

Laurel Terry's Summary & Supplement to the Voluntary Good Practices Guidance

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ABA Model Rule 1.2(d) provides that a “lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent” ABA Model Rule 1.16(a) **requires** that a lawyer withdraw from representation if “the representation will result in violation of the rules of professional conduct or other law.” Under Rule 8.4, a lawyer is subject to discipline if the lawyer violates or attempts to violate a rule of professional conduct, commits a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects; or engages in conduct involving dishonesty, fraud, deceit or misrepresentation, or that is prejudicial to the administration of justice. Most state ethics rules are substantially similar to these ABA Model Rules. Because U.S. lawyers are subject to stringent conflict of interest rules (Rules 1.7-1.9), client identification is a necessary part of lawyers’ practices.

In 2008, FATF adopted a risk based guidance document entitled “RBA Guidance for Legal Professionals.” This document is “high level” guidance intended to provide a broad framework for implementing a risk-based approach for the legal profession. It urged the legal profession and individual countries to develop and implement “an effective risk-based approach.” (FATF RBA Guidance at ¶¶6-7). In 2010, a significant number of U.S. legal profession organizations endorsed the Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing. (The ABA House of Delegates endorsed the VGPG document in August 2010.) The VGPG summarizes the FATF RBA Guidance but provides more detailed guidance to U.S. lawyers by including “Practice Pointers [PP],” and Appendix A (p. 38) regarding client intake. ABA FORMAL Ethics Opinion 463: CLIENT DUE DILIGENCE, MONEY LAUNDERING, AND TERRORIST FINANCING (May 23, 2013) confirms that lawyers who use the risk-based control measures detailed in the *Voluntary Good Practices Guidance* to avoid aiding illegal activities are acting in a manner consistent with the Model Rules. This Summary is not intended to replace the *Voluntary Good Practices Guidance* but to provide a shorter, more visual summary and to help U.S. lawyers more quickly locate the relevant section of the VGPG, including its *Practice Pointers*.

- In addition to the VGPG, lawyers may find it useful to consult the October 2014 “Lawyers’ Guide” jointly prepared by the International Bar Association, the CCBE, and the ABA. See <http://tinyurl.com/2014lawyersguide>.

Are **any** of the following present?

1. Buying or selling of Real Estate (*See Practice Pointer* on p. 12 [hereinafter “PP”])
 2. Managing client money, securities of other assets? (*See PP* on p. 13)
 3. Management of bank, savings or securities account (*See PP* on p. 13)
 4. Organization of contributions for the creation, operation, or management of companies? (*See PP* on p. 13)
 5. Creation, operation or management of legal persons or arrangements and buying and selling of business entities (*See PP* on p. 14)
- **If the answer to any of these questions is “YES,” perform Client Due Diligence (CDD).**

In determining the appropriate **level** of Client Due Diligence, **consider the three major risk categories:**

1. **Country/Geographic Risk** (*See PP* on p. 16)
2. **Client Risk** (*See PP* on pp. 17–21)
 - The FATF RBA GUIDANCE identifies 10 categories of potentially higher risk clients: 1) Politically exposed persons (“PEPS”); 2) Unusual activity; 3) masking beneficial ownership; 4) cash intensive business (unless subject to AML/CFT regulation); 5) Charities & NPOs not subject to monitoring or supervision; 6) financial intermediaries not subject to adequate AML/CFT rules; 7) clients with criminal convictions; 8) clients with no address/multiple addresses; 9) unexplained change in instructions; and 10) structures with no legal purpose. The *PP* on pp. 17–21 provide additional information.
3. **Service Risk** (*See PP* on pp. 21–28)
 - The FATF RBA GUIDANCE identifies 14 types of services that are at higher risk for money laundering and terrorist financing. These typically involve the movement of funds and/or the concealment of beneficial ownership: 1) Touching the money test; 2) concealment of beneficial ownership; 3) performing services outside area of expertise; 4) accelerated real estate transfers; 5) cash payments and payments from other sources; 6) inadequate consideration; 7) estate administration where the decedent had been convicted of proceeds generating crimes; 8) extraordinary legal fees; 9) source of funds/wealth; 10) out of character transactions; 11) shell companies; 12) hard-to-identify trust beneficiaries; 13) anonymity; and 14) trust services. (*See PP* on pp. 21–28 for additional information).

