Rule 9011. However, the Editors' Comment in Norton Bankruptcy Law and Practice, Norton Bankruptcy Rules, provides in part:

> The principles which govern the imposition of sanctions have been generally established by courts and are as follows:
>
> (1) that the attorney has read the document;
>
> (2) that to the best of his knowledge, information and belief, formed after reasonable inquiry,
>
> (3) it is well grounded in fact ….
>
> Based on the foregoing, it is evident that the two key changes were a duty to "make a reasonable inquiry" and the mandatory imposition of sanctions for the violation of the Rule. The majority of the courts now conclude that the standard is an objective standard and "poor heart but empty head" is no excuse.

Having reviewed the basic underpinnings of Rules 11 and 9011, and Model Rule 1.1, the goal of the presentation is to assess what courts around the country are saying about how the tenets of the Rules apply in matters pending before them. We will look at how the Rules are being applied to lawyer conduct, and what that may portend. Because much of the author's experience is in the Bankruptcy arena, many examples are drawn from that arena while also being representative of other fora.[1]

One of the earlier decisions after the 1983 amendment to Rule 11 is In re Two Star Surgical Supply, Inc., 70 B.R. 241 (Bankr. ED. NY 1987). In the simplest of factual scenarios, counsel for a defendant in an adversary proceeding signed an answer to the complaint. In the introductory paragraphs, the complaint alleged: 1) the proceeding was brought pursuant to Rule 7001 and sections 541 and 542 of the Bankruptcy Code; 2) on a certain date the bankruptcy petition was filed by the debtor; and 3) debtor is a debtor-in-possession with the powers and duties of a trustee. In the answer, signed by the attorney, the attorney stated that defendant "[d]enies knowledge or information sufficient to form a belief as to the truth or falsity of each and every allegation contained in paragraphs '1', '2' '3' …. 70 B.R. at 242. Upon reading that, the court engaged defense counsel in a colloquy about what investigation he had undertaken to

[1] The opinions expressed in this paper are either from the cases or articles identified, or those of the author, and not necessarily those of anyone else, including any other lawyer in the Ballard Spahr firm.

determine whether the allegations were accurate or not. Upon learning that no inquiry had been undertaken, the court determined sanctions were appropriate. The court explained:

> Rule 11 compels an attorney to take some affirmative steps to determine that grounds exist to support his pleadings. [Citation omitted.] "In other words, the rule is intended to provide a minimal ethical standard to which attorneys are bound when they file pleadings with the court."

Id. at 243. The court noted that the Second Circuit had examined the 1983 amendment, and had written:

> The language of the rule, which was amended in 1983, provides a striking contrast to the words of its predecessor. Prior to the 1983 amendment, the rule spoke in plainly subjective terms: An attorney's certification that "to the best of his knowledge, information, and belief, there [was] good ground to support it." The rule, therefore, contemplated sanctions only where there was a showing of bad faith … and the only proper inquiry was the subjective belief of the attorney at the time the pleading was signed.
>
> The addition of the words "formed after a reasonable inquiry" demand that we revise our inquiry. [Citation omitted.] No longer is it enough for an attorney to claim that he acted in good faith, or that he personally was unaware of the groundless nature of an argument or claim. For the language of the new Rule 11 explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed. Simply put, subjective good faith no longer provides the safe harbor it once did.

70 B.R. at 244.

In summing up its discussion of the Rule 11 and Rule 9011 requirements, the Two Star court stated:

> The United States district [sic] court for the District of Columbia put it best when it observed that the "reasonable inquiry" language of Rule 11 "imposes a stop-and-think obligation on the lawyer." [Citations omitted.] The attorney is required to stop and think about the pleadings in order to certify that the information contained therein is "well-grounded in fact and warranted by existing law 'to the best of his knowledge, information, and belief formed after reasonable inquiry.'"

Id.

