
A Lawyer's Guide to Detecting and Preventing Money Laundering

A collaborative publication of the
International Bar Association, the
American Bar Association and the Council
of Bars and Law Societies of Europe

October 2014

the 1990s, the number of people in the world who are living in poverty has increased from 1.1 billion to 1.6 billion (World Bank 2000).

There are a number of reasons for this increase. One of the main reasons is that the world population has increased from 5 billion in 1985 to 6 billion in 2000. This increase in population has led to a corresponding increase in the number of people who are living in poverty. Another reason is that the world economy has not grown as fast as it should have, leading to a stagnation of income for many people.

There are a number of ways in which we can help to reduce the number of people living in poverty. One of the most important is to help to improve the world economy. This can be done by promoting trade and investment, and by helping to improve the infrastructure of developing countries.

Another important way to help is to provide education and training for people in developing countries. This will help them to acquire the skills and knowledge that they need to be able to find work and improve their standard of living.

Finally, it is important to provide social services such as health care and housing for people in poverty. This will help to improve their quality of life and reduce the number of people who are living in poverty.

There are a number of organizations that are working to help reduce the number of people living in poverty. These include the World Bank, the International Monetary Fund, and a number of non-governmental organizations.

It is important that we all work together to help reduce the number of people living in poverty. This will help to create a more just and equitable world for all.

There are a number of ways in which we can help to reduce the number of people living in poverty. One of the most important is to help to improve the world economy. This can be done by promoting trade and investment, and by helping to improve the infrastructure of developing countries.

Another important way to help is to provide education and training for people in developing countries. This will help them to acquire the skills and knowledge that they need to be able to find work and improve their standard of living.

Finally, it is important to provide social services such as health care and housing for people in poverty. This will help to improve their quality of life and reduce the number of people who are living in poverty.

There are a number of organizations that are working to help reduce the number of people living in poverty. These include the World Bank, the International Monetary Fund, and a number of non-governmental organizations.

It is important that we all work together to help reduce the number of people living in poverty. This will help to create a more just and equitable world for all.

This Guide has been prepared by working groups of the International Bar Association (“IBA”) (led by Stephen Revell), the American Bar Association (“ABA”) (led by Kevin Shepherd) and the Council of Bars and Law Societies of Europe (“CCBE”) with the help of Dr S. Chandra Mohan (Associate Professor of Law) and Lynn Kan (Juris Doctor), Singapore Management University, School of Law.

Contents of the Guide

Executive Summary	2
I. Introduction and Background	3
II. Sources of the Legal Profession’s AML Responsibilities	11
III. Vulnerabilities of the Legal Profession to Money Laundering	23
IV. The Risk-Based Approach and Money Laundering Red Flags	27
V. Case Studies	39
VI. Glossary and Further Resources	48
Endnotes	52

Disclaimer:

This Guide has been prepared and published for informational and educational purposes only and should not be construed as legal advice. The laws and regulations discussed in this Guide are complex and subject to frequent change and the reader should review and understand the laws and regulations that are applicable to the reader (which may involve the laws and regulations of more than one country) and not rely solely on this Guide. The IBA, ABA and CCBE assume no responsibility for the accuracy or timeliness of any information provided herein, or for updating the information in this Guide. For further information on applicable laws and regulations a reader may visit the following website of the IBA which aims to give country by country information provided by correspondents in each country – <http://www.anti-moneylaundering.org/globalchart.aspx>. In addition, readers should carefully consider the legal and regulatory issues in their own countries by referring to their bar association or law society for country specific guidance on anti-money laundering issues.

Executive Summary

Money laundering and terrorist financing represent serious threats to life and society and result in violence, fuel further criminal activity, and threaten the foundations of the rule of law (in its broadest sense). Given a lawyer's role in society and inherent professional and other obligations and standards, lawyers must at all times act with integrity, uphold the rule of law and be careful not to facilitate any criminal activity. This requires lawyers to be constantly aware of the threat of criminals seeking to misuse the legal profession in pursuit of money laundering and terrorist financing activities.

While bar associations around the world play a key role in educating the legal profession, the onus remains on individual lawyers and on law firms to ensure that they are aware of and comply with their anti-money laundering ("AML") obligations. These obligations stem primarily from two sources:

- (i) the essential ethics of the legal profession including an obligation not to support or facilitate criminal activity; and
- (ii) in many countries, specific laws and regulations that have been extended to lawyers and require, in a formal sense, lawyers to take specific actions. These typically include an obligation to conduct appropriate due diligence about clients with a view to identifying those that may be involved in money laundering and, in some jurisdictions, an obligation to inform the authorities if they suspect clients and/or the persons the client is dealing with may be involved in money laundering. This obligation to report is highly controversial and is seen by many to endanger the independence of the legal profession and to be incompatible with the lawyer-client relationship. However, in some countries lawyers can themselves be prosecuted for a failure to carry out appropriate due diligence and report suspicious transactions to the authorities. Although we may not agree with or support such an approach, it is important that lawyers in such countries are fully aware of these obligations and the actions they need to take.

All lawyers must be aware of and continuously educate themselves about the relevant legal and ethical obligations that apply to their home jurisdiction and other jurisdictions in which they practice, and the risks that are relevant to their practice area and their clients in those jurisdictions. This is particularly so as the money laundering and terrorist financing activities of criminals are rapidly and constantly evolving to become more sophisticated. Awareness, vigilance, recognising red flag indicators and caution are a lawyer's best tools in assessing situations that might give rise to concerns of money laundering and terrorist financing. Such situations may, in some countries, result in (i) the lawyer being found guilty of an offence of supporting money laundering, due to the failure to properly "check" clients or report suspicious transactions where it is required and (ii) the lawyer being subject to professional discipline.

This Guide is intended as a resource to be used by lawyers and law firms to highlight the ethical and professional concerns relating to AML and to help lawyers and law firms comply with their legal obligations in countries where they apply. Clearly, this Guide does not impose any obligations on a lawyer. In it you will find:

- (i) a summary of certain international and national sources of AML obligations (Part II);
- (ii) a discussion of the vulnerabilities of the legal profession to misuse by criminals in the context of money laundering (Part III);
- (iii) a discussion of the risk-based approach to detecting red flags, red flag indicators of money laundering activities and how to respond to them (Part IV); and
- (iv) case studies to illustrate how red flags may arise in the context of providing legal advice (Part V).

This Guide is not a 'manual' which will ensure that lawyers satisfy their AML obligations. Rather, it aims to provide professionals with practical guidance to develop their own risk-based approaches to AML compliance which are suited to their practices.

I. Introduction and Background

I. Introduction and Background

Money laundering (the conversion of proceeds from crime into legitimate currency or other assets) and terrorist financing (whether from the proceeds of crime or otherwise) are not new phenomena. Criminals have been concealing the illicit origins of money through money laundering for decades. However, the scale of such activity has grown significantly – a 2009 estimate of the extent of money laundering put it at a staggering 2.7% of the world’s gross domestic product (or US\$1.6 trillion).¹

Measures combatting money laundering and terrorist financing overlap to a large extent, as criminals engaging in either of these activities are looking to transfer money while concealing the origin and destination of the funds. Further special considerations, however, apply in the fight against terrorist financing. Although this Guide focuses on anti-money laundering (“AML”) compliance and does not purport to tackle comprehensively the issue of the legal profession’s role in the fight against terrorist financing, many of the practices this Guide discusses would also help a lawyer from being misused to facilitate terrorist financing.

Money laundering involves three distinct stages: the placement stage, the layering stage, and the integration stage. The placement stage is the stage at which funds from illegal activity, or funds intended to support illegal activity, are first introduced into the financial system. The layering stage involves further disguising and distancing the illicit funds from their illegal source through the use of a series of parties and/or transactions designed to conceal the source of the illicit funds. The integration phase of money laundering results in the illicit funds being considered “laundered” and integrated into the financial system so that the criminal may expend “clean” funds. These stages are illustrated in the following diagram:²

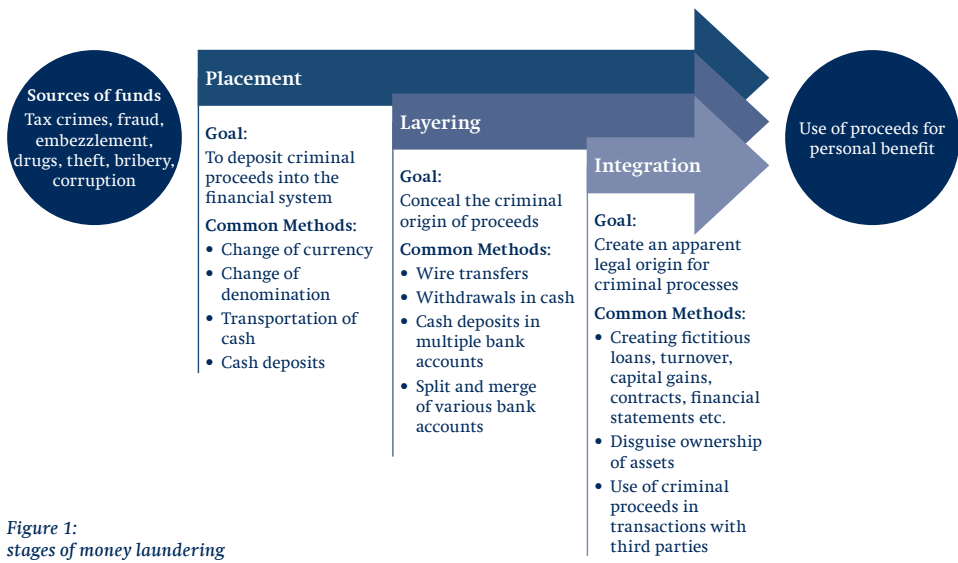


Figure 1:
stages of money laundering

A. The 40 Recommendations

A diverse mix of domestic and international laws (both criminal and civil), regulations and standards has been developed to counter money laundering and terrorist financing. Most significant among these are the Recommendations of the Financial Action Task Force (“FATF”), an inter-governmental body established in 1989 at the G7 summit in Paris as a result of the growing concern over money laundering.³ The Recommendations are not international laws, but are a set of internationally endorsed global standards, which are based in part upon policies and recommendations stemming from United Nations (“UN”) conventions and Security Council resolutions. Further, the FATF Recommendations require that individual countries formulate and implement offences of money laundering and terrorist financing in accordance with the provisions set out in the Recommendations; FATF members and certain other countries have formally agreed to implement the Recommendations.⁴

The original Recommendations were drawn up in 1990 and were directed at the financial sector, as it was clear that banks were most at risk of being misused in connection with money laundering and terrorist financing. The Recommendations were first reviewed in 1996 and were supplemented with the Eight Special Recommendations on Terrorist Financing in 2001.⁵ A further revision in 2003 expanded the reach of the Recommendations to bodies that provide “access points” to financial systems, also referred to as “gatekeepers”. Broadly, these are persons, including lawyers⁶, FATF believes are in a position to identify and prevent illicit money flows through the financial system by monitoring the conduct of their clients and prospective clients and who could, if these persons are not vigilant, inadvertently facilitate money laundering and terrorist financing. The term used for “gatekeepers” in the 40 Recommendations is “Designated Non-Financial Businesses and Professions” (“DNFBP”).⁷ Extending the reach of the Recommendations to capture DNFBPs was motivated by FATF’s perception that “gatekeepers” were unwittingly assisting organised crime groups and other criminals to launder their funds by providing them with advice, or acting as their financial intermediaries.⁸ Unfortunately, when the Recommendations were extended to gatekeepers scant accommodation was made for the fact that many of the gatekeepers (including lawyers) have a fundamental role and provide different services as compared to the banks for which the Recommendations were originally drafted. As a result, FATF’s approach treats all gatekeepers in the same way as banks. Similarly, the extension was made without full recognition of the resources available to many gatekeepers, again particularly lawyers, as compared to the resources that are available to many banks.

The current version of the Recommendations, published in February 2012 and referred to in this Guide as the 40 Recommendations, embodies a focus on preventative measures, such as “customer due diligence” (“CDD”). This is done through the adoption of a risk-based approach, and the 40 Recommendations generally assume a somewhat different AML approach to the “hard law” approach embodied in both past international conventions and criminalisation of money laundering activities. Controversially, they include an obligation on gatekeepers, including lawyers, to report suspicious activity to the authorities.

The Recommendations set out a framework of measures, rather than direct obligations, that countries should implement to combat money laundering and terrorist financing. The 2003 revisions to the Recommendations are absolutely key from a lawyer's perspective. The 2003 revisions directed countries to bring into force laws or amendments to laws that put specific obligations on lawyers to take action in connection with money laundering and terrorist financing. Some in the legal profession view the Recommendations (and related national and regional legislation) as a source of another compliance burden on a profession that is already heavily regulated and, with regard to the obligation to report suspicious transactions, as a fundamental challenge to the lawyer-client relationship. Although lawyers and bar associations around the world (including the IBA, ABA and CCBE) deplore money laundering and terrorist financing and are keen to see lawyers play an appropriate role in the fight against these practices, many are concerned with the way in which AML obligations have been placed on the profession and the impact this has on lawyer-client relationships, a lawyer's independence and role in society and the rule of law. Notwithstanding these concerns, many jurisdictions have passed laws that formally impose obligations on lawyers and some have provided that breach of these obligations can expose lawyers to criminal prosecution. Lawyers must be aware of these laws and, where applicable, need to comply with them.

The basic intent behind the 40 Recommendations is consistent with what lawyers, as guardians of justice and the rule of law, and professionals subject to ethical obligations, have always done – namely to avoid assisting criminals or facilitating criminal activity. Some of the underlying ethical principles that the legal profession upholds, namely to avoid supporting criminal activity and being unwittingly involved in the pursuit of criminal activity, support the role that lawyers need to play in the fight against money laundering and terrorist financing. Notwithstanding these common ethical underpinnings, serious concerns remain about the obligation in the 40 Recommendations to report suspicious activity, particularly in jurisdictions where lawyers do not benefit from any relevant exceptions concerning the confidentiality created in a lawyer-client relationship. Importantly for lawyers, the Recommendations include a key interpretive note to Recommendation 23 that states that DFNBPs are not required to report suspicious transactions “*if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege*”. However, even putting the 40 Recommendations to one side, it is at present an unanswered question in some jurisdictions as to what lawyers should ethically do if they become aware that their clients are misusing them for criminal purposes. For example, is it sufficient for the lawyers to stop acting or does this merely push the criminals to use the services of the lawyer next door (or in the next jurisdiction)?

