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Professional Responsibility in an Age of Alternative Entities, Alternative Finance, and Alternative Facts

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PROFESSIONAL RESPONSIBILITY IN AN AGE OF ALTERNATIVE ENTITIES, ALTERNATIVE FINANCE, AND ALTERNATIVE FACTS

Joan MacLeod Heminway¹

[I]n the absence of guidance, business lawyers are acting with zeal, but that zeal is not loyal to their clients. Zealous business lawyers are encouraging the liability-creating conduct they should be advising against. We should expect more from lawyers. Clients should expect more from their own lawyers.²

I. INTRODUCTION

U.S. business lawyers know to look to rules of professional conduct (state and, as applicable, federal and other) to guide their activities. Law schools offer required courses in professional responsibility and ethics (“PR&E”) to acquaint students with these rules, introduce notions of professional ethics, and otherwise help prepare aspiring lawyers for the demands of their legal careers.³ Specifically, Standard 302 of the American Bar Association’s Standards and Rules of Procedure for Approval of Law Schools provides that “[a] law school shall establish learning outcomes that shall, at a minimum, include competency in the . . . [e]xercise of proper professional and ethical responsibilities to clients and the legal system.”⁴ To evaluate understanding and reinforce PR&E obligations,

¹ Rick Rose Distinguished Professor of Law, The University of Tennessee College of Law. New York University School of Law, J.D. 1985; Brown University, A.B. 1982. I am grateful for comments received on a draft of this essay from T.J. Gentle and Jonathan Rohr.

² Paula Schaefer, *Harming Business Clients with Zealous Advocacy: Rethinking the Attorney Advisor’s Touchstone*, 38 FLA. ST. U. L. REV. 251, 298 (2011).

³ See Jonel Newman & Donald Nicolson, *A Tale of Two Clinics: Similarities and Differences in Evidence of the “Clinic Effect” on the Development of Law Students’ Ethical and Altruistic Professional Identities*, 35 BUFF. PUB. INT. L.J. 1, 17 (2017) (noting that professional ethics education in U.S. law schools “occurs in compulsory stand-alone ethics classes” that are uninspiring and code-oriented).

⁴ Section of Legal Educ. & Admissions to the Bar, Am. Bar Ass’n, Standards and Rules of Procedure for Approval of Law Schools, Standard 302 (2016); see also Alexis Ander-

the bar examination process in all but a few U.S. states and territories includes the Multistate Professional Responsibility Exam (“MPRE”), a professional responsibility component that must be passed before bar admission.⁵

Yet, business lawyers in the United States find little in the way of robust, tailored guidance in most applicable bodies of rules governing their professional conduct. There is, in the *American Bar Association’s Model Rules of Professional Conduct*, direct guidance on representing the organizational client.⁶ This is critical. But there is so much more to a business transactional or dispute resolution practice than identifying the client in organizational representations and addressing related PR&E issues.

In general, while the basics covered and tested in the typical required courses on PR&E and on the MPRE address many of the right notions, the contextual examples illustrating these concepts often come from criminal and civil advocacy settings relating to individuals rather than business transactional settings involving organizations and their principals. On the one hand, this makes sense, since students may not be obligated to take a basic business law course as a degree requirement

son, *Classroom Taping Under Legal Scrutiny—A Road Map for A Law School Policy*, 66 J. LEGAL EDUC. 372, 408 (2017).

⁵ *Basic Overview: Bar Admissions Basic Overview*, AM. BAR ASS’N, https://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview.html (last visited Sept. 1, 2017) (“[A]lmost all jurisdictions require that the applicant present an acceptable score on the Multistate Professional Responsibility Examination (MPRE), which is separately administered three times each year.”); *Jurisdictions Requiring the MPRE*, NAT’L CONF. OF BAR EXAMINERS, <http://www.ncbex.org/exams/mpre/> (last visited Sept. 1, 2017) (displaying a map that shows the following states and territories not requiring the MPRE: Maryland, Puerto Rico, and Wisconsin); see also, e.g., Kamina Aliya Pinder, *Do As I Teach Not As I Do: For Whom Are Law Schools Trustees?*, 55 U. LOUISVILLE L. REV. 323, 343 (2017) (asserting that “students consider legal ethics only to the extent necessary to prepare for the Multistate Professional Responsibility Exam (‘MPRE’) or bar exam”).

⁶ MODEL RULES OF PROF’L CONDUCT r. 1.13 (AM. BAR ASS’N 2016).

or may not have completed a course in business law before taking the required PR&E course. On the other, the relative paucity of business law examples in PR&E educational settings short-changes all students—but particularly those who desire to practice in a business transactional or litigation context. The problem is especially acute for those desiring a transactional advisory practice.

The relative lack of guidance in PR&E for business lawyers is particularly troubling in light of two formidable challenges to PR&E in business law: legal change and complexity. Neither is a new phenomenon (or, in fact, exclusively the province of business law). Both, however, are exemplified in the current practice of business law in ways that raise salient and difficult PR&E questions for business lawyers in common practice settings. Legal change and complexity, when layered onto the comparatively weak PR&E direction typically provided to prospective and practicing business lawyers, highlight the need for more or better education, guidance, and overall conversation and debate about PR&E in the business law context.

The change and complexity arises from exciting developments in the industry that invite—even entice—the participation of business lawyers. In both the transactional and litigation settings, business lawyers find themselves needed by clients who are engaged in transactions and commercial practices that are on the cutting edge. They want to engage in these client representations. They want to be the best advisor and advocate that the client can have—acting “with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.”⁷ Yet, in their dedication and zeal, there are PR&E perils.

To illustrate the point that legal change and complexity present palpable PR&E challenges to legal counsel engaged in business transactions advice and dispute resolution, this essay offers current examples from three different areas of business law practice. The three exemplar areas of practice (each of which is accompanied by legal challenges) are

⁷ *Id.* r. 1.3 cmt. 1.

labeled “Alternative Entities,” “Alternative Finance,” and “Alternative Facts.” Each is described briefly below, together with significant PR&E challenges presented by that practice area. The essay concludes by offering general prescriptions for addressing these and other PR&E challenges faced by business lawyers in an age of legal change and complexity.

II. ALTERNATIVE ENTITIES

Business transactional lawyers are sure to engage in planning and drafting involving business entities in the course of their careers. These engagements may relate to business entity choice, structure, governance, or finance. Although the term “alternative entities” can have several different meanings in a business law setting, in this essay, the term is used to signify for-profit business entities other than traditional for-profit corporations.⁸

⁸ As the text indicates, “alterative entity” is not always a well-understood term of art among business lawyers, most commentators agree that alternative entities “technically comprise limited partnerships, limited liability companies, limited liability partnerships, limited liability limited partnerships, general partnerships, and statutory business trusts.” Thomas L. Ambro, *Martin I. Lubaroff: Change Agent for Alternative Entities*, 29 DEL. LAW. 12, 13 (2011). Professor Ann Conaway similarly defined the term from a Delaware perspective (although she requires a contractual basis, which is nonessential—but still relevant—to the matters addressed here):

the term “alternative entity” refers to those business organizations that are: (1) not incorporated; and (2) historically contractual, rather than statutory or regulatory, in nature. According to this definition, Delaware's alternative entities include partnerships, limited liability partnerships (LLPs), limited partnerships (LPs), limited liability limited partnerships (LLLPs), LLCs, statutory trusts, and uniform unincorporated associations.

Ann E. Conaway, *Lessons to Be Learned: How the Policy of Freedom to Contract in Delaware's Alternative Entity Law Might Inform Delaware's General Corporation Law*, 33 DEL. J. CORP. L. 789, 790 n.2 (2008). This essay generalizes the use of the term to illustrate the overall phenomenon of unincorporated entities made famous by Larry Ribstein. See LARRY W. RIBSTEIN, *THE RISE OF THE UNINCORPORATION* (2009).