With the foregoing as background, it is of interest to examine some of the ways the "reasonable inquiry" requirement has impacted the practice of attorneys, particularly in the bankruptcy arena. For example, In re Goodman, 2013 WL 4767741 (9th Cir. BAP 2013), the court found that the debtor's attorney violated multiple rules, including Rule 9011, in his operation of a high volume consumer bankruptcy practice. At the center of the dispute was the filing of a false credit counseling certificate. The Goodman court concluded that the attorney's conduct was "frivolous", thus satisfying one of 9011's grounds for sanctions. The BAP stated:

> The word "frivolous," when used in connection with sanctions, denotes a filing that is both baseless – lacks factual foundation – and made without a reasonable and competent inquiry. [Citation omitted.] An attorney has a duty to conduct a reasonable factual investigation as well as to perform adequate legal research that confirms his position is warranted by existing law (or by a good faith argument for a modification or extension of existing law). [Citation omitted.] "An attorney's signature on a complaint is tantamount to a warranty that the complaint is well grounded in fact and 'existing law' … "Thus, a finding that no reasonable inquiry was made into either the facts or the law is tantamount to a finding of frivolousness.

2013 WL 4767741 at pp. 15-16.

The Goodman court continued:

> Goldberg's filing of the CC Certificate was frivolous because he failed to show that he made a reasonable inquiry into either the facts or the law. Even when Debtor notified him about the questionable CC Certificate, nothing in the record suggests that Goldberg made any attempt to inquire about, or address, the issue. He did not contact Debtor, he did not conduct an audit of his records and he did not inquire with his staff or implement any changes to his office procedures. Additionally, Goldberg did not attempt to withdraw the CC Certificate or have Debtor complete the counseling and obtain a new certificate. Under no circumstances would Goldberg's lack of inquiry and action be deemed reasonable.

Approximately one year after the Goodman decision, the 9th Circuit Bankruptcy Appellate Panel filed its decision in In re Seare, 515 B.R. 599 (2014). Distilled down to the points pertinent to the present discussion, the court found that the debtor's attorney, DeLuca, failed to inquire into the nature of the debt that resulted in garnishment of the debtor's wages. It was clear that debtor's goal in filing bankruptcy was to discharge the debt and stop the garnishment. That could only happen if the debt was dischargeable. As the court noted: "The fact that the Judgment lead to a garnishment was a sufficient 'red flag' for further inquiry." As the BAP put it: "Bottom line, DeLuca did not perform a "reasonable investigation into the circumstances that gave rise to the petition." Interestingly, both the trial and appellate court

looked to the duty of reasonable inquiry set out in 11 U.S.C. § 707(b)(4)(C), which imposes the same requirement as Rules 11 and 9011.

Another area in which the duty to conduct a reasonable pre-filing investigation is in cases under the Fair Debt Collection Practice Act, and analyzed under Rules 11 and 9011. In re Sekema, 523 B.R. 651 (Bankr. N.D. In. 2015) involved the filing of proofs of claims in bankruptcy that were barred by state statutes of limitations. Even where the statute of limitations was an affirmative defense to the claim, before filing a proof of claim for it the creditors should have conducted a pre-filing investigation.

Kaymark v. Bank of America, N.A., 783 F.3d 168 (3rd Cir. 2015) involved allegations of a creditor in a state foreclosure complaint for fees not yet incurred as due and owing. The court's answer was that the plaintiff had sufficiently set forth a claim for violation of the FDCPA. For our purposes, a reasonable pre-filing investigation of the actual amounts due and owning might have absolved the creditor filing the complaint.

In In re Royal Manor Management, Inc., 525 B.R. 338 (6th Cir. BAP 2015), the creditors' attorney was sanctioned over $207,000 for filing and litigating a frivolous claim. Crawford v. LVNV Funding, LLC, 758 F.3d 1254 (11th Cir. 2014) involved a time-barred proof of claim, and filing it was found to violate the FDCPA.

As already noted, the Bankruptcy arena is a fertile one for recognition of a pre-filing duty to investigate. Some of the cases already noted make that point. In addition to Rule 9011 (the Bankruptcy analog to Rule 11), there is also 11 U.S.C. § 707(b)(4)(C) which states:

> (c) The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has –
>
> (i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and
>
> (ii) determined that the petition, pleading, or written motion –
>
> (I) is well grounded in fact; and
>
> (II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (i).

In addition to the foregoing, § 707(b)(4)(D) states: "The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect. (Emphasis added.)

