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WSSFC 2023

Practice Management Track – Session 5

Should the Corporate Transparency Act Change How You Practice?

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About the Presenters...

Aviva Meridian Kaiser is Ethics Counsel at the State Bar of Wisconsin. Prior to joining the State Bar in 2013, she taught at the University of Wisconsin Law School for 25 years. She taught Professional Responsibilities, Ethical and Professional Considerations in Writing, Problem Solving, and Risk Management. From 1992 until 2002, she was the Director of the Legal Research and Writing Program. Aviva received her B.A. in Chinese from the University of Pittsburgh and her J.D. from the State University of New York at Buffalo Law School. She clerked for the Honorable Louis B. Garippo in People v. John Wayne Gacy and clerked for the Honorable Maurice Perlin in the Illinois Appellate Court. She practiced law in Chicago before beginning her full-time teaching career at IIT Chicago/Kent College of Law. Aviva is a member of the State Bar of Wisconsin, a Wisconsin Law Fellow, an American Bar Foundation Fellow, and a frequent speaker on matters of professional ethics.

Stephanie L. Melnick has been practicing law in the Milwaukee area for 29 years. She currently owns and operates Melnick & Melnick, S.C. – a Milwaukee law firm that serves small businesses and their owners. Committed to advancing women in business, Stephanie launched She Stands Tall® in 2017 starting with a female entrepreneurs' speaker series. Since then, Stephanie, and the women of Melnick & Melnick, S.C., have featured over 75 female entrepreneurs as well as hosted educational events about marketing, brand protection, and financial literacy.

Should the Corporate Transparency Act Change How You Practice?
Wisconsin Solo and Small Firm Conference
October 20, 2023

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What is the Corporate Transparency Act?

The Corporate Transparency Act (CTA) creates a Beneficial Ownership Information (BOI) reporting requirement for the purpose of detecting, preventing, and punishing terrorism, money laundering, and other illicit activity using business entities.

What is Beneficial Ownership Information

BOI refers to identifying information about individuals who directly or indirectly own or control a Reporting Company.

Which entities will be required to report Beneficial Ownership Information to FinCEN?

Entities required to file BOI reports include:

- Domestic Reporting Companies including corporations, LLCs, and any other entities created by filing with the Wisconsin DFI or similar office in another state.
- Foreign Reporting Companies including entities formed under the law of a foreign country which have registered to do business in the U.S. by filing a document with the Wisconsin DFI or similar office in another state.

Who is a Beneficial Owner of a Reporting Company?

A Beneficial Owner is a person who directly or indirectly:

- Exercises substantial control over the Reporting Company or
- Owns or controls at least 25% of the Reporting Company's ownership interests.

An individual exercises substantial control if they are or do any of the following:

- Is a Senior officer (e.g., president, CEO, general counsel, CFO, COO, or any other officer performing a similar function).

- Has authority to appoint or remove certain officers or a majority of directors of the Reporting Company.
- Is an important decision maker concerning the Reporting Company's business, finances, or structure.
- Exercises any other form of substantial control over the Reporting Company.

See Chapter 2 of FinCEN's Small Entity Compliance Guide for information about substantial control indicators (chapter 2.1), types of ownership interests (chapter 2.2), checklists to help determine whether an individual is a Beneficial Owner (chapter 2.3), and exemptions from Beneficial Owner definition e.g., minor children, certain employees, inheritors, and creditors (chapter 2.4).

Who is a Company Applicant of a Reporting Company?

A Company Applicant is either or both of the following:

- The individual who actually files the document that creates or registers the corporation, LLC, or other entity and
- If more than one person is involved in the filing, the person who is primarily responsible for directing or controlling the filing.

Only Reporting Companies created on or after January 1, 2024, will need to report their Company Applicants.

Additional examples of Company Applicants are listed in Chapter 3.2 of FinCEN's Small Entity Compliance Guide.

What information will Reporting Companies need to disclose about themselves?

Reporting Companies will need to disclose the following information about themselves:

- Legal name
- Trade names (d/b/a)
- Street address of its principal place of business if in the U.S. or address from which company conducts business in the U.S.
- Jurisdiction of the entity's formation
- Taxpayer identification number

What information will Reporting Companies be required to disclose about their Company Applicants?

Reporting Companies will need to report the following information each Company Applicant:

- Individual's name;
- Date of birth;
- Residential address; and
- Identifying number from an acceptable document such as a passport or a U.S. driver's license or identification document.

Reporting Companies will need to upload an image of the identification document used.

What information will Reporting Companies be required to disclose about their Beneficial Owners?

Reporting Companies will have to report the following information each Beneficial Owner:

- Individual's name;
- Date of birth;
- Residential address; and
- Identifying number from an acceptable document such as a passport or a U.S. driver's license or identification document.

Reporting Companies will need to upload an image of the identification document used.

What are the filing deadlines under the CTA?

- Entities created or registered **before** January 1, 2024, will have until January 1, 2025, to file their initial BOI reports.

