LEGISLATIVE REFORM

The Role of Lawyers in the Fight Against Money Laundering: Is a Reporting Requirement Appropriate?

I. INTRODUCTION

Money launderers seek to legitimize the proceeds of crime through transactions involving the least amount of inspection while affording a minimal risk of detection.[1] The Financial Action Task Force, a policy-making body that promotes international standards against money laundering, recommends that institutions involved in the transfer of funds be allowed to inquire into clients' activities notwithstanding the compromise to financial privacy.[2] For example, a Colombian cartel systematically used money transmitters in metropolitan New York to convert drug sale proceeds until authorities regulated the sector.[3] The Treasury Department responded by authorizing the financial institutions in the immediate area to report transactions in excess of a specified amount.[4] Since the release of the Financial Action Task Force's Forty Recommendations against money laundering in the mid-1990s, numerous signatory jurisdictions are required to impose reporting requirements upon the financial industry as part of their larger anti-money laundering programs.[5] Like other criminals wishing to exploit available opportunities, money launderers reacted to the regulations by moving away from the financial industry and shifting toward less-supervised businesses that assist in moving funds. Professional services that were not traditionally used in money laundering are more widely pursued as the sophistication of the criminal activity developed. In particular, lawyers are among those identified as preferred agents for laundering illegally obtained money.[6]

The modern trend in money laundering finds criminals engaging lawyers as profes-

1. *See* Julia Randell Khan & Karen Conolly, *Money Laundering: Updating Your Procedures*, XI PRAC. L. COMPANIES at 29, 30 (2000). Money laundering involves the placement of funds by entering into a transaction to dispose of cash, layering the money in numerous transactions to hide the paper trail and integrating the proceeds into the financial stream as ordinary funds.

2. *See* Financial Action Task Force on Money Laundering, *The Forty Recommendations* (1990), *available at* http://www.oecd.org/fatf/40Recs_en.htm (last modified Nov. 7, 2000) (establishing guidelines to assist governments in implementing anti-money laundering laws).

3. *See* Bruce Zagaris, *Money Laundering and Bank Secrecy: U.S. Enacts Anti-Money Laundering Act*, 14 INT'L ENFORCEMENT L. REP., Dec. 1998, at 1, *available in* LEXIS, Secondary Legal/Legal News.

4. *See id.*

5. *See* Financial Action Task Force on Money Laundering, *supra* note 2.

6. *See* Bruce Zagaris, *Avoiding Criminal Liability in the Conduct of International Business*, 21 WM. MITCHELL L. REV. 749, 809 (1996).

sional intermediaries for converting funds derived from illicit activities[7] due to the air of legitimacy provided by their services. Although government agencies in the United States have established effective measures to fight the money laundering phenomenon that occurs through the financial sector, the use of non-financial institutions by money launderers warrants further regulation. Legal professionals who handle client funds and assist in financial and investment business are especially susceptible to potential liability for money laundering. It now appears that procedural safeguards are necessary if lawyers are to maintain a high level of professional responsibility while continuing to provide effective representation.

Section II of this Note provides an overview of U.S. regulations designed to combat money laundering, with particular emphasis on the provisions applicable to lawyers. Section III presents the European perspective on the money laundering problem. An analysis of the United Kingdom's implementation of European Community legislation involving lawyers and non-financial institutions allows for a comparison with U.S. laws. Section IV raises potential ramifications upon the legal profession in the U.S. if legislation similar to proposed E.C. laws is considered in the future. Finally, some recommendations for establishing money laundering countermeasures are presented in Section V.