FATF has published a typologies report⁹ to describe the vulnerabilities of the legal profession to money laundering and terrorist financing risks. FATF hoped this would assist lawyers in their interpretation of obligations imposed on them as a result of national or regional measures implementing the 40 Recommendations. Unfortunately, we do not believe this Report is as helpful as FATF intended, principally because it focuses heavily on situations in which lawyers are knowingly involved in money laundering and/or terrorist financing activities. As a result, the FATF report is in danger of creating a misleading impression of the legal profession. The profession generally believes that, contrary to what

the FATF typologies report may suggest, circumstances in which lawyers are knowingly involved in criminal activities are quite rare. As a matter of general principle, the legal profession does not want any exceptional or special treatment for lawyers who are knowingly involved in criminal activities – if so involved, such lawyers are also criminals and should be treated accordingly. We believe it is more productive to focus on situations where: (i) lawyers may become unknowingly and unintentionally involved in criminal activities and (ii) educating lawyers to be alert to misuse by criminals so that lawyers can play an active and informed role in the fight against money laundering and terrorist financing. Accordingly, this Guide focuses on situations where a criminal may seek to use the services of a lawyer who is not attuned to the risks and “red flag” indicators associated with such risks and aims to educate lawyers so that they can avoid their services from being used to facilitate money laundering or terrorist financing. Our intention is for the legal profession to continue to demonstrate leadership in this area and provide an important resource for lawyers across the globe seeking to guard against becoming unknowingly and unintentionally involved in money laundering and terrorist financing activities, regardless of the source of their AML obligations.

Before moving on to the substantive parts of this Guide, Section B below gives short descriptions of the efforts of bar associations across the globe to create other sources of guidance relating to AML obligations.¹⁰

B. Bar associations’ AML and counter terrorist financing efforts

Bar associations and law societies around the world, including the IBA, ABA and CCBE, have been actively supporting AML efforts by lawyers with policies and programmes to raise their members’ awareness of money laundering and terrorist financing issues and their members’ related obligations.

ABA	CCBE	IBA
<p>ABA comprises almost 400,000 members</p> <p>Operates the Task Force on Gatekeeper Regulation and the Profession that examines government and multilateral efforts to combat international money laundering and the implications of these efforts for the legal profession</p> <p>Formulates an effective AML and counter-terrorist financing policy consistent with the U.S. Constitution and other fundamental underpinnings of the lawyer-client relationship. Educates lawyers about AML initiatives, including ABA Formal Ethics Opinion 463.</p>	<p>The CCBE represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers</p> <p>Includes the Anti-Money Laundering Committee</p> <p>Clarifies how the Recommendations and EU Directives have been implemented in the various EU member states.</p>	<p>Membership consists of 30,000 individual lawyers and over 195 bar associations/law societies globally</p> <p>Operates the Anti-Money Laundering Legislation Implementation Working Group</p> <p>Focuses on challenges for the legal profession presented by compliance with AML legislation throughout the world</p> <p>Provides country by country information on the following website: http://www.anti-moneylaundering.org/globalchart.aspx</p>

Table 1:
Anti-money laundering efforts of bar associations¹¹

The IBA has a specialised working group within its Public and Professional Interest Division, the Anti-Money Laundering Legislation Implementation Working Group, which focuses on the challenges for the legal profession presented by compliance with AML legislation throughout the world.

The ABA's Task Force on Gatekeeper Regulation and the Profession was created in 2002 to analyse and coordinate the ABA's response to AML enforcement initiatives by the U.S. federal government and other organisations that could adversely affect the lawyer-client relationship. It reviews and evaluates ABA policies and rules regarding the ability of lawyers to disclose client activity and information, helps develop policy positions on gatekeeper-related issues, runs educational programs for lawyers and law students and produces related guidance materials for lawyers.¹²

The CCBE has had many discussions with FATF and the European Commission in connection with AML regulations and directives. The CCBE's website sets out its canon of policy work, including numerous position papers and consultations on AML directives. Further, it has worked alongside other European organisations and the Commission of the European Communities to produce a useful document setting out the implementation of the Recommendations within the European Union ("EU") and answering questions on related issues such as tipping-off, the jurisdiction of relevant bar associations over reporting obligations, and the circumstances under which a lawyer is obliged to report to authorities.¹³

A number of European countries have bodies, such as national bar associations, law societies and regulators of the legal profession, that publish guidance and examples of good practices to help lawyers comply with their AML obligations. Lawyers are advised to contact their bar or law society to enquire about the existence of guidelines and to familiarise themselves with such country specific guidance where applicable. An example of such guidance is that produced by the Law Society of England and Wales and the body that steers its AML policy work, the Money Laundering Task Force ("MLTF"). In 2002, following discussions with government, law enforcement, other regulatory bodies and the profession, the MLTF issued official guidance for solicitors. In 2009, in response to the Third EU Money Laundering Directive and the subsequent update of the United Kingdom ("U.K.") AML Regulations, the Law Society of England and Wales released its first AML Practice Note. Her Majesty's Treasury approved the Practice Note, meaning that regulators and the courts must have regard to it when considering allegations that a solicitor has not complied with AML obligations. It is updated regularly – the next wholesale revision will update the Practice Note for the Fourth EU Money Laundering Directive and resultant changes to U.K. AML legislation. The Law Society of England and Wales has also put together a comprehensive package of resources to assist solicitors in complying with U.K. AML legislation¹⁴ and operates a Practice Advice Service that receives approximately 6,000 calls annually from solicitors seeking AML advice.¹⁵

We would encourage bar associations all over the world to consider how they can best help their lawyer members: (i) access and understand relevant AML obligations; (ii) reflect on the ways lawyers and law firms may be misused by criminals in the context of money laundering and terrorist financing; and (iii) reflect on practices lawyers and law firms

can adopt in their particular jurisdiction and in accordance with the relevant bar rules, to ensure the highest ethical standards of the profession are maintained.

Ultimately, however, it is the responsibility of members of the profession to ensure that they each:

- (i) understand the formal AML obligations they are subject to in their country and by reference to their practice;
- (ii) understand their ethical obligations in this area;
- (iii) train their staff to be alert to the misuse of the lawyer and the law firm practice to misuse by criminals;
- (iv) train their staff to identify complex transactions that could inadvertently engage predicate offences¹⁶ and how to advise clients about any reporting obligations triggered; and
- (v) take appropriate action dependent upon the regulations they are subject to if they know or suspect a client or a potential client (or someone dealing with their client) is laundering money or financing terrorists. These actions may include seeking to dissuade the client from the proscribed course of conduct, taking the matter up the chain of authority within the client management structure, reporting the matter to the authorities (at least, where this is required) or refusing to act.

As indicated above, not all lawyers and jurisdictions support the approach recommended in the 40 Recommendations. In particular, many lawyers, bar associations, and others in the international legal community reject or challenge the validity of the requirement placed upon lawyers to report suspicions of money laundering to the authorities due to concerns that this breaches basic lawyer-client confidentiality and privilege rules. In some countries this has led to intensive discussions to persuade member countries not to apply the 40 Recommendations to lawyers and/or to modify their application, in other countries to change, challenge or suspend laws that have been introduced and in certain countries to develop alternative procedures that lawyers are encouraged to follow with a view to preventing money laundering but in ways different from those recommended by FATF.

For example, the Federation of Law Societies of Canada (“FLSC”) launched a constitutional challenge against attempts by the Canadian government to oblige lawyers to report suspicious transactions. This court challenge resulted in an interlocutory injunction suspending application of the AML legislation to Canadian lawyers and Quebec notaries and ultimately led to amendments to the legislation exempting legal counsel from the suspicious transactions reporting requirements. Independent of the litigation, the FLSC developed a model rule to prevent lawyers and Quebec notaries from accepting large sums of cash from their clients. The rule, which has been adopted by all Canadian law societies (the regulators of the legal profession in Canada), restricts members of the legal profession from receiving cash in excess of \$7,500, an amount below the reporting threshold in the legislation. The FLSC subsequently created a model “Know Your Customer” rule (the “KYC Rule”) that requires lawyers to apply identity verification rules

and use reasonable efforts to ascertain a party's identity whenever they assist or advise on a financial transaction. All Canadian law societies have since adopted this rule.

In spite of the AML initiatives of the regulators of Canada's legal profession in 2008, the federal government sought to compel lawyers and Quebec notaries to comply with new client identification and record-keeping regulations. This led to renewal of the FLSC's constitutional challenge. Both the British Columbia Supreme Court and the British Columbia Court of Appeal have ruled that the legislation and regulations: (i) unduly infringe upon the lawyer-client relationship and (ii) are unnecessary in light of the effect and constitutional regulations imposed on legal counsel by the provincial and territorial regulators. An appeal to the Supreme Court of Canada by the federal government was heard in May 2014 and the parties are awaiting the Court's judgment.

The Japan Federation of Bar Associations has played a vital role in ensuring lawyers in Japan are excluded from reporting obligations in legislation imposing AML obligations.¹⁷ Its own regulations allow the legal profession to maintain a "Never to Whistleblow" approach to countering money laundering. The Japan Federation of Bar Associations has drafted its own comprehensive list of events specific to lawyers that trigger client identification duties, which are similar to the situations specified in the 40 Recommendations. In short, the Japan Federation of Bar Associations accepts CDD, but not suspicious transaction reporting.

II. Sources of the Legal Profession's AML Responsibilities

II. Sources of the Legal Profession’s AML Responsibilities

Lawyers must understand the matrix of AML obligations to: (i) uphold the ethical standards that apply to them, (ii) comply with their AML obligations and (iii) avoid exposing themselves to the risk of unintentionally assisting criminals in the execution of criminal activity (and potential criminal prosecution arising therefrom). The AML obligations not only define the lawyers’ role in the fight against money laundering and terrorist financing, but also require lawyers to act and deal with all clients in a variety of ways. If lawyers fail to act in accordance with these obligations in certain jurisdictions (e.g., failing to implement an adequate CDD program or failing to report suspicions of money laundering), they will be at risk of prosecution even if “innocent” of any crime of actual money laundering. It is important to emphasise that these responsibilities apply even in the absence of any intent knowingly to engage in money laundering. In virtually all jurisdictions, it is a criminal offence for a lawyer knowingly and intentionally to engage in, aid or facilitate any other person to engage in, money laundering. In those circumstances, the “crime/fraud” exception to the lawyer-client privilege is likely to apply, thus stripping away any ethical or legal duties of confidentiality.

A. International obligations

From the perspective of the authorities, the 40 Recommendations provide the main international AML standards¹⁸ and have been endorsed by more than 180 countries. As noted above, though, the 40 Recommendations were initially developed for the financial sector and, at times, do not lend themselves well for application to the legal profession with its broad spectrum of legal practices and firms – sole proprietors and multi-jurisdictional international firms – varied internal structures and above all, its professional and ethical duties. The two crucial Recommendations applicable to lawyers provide as follows:

Recommendation 22(d): *“The CDD and record-keeping requirements set out in Recommendations 10, 11, 12, 15, and 17, apply to designated non-financial businesses and professions (DNFBPs) in the following situations: Lawyers, notaries, other independent legal professionals and accountants – when they prepare for or carry out transactions for their client concerning the following activities:*

- *buying and selling of real estate;*
- *managing of client money, securities or other assets;*
- *management of bank, savings or securities accounts;*
- *organisation of contributions for the creation, operation or management of companies;*
- *creation, operation or management of legal persons or arrangements, and buying and selling of business entities.”*

Recommendation 23(a): *“The requirements set out in Recommendations 18 to 21 apply to all designated non-financial businesses and professions, subject to the following qualifications: Lawyers, notaries, other independent legal professionals and accountants should be required to report suspicious transactions when, on behalf of or for a client, they engage in a financial transaction in relation to the activities described in paragraph (d) of Recommendation 22.”*

Recommendations 22(d) and 23(a) extend the ambit of only nine of the substantive 40 Recommendations to “lawyers, notaries and independent legal professionals”¹⁹ and are clear that FATF’s AML requirements are only intended to apply when the lawyer is carrying out certain specified transactions and activities – that are believed by FATF to carry a higher risk of money laundering – rather than to all of the legal services provided by the profession. The following conclusions necessarily stem from its ambit:

- certain activities undertaken by lawyers are not within the scope of the 40 Recommendations – e.g., acting for a client on a *bona fide* litigation, including in some jurisdictions the completion of transactions settling or disposing of such litigation – provided that none of the services specified in Recommendation 22(d) are also being carried out;
- notwithstanding the above, Recommendation 22(d) is widely drafted and the relevant “activities” ought to be interpreted cautiously. It would be advisable that lawyers err on the side of caution and comply with relevant national laws when they have any doubt as to whether they are applicable. Of course, a more careful analysis should be undertaken before making a suspicious transaction report (“STR”) (on which see more below); and
- in any event, the ethical considerations that a lawyer should apply in an AML context are not limited by reference to Recommendation 22(d) and these ethical principles should apply to all work carried out by a lawyer. However, the fact that the Recommendations formally apply only to a narrow range of transactions is extremely important in the context of suspicious transaction reporting that many lawyers believe should be construed as narrowly as possible – particularly given the view among many lawyers that STRs run contrary to the confidentiality and loyalty requirements of the lawyer-client relationship.

The Interpretative Note to Recommendation 23 states that DFNBP’s should not be required to report suspicious transactions where they have obtained information raising their suspicions “*in circumstances where they are subject to professional secrecy or legal professional privilege*”. In many jurisdictions (or where cross-border issues arise), this qualification requires a very careful consideration of the ambit of professional secrecy or privilege. Such analyses have highlighted the lack of clarity around the meaning and ambit of such terms that in turn has led, in certain jurisdictions, to a protracted debate as to the scope of this caveat.