- Entities created **on or after** January 1, 2024, will have 30 days to file their initial BOI reports. The 30-day deadline runs from the date the Wisconsin Department of Financial Institutions (DFI), or similar agency in other states, provides public notice of the entity's creation or when the entity receives actual notice that its creation or registration is effective, whichever is earlier.

Takeaway: Clients ready to create new entities at year end 2023 should not wait. Waiting until January 2024 to file will shorten their BOI filing deadline from one year to 30 days. Plus, entities created on or after January 1, 2024, will also have to file information about their Company Applicants (see below). An entity created in 2023 could be effective in 2024 if a delayed effective date, up to 90 days after DFI receives the organizing document, is selected on the Articles of Incorporation/Organization.

Are any entities exempt from the CTA's reporting requirements?

Yes, publicly traded companies meeting certain requirements, many nonprofits, and certain large operating companies are exempt. The list of exemption categories is available in chapter 1.2 of the Small Entity Compliance Guide.

Are Company Applicants required to keep the information they file with FinCEN updated?

Yes, if any required information related to the Reporting Company or its Beneficial Owners changes, the Reporting Company must file an updated report within 30 days. In addition, if the Reporting Company learns of inaccuracy in its report, it must correct same within 30 days of the date it learned about or had reason to know about the error.

Are inactive entities required to file Beneficial Ownership Information?

No, if an inactive entity satisfies all six of the following criteria, it qualifies for the inactive entity exemption and does not have to file with FinCEN.

- The entity existed as of January 1, 2020;
- The entity is not engaged in active business;
- The entity is not owned directly or indirectly by a "foreign person."
- The entity has not sent or received funds greater than $1,000, directly or "through any financial account in which the entity or any affiliate of the entity had an interest, in the preceding twelve-months period"; and
- The entity does not hold any kind or type of assets, in the United States or abroad, including without limitation any ownership interest in any corporation, limited liability company, or other similar entity.

A detailed checklist for the inactive entity exemption is available in chapter 1.2 (Exemption #23 at page 14) of the Small Entity Compliance Guide.

What are the penalties if a Company Applicant fails to comply with the CTA's reporting requirements?

If an inaccuracy is corrected within 90 days of the filing deadline for the original report, the CTA creates a safe harbor, and no penalty will be imposed. However, if a person willfully fails to complete or update BOI information or files false or fraudulent BOI, civil penalties of up to $500 per day and criminal penalties including imprisonment for up to 2 years and/or a $10,000 fine may apply. Senior officers of an entity that fails to file a BOI report may be held accountable. In addition, a person could be subject to civil and/or criminal penalties if they cause a Reporting Company not to file or to file false information. For example, if a Beneficial Owner refuses to provide information or

provides false information knowing that the information is needed for or will be reported to FinCEN.

Under the CTA, who can access Beneficial Ownership Information?

Financial Crimes Enforcement Network (FinCEN) will permit federal, state, local, and tribal officials to obtain BOI for "authorized activities related to national security, intelligence, and law enforcement." Foreign officials who request access through a U.S. federal government agency may also obtain access to BOI. Financial institutions will also have access to BOI under certain circumstances and with the reporting company's consent. FinCEN is developing rules that will govern access to and handling of BOI.

How will FinCEN protect Beneficial Ownership Information it receives?

According to FinCEN, "Beneficial ownership information reported to FinCEN will be stored in a secure, non-public database using rigorous information security methods and controls typically used in the federal government to protect non-classified yet sensitive information systems at the highest security level. FinCEN will work closely with those authorized to access beneficial ownership information to ensure that they understand their roles and responsibilities to ensure that the reported information is used only for authorized purposes and handled in a way that protects its security and confidentiality."

How will Beneficial Owner Information reports be filed?

BOI information will be reported to FinCEN electronically via a secure filing system accessible through FinCEN's website. The system is still being developed. No filing fee will be required.

What is a FinCEN identifier?

A FinCEN identifier is a unique number that FinCEN will assign to an individual or Reporting Company upon request after the individual or Reporting Company provides certain information to FinCEN (*e.g.*, for an individual, name, date of birth, address, unique identifying number from an acceptable document, and an image of the document). Individuals may apply for FinCEN identifiers electronically and will receive it immediately after completing the application. The FinCEN identifier may be used in BOI reports instead of the required personal information.

How do I stay informed about FinCEN's development of the BOI filing system and other information?

Once the form for filing BOI is available it will be posted on FinCEN's beneficial ownership information webpage. You can also sign up to FinCEN updates by email here.

Resources

- Laws, Regulations, and Final Rules
  - Corporate Transparency Act
  - BOI Reporting Requirements (31 U.S.C. § 5336)
  - BOI Reporting Requirements Final Rule (31 CFR Part 1010)
    - BOI Reporting Rule Fact Sheet
- FinCEN BOI Reporting Homepage
  - FinCEN Small Entity Compliance Guide
    - See Appendix A which shows where different parts of the CTA's Reporting Rule, 31 CFR Part 1010.380, are covered in the FinCEN Small Entity Compliance Guide.
  - BOI Reporting Filing Dates
  - BOI Reporting Key Questions
  - BOI Reporting FAQs
  - BOI Videos
  - Sign up for FinCEN Updates

Should the Corporate Transparency Act Change How You Practice?
Ethical Considerations
WSSFC 2023 (October 20, 2023)

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This outline addresses the impact the Corporate Transparency Act will have on the lawyer's duties under the Rules of Professional Conduct.