II. U.S. ANTI-MONEY LAUNDERING REGULATIONS

The United States' anti-money laundering regime consists of several pieces of legislation designed to coordinate the efforts of government agencies and industries touched by the problem while attacking the steps taken to disguise tainted funds.[8]

Although the Racketeer Influenced and Corrupt Organization Act (RICO) may be considered the precursor to anti-money laundering legislation criminalizing activities involving interstate commerce, the Bank Secrecy Act of 1970 first instituted a duty upon financial institutions to report transactions involving more than $10,000.[9] Submitted in the form of currency transaction reports (CTRs),[10] the purpose behind detailing large financial transactions is to retain records that may be helpful in the event of a regulatory or criminal investigation. The financial industry practice of filing CTRs generated shrewd responses from those involved in money laundering. First, money launderers easily circumvented the CTRs filed by banks and other financial organizations through a practice called "smurfing" which entails breaking large sums of money into smaller amounts and entering numerous transactions.[11] Others simply avoided those particular

7. *See* Stephen Gentle & Christopher Murray, *Handling Funds*, *in* ANTI-MONEY LAUNDERING GUIDE 5660-61 (Barry A.K. Rider & Dr. Chizu V. Nakajima eds., 2000).

8. *See* Wilmer Parker III, *United States*, *in* ANTI-MONEY LAUNDERING GUIDE 85101-104 (Barry A.K. Rider & Dr. Chizu V. Nakajima eds., 2000).

9. *See id.* at 85101, 85404.

10. *See id.* at 85404.

11. *See* Jimmy Gurule, *The Money Laundering Control Act of 1986: Creating a New Federal Of-*

institutions required to file CTRs and sought alternative means of converting illicit money into legitimate funds.

To catch transactions entered to launder dirty money through non-financial institutions, the Internal Revenue Service (IRS) requires anyone who receives $10,000 or more in the course of business dealings to return a Form 8300 with details of the client's identity, and the amount and the nature of the transaction.[12] Under the Internal Revenue Code, lawyers and other non-financial businesses must provide the IRS with a report similar to a CTR that the authorities may access in the event that money laundering is suspected. Failure to provide the required information may result in civil or criminal penalties.[13] Lawyers handling financial matters or investment business on behalf of their clients must therefore be cognizant not only of their reporting obligations but of their potential liabilities under such regulation. However, lawyers have been known to avoid reporting on the basis that it violates attorney-client confidentiality[14] and to 'look the other way' when acting in their legal capacity.

In 1986, Congress criminalized the intentional transfer or movement of tainted funds under the Money Laundering Control Act.[15] The legislation broadly encompasses activities associated with money laundering and consists of two regulations devised to confront distinct but related pursuits. On the one hand, section 1956 deals with transactions entered specifically with the intention of furthering illegal activities, with the knowledge that the funds involved were criminally obtained.[16] On the other hand, section 1957 is designed to catch those who enter transactions to protect illicit funds from detection, despite a lack of intent to promote criminal activity.[17] According to section 1957, anyone who participates in a financial transaction greater than $10,000 in value and knows that the funds are tainted, despite lacking the intention to further criminal activity, may be fined or imprisoned.[18] Under section 1957, lawyers who handle funds on behalf of a client when assisting in a financial matter may be liable if they are aware that their client gained the money through criminal means. Although lawyers are not exempt from liability under the Money Laundering Control Act, the professional bar association provides little guidance as to the responsibilities of lawyers under this law. Perhaps this inattention stems from the doubt expressed by those responsible for drafting

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fense or Merely Affording Federal Prosecutors and Alternative Means of Punishing Specified Unlawful Activity?, 32 AM. CRIM. L. REV. 823, 825 (1995).

12. *See* I.R.C. § 6050I (2000).

13. *See id.*

14. *See* Wendy Shuck, *The Impact of Anti-Money Laundering Laws on Attorney-Client Privilege*, 19 SUFFOLK TRANSNAT'L. L. REV. 507, 516 (1996).

15. Money Laundering Control Act, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 18 U.S.C. §§ 1956-57 (1988)) [hereinafter *Money Laundering Control Act*].

16. *See* Gurule, *supra* note 11, at 826-27.

17. *See* Parker, *supra* note 8, at 85,402.

18. *See Money Laundering Control Act*, *supra* note 15. *See also* Paul G. Wolfteich, *Making Criminal Defense a Crime Under 18 U.S.C. § 1957*, 41 VAND. L. REV. 843 (1988) (explaining the scope and state of mind required for liability under Section 1957).

the legislation that it would result in much prosecution of lawyers for involvement in money laundering while acting in their legal capacity.[19] A problematic result of the knowledge requirement under section 1957 is that it discourages lawyers from inquiring about the source of their clients' funds in order to escape criminal responsibility.