For many of us then in business law practice, the upsurge of the limited liability company (“LLC”)—sometimes confused with the corporate business form⁹—at the end of the 20th century was a legal change that came as a bit of a surprise.¹⁰ The LLC phenomenon seemed to spread like wildfire. The resulting change in business entity practice was rapid and significant.¹¹ Just when we began to catch our collective breaths, the country was swept by a wave of desire, in light of the widespread adoption of LLC legislation across the United States, to enact amendments to partnership law that allowed for the legal existence of a limited liability partnership.¹² This change was codified as part of a major overhaul of partnership law.¹³ Seemingly of necessity, limited partnership law then also was modernized in significant ways.¹⁴

⁹ See, e.g., Joshua Fershee, *Hawaii Courts Take Note: LLCs Are Not Corporations*, L. PROFESSOR BLOGS NETWORK: BUS. L. PROF BLOG (Oct. 24, 2017), http://lawprofessors.typepad.com/business_law/2017/10/hawaii-courts-llcs-are-not-corporations.html; Joshua Fershee, *LLCs Are Still Not Corporations, Despite 1898 New Contrary Claims*, L. PROFESSOR BLOGS NETWORK: BUS. L. PROF BLOG (Jan. 3, 2017), http://lawprofessors.typepad.com/business_law/2017/01/llcs-are-still-not-corporations-despite-1898-new-contrary-claims.html.

¹⁰ See, e.g., Lance Cole, *Reexamining the Collective Entity Doctrine in the New Era of Limited Liability Entities—Should Business Entities Have A Fifth Amendment Privilege?*, 2005 COLUM. BUS. L. REV. 1, 4 (2005) (“One of the most significant developments in United States law at the end of the twentieth century has been the remarkable proliferation of new forms of business entities.”).

¹¹ See generally Eric H. Franklin, *A Rational Approach to Business Entity Choice*, 64 U. KAN. L. REV. 573, 575–76 (2016) (describing the complexity in choice of entity decision-making by reference to the rise of the limited liability company).

¹² See Mary Siegel, *Fiduciary Duty Myths in Close Corporate Law*, 29 DEL. J. CORP. L. 377, 465 (2004) (“The 1990s saw many developments in business law. Two new business associations, the Limited Liability Company (LLC) and the Limited Liability Partnership (LLP), were created, combining favorable tax treatment, limited liability and freedom of contract. In addition, both the UPA and the ULPA were revised.” (footnotes omitted)).

¹³ See *id.*

¹⁴ See *id.*

Having almost fully recovered from these striking changes, forces gelled for another round of popular changes to state entity legislation. This time, the catalyst was dissonance between social enterprise values and the shareholder wealth maximization norm.¹⁵ Up sprung low-profit limited liability companies (“L3Cs”), benefit corporations (sometimes confused with B Corporations—also known as B Corps, which are not a separate form of legal entity but, instead, a certified designation for which a for-profit firm may qualify¹⁶), social purpose corporations, and the like.¹⁷

All of these fundamental changes to the laws governing business entities have evolved in major part over the last 25 years.¹⁸ “This evolution showed little regard for the convenience of lawyers . . . who had to deal with the new forms.”¹⁹ The new forms introduced complexity to

¹⁵ See, e.g., J. Haskell Murray, *Social Enterprise and Investment Professionals: Sacrificing Financial Interests?*, 40 SEATTLE U. L. REV. 765, 766 (2017) (“Proponents of . . . social enterprise statutes argue that such statutes are needed because traditional corporate law prevents sacrificing the financial interests of shareholders in the interest of a broader social good, or in the interest of other stakeholders.”); Lydia Segal, *Benefit Corporations: A Step Towards Reversing Capitalism’s Crisis of Legitimacy?*, 24 VA. J. SOC. POLY & L. 97, 112 (2017) (“Benefit corporation laws were intended to liberate officers to pursue a social goal without having to worry about being sued for a breach of fiduciary duty under shareholder primacy.”).

¹⁶ See *What Are B Corps?*, B CORPORATION, <https://www.bcorporation.net/what-are-b-corps> (last visited Oct. 30, 2017) (“B Corps are for-profit companies certified by the nonprofit B Lab to meet rigorous standards of social and environmental performance, accountability, and transparency.”).

¹⁷ See Murray, *supra* note 15, at 767–73 (tracing the history of various forms of social enterprise entity).

¹⁸ See Franklin, *supra* note 11, at 576 (“[T]he 1990s and 2000s witnessed the LLC become the dominant business entity option for new businesses.”); Murray, *supra* note 15, at 766 (“Over the past decade, more than three dozen jurisdictions in the United States passed some form of social enterprise legislation.”).

¹⁹ Larry E. Ribstein, *Making Sense of Entity Rationalization*, 58 BUS. LAW. 1023, 1023 (2003).

entity regulation, choice-of-entity decision-making, and entity representation.²⁰

The most significant challenges to business law PR&E that stem from the rapid growth in alternative entities are in the areas of competence and diligence. These standards of professional conduct are central to any client representation, but they have particular meaning in context.

[L]awyers for corporate clients hardly need to be reminded that their clients expect their lawyers to work hard and to defer on aspects of their interactions not squarely within lawyers' primary areas of expertise. Indeed, the diligence requirement, as interpreted to require "zeal on the client's behalf," may sometimes coax corporate lawyers in socially undesirable directions—for example, when they confront evidence of a scheme to evade government regulators, or to market a dangerous product, or to mislead investors.²¹

The challenges placed on competence and diligence in corporate lawyering exist, as this essay describes, in practice settings involving alternative finance and alternative facts, in addition to those concerning alternative entities.

Under the American Bar Association's *Model Rules of Professional Conduct*, "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."²² Moreover, "[a] lawyer shall act with reasonable diligence and promptness

²⁰ *Id.* at 1027-30 (outlining challenges arising from entity proliferation).

²¹ Ann Southworth, *Our Fragmented Profession*, 30 GEO. J. LEGAL ETHICS 431, 437 (2017).

²² MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2016).

in representing a client.”²³ These rules require that legal counsel representing alternative entities understand the continuously developing law governing these entities and its rigorous application in context. They also require persistent, conscientious engagement in the lawyering process. Compliance with these standards of conduct is both important and difficult.

Each of these new alternative forms of entity has an intricate legal structure. While the architecture of each form of business entity builds off similar concepts that engage business associations, securities, and tax law, the specifics are complex and derive from a range of legal sources—statutes, agency regulations, and judicial opinions—at the federal and state levels. The substantial change and complexity presented to legal counsel by the introduction of alternative forms of business entity over the past quarter century test a business lawyer’s ability to exercise ethical professional judgment at multiple junctures and in myriad ways.

The nature of alternative entities clearly reveals the inherent conundrum at the heart of the PR&E issues.

Many aspects of associations are apparently contradictory, or at best, ambiguous. On one hand, a partnership has been characterized as no more of an entity than a friendship. On the other, an association is at once a contract among its owners and a separate entity with its own legal identity. The owners are at once self-interested and fiduciaries to other owners and the association. As a result, the responsibility and liability of attorneys in representing these entities and their owners has been character-

²³ *Id.* r. 1.3.

ized by the same ambiguity and inconsistency.²⁴

These paradoxes are integral to the various business forms, and the immutable and default rules of each form establish distinct puzzles for the client and lawyer alike.

Fiduciary duties are particularly complicated in the LLC form. This has been a professional responsibility concern from the early days of the LLC.²⁵ A key tension created in the statutes that confounds the non-expert is the extent to which fiduciary duties—whether codified in statutes or existing at common law—may be tailored or eliminated by contract. The limited partnership and limited liability statutes in Delaware, for example, allow a significant amount of private ordering on this point. Specifically, under Delaware limited partnership and LLC law, fiduciary duties can be eliminated, leaving only the more narrowly interpreted contractual covenant of good faith and fair dealing as immutable.²⁶ This legislation provides a trap for the unwary given that traditional private ordering rules still applicable in most states do not permit the elimination of the fiduciary duties of care and loyalty.