I. SCR 20:1.1 Competence

Lawyers must acquire the legal knowledge about the requirements of the Corporate Transparency Act and modify any documents to comply with the Act's Requirements. Competent representation may extend beyond the reporting obligations. For example, lawyers must also consider whether form documents need to be modified to provide the client with the means to obtain the information from the beneficial owners and officers.

A. The Rule and ABA Comment

SCR 20:1.1 states:

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

The **ABA Comment** following the Rule provides guidance.

> **Legal Knowledge and Skill**
> [1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.
> [2**] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience….** [Emphasis added.]
> [4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation.
> **Thoroughness and Preparation**
> [5] 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. The**

required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2©. [Emphasis added.]

Maintaining Competence

[8] To maintain the requisite knowledge and skill**, a lawyer should keep abreast of changes in the law and its practice**, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. [Emphasis added.]

B. ABA Formal Opinion 463 Client Due Diligence, Money Laundering, and Terrorist Financing

The opinion examines the contours of the lawyer's ethical obligations with regard to efforts to deter and combat money laundering.

> 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 theory4 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. [Footnotes omitted.]
>
> 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 [Footnotes omitted.]

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. The level of client due diligence "varies depending

on the risk profile of the client, the country or geographic area of origin, or the legal services involved."

> 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.

The opinion advises lawyers to understand the risk-based measures and controls for clients and legal matters and use them for guidance when developing client intake and ongoing client monitoring processes.

II. SCR 20:1.4 Communication

Whether a lawyer is required to inform a client about the Corporate Transparency Act depends on two crucial factors. First, the duty to communicate under SCR 20:1.4 applies to current clients. Whether a person is a current client or former client is not always clear. Second, the duty to communicate may depend on whether information about the Corporate Transparency Act falls within the scope of representation. [Section III of this outline addresses the scope of representation.]

A. Former or Current Client? It Does Matter.

Former Clients

SCR 20:1.4(a)(1)-(5) and (b) expressly refer to "the client." Nowhere does SCR 20: 1.4 impose on lawyers a duty to communicate with former clients. The ABA Comment to SCR 20:1.4 focuses on current clients and is silent with respect to communications with former clients. Had the drafters of the Rule intended it to apply to former clients, they presumably would have referred to former clients in the language of the rule or in the Comments to the Rule.

The duty to communicate with a former client often arises in the context of a material error made by the lawyer when representing the client. ABA Formal Opinion 481 (2018) A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error states:

> If a material error relates to a former client's representation and the lawyer does not discover the error until after the representation has been terminated, the lawyer has no obligation under the Model Rules to inform the former client of the error. To illustrate, assume that a lawyer prepared a contract for a client in 2015. The matter is concluded, the representation has ended, and the person for whom the contract was prepared is not a client of the lawyer or law firm in any other matter. In 2018, while using that agreement as a template to prepare an agreement for a different client, the lawyer discovers a material error in the agreement. On those facts, the Model Rules do not require the lawyer to inform the former client of the error. **Good business and risk management reasons may exist for lawyers to inform former**

> **clients of their material errors when they can do so in time to avoid or mitigate any potential harm or prejudice to the former client. Indeed, many lawyers would likely choose to do so for those or other individual reasons. Those are, however, personal decisions for lawyers rather than obligations imposed under the Model Rules.** [Emphasis added.]

Similarly, a lawyer would have no ethical obligation to inform a former client about obligations under the Corporate Transparency Act. However, good business and risk management reasons may exist for lawyers to inform former clients about the Act.

Moreover, **SCR 20:1.9 Duties to Former Clients** does not include a requirement to communicate with former clients.

Distinguishing Former Client from Current Client

For many business lawyers, the relationship with the client is ongoing. ABA Comment [4] to SCR 20:1.3 provides guidance when determining whether the lawyer-client relationship has terminated.

> [4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. **If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.** For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client.

Current Client

SCR 20:1.4 would require the attorney to inform current clients about the Corporate Transparency Act's reporting requirements when those requirements would fall within the scope of representation. [Section III of this outline addresses the scope of representation.]

However, good business and risk management reasons may exist for lawyers to inform other current clients about the Act.

B. The Client Who Does Not Want to Comply with the Requirements of the Act

SCR 20:1.4(a)(5) requires the lawyer to "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law."

While **SCR 20:1.2(d),** "a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law," the lawyer may "not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."

Keep in mind that the lawyer should also counsel the client about the duties imposed on the lawyer by SCR 20:1.13(b)and (c).

C. The Rule and ABA Comment

SCR 20:1.4 states:

(a) A lawyer shall:

(1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in SCR 20:1.0(f), is required by these rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests by the client for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The **ABA Comment** following the Rule provides guidance.

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved.