Government regulators recognized that further action by the financial industry was necessary to supplement the practice of filing CTRs. As a result, Congress passed a crucial amendment to the Money Laundering Control Act in 1994 in which it further required financial institutions and their employees to report on suspicious transactions.[20] Suspicious activity reports (SARs) under 31 U.S.C. § 5318(g) play a key position in the US system against money laundering[21] and are currently filed by a number of organizations including banks, holding companies, credit unions, and money remitters.[22] Thus, in addition to CTRs which are submitted on the basis of meeting a threshold minimum value, the use of subjective judgment is also authorized by the measures formulated against money laundering. A SAR must provide detailed information regarding the client, the nature and amount of the transaction, the employees involved in the transaction and an explanation of the unusual nature of the transaction.[23] Coupled with the requirement of filing a SAR is the prohibition on financial institutions and their employees from notifying the client who is the subject of suspicion.[24] The Treasury Department's Financial Crime Enforcement Network (FinCEN) has tracked and measured the utility of SARs since 1996.[25] According to the American Bankers Association, SARs have played an important role not only in calling attention to the incidence of financial crimes but also in identifying geographical areas where such activity is concentrated.[26] It appears that despite the problem potentially raised by using subjective criteria in deciding whether or not to file a SAR, the reporting method is now routine procedure among federally regulated financial institutions.

More recently, the Federal Reserve Board proposed "know your customer" regulations to supplement the existing regime.[27] Aimed at banking institutions, the "know your

19. *See* Wolfteich, *supra* note 18, at 849.

20. *See* Annunzio-Wylie Anti-Money Laundering Act of 1994, Pub. L. No. 103-325, 108 Stat. 2254 (codified at 31 U.S.C. § 5318 (1995)).

21. *See id.*

22. *See* Matthew R. Hall, *An Emerging Duty to Report Criminal Conduct: Banks, Money Laundering, and the Suspicious Activity Report*, 84 KY. L. J. 643, 656 (1995).

23. *See id.* at 656-67.

24. *See* FINANCIAL CRIMES ENFORCEMENT NETWORK, U.S. DEP'T OF THE TREASURY, *The SAR Activity Review – Trends, Tips and Issues*, 28 (October 2000), *available at* http://www.treas.gov/fincen (last modified Feb. 22, 2001) [hereinafter *SAR Activity Review*].

25. *See id.* at 2.

26. *See id.* at 14.

27. *See US: Proposed 'Know Your Customer' Rules Withdrawn*, MONEY LAUNDERING MONITOR (CCH, Institute of Advanced Legal Studies, London, England) April 1999, at 7 *available at* http://www.cchnewlaw.co.uk (last visited Feb. 22, 2001).

customer" regulations would have extended reporting procedures already in force by calling for the verification of clients' identities and recording of patterns of transactions. The proposal, however, was withdrawn as a result of criticism both from private parties and the financial sector.[28] Opponents of the proposal claimed that imposing additional rules would place an undue burden on banks and more importantly, would invade the privacy of clients.[29] Despite the failure to enact "know your customer" rules, the financial industry continues to subscribe to established procedures for reporting large transactions and suspicious activities that provide audit trails if necessary. The failure of the Federal Reserve Board's proposed measure to gain approval may signal that while further regulation is necessary, the sectors calling for such legislation are those experiencing increased activity as a result of the shift in the money laundering trend.

Given the way in which money laundering has branched out beyond the traditional sectors, it appears that U.S. measures are not sufficiently comprehensive although they assigns liability to a broad range of participants in the crime. Regulation of the financial industry has been instrumental in identifying atypical activities and for prosecuting money launderers.[30] However, the activity of moving illegitimate funds continues to be a pervasive problem since its pursuit has been redirected through other avenues. Today, placement of illicit funds is done with the help of professional intermediaries and other non-banking financial institutions. While the U.S. has created sound and effective measures thus far, placing obligations similar to those imposed on the financial industry upon professionals who provide services related to the transfer of property or funds must be considered. In particular, lawyers are vulnerable when handling investment deals, property transfers and other financial matters for clients due to the confidentiality that cloaks their services. Although Congressional action in this arena may prove to be problematic, the legal profession might benefit from the institution of guidelines designed to identify, handle and prevent potential abuse of legal services by money launderers. The legal community is predictably bound to strongly oppose the imposition of reporting requirements upon the profession. However, doing so may grant lawyers a safe harbor against liability while counteracting conscious avoidance by those in the profession.