Before considering in more detail how the relevant Recommendations apply to lawyers, it is important to emphasise that these Recommendations do not have direct applicability to lawyers (or others). The Recommendations only apply as a result of individual countries adopting laws and regulations that are based upon them. There is a requirement upon countries that are members of FATF to implement the Recommendations and many other countries have chosen to do so. Many countries have implemented the Recommendations in whole or in part and members of FATF are “evaluated” based on their implementation of the Recommendations. Although lawyers need to understand the 40 Recommendations as they form the basis of the laws in many countries, and indeed have been strictly followed in many countries including for example through EU directives, it is the laws

and regulations in an individual country to which the lawyer (and others) are subjected to – accordingly, it is those laws and regulations that the lawyer needs to be both familiar with and comply with, not the 40 Recommendations themselves.

In this Guide we have discussed the Recommendations that apply to lawyers at length because it is beyond the scope of this Guide to provide an analysis of the legal regime in each country that has implemented the Recommendations and, to generalise broadly, many countries have adopted the Recommendations without significant change subject to two critical—and fundamental—points:

- (i) some countries, such as the U.K., have “gold plated” the 40 Recommendations, meaning that they have extended the 40 Recommendations to an expansive range of “predicate offences” (i.e., the offences that generate the money laundering that in turn generate the obligations to prevent money laundering), even if the conduct constituting the offence occurred outside the U.K., and not just serious criminal offences; and
- (ii) in some countries, for example the U.S., concerns about the impact of STR on the administration of justice, the lawyer-client relationship, the rule of law, and the independence of the legal profession, have led to an approach that focuses on educating lawyers regarding unwitting involvement so that criminals will not be able to find lawyers who will assist them in their unlawful schemes. In a recent empirical study regarding terrorist financing, U.S. law firms performed among the best among surveyed entities in refusing requests for help in suspicious circumstances. This is a good illustration of approaches that are “different” to those in the 40 Recommendations and are working effectively in practice.

The following discussion of the Recommendations (and suggested actions) is general and not country-specific. Nevertheless, a discussion of the 40 Recommendations is relevant to all lawyers, regardless of whether they are subject to corresponding national laws implementing the 40 Recommendations as they are the core international AML standards. In addition, lawyers have ethical obligations (including with regard to AML – see further Section C below) and a knowledge of the 40 Recommendations can help lawyers enhance their general AML compliance and better understand the issues that concern regulators.

Customer due diligence – Recommendation 10

This Recommendation requires lawyers to know who their client is when:

- (i) business relations are being established and certain occasional transactions are entered into;
- (ii) there is a suspicion of money laundering or terrorist financing; or
- (iii) there are doubts as to the veracity or adequacy of previously obtained customer identification data.

When dealing with a client that is not an individual or a group of individuals, effective CDD requires identifying not only the client but also its beneficial owner(s), i.e., the

person(s) who ultimately own or control the client. For more information on this, see paragraph (iii) of Section A of Part IV.

Suggested Actions For Lawyers

Identify the client and their beneficial owner

Use reliable, independent source documents, data or information. If dealing with a corporate, request structure chart and details of beneficial ownership

Understand the business relationship

Understand, and if appropriate, obtain information about the purpose and intended outcome of the transaction for which your services are being engaged

Maintain CDD activities

Conduct due diligence about the business relationship and services on an ongoing basis to ensure they accord with your knowledge of the client, its source of funds and risk profile

If you cannot carry out satisfactory CDD

Do not establish a business relationship or continue acting for the client. In relevant countries consider whether you are required to make an STR

Record keeping requirements – Recommendation 11

FATF recommends that, for a period of 5 years after the end of a business relationship or the date of an “occasional transaction”, lawyers maintain necessary records on all transactions (international and domestic) that could be required to comply with requests for information from competent authorities.

Suggested Actions For Lawyers

Relevant records

Keep documents obtained for your CDD measures (copies or originals), files and business correspondence for a period of time after the end of the business relationship or after the date of the “occasional transaction” (usually corresponding to the time period recommended by FATF (i.e., 5 years) or, if longer, a national limitation period (e.g., 10 years in Italy)). In the U.S., a number of states require lawyers to maintain certain client records for several years (e.g., 5-7 years in some states).

Records include

Electronic communications (e.g., emails) and documentation, as well as physical, hard copy communications (e.g., letters) and documentation

Records must be

“Sufficient to permit the reconstruction of individual transactions” (including the amounts and types of currency involved) so that they can serve as evidence in a prosecution

Enhanced CDD for politically-exposed persons – Recommendation 12

Lawyers must have appropriate risk-management systems in place to determine whether a client or its beneficial owner is a politically exposed person (“PEP”), that is, a person who is or has been entrusted with prominent public functions or his or her close associates.²⁰ Enhanced CDD measures must be applied to all *foreign* PEPs, their family members and close associates. In certain circumstances, enhanced CDD measures also may need to be applied to domestic PEPs or international organisation PEPs. If a lawyer determines a client or its beneficial owner to be a domestic or international organisation PEP, the lawyer must carry out a risk assessment of the business relationship with the

PEP (bearing in mind the same red flag indicators that apply to assessing money laundering risks generally, discussed in Part IV). If the outcome of such a risk assessment is that the business relationship would be one of higher risk, the lawyer ought to apply enhanced CDD measures consistent with those that would apply to a foreign PEP.

Underlying the rationale for applying enhanced CDD to PEPs and their associates is the influence that PEPs have, which puts them in positions that can be misused to launder money and finance terrorism, as well as to facilitate predicate offences, such as corruption and bribery.

Suggested Actions For Lawyers

When dealing with PEPs, or their families or close associates:

- obtain senior partner (or another partner's) approval for establishing/continuing the business relationship
- take reasonable steps to establish the source of wealth and funds
- conduct enhanced ongoing monitoring of the business relationship

Note: The broad definition of PEP may make it difficult to determine whether your clients (or their beneficial owners) are PEPs. Check whether you have access to any resources (such as a database containing the names and identities of PEPs) that may help you with this

New technologies – Recommendation 15

Lawyers must keep pace with new ways in which money laundering and terrorist financing are carried out because they could be advising on transactions involving such technologies.

Suggested Actions For Lawyers

New technologies – identify, assess and manage the risks that may arise when:

- new products and business practices are developed by/for lawyers
- new technologies are used by lawyers for new and existing products

Reliance on third parties and group-wide compliance – Recommendation 17

Lawyers can rely on a third-party to carry out CDD measures on their behalf. This is most likely to be relevant when the client is based in a different country to that in which the lawyer is based, e.g., a law firm in country A instructs a law firm in country B on behalf of a client. Note that when CDD is carried out through a third-party, AML responsibility still rests with the lawyer who is doing the relying, i.e., the relying lawyer may be found guilty if that lawyer undertook legal work that assisted money laundering activities having relied on someone who failed to perform proper CDD.

Suggested Actions For Lawyers

Choice of third party

Be satisfied that the third party (i) has a good reputation, (ii) is regulated, supervised and monitored, (iii) has measures in place for compliance with CDD and record-keeping requirements under Recommendations 10 and 11 and (iv) has necessary information concerning country specific risks in its country of operation

CDD information

Obtain necessary information under Recommendation 10 for your own records from the third party and satisfy yourself that copies of identification data and other documentation collected under CDD measures will be available from the third party upon request

Internal controls – Recommendation 18

Law firms and other organisations to which the 40 Recommendations apply must implement compliance programmes against money laundering and terrorist financing.

Suggested Actions For Lawyers

If you manage a law firm or practice

Ensure that an adequate AML compliance programme is in place and provide appropriate training for your employees on an ongoing basis

International law firms

Internal controls ensuring AML compliance must be implemented in foreign branches and majority-owned law firms abroad. Consider whether compliance with additional local requirements is required

Enhanced CDD for higher risk countries – Recommendation 19

The 40 Recommendations call for enhanced CDD measures to be applied to clients from higher risk countries (being countries designated by FATF as such²¹).

Suggested Actions For Lawyers

Identifying high risk countries

See Part IV of this Guide for a list of country and geographic risk factors that you can use to identify whether you are dealing with a client from a higher risk country

Client from higher risk country

When dealing with such natural or legal persons and financial institutions apply enhanced measures that are effective and proportionate to the risks, e.g., carry out more thorough background checks and insist on provision of original documents where practicable

Suspicious transaction reporting – Recommendation 20

This Recommendation suggests that national laws should require that suspicions that funds are the proceeds of crime be reported to a financial intelligence unit (“FIU”). Many lawyers view this as the most difficult Recommendation to comply with as it is contrary to their views of the traditional confidentialities between client and lawyer. Accordingly, great care should be taken before any such report is made. However, in those countries where lawyers are required to make reports they need to be aware of the obligation to do

so and the consequences of any failure to report. There are examples in some jurisdictions (e.g., the U.K.) of lawyers being successfully prosecuted for a failure to report. In countries where the obligation to report exists, the relevant bar association (or specialist group) often provides advice and guidance on the topic and lawyers, in particular sole practitioners and small law firms, are encouraged to take advantage of this support.

Suggested Actions For Lawyers

Suspicious Transaction Reports

Familiarise yourself with the requirements relating to STRs in the relevant jurisdiction. If there is an obligation to make STRs and you suspect, or have reasonable grounds to suspect, that funds are proceeds of a criminal or terrorist activity report your suspicions to the relevant FIU (or as required in the relevant jurisdiction(s))

Tipping off and confidentiality – Recommendation 21

There is a tension between client confidentiality and compliance with AML obligations by lawyers, who owe an ethical obligation to their clients to maintain confidence and to act in their clients' best interests (see Section C below). Except in limited circumstances, in many countries lawyers may not divulge confidential client information without seeking their clients' prior consent. Some countries do not even allow clients to "waive" their right to confidentiality. These obligations are juxtaposed against the fact that compliance with AML obligations in some countries necessitates the reporting of confidential information by lawyers to the authorities. Recommendation 21 aims to ensure that, when sharing their suspicions about money laundering and terrorist financing activity with the relevant authorities in good faith, lawyers:

- (i) are protected from the repercussions of breaching the duty of confidentiality; and
- (ii) do not tip-off their clients as to the STRs they make, so as to not thwart any investigative efforts into the reported person's activities. Avoiding tipping off is an extremely problematic issue for lawyers not least as it may involve the lawyers ignoring the client and/or stalling and/or taking other action that is not consistent with good service and putting the client first. Even in situations where the FIU permits a lawyer to continue acting the lawyer is still under an obligation to avoid tipping off and, for example, avoiding an honest explanation for any delay that may have occurred as a result of the reporting.

Suggested Actions For Lawyers

STRs

Consider adding provisions to your terms of engagement that track the protections in Recommendation 21 so as to protect yourself contractually from civil liability for compliance with STR obligations if you report suspicions in good faith to the FIU

Tipping-off

Do not disclose to, or tip off, the client that an STR is being filed with the FIU

B. National obligations

As mentioned in Part I, the 40 Recommendations do not themselves impose obligations on lawyers – instead, they are a set of recommendations that national legislatures should follow when imposing AML obligations through domestic law. Accordingly, where AML obligations have been imposed via national laws, what really matters to lawyers are the laws of the country (or countries) in which they practice.

In some jurisdictions national laws reflect collaborative efforts by a group of countries. A prime example of this is the EU, which, since 2003, has been imposing AML obligations on lawyers via the Second Anti-Money Laundering Directive.²² Among other things, the directive requires lawyers to conduct CDD whenever they carry out activities that are largely identical with those listed in Recommendation 22(d) – the influence of the Recommendations is readily apparent in the directive. Indeed, the EU is currently updating the directive to reflect the changes to the 40 Recommendations and published a proposal in 2013 for a fourth AML Directive.²³ Of course, directives do not have direct effect in the EU member states and are implemented via national laws and regulations. These may therefore be implemented differently. Nonetheless, there is a common approach to imposing AML obligations on lawyers throughout all the EU member states.

There are jurisdictions where no formal AML obligations are imposed on lawyers, but in which lawyers are still expected to play a role in the fight against money laundering. For example, unlike their European counterparts, U.S. lawyers are not subject to the general AML responsibilities.²⁴ They are not mandated by separate law to comply with those gatekeeper requirements concerning suspicious activity reporting, CDD or record-keeping.²⁵ This does not mean they should reduce their awareness of suspicious transactions involving their clients. Furthermore, although not part of a set of wider AML obligations, U.S. lawyers must not:

- retain a fee received from illicit funds;
- receive currency of \$10,000 or more unless they file currency transaction reports;²⁶ and
- transact, facilitate or advise with respect to a transaction with “blocked persons”, namely drug traffickers, terrorists and former foreign leaders of certain nations like North Korea, or with any other person subject to U.S. economic sanctions, without a license from the U.S. Treasury Department.²⁷

In jurisdictions where AML obligations are not imposed by law on lawyers, but where civil or criminal liability will still arise if a lawyer participates (even unwittingly) in a client’s scheme to launder money, it would be advisable for lawyers to be aware of the 40 Recommendations to minimise the risk of facing criminal prosecution or civil liability.

Throughout the world, self-regulating organisations (“SROs”) (or, in certain jurisdictions, co-regulating organisations) such as bar associations play a part in shaping lawyers’ AML obligations.²⁸ Depending on the powers and responsibilities of the SROs (e.g., in the U.S. these include independent lawyer disciplinary agencies), they may be able to facilitate or

ensure compliance by lawyers with the relevant legislation and/or develop guidance relating to money laundering and terrorist financing (refer to Section B of Part I).

In jurisdictions where there are no laws imposing AML or related obligations, lawyers still have ethical obligations that require them to avoid supporting criminal activity and being unwittingly involved in its pursuit (see Section C below). Those lawyers who are not subject to any relevant national laws should have regard to international standards (predominantly the 40 Recommendations) to ensure that they are meeting their ethical obligations. Such lawyers will still be faced with the difficult issue of reporting money laundering suspicions to authorities, which, if there are no national laws on AML compliance, is unlikely to be a regulated issue. In such circumstances, we suggest that lawyers consult applicable ethics rules and standards as well as guidance issued by their bar association(s) or law societies.

