CGF POINT OF LAW

E-NEWSLETTER OF CLARKE GITTENS FARMER, ATTORNEYS-AT-LAW

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ABOUT

Clarke Gittens Farmer is one of the principal law firms in Barbados. The firm is a commercial law firm, providing legal services for both domestic and international corporate and private clients. The firm strives to provide high quality work in banking, corporate, commercial, business law and commercial litigation. The firm also advises clients on the purchase and sale of residential and commercial property in Barbados and maintains a significant trademark and patent registration practice.

INTRODUCTION

Happy New Year to all and welcome to the first issue of the e-Newsletter for 2014.

This issue of the e-Newsletter is a particularly special publication for the Newsletter Committee as the e-Newsletter is this month celebrating its first anniversary. We therefore take this opportunity to thank you, our clients, colleagues and friends, for your encouragement and kind wishes over the course of the last year. We welcome your feedback and hope that you will continue to enjoy our offerings.

In the first article we explore some of the reasons why it is important to make a will and who has the capacity to make a valid will. We will also look at the requirements of a valid will and the actions that a person may take in order to safeguard his will.

As Barbados seeks to remain competitive in the rapidly changing global environment, the Government of Barbados is constantly challenged to effect the necessary legislative and infrastructural framework which increases Barbados' attractiveness to international investors. A recent initiative by the Government of Barbados in this regard was the enactment of the *Foundations Act, 2013-2*. In the second article we provide an overview of the *Foundations Act, 2013-2* and explore some salient provisions of the legislation which make foundations an attractive structure with respect to wealth management and asset protection.

In the third article we explore the obligations imposed on attorneys-at-law under the *Money Laundering and Financing of Terrorism (Prevention and Control) Act, 2011-2* as well as the sanctions which may be imposed on attorneys-at-law for failing to comply with the legislation.

We hope you enjoy!

Mrs. Rosalind K. Smith Millar

Making A Will

By Mrs. Rosalind K. Smith Millar, Partner
and Miss Annette Y. Linton, Associate

Miss Annette Y. Linton

Introduction

No man knows the day or the hour of his demise. A prudent person will ease the burden on his surviving relatives by planning ahead and making provisions for the management of his estate. People often put off making a will but it is an important step in influencing what happens to your property after your death and determining who benefits from your estate.

If you die without a will (known as dying "**intestate**"), there are certain rules ("**intestacy rules**") which dictate how your property should be distributed.

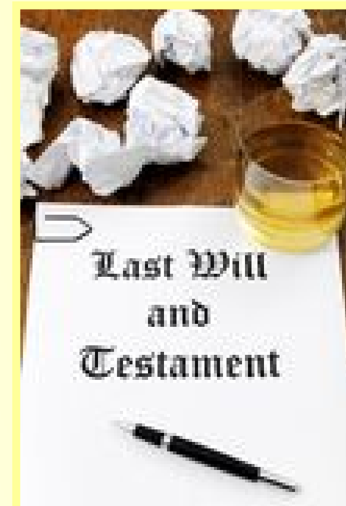
The intestacy rules for Barbados are set out in the *Succession Act, Cap. 249* of the laws of Barbados. Under these rules, most of your estate will go to your spouse and/or children, and if none to other next-of-kin e.g. parents or siblings.

The distribution prescribed by the intestacy rules may not match your personal wishes. Verbal statements during your life that you want a particular person to receive a particular asset on your death are not legally binding. Even wishes written in correspondence, e.g. letters to relatives, may not be legally binding unless they comply with the statutory requirements for a valid will.

In addition, if you die intestate the Court will appoint an Administrator to manage your estate. The Court will usually appoint your nearest surviving next-of-kin to be the Administrator of your estate e.g. a spouse, adult children, parents or siblings.

By making a will, you can:

- determine who will manage your estate and carry out your wishes (an executor);
- express your wishes for burial;
- control who will inherit your property;
- leave particular assets to certain people;
- provide for minor children, dependents and other persons that you care about;
- place conditions on the receipt of gifts by beneficiaries;
- create trusts for the holding of assets for minor children or other dependants and outline the terms of those trusts;
- appoint guardians for minor children;
- give specific directions for settling your debts; and
- make charitable donations.



Who can make a will?