Foreign jurisdictions have recognized the need to strengthen reporting requirements by non-financial institutions and businesses that are likely conduits for money laundering. A comparison of the U.S. anti-money laundering regime with that of the United Kingdom seems to confirm that lawyers have an additional professional obligation and interest in taking part in the fight against money laundering.

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28. *See id.*
29. *See id.*
30. *See SAR Activity Review*, *supra* note 24, at 14, 16, 19-22.

III. EUROPEAN COMMUNITY AND UNITED KINGDOM MONEY LAUNDERING LAWS

The European Community, formed to promote freedom of access between member states and increased competitiveness as a unit, recognized that the principle of free movement also allows those in organized crime greater opportunity to legitimize tainted funds.[31] Thus, the European Community needed protection against the increased flow of financial crime generated by the single market. In 1991, the European Commission issued Directive 91/308/EEC to simultaneously advance the integration of a single market and to counteract money laundering.[32] The Directive made money laundering connected with drug activities an offense and imposed an obligation upon the financial sector to adopt the practice of knowing its customers.[33] In addition, the Directive instituted the practice of reporting suspicious activity by authorizing the relaxation of banking secrecy rules when warranted.[34] The European Community acted immediately in order to preempt the member states from implementing their own national regulations against money laundering that might have been incompatible with the goals of the Community as a whole.[35] As an alternative, E.C. member states are bound to implement the Money Laundering Directive but retain the discretion to expand its scope as long as its goals are advanced.[36]

Regulations criminalizing money laundering were in effect in the United Kingdom prior to the enactment of the European Community's Money Laundering Directive. In particular, the scope with which the U.K. implemented the Directive is a useful reference for potential formulation of U.S. laws regarding the use of non-financial institutions for money laundering.[37] In order to implement the E.C. Money Laundering Directive, the U.K. revised its Criminal Justice Act of 1993 (CJA) and enacted the Money Laundering Regulations of 1993 (the Regulations).[38] The CJA previously criminalized

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31. *See FATF-VIII Annual Report* 12-13 (June 19, 1997), *available at* http://www.oecd.org/fatf/Ctry-orgpages/ctry-uk_en.htm (last visited Feb. 20, 2001).

32. *See* Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, Official Journal No. L166, at 77. [hereinafter *Money Laundering Directive*]. *See also* European Parliament and Council Directive amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, COM (99) 532 final, *available at* http://europa.eu.int/eur-lex/en/com/dat/1999/en_599PC0352.html (modified daily).

33. *See id.*

34. *See* Commission Proposal for Amending Council Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering, 7 (July 1999), *available at* http://europa.eu.int/eurlex/en/com/pdf/1999/en_599PC0352.pdf (last visited Feb. 22, 2001).

35. *See* WILLIAM C. GILMORE, THE EVOLUTION OF MONEY LAUNDERING COUNTERMEASURES, 156 (2d ed. 1999).

36. *See Money Laundering Directive*, *supra* note 32.

37. The United Kingdom acceded by treaty to the European Community and incorporated the European Economic Community Treaty into UK law through an act of Parliament called the European Communities Act of 1972. *See generally* Europa, *The History of the European Union: A Chronology from 1946 to 2000*, *available at* http://www.europa.eu.int/abc/history/index_en.htm (last visited Dec. 6, 2000).