C. Ethical obligations and STRs – challenges to lawyers

Among other obligations relating to criminal conduct, professional ethics require lawyers not to assist clients in the conduct of criminal activity. Clearly, an important part of the lawyer’s role is to represent persons who have been charged with criminal activity and indeed to represent guilty criminals (e.g., in sentencing and litigation situations). Similarly, lawyers frequently advise clients as to whether certain actions may be criminal and/or illegal (e.g., advising on whether a tax scheme is a legal avoidance of tax, as opposed to an illegal evasion of tax). Neither FATF nor any other regulatory body has apparently suggested that the role a lawyer plays in providing such types of advice conflicts with underlying ethical requirements, or is inconsistent with the principles behind the 40 Recommendations and national legislation.

As a profession, lawyers accept the premise that they should not assist clients in the conduct of criminal activity and the profession should be on its guard against misuse by criminals. Ethical obligations arguably already require lawyers to analyse carefully the reputation and motivation of their clients through “client due diligence” – there is very little disagreement about this among lawyers. The more difficult ethical issue is whether lawyers should be required to report clients to the authorities if they suspect them of money laundering. The applicable legal standard for forming a “suspicion,” which might be quite low, is a factor that adds to the difficulty facing lawyers in this regard.

A public interest underlies both AML measures and the duties of confidentiality that lawyers owe to clients. However, as mentioned above in the context of Recommendation 21, there is a tension between compliance with AML obligations and the duties of confidentiality and loyalty that the legal profession owes to its clients. In requiring lawyers to file STRs on their clients, the 40 Recommendations risk compromising the independence of the profession, because by reporting on their clients’ suspect transactions and activities to the authorities, lawyers are effectively becoming agents of the state.²⁹ The “no-tipping off rule”, which forbids lawyers who file STRs from informing their client that they have done so, may further damage the clients’ confidence in their lawyers’ services and impact the administration of justice.³⁰

Traditionally, communications between lawyers and clients in the provision of legal advice and representation in current and future litigation have been protected by legal professional privilege (a common law concept) and professional secrecy (a continental law concept), which are only abrogated in certain countries under certain circumstances by statute, ethical rule, or because the arrangement between lawyer and client is criminal in nature. As mentioned in Section A above, the tension between simultaneous compliance with AML and confidentiality obligations is addressed through the Interpretative Note to Recommendation 23, which excludes lawyers from the obligation to report suspicious transactions where they obtain information about them in privileged circumstances or subject to professional secrecy.³¹ The Interpretative Notes, like the Recommendations themselves, are also directed at countries implementing the Recommendations, rather than at lawyers. Further, the Interpretative Note to Recommendation 23 also states that “[i]t is for each country to determine the matters that would fall under legal professional privilege or professional secrecy”. Accordingly, knowledge of national laws relating to privilege or professional secrecy is key for lawyers concerned about breaching confidentiality when making an STR, as national laws will determine whether there is a concept of privilege or professional secrecy in the relevant jurisdiction and what circumstances it covers. As an example, the U.K. has a specific “privileged circumstances” defence to the requirement to report suspicions of money laundering.³² Lawyers should consult guidance published by their local bar association to determine the existence, and extent, of any privilege or professional secrecy exception in their jurisdiction.

Where national legislation does not provide an answer, the following three factors should help reduce the perceived tension between AML compliance and confidentiality obligations and highlight the common ground between the two duties:

- (i) AML obligations mostly arise in the context of activities that are criminal;
- (ii) the goal behind the FATF 40 Recommendations of trying to prevent lawyers from assisting clients in money laundering and terrorist financing activities is consistent with the ethical obligations of lawyers; and
- (iii) the ethical obligation to act in accordance with the client’s interests as the overriding imperative guiding professional behaviour is not necessarily absolute.

The IBA’s International Principles on Conduct for Lawyers make it clear that the principle of treating client interests as paramount is qualified by duties owed to a court and the requirement to act in the interests of justice.³³ The same concept is found in ABA Model Rule of Professional Conduct 3.3, in which certain specific obligations to the tribunal take precedence over obligations to the clients. The CCBE Code of Conduct lays down similar principles for European lawyers.³⁴ The ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 463 in May 2013 dealing with the ethical dimensions of the ABA’s voluntary AML good practice guidance and noting the tensions between compliance with AML obligations and the duty of confidentiality that lawyers owe to their clients.³⁵ While guidance from the IBA, CCBE and the ABA is not binding, it does underscore the fact that members of the legal profession are also guardians of justice and are expected by society to uphold the rule of law. Any duties owed by lawyers by virtue of the fact that they are lawyers should be interpreted in light

of the role that members of the legal profession are expected to play in society – such expectation does not include creating barriers that can be abused by persons engaging in money laundering and terrorist financing for their criminal gain. Although there seems to be a global consensus that lawyers owe obligations to multiple constituencies, there is great variation in how these competing interests are balanced in any particular country. All agree that a lawyer should not assist a client in criminal activities, but the details of how these obligations are implemented vary from country to country. The resolution is often the result of detailed policy considerations, input from stakeholders and consideration of the context and history within the jurisdiction. Accordingly, one can agree on the overarching principle that lawyers should not assist criminals in illegal activity, as FATF has sought to promulgate, but implementation should be appropriate to each jurisdiction. The key point is that it is vital that lawyers are not facilitating criminal financial flows and that, instead, they uphold the law.

D. Policy issues for the profession to consider

Additionally, there are certain other policy issues – related to the underlying criminal offence – for the legal profession to consider. Whether conduct is criminal has a bearing on whether proceeds flowing from such conduct constitute the “proceeds” of crime within the scope of AML regulations. Examples of these issues include:

- Should there be a standard for the types of criminal conduct subject to AML regulations? Given that there is such a wide spectrum of severity of criminal offences – ranging from breaches of technical regulatory regimes to drug trafficking – it is questionable if reports arising from certain predicate criminal offences (e.g., inadvertent breaches of technical regulatory regimes) aid FIUs in combatting money laundering.
- If there should be a standard, how should the line be drawn?
- Would it be helpful to instead focus on the proceeds resulting from such breaches and have a *de minimus* monetary figure before reporting is required?
- Should there be a global standard in relation to what is criminal for AML purposes? The difference in the types of criminal offences globally means that there is a disparity as to the types of offences that may trigger reporting obligations in different countries. This would be particularly relevant if the conduct is multi-jurisdictional and may only be criminal in one jurisdiction. Should the proceeds flowing from such a transaction trigger reporting obligations only in the jurisdiction in which the conduct is criminalised?

This Guide raises these policy issues because a discussion of them is helpful to understanding the impact of varying standards of criminal conduct on the scope and sources of AML regulations. This Guide does not, however, seek to provide answers to these policy issues.

III. Vulnerabilities of the Legal Profession to Money Laundering

III. Vulnerabilities of the Legal Profession to Money Laundering

Lawyers are potentially vulnerable to being misused and so unwittingly assisting in the money laundering activities of criminals. Criminals may seek legal services to lend a gloss of legitimacy to their crime-based financial, corporate and real estate transactions and are increasingly adopting sophisticated and complex means to channel illicit funds into and through the financial system. Special considerations apply to identifying persons who wish to access legal services to facilitate funding of terrorist activities. While awareness of the general instances of money laundering should help, there are additional vulnerabilities to consider in relation to terrorist financing. In particular, terrorist financing may involve low dollar amounts and the use of activities that present as innocent and aid in concealing the intentions of the client (e.g., masking financing as charitable donations).³⁶ This Guide does not comprehensively address the vulnerabilities of the legal profession to terrorist financing in particular and, instead, focuses on money laundering generally.

There are three main reasons why lawyers are exposed to misuse by criminals involved in money laundering activities. First, engaging a lawyer adds respectability and an appearance of legitimacy to any activities being undertaken – criminals concerned about their activities appearing illegitimate will seek the involvement of a lawyer as a “stamp of approval” for certain activities. Second, the services that lawyers provide, e.g., setting up companies and trusts, or carrying out conveyancing procedures, are methods that criminals can use to facilitate money laundering. Third, lawyers handle client money in many jurisdictions – this means that they are capable, even unwittingly, of “cleansing” money by simply putting it into their client account.

A. Types of services that are vulnerable to money laundering

FATF has identified certain legal services, though not necessarily accepted by the legal profession, as particularly susceptible to misuse by criminals in the context of money laundering and terrorist financing:



Figure 2: Money laundering and terrorist financing – susceptible legal services³⁷

Lawyers involved in real estate transactions should be particularly vigilant according to FATF. Data from STRs and confiscated assets reports compiled by FATF show that real estate assets formed 30% of all criminal assets in the years 2011–2013, highlighting that criminals tend to channel their illegal funds into the financial system through the guise of property purchases and sales.³⁸

Even the most vigilant of lawyers may have difficulty identifying transactions or funds that are tainted with illicit origin when criminal proceeds have already been “laundered” to a large extent to disguise any appearance of irregularity. Moreover, the patterns of money laundering and terrorist financing are rarely static, so the red flags that appear useful one day need to be updated the next. Lawyers should thus keep themselves up-to-date with the latest news and movements of criminal activity through resources provided by FATF and their own bar associations and law societies, as well as through appropriate educational programmes. This is an area where bar associations and law societies can play an extremely useful role to ensure that members are kept abreast of any developments.

B. How lawyers may be involved: from intentional involvement through wilful blindness / negligent involvement to unwitting involvement

The legal profession’s involvement in money laundering and terrorist financing transactions can be drawn across a spectrum, ranging from a lawyer being wholly complicit in the criminal activity to being unknowingly or unintentionally involved.

The legal profession does not, and never will, condone the actions of any lawyer who

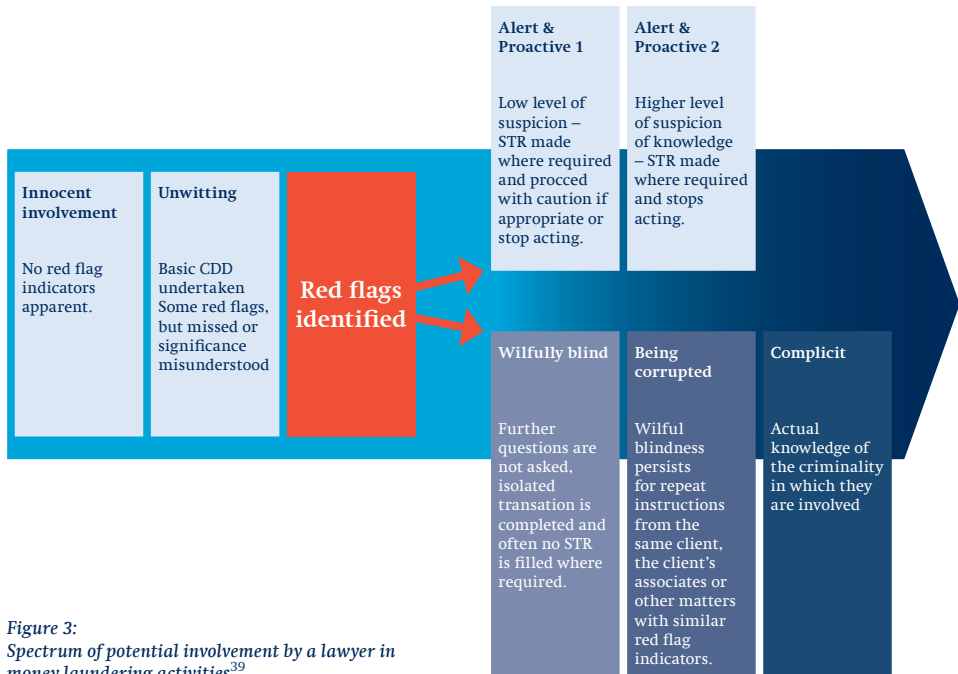


Figure 3: Spectrum of potential involvement by a lawyer in money laundering activities³⁹

knowingly participates in the criminal activity of a client, regardless of whether it is related to money laundering – they are likely to be directly guilty of a criminal offence. This Guide aims to provide information and guidance for lawyers who might unknowingly or unintentionally be involved in money laundering and terrorist financing activity because, for example, red flag indicators are not readily apparent as the transaction proceeds and funds have been “cleaned” of all traces of criminality, or because the lawyers fail to appreciate the significance of the red flags in front of them.⁴⁰

It is impossible for lawyers to avoid completely innocent involvement because in some circumstances, there are no red flag indicators apparent. There is nothing to alert even the most observant and suspicious lawyer. Further down the spectrum, lawyers who observe some of the practices suggested in this Guide should be able to avoid being accused of unwitting involvement or wilful blindness and should be better at questioning whether they are being wilfully blind. Wilful blindness should be guarded against and the lawyer who is vigilant will cease to be ‘wilfully blind’ and take appropriate action. The lawyer who is knowingly and wilfully blind to the situation is, for all intents and purposes, complicit with the criminal and could be prosecuted accordingly.

If the activities of a client or other party to a client’s transaction raise suspicions, a lawyer should file an STR (where this is required) and, depending on the level of information the lawyer has for the suspicion and the lawyer’s professional obligations in the given circumstances, either proceed with the transaction with caution, or cease acting for the client. The lawyer, however, must be careful not to disclose to the client the fact that an STR was filed given the no tipping-off provisions that typically accompany rules requiring suspicious transaction reporting.

Even where individual red flag indicators do not sufficiently raise the suspicion of money laundering, the lawyer ought to consider whether there are grounds to inquire more of a client to remove concerns about the source of funds being used in the transaction – i.e., are you asking enough questions and are you in danger of being accused of being wilfully blind?

A lack of information may also raise concerns. A client’s evasiveness or unwillingness to give answers may arouse suspicion that the lawyer’s services are being misused, especially where there are multiple red flag indicators present. Questioning why your client is not forthcoming will help you to establish whether the client has legitimate reasons for withholding information (e.g., concerns around breaching confidentiality agreements) or whether the client’s evasiveness is an indication of underlying criminal intentions.