Anyone who is 18 years of age or over and of sound mind can make a will. What is meant by "sound mind"? It means that the person making the will must have the mental capacity to understand the nature of what they are doing, the effect of the will and its provisions.

If the mental capacity of a person is in doubt, an assessment of their mental capacity should be made by a doctor before a will is made.

Making A Will Cont'd.

By Mrs. Rosalind K. Smith Millar, Partner
and Miss Annette Y. Linton, Associate

<u>Requirements of a valid will</u>

To be legally valid, a will must be:

- made voluntarily and without pressure from any person;
- in writing;
- signed by the person making the will in the presence of two (2) witnesses; and
- signed by the two (2) witnesses in the presence of the person making the will after he has signed it.

A witness must not be a beneficiary or the beneficiary's spouse. If either of those persons do sign as a witness, the will remains valid but the gift to the beneficiary is null and void.

Although a will does not have to be prepared by an attorney-at-law to be valid, you should have an attorney-at-law check a will you have drawn up yourself or, better yet, prepare the will for you to avoid unwanted consequences e.g. the will being invalid, gifts to beneficiaries failing or disputes arising over the correct interpretation of the will.

<u>Updating/changing your will</u>

Once you have made your will, you should review it periodically to keep it up to date. If circumstances have changed, e.g. you got married or divorced, you have children, you acquire new property, executors or beneficiaries have died or you have simply changed your mind about certain appointments or bequests, it may be necessary to either update your will or make a new will.

It is not advisable to write amendments on the original will, as later alterations will not be valid or have any effect unless executed in the same manner required for the execution of the will.

The best ways to change your will are either executing a codicil or making a new will.

A codicil is a separate document intended to amend a previously executed will. It is supplemental to the original will; it does not replace the original will. A codicil must be executed in the same manner as a will.

There is no limit to the number of codicils that can be added to a will.

Codicils are suitable to effect simple changes to a will e.g. to change executors or make simple changes to bequests.

Where drastic changes are desired it is best to make a new will. The new will should specifically state that it revokes the previous will and any codicils. The old will and any codicils should also be destroyed.

<u>Safeguarding your will</u>

The original will (and any codicils) should be kept in a safe and secure place where your executor can easily find it after your death.

You can lodge your will at the Depository of Wills of Living Persons at the Supreme Court Registry (the "**Court**"). Lodging the will with the Court will minimise the risk of it being lost, stolen or damaged and ensure that the will can be easily located by your executor when needed.

Miss Gillian M. H. Clarke

Building a Solid Foundation: An overview of the Foundations Act

By Miss Gillian M.H. Clarke, Partner
and Mrs. Lisa R. Toppin-Corbin, Associate

Mrs. Lisa R. Toppin-Corbin

The recently enacted *Foundations Act, 2013-2* (the "**Act**"), which awaits proclamation, provides for the registration and operation of domestic or international foundations and is expected to enhance Barbados' financial services landscape by offering clients in emerging economies an alternative vehicle in wealth management and asset protection.

New to Barbados but widely used in other jurisdictions, a foundation is an entity which has hybrid features of a company and a trust. Foundations appeal to persons in civil law jurisdictions who are less familiar with the concept of the trust or whose legal and tax regimes may not recognise the legal status of a trust. The flexibility of a foundation and the founder's ability to retain control of how assets are managed and distributed are attractive. For clients in common law jurisdictions, their use may simplify planning corporate structures and reduce costs by eliminating the need to use both a trust and a company.

Foundations have a legal personality independent of its founder and beneficiaries. They may be charitable or non-charitable, established for indefinite or fixed periods and are managed by a council whose function is similar to a board of directors. A foundation is established when upon payment of the relevant fee, its charter is delivered to the Registrar, Corporate Affairs (the "**Registrar**") and it is registered in a public register in accordance with the Act. The charter, which is akin to a deed of a trust, must set out, among other things, the purposes and objects of the foundation and details of the manner of designation of the beneficiary or the identification of a person, body or class of persons by reference to which the beneficiary is to be ascertained.

A foundation shall hold assets valued at not less than BDS$10,000 which must be managed, administered, invested and disbursed in accordance with its charter, by-laws and the Act for the benefit of its beneficiaries and for the attainment of its purpose. The founder may, in the charter or by-laws, reserve for itself or any other person, the right to direct or approve, among other things: (i) the investment activities of the foundation; (ii) the amendment of the charter or by-laws; (iii) the appointment or removal of a councillor or any supervisory person, (iv) the rights, entitlements and restrictions of a beneficiary; and (v) the addition or exclusion of a beneficiary.