III. SCR 20:1.5(b)(1) Scope of Representation

Related to the challenges raised by the lawyer's duty to communicate, is the challenge of determining whether the scope of representation of current clients includes the Corporate Transparency Act. Also challenging is defining the scope of representation for new clients.

While the SCR 20:1.5(b)(1) does not require a particular degree of specificity, the description should be sufficient to identify the services for which the lawyer has been retained. Sometimes it may not be enough to specifically delineate what will be included in the representation, but it may also be wise to exclude any reasonably related matters are not specifically listed. This is especially true because the "unbundling" of legal services, also known as "limited scope representation," is an increasingly common form of practice. The term refers to an arrangement where the lawyer agrees to some, but not all, of the legal services usually completed during a representation. For example, the lawyer may agree to provide advice and help draft or review documents, but not complete or file them.

A. Currently Represented Clients and Matters

For currently represented clients, the lawyer should review the scope of representation in the engagement agreement to help determine the services the lawyer may owe the client.

Scenario: Lawyer represents an LLC in a lawsuit involving the breach of an asset purchase agreement. The engagement agreement limits the representation to that particular litigation matter and excludes appeals.
The scope of representation does not include representation for Corporate Transparency Act matters, and Lawyer would not be required to advise client about its obligations under the Act.

Scenario: Lawyer currently represents an LLC that was formed several years ago by another lawyer. Lawyer's scope of representation is broadly drafted to include "general corporate matters."
Lawyer's scope of representation, whose duties are described as those of a corporate counsel, would include advising the LLC about the Corporate Transparency Act.

Unfortunately, there are representations where it is not clear whether the scope of representation extends to the Corporate Transparency Act.

Scenario: Lawyer was engaged on a limited scope representation to amend the operating agreement of an LLC. Depending on the amendments, it may require the lawyer to inform the client about the Corporate Transparency Act's requirements.

The lawyer should send a written communication to the current clients explaining the scope of their representation and whether the lawyer will provide services with respect to the Corporate Transparency Act. If the scope of representation does not include the Act, the lawyer should consider a separate engagement agreement.

B. New Clients and New Matters

The scope of representation should be drafted with specificity.
Scenario: Lawyer is engaged to form an entity that will be required to report pursuant to the Corporate Transparency Act. The engagement agreement should advise that the formation requires compliance with the Act's reporting obligations within 30 days, but Lawyer will not be responsible for gathering any information needed for the report or filing the report.

C. The Rule

SCR 20:1.5(b)(1)

> The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate as in the past. If it is reasonably foreseeable that the total cost of representation to the client, including attorney's fees, will be $1000 or less, the communication may be oral or in writing. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.

IV. The Accidental Client: "I'm a lawyer. Just not your lawyer."

When sending out notices about the Corporate Transparency Act to former clients and to current clients whose scope of representation does not include the Act, lawyers must be careful not to create an accidental lawyer-client relationship.
If the lawyer does not want to form a lawyer-client relationship, notice about the Corporate Transparency Act should contain a statement the notice does not create a lawyer-client relationship

The Rules of Professional Conduct do not determine whether a lawyer-client relationship has been formed. **Scope [17] to the Rules of Professional Conduct** states:

> [17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Restatement (Third) of the Law Governing Lawyers § 14 (2000) is relied upon to determine when a lawyer-client relationship is established. It states:

> A relationship of client and lawyer arises when:
> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
> (a) the lawyer manifests to the person consent to do so; or
> (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
> (2) a tribunal with power to do so appoints the lawyer to provide the services.

V. Confidentiality

SCR 20:1.6 prohibits the lawyer from disclosing all information relating to the representation of the client unless the client gives informed consent, the disclosure is implied authorized to carry out the representation, or one of the other limited exceptions applies.

When representing a client in connection with Corporate Transparency Act reporting, the lawyer may acquire beneficial ownership information and information about third parties. This information is information relating to the representation of the client and is protected by the duty of confidentiality and cannot be disclosed without the informed consent of the client, is impliedly authorized to carry out the representation, or one of the other exceptions applies.

The lawyer may disclose that information required by the Act pursuant to SCR 20:1.6(c), which permits disclosure to comply with other law or court order. However, even though the information is disclosed in filing the Corporate Transparency Act report, the lawyer has a duty to act competently to protect that information from other inadvertent or unauthorized disclosure.

A. The Rule and ABA Comment

SCR 20:1.6 Confidentiality

(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;

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

(6) to detect and resolve conflicts of interest, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(d) 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.

ABA Comment [18]-[19]

Acting Competently to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or

important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Should the Corporate Transparency Act Change How You Practice?

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What is the Corporate Transparency Act ("CTA")?