IV. The Risk-based Approach and Money Laundering Red Flags

IV. The Risk-Based Approach and Money Laundering Red Flags

A. The Risk-Based Approach to Fighting Money Laundering

(i) What is the Risk-Based Approach?

A risk-based approach is widely accepted, including by FATF and the regulators, as the most effective way of tackling money laundering and terrorist financing, as it:

- reduces the “checklist” mentality inherent in a “rules-based” approach that requires compliance with rules irrespective of the underlying risk;
- ensures that the highest risk scenarios receive enhanced CDD and transaction monitoring; and
- allows lawyers and law firms to most effectively and efficiently deploy their resources and personnel to ensure compliance with the applicable AML regime.

The IBA, ABA and CCBE formed an informal working group that developed, with FATF, a risk-based approach guidance for lawyers. This resulted in FATF’s publication of the “Risk-Based Approach Guidance for Legal Professionals”⁴¹ (“Lawyer RBA Guidance”) in 2008. The Lawyer RBA Guidance divides risks into three categories – country/geographic risk, client risk and service risk – each of which has a number of elements or factors that should be evaluated separately.

Country/ Geographic Risk	Client Risk	Service Risk
<p><i>Countries subject to sanctions, embargoes or similar measures issued by, for example, the UN</i></p> <p><i>Countries identified by credible sources (i.e., well-known bodies that are regarded as reputable, e.g., International Monetary Fund, The World Bank, and OFAC) as:</i></p> <ul style="list-style-type: none"> • <i>generally lacking appropriate AML laws, regulations and other measures;</i> • <i>being a location from which funds or support are provided to terrorist organisations; or</i> • <i>having significant levels of corruption or other criminal activity.</i> 	<p><i>Domestic and international PEPs</i></p> <p><i>Entity, structure or relationships of client make it difficult to identify its beneficial owner or controlling interests (e.g., the unexplained use of legal persons or legal arrangements)</i></p> <p><i>Charities and “not-for-profit” organisations that are not monitored or supervised by authorities or SROs</i></p> <p><i>Use of financial intermediaries that are neither subject to adequate AML laws nor adequately supervised by authorities or SROs</i></p>	<p><i>Where lawyers, acting as financial intermediaries, actually handle the receipt and transmission of funds through accounts they control</i></p> <p><i>Services to conceal improperly beneficial ownership from competent authorities</i></p> <p><i>Services requested by the client for which the lawyer does not have expertise (unless the lawyer is referring the request to an appropriately trained professional for advice)</i></p> <p><i>Transfer of real estate between parties in an unusually short time period</i></p>

Country/ Geographic Risk	Client Risk	Service Risk
	<p>Clients who:</p> <ul style="list-style-type: none"> • conduct their business relationships or request services in unconventional circumstances; • are cash-intensive businesses (e.g., money service businesses and casinos), that are not usually cash-rich but generate substantial amounts of cash; • have no address, or multiple addresses; or • change settlement or execution instructions. 	<p>Payments from un-associated or unknown third parties and payments for fees in cash where this would not be typical</p> <p>Consideration is inadequate or excessive</p> <p>Clients who offer to pay extraordinary fees for services that would not warrant such a premium</p>

Table 3:
Factors relevant to evaluating risks of money laundering and terrorist financing in the legal profession⁴²

For example, a transaction could have a “high” service risk because certain types of services (e.g., clearing money through client accounts) are involved, but a “low” country risk because it originates from a country that is not subject to UN sanctions and has appropriate AML laws.

This approach to risk analysis is not explicitly embedded in any national laws to which a particular lawyer may be subject. The Lawyer RBA Guidance generally serves as good guidance in terms of encouraging lawyers how to think about the risks they face in an AML or terrorist financing context. Further, it ties in well with the red flag indicators discussed in Part IV – a risk-based approach: (i) supports lawyers in identifying red flags through ‘onboarding’ processes such as CDD and (ii) provides a framework to alert lawyers to red flags at various stages of the transaction that money laundering may be an issue, prompting further analysis, questions and/or preventative action. Sections B, C and D below suggest how lawyers should use a risk-based analysis in practice and for training purposes. Where national laws do not have scope to allow for a risk-approach to be used, the following still provides a useful overview of how CDD may be best approached.

(ii) Key Risk-Based Approach Procedures

A risk-based approach can be effectively implemented by lawyers using certain procedures, assisting them with identifying and assessing the risks posed by red flag indicators.

Client Intake Procedure	<ul style="list-style-type: none"> • Identify and verify the identity of each client on a timely basis (particularly if the client identity changes) • Identify, and take reasonable measures to verify the identity of, the beneficial owner • Understand client's circumstances and business, depending on the nature, scope and timing of services to be provided. You can obtain this information from clients during the normal course of their instructions
Proceed with engagement?	<ul style="list-style-type: none"> • After completing the client intake procedure consider whether there is a risk for the lawyer of committing the substantive offence of money laundering though assisting the client • Make a risk assessment of any red flags present and clarifications sought from the client to decide whether to proceed, or continue, with the engagement
Monitor	<ul style="list-style-type: none"> • Continue to monitor the client's profile for signs of money laundering and terrorist financing, particularly if the client is a PEP or from a higher risk country • Adopt the risk-based approach of evaluating money laundering and terrorist financing risks by client, type of legal service, funds and client's choice of lawyer
If required and/or permitted, making an STR	<ul style="list-style-type: none"> • If there are grounds for suspecting criminal proceeds are being used in a transaction or in engaging the lawyer, the lawyer should, where required, make an STR to the FIU of the relevant jurisdiction • Consider whether the client should be advised to make its own STR to avoid committing a principal money laundering offence • Consider whether to stop acting for the client immediately after making the STR if the client is the subject of the STR or if the client insists on completing a transaction in violation of applicable law
Avoid Tipping Off	<ul style="list-style-type: none"> • When an STR is filed with the FIU, refrain from disclosing to the client or related parties that an STR has been filed

Figure 4:
Suggested practice for lawyers concerned about money laundering activities

(iii) Client intake procedures and monitoring

AML compliance begins with adequate client intake procedures, which should start with obtaining information about the client and verifying its identity. Beyond getting the client's name, address and telephone number, it may be necessary to get additional information, for example:⁴³

- client's past and present employment background;
- place and date of birth;
- past and current residential address;
- business address and phone numbers;
- marital status;

- names and other identification data of spouse(s) and children;
- name and contact details of the client's certified public accountant;
- past criminal record;
- pending lawsuits; and
- tax filings with government authorities.

In addition to this basic information, the lawyer should check if the client's name is on any relevant official database or "black list" concerning financial or economic sanctions, for example, the Consolidated List of Persons, Groups and Entities Subject to EU Financial Sanctions maintained by the European Commission and the Specially Designated Nationals and Blocked Persons List and Sectoral Sanctions Identifications List maintained by the U.S. Treasury Department. Another good starting point is simply conducting an Internet search of the client's name.

If any red flags about the client are raised, enhanced or additional review may be appropriate. Larger firms may do well to implement procedures for referral of higher risk clients to management levels or specially formed committees. Smaller firms may not be able to implement the same kind of procedures, but even sole practitioners should seek an additional review when red flags are raised or discuss your concerns with a colleague or a local bar association or representative of a specialist group, such as a sole practitioners association.

As briefly mentioned in the context of Recommendation 10 in Part II, CDD requires identifying not only the client but also its beneficial owner(s), i.e., the person(s) who ultimately own or control the client. Depending on whether a lawyer is dealing with a client that is a company, trust, partnership or other legal entity, the beneficial owner can exercise control over the client through ownership of shares, voting rights, or other forms of control over management. Conducting CDD on the client should alert the lawyer to the presence of a beneficial owner, (which he or she can also clarify directly by asking the client). Where the client has a beneficial owner, the lawyer should use the same CDD procedures that are used in connection with verifying the client's identity and take reasonable steps to identify and verify the identity of the beneficial owner.

When dealing with clients who are individuals there is no need to identify potential beneficial owners as such. However, a similar concept applies – just as a beneficial owner will direct a corporate client's activities, instructions that are seemingly coming from a client who is an individual may be directed by a third party. Lawyers must remember to establish that they are carrying out legal services for the client in front of them in accordance with that client's instructions, otherwise lawyers will not be capable of verifying the motive of a client and the purpose for which their services are being engaged. Lawyers should be wary of 'front guys' or 'agents' who are merely used as a means of communicating a third party's instructions.

Good practice indicates that lawyers should have appropriate internal "on-boarding" procedures. At a minimum, lawyers should have in place checklists of what basic CDD

measures should consist of so that they have a reference point for where to start. Law societies in various jurisdictions may provide a basic list of what CDD measures are required to be carried out by the law firms in that jurisdiction (e.g., the Law Society of Hong Kong). Lawyers could use these as a starting point to assist them in developing their own “on-boarding” procedures. Ideally, lawyers should aim to develop an internal policy and procedure for on-boarding so that CDD measures are consistently applied and that there is clear evidence of the approach taken. A lack of satisfactory procedures means that lawyers remain at risk of committing money laundering offences, and can in certain jurisdictions result in fines, civil penalties or even criminal prosecution by the authorities.

The same basic principles that apply in the client intake process are also applicable when monitoring the client relationship. As the profile (or even the identity) of the client may change over time, vigilant lawyers should, as circumstances change, re-evaluate and update the client profile. The goal of this ongoing monitoring is for lawyers to monitor and regularly re-assess whether they have been asked to facilitate money laundering and terrorist financing. If the lawyers conclude that this is why they have been retained, they should decline to continue the representation. Lawyers should evaluate the ongoing money laundering and terrorist financing risk of continuing to work for a client through the same risk-based approach used at intake – country risk, client risk and service risk.

B. How to use “red flags” to assess money laundering or terrorist financing

Looking for and recognising red flags helps alert lawyers to the potential for misuse and helps them to identify possible money laundering and terrorist financing activities. Hence, regardless of the area of law that is the focus of their practice, lawyers should be aware of certain red flag indicators that may arise in every day practice. When reading this Section B, it should be noted that:

- the red flags discussed are contextual – client risks and the source of funds may compel further inquiry by the lawyer; and
- the mere presence of a red flag indicator is not necessarily a basis for a suspicion of money laundering or terrorist financing – a client may be able to provide a legitimate explanation.

We will discuss red flags as they arise in the context of:

- the client;
- the services lawyers provide;
- the clients’ funds; and
- the clients’ choice of lawyer.

(i) Red flags about the client – is the client risky?

The major source of red flags is the “person” in front of you – whether an individual or a company. Clients may themselves have criminal intentions or they may, knowingly or not, become involved with entities that do, e.g., through investments. It is important to

scrutinise the person in front of you and the intentions behind their instructions to understand more about the person you are being engaged by and the context of the services that are being requested. Red flag indicators relating to client risk include:

Client's behaviour or identity	Concealment techniques	The relationship between the client and counterparties
<p>Client is secretive or evasive about:</p> <ul style="list-style-type: none"> • its identity or that of its beneficial owner; • the source of funds or money; or • why it is doing the transaction in the way it is <p>Client is:</p> <ul style="list-style-type: none"> • known to have convictions, or to be currently under investigation for, acquisitive crime or has known connections with criminals; • related to or a known associate of a person listed as being involved or suspected of involvement with terrorists or terrorist financing operations; • involved in a transaction that engages a highly technical or regulatory regime that imposes criminal sanctions for breaches (increasing the risk of a predicate offence being committed); or • unusually familiar with the ordinary standards provided for by the law in satisfactory customer identification, data entries and STRs, or asks repeated questions on related procedures 	<ul style="list-style-type: none"> • Use of intermediaries without good reason • Avoidance of personal contact for no good reason • Reluctance to disclose information, data and documents that are necessary to enable the execution of the transaction • Use of false or counterfeited documentation • The client is a business entity that cannot be found on the Internet 	<ul style="list-style-type: none"> • Ties between the parties of a family, employment, corporate or any other nature generate doubts as to the real nature/ reason for transaction • Multiple appearances of the same parties in transactions over a short period of time • The parties attempt to disguise the real owner or parties to the transaction • The natural person acting as a director or representative does not appear to be a suitable representative <p>The parties are:</p> <ul style="list-style-type: none"> • native to, resident in, or incorporated in a higher-risk country; • connected without apparent business reason; • of an unusual age for executing parties; • not the same as the persons actually directing the operation

Table 4:
Summary of client risk profiles

The nature of the client relationship will also be a factor in considering the client risk at hand. If the lawyer has been regularly representing the client for many years on certain types of transactions, there is low risk should the client request that the lawyer carry out the same, or similar, type of transaction again. Accordingly, reduced CDD would suffice

in the circumstances. By contrast, a sudden change in the transactions being undertaken by an existing client or taking on a new client that is reluctant to disclose information may raise red flags and call for heightened scrutiny.

Understanding whether substantial client risk exists also requires lawyers to keep track of country risk profiles – which country is the client from and where are they doing business? This will be particularly important where a lawyer’s clients are usually located in different jurisdictions from that lawyer. Rankings of corruption provided by Transparency International (a global civil society organisation that fights corruption), and reports collated by The World Bank annually may be useful resources in this regard.⁴⁴

Please refer to case studies 1, 2, 3 and 4 in Part V for examples of client-related red flags.

(ii) Red flags in the services provided – are the services risky?

Some services that are the “bread and butter” of a lawyer’s work are sought after by those seeking to launder money, as these services facilitate money laundering through, for example, creating structures in which money can be concealed (e.g., complicated company and trust structures), or providing excuses for depositing money into client accounts⁴⁵ (e.g., real estate transactions).