In re Young, 789 F.3d 872 (8th Cit. 2015) upheld sanctions against a debtor's attorney for mischaracterizing post-petition alimony as a pre-petition debt. In re Parikh, 508 B.R. 572 (Bankr. E.D. NY 2014) involved the failure to review debtor's prior Chapter 13 filing before filing a Chapter 7 for the same debtor.

In re Weaver, 307 B.R. 834 (Bankr. S.D. Ms. 2002) involved counsel relying on the client to disclose any prior filings rather than using readily available methods to conduct own inquiry. Reliance on own client was not reasonable. In In re Armwood, 175 B.R. 779 (Bankr. N.D. Ga. 1994), the court listed a number of steps counsel should have taken to discharge any Rule 9011 liability. Because they were not taken, and four prior filings were not discovered or disclosed, sanctions were imposed on the attorney.

In re Bono, 70 B.R. 339 (Bankr. E.D. NY 1987) involved an attorney who did not find out that the petition he filed for the debtor was the debtor's third filing, and was filed during the 180 bar on filing under 11 U.S.C. § 109. Sanctions resulted.

Before the court in In re Bailey, 321 B.R. 169 (Bankr. E.D. Pa. 2005) was another attorney who failed to uncover multiple prior filings of his clients. The court found the attorney could not just rely on a client's representation about prior filings, but had to search PACER.

In re Varan, 2014 WL 288162 (Bankr. N.D. Il. 2014) involved not only the duty to investigate the accuracy of bankruptcy schedules, but also to properly amend them when inaccuracies are discovered.

One of the most interesting ways in which the need for reasonable inquiry may arise derives from international interest in guarding against money laundering, and terrorist financing, stemming from the urgings of the G-8 countries. In response, the ABA adopted Formal Opinion 463, in which the ABA encourages members of the bar, generally, to be sensitive to and alert to spot what may be improper ways of moving money. The ABA stresses that lawyers should do so voluntarily, but there is no duty to do so. Prior to issuance of Opinion 463, the ABA adopted a resolution endorsing "Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing". The ABA advises that the Guidance is not intended to suggest a standard of care for the practice of law, but just guidance to be adopted voluntarily.

To summarize, there are multiple ways in which a lawyer's duty of reasonable inquiry to assure the accuracy and completeness of documents signed, filed or argued arises. As with all matters ethical, heightened awareness and sensitivity is our way to serve the client and the court system.

