

Making the case for appropriate anti-money laundering rules for lawyers

Neil Rose

Neil Rose is a former solicitor and has been a legal journalist and editor in England for the past 13 years. He can be contacted by e-mail at neil.rose@writtenmedia.co.uk.

Lawyers have been fighting for their own rules in relation to anti-money laundering – progress is being made but the battle is not yet won.

What do lawyers have in common with casino operators, real estate agents and dealers in precious metals? All members of the so-called 'gatekeeper community', they helped convince the Financial Action Task Force (FATF) that it should not apply to their industries' anti-money laundering (AML) guidance designed for the financial sector.

FATF recommendations

The FATF is an intergovernmental body with 34 members whose purpose is developing and promoting policies, both at national and

international levels, to combat money laundering and terrorist financing. It has laid out the benchmark 40 Recommendations, which provide a plan of action to fight money laundering.

What it says filters down, for example into European directives and then into the national laws of EU Member States. So having won the first battle, the gatekeeper community's next battle was to have sector-specific guidance, rather than one that covered them all. Eventually the case for lawyers being different from casino operators was made, much negotiation followed and, in October 2008, the FATF published its 'Risk-Based Approach Guidance for Legal Professionals' (on the same day as the casino industry got its own version).

The guidance sets out a risk-based approach to assessing the likelihood of money laundering taking place in any case or with any client – with geography, the nature of the client and its business, and the nature of the service requested the primary markers – and sets out recommended approaches to the implementation of effective monitoring processes and training programmes in law firms.

It is the culmination of several years of hard work by the IBA Anti-Money Laundering Legislation Implementation Group (AMLLIG), the American Bar Association and the Council of Bars and Law Societies of Europe (CCBE), which have worked intensively to move the FATF from a position of knowing little and caring less about the unique nature of the legal profession to one where there is now a proper dialogue. 'The mere fact that we got separate guidance for lawyers was a huge, huge step forward', says Stephen Revell, Chair of the IBA AMLLIG.

Need for 'suitable' rules

But that does not mean it is the end of the fight to produce rules suitable for the legal



profession – not by a long way. There are still some fundamental arguments to be had over the coming years. Revell is honest enough to admit that ‘we didn’t win every battle’ on the guidance, but at the same time ‘we took it to the wire and beyond’ on issues such as identifying beneficial owners, right down to the deadline of the FATF plenary meeting in Ottawa in September 2008.

But the guidance undoubtedly represents progress. Revell describes it as a ‘high-level reference point’ for states and bar associations when drafting and interpreting domestic legislation, and one that contains ‘phrases and paragraphs’ that will help lawyers make their case. The reality is that ‘in many countries, the rules that lawyers are being asked to adhere to are disproportionate and inconsistent with their duties’.

Peter McNamee, senior legal adviser at the CCBE, says his organisation is now ‘going to invite our member bars to take the guidance into consideration, especially when drafting guidelines of their own’. Within the context of having fundamental objections to the whole process, CCBE secretary-general Jonathan Goldsmith professes himself happy with the guidance. ‘Given the circumstances, the FATF did try and take account of our concerns’, he says.

Revell, a partner at leading London law firm Freshfields Bruckhaus Deringer, has been the driving force behind the AMLLG’s activity in this area in recent years, work that began with his concerns that ‘increasingly I was seeing new laws coming through which were onerous for lawyers and damaging to clients without sufficient thought or consultation with lawyers’.

From the start, the AMLLIG has been clear that it strongly supports the fight against money laundering – but equally it questions whether lawyers should be quite the target they have been. Revell says the group began its work with two fundamental concerns, neither of which is close to being resolved.

First is the lack of evidence that lawyers are unwittingly facilitating money laundering (there will, of course, always be a tiny minority who deliberately become involved). ‘There was this idea that, by exercising some extra care and diligence, the lawyer could have worked out what was happening. So we asked for hard evidence of this, but to date we have not received any.’

The evidence would help design systems and educate lawyers on what to look out for, but equally, if it does not exist, says Revell, it raises the question of whether all the work and expenditure to put lawyers at the forefront of the fight against AML is a proportionate response to the actual risk. This point assumes greater weight given that the guidance is all about a risk-based approach.

McNamee enforces the point. ‘It is a question we raise at every opportunity. Based on the evidence we have, there are very few lawyers unwittingly involved in money laundering. The FATF guidance, like the EU directives, is a very disproportionate response to the problem.’

The second concern is whether lawyers should be obliged to blow the whistle on clients they suspect may be involved in money laundering. The focus of the recent guidance is on customer due diligence, which is relatively uncontroversial – unlike suspicious transaction reporting. Though there is some protection for lawyers – such as by limiting it to certain types of work – reporting has provoked some very strong principled opposition from lawyers who believe that the lawyer–client relationship should be sacrosanct.

Varied responses worldwide

Part of the problem is that there are different approaches taken to reporting around the world. The United Kingdom’s law has taken it to extremes by ‘gold plating’ the underlying European directive, leading to lawyers making thousands of suspicious transaction reports a year. Solicitors have even gone to prison for not reporting transactions that the courts have subsequently ruled they should have had their suspicions about.