38. *See* Criminal Justice Act, 1993, ch. 36 (Eng.)[hereinafter *Criminal Justice Act*]. *See also* Money

money laundering related to drug activity before the issue of the Directive and Parliament later extended the law to cover all serious crimes, terrorist acts and drug trafficking.[39] Together, the CJA and the Regulations work to fight money laundering from opposite ends. While the CJA penalizes the offense of money laundering itself, the Regulations are comprised of preventive measures designed to identify illegal activities before they reach the criminal investigative stages.[40]

Unlike their U.S. counterpart, the procedures under the 1993 Regulations are comprehensive because they cover most business entities that are vulnerable to money laundering. The Regulations impose identical reporting and record-keeping obligations upon both financial institutions and certain non-financial intermediaries that carry out "financial business."[41] Thus, financial service providers such as credit institutions, insurance businesses, notaries public, financial advisers, accountants, and solicitors are all required to comply with the identification and reporting procedures.[42] The Regulations therefore require legal professionals to verify the identity of new clients thoroughly by requesting that they furnish sufficient identification information.[43] Similar to the threshold for CTRs filed by financial institutions in the U.S., client identification is necessary for individual transactions involving more than £10,000 or when a number of different transactions that appear connected add up to more than £10,000.[44] Rather than submitting reports directly to government agencies, solicitors and other professionals upon whom the Regulations apply in the U.K. must implement an in-house system for recording suspicious transactions that must be kept for five years from the date of a transaction.[45] For example, a solicitors' firm must appoint an officer to supervise internal reporting procedures and act as a liaison with the Economic Crime Unit of the National Crime Intelligence Service if further investigation ensues.[46]

Although the U.K.'s Regulations applicable to solicitors have been in force for a number of years, the incorporation of the procedures into standard practice has been slow.[47] Solicitors in the U.K. may not be unaware of the laws but are rather mindful not

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Laundering Regulations, 1993 (SI 1993/1933) (Eng.)[hereinafter *Money Laundering Regulations*]. *See generally* THE LAW SOCIETY OF ENGLAND AND WALES, THE GUIDE TO THE PROFESSIONAL CONDUCT OF SOLICITORS, 337-340 (Nicola Taylor, ed. 8th ed. 1999) (annotating UK legislation with practice notes for solicitors and barristers).

39. *See* Gautam Bhattacharya and Emma Radmore, *Fighting Money Laundering – A United Kingdom Perspective*, *in* MONEY LAUNDERING CONTROL 101 (Barry Rider and Michael Ashe, eds. 1996).

40. *See* Khan & Conolly, *supra* note 1, at 29.

41. *Money Laundering Regulations*, *supra* note 38, Section 4(1).

42. *See* GILMORE, *supra* note 35, at 159.

43. *See* Khan & Conolly, *supra* note 1, at 35.

44. *See id.* at 32-33.

45. *See id.* at 35.

46. *See Money Laundering Regulations*, *supra* note 38, Section 5.

47. *See UK: Importance of In-House Systems and Training Stressed*, MONEY LAUNDERING MONITOR: KEY DEVELOPMENTS IN INTERNATIONAL MONEY LAUNDERING REGULATIONS (CCH, Institute of Advanced Legal Studies, London, England) April 2000, at 6, *available at* http://www.cchnewlaw.co.uk (last visited Feb. 22, 2001).

to compromise their duties to clients. In order to raise awareness of the money laundering provisions within the legal community, the Law Society of England and Wales formulated guidelines to explain solicitors' obligations in accordance with the current legislation.[48] Solicitors may be deemed liable for participating in money laundering in a number of ways under the U.K. laws. According to the Law Society, solicitors may be liable for assisting a client in disguising criminally-obtained funds, for warning a client who is the subject of a potential criminal investigation, for concealing one's suspicion or knowledge of money laundering activities or for failing to alert the authorities of such activities.[49] As a consequence, solicitors who fail to report knowledge or suspicion of money laundering possibly face a fine or imprisonment.[50] While solicitors in the U.K. appear bound by a duty to report irregular dealings with clients, the lack of in-house training on the subject at solicitors' firms demonstrates that legal professionals have remained reluctant to divulge information regarding clients. Reporting one's suspicion that a client may be engaging legal services in order to legitimize tainted funds is incongruous with the entrenched principle of client confidentiality. However, compliance with the reporting regulations is highly encouraged because it provides solicitors with an escape from the likelihood of prosecution.[51] Rather than perceiving U.K. legislation as imposing a duty to report, however, it may be characterized as promoting a "culture of defensive reporting" within the legal community.[52]