Rule 1.1: Competence

Client-Lawyer Relationship
Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

• *Investigation and Research*

The interrelated obligations of thoroughness and preparation require a lawyer to investigate the facts of a matter and research the applicable law. *See, e.g., People v. Boyle*, 942 P.2d 1199 (Colo. 1997) (failure to prepare adequately for hearing or to discover readily available evidence supporting asylum petition); *People v. Felker*, 770 P.2d 402 (Colo. 1989) (lawyer prepared in car on way to courthouse for hearing on permanent orders in marital dissolution case, failed to seek maintenance and support arrearages, equitable division, or attorneys' fees or expenses, and failed to consult with client concerning agreement to limit child support); *In re Mekler*, 689 A.2d 1171 (Del. 1996) (failure to check for conflicts of interest before accepting case violated Rule 1.1; lawyer representing mother in child custody case had previously represented father of same child in custody dispute); *In re Guy*, 756 A.2d 875 (Del. 2000) (lawyer failed to contact any of four potential defense witnesses named by his client in criminal case); *Dillard Smith Constr. Co. v. Greene*, 337 So. 2d 841 (Fla. Dist. Ct. App. 1976) (lawyer's failure to read contract submitted by client for review actionable even if some reasonably careful lawyers, after reading it, might have given same advice lawyer gave); *In re Zimmerman*, 19 P.3d 160 (Kan. 2001) (plaintiff's lawyer in personal injury action did not hire expert witness to examine product involved in client's injury even after product was recalled and then failed to respond to motion for summary judgment, claiming lack of good-faith basis for response); *Attorney Grievance Comm'n v. Chasnoff*, 783 A.2d 224 (Md. 2001) (plaintiff's lawyer in personal injury suit did not visit scene of accident until two years after the fact, did not attempt to locate employee who tried to help client on night of accident, did not attempt to preserve testimony of witnesses, and did not have client monitor his medical condition to document lack of improvement); *Attorney Grievance Comm'n v. Middleton*, 756 A.2d 565 (Md. 2000) (lawyer representing rape defendant did not file any discovery requests and made no effort to obtain discoverable information from state's file); *Collins v. Perrine*, 778 P.2d 912 (N.M. 1989) (lawyer recommended settlement of medical malpractice case without doing sufficient legal or medical research and without consulting treating physician); *In re Kovitz*, 504 N.Y.S.2d 400 (App. Div. 1986) (lawyer failed to investigate personal injury case for fourteen years, claiming it was trial tactic to outwait witnesses); *Toledo Bar Ass'n v. Wroblewski*, 512 N.E.2d 978 (Ohio 1987) (lawyer for estate did not properly complete inventory and made no attempt to determine if any next of kin survived); *In re Greene*, 557 P.2d 644 (Or. 1976) (lawyer who was personal representative of estate did not ask relatives about assets and did not ascertain value of realty owned by estate); *In re Winkel*, 577 N.W.2d 9 (Wis. 1998) (lawyer failed to obtain information concerning trust funds held by clients' business, including amounts of deposits and disbursements made and claims of contractors on funds, before clients surrendered assets to bank); *In re Fischer*, 499 N.W.2d 677 (Wis. 1993) (lawyer signed, as attorney of record, complex pleadings forwarded to him by "American Constitutional Coalition Foundation," which processed complaints from inmates challenging their incarceration; lawyer made no attempt to ascertain basis for their claims and made no assessment of documents).

707 (b)(4)

(A) The court, on its own initiative or on the motion of a party in interest, in accordance with the procedures described in rule 9011 of the Federal Rules of Bankruptcy Procedure, may order the attorney for the debtor to reimburse the trustee for all reasonable costs in prosecuting a motion filed under section 707(b), including reasonable attorneys fees, if–

(i) a trustee files a motion for dismissal or conversion under this subsection; and

(ii) the court–

(I) grants such motion; and

(II) finds that the action of the attorney for the debtor in filing a case under this chapter violated rule 9011 fo the Federal Rules of Bankruptcy Procedure.

(B) If the court finds that the attorney for the debtor violated rule 9011 of the Federal Rules of Bankruptcy Procedure, the court, on its own initiative or on the motion of a party in interest, in accordance with such procedures, may order–

(i) the assessment of an appropriate civil penalty against the attorney for the debtor; and

(ii) the payment of such civil penalty to the trustee, the United States trustee (or the bankruptcy

administrator, if any).

(C) The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has–

(i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and

(ii) determined that the petition, pleading, or written motion–

(I) is well grounded in fact; and

(II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

(D) The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

Rule 9011 (b) By presenting to the court . . . a petition, pleading, written motion or other paper, an attorney . . . is certifying that to the best of the person's knowledge,

information, and belief, formed after an inquiry reasonable under the circumstances–

(1) it is not being presented for any improper purpose . . .

(2) the claims, defenses . . . are warranted

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery . . .

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 463 **May 23, 2013**

Client Due Diligence, Money Laundering, and Terrorist Financing

The Model Rules of Professional Conduct and the ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing ("Good Practices Guidance") are consistent in their ethical principles, including loyalty and confidentiality. The Good Practices Guidance provides information to help lawyers recognize and evaluate situations where providing legal services may assist in money laundering and terrorist financing. By implementing the risk-based control measures detailed in the Good Practices Guidance where appropriate, lawyers can avoid aiding illegal activities in a manner consistent with the Model Rules.[1]

In an effort to combat money laundering and terrorist financing, intergovernmental standards-setting organizations and government agencies have suggested that lawyers should be "gatekeepers" to the financial system.[2] The underlying theory behind the "lawyer-as-gatekeeper" idea is that the lawyer has the capacity to monitor and to control, or at least to influence, the conduct of his or her clients and prospective clients in order to deter wrongdoing.[3] Many have taken issue with this theory[4] and with the word "gatekeeper." The Rules do not mandate that a lawyer perform a "gatekeeper" role in this context.[5] More importantly, mandatory reporting of suspicion about a client is in conflict with Rules 1.6 and 1.18, and reporting without informing the client is in conflict with Rule 1.4(a)(5). In this opinion we examine the contours of a lawyer's ethical obligations under the Model Rules of Professional Conduct with regard to efforts to deter and combat money laundering.