Away from money laundering, there are other limited circumstances in which solicitors should break confidentiality – such as to prevent someone suffering serious bodily harm. But in France, by contrast, even your client announcing their intention to commit murder does not require you to blow the whistle.

Clearly there is not a level playing field. The United States, in breach of its treaty obligations to the FATF, has not yet implemented a reporting regime for lawyers, while to the north lawyers persuaded the courts to strike down the Canadian Government’s effort to do so.

The Japanese bar has firmly opposed reporting obligations and successfully excluded lawyers from them under its Anti Money Laundering Legislation. Tatsu Katayama, Director of the Office of International Affairs of the Japan Federation of Bar Associations says that: ‘Japanese legislation is also in breach of treaty obligations in that we do not oblige lawyers to report. However, we do not think it breach of international obligations. FATF recommendations are made among executive branches of the government. It should not be binding on member states because they were not ratified by the parliament. The cases of Canada, the US and Japan should be taken as an indication of the disparity of the initial action by FATF.’

In Australia, the traditional activities of lawyers (and other gatekeepers) are not yet covered by its AML legislation. The debate about the nature and extent of obligations to be imposed on lawyers is therefore ongoing.

'Solicitors have gone to prison for not reporting transactions that the courts ruled they should have had their suspicions about'

Issues such as clear protection for privileged communications, to whom suspicious matter reports might be made and the threshold for making such reports, as well as many other important issues, are yet to be decided.

The recent English case of *Shah & Anor v HSBC Private Bank (UK) Ltd* [2009] EWHC 79 (QB) provides a caution in relation to suspicious matter reporting. The claim that HSBC needed to have reasonable grounds for its suspicion before making a report was rejected. The court stated that 'unlike law enforcement agencies banks have neither the responsibility nor expertise to investigate criminal activities to satisfy themselves that the grounds for their suspicion are well founded, reasonable or rational'. Australia's AML legislation currently requires reasonable grounds for a suspicion to be reported, giving rise to the responsibility and expertise issue mentioned by the court in *Shah*. Imposing this test on lawyers would not only be onerous, but would also represent another significant national variation in the application of FATF guidelines in member jurisdictions.

For Revell, this indicates that 'we as a profession haven't yet bottomed out the debate' on reporting. 'If you put six lawyers in a room, you'll get ten opinions.' And it is a debate that needs to be had in the wider context of society's standards, he reckons. The man on the street, for example, might well expect that there should be an exception to confidentiality where there is a serious risk of physical harm. But would he think the same in the case of financial harm?

Revell believes that even those who accept there are circumstances in which lawyers should report on their clients agree that the current obligations have gone too far. 'This may take a long time, but it's a worthwhile goal to say we need to revisit with the FATF the whole suspicious transaction reporting regime they've established.'

McNamee comes to the same conclusion, but gets there in a different way. While UK lawyers are making their thousands of reports, lawyers in the rest of Europe – where there has been no gold plating – do not generate 100 between them. 'Was there any need for [the rules]?' he asks rhetorically. He argues that it was important to hold an absolute line against any reporting, saying that 'once you've eroded the principle, you chip away at it with other legislation'.

There are signs to encourage the hope that the FATF may engage on this issue. First, says Revell, 'the FATF has been as surprised as us by the fact that Member States haven't

been able to come up with any examples of unwitting involvement. While they wouldn't admit it, I hope they've started thinking whether the requirements on lawyers are entirely proportionate'. Then there is that problem of the level playing field, with leading members yet to implement the FATF's recommendations. 'What is the FATF going to do? Throw out the US or redebate it?' Finally, the negotiations over the guidance 'showed the lawyers are prepared to talk constructively about their role in the fight against money laundering'.

The CCBE will be approaching the issue at a European level, with the European Commission expected to announce a review of the Third Money Laundering Directive this year.

Battle continues

In the meantime, the work of the AMLLIG will continue apace. Its Anti-Money Laundering Forum website has proven hugely successful – feeding into the wider aim of giving bars and lawyers the tools to tackle this issue in their own countries. Practical help on customer due diligence and suspicious transaction reporting will also continue to be a high priority, Revell says. 'Like it or not, we need to educate lawyers on how to deal with the risk of abuse of our role by money launderers.'

And of course the dialogue with the FATF will continue, both to achieve the long-term goal of putting reporting back on the table, but also specific issues arising out of the FATF recommendations. For example, the AMLLIG is pushing for recognition that if a lawyer reasonably relies on a third party's due diligence, and it turns out the third party has not done their job properly, the lawyer is not held responsible.

Working at a large English firm with a significant international presence, Revell knows better than most how unnecessarily expensive and awkward anti-money laundering laws can be when applied to lawyers too zealously.

'There is some momentum beginning to build to re-examine the fundamental rule on whistleblowing', he says. Though realistic enough to know that it will never be ripped up entirely, Revell thinks there is room, for example, to make it less mandatory and restrict it to serious matters, however that might be defined. 'It's broken so we should work on fixing it – but I wouldn't like to predict what the fix is and when it will come.' ☒