The legitimacy of placing additional responsibility upon lawyers due to the role they play as an intermediary in money laundering is not only recognized in the U.K. Following the U.K. standards, the European Commission proposed amendments to the Money Laundering Directive in response to the current trend in money laundering.[53] Money laundering offenses in the Community will no longer be confined to drug-related activities but will include all organized crime.[54] Like the broad U.K. regulations in place, the Directive will be expanded to cover non-financial activities and professionals whose services are employed by those who wish to disguise illicit funds. Some of the alternative services that are now being used for converting dirty money include currency exchange bureaus, casinos, lawyers, real estate agents, and auditors.[55] Despite the delay in fully integrating anti-money laundering procedures among non-financial institutions,

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48. The Law Society of England and Wales is the professional organization of lawyers in the United Kingdom. *See* Andrew Campbell, *Solicitors and the Prevention of Money Laundering*, III(2) J. MONEY LAUNDERING CONTROL 135, 136-38 (1999).

49. *See* The Law Society of England and Wales, *Money Laundering Legislation: Guidance for Solicitors* (December 1999) 5-6, *available at* http://www.lawsociety.org.uk (last visited Feb. 22, 2001).

50. *See Money Laundering Regulations*, *supra* note 38, Section 5(2).

51. *See* Gentle & Murray, *supra* note 7, at 5663.

52. *See id.* at 5741.

53. *See Money Laundering Directive*, *supra* note 32, at Article 1.

54. *See id.*

55. *See id.* at Article 2a.

preventive steps are being established to counteract the developments in the area of money laundering. The example of the United Kingdom's laws requiring legal professionals to comply with identical reporting obligations as those of financial institutions demonstrates that US legislation imposing such responsibilities upon lawyers should perhaps be considered.

IV. POTENTIAL EFFECTS ON THE LEGAL PROFESSION

Banks and financial institutions were traditionally known to afford confidential services that allow for the concealment of illegally obtained money. The fact that client privacy is also closely guarded in the financial sector, especially with regard to banking activities, has not thwarted the imposition of reporting requirements because the procedures are legitimately within the authority of its regulators. Designating financial institutions with reporting responsibilities is the norm among the anti-money laundering procedures in many jurisdictions and is endorsed by the Financial Action Task Force.[56] Placing similar obligations upon legal professionals appears problematic however, because unlike financial institutions, lawyers are independent professional advisors. Lawyers place a high significance on the privacy of their dealings with clients and view intrusions as threatening to the integrity of the profession. If U.S. lawyers are to accede to having their services monitored, they must first be assured that the professional obligations to clients will not be compromised.

In the U.K., reporting requirements may be in place but the legal community challenges the provisions as detrimental to the quality of their services. The recent amendments to the European Community Directive stimulated debate on the compatibility of anti-money laundering measures with the practice of law. After the European Community's release of the amendments to the Directive, the Law Society formed the Money Laundering and Serious Fraud Task Force (the Task Force) to fully implement the changes that will become effective this year.[57] Responsible for distributing the practice guidelines for solicitors, the Task Force took part in European Parliament debates on issues that will specifically impact the practice of U.K. solicitors. For example, the European Parliament proposed to limit solicitor-client privilege in a way analogous to the relaxation of banking secrecy laws in order to strengthen the fight against money laundering.[58] Before the amendments take effect, the European Parliament was considering the concept of "litigation privilege" which would have limited the protection only to communication between the client and the solicitor that is directly related to legal pro-

56. *See* Financial Action Task Force, *supra* note 2.

57. *See Law Society Gets Serious About Money Laundering*, MONEY LAUNDERING MONITOR: KEY DEVELOPMENTS IN INTERNATIONAL MONEY LAUNDERING REGULATIONS (CCH, Institute of Advanced Legal Studies, London, England) July 2000, p.1, *available at* http://www.cchnewlaw.co.uk (last visited Feb. 20, 2001).