In August 2010 the ABA's policymaking House of Delegates adopted the *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist*

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[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2013. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] Kevin L. Shepherd, *The Gatekeeper Initiative and the Risk-Based Approach to Client Due Diligence: The Imperative for Voluntary Good Practices Guidance for U.S. Lawyers*, 2010 J. PROF. LAW 83, 88 (lawyers are considered "gatekeepers" because they have the ability to furnish access to the various functions that might help criminals move or conceal funds).

[3] *See* Press Center, *Treasury Deputy Secretary Stuart Eizenstat House Committee on Banking and Financial Services*, U.S DEPARTMENT OF THE TREASURY (Mar. 9, 2000), http://www.treasury.gov/press-center/press-releases/Pages/ls445.aspx (stating that "[w]e are aggressively pursuing programs aimed at the lawyers, accountants and auditors who function as 'gatekeepers' to the financial system. While legal rules properly insulate professional consultations from overly broad scrutiny and create a zone of safety within which professionals can advise their clients, those rules should not create a cover for criminal conduct.").

[4] *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2013 BCCA 147 (2013), *available at* http://www.canlii.org/en/bc/bcca/doc/2013/2013bcca147/2013bcca147.html (striking down Canadian legislation as violating the solicitor-client privilege and interfering with the independence of the Bar).

[5] *But see* Rutheford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers*, 56 RUTGERS L. REV. 9 (2003).

Financing ("Good Practices Guidance"),[6] along with a resolution stating that the Association "acknowledges and supports the United States Government's efforts to combat money laundering and terrorist financing." The approved Good Practices Guidance states that it is not intended to be, nor should it be construed as, a statement of the standard of care governing the activities of lawyers in implementing a risk-based approach to combat money laundering and terrorist financing, but rather is intended to serve as a resource that lawyers can use in developing their own voluntary approaches.[7]

Good Practices Guidance policy supports a "risk-based" approach in accord with guidelines developed by the Financial Action Task Force on Money Laundering ("FATF") created by the U.S. and other leading industrialized nations.[8] This approach differs from a rules-based approach that requires compliance with every element of detailed laws, rules, or regulations irrespective of the underlying quantum or degree of risk. The Good Practices Guidance urges lawyers to assess money-laundering and terrorist financing risks by examining the nature of the legal work involved, and where the business is taking place.[9]

The Model Rules neither require a lawyer to fulfill a gatekeeper role, nor do they permit a lawyer to engage in the reporting that such a role could entail. It would be prudent for lawyers to undertake Client Due Diligence ("CDD")[10] in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity. This admonition is consistent with Informal Opinion 1470 (1981), where we stated that "[a] lawyer cannot escape responsibility by avoiding inquiry. A lawyer must be satisfied, on the facts before him and readily available to him, that he can perform the requested services without abetting fraudulent or criminal conduct and without relying on past client crime or fraud to achieve results the client now wants."[11] Further in that opinion we stated that, pursuant to a lawyer's ethical obligation to act competently,[12] a duty to inquire further may also arise.[13]

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[6] Resolution & Report 116, *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing*, AMERICAN BAR ASSOCIATION (2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/116.authcheckdam.pdf. *See generally* Shepherd, *supra* note 2.

[7] Resolution & Report 116, *supra* note 6, at 7.

[8] *Federation of Law Societies of Canada v. Canada*, *supra* note 4.

[9] *See* Michael A. Lindenberger, *Into the Breach: Voluntary Compliance on Money Laundering Gets a Boost from the ABA and Treasury*, ABA JOURNAL (Oct. 2011), *available at* http://www.abajournal.com/magazine/article/into_the_breach_voluntary_compliance_on_money_laundering_gets_a_boost/ (quoting the ABA President to encourage lawyers to be more vigilant about combating money laundering by following the Good Practices Guidance so that gatekeeper legislation regulating the legal profession will be unnecessary).