Criminals might try to misuse client accounts to convert the cash proceeds of crime into less suspicious assets or to swap “dirty money” for “clean money”. Attempts to misuse client accounts might occur in, for example, the case of ‘aborted transactions’ – criminals may avoid suspicion by appearing to conduct a purported legitimate transaction that, for one reason or another, collapses before completion, but after the transfer of illegitimate funds into a lawyer’s client account. It may be difficult to ascertain whether an aborted transaction was legitimate. Look out for circumstances where the client: (i) tells you that funds are coming from one source and at the last minute changes the source of funds; or (ii) asks you to send money received into your client account back to its source, to a third party or multiple recipients, sometimes according to the direction of a third party (in order to conceal the identity of the real criminal client). Remember that you should only handle clients’ money in connection with underlying legal work. If a client is eager to transfer money into your client account at the very outset of instructing you this should raise a red flag – make sure that you have had enough time to conduct CDD and establish the nature and purposes of a transaction before you share client account details with a client.

Please refer to case study 5 in Part V for examples of client account-related red flags.

Law enforcement authorities believe that the purchase of real estate is a common method for disposing of criminal proceeds. Real estate is generally an appreciating asset and the subsequent sale of the asset can provide a legitimate reason for the appearance of funds.

Please refer to case studies 6, 7 and 8 in Part V for examples of real estate-related red flags.

The company and trust structures may be exploited by criminals who wish to retain control over criminally derived assets while creating impediments to law enforcement agencies in tracing the origin and ownership of assets. Criminals will often seek to have

lawyers create companies and trusts, as well as be involved in the management of companies and trusts, to provide greater respectability and legitimacy to the entities and their activities. The trusts typically involve a settlor or trustor (who creates the trust and funds it with his or her property), assets being transferred into a trust, one or more trustees (who are given responsibility for safeguarding the assets and making distributions pursuant to the trust document), and one or more beneficiaries (to whom distributions of income or underlying assets can or must be made).

In some countries, a lawyer may be prohibited from acting as a trustee or as a company director. In countries where this is permitted, there are differing rules as to whether that lawyer can also provide external legal advice or otherwise act for the company or trust. Where such rules exist, funds relating to activities of the company or trust are prevented from going through client accounts. Some countries strictly regulate who can form and manage companies and trusts while other jurisdictions have no, or comparatively lax, laws regulating these issues.

Shell companies are business or corporate entities that do not have any business activities or recognisable assets themselves. They may be used for legitimate purposes such as serving as transaction vehicles. However, they are also an easy and inexpensive way to disguise beneficial ownership and the flow of illegitimate funds and so are attractive to criminals engaged in money laundering. You should be suspicious if a client engages your services only in connection with the routine aspects of forming an entity, without seeking legal advice on the appropriateness of the company structure and related matters. In jurisdictions where members of the public may register companies themselves with the company register, this may indicate that they are seeking to add respectability to the creation of the shell company.

Please refer to case study 1, 9 and 10 in Part V for examples of company and trust structure-related red flags.

Litigation is not an activity covered by the Recommendations, i.e., it is not in the list in Recommendation 22(d) and does not trigger an obligation to conduct CDD or file an STR. However, in the English Court of Appeal case of *Bowman v Fels*,⁴⁶ it was held that while genuine litigation should be exempt from reporting suspicions of money laundering to the U.K. National Criminal Intelligence Service (predecessor to the National Crime Agency), such exemption should not extend to sham litigation, which is an abuse of the court's processes (the case of *Bowman v Fels* should be understood in the context of the English approach to AML legislation that may not apply in other countries)⁴⁷. Litigation may constitute *sham litigation* if the subject of the dispute is fabricated (e.g., if there is no actual claim and the litigation is simply a pretext for transferring the proceeds of crime from one entity to another possibly via a client account) or if the subject of the litigation is a contract relating to criminal activity that a court would not enforce.

Please refer to case study 11 in Part V for examples of litigation-related red flags.

iii. Red flags relating to our clients' funds

The third major source of red flag indicators that lawyers should be aware of are the funds received from clients in connection with transactions and legal proceedings.

Lawyers should consider whether there is anything unusual about the amount of funds involved, their source or the mode of payment used by the client.

Size of funds	Source of funds	Mode of payment
<p>There is no legitimate explanation for:</p> <ul style="list-style-type: none"> • a disproportionate amount of private funding, bearer cheques or cash (consider individual's socio-economic, or company's economic, profile); • a significant increase in capital for a recently incorporated company or successive contributions over a short period of time to the same company; • receipt by the company of an injection of capital or assets that is high in comparison with the business, size or market value of the company performing; • an excessively high or low price attached to securities being transferred; • a large financial transaction, especially if requested by a recently created company, where it is not justified by the corporate purpose, the activity of the client or its group companies; or • the client or third party contributing a significant sum in cash as collateral provided by the borrower/debtor rather than simply using those funds directly. 	<p>The source of funds is unusual because:</p> <ul style="list-style-type: none"> • third party funding either for the transaction or for fees/taxes involved with no apparent connection or legitimate explanation; • funds are received from or sent to a foreign country when there is no apparent connection between the country and the client; • funds are received from or sent to higher-risk countries; • the client is using multiple bank accounts or foreign accounts without good reason; • private expenditure is funded by a company, business or government; or • the collateral being provided for the transaction is currently located in a higher-risk country. 	<ul style="list-style-type: none"> • The asset is purchased with cash and then rapidly used as collateral for a loan. <p>There is no legitimate explanation for:</p> <ul style="list-style-type: none"> • an unusually short repayment period having been set; • mortgages being repeatedly repaid significantly prior to the initially agreed maturity date; or • finance being provided by a lender, either a natural or legal person, other than a credit institution.

Table 5:
Summary of fund risk profiles

Please refer to case studies 12 and 13 in Part V for examples of client funds-related red flags.

(iv) Red flags relating to the client's choice of lawyer

Lawyers should tread with caution whenever clients are instructing them from a distance about transactions without legitimate reason for doing so. Other red flags relating to the client's choice of lawyer include:

- lawyers being engaged although they lack competence in the relevant area of law or experience in providing services in complicated or especially large transactions;
- a client being prepared to pay substantially higher fees than usual, without good reason;
- a client changing legal advisors a number of times within a short span of time;
- engagement of multiple legal advisers without good reason; and
- another lawyer refusing to enter into, or termination of, a relationship with the client.

If an instruction is “too good to be true” then maybe it is!

Please refer to case study 14 in Part V for examples of red flags related to the client’s choice of lawyer.

C. Investigating red flags thoroughly

Where information may be difficult to obtain, you should still satisfy yourself that there is no money laundering, terrorist financing or illegal activity involved. You should not avoid seeking clarification in the interest of expediency.

Please refer to case study 15 in Part V for an example of investigating red flags thoroughly.

D. What to do when red flags lead lawyers to believe that money laundering or terrorist financing is at issue

(i) Making an STR and avoiding tipping-off

Lawyers who suspect that their clients are involved, or another party to the clients’ transaction is using or is involved, with the proceeds of criminal or terrorist activity should, where required, make an STR with the relevant FIU and even if not required, should consider making a report unless filing such a report would violate the rules of lawyer-client privilege, confidentiality and ethics in the relevant country as it would in some jurisdictions. The decision to make an STR or other form of report may come before or after conducting CDD.

Assuming the jurisdiction’s rules require making an STR, the lawyer making the report should not disclose to any person that an STR or related information have been shared with the authorities. This is to avoid tipping off and impeding the investigations that are carried out by the FIU or enforcement authorities. FATF guidance clarifies that if a lawyer seeks to dissuade a client from engaging in an illegal activity, this should not amount to tipping off the client.⁴⁸ Disclosure is also likely to be permitted where it would not prejudice any potential investigation. National laws and regulations should be consulted to verify the position in the relevant jurisdiction. After the making of an STR, the lawyer may be prohibited by applicable law from continuing to act with respect to a reported transaction until consent is received from the FIU or applicable waiting periods have elapsed.

(ii) Ceasing to Act

Irrespective of whether a lawyer is required to make an STR or chooses to make a report (and subject to tipping-off rules where they apply), a lawyer needs to consider carefully whether (and if so how) to cease acting for a client who the lawyer suspects is laundering money. This is often a difficult judgement call, especially for small firms and in situations where the client is powerful and/or the lawyer needs as many clients as possible. However, the ethical standards of the profession must prevail and as a profession we must guard against misuse by criminals even if this has financial consequences.

It would be improper, however, if lawyers collectively refused – as some banks have done – to decline to represent certain categories of clients because they initially present some risk and require enhanced CDD. All client situations should be evaluated on a case-by-case basis. Lawyers should be mindful of the UN Basic Principles on the Role of Lawyers (1990), the first principle of which is that “*All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.*” This does not mean, however, that lawyers should act for clients who are seeking to launder money and misuse the provision of legal services to assist in the laundering of money.

(iii) When in doubt?

Lawyers can be put in very difficult situations with regard to their obligations for AML and terrorist financing. In larger firms there may be compliance officers and several other partners to whom a lawyer can turn. In smaller firms and for sole practitioners this is not so straightforward. Lawyers should always carefully consider taking advice from colleagues and/or approaching their bar associations and law societies for help and guidance in difficult situations.

When in doubt, lawyers should also consider if there is an appropriate body that can grant consent to continue acting for the client.

Please refer to case study 16 in Part V for an example of consent sought by a law firm.

V. Case Studies

In this Part V, we will look at various “real life” situations where lawyers could be unwittingly used in the furtherance of the criminal activities of clients. Some of the case studies are loosely based on real life examples that various bar associations have become aware of; others are drawn from training programmes that have been developed by bar associations and individual law firms. Obviously, these case studies are by no means exhaustive of the issues that might give rise to suspicions on behalf of a lawyer and are merely included to indicate the types of situations that lawyers should be on the lookout for and, equally importantly, should be training all the lawyers in their practice to be aware of and alert to.

V. Case Studies

A. Client risks

1. The importance of independent verification of clients – really “know your clients”

A lawyer agreed to act for company A, which was the holding company of several operating subsidiaries on a sale of those subsidiaries. A was owned by an individual, Mr X.

During the course of advising A, the lawyer saw a press report that highlighted the existence of litigation brought in another country against some of A's subsidiaries. Upon searching for publicly available court documentation, the lawyer discovered that a court appointed insolvency practitioner of another company, B, which until recently was owned by Mr X, had brought claims against some of A's subsidiaries for the return of certain assets. The claim asserted that in the run-up to the insolvency of B, assets were transferred to A's subsidiaries for the purposes of putting the assets beyond the reach of the creditors of B. It later transpired that Mr. X was also the subject of claims as he had directed the asset transfers.

The lawyer questioned company A about the litigation. Company A indicated that: (i) its subsidiaries were defending it and inundated the lawyer with documentation that demonstrated that there was a good defence; and (ii) it was not itself involved in any proceedings. The lawyer continued on the condition that statements were made in the disclosure letter regarding the litigation. Company A put significant pressure on the lawyer to keep the disclosure to a minimum, based on the defence documentation provided, and given the urgent nature of the proposed deal.

It was subsequently discovered that the defence documents provided to the lawyer were falsified and A's subsidiaries had received assets that had been improperly transferred. It appeared that the whole arrangement had been set up by Mr. X to prevent him from losing money as a result of the previous mismanagement of B.

Red flags:

Insolvency of another company with a common beneficial owner; claims made regarding asset transfers to the subsidiary; no mention of the issue by the client initially, followed by an over willingness to provide a lot of documentation; urgency in getting the deal done.

What can you do?

Seek verification of documents provided or request originals (in the circumstances the lawyer could have requested a court-stamped copy of the relevant documents); talk to the insolvency practitioner (possibly only after seeking the client's consent).

2. Politically exposed person

A senior lawyer in a law firm was approached to act for an individual in the purchase of a football club. The client was a high net worth individual who had made his fortune in the mining industry in an emerging market. He then moved into politics before choosing to pursue some business interests. Due diligence was carried out on the individual that included searches of a subscriber database, which highlighted that the individual was a PEP. Accordingly, the issue of source of funds was raised. Upon enquiry, the individual responded that the acquisition was to be funded out of the proceeds of sale of one of his former mining businesses.

The law firm accepted the engagement. During the course of advising on the proposed investment, a junior lawyer highlighted a recent news article to the senior lawyer. In the article the client had been accused of bribery in obtaining the mining concessions on which his fortune was built. Further, during his time in politics, the client was implicated in an expenses scandal, although a parliamentary investigation found him not guilty of these accusations.

The senior lawyer raised this issue with the client and the client explained that the charges were politically motivated and had been made up by an opponent to discredit him. The lawyer was aware that this sort of thing happened in emerging markets, but raised it with his money laundering reporting officer. Upon advice from the money laundering reporting officer, the law firm did not proceed to act for the client.

A couple of years later, a foreign court convicted the client of bribery and corruption both in connection with the mining rights and the expenses investigation (which, as it turned out, had initially been led by the client's close associate) and sought to freeze the individual's assets. It also transpired that there were a number of press articles alleging that the result of the parliamentary enquiry had not been fair given the links between the client and the person leading it.

Red flags:

Mining and natural resource extraction in emerging markets are often high risk and associated with corruption. PEPs are recognised as needing more careful and thorough due diligence.

What can you do?

Carry out independent research into matters raising suspicion – in the case study, the lawyer carried out relatively little independent research into the circumstances of the acquisition of the licenses and the individuals who were leading the parliamentary investigation; explanations were taken at face value without further enquiry and it was fortunate that the individual spoke to the money laundering reporting officer.

3. Risky clients

A new client, A, drops into Law Firm B's office in person, without an appointment and requests legal advice in relation to setting up a business in Law Firm B's jurisdiction. The person is from Country X (an African country) and has a company incorporated there. A states that he has obtained funding from Company C which is located in Country Y (a Middle Eastern country) and the funding of €1 million will be wired from a Swiss bank account. Client A says that he has lost his passport and is in the process of applying for a new one. He produces a photocopy of some temporary papers in the meantime and agrees to send copies of the new passport when it is issued. He also produces the investment agreement with Company C – this agreement looks too basic to have been drafted by a lawyer.

The lawyer tries to perform an Internet search on A and A's company, but there is no information available.

Red flags:

Client and the investor are both located in high-risk countries; funding is arriving from a Swiss bank account; client has no proper identification papers; there is no information available on the client and his business; purported legal documentation is too simplistic for the relevant transaction; client's connection with the jurisdiction is unclear.