A foundation must have a council responsible for its management and operation. Councillors have the power to bind the foundation. The councillors of a foundation must appoint a secretary. Councillors are subject to a duty of confidentiality under the Act and, in accordance therewith, must keep confidential all information regarding the nature and amount of the assets of the foundation and the conduct of their administration.

A guardian may be appointed pursuant to the charter to supervise the management and conduct of the foundation by the councillor and to take actions to ensure compliance by the foundation and its councillors with the provisions of the charter, the by-laws and the Act. A founder may be appointed as a guardian but a sole councillor may not act as a guardian.

A councillor, guardian, secretary and any other officer of a foundation, in exercising his powers and discharging his duties, is subject to a duty to act honestly, in good faith and in the best interests of the foundation, its beneficiaries or its purposes; and to exercise the care, diligence and skill which a reasonably prudent person would be expected to exercise in comparable circumstances. Breach of this duty is an offence liable on summary conviction to a fine of BDS$25,000 or to a term of imprisonment of twelve (12) months or both.

A foundation must keep at its registered office: (i) accounts and records which reflect the financial position of the foundation; (ii) copies of the charter and by-laws and any amendments thereto; and (iii) minutes of all meetings of the council and copies of all resolutions passed by the council. The secretary (or registered agent, in the case of an international foundation) must maintain a register of particulars of

Building a Solid Foundation: An overview of the Foundations Act Cont'd

By Miss Gillian M.H. Clarke, Partner and Mrs. Lisa R. Toppin-Corbin, Associate

the identification of the councillors, guardian, beneficiaries and auditors, where applicable, and any persons having power of attorney granted by the foundation. Records must be kept for at least six (6) years after the end of the period to which they relate. To do otherwise is an offence under the Act.

An international foundation is one which is organised in a jurisdiction other than Barbados, which has legal characteristics that would, if it were in Barbados, enable it to be established as a foundation under the Act. An international foundation, if it is not prohibited under the laws of its jurisdiction of formation, may apply to the Registrar for a certificate of continuance to Barbados.

An international foundation must have at least one councillor resident in Barbados and must at all times have a registered agent resident in Barbados. A registered agent must be licensed under the *International Corporate and Trust Service Providers Act, 2011-5*.

The Act has several attractive features:

- A foundation may leave Barbados and become established in another jurisdiction.
- A foundation may be dissolved in certain circumstances and may be subsequently revived upon application to the Registrar.
- A foundation governed by Barbados law is not subject to the forced heirship laws of foreign jurisdictions.
- No transfer of property to a foundation which is valid under Barbados law shall be void, voidable, liable to be set aside or defective by reference to the law of a foreign jurisdiction.
- The foundation's charter or by-laws or a disposition by the councillors or guardian may provide that any assets of the foundation (or income derived from such assets or property) available for distribution to a beneficiary shall not be alienated or pass by bankruptcy, insolvency or liquidation or be liable to be seized, sold, attached, or taken in execution by process of law, notwithstanding any rule of law to the contrary.
- The foundation's charter or by-laws may provide that a beneficiary shall forfeit a benefit or right under the charter or by-laws where the beneficiary challenges the establishment of the foundation or the transfer of any assets to the foundation.

In light of recent reductions to the tax rates paid by entities operating within the international financial services sector, it is anticipated that a similarly attractive regime will be prescribed for international foundations. A beneficiary who is not resident in Barbados will not be subject to income tax in Barbados on amounts distributed to him by the foundation. No withholding tax is payable for the purposes of the *Income Tax Act, Cap. 73* on any distributions or other income paid or deemed to be paid by an international foundation to a person who is not resident in Barbados for the purposes of the Income Tax Act. All foundations are expressly exempt from *ad valorem* stamp duty except in respect of real estate and shall pay a fixed duty under the *Stamp Duty Act, Cap. 91*. The Act specifies that the *Exchange Control Act, Cap. 71* and the *Succession Act, Cap. 249* shall not apply to international foundations.