[10] The Good Practices Guidance encourages all lawyers to perform basic CDD by (1) identifying and verifying the identity of each client; (2) identifying and verifying the identity of any "beneficial owner" of the client, defined as the natural person(s) with ultimate control of a client, when such an analysis is warranted from a risk-based standpoint; and (3) obtaining enough information to understand a client's circumstances, business, and objectives. Resolution & Report 116, *supra* note 6, at 9-11.

[11] ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1470 (1981) [hereinafter ABA Informal Op. 1470]. *See also*, GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.6:403, 199-200 (2d ed. 1990 & Supp. 1998). *Cf.* Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 200 (1978) (warning lawyers against "assum[ing] the worst regarding the client's desires").

[12] *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 6-101 (1979) (now Rule 1.1).

An appropriate assessment of the client and the client's objectives, and the means for obtaining those objectives, are essential prerequisites for accepting a new matter or continuing a representation as new facts unfold. Rule 1.2(d) prohibits a lawyer from *knowingly* counseling or assisting a client to commit a crime or fraud. A lawyer also is subject to federal laws prohibiting conduct that aids, abets, or commits a violation of U.S. anti-money laundering laws (*e.g.*, 18 U.S.C. Sections 1956 and 1957) or counter-terrorist financing laws.[14] Thus, for example, lawyers should be mindful of legal restrictions applicable to all persons in the U.S. to avoid providing certain legal services to, and receiving money from, individuals or entities publicly identified by the U.S. Department of the Treasury on its Specially Designated Nationals List ("SDN List").[15] In certain circumstances, checking a client's identity internally within the firm against the SDN List can avoid the risk of unlawful conduct by the lawyer.

The level of appropriate CDD varies depending on the risk profile of the client, the country or geographic area of origin, or the legal services involved.[16] For example, the fact that clients are deemed to be "Politically Exposed Persons," (*e.g.*, domestic or foreign senior government, judicial, or military officials) may justify enhanced due diligence on the part of the lawyer because of the potential for corruption. Clients or legal matters associated with countries that are subject to sanctions or embargoes issued by the United Nations, or those identified by credible sources as having significant levels of corruption or other criminal activity or that provide funds or support to terrorist organizations, may require greater examination. Furthermore, clients who ask that the lawyer handle actual receipt and transmission of funds or those who request accelerated real estate transfers for no apparent reason may also require an extra level of scrutiny.

Once a representation has commenced, a lawyer may terminate it in a number of circumstances in which the lawyer does not *know* for certain the client's plans or whether the client is engaged in criminal or fraudulent activities, but the lawyer has reason to believe that the client is engaging, or plans to engage, in such improper activities. Rule 1.16(b)(2) (Declining or Terminating Representation) states that a lawyer may withdraw from representing a client if "the client persists in a course of action involving the lawyer's services that the lawyer *reasonably believes* is criminal or fraudulent." (Emphasis added).[17]

The Committee believes that the advice derived from the Good Practices Guidance is consistent, and not in conflict, with the ethical obligations of lawyers under the Model Rules. Indeed, the Good Practices Guidance states that "when faced with a situation where the lawyer is compelled to decline or terminate the relationship, the lawyer should comply with the requirements of the applicable rules of professional conduct."[18] Accordingly, lawyers should be

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[13] ABA Informal Op. 1470, *supra* note 11.

[14] These laws include, for example, the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272; Exec. Order No. 13224, 66 Fed. Reg. 49079 (Sept. 23, 2001).

[15] *Specially Designated Nationals List*, U.S. DEPARTMENT OF THE TREASURY, http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx (last visited May 20, 2013).

[16] *Supra* note 10.

[17] Moreover, Model Rule 1.16 (b)(4) allows a lawyer to withdraw when "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."