58. *See id.*

ceedings.[59] The Task Force has advocated the views of the legal community in the U.K. that placing such a limitation on solicitor-client privilege would render the protection a futile one because it would only take effect if and once legal proceedings begin, which is also when the protection is needed most.[60]

Although the European Parliament's proposal is only one example of how anti-money laundering legislation may affect the practice of law, imposing reporting requirements upon lawyers raises similar fundamental issues whether it is considered within the context of the legal profession in the United States or in the United Kingdom. Both in the U.S. and the U.K., the confidential relationship between the client and her lawyer makes the profession attractive to money launderers. First, reporting on suspicious client activity violates a lawyer's duty of confidentiality to the client. In the U.K., solicitors are bound by a general duty of confidentiality that covers all information regarding the client, whether it is communicated by the client or by another acting on her behalf.[61] Few lawyers or solicitors would risk their careers and becoming the subject of disciplinary action by a professional association for violating the confidence of their clients. Solicitors in the U.K. are released from their duty of confidentiality if they are to comply with the record-keeping laws. Under the Criminal Justice Act of 1993, strong evidence of a client's criminal motive warrants the release of information to the authorities without jeopardizing a solicitor's career.[62] The common law makes room for a compelling public interest to override a solicitor's contractual obligation and invalidate a claim for breach of confidentiality.[63] Due to the U.K.'s strong public policy against money laundering, occasional divergence from standard legal professional norms may be justified.[64]

A related concern with regard to the effect of reporting procedures on solicitors is its impact upon attorney-client privilege. The distinction between confidentiality and privilege is that the former applies to communication that occurs within the attorney-client relationship while the latter, referred to as legal professional privilege in the U.K., covers only selected information that is protected against disclosure.[65] Since the privilege against disclosure belongs to the client, only she and not the lawyer may waive it before any information may be legitimately disclosed to a third party.[66] For example, requiring U.K. solicitors to report their suspicions regarding a client is contradictory to the fundamental duties of confidentiality and privilege that attach in a solicitor-client

59. *Id.* at 2.

60. *See id.*

61. *See* THE LAW SOCIETY OF ENGLAND AND WALES, THE GUIDE TO THE PROFESSIONAL CONDUCT OF SOLICITORS, 324 (Nicola Taylor ed., 8th ed. 1999).

62. *See* Gentle & Murray, *supra* note 7, at 5662.

63. Law Society of England & Wales, *supra* note 49, at 6.

64. *See* THE LAW SOCIETY OF ENGLAND AND WALES, *supra* note 61, at 325.

65. *See* Campbell, *supra* note 48, at 137.

66. *See id.* at 138.

relationship. However, lawyers acting in their legal capacity are exempt from divulging information confided to them by clients. U.K. money laundering laws treat privilege much like confidentiality by protecting solicitors against professional misconduct. Under the U.K. regime, providing authorities with information does not constitute a waiver of privilege as long as it is performed within the context of a criminal investigation.[67] By protecting barristers and solicitors against potential breaches of their professional obligations, U.K. laws attempt to facilitate the cooperation of the legal community when a criminal investigation of financial crime takes place. In addition, solicitors and legal firms in the U.K. are given safe harbor protection against liability so long as they take reasonable efforts to comply with the reporting regulations through instituting internal procedures.[68]

If U.S. lawyers are likewise assigned the task of reporting against money laundering, their ability to give effective advice may be at risk. The premise underlying the protection of clients' confidences is to encourage full disclosure of one's situation in order for a lawyer to offer the best possible representation. Fear that a lawyer may divulge confidential information has the obvious implication that clients may become unwilling to fully disclose information to their counsel. Regardless of whether clients are innocent, involved in minor offenses, or outright using legal services in pursuit of financial fraud, they are bound to act defensively when seeking legal advice. Thus, any future U.S. regulation that might make lawyers a part of the scheme for deterring financial crime must be designed in such a way that does not merely empower lawyers with deciding when their clients' privacy may or may not be restricted.

V. RECOMMENDATIONS

The Financial Action Task Force recognizes the leadership position of the U.S. in creating effective legislation against money laundering.[69] Yet the movement of money laundering activities in the direction of deregulated businesses invites further action on both the parts of government agencies and professional associations in the U.S. Simply extending the existing reporting regulations to encompass other professionals and business within the established regime may not provide an effective countermeasure. The difficulty of regulating the legal profession in the same manner in which the financial sector has been monitored is in the intrusion upon a professional community that places a high premium on confidentiality.[70] The only way in which a measure involving the legal community will work is if it does not significantly interfere with lawyers' obliga-

67. *See* Khan & Conolly, *supra* note 1, at 31.