²⁴ Robert R. Keatinge, *The Implications of Fiduciary Relationships in Representing Limited Liability Companies and Other Unincorporated Associations and their Partners or Members*, 25 STETSON L. REV. 389, 389-90 (1995) (footnotes omitted).

²⁵ See generally Keatinge, *supra* note 24 (considering “ethical responsibilities and legal liability of attorneys representing . . . liability companies . . . and members in limited liability companies. . . , particularly with respect to the implications for such representation of the fiduciary relationships among the owners and between the owners and the association”).

²⁶ DEL. CODE ANN. tit. 6, § 17-1101(d) (2017); DEL. CODE ANN. tit. 6, § 18-1101(e); see also Conaway, *supra* note 8, at 790-91 (“[I]n 1990, 1992, and 2004, Delaware adopted a series of amendments to its alternative entity acts that authorize owners to contractually limit or eliminate duties and liabilities, including fiduciary duties of owners or managers to each other, the entity, or another person that is a party to the entity’s private agreement, so long as no attempt is made to limit or restrict the implied contractual covenant of good faith and fair dealing.”).

A researcher in the field noted, in the course of conducting a study, results that caused her to question the quality of the representation that legal counsel provided in navigating these waters in the LLC context.²⁷ Her research not only raises concerns about attorney competence and diligence, but also about the nature of LLC statutes and the course of conduct of legislators in enacting LLC law.

LLC legislation should not presume that the typical LLC investor will retain a highly-compensated attorney who is an expert in fiduciary duties to analyze the impact of a contractual waiver embedded in an LLC agreement drafted by the LLC managers or controlling members. Given the imperfect nature of the contractual playing field and the inexpert training of many attorneys . . . throughout the country, a well-developed statutory framework is needed to establish mandatory minimum fiduciary duties.²⁸

The concerns she expressed about attorney training are worth noting. The essay will come back to that point later.

Concerns other than fiduciary duties also confound the drafters of organic documents for LLCs and other alternative entities. In particular, the state-mandated governance document (in the LLC context, typically an “operating agreement” or “limited liability company agreement”)

²⁷ Sandra K. Miller, *What Fiduciary Duties Should Apply to the LLC Manager After More Than A Decade of Experimentation?*, 32 J. CORP. L. 565, 611 (2007) (“Attorneys outside of Delaware may not be experts on fiduciary duties . . . LLC investors, and for that matter, their attorneys, may not fully understand and appreciate the full implications of contractual waivers.” (footnote omitted)); *id.* at 584 (“The findings cast doubt on whether many LLC agreements are extensively negotiated by attorneys who are well-versed in LLC statutory law and governance issues.”).

²⁸ *Id.* at 611.

may interact in novel ways with contracts necessary to the operation of the firm.

A common mistake of many drafters of operating agreements is to fail to coordinate loan and other agreements entered into by the LLC with the LLC's operating agreement. Thus, counsel should be diligent to ensure that the terms of the various agreements to which the LLC is a party, including the operating agreement, are compatible.²⁹

Although this same issue exists with traditional forms of entity, the contractual nature of LLC law offers significant, novel traps for the unwary that may offer uncertain legal outcomes.

Alternative entities also raise sophisticated issues under applicable federal and state law other than entity law. There may be, for example, confusion about whether the offer and sale of equity interests in alternative entities must be registered as a securities offering under federal or state law. The answer to this question requires determining whether the equity interests are securities under the relevant law. Many federal and state statutory laws on this issue were codified before the rise of alternative entities. As a result, decisional law has largely defined what a security is in the alternative entity context.

The law in this area does not draw bright lines, especially when the instrument at issue is not a standard equity or debt instrument. In those cases, the “what is a security?” question must be answered by individual applications of the law (in the form of a multipart judicial test for determining the existence of an “investment contract”) to the unique facts of each distinct alternative entity.

²⁹ Joint Task Force of Committee on LLCs, Partnerships and Unincorporated Entities and the Committee on Taxation, ABA Section of Business Law, *Model Real Estate Development Operating Agreement with Commentary*, 63 BUS. LAW. 385, 486 n.250 (2008).

Since general partnership, limited partnership, limited liability partnership, and limited liability company interests are not expressly defined as securities under the federal securities laws, the *Howey* test has been used to determine whether these interests are securities. While it seems that such common business entity interests should have a set status under the securities laws, because they are not expressly considered securities under the statutory definition, the *Howey* test has been applied to them with varying results. The result of this application is that each of these business entity interests may or may not be securities, depending upon the facts of the particular case.³⁰

The investment contract analysis can be involved and may be indeterminate. Adding to the uncertainty posed by that analysis: the fact that different definitions of a security exist at the federal and state levels and as among the various states.³¹

The conclusion that an equity interest in an alternative entity is a security under federal or state law is challenging. The regulatory system governing securities at both levels is multidimensional, and the penalties

³⁰ Justin Blount & Drew Thornley, *Federal Preemption in Securities Laws, the Investment Contract, and Macroprudential Financial Regulation*, 14 DEPAUL BUS. & COM. L.J. 273, 286 (2016) (footnotes omitted). The *Howey* test is the federal judicial test for determining whether a financial instrument is an investment contract. SEC v. *Howey*, 328 U.S. 293 (1946). Some states also use the *Howey* test for this purpose; others use other judicial tests. See *infra* note 31.

³¹ See, e.g., Bradford, *supra* note 36, at 32 n.148 (noting the existence of a “risk capital” test used in some states); Christine Lazaro & Benjamin P. Edwards, *The Fragmented Regulation of Investment Advice: A Call for Harmonization*, 4 MICH. BUS. & ENTREPRENEURIAL L. REV. 47, 56 (2014) (noting both the “risk capital” and *Hawaii Markets* tests).

for noncompliance can be severe. Specifically, the conclusion that a security is being offered or sold may trigger tedious and time-consuming registration requirements under federal and state law and the need for appropriate regulatory licensure for intermediaries involved in the offering. Purchasers of securities offered and sold without registration or an available exemption may be entitled to a rescission remedy under federal law.

These are but a few of many examples of the intricate legal issues involved in the representation of alternative entities. The relatively recent incorporation of alternative entities into U.S. business law and the ensuing ongoing development of federal and state law relating to these popular forms of business association conspire to put pressure on attorney competence and diligence. Among other things, law practice that involves alternative entities is likely to raise thorny questions relating to fiduciary duties and other internal governance matters, as well as important assessments regarding the applicability of federal and state securities law. Engagement in a client matter involving these forms of entity requires a commitment to expertise, experience, care, detailed planning, and a persistent, meticulous attentiveness to detail throughout the course of the representation.

III. ALTERNATIVE FINANCE

Traditional business finance, like traditional business entity law, has undergone considerable transformation in a relatively short period of time. This essay uses “alternative finance” to describe the advent of new ways of funding business firms and projects.³² Key examples that illustrate the development of alternative finance include crowdfunding and initial coin offerings. Each of these means of financing business activi-

³² The term “alternative finance,” like “alternative entities,” does not have a well-accepted meaning in the literature. Two prominent experts in financial regulation recently described alternative finance as “including crowdfunding, marketplace (a.k.a. ‘peer-to-peer,’ or ‘P2P’) lending, and cryptocurrency networks.” Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143, 1201 (2017).

ties has come to popular prominence in the past ten years.³³ Crowdfunding emanated from a fusion of e-commerce and social media; initial coin offerings ride the wave of crowdfunding to capitalize on the origination of cryptocurrencies founded in blockchain or other distributed ledger technology (“DLT”).³⁴

Crowdfunding has been variously defined in the literature. At its core, however, it involves a request for financing from an unrestricted group of funders.³⁵ Although anyone asking for a handout may, under that definition, be engaging in crowdfunding, the contemporary version of crowdfunding involves Internet finance—the financing of business and individual enterprises (operations and projects) using computers operating over global networks. Crowdfunding can take various forms, from the solicitation of donations, to a request for funding in exchange for future products or other rewards, to the offering of financial interests that are classified as securities under federal or state law.³⁶ Crowdfunding has become a widespread topic of conversation in small business fi-

³³ See David Groshoff, *Kickstarter My Heart: Extraordinary Popular Delusions and the Madness of Crowdfunding Constraints and Bitcoin Bubbles*, 5 WM. & MARY BUS. L. REV. 489, 549 (2014) (“Like Bitcoin, Kickstarter started in 2009.”).