A founder, beneficiary or guardian of a foundation, or the Registrar may apply to the Court for an order directing that an investigation be made of the foundation or any foundation or company affiliated with it. Where it appears to the Court that the affairs of the foundation or any of its affiliates are operating in a fraudulent manner, or that a foundation was established for fraudulent purposes, or that persons concerned with the foundation or its affiliates have acted fraudulently or dishonestly, the Court may make any order it thinks fit with respect to an investigation by an inspection of the foundation or any of its affiliates.

Building a Solid Foundation: An overview of the Foundations Act Cont'd

By Miss Gillian M.H. Clarke, Partner and Mrs. Lisa R. Toppin-Corbin, Associate

All applications for investigations made under the Act and any subsequent proceedings must generally be heard *in camera*. There is also a restriction on the publication of anything related to such proceedings. No person is excused from attending and giving evidence, and producing documents by reason only that the evidence may incriminate him; but the evidence may not be used against him in any proceeding thereafter, other than a prosecution for perjury in giving the evidence. An oral or written statement or report made by an inspector or any other person in an investigation has absolute privilege. Likewise, information protected by legal professional privilege need not be disclosed in proceedings instituted under the Act.

The Financial Services Commission (the "**FSC**"), for the purposes of monitoring and assessing compliance by persons with the *Money Laundering and Financing of Terrorism (Prevention and Control) Act 2011-23*, may:

(a) inspect the accounts and records of a relevant person, whether in or outside of Barbados, including the systems and controls of the relevant person;

(b) inspect the assets of a relevant person, including cash belonging to or in the possession or control of the relevant person; and

(c) examine and make copies or documents belonging to or in the possession or control of a relevant person,

that, in its opinion, relate to a foundation established under the Act.

A person who:

(a) falsely represents the financial position of the foundation to any person;

(b) withholds information relating to the financial position of the foundation or any other matter regulated by the Act from any person entitled to receive that information; or

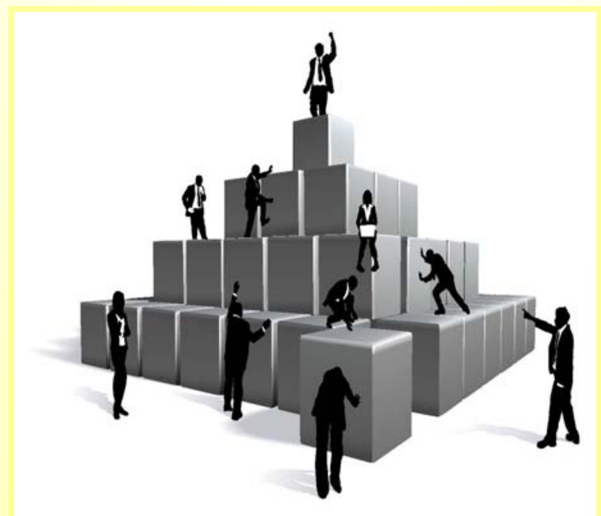
(c) falsifies any document

(i) to be delivered under the Act to the Registrar; and/or

(ii) required by the Act to be prepared in respect of the foundation,

is guilty of an offence and is liable on summary conviction to a fine of BDS$25,000 or to a term of imprisonment of twelve (12) months or to both.

The Act emphasizes regulation and legal protection. Steps have been taken to provide adequate safeguards for beneficiaries. The Act's financial incentives such as the attractive tax rates, its protection of assets against forced heirship and alienation and its focus on privacy backed by the strength of Barbados' reputation of stability will assist in advancing Barbados' position as a transparent and reputable international financial center.



Mrs. Rosalind K. Smith Millar

MONEY LAUNDERING AND THE LEGAL PROFESSION

By Mrs. Rosalind K. Smith Millar, Partner

Introduction

Attorneys-at-law are formally brought under the anti-money laundering and combating the financing of terrorism ("**AML/CFT**") regime through the *Money Laundering and Financing of Terrorism (Prevention and Control) Act 2011-2* (the "**Act**"). These provisions and related legislation apply to attorneys-at-law as they do to financial institutions.

Money laundering ("**ML**") is the process of making dirty money clean by placing dirty money or assets into the legitimate financial system and moving those assets around so they become integrated into the system and re-appear as legitimate funds or assets. Financing of terrorism ("**FT**") is often accomplished through laundering the proceeds of crime.

