

STEP

Privacy, Transparency and Wealth Planning for Today's International Client – Professional Responsibility

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Professional Responsibility

- Traditional obligations of lawyers include:
 - ◆ Duty of competence and diligence
 - ◆ Duty of confidentiality
 - ◆ Duty of loyalty and avoidance of conflicts of interest
 - ◆ Duties as officers of the court, including duty of candor to tribunals and fairness and truthfulness to third parties
- Professional responsibility rules in various countries generally cover these obligations, but details vary greatly. Some examples:
 - ◆ United States – [ABA Model Rules of Professional Conduct](#)
 - ◆ England – [Solicitors Code of Conduct 2011](#)
 - ◆ Japan – [Attorney Act Chapter IV](#)
 - ◆ Switzerland – [Code de Déontologie](#)

Professional Responsibility

- In cross-border matters, issues arise either in more acute form than in a purely domestic context or going beyond traditional professional responsibility concerns:
 1. What obligations are there to know about foreign law and how does this square with the duty of competence?
 2. What obligations may lawyers have to other third parties – such as actual and potential creditors or foreign governments?
 3. What must lawyers know about their clients, in particular about the source of wealth in general and in relation to a particular matter?
 4. Is a lawyer obliged to prevent a client from committing criminal offences at home and in foreign countries?
 - Is it enough to refuse a case or to withdraw as counsel?
 - How much confidentiality can a lawyer maintain?
- How do these issues apply to other professionals, such as accountants, wealth managers, and trustees?
 - ◆ U.K. professional bodies have [Statement of Professional Conduct in Relation to Taxation](#) (November 1, 2016; effective March 1, 2017)

Advising Across Borders – 1

- Advisors can no longer ignore issues in other jurisdictions
 - ◆ Standard domestic planning techniques may not work. E.g.,
 - U.K. domiciled client buying a California home using a standard probate avoidance trust may trigger U.K. inheritance tax
 - Debt structures intended to generating U.S. interest deductions may simply shift income to the investor's home country
 - ◆ Pre-immigration planning may have adverse consequences
 - Pre-immigration gift may trigger home country gains or gift taxes
 - Canadian resident moving to another country remains resident in Canada until tax (as opposed to actual) residence begins in the other country
 - ◆ Foreign country actual or de facto exchange controls
 - E.g., China, South Africa

Advising Across Borders – 2

- Many home country advisors have difficulty adjusting to differences in other countries
 - ◆ They may ignore or try to work around those differences
 - ◆ They can be resistant to unfamiliar concepts
 - ◆ They may be over-protective of their relationship with emigrating clients
- Clients worry about the cost and inconvenience of having their home and target country advisors communicate
 - ◆ Even when advisors belong to same firm or association
 - ◆ They need to be persuaded of the benefits of cooperation
- For both clients and advisors, minds must be kept open – what works at home may not work abroad

Exposure in Cross-Border Transactions

- The United States may enforce civil or criminal sanctions against advisers who engage in or assist conduct that violates its law, regardless of where the conduct occurred
 - ◆ Example: Bank Wegelin
 - Founded in 1741. In 2013, it admitted that, for nearly 10 years, it helped Americans hide over \$1 billion from the U.S. authorities
 - Although it had no direct U.S. presence and its activities did not violate Swiss law, it pleaded guilty in New York to assisting tax evasion and was fined \$57.8 million. The bank closed after transferring its non-U.S. business to its subsidiary Notenstein Privatbank (now part of the Austrian Raffeisen Banking Group)
- Chipping away at the Revenue Rule – *Pasquantino v. U.S.*
 - ◆ U.S. Supreme Court upheld conviction for wire fraud of defendants who used interstate communication to plan defrauding Canadian customs through smuggling alcohol across the U.S.-Canada border
 - ◆ The U.S. may will prosecute crimes involving international tax planning if conduct involves the use of instrumentalities of interstate commerce, or breaks U.S. federal law. Several successful prosecutions have followed *Pasquantino*

Some Other Cross-Border Examples

- The U.K. processes tax crimes under its Anti-Money Laundering regime
 - ◆ Proceeds of Crime Act of 2002 – Foreign nationals may be prosecuted for knowingly aiding a British taxpayer in committing a tax crime in the U.K., despite having non-resident alien status
- German Steuerberaterbührenverordnung Sections 116 and 117a specifically provide for international cooperation in the prosecution of tax crimes involving Germans or German tax

KYC for Lawyers

- Banks have become subject in many countries to increasingly stringent KYC rules
 - ◆ These are closely associated with FATCA and CRS
 - ◆ But they also arise under extensive initiatives directed against money laundering, organized crime, anti-corruption, international sanctions, and terrorism
 - ◆ Many of these requirements apply to professional advisors
- U.S. lawyers are not yet subject to extensive KYC requirements specifically directed at the profession
 - ◆ Client intake procedures have been more focused on conflicts of interest and financial suitability
 - ◆ Lawyers are often motivated by a belief that everyone is entitled to representation
 - ◆ Change is surely coming

KYC: Verifying Client Information

- U.S. lawyers do in fact have some professional responsibility to verify client identity, facts on which advice is given and source of funds
 - ◆ Current requirements under the Model Rules of Professional Responsibility and Circular 230
 - Attorney must make a “reasonable inquiry” into the facts
 - However, where an attorney knows or should know on the basis of that inquiry, the attorney may be held accountable for any illegal or unethical actions taken.
 - ◆ AML laws, including reporting of cash transactions, apply to lawyers
- Nevertheless, lawyers generally lack the resources of banks to conduct client due diligence
 - ◆ Attorneys can use similar procedures and other tools
 - Require personal information (passports, proof of residence, references, etc.)
 - Use of OFAC search, internet and social media searches to verify identity and check background information
 - Client intake standards should become more risk-based
 - ◆ Lawyer should disclose to clients at initial contact that these outlets may be used to collect or verify client information

Confidentiality

- Traditionally, particular emphasis has been placed in the U.S. on the obligation of lawyers to clients
- Very strong obligations to maintain client confidences - both as a matter of professional duty and under the attorney-client privilege
- Third party obligations nevertheless exist:
 - ◆ Crime-fraud exception – where the lawyer participates in the commission of a crime or of fraud
 - ◆ Exception where lawyer acting in another capacity (e.g., financial advisor or tax preparer)
 - ◆ Privilege relates to communications not documents, which cannot be made privileged by giving custody to a lawyer
 - ◆ Duty of lawyer as officer of the court (duty of candor)

Advising About Confidentiality

- To what extent can a lawyer or other professional advise a client about maintaining confidentiality about the client's assets and personal information?
- How do we reconcile CRS and clients' rights to privacy?
- Can U.S. lawyers advise on structures designed to avoid information exchanges under CRS, when the U.S. is not a party to CRS?
 - ◆ CRS calls for automatic information exchange without requiring U.S.-style standards for maintaining taxpayer privacy
 - ◆ What about legitimate concerns relating to corruption and personal safety in current or prospective CRS countries?
 - ◆ To what extent does a structure, legal in the United States but designed to avoid disclosure under CRS, differ from the conduct for which Bank Wegelin pleaded guilty?
 - ◆ At a minimum, lawyers should assure themselves that the client is making appropriate efforts to be tax compliant