³⁴ See Josias N. Dewey & Michael D. Emerson, *Beyond Bitcoin: How Distributed Ledger Technology Has Evolved to Overcome Impediments Under the Uniform Commercial Code*, 47 UCC L.J. 105, 105 (July 2017) (“Distributed ledger technology . . . is commonly defined as a decentralised peer-to-peer network that maintains a public, or private, ledger of transactions that utilizes cryptographic tools to maintain the integrity of transactions and some method of protocol-wide consensus to maintain the integrity of the ledger itself.” (footnotes omitted))

³⁵ See, e.g., Paul Belleflamme et al., *Crowdfunding: Tapping the Right Crowd*, 29 J. BUS. VENTURING 585, 588 (2014) (“Crowdfunding involves an open call, mostly through the Internet, for the provision of financial resources either in the form of donation or in exchange for the future product or some form of reward to support initiatives for specific purposes.”).

³⁶ See, e.g., C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, 2012 COLUM. BUS. L. REV. 1, 14-27; Brian L. Frye, *Solving Charity Failures*, 93 OR. L. REV. 155, 181-90 (2014); Groshoff, *supra*, note 33, at 538-50; Ethan Mollick, *The Dynamics of Crowdfunding: An Exploratory Study*, 29 J. BUS. VENTURING 1 (2014).

nance in and outside the United States, generating excitement and adherents in a reactively short period of time.³⁷

“Coin offerings are a way for start-ups or online projects to raise money without selling stock or going to venture capitalists—essentially a new form of crowdfunding.”³⁸ Initial coin offerings involve the offer and sale of virtual assets—digital tokens or coins that act as mediums of exchange in commerce.³⁹ An individual form of token or coin is referred to as a cryptocurrency. Bitcoin and ether are perhaps the most well-known examples of cryptocurrencies.⁴⁰ These cryptocurrencies owe their existence to DLT. DLT utilizes peer-to-peer networks that are responsible for tracking both the creation of units of cryptocurrency (tokens or

³⁷ See, e.g., Sean M. O'Connor, *Crowdfunding's Impact on Start-Up IP Strategy*, 21 GEO. MASON L. REV. 895, 897 (2014) (referencing “the popular appeal of crowdfunding”).

³⁸ Nathaniel Popper, *An Explanation of Initial Coin Offerings*, N.Y. TIMES (Oct. 27, 2017), https://www.nytimes.com/2017/10/27/technology/what-is-an-initial-coin-offering.html?_r=0.

³⁹ See, e.g., Jonathan Rohr & Aaron Wright, *Blockchain-Based Token Sales, Initial Coin Offerings, and the Democratization of Public Capital Markets* 7 (Univ. of Tenn. Coll. of L. Research Paper #338), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3048104 (“Blockchains first emerged to facilitate the transfer of decentralized, digital currencies.” (footnote omitted)); *SEC Issues Investigative Report Concluding DAO Tokens, a Digital Asset, Were Securities*, 36 BANKING & FIN. SERVICES POL'Y REP. 21, 22 (Sept. 2017) (describing initial coin offerings as “offers and sales of digital assets by ‘virtual’ organizations”).

⁴⁰ See Sanford J. Boxerman & Michelle Feit Schwerin, *Its Bark Is Worse Than Its Bit(e) Regulatory and Criminal Law Implications of Virtual Currency*, CRIM. JUST., Winter 2017, at 10, 11 (mentioning bitcoin and ether as the two largest cryptocurrencies); Larissa Lee, *New Kids on the Blockchain: How Bitcoin's Technology Could Reinvent the Stock Market*, 12 HASTINGS BUS. L.J. 81, 115 (2016) (“Ethereum . . . created its own cryptocurrency called ether.”); Alexander B. Lindgren, *Blockchain Regulation: Growing Pains of a Financial Revolution*, 59 ORANGE COUNTY LAWYER 38, 38 (Oct. 2017) (“For example, ‘bitcoins’ are the tradeable asset linked to the ‘Bitcoin’ blockchain network.”). Ethereum expanded Bitcoin’s scripting ability beyond the ability to keep track of the number and location of Bitcoins in ways that helped to accelerate the popularity of cryptocurrencies and facilitate initial coin offerings. See Yan Chen, *Blockchain Tokens and the Potential Democratization of Entrepreneurship and Innovation* 4-6, BUS. HORIZONS (forthcoming 2018), available at <https://ssrn.com/abstract=3059150>.

coins) and ownership of those units over time. Notably, with DLT, there is no need for maintenance of the ledger by a trusted third-party. Instead, the ledger is stored and updated by the nodes that join the network.⁴¹ The market for initial coin offerings is growing rapidly, with new cryptocurrencies being introduced on a regular basis.⁴²

The recent introduction and rapid growth of crowdfunding and initial coin offerings represent a veritable revolution in business finance catalyzed by sophisticated technological advances and societal demand. As often is true with rapid change in the virtual realm, existing law and regulation come under pressure. This pressure affects the regulation of crowdfunding and initial coin offerings somewhat differently.

Financing transactions typically are regulated based on the nature of the interest that the funder receives in return for the funding provided. This means that no single regulatory system governs either crowdfunding or initial coin offerings. For example, charitable solicitation laws govern a crowdfunded donation to a nonprofit organization;⁴³ consumer protection law applies to reward and pre-sale crowdfunding;⁴⁴ and feder-

⁴¹ See Dewey & Emerson, *supra* note 34, at 105 (“DLT is best known for its original implementation, that of the virtual currency Bitcoin.”); Lindgren, *supra* note 40, at 38 (“Cryptocurrencies act as an alternative to traditional currency, based upon a technology known as a ‘blockchain.’”); Rohr & Wright, *supra* note 39 at 7 (“By relying on the Internet and a blockchain, digital assets—like bitcoin—could be transferred across the globe like email or music files. A blockchain kept track of who owned these digital assets at any point in time without the need for a centralized intermediary, like a central bank or centralized exchange.” (footnotes omitted)).

⁴² See Popper, *supra* note 38 (“Initial coin offerings have come out of nowhere in 2017 to become the talk of Silicon Valley and Wall Street. Programmers have raised over \$3.2 billion this year by selling their own virtual currencies to investors. That is 3,000 percent more than the amount raised using coin offerings in 2016.”).

⁴³ See, e.g., Michael P. Mosher & Alexander C. Campbell, *Crowdfunding in the Tax-Exempt Sector—Legal and Practical Considerations*, 26 TAX’N EXEMPTS 36, 40 (May/June 2015) (noting two issues arising out of state charitable solicitation regulation).