What can you do?

Conduct enhanced CDD on the client and the other counterparties to the transaction to identify who they are and ascertain the source of funds. Lawyers should decline to act where there are multiple high-risk factors and consider if a reporting obligation arises in their jurisdiction.

4. Transactions involving unexpected criminal offences

Lawyers should be aware that there may be criminal offences imposed for certain areas of law that one would not ordinarily expect. The potential criminal conduct may not be readily apparent to the advising lawyer in the first instance. Lawyers should be vigilant to this possibility when advising on transactions.

Mr. A, a high net worth individual who recently started investing in properties, makes an appointment with Lawyer B to discuss a dispute about a property Mr. A owns. The property is residential and divided into apartments that are leased to various tenants. Mr. A had bought 50% of the interest in the property from a company owned by Trust D (which Mr. A had settled for the benefit of his family members). The purchase agreement was only intended to transfer beneficial interest in the property to Mr. A, but was incorrectly drafted, resulting in the legal interest of the property being transferred as well. Mr. A purchased the property interest at slightly below market price.

One of the tenants has now complained that the transfer of interest to Mr A has breached his rights under Legislation X. Legislation X requires a landlord to notify his tenant if he intends to sell the property, and give the tenant a first right to purchase the property – breach of Legislation X is a potential criminal offence.

In addition to advising Mr. A on the dispute, Lawyer B also advises Mr. A that he may have potentially committed a money-laundering offence. Although the criminal offence (if any) would be committed by the seller, Mr. A may have derived a "benefit" from the criminal offence. If Legislation X had been complied with and the property purchased by the tenant at market value, the difference in value between Mr. A's purchase price and the market value might be a "benefit" that constitutes proceeds of crime.

Red flags:

Dispute or a transaction involving a technical regulatory regime that has an unexpected potential criminal offence; parties derived some form of benefit from the transaction.

What can you do?

Where a potential criminal offence may have taken place, analyse if a criminal offence has inadvertently been committed and if a "benefit" was derived from the transaction. If so, the "benefit" may be the proceeds of crime and lawyers should consider if their clients will need to make an STR.

B. Attempts to misuse client accounts

5. Aborted transactions and transfer of funds without underlying legal work

A law firm was approached by a new client with instructions to assist on a number of asset purchases. The client was dealing with a junior lawyer at the firm who, at the request of the client, supplied her with the account details of the firm before completing CDD on the client or entering into an engagement letter with her. The client did not give any further instructions following the deposit of funds. Subsequently, the client explained that she no longer intended to purchase the relevant assets and asked for the deposited money to be provided to a third party, rather than returned to her personal account.

Red flags:

Once funds received in client account, the transaction is aborted. Client requests that deposited funds are sent to a third party, rather than returned to it. The client is avoiding personal contact without good reason.

What can you do?

Do not allow clients to deposit funds in a client until you carry out CDD, establish the purpose of the transaction and satisfy yourself that there are no money laundering risks attaching to the funds. Alternatively, do not send the funds to the third party but instead return them to the original source.

C. Property purchases

6. Investment of proceeds in real estate

Criminals may be aware that lawyers cannot directly handle large sums of money. However, criminals will still seek to use the purchase of real property as a means of depositing cash obtained from criminal activity. This is seen as part of the layering process of laundering whereby the property purchase is wholly or predominantly funded through private means rather than through a mortgage or loan.

A client deposited the total purchase price, in cash, with his lawyers at the very outset of the engagement with the law firm and well before final agreement was reached on the purchase price for the property. The lawyers' CDD indicated that the sum that was deposited was a large amount relative to the client's employment income. The purchase of the property went ahead for a sum smaller than that deposited and the remaining funds were returned to a third party indicated by the client. It subsequently turned out that the funds deposited were the proceeds of crime.

Red flags:

Unusual manner of execution – the deposit of funds for the purchase price occurred unusually early in the transaction and before the purchase price had been agreed between the parties. Amount being deposited large compared to client's modest income. Surplus funds were deposited. Remaining funds remitted to a third party, not to the client.

What can you do?

Lawyers should be wary of clients who are ready to deposit funds into their client account at the very outset of an engagement. When lawyers have reason to believe that the funds the client has deposited are a large amount compared to their socio-economic profile, lawyers should consider conducting enhanced verification of the source of funds.

7. Back-to-back sales

Quick successive sales of property, either with or without a mortgage, enable criminals to inflate the value of a property, thereby justifying the injection of further criminal funds into the purchase chain and enabling value to be transferred to other parts of an organised crime group or re-invested within the group.

Mr. A, a lawyer, was approached by an individual to act on the purchase of a number of real estate properties. The client claimed to be funding the purchases from previous real estate sales and presented a bank cheque to pay the purchase price. Shortly afterwards, the client instructed Mr. B, also a lawyer but who was not connected to Mr. A and unaware of the client's previous instructions to Mr. A, to re-sell the properties at a higher price.

It transpired that the properties were being bought from, and then sold to, people that the client knew in order to launder the proceeds of crime.

Red flags:

Back to back property transactions, which were out of sync with normal market dynamics - the purported value of each property rapidly increased with each subsequent transaction (despite the short period of time in between transactions). Client changes legal advisor a number of times in a short time period for no apparent reason.

What can you do?

In the circumstances, the lawyers ought to have made further enquiries about the client's source of funds and the motivation for the transactions.

8. Non-clients transferring proceeds into client accounts

Lawyers acting for sellers of property are not required to carry out CDD on the purchasers because this is completed by the lawyers acting for the purchaser. However, if the proceeds are transferred directly to the law firm's client accounts without prior authorisation, the funds could be 'cleaned' and there could be a risk of the law firm committing a money laundering offence.

Law Firm A acts for the seller of a property. The purchaser is located in country X, which is an emerging market. The purchaser transfers the purchase price to Law Firm A's client account rather than the seller's bank account without first informing Law Firm A. The purchase price was paid entirely in cash and no bank financing was taken out.

The senior lawyer advising on the transaction raises this issue with the firm's money laundering reporting officer. Law Firm A decides that it must make an STR to the FIU and temporarily hold on to the funds. It cannot return the funds to the purchaser as this would 'clean' the funds. Law Firm A also needs to consider whether it can inform its own client of the situation as this could amount to "tipping off" and prejudice the investigation. Law Firm A may also need to consider how it suspends the transaction without "tipping off" the purchaser.

Red flags:

The purchase price is paid entirely in cash and transferred to the law firm's client account rather than the purchaser's bank account; purchaser is located in a high risk jurisdiction; purchaser did not seek prior approval for the transfer.

What can you do?

Where funds are transferred directly into client account without any prior notice, lawyers should not immediately return the funds. The facts will need to be investigated further and lawyers should consider if any reporting obligations arise. Lawyers should seek guidance when in doubt.

D. Trust structures

9. Creation of a private trust to disguise proceeds of crime

In Country A, an elderly female national from Country B with the appropriate visa, consults with a trust lawyer. She found the lawyer's name through an Internet search. She asks the lawyer to prepare a trust to handle an inheritance she has in Country B; the trust will be funded via wire transfer from Country B into the law firm's client account in Country A. Country B is a country that scores lowly on Transparency International's Corruption Perceptions Index and is subject to various sanctions programs. She will be the trustee and her children in Country A will be beneficiaries. She asks for a memorandum on tax issues and filing requirements. She also wants an introduction to a certified public accountant and to a banker in Country A.

The type of trust requested by the client is a normal structure familiar to most trust lawyers. The goal of the client appears to be asset management for the benefit of the client's children. While the tax consequences may be complex, the plan itself is relatively typical.

The lawyer agrees to act for the client.

Red flags:

Client is not well known to the lawyer nor does the source of the connection add any comfort. Client comes from Country B, a jurisdiction where there is geographic risk. The funds are being wired from outside of the lawyer's jurisdiction (Country A) into the lawyer's trust fund account. Can the lawyer rely on the CDD being conducted by the paying bank?

What can you do?

Here, as is true with other case studies, the obligations of the lawyer will depend on the jurisdiction where the lawyer practices. Where the lawyer has a STR regime, the lawyer must determine if the facts justify a report. Where such a regime is not in place, the lawyer must consider the applicable legal and ethical responsibilities. Here, the presence of geographic risk, client risk and service risk should steer the lawyer away from representation.

10. Management of an existing trust that may contain criminal property

A client comes into the trust lawyer's office to hire the lawyer in connection with terminating a trust established by his deceased mother, under which trust the client is the sole beneficiary. When asked about the source of the funds in his mother's trust, the client is evasive. When pressed, the client informs the lawyer that he suspects that a majority of the trust estate was the product of a decades-long fraud and scheme of embezzlement perpetrated by his mother against her former employer's business and personal assets as a result of her close personal relationship with the employer. The client asks the lawyer for advice regarding the disposition of the assets in the trust and the client's legal obligations to the former employer.

Red flags:

Client is not well known to the lawyer. The funds in the trust may be the proceeds of crime.

What can you do?

Again, the obligations of the lawyer will depend on the jurisdiction where the lawyer practices. Where the lawyer has an STR regime, the lawyer must determine if the facts justify a report. Where such a regime is not in place, the lawyer must consider the applicable legal and ethical responsibilities. Here, the lawyer may properly decide to advise the client regarding the rights of the defrauded employer and the impact of those rights on the trust assets (and on the client to whom the trust assets are to pass).

E. Fictitious claims

11. Unexpectedly short procedure

A foreign company retained a lawyer to file a claim against another foreign company. The defendant did not contest the claim so that a default judgment was entered. The defendant immediately paid the sum into the law firm's client account. The defendant even paid the amount in question twice - when the second payment was made, the defendant informed that the second payment was made erroneously and asked the law firm to forward the funds to another subsidiary of the defendant company.

Red flags:

Two foreign companies without obvious connection to the place of litigation.

Very short procedure – defendant does not contest default judgment. Unusual error in paying large sum twice and then request to forward funds to a different entity than that which made the payment.

What can you do?

The lawyer should have been alerted by the ease with which the litigation was settled. It may be difficult to establish whether one is dealing with fictitious claims, but lawyers must keep an eye out where matters seem to be proceeding too smoothly.

Whenever clients ask that payments made in error be returned to third parties, lawyers ought to question why they are requesting this.

F. Sources of funds

12. Size of funds provided are disproportionate or inexplicable

When there has been a significant increase in capital for a recently formed entity, successive contributions over a short period of time have been made to the same entity or contributions have been made that are high in comparison with the business, size or market value of the entity, a lawyer should ascertain the reasons behind these increases.

A lawyer is acting for a company from an emerging market that is trying to make an IPO. As a result of concerns over the financial viability of the company and a potentially messy dispute over ownership of the company, the company is struggling to make the IPO a success. At the last minute a previously unknown wealthy investor comes along. In reality, arrangements had been made between representatives of the company and the investor to promote the investment and that the money being offered by the wealthy investor was actually the company's money. The individual received the money plus an incentive payment in order to assist.

Red flags:

Unexplained financing arrangements. Involvement of a high risk jurisdiction. Appearance of sudden willing investor when previous interest was lacking.

What can you do?

When faced with a sudden willing investor or other source of funds not previously available, consider conducting measures akin to CDD to verify the identity of the 'source of funds' and the reasons for their sudden appearance in the transaction.

G. Choice of lawyer

13. Failure to consider who controls the client

ABC Ltd. “passed” a law firm’s CDD/client process and has provided confirmation/documentation indicating who ultimately owns the client. During the course of the transaction, the lead partner becomes less involved and starts to hand over work streams to her lead associate (as it would be valuable experience for this individual who is looking for partnership). A previously unidentified individual starts to attend meetings and appears to be leading many of the discussions/decisions on behalf of the client.

The client is in fact ultimately controlled by the individual’s father who turns out to be subject to an arrest warrant in another country. The purpose of the deal was to put assets beyond the reach of law enforcement.

Red flags:

Documented ultimate beneficial owner owns shares on behalf of another or takes instructions from another individual. Other related red flags could include the client requesting that an apparently unrelated individual is copied into all emails or attends meetings, without their involvement being explained.

What can you do?

Most jurisdictions allow lawyers to take instructions from third parties only in very limited circumstances. However, as in the scenario in this case study, sometimes a third party will be dictating the actions of the client on record in more overt ways. Understanding the motives of a client will be important in establishing whether the client really is the instructing party.

14. Instructions from overseas clients

Lawyer A is an employment specialist and has acted for Client B in relation to some employment matters. After a few months, Client B contacts Lawyer A, requesting that he act for a friend, C, in relation to the purchase of some high-value properties.

Friend C lives in another country, which is an emerging market, and does not intend to travel to visit the properties being purchased. Friend C would like the purchases to be completed as soon as possible and he assures Lawyer A that financing will not hold the time table up as no bank loans will be required. He also promises to pay Lawyer A an extra fee if the purchases are completed by a certain date.

Red flags:

Lawyer being asked to advise on an area of law in which he lacks expertise; client is not visiting the properties despite the high value of the transaction, client paying large value of funds in cash; client promises to pay extra fees for speedily completing transaction; client will be transferring funds from a jurisdiction where there are difficulties ascertaining AML compliance.

What can you do?

Perform CDD on the prospective client. Where there are high risk indicators, lawyers should seek senior approval before accepting engagement and determine the source of funds. Where such cases are referrals from previous clients, lawyers may also need to review the previous transactions with such clients for AML risks.

H. Investigating red flags

15. Performing thorough due diligence

A long standing client was acquiring a middle eastern construction entity. On performing due diligence a number of contracts and payments were noted for services from consultant companies. It was very difficult to establish the identity of the individual consultants or establish the exact nature of the services provided beyond generic descriptions.

While it may have been expedient to stop at the generic descriptions, the legal advisers involved advised their client that more substantive answers were required from the seller concerning the consultant contracts and fees paid under those contracts. On a more detailed analysis of the consultant entities it became apparent that some were linked to individuals known to be part of the government organisation responsible for licensing and permits and that the consultant fees were in fact bribes. Accordingly, the lawyers advised their client that the contracts the entity they were purchasing had won may represent the proceeds of crime (bribery).