Many legal services are susceptible to being used to obscure the source of funds or the identity of the owner of funds and assets, two key aspects of the ML process. Typologies include complex financing schemes, use of trust accounts and complex legal ownership structures or nominees, payment by cash, and successive sales and purchases.

Compliance and Due Diligence

All attorneys-at-law are required to have a compliance plan designed to prevent the use of the legal system as a conduit for ML/FT.

The compliance plan must cover, at a minimum, procedures for transactional and client due diligence, record-keeping, internal and external reporting procedures for suspicious activities and transactions, and staff training.

Deterrence, detection, and good record-keeping are essential. By assessing the client's identity, the method of service delivery or interface, the type of service, geographical factors and the client's structure and strategy the legal professional can get a good feel for whether the client or the transaction are ML/FT risks.

Transactional due diligence

Standard due diligence is required for all transactions relating to buying and selling real estate or other assets; managing client money, securities or other assets; managing bank, savings or securities accounts; organizing contributions for the creation, operation or management of companies; creating, operating or managing legal persons or arrangements, and buying and selling business entities; and collection of debts.

Client due diligence ("**CDD**")

Attorneys-at-law must carry out due diligence verification on all clients, and they should not accept the work unless the client has provided the necessary documentation. It should be noted that the penalties for ML/FT are very steep (e.g. for aiding, abetting, counselling, procuring or conspiring to commit money laundering, the penalty on indictment is BDS$1,500,000 or twenty-five (25) years in prison or both, while the penalty for failing to keep business transaction records is BDS$100,000 on indictment).

Engaging in money laundering; aiding, abetting etc; and failure to keep records are also criminal offences under the *Proceeds of Crime Act, Cap. 143*.

Attorneys-at-law are required by law to collect and keep CDD records for the specified period of six (6) years after the conclusion of the transaction. Due diligence requirements are therefore not to be taken lightly, and the depth of enquiry depends on both the client and the nature of the work.

Standard CDD requires: (i) establishing and independently verifying the client's true identity; (ii) establishing the true ultimate beneficiary of the services and identifying the client, the beneficiary, and the client's authority to act; and (iii) taking reasonable measures to establish and identify the true identities of the individuals who are the beneficial owners of the client.

MONEY LAUNDERING AND THE LEGAL PROFESSION Cont'd

By Mrs. Rosalind K. Smith Millar, Partner

Reduced CDD is appropriate: (i) where the proposed client is a licensed entity, the Barbados Government or a statutory body; (ii) for transactions in the course of a business relationship where the client has already produced satisfactory CDD; or (iii) if satisfactory CDD documents are provided by other professional service providers (e.g. other lawyers, accountants, banks).

Enhanced due diligence ("**EDD**") is required for: (i) Politically Exposed Persons; (ii) individuals who are nationals of, reside or do business in High-Risk Jurisdictions; (iii) clients engaged in cash-based or unusual businesses; (iv) clients using complex ownership structures or complex business strategies; and (v) clients who resist providing requested CDD information.

EDD means taking additional care in accepting identification documents; reviewing current financial statements; verifying source of funds or wealth; reference checks from a banker, accountant or lawyer in the individual's usual country of residence; checking electronic databases; more frequent monitoring and ongoing due diligence.

Reporting suspicious activity

The AML/CFT regulator for legal professionals is The Financial Intelligence Unit ("**FIU**") of the Anti-Money Laundering Authority established under the Act.

Suspicious activities or transactions must be reported to the FIU. Subject to the exception of legal professional privilege, everyone must comply with the instructions issued or requests of the FIU; permit entry and inspection; give reasonable assistance; and answer questions.

Any reasonable suspicion that funds or services are related to or are to be used to facilitate an offence under the *Anti-Terrorism Act, Cap. 158* must also be promptly reported to the Commissioner of Police.

It is an offence to disclose to anyone that an investigation is or may be conducted, so as to prejudice the investigation. This is referred to as tipping off. Any information or document that may be material to an investigation must be preserved.

CGF NEWS

Community Outreach Initiative

Clarke Gittens Farmer recognises the importance of giving back to the community and is proud to give its support to charities and non profit organisations in the island.

To start off this new year the firm made donations to the Salvation Army and the Albert Cecil Graham Development Centre.