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Controls for Higher Risk Clients: The FATF RBA GUIDANCE does not prohibit a lawyer from representing a higher risk client but it directs the lawyer to implement appropriate measures and controls to mitigate the potential money laundering and terrorist financing risks of those higher risk clients.

- These measures and controls may include the following: 1) general training; 2) specific training; 3) enhanced due diligence; 4) peer/managerial oversight; 5) evolving evaluation of services; 6) ongoing/evolving evaluation of clients; 7) overlap.

These measures, together with a *Practice Pointer*, are set forth in greater detail on pp. 32–34.

Variables That May Affect Risk: In determining the appropriate level of Client Due Diligence, the FATF RBA GUIDANCE identifies a number of **variables** that may require *enhanced* due diligence or that may lead the lawyer to conclude that *standard CDD can be reduced*: (See *PP* on pp. 28–32)

- These variables include: 1) the nature of the client relationship; 2) existing regulation; 3) reputation and publicly available information; 4) regularity/duration of relationship; 5) familiarity with country/laws; 6) duration/magnitude of lawyer-client relationship; 7) local counsel; 8) geographic disparity; 9) one shot transactions; 10) technological developments favoring anonymity; 11) client origination/referral source; 12) structure of client/transaction; 13) trusts that are pension funds.

Each of these risk variables is discussed in greater detail in the VGPG *Practice Pointers* on pp. 28–32.

Basic Protocol for Client Intake and Assessment (VGPG pp. 34–39):

Standard Level of Client Due Diligence

Individual Clients	Organizational Clients (including trusts & estates)
<p>1. <u>Identify</u> the client & <u>verify</u> that client's identity using reliable independent source documents, data, or information. <u>Document</u> the findings. See VGPG on p. 35</p> <p>See VGPG on p. 35 at 6.1 for examples of information & documents the lawyer may use. See Appendix A at 1.1, p. 38 for additional identity information a lawyer should seek depending on the circumstances. See 2.1 for potential verification steps, depending on the risk profile of the client, including an OFAC scan, other searches, and background checks. See VGPG Appendix A, #2 on p. 39, available at http://tinyurl.com/clientintake.</p> <p>2. Obtain information on the purpose and intended nature of the business relationship. See p. 35.</p>	<p>1. <u>Identify</u> the client & <u>verify</u> the client's identity using reliable independent source documents, data, or information. <u>Document</u> the findings. See VGPG on p. 35.</p> <p>See VGPG p. 35 at 6.1 & 6.2 for examples of information & documents the lawyer may use. See Appendix A at 1.2, p. 38 for additional identity information a lawyer should seek depending on the circumstances. See Appendix A at 2.1 on p. 39 for potential verification steps, depending on the risk profile of the client, including an OFAC scan, other searches, and background checks.</p> <p>2. Obtain information on the purpose and intended nature of the business relationship. See p. 35.</p>

Enhanced Level of Client Due Diligence	Reduced Level of Client Due Diligence
<ul style="list-style-type: none"> • Clients that are reasonably determined by the lawyer to be of higher risk require enhanced CDD. • Enhanced client due diligence means a more in-depth, systematic inquiry into the client and its ownership and business activities. • The lawyer needs to ensure that the client and its ownership and business activities comply with applicable law and that no criminal activity is involved. See <i>PP</i> at p. 36. 	<p>Lawyers can use reduced CDD with:</p> <ol style="list-style-type: none"> 1. Publicly-listed companies 2. Financial institutions subject to AML/CFT regulation 3. Gov't authorities & state run enterprises See VGPG p. 36 <p>See also the prior risk-based analysis.</p>

CRITICAL NOTE: “Not every risk-based approach analysis of a potential client will inexorably lead to the conclusion that, with appropriate controls, the lawyer can accept and proceed with the proposed engagement. *It may be possible that the lawyer's analysis will lead the lawyer to reject the engagement or to withdraw from the representation.*” See VGPG p. 37; see also your state's equivalent of ABA Model Rules 1.2(d), 1.16, and 8.4. Periodic review may be appropriate depending on the risk factors. The VGPG and ACTEC Sample Intake forms are very helpful. See <http://tinyurl.com/clientintake> and <http://tinyurl.com/ACTECintake>.