⁴⁴ See, e.g., *id.* at 40–41 (“In the area of consumer protection, the primary legal issue that crowdfunding raises is the prevention of fraud and unfair or deceptive business practices. Essentially, the issue is how to protect consumers from unscrupulous campaign

al (and, as applicable, state) securities regulation steps in to address securities or investment crowdfunding.⁴⁵ Initial coin offerings are more difficult to classify.⁴⁶ Among other things, there is no comprehensive regulation governing blockchain applications.⁴⁷ Having said that, the U.S. Se-

creators and platform administrators who fail to deliver on promises made in the campaign.”); Guy Noyes, *Kicking Start-Ups Out of Online Financial Markets: Why the FTC Should Regulate Websites to Supplement the SEC*, 19 INTELL. PROP. L. BULL. 29, 45 (2014) (“[T]he Federal Trade Commission Act (FTC Act) could be interpreted to grant the FTC the authority to regulate non-securities crowdfunding websites like Kickstarter. The FTC Act empowers the FTC to investigate businesses and punish the use of unfair trade practices.” (footnotes omitted)); Chrissie Scelsi, *Keeping the Internet of Things Monster at Bay: Protecting the Patient Privacy of Sports and Entertainment Clients in the Age of the Selfie*, 33 ENT. & SPORTS LAW. 39, 46 (Fall 2016) (“State attorneys general are monitoring the crowdfunding space from a consumer protection law standpoint . . .”).

⁴⁵ See, e.g., Bradford, *supra* note 36, at 30–42 (assessing the potential applicability of securities regulation to various types of crowdfunding); Joan MacLeod Heminway & Sheldon Ryan Hoffman, *Proceed at Your Peril: Crowdfunding and the Securities Act of 1933*, 78 TENN. L. REV. 879, 885–906 (2011) (analyzing crowdfunding interests securities under U.S. federal law).

⁴⁶ See, e.g., Jeffrey E. Alberts & Bertrand Fry, *Is Bitcoin a Security?*, 21 B.U. J. SCI. & TECH. L. 1, 21 (2015) (concluding that Bitcoin is not likely a security but noting that “securities law is not irrelevant to virtual currency investments”); Jerry Brito, *The SAFT Is a Symptom of Regulatory Uncertainty*, COINDESK (Nov. 13, 2017), <https://www.coindesk.com/saft-symptom-regulatory-uncertainty/> (analyzing the regulatory aspects of offerings involving simple agreements for future tokens, often referred to as SAFTs); Edward Dartley et al., *Initial Coin Offerings: Key Considerations You Absolutely, Positively Need to Know About Before Launching an ICO*, NAT’L L. REV. (Nov. 8, 2017), <https://www.natlawreview.com/article/initial-coin-offerings-key-considerations-you-absolutely-positively-need-to-know> (“Among the regulators that have staked claims over the regulation of one or more facets of token offerings are the Securities and Exchange Commission . . . , the Commodity Futures and Exchange Commission . . . , the Internal Revenue Service . . . , and the Financial Crimes Enforcement Network”); Reuben Grinberg, *Bitcoin: An Innovative Alternative Digital Currency*, 4 HASTINGS SCI. & TECH. L.J. 159, 200 (2012) (“[A]lthough bitcoins share many features with commodities, they also share features with securities.”).

⁴⁷ See, e.g., Scott J. Shackelford & Steve Myers, *Block-by-Block: Leveraging the Power of Blockchain Technology to Build Trust and Promote Cyber Peace*, 19 YALE J. L. & TECH. 334, 366

curities and Exchange Commission (“SEC”) recently asserted regulatory authority over an initial coin offering based on the determination that the tokens offered were investment contracts.⁴⁸ It seems clear that the industry is not content to rest on that assertion, however, and continues to press forward with initial coin offerings that challenge the boundaries of regulatory authority.⁴⁹

The recent and ongoing disruptions in business finance caused by crowdfunding and initial coin offerings, like those generated by recent additions and changes to alternative entities, test a business lawyer’s competence and diligence. Alternative finance forces business lawyers to flex their PR&E muscles in new ways. The exercise of professional discretion plays a strong role in ethical professional conduct in the context of alternative finance, as it does in business law practice involving alternative entities.

A primary substantive concern in alternative finance—as it is in alternative entities—is the potential application of the federal and state securities laws to alternative finance instruments and transactions.⁵⁰ Spe-

(2017) (“Unsurprisingly, there currently exists no comprehensive black letter blockchain regulation”).

⁴⁸ See U.S. Sec’s & Exch. Comm’n, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Sec. Exch. Act Rel. No. 81207, (July 25, 2017), <https://www.sec.gov/litigation/investreport/34-81207.pdf>.

⁴⁹ See, e.g., Robert J. Anello & Christina Lee, *New-Wave Legal Challenges for Bitcoin and Other Cryptocurrencies*, LAW.COM (Nov. 7, 2017), <https://www.law.com/sites/almstaff/2017/11/07/new-wave-legal-challenges-for-bitcoin-and-other-cryptocurrencies/> (noting recent enforcement activity by the SEC and the U.S. Department of Justice); Rhys Dipshan, *Even After SEC Guidance, Compliance Blind Spot Remains for Cryptocurrency Trading*, LEGALTECH NEWS (Sept. 21, 2017), <https://www.law.com/legaltechnews/sites/legaltechnews/2017/09/21/even-after-sec-guidance-compliance-blind-spot-remains-for-cryptocurrency-trading/> (describing securities law compliance questions regarding investment advisory firms and personnel as well as virtual currency trading platforms).

⁵⁰ See, e.g., Joan MacLeod Heminway, *Business Lawyering in the Crowdfunding Era*, 3 AM. U. BUS. L. REV. 149, 175–77 (identifying competence issues relating to early securities offering compliance in the crowdfunding context).

cifically, the determination of whether a particular financing interest offered and sold in a crowd-funded offering or initial coin offering constitutes a security—invoking the application of germane federal and state securities laws—is nontrivial and multifaceted. Different types of crowd-funding and initial coin offerings raise different questions under federal and state law. The analysis is even more challenging in an alternative finance context than it is in an alternative entity context, especially for initial coin offerings, which are typically more complex and may be less well understood.⁵¹ Moreover, these two areas of rapid change and complexity—alternative entities and alternative finance—may coincide. Alternative entities may engage alternative finance to secure necessary funding for their operations, adding to the difficulty of the necessary legal work and the related PR&E issues.

A further aspect of securities law bears mention in the alternative finance PR&E context. The potential application of professional responsibility rules under federal securities law is sometimes overlooked or undervalued in assessing PR&E issues involved in finance transactions. Specifically, Title 17, Chapter II, Part 2015 of the U.S. Code of Federal Regulations includes professional conduct standards for legal counsel representing issuers before the SEC.⁵² An attorney is governed by these standards if, for example, he or she (1) provides U.S. securities regulation advice regarding documents that will be filed with or submitted to, or be incorporated by reference in documents filed with or submitted to, the SEC or (2) advises an issuer on whether the U.S. securities laws require the filing of a document with the SEC.⁵³ These are relatively broad legal-

⁵¹ See Benjamin Katz, *The Resurgence and Relevance of Bitcoin: What You Need to Know, and Why*, L. PRAC. TODAY (Jan. 14, 2016), <http://www.lawpracticetoday.org/article/the-resurgence-and-relevance-of-bitcoin-what-you-need-to-know-and-why/> (“It is likely that less than 1% of all attorneys understand how Bitcoin, and the blockchain technology underpinning the cryptocurrency, really work. That is not due to the collective ineptitude of the bar, but the immense complexity and cutting edge nature of the subject matter.”).

⁵² 17 C.F.R. § 205.1, 205.3(a) (2017).

⁵³ *Id.* § 205(a)(iii) & (iv)

ly advisory contexts in which many finance lawyers may participate. Accordingly, legal counsel providing advice to issuers in alternative finance transactions may be required to comply with the federal professional conduct standards and should be aware of their potential applicability and contents.