The Salvation Army is known for its work with people who have fallen on hard times. It offers help to the elderly, the young, offenders, drug addicts, disabled people and people who have been affected by natural disaster. It is responsible for distributing meals and garments and providing shelter and comfort.

The Albert Cecil Graham Development Centre (formerly the Children's Development Centre) provides health care and education for disabled children. It scans, monitors and treats children with mental and physical developmental delays.

CGF NEWS Cont'd

Appointment of Partner

Mrs. Nicola A. Berry

The Newsletter Committee extends its heartiest congratulations to Mrs. Nicola Berry, Chairperson of the Newsletter Committee, who was invited to be a partner of the firm effective January 1, 2014.

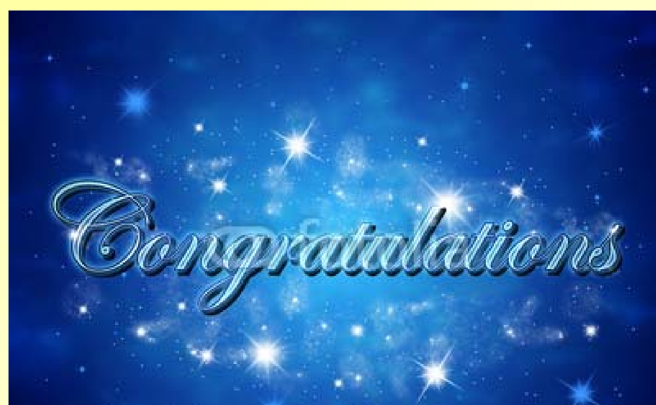
Nicola joined the firm in 2008 and is attached to the Commercial Department where she advises local and international clients on a range of corporate and commercial law matters including corporate finance, financial regulation, competition law and energy related matters.

Prior to joining the firm, Nicola worked as a Senior Crown Counsel in the Litigation Division of the Jamaica Attorney General's Chambers and in the International Law Division of the Jamaica Attorney General's Chambers. She was also a tutor in international business law at the University of the West Indies, Mona Campus.

In addition to a LL.B. (Hons) and a Legal Education Certificate, Nicola holds a BSc. (Hons) in International Relations and a Masters (with Merit) in International Business Law. She has written articles in a number of prominent publications, including the Barbados Country Guide on Anti-Money Laundering, Thompson Reuters "Compliance Complete" Internet Subscription Service, 2012 (co-authored with our Mr. Creig Kinch).

Outside of work, Nicola serves as a director of The Substance Abuse Foundation Inc., a registered charity, which operates the Verdun House treatment facility in Barbados for individuals suffering from a substance abuse addiction or dependency. Nicola is also the proud mother of Alexander Berry and Joshua Berry.

The Newsletter Committee extends best wishes to Nicola as she takes up her new position within the firm.



CGF POINT OF LAW published by Clarke Gittens Farmer is an e-Newsletter for clients, colleagues and friends of the firm. This e-Newsletter provides an overview of notable news and legal developments.

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Partners: **Managing Partner:** Mr. T. David Gittens, Q.C. **Partners:** Mr. Stephen W. Farmer, Q.C., Miss Gillian M. H. Clarke, Mr. Ramon O. Alleyne, Mrs. Savitri C. B. C. St. John, Ms. Debbie A. P. Fraser, Mrs. Rosalind K. Smith Millar, Mr. Kevin J. Boyce and Mrs. Nicola A. Berry.

Team: **Supervising Partner:** Ms. Debbie A. P. Fraser **E-Newsletter Committee:** Mrs. Nicola A. Berry (Chair), Miss Annette Y. Linton, Miss Nicole S. McKetney, Miss Sabrina L. Maynard, Mrs. Lisa R. Toppin-Corbin and Mr. Michael J. Koeiman. **Technical and Administrative Support:** Mr. Creig R. D. Kinch, Miss Stephanie V. Blenman, Mr. John B. Newton, Ms. Erith B. Small and Mrs. Laura V. Stanton.

Disclaimer: IMPORTANT NOTICE: This e-Newsletter does not constitute and should not be construed as legal advice. Should further analysis or explanation of the subjects contained in this e-Newsletter be required, please contact us. Always consult a suitably qualified lawyer on any legal problem or issue.

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