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Ethical Issues Facing In-House Counsel

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ABA Opposes Anti-Money Laundering Legislation that Imposes Burdensome Regulations on Small Businesses and their Attorneys and Undermines the Attorney-Client Privilege

The American Bar Association supports reasonable and necessary domestic and international measures to combat money laundering but opposes legislation that would impose burdensome and intrusive regulations on small businesses, their attorneys, or the states or that would undermine the attorney-client privilege. Thus, the ABA opposes key provisions in the **Corporate Transparency Act** (H.R. 2513, sponsored by Rep. Carolyn Maloney (D-NY); and S. 1978, Sen. Ron Wyden (D-OR)); the **ILLICIT CASH Act** (S. 2563, Sen. Mark Warner (D-VA)); and the **TITLE Act** (S. 1889, Sen. Sheldon Whitehouse (D-RI)) that would require small businesses or their attorneys to submit detailed information about the businesses' beneficial owners to the Treasury Department's Financial Crimes Enforcement Network (FinCEN) or to the states and require FinCEN or states to disclose the data to government agencies and financial institutions on request. The ABA also opposes provisions in S. 1889 that would regulate many attorneys as "formation agents" under the Bank Secrecy Act.

The ABA opposes H.R. 2513/S. 1978, key provisions in S. 2563, and S. 1889 because:

- **The legislation would impose burdensome, costly, and unworkable beneficial ownership reporting requirements on small businesses and their attorneys, and raises serious privacy concerns.** Millions of small businesses would be required to disclose detailed beneficial ownership information to FinCEN or the states and then continuously update that information, with harsh civil and criminal penalties for noncompliance. Many attorneys and law firms that help clients to form companies would be deemed to be applicants or formation agents under the bills and would also be subject to these requirements. FinCEN or the states would then be required to maintain this information in a database and disclose it to other government agencies and financial institutions on request. This new federal regulatory regime, combined with the broad and confusing definition of "beneficial ownership," would be costly, impose onerous burdens on legitimate businesses, and would be almost impossible to comply with. Sharing the data with other government agencies and financial institutions also increases the potential for cybersecurity breaches, misuse, and unauthorized disclosure.

- **S. 1889 would also undermine the attorney-client privilege, client confidentiality, and state court regulation of the legal profession.** Under the bill, attorneys that help small business clients to form new companies would be considered "formation agents" (and hence a new category of "financial institution") under the Bank Secrecy Act and would be subject to the strict anti-money laundering (AML) and suspicious activity reporting (SAR) requirements of the Act. These SAR requirements could compel attorneys to disclose confidential client information to government officials, a result plainly inconsistent with their ethical duties and obligations established by the state supreme courts that license, regulate and discipline attorneys. Requiring attorneys to report such information to the government—under penalty of harsh civil and criminal sanctions—would also seriously undermine the attorney-client privilege, the confidential attorney-client relationship, and the right to effective counsel by discouraging full and candid communications between clients and their attorneys.

- **The burdensome reporting requirements in the legislation are unnecessary and duplicative because the federal government already has other, more effective tools.** FinCEN's new Customer Due Diligence Rule and other FinCEN regulations already require banks to collect beneficial ownership data about most business entities opening new accounts as well as existing account holders with an elevated risk profile. The IRS also requires every business with at least one employee to designate a "responsible party" who controls the business on the entity's SS-4 Form. Together, these FinCEN and IRS rules provide the federal government with access to useful beneficial ownership information on almost every business entity in the United States.

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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 491 **April 29, 2020**

Obligations Under Rule 1.2(d) to Avoid Counseling or Assisting in a Crime or Fraud in Non-Litigation Settings

Model Rule 1.2(d) prohibits a lawyer from advising or assisting a client in conduct the lawyer "knows" is criminal or fraudulent. That knowledge may be inferred from the circumstances, including a lawyer's willful blindness to or conscious avoidance of facts. Accordingly, where facts known to the lawyer establish a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity, the lawyer has a duty to inquire further to avoid advising or assisting such activity. Even if information learned in the course of a preliminary interview or during a representation is insufficient to establish "knowledge" under Rule 1.2(d), other rules may require the lawyer to inquire further in order to help the client avoid crime or fraud, to avoid professional misconduct, and to advance the client's legitimate interests. These include the duties of competence, diligence, communication, and honesty under Rules 1.1, 1.3, 1.4, 1.13, 1.16, and 8.4. If the client or prospective client refuses to provide information necessary to assess the legality of the proposed transaction, the lawyer must ordinarily decline the representation or withdraw under Rule 1.16. A lawyer's reasonable evaluation after inquiry and based on information reasonably available at the time does not violate the rules. This opinion does not address the application of these rules in the representation of a client or prospective client who requests legal services in connection with litigation.[1]

I. Introduction

In the wake of media reports,[2] disciplinary proceedings,[3] criminal prosecutions,[4] and reports on international counter-terrorism enforcement and efforts to combat money-laundering, the legal profession has become increasingly alert to the risk that a client or prospective client[5] might try to retain a lawyer for a transaction or other non-litigation matter that could be

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2019. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] *See* Debra Cassens Weiss, *Group Goes Undercover at 13 Law Firms to Show How U.S. Laws Facilitate Anonymous Investment,* A.B.A. J. (Feb. 1, 2016), https://www.abajournal.com/news/article/group_goes_undercover_at_13_law_firms_to_show_how_us_laws_facilitate; *see also* Louise Story & Stephanie Saul, *Stream of Foreign Wealth Flows to Elite New York Real Estate*, N.Y. TIMES (Feb. 7, 2015), https://www.nytimes.com/2015/02/08/nyregion/stream-of-foreign-wealth-flows-to-time-warner-condos.html.

[3] *In re* Albrecht, 42 P.3d 887, 898–900 (Or. 2002) (disbarment for assisting client in money laundering).

[4] *See, e.g.*, United States v. Farrell, 921 F.3d 116 (4th Cir. 2019) (affirming conviction for money laundering); United States v. Blair, 661 F.3d 755 (4th Cir. 2011) (same); Laura Ende, *Escrow, Money Laundering Cases Draw Attention to the Perils of Handling Client Money*, STATE BAR OF CAL. (Feb. 2017), http://www.calbarjournal.com/February2017/TopHeadlines/TH1.aspx (lawyer sentenced "to five years in prison after being convicted of felonies related to a money laundering scheme").

[5] "Client" refers hereinafter to "client and prospective client" unless otherwise indicated.

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