Creates Beneficial Ownership Information reporting requirement

Purpose is to detect, prevent, and punish terrorism, money laundering, and other illicit activities

Spearheaded by U.S. Department of Treasury's Financial Crimes Enforcement Network (FinCEN)

2

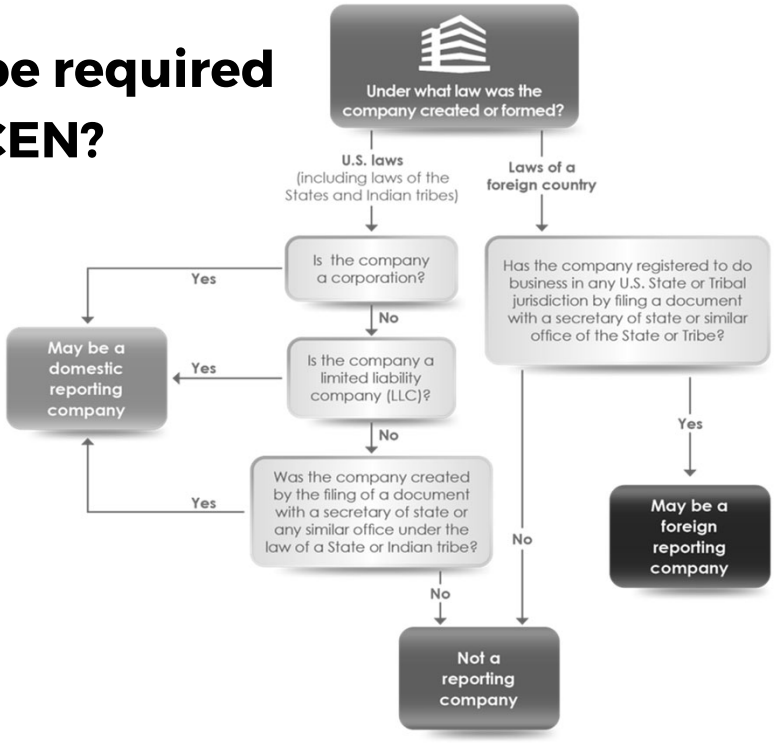
What is Beneficial Ownership Information("BOI")?

Identifying information about individuals who directly or indirectly own or control a Reporting Company

3

Which entities will be required to report BOI to FinCEN?

- Domestic Reporting Companies
- Foreign Reporting Companies



FinCEN's Beneficial Ownership Information Reporting, Frequently Asked Questions

4

Who is a Beneficial Owner of a Reporting Company?

Exercises substantial control over Reporting Company

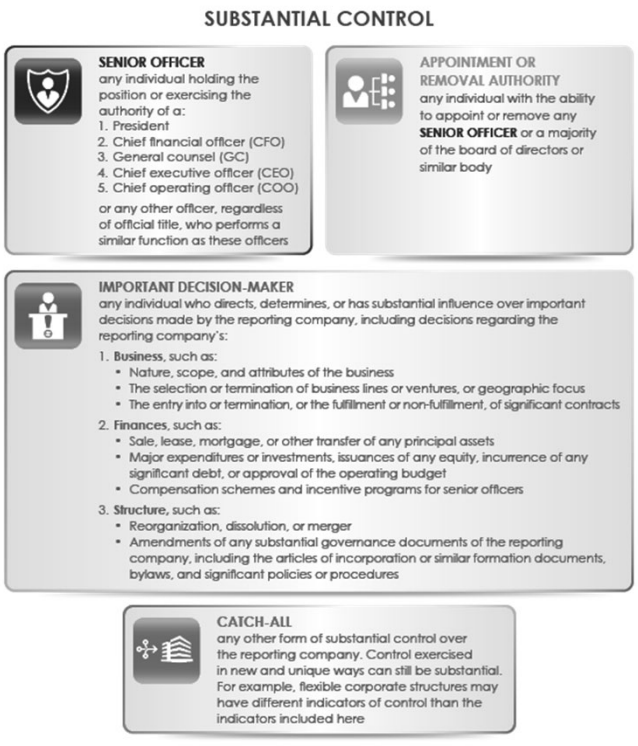
Owns or controls at least 25% of Reporting Company's ownership interests

5

What is substantial control?

- Is a senior officer (president, CEO, general counsel, CFO, COO, or any other officer performing a similar function)
- Has authority to appoint or remove certain officers or majority of directors of Reporting Company
- Is an important decision maker concerning Reporting Company's business, finances, or structure
- Exercises any other form of substantial control over Reporting Company

FinCEN's Beneficial Ownership Information Reporting, Frequently Asked Questions



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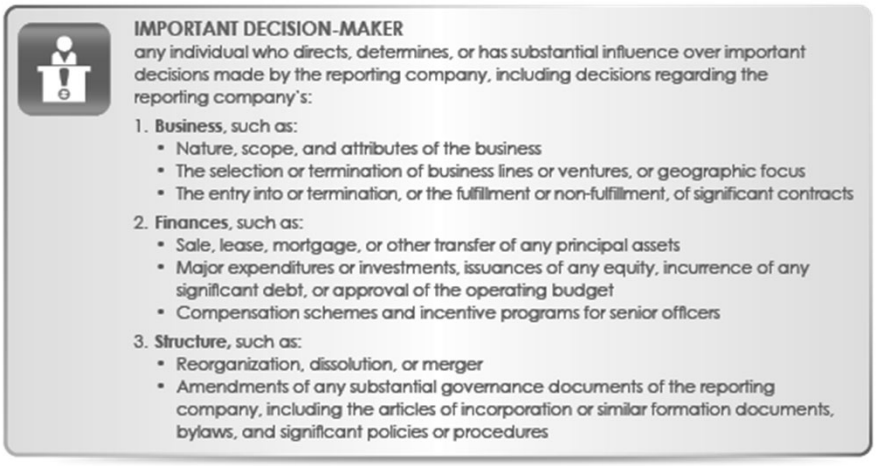
Who is an Important Decision-Maker?