More central to the challenges created for lawyers by alternative finance, however, is the essential role of technology in the offering process and, in the case of initial coin offerings, the generation of the subject financial interest and instrument. Lawyers are not required to take courses in technology and are not assessed in technological aptitude either in law school or in the licensure process. The increasing role of technology in practice has direct impact on a lawyer's assessment of competence in representing clients with technologically driven businesses, including clients engaging in alternative finance. This impact has not gone unnoticed. The American Bar Association added a new comment to the competence standard in the *Model Rules of Professional Conduct* in 2012⁵⁴ that specifically addresses technological competence.

While the second comment to that rule indicates that “[a] lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar,” Comment [8] now advises that the lawyer should have a certain quantum of information before undertaking a representation that involves technological concerns or problems.⁵⁵

⁵⁴ MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2016).

⁵⁵ John M. Facciola, *A Judicial Perspective: Technological Competence and the Law Schools*, 2015 J. PROF. LAW. 119, 120 (citation omitted).

Certainly, clients engaging lawyers to represent them in connection with crowdfunding or initial coin offerings expect and should expect that those lawyers are well informed about the related technologies.

Also, lawyers representing clients involved in alternative finance should be aware that their clients' businesses or the transactions in which they participate may involve smart contracts—"a computer program that is stored on blockchain that causes digital assets to transfer between parties under certain conditions"⁵⁶—or other applications that incorporate algorithms that have binding consequences on transactional parties. Once the algorithmic code is on the blockchain, it is permanent and executes automatically.⁵⁷ Under these circumstances, computerized systems may be deemed to be making legal conclusions—determining the legal rights or responsibilities of a contacting party. Lawyers advising clients entering into these smart contracts therefore must understand the code and its ramifications. A further professional conduct risk in this setting is that a non-lawyer developer of a smart contract or application may be engaging the unauthorized practice of law.⁵⁸ A lawyer's obligation to be diligent in representing the client's interests demands that the lawyer

⁵⁶ John R. Storino et al., *Decrypting the Ethical Implications of Blockchain Technology*, LEGAL-TECH NEWS (Nov. 13, 2017), <https://www.law.com/legaltechnews/sites/legaltechnews/2017/11/13/decrypting-the-ethical-implications-of-blockchain-technology/>. "To explain the technology, cryptographer Nick Szabo—who coined the term 'smart contract'—analogized smart contracts to a vending machine: Vending machines are programmed to transfer ownership of delicious 'assets' (*i.e.*, candy bars) once a predetermined amount of money is input." *Id.*

⁵⁷ See Rohr & Wright, *supra* note 39, at 10–11.

⁵⁸ See Storino et al., *supra* note 56 ("[M]any smart contracts will alter parties' rights and responsibilities—for example, by transferring ownership of digital assets—and may constitute an enforceable agreement. In addition, selecting what terms to commit to a smart contract may cause one to exercise legal judgment."); see also Heminway, *supra* note 50, at 171–74 (raising analogous issues in the crowdfunding context).

identify and manage the risks relating to smart contracts and other automated transactional components.⁵⁹

Finally, lawyers working on alternative finance transactions may desire or be pressured to accept partial or full payment for their services in the form of equity or other financial interests in the client. These arrangements raise the same concerns about independence, conflicting interests, and loyalty that exist in other contexts in which lawyers are paid with financial instruments issued by a client.⁶⁰ However, the uncertain regulatory status of some alternative finance transactions may add complexity and risk to a lawyer's acquisition and holding of investment interests in a client, including securities or other financial instruments offered in crowdfunded or initial coin offerings.⁶¹

⁵⁹ See Storino et al., *supra* note 56 (suggesting, among other things, that lawyers either “become more conversant in the computer coding languages” or “hire or work with coders”).

⁶⁰ See, e.g., John S. Dzienkowski & Robert J. Peroni, *The Decline in Lawyer Independence: Lawyer Equity Investments in Clients*, 81 TEX. L. REV. 405 (2002) (describing the history of and changes to professional responsibility rules governing lawyer investments in clients); Donald C. Langevoort, *When Lawyers and Law Firms Invest in Their Corporate Clients' Stock*, 80 WASH. U. L.Q. 569 (2002) (focusing attention on the effects of client stock ownership on lawyer objectivity and insider trading); Dana A. Remus, *Reconstructing Professionalism*, 51 GA. L. REV. 807, 823 (2017) (“When clients can demand legal services . . . irrespective of the profession's ethical rules, they can exert overwhelming pressure on lawyers to ignore their public-facing duties and to focus exclusively on client demands.”).

⁶¹ One commentator analogized payments for legal services in bitcoin or other cryptocurrencies to payments made in property through bartering. See Ian Anderson, *Is It Worth the Hassle to Accept Bitcoin for Legal Services?*, THE RECORDER (Dec. 15, 2017), <https://www.law.com/therecorder/sites/therecorder/2017/12/15/is-it-worth-the-hassle-to-accept-bitcoin-for-legal-services/>. It has been reported that Perkins Coie “takes a small stake” in bitcoin firms to which it provides legal advice. It is unclear whether those interests are tradition equity interests or bitcoin investments (and if so, what kind). See Daniel Cawrey, *How One Law Firm is Helping Bitcoin Startups Find Success*, COINDESK (July 8, 2014), <https://www.coindesk.com/one-law-firm-helping-bitcoin-startups-find-success/>. Nebraska has issued an ethics advisory opinion permitting the use of “digital currencies” in payment for legal services, subject to certain factors. See

Overall, alternative finance raises significant challenges for legal advisors. Lawyers retained by those engaging in alternative finance must provide competent, diligent counsel; but even seasoned business lawyers may find themselves in relatively undefined territory. Thus, while expertise, experience, care, detailed planning, and attentiveness to detail are as important in alternative finance matters as they are in alternative entity representations, they are insufficient to the task, in many cases. Decisions as to when and how to represent parties in alternative finance transactions may be exceedingly difficult for lawyers, especially for matters involving untested legal boundaries. Common sense, reasonableness, and conservatism in judgment are attributes and values that lawyers can bring to bear in assisting clients who desire to navigate these uncertain legal waters.

IV. ALTERNATIVE FACTS

A single corporation's name has come to symbolize, in the modern era, misstatements of material fact and misleading omissions to state material fact: Enron. Those who lived through what has variously been described as a debacle⁶² or a fiasco⁶³ (among other derogatory terms) understand that, among other things, the corporate disclosure lapses at Enron Corporation in the late 1990s and early 2000s constituted a highly public manifestation of a dirty little secret in business transactional law: facts can be massaged and portrayed in different ways for different purposes. The dawn of the current presidential administration in January 2017 gave this kind of chicanery a label: "alternative facts." *Dictionary.com* offers the following definition:

Nebraska Ethics Advisory Opinion for Lawyers No. 17-03 (Sept. 11, 2017), available at <https://supremecourt.nebraska.gov/sites/default/files/ethics-opinions/Lawyer/17-03.pdf>.

⁶² See, e.g., David Millon, *Who "Caused" the Enron Debacle?*, 60 WASH. & LEE L. REV. 309, 311 (2003).

⁶³ See, e.g., William S. Lerach, *Plundering America: How American Investors Got Taken for Trillions by Corporate Insiders – The Rise of the New Corporate Kleptocracy*, 8 STAN. J.L. BUS. & FIN. 69, 105 (2002).

Alternative facts have been called many things: falsehoods, untruths, delusions. To break it down, a *fact* is something that actually exists—what we would call “reality” or “truth.” An *alternative* is one of a choice between two or more options, like when actor Maurice Chevalier said “Old age isn't so bad when you consider the alternative,” the alternative here of course being death. So to talk about *alternative facts* is to talk about the opposite of reality (which is delusion), or the opposite of truth (which is untruth).⁶⁴

Some have said that we now live in an “age” or “era” of alternative facts.⁶⁵

Alternative facts are political and politicized. But they also have legal ramifications. Facts are one of the four components of basic legal reasoning (including IRAC—the four letters signifying issue, rule, appli-

⁶⁴ *Alternative facts*, DICTIONARY.COM (last visited September 1, 2017), <http://www.dictionary.com/meaning/alternative-facts>. The dictionary entry credits the term to presidential advisor Kellyanne Conway. *Id.* (“Kellyanne Conway, an advisor to President Donald Trump, used the euphemism *alternative facts* when she was a guest on NBC’s *Meet the Press* on January 22, 2017 in a conversation with the show’s moderator Chuck Todd.”).