[18] Resolution & Report 116, *supra* note 6, at 38.

conversant with the risk-based measures and controls for clients and legal matters with an identified risk profile and use them for guidance as they develop their own client intake and ongoing client monitoring processes. When in a lawyer's professional judgment aspects of the contemplated representation raise suspicions about its propriety, that lawyer's familiarity with risk-based measures and controls will assist in avoiding unwitting assistance to unlawful activities. Indeed, the usefulness of the Good Practices Guidance is an example of the declaration in the Model Rules that "[t]he Rules do not ... exhaust the moral and ethical considerations that should inform a lawyer...."[19]

[19] MODEL RULES OF PROF'L CONDUCT, SCOPE, cmt. 16. *See also* MODEL RULES OF PROF'L CONDUCT R. 2.1 (explaining that "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 335 (1974) (stating that in the context of writing opinions for transactions involving sales of unregistered securities, a lawyer should not "accept as true that which he does not reasonably believe to be true.").

Rule 1.6: Confidentiality of Information

Client-Lawyer Relationship
Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comment on Rule 1.6

Client-Lawyer Relationship
Rule 1.6 Confidentiality Of Information - Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not

counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

RPC **1.6**

RPC **1.6** Confidentiality of Information

Currentness

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d).

(b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:

(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;

(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.

(c) If a lawyer reveals information pursuant to RPC **1.6**(b), the lawyer also may reveal the information to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss.

(d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the **conduct** in which the client was involved;

(3) to prevent the client from causing death or substantial bodily harm to himself or herself: or

(4) to comply with other law.

(e) Reasonable belief for purposes of RPC **1.6** is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsections (b), (c), or (d).

WI SCR Ch. 20 SCR **20:1.6**

SCR **20:1.6**. Confidentiality

Currentness

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c).

(b) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.

(c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably likely death or substantial bodily harm;

(2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(3) to secure legal advice about the lawyer's **conduct** under these **rules**;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon **conduct** in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to comply with other law or a court order.

Honorable Peter W. Bowie, Retired
Of Counsel
Ballard Spahr LLP

Judge Bowie retired from the United States Bankruptcy Court for the Southern District of California in April, 2015, after more than 27 years on the bench.

After graduating from Wake Forest College (now University), Bowie volunteered for the United States Navy, attended the Naval Justice School as a non-lawyer, and served on the USS Galveston (CLG-3) as the legal officer. After two deployments to Vietnam and a tour at the Naval Communications Command in Virginia, he attended the University of San Diego School of Law, where he wrote for the Law Review and graduated Magna Cum Laude.

After graduation from law school, Bowie commenced work as a trial attorney with the United States Department of Justice in the Honors Program. Following several years of trying cases around the country, he was selected to serve as an Assistant U.S. Attorney in the Civil Division of the U.S. Attorney's Office in San Diego, rising to the positions of Assistant Chief of the Civil Division, then Chief Assistant U.S. Attorney for the full office.

In the early 1980's Bowie served as a hearing referee for the State Bar Court of California. In 1985, he was sworn in as a member of the Review Department of the State Bar Court, and served until volunteer positions were eliminated state-wide in 1990.

Meanwhile, in 1988, Judge Bowie was appointed to the Bankruptcy Court. In 1995, he was appointed by late Chief Justice Rehnquist of the United States Supreme Court to serve as the only Bankruptcy Judge in the country on the Judicial Conference Codes of Conduct Committee. As those twice renewed appointments were expiring, in 2003 Bowie was asked by the Judicial Conference to serve as a liaison of the Federal Judiciary to the American Bar Association's Joint Commission that, over the next three and one-half years, rewrote the ABA Model Code of Judicial Conduct. In 2009, Bowie was appointed by the President of the ABA to serve on the Judicial Advisory Committee of the ABA's Standing Committee on Ethics and Professional Responsibility. After three years as a member, he was appointed chair of the Judicial Advisory Committee, and served as chair until August, 2015.

In the meantime, Judge Bowie started presenting programs on ethics issues for the Federal Judicial Center in 1997, which continues to the present. In addition to the Federal Judicial Center, he has participated in programs for the county and state bars, for bar organizations in other states and regions, as well as in Russia, Moldova and Mongolia. He has also participated in the Library of Congress Open World program, bringing foreign delegations of jurists and attorneys to the United States.