FinCEN's Beneficial Ownership Information Reporting, Frequently Asked Questions

7

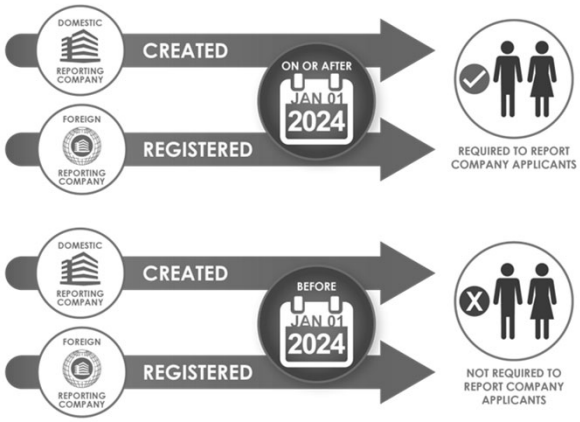
Who is a Company Applicant of a Reporting Company?

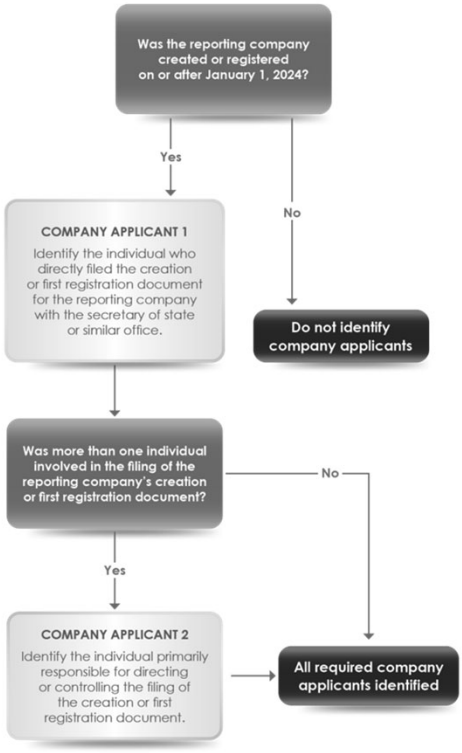
The individual who actually files the document that creates or registers the corporation, LLC, or other entity and

If more than one person is involved in the filing, the person who is primarily responsible for directing or controlling the filing.

8

Who is required to report a Company Applicant?





FinCEN's Beneficial Ownership Information Reporting, Frequently Asked Questions

9

What information will Reporting Companies need to disclose about themselves?

Legal name

Trade names (d/b/a)

Street address of its principal place of business if in the U.S. or address from which company conducts business in the U.S.

Jurisdiction of the entity's formation

Taxpayer identification number

10

What information will Reporting Companies be required to disclose about Company Applicants and Beneficial Owners?

- Individual's name
- Date of birth
- Residential address
- Identifying number from an acceptable document such as a passport or a U.S. driver's license or identification document
- Image of passport, U.S. driver's license or identification document

11

What are the filing deadlines under the CTA?

- **Entities created or registered before January 1, 2024, will have until January 1, 2025, to file their initial BOI reports.**
- **Entities created on or after January 1, 2024, will have 30 days to file their initial BOI reports.**

FinCEN's Beneficial Ownership Information Reporting, Frequently Asked Questions

12

Are any entities exempt from the CTA's reporting requirements?

Exemption No.	Exemption Short Title
1	Securities reporting issuer
2	Governmental authority
3	Bank
4	Credit union
5	Depository institution holding company
6	Money services business
7	Broker or dealer in securities
8	Securities exchange or clearing agency
9	Other Exchange Act registered entity
10	Investment company or investment adviser
11	Venture capital fund adviser
12	Insurance company
13	State-licensed insurance producer
14	Commodity Exchange Act registered entity
15	Accounting firm
16	Public utility
17	Financial market utility
18	Pooled investment vehicle
19	Tax-exempt entity
20	Entity assisting a tax-exempt entity
21	Large operating company
22	Subsidiary of certain exempt entities
23	Inactive entity

FinCEN's Beneficial Ownership Information Reporting, Frequently Asked Questions

13

Are Company Applicants required to update information filed with FinCEN?

FinCEN's Beneficial Ownership Information Reporting, Frequently Asked Questions

14

Are inactive entities required to file BOI?