Red flags:

Involvement of a higher-risk jurisdiction. Difficulty in obtaining satisfactory information as to services being provided by the target company.

What can you do?

Lawyers must remember that they have an obligation to satisfy themselves that all issues involved in a transaction are legal. Resist the temptation to avoid seeking further clarification of matters in the interests of expediency.

Note also that in the circumstances seeking further clarification was part of the lawyer's duty of care to its client – had the lawyer not sought further clarification as to the services being provided by the target, the client would have unwittingly invested in an entity involved in criminal activities. Consider whether there is an obligation under local law to make an STR even when the client abandons the transaction.

I. Reacting to red flags

The following case study illustrates a situation in which lawyers were alerted by red flag indicators and took appropriate action in response to their concerns.

16. Requesting consent to proceed with a transaction from the relevant authority when in doubt

An established London jewellers and longstanding client was in the process of being bought by a private equity entity. As part of the due diligence, queries were raised regarding the insurance arrangements for the movement of high value goods between stores and ad-hoc VIP viewings across the world. On further probing it transpired that the client was, on occasion, sending its sales staff to offices and VIPs wearing the jewellery that was to be offered for sale. This meant that the client did not pay the relevant import duties in those countries, a potential criminal offence resulting in the company being tainted by the proceeds of crime. The client informed the law firm that the practice was one of convenience and speed rather than a deliberate attempt to avoid taxes and only occurred on a limited number of occasions.

Consent was requested by the law firm from the Serious Organised Crime Agency (the predecessor of the U.K.'s National Crime Agency, the U.K. body tasked with overseeing AML compliance) to proceed with the sale of the business.

Red flags:

Unusual practice in relation to the transport of jewellery, avoidance of import duties.

What can you do?

Pay attention to the information discovered during CDD processes and during the business relationship with the client.

If a lawyer's suspicions are raised, he or she must ask further questions and consider whether there is an appropriate body which can grant consent to his or her further engagement with the client. The lawyer must also consider if he or she should advise the client to self-report the violation.

VI. Glossary and Further Resources

VI. Glossary and Further Resources

ABA	American Bar Association
AML	Anti-Money Laundering / Countering the Financing of Terrorism (also used for Combating the financing of terrorism)
CCBE	Council of Bars and Law Societies of Europe
CDD	Customer Due Diligence
FATF	Financial Action Task Force, intergovernmental body that develops and promotes policies to combat money laundering and terrorist financing
FIU	Financial Intelligence Unit
IBA	International Bar Association
PEP	Politically Exposed Person

Recommendations	<p>“International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation. The FATF Recommendations” published by FATEF; references to 40 Recommendations are references to the 2012 revision of the Recommendations currently in force available at www.fatf-gafi.org/recommendations</p>
STR	Suspicious Transaction Report
SRO	Self-Regulating Organisation
ABA’s International Law Section’s Anti-Money Laundering Committee	http://apps.americanbar.org/dch/committee.cfm?com=IC700500
ABA’s Task Force on the Gatekeeper Regulation and the Profession	http://www.americanbar.org/groups/criminal_justice/gatekeeper.html
ABA, Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing (2010)	http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/116.authcheckdam.pdf
CCBE Money Laundering Committee	http://www.ccbe.eu/index.php?id=94&id_comite=20&L=0

CCBE Position papers and resources

http://www.ccbe.eu/index.php?id=94&id_comite=20&L=0.

Working Document of the Commission of the European Communities, The application to the legal profession of Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering (2006)

http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/commission_report_la1_1183722383.pdf.

FATF

<http://fatf-gafi.org>

IBA Anti-Money Laundering Forum

<http://www.anti-moneylaundering.org/>

IBA's AML resources

<http://www.anti-moneylaundering.org/ReadingRoom.aspx>.

Law Society of England and Wales – AML Toolkit

<http://www.lawsociety.org.uk/advice/anti-money-laundering/>

Endnotes

Endnotes

- 1 A United National Office on Drugs and Crime 2011 report estimated that in 2009, criminal proceeds amounted to 3.6% of global GDP, with 2.7% (or US\$ 1.6 trillion) being laundered:
<http://www.unodc.org/unodc/en/press/releases/2011/October/unodc-estimates-that-criminals-may-have-laundered-usdollar-1.6-trillion-in-2009.html>
- 2 OECD. “Money Laundering Awareness Handbook for Tax Examiners And Tax Auditors, Organisation For Economic Co-Operation and Development”. 2009. Available at www.oecd.org/dataoecd/61/17/43841099.pdf
- 3 The mandate of FATF is to set standards and to promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and the financing of proliferation, and other related threats to the integrity of the international financial system. The FATF 40 Recommendations 2012 are available at www.fatf-gafi.org/recommendations
- 4 Neil Jensen, Cheong-Ann Png, “Implementation of the FATF 40+9 Recommendations: A perspective from developing countries”, *Journal of Money Laundering Control*, 14.2 (2011): 110 – 120
- 5 A ninth special recommendation was added in October 2004 to address cash courier related concerns.
- 6 The term “lawyers” is used throughout this Guide to refer to all legal professionals, including civil law notaries.
- 7 Broadly, the 40 Recommendations define DFNBPs as: legal professionals, casinos, real estate agents, dealers in precious metals and stones and trust and company service providers (for further detail, please refer to Part III).
- 8 Shepherd, Kevin L. “Guardians at the Gate: The Gatekeeper Initiative and the Risk-based Approach for Transactional Lawyers.” *Real Property, Trust & Estate Law Journal* 43.4 (2009).
- 9 “Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals” (FATF, 2013), available at: <http://www.fatf-gafi.org/topics/methodsandtrends/documents/mltf-vulnerabilities-legal-professionals.html>
- 10 See also Part VI (Further Resources) of this Guide for a list of electronically available AML resources.
- 11 Sources of information:
ABA website (<http://www.americanbar.org/>);
CCBE website (<http://www.ccbe.edu/>); and
IBA website (<http://www.anti-moneylaundering.org/>)
- 12 Such materials include the *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing*, 2010. Available at http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/116_authcheckdam.pdf
For additional items, see Laurel S. Terry, “U.S. Legal Profession Efforts to Combat Money Laundering & Terrorist Financing”. (2014/2015). 59(3) N.Y.L.S. L.Rev. (Forthcoming).
- 13 Available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/commission_report_la1_1183722383.pdf

- 14 This package includes a dedicated AML website (<http://www.lawsociety.org.uk/advice/anti-money-laundering/>), a bi-monthly AML newsletter and training events and country-wide national networking groups for money laundering reporting officers.
- 15 Information provided by the Law Society of England and Wales.
- 16 For instance, transactions may involve highly technical and regulated regimes, where certain breaches may result in criminal sanctions (e.g. breaches of certain environmental laws in the UK may have criminal consequences). Due to the technical and complex nature of the industry, the client may be unaware that it has committed such a breach. See Section B of Part IV and case study 4 of Part V for more discussion. Lawyers will need to pay particular attention to AML risks when advising on such transactions as any proceeds generated from such offences would be proceeds of “crime” thereby possibly triggering reporting obligations.
- 17 Tatsu Katayama, Anderson Mori and Tomotsune. “Never to Whistleblow – JFBA’s Approach: When to whistle-blow – a lawyer’s guide.” IBA Annual Conference, Dubai, November 2011. Available at <http://www.anti-moneylaundering.org/Document/Default.aspx?DocumentUid=0EE69B97-7740-4EF9-ADE7-9D4FD3A85222>
- 18 Lawyers in jurisdictions that are party to other international conventions must be aware of AML offences thereunder. For example, the 1988 Vienna Convention and the Palermo Convention 2000, require countries to criminalise the concealment, or changing the true nature, source or location of, property that is derived from drug trafficking. For more detail see Paul Alan Schott, *Reference Guide to Anti-money Laundering and Combating the Financing of Terrorism*, World Bank Publications, 2006; Jean-François Thony “Money laundering and terrorism financing: an overview.” *International Monetary Fund* 1 (2002).
- 19 The glossary to the 40 Recommendations clarifies that this refers to sole legal practitioners and partners, or employed legal professionals within professional firms. The term does not capture “internal” (i.e., in-house) professionals that are employees of other types of businesses, nor legal professionals working for government agencies
- 20 For an examination of various definitions of PEPs, see Kim-Kwang Raymond Choo, (2008) “Politically exposed persons (PEPs): risks and mitigation”, *Journal of Money Laundering Control*, Vol. 11 Iss: 4, pp.371 – 387
- 21 A list of such countries can be found at: <http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/>. These include Iran, the Democratic People’s Republic of Korea, Algeria, Ecuador, Indonesia and Myanmar.
- 22 European Commission, Commission Directive 2001/97/EC. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001L0097>

- 23 European Commission, "Proposal for a directive of the European parliament and of the council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing." Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0045&from=EN>
- 24 Lawyers do not fall under the Bank Secrecy Act (31 USC §§5311) which applies to "financial institutions". However, they are subject to prohibitions in regulations issued by the Office of Foreign Assets Control. Information from Anti-money Laundering Forum, http://www.anti-moneylaundering.org/northamerica/United_States_of_America.aspx
- 25 See Formal Opinion 463 (May 2013), ABA Standing Committee on Ethics and Professional Responsibility.
- 26 18 U.S. Code § 1957 and 31 U.S.C. §§5331-32.
- 27 U.S. Department of the Treasury, Sanctions Program and Country Information. <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>
- 28 "Risk Based Approach Guidance for Legal Professionals" (FATF, 2008). defines a self-regulatory organization as "A body that represents a profession (e.g., lawyers, notaries, other independent legal professionals or accountants), and which is made up of member professionals or a majority thereof, has a role (either exclusive or in conjunction with other entities) in regulating the persons that are qualified to enter and who practise in the profession, and also performs certain supervisory or monitoring type functions."
- 29 Blake Bryant Goodsell. "Muted Advocacy: Money Laundering and the Attorney-Client Relationship in a Post 9/11 World." *J. Legal Prof.* 34 (2009): 211.
- 30 Karin Svedberg Helgesson. "Public-Private Partners Against Crime: Governance, Surveillance and the Limits of Corporate Accountability." *Surveillance & Society* 8.4 (2011).
- 31 Note that in many jurisdictions confidentiality is an ethics concept while professional secrecy and legal professional privilege are evidentiary concepts.
- 32 Proceeds of Crime Act, section 330(6)
- 33 International Bar Association. "Commentary on IBA International Principles on Conduct for the Legal Profession." 28 May 2011
- 34 CCBE. "Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers". 2013. Available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf
- 35 *Supra* n 25.
- 36 American Bar Association, "Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing". Available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_taskforce_gtfgoodpracticesguidance.authcheckdam.pdf
- 37 Please see Section B of Part IV for a discussion of sham litigation. FATF refers to "sham litigation", whereas a more accurate term is "fictitious claims", as *bona fide* litigation is outside the scope of the Recommendations and the EU Directive. See also, Section A of Part II.
- 38 FATF Typologies Report 2013 available at <http://www.fatf-gafi.org/topics/methodsandtrends/documents/mltf-vulnerabilities-legal-professionals.html>

- 39 *Supra* n 33.
- 40 For more information and examples of lawyers who have been involved in intentional money laundering, see David J Middleton and Michael Levi, “The role of solicitors in facilitating ‘Organised Crime’: Situational crime opportunities and their regulation,” *Crime, Law & Social Change* (2004) 42:123-161.
- 41 Available at :
<http://www.fatf-gafi.org/topics/fatfrecommendations/documents/riskbasedapproachguidanceforlegalprofessionals.html>
- 42 Source of information: Lawyer RBA Guidance
- 43 American Bar Association, “Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing”, 2010. Available at <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/116.authcheckdam.pdf>
See also Kevin L. Shepherd, “The Gatekeeper Initiative and the Risk-Based Approach to Client Due Diligence,” (2012) *The Review of Banking and Financial Services* 28(4) 33-42.
- 44 Transparency International’s Corruption Perception Index is available at <http://www.transparency.org/research/cpi/overview>
The World Bank produces Worldwide Governance Indicator reports for over 200 countries over 1996–2012 that are available for download at <http://info.worldbank.org/governance/wgi/index.aspx#countryReports>
- 45 According to FATF, client accounts can be susceptible to misuse by criminals in the context of money laundering and terrorist financing. In some jurisdictions, client accounts, i.e., segregated accounts in the name of lawyer or law firm into which client funds are placed, are referred to as “client trust accounts”.
- 46 [2005] EWCA Civ 226 available at www.bailii.org/ew/cases/EWCA/Civ/2005/226.html.
- 47 As indicated in endnote 38, FATF refers to “sham litigation”, whereas, a more accurate term is “fictitious claims” as *bona fide* litigation is outside the scope of the Recommendations and EU Directives.
- 48 Interpretative Note to Recommendation 23 (DNFBPs – Other Measures), FATF 40 Recommendations 2012.

The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that every entry, no matter how small, should be recorded to ensure the integrity of the financial data. This includes not only sales and purchases but also expenses and income. The document provides a detailed list of items that should be tracked, such as inventory levels, supplier payments, and customer orders. It also outlines the procedures for recording these transactions, including the use of standardized forms and the importance of double-checking entries for accuracy.

The second part of the document focuses on the analysis of the recorded data. It describes various methods for identifying trends and anomalies in the financial records. This includes comparing current performance against historical data and industry benchmarks. The document also discusses the importance of regular audits to verify the accuracy of the records and to detect any potential fraud or errors. It provides a step-by-step guide for conducting these audits, from the selection of samples to the final reporting of findings.

The final part of the document addresses the communication of the results of the financial analysis. It emphasizes the need for clear and concise reporting to management and other stakeholders. The document provides a template for a financial report, including sections for a summary of findings, a detailed breakdown of the data, and recommendations for future actions. It also discusses the importance of maintaining transparency and accountability in the reporting process, and provides guidance on how to handle any questions or concerns that may arise.