⁶⁵ See, e.g., Dina Bass, *In the Era of Alternative Facts, Steve Ballmer Finds a Hunger for Real Data*, BLOOMBERG TECHNOLOGY (May 23, 2017), <https://www.bloomberg.com/news/articles/2017-05-23/in-the-era-of-alternative-facts-steve-ballmer-finds-a-hunger-for-real-data>; Megan Garber, *The 'Leak' in the Age of Alternative Facts*, THE ATLANTIC (May 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/05/the-leak-in-the-age-of-the-alternative-fact/526914/>; Jonathan D. Raskin, *Ethics and Honesty in an Age of Alternative Facts*, PSYCH. TODAY (July 15, 2017), <https://www.psychologytoday.com/blog/making-meaning/201707/ethics-and-honesty-in-age-alternative-facts>; Richard P. Wenzel, *Medical Education in the Era of Alternative Facts*, 377 NEW ENGLAND J. OF MED. 607 (Aug. 17, 2017), <http://www.nejm.org/doi/full/10.1056/NEJMp1706528#t=article>.

cation, conclusion—in which a legal issue is resolved by applying a legal rule to specific facts).⁶⁶ Differences in the facts presented can and often do result in different legal conclusions being reached.

Notwithstanding a lawyer's obligation of confidentiality,⁶⁷ a transactional business lawyer may be responsible for her clients' compliance with disclosure requirements under federal or state securities laws or state fiduciary duty principles.⁶⁸ This may mean revealing facts that a client would rather not disclose.⁶⁹ When effectuated in connection with the purchase or sale of a security, both the omission to state a material fact required to be stated to make existing disclosures not misleading and the misstatement of material fact can lead to liability for securities fraud under Section 10(b) of, and Rule 10b-5 under, the Securities Exchange Act of 1934, as amended ("1934 Act").⁷⁰ Willful violations are subject to potential criminal enforcement.⁷¹

⁶⁶ See, e.g., James M. Boland, *Legal Writing Programs and Professionalism: Legal Writing Professors Can Join the Academic Club*, 18 ST. THOMAS L. REV. 711, 713 n.13 (2006) ("TRAC stands for Issue, Rule, Analysis, and Conclusion."); *id.* at 731 (describing the IRAC method as "traditional methods of legal reasoning").

⁶⁷ See MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2016).

⁶⁸ See, e.g., William H. Simon, *Attorney-Client Confidentiality: A Critical Analysis*, 30 GEO. J. LEGAL ETHICS 447, 453–54 (2017) ("If the lawyer has responsibility for the client's compliance with disclosure duties—for example, . . . under the securities laws . . . —the lawyer will have to insist on disclosure even if the client objects and the lawyer learned of the fact in a confidential communication.").

⁶⁹ See William H. Simon, *Duties to Organizational Clients*, 29 GEO. J. LEGAL ETHICS 489, 520 (2016) ("If the lawyer has responsibility for the client's compliance with disclosure duties, she will have to insist on disclosure of the information no matter how disadvantageous disclosure is to the client.").

⁷⁰ 15 U.S.C. § 78j(b) (2012); 17 C.F.R. § 240.10b-5(b) (2017).

⁷¹ 15 U.S.C. § 78ff(a).

The law governing securities fraud—and fraud more generally—is constantly evolving and quite nuanced.⁷² Many puzzles remain in the application of the law in context. For example, a case in which the U.S. Supreme Court recently granted certiorari, *Leidos, Inc. v. Indiana Public Retirement System*,⁷³ involves a seemingly obvious point of law that remains unsettled—whether the omission of facts required to be disclosed under mandatory disclosure rules adopted by the SEC constitutes the predicate breach of a duty to disclose that is necessary to a successful cause of action for an omission to state material fact under Section 10(b) of and Rule 10b-5 under the 1934 Act.⁷⁴

The plasticity and intricacy of the law of securities fraud combine to create competence and diligence issues akin to those described in the context of alternative entities and alternative finance. Securities fraud law is under constant development and subject to significant interpretation and debate. However, the very possibility of fraud raises distinctive issues for business lawyers practicing in a matter involving alternative facts.

Under the *Model Rules of Professional Conduct*, a lawyer's obligations when faced with client fraud are reasonably straightforward: “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.”⁷⁵ Indeed, “[t]he lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how

⁷² See, e.g., James J. Park, *Bondholders and Securities Class Actions*, 99 MINN. L. REV. 585, 618 (2014) (“[S]ecurities fraud and the class actions targeting such fraud are not static in nature. Both securities fraud and securities class actions can evolve.”).

⁷³ *Leidos, Inc. v. Indiana Pub. Ret. Sys.*, 137 S. Ct. 1395 (2017) (granting petition for certiorari).

⁷⁴ See Brief of Professors at Law and Business Schools as *Amicus Curiae* in Support of Respondents, *Leidos, Inc. v. Indiana Pub. Ret. Sys.*, No. 16-581 (U.S. Sup. Ct. Sept. 7, 2017), available at <http://www.scotusblog.com/wp-content/uploads/2017/09/16-581-bsac-Professors-at-Law.pdf>.

⁷⁵ MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2016).

the wrongdoing might be concealed.”⁷⁶ This includes contracts and SEC statements, schedules, or reports. A lawyer must not only advise a client that he, she, or it cannot disclose alternative facts, but must also withdraw from representation if the client determines nonetheless to proceed with disclosure of alternative facts.⁷⁷

Business lawyers also must be careful not to convey alternative facts to third parties. All lawyers have an obligation not to “make a false statement of material fact or law to a third person” in the course of a client representation.⁷⁸ The relevant comment to this rule of professional conduct offers important clarification of the nature and extent of the obligation.

A lawyer is required to be truthful when dealing with others on a client’s behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows

⁷⁶ *Id.* r. 1.2 cmt. 10.

⁷⁷ MODEL RULES OF PROF’L CONDUCT r. 1.16(a)(1) (AM. BAR. ASS’N 2016); *see also id.* r. 1.2 cmt. 10 (“A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter.”). Withdrawal is necessary, but it may not alone be sufficient.

Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client’s crime or fraud.

Id. r. 4.1 cmt. 3.

⁷⁸ MODEL RULES OF PROF’L CONDUCT r. 4.1 (AM. BAR ASS’N 2016).

is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.⁷⁹

Thus, a business lawyer must refrain from passing on alternative facts to others, endorsing alternative facts conveyed to others, and creating alternative facts by telling half-truths.

In a time of alternative facts, the PR&E questions that business lawyers face include and may derive from business ethics issues that exist at the client level. Among other things, clients engaged in groundbreaking work with alternative entities or in alternative finance may push the envelope—test limits. Alternative facts may be more culturally prevalent in this environment. Enron was, of course, a high flyer that took compliance issues to and over the edge.

Moreover, especially during troubled economic times in which alternative entities and alternative finance may play strong roles in spurring economic activity, lawyers may face pressures to secure and keep clients.⁸⁰ Difficult disclosure judgments—involving disclosures from clients to lawyers, disclosures among transactional partners, and disclosures to third parties (including, prominently, regulatory authorities)—must be made in innovative business law contexts. PR&E issues involving client communication and confidences, the lawyer's role as an advisor, and the lawyer's obligation to be truthful in statements to others all are implicated in meaningful ways in this environment.

⁷⁹ *Id.* cmt. 1.