No, if an entity satisfies all six of the following criteria, it qualifies for the inactive entity exemption and does not have to file	Entity existed as of January 1, 2020
	Entity is not engaged in active business
	Entity is not owned directly or indirectly by a "foreign person."
	Entity has not sent or received funds greater than $1,000, directly or "through any financial account in which the entity or any affiliate of the entity had an interest, in the preceding twelve-months period"
	Entity does not hold any kind or type of assets, in the United States or abroad, including any ownership interest in any corporation, limited liability company, or other similar entity

15

What are the penalties for failure to comply with CTA's reporting requirements?

Inaccuracies	Willful failure to complete or update BOI or filing of false information
• Must be corrected within 90 days of the filing deadline • If not corrected, penalties apply	• Civil penalties of up to $500 per day • Criminal penalties including imprisonment and/or $10,000 fine

16

Who can access Beneficial Ownership Information?

Upon request of federal, state, local, and tribal officials

Foreign officials who request access through a U.S. federal government agency

Financial institutions under certain circumstances and with the reporting company's consent

17

Rules of Professional Conduct

- SCR 20:1.1 Competence
- SCR 20:1.4 Communication
- SCR 20:1.5(b)(1) Scope of Representation
- The Accidental Client: "I'm a lawyer. Just not your lawyer."
- SCR 20:1.6 Confidentiality

18

SCR 20:1.1 Competence

SCR 20:1.1

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

ABA Comment [8]

[8] To maintain the requisite knowledge and skill**, a lawyer should keep abreast of changes in the law and its practice**, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. [Emphasis added.]

19

SCR 20:1.1 Competence

ABA Formal Opinion 463 Client Due Diligence, Money Laundering, and Terrorist Financing

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") 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." Further in that opinion we stated that, pursuant to a lawyer's ethical obligation to act competently, a duty to inquire further may also arise.

20

SCR 20:1.1 Competence

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. The level of client due diligence "varies depending on the risk profile of the client, the country or geographic area of origin, or the legal services involved."**

21

SCR 20:1.1 Competence

Clients who 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.

22

SCR 20:1.4 Communication

Whether a lawyer is required to inform a client about the Corporate Transparency Act depends on two crucial factors. **First, the duty to communicate under SCR 20:1.4 applies to current clients. Whether a person is a current client or former client is not always clear. Second, the duty to communicate may depend on whether information about the Corporate Transparency Act falls within the scope of representation.**

23

SCR 20:1.4 Communication

Former or Current Client? It Does Matter.

Former Clients

SCR 20:1.4(a)(1)-(5) and (b) expressly refer to "the client." Nowhere does SCR 20: 1.4 impose on lawyers a duty to communicate with former clients. The ABA Comment to SCR 20:1.4 focuses on current clients and is silent with respect to communications with former clients. Had the drafters of the Rule intended it to apply to former clients, they presumably would have referred to former clients in the language of the rule or in the Comments to the Rule.

The duty to communicate with a former client often arises in the context of a material error made by the lawyer when representing the client. **ABA Formal Opinion 481 (2018) A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error** provides guidance.

24

SCR 20:1.4 Communication

Former Client (continued)

ABA Formal Opinion 481 (2018) A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error

"If a material error relates to a former client's representation and the lawyer does not discover the error until after the representation has been terminated, the lawyer has no obligation under the Model Rules to inform the former client of the error. To illustrate, assume that a lawyer prepared a contract for a client in 2015. The matter is concluded, the representation has ended, and the person for whom the contract was prepared is not a client of the lawyer or law firm in any other matter. In 2018, while using that agreement as a template to prepare an agreement for a different client, the lawyer discovers a material error in the agreement. On those facts, the Model Rules do not require the lawyer to inform the former client of the error."

25

SCR 20:1.4 Communication

Former Client (continued)

"Good business and risk management reasons may exist for lawyers to inform former clients of their material errors when they can do so in time to avoid or mitigate any potential harm or prejudice to the former client. Indeed, many lawyers would likely choose to do so for those or other individual reasons. Those are, however, personal decisions for lawyers rather than obligations imposed under the Model Rules." [Emphasis added.]

Moreover, **SCR 20:1.9 Duties to Former Clients** does not include a requirement to communicate with former clients.

26

SCR 20:1.4 Communication

Former Client (continued)

Similarly, a lawyer would have no ethical obligation to inform a former client about obligations under the Corporate Transparency Act. However, good business and risk management reasons may exist for lawyers to inform former clients about the Act.

27

SCR 20:1.4 Communication

Distinguishing Former Client from Current Client

For many business lawyers, the relationship with the client is ongoing. ABA Comment [4] to SCR 20:1.3 provides guidance when determining whether the lawyer-client relationship has terminated.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. **If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal.**

28

SCR 20:1.4 Communication

Distinguishing Former Client from Current Client (continued)

ABA Comment [4] (continued)

Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client.

29

SCR 20:1.4 Communication

Current Client

SCR 20:1.4 would require the attorney to inform current clients about the Corporate Transparency Act's reporting requirements when those requirements would fall within the scope of representation. [Section III of this outline addresses the scope of representation.]

However, good business and risk management reasons may exist for lawyers to inform other current clients about the Act.