68. *See Money Laundering Regulations*, *supra* note 38, Sections 5(1)-(3).

69. *See FATF-VIII Annual Report* 14-16 (June 19, 1997), *available at* http://www.oecd.org/fatf/pdf/AR97_en.pdf (last modified Feb. 16, 2001).

70. *See* Gentle & Murray, *supra* note 7, at 5742.

tions to their clients. A related consideration is that government control of a body of professionals designated with the duty to assist clients in their private endeavors may result in a division of lawyers' loyalties. Confidence in the impartiality and independence of lawyers would erode and directly impact the quality of advice legal professionals could offer to clients. While legislative action parallel to those already implemented in the U.K. and by European Community member states appears necessary, it is highly unlikely that equally strong legislation imposing reporting requirements could be enacted in the U.S. without a backlash from the legal community.

Formulating new laws targeted at non-financial businesses and professionals may not be necessary because the Money Laundering Control Act is not limited in terms of who may be held liable according to its provisions. Lawyers might think twice about becoming involved in money laundering in the course of representing their clients if prosecutions of other lawyers are pursued under section 1957. The problem with using the law as a deterrent in this context is that it might make lawyers hesitant to provide their legal expertise and choose only safe cases. Instead of entirely avoiding the problem of money laundering by refusing representation, lawyers must be allowed to remain independent in advising clients of their rights while also discouraging the use of their expertise to circumvent established regulations.

If U.S. measures against money laundering are to be made more comprehensive by including lawyers within their scope, there are some alternatives to congressional action that may be considered in the future. Since lawyers will vehemently oppose becoming subject to government regulation, the professional community may choose to become self-regulating with regard to the money laundering issue. Rather than direct government imposition of reporting requirements upon lawyers, an independent body may be designated with the responsibility of creating provisions specifically applicable to the legal community. Similar to the work of the Law Society of England and Wales, the American Bar Association may form a committee consisting of financial experts, judges, and lawyers to formulate guidelines to be followed by the legal community. Such a body may conduct a study to determine the level of awareness among lawyers on the incidence of money laundering activities pursued with the help of their professional services. As a result of its findings, the ABA-affiliated body may then formulate guidelines to promote an industry-wide practice of diligent inquiry about clients' identities and goals. In turn, lawyers may then be given the opportunity to decide whether effective representation of a particular client is both wise and feasible. Perhaps coupled with the inquiry into a client's background might be the creation of an anonymous resource center where lawyers may ask designated "experts" how they may protect themselves against potential liability while continuing to represent clients whose situations might raise some doubt. The difficulty faced by an organization such as the one suggested is in determining how to avoid causing lawyers to turn away potential clients who seek representation.

Another alternative that the American Bar Association may wish to pursue should the legal community be hostile to congressional action is to revise the Model Rules of Professional Conduct. Although the rules differ from state to state, the ABA might wish to follow the footsteps of the Law Society by providing for specific deviations to particular rules when there is a compelling public policy involved. For instance, Model Rule 1.6 allows for a derogation from the duty of confidentiality if a client is in danger of physical harm or if a lawyer must raise a defense in the event she is civilly or criminally charged in connection with client activity.[71] Under this provision, the ABA might choose to set specific examples when lawyers may be released from their duty of confidentiality such as in the event that a criminal investigation of their client is pursued by the authorities. A conflict of interest is likely to arise if a lawyer continues to represent a client on whom information has been revealed to government investigators. If so, lawyers might themselves be advised to consider whether representation of the client should still continue.

While these recommendations are merely starting points for consideration, they are provided here with the intention of raising concern and potential action both on the legislative level as well as within the professional community itself.

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71. *See* AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.6 (1999), *available at* http://www2.law.cornell.edu/cgi-bin/foliocgi.exe/modelrules (last visited Feb. 13, 2001).

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