⁸⁰ See J. Bradley Bennett & Jody Manier Kris, *Under the Microscope Business Lawyers Are Being Probed As Never Before*, BUS. L. TODAY, June 2000, at 10, 14 (“Many prosecutions [of business lawyers] can be traced to a myopia caused either by the business lawyer's goal of zealously representing a client or by the tremendous pressure put on lawyers to attract and retain clients.”); Milton C. Regan, Jr. et. al., *Lawyer Independence in Context: Lessons from Four Practice Settings*, 29 GEO. J. LEGAL ETHICS 153, 163 (2016) (noting that those in solo and small-firm practices, especially junior lawyers, may face pressures to obtain and please clients).

Lawyer independence also may be at issue in client representations involving alternative facts. This matter is addressed in Rules 2.1 and 5.4 of the *Model Rules of Professional Conduct*.⁸¹

Independence of the bar is viewed as an individual attribute [T]he term is conventionally used in two seemingly conflicting ways. At times, “professional independence” means independence from clients. This can be either a state of mind, e.g., detachment or objectivity, or something more tangible. At other times, “professional independence” implies independence from the pressures and influences of others who might compromise lawyers' loyalty to clients.⁸²

Alternative facts may implicate either or both of these conceptions of lawyer independence. Either a client or a third party may impermissibly direct or influence a business lawyer's candor or independent professional judgment on a disclosure matter implicating alternative facts. In either case, it is clear that, in an environment concerning alternative facts, “being an effective lawyer involves more than opining on legality.”⁸³

⁸¹ MODEL RULES OF PROF'L CONDUCT rr. 2.1, 5.4 (AM. BAR ASS'N 2016).

⁸² Bruce A. Green, *Lawyers' Professional Independence: Overrated or Undervalued?*, 46 AKRON L. REV. 599, 607–08 (2013).

⁸³ Regan, Jr. et. al., *supra* note 80, at 204.

V. CONCLUSION

*It is time for the legal profession to articulate meaningful guidance for nonlitigators. Lawyers are fiduciaries, so it is logical that this fiduciary obligation should be lawyers' touchstone. Rather than zealously advocating every client scheme, attorneys should be guided by their obligations of competence and loyalty to their clients.*⁸⁴

Lawyers engaged in transactional or adversarial business law practice face real and significant PR&E challenges. Those offering transactional advisory services face especial barriers to a professionally responsible and ethical practice. A business lawyer's legal education and process of licensure may not have prepared him or her well for the resulting travails, especially in times of rapid change that involve matters of legal complexity. Experiential PR&E wisdom takes time and the right context to fully develop. More is needed to support professionally responsible and ethical business law practice in the current milieu.

As legal educators, we have an obligation in this regard. For one (as others have observed elsewhere), law schools can be more conscious of infusing the business law curriculum (and especially the formative Business Associations or similar course) with more professional responsibility and ethics questions, as they arise in the ordinary course. Setting aside specific time in business law courses to discuss related issues in the PR&E realm seems essential—a bare minimum.⁸⁵

But the bar—both institutionally (through bar associations and affinity groups) and at the organizational and individual practice levels—

⁸⁴ Schaefer, *supra* note 2, at 298.

⁸⁵ See Joan MacLeod Heminway, *Teaching Business Associations Law in the Evolving New Market Economy*, 8 J. BUS. & TECH. L. 175, 177 (2013) (noting that I attempt to include, as a depth topic in my Business Associations course, “professional responsibility issues in business law”); Sandra K. Miller & Yvonne L. Antonucci, *Default Rules and Fiduciary Duty Waivers in Alternative Entities: Policy Issues and Empirical Insights*, 42 J. CORP. L. 147, 186 (2016) (“Integrating ethical units into courses on contracts, business organizations, business planning, agency, and estate planning may be considerably more effective in fostering ethical sensibilities than a single law school course on ethics and professional responsibility.”).

must also step up to ensure that it is providing sufficient, high-quality education and counseling on substantive law, technology, and PR&E. In particular, PR&E education and advice should focus more attention on foregoing and withdrawing from representation. This kind of support for business lawyers is sorely needed and too long in coming. But focused changes in programming and stronger continuing ties between law schools and practitioners and among those in the profession could go a long way in helping bridge gaps.

Of course, targeted bar association programs do little good if bar members are not attending them and engaging meaningfully with the subject matter. State continuing legal education requirements, as applicable, can help generate attendance. But these mandates may be general in nature and application. As a result, they may not effectively channel business lawyers into the substantive law, technology, and PR&E programs they most need. Individual states may do a better or worse job in this regard.⁸⁶ Ensuring effective participation is even more difficult. Continuing legal education providers should consider promoting small group exercises or other innovative program formats in which the attendees work through problems together.

Apart from legal education in or beyond law school, significant practice experience with professionally responsible, ethical colleagues and transaction participants can provide business law practitioners with targeted guidance and applied knowledge over time. This is small comfort, however, for the clients who retain legal counsel inexperienced in the matters for which they may be hired. These lawyers may not be able to make up for a lack of experience without seeking appropriate support and counsel from more lawyers and others more who may be more experienced. That support and counsel may come from continuing legal education programming or professional relationships. Law schools and

⁸⁶ See Miller, *supra* note 27, at 585 (reporting that her study “found that fewer respondents outside of Delaware had participated in continuing legal education seminars on fiduciary duties within the last twelve months than their Delaware counterparts (19% compared to 43%).”).

bar associations—as well as other licensing authorities and professional associations (e.g., local chapters of the American Inns of Court)—may want to consider introducing or increasing mentoring and networking opportunities for junior business lawyers and lawyers taking on new types of business engagements that involve unfamiliar areas of substantive law or unknown, opaque technologies.

Of course, the ultimate responsibility for PR&E compliance rests with the individual lawyer. Only the lawyer can determine the need for additional substantive law, technological, or PR&E knowledge and experience. Moreover, the lawyer must evaluate the potential risks relating to her ability to exercise independent professional judgment. However, we should recognize that it may be difficult for a business lawyer to make those assessments when faced with an exciting new client or matter that piques her interest, especially in a law practice environment characterized by rapid change and complexity. Diminished assessment abilities may especially exist in solo practice or small-firm environments where work for a client that prominently features alternative entities, alternative financings, or alternative facts may be more prevalent and more necessary to sustaining the lawyer's practice.⁸⁷ However, judgment impairments are not unique to the small-firm environment. Large-firm culture also may “sometimes generate pressure to engage in professional misconduct.”⁸⁸

Nevertheless, evaluations of adequate expertise and experience, as well as the prospects for exercising independent judgment, must be made. Having made them, the attorney then can determine whether to proceed with the representation. In some—even many—cases, notwithstanding the stimulating or attractive nature of the client or matter, it may be best for a business lawyer to decline representation of a client on

⁸⁷ See Regan, Jr. et. al., *supra* note 80, at 163 (noting “the pressures on newer small practices to operate outside of their specialty or areas of expertise.”).

⁸⁸ Southworth, *supra* note 21, at 439.

a particular matter and instead provide a referral.⁸⁹ An informed exercise of discretion in taking on clients and matters will help preserve the attorney's reputation and licensure and, in the process, help ensure that clients proceed prudently in a business world that is constantly pushing out into new frontiers and, as a result, may tend to encourage taking legal risks. We can and should provide business lawyers with better and more consistent support in exercising their professional judgment in these regards in a manner that most closely comports with the PR&E rules as applied to their practice.

⁸⁹ See Regan, Jr. et. al., *supra* note 80, at 163 ("Echoing Model Rule 1.1's exhortation on providing competent service, panelists agreed that providing referrals was always preferable to taking on work well outside of your scope of expertise. Beyond the ethical implications, . . . referring the work elsewhere has practical benefits. The attorney builds a network that helps the attorney get future business from reciprocal referrals, and the client is likely to get a better result and hold the referring attorney in higher regard." (footnotes omitted)).