30

SCR 20:1.5(b) Scope of Representation

Related to the challenges raised by the lawyer's duty to communicate, is the challenge of determining whether the scope of representation of current clients includes the Corporate Transparency Act. Also challenging is defining the scope of representation for new clients.

While the SCR 20:1.5(b)(1) does not require a particular degree of specificity, the description should be sufficient to identify the services for which the lawyer has been retained. Sometimes it may not be enough to specifically delineate what will be included in the representation, but it may also be wise to exclude any reasonably related matters are not specifically listed.

31

SCR 20:1.5(b)Scope of Representation

Currently Represented Clients and Matters

Scenario: Lawyer represents an LLC in a lawsuit involving the breach of an asset purchase agreement. The engagement agreement limits the representation to that particular litigation matter and excludes appeals.

The scope of representation does not include representation for Corporate Transparency Act matters, and Lawyer would not be required to advise client about its obligations under the Act.

Scenario: Lawyer currently represents an LLC that was formed several years ago by another lawyer. Lawyer's scope of representation is broadly drafted to include "general corporate matters."

Lawyer's scope of representation, whose duties are described as those of a corporate counsel, would include advising the LLC about the Corporate Transparency Act.

32

SCR 20:1.5(b) Scope of Representation

Currently Represented Clients and Matters (continued)

Unfortunately, there are representations where it is not clear whether the scope of representation extends to the Corporate Transparency Act.

Scenario: Lawyer was engaged on a limited scope representation to amend the operating agreement of an LLC. Depending on the amendments, it may require the lawyer to inform the client about the Corporate Transparency Act's requirements.

The lawyer should send a written communication to the current clients explaining the scope of their representation and whether the lawyer will provide services with respect to the Corporate Transparency Act. If the scope of representation does not include the Act, the lawyer should consider a separate engagement agreement.

33

SCR 20:1.5(b) Scope of Representation

New Clients and New Matters

The scope of representation should be drafted with specificity.

Scenario: **Lawyer is engaged to form an entity that will be required to report pursuant to the Corporate Transparency Act.**

The engagement agreement should advise that the formation requires compliance with the Act's reporting obligations within 30 days, but Lawyer will not be responsible for gathering any information needed for the report or filing the report.

34

The Accidental Client: "I'm a lawyer. Just not your lawyer."

When sending out notices about the Corporate Transparency Act to former clients and to current clients whose scope of representation does not include the Act, lawyers must be careful not to create an accidental lawyer-client relationship.

If the lawyer does not want to form a lawyer-client relationship, notice about the Corporate Transparency Act should contain a statement the notice does not create a lawyer-client relationship.

The Rules of Professional Conduct do not determine whether a lawyer-client relationship has been formed. **Scope [17] to the Rules of Professional Conduct** states: [17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists.

35

The Accidental Client: "I'm a lawyer. Just not your lawyer."

Restatement (Third) of the Law Governing Lawyers § 14 (2000) is relied upon to determine when a lawyer-client relationship is established. It states:

A relationship of client and lawyer arises when:
(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
- **(a) the lawyer manifests to the person consent to do so; or**
- **(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or**

(2) a tribunal with power to do so appoints the lawyer to provide the services.

36

SCR 20:1.6 Confidentiality

SCR 20:1.6 prohibits the lawyer from disclosing all information relating to the representation of the client unless the client gives informed consent, the disclosure is implied authorized to carry out the representation, or one of the other limited exceptions applies.

When representing a client in connection with Corporate Transparency Act reporting, the lawyer may acquire beneficial ownership information and information about third parties. This information is information relating to the representation of the client and is protected by the duty of confidentiality and cannot be disclosed without the informed consent of the client, is impliedly authorized to carry out the representation, or one of the other exceptions applies.

37

SCR 20:1.6 Confidentiality (continued)

The lawyer may disclose that information required by the Act pursuant to SCR 20:1.6(c), which permits disclosure to comply with other law or court order. However, even though the information is disclosed in filing the Corporate Transparency Act report, the lawyer has a duty to act competently to protect that information from other inadvertent or unauthorized disclosure.

SCR 20:1.6(d) 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.

38

SCR 20:1.6 Confidentiality (continued)

SCR 20:1.6 ABA Comment [18] – [19] Acting Competently to Preserve Confidentiality
[18] Paragraph (d) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure

39

SCR 20:1.6 Confidentiality (continued)

SCR 20:1.6 ABA Comment [18] (continued)Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to,

- **the sensitivity of the information,**
- **the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards,**
- **the difficulty of implementing the safeguards, and**
- **the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).**

40

SCR 20:1.6 Confidentiality (continued)

SCR 20:1.6 ABA Comment [19]
When transmitting a communication that includes information relating to the representation of a client**, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.** This duty, however, does not require that the lawyer use special security measures if the **method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions.**

41

SCR 20:1.6 Confidentiality (continued)

SCR 20:1.6 ABA Comment [19] (continued)
Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include

- **the sensitivity of the information and**
- **the extent to which the privacy of the communication is protected by law or by a confidentiality agreement.**

A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. **Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.**

42

Questions?

43

Thank you!

44