

**AMERICAN BAR ASSOCIATION  
TASK FORCE ON GATEKEEPER REGULATION AND THE PROFESSION  
SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW  
CRIMINAL JUSTICE SECTION  
SECTION OF LITIGATION  
SECTION OF INTERNATIONAL LAW AND PRACTICE**

**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

1 RESOLVED, That the American Bar Association supports the enactment of reasonable  
2 and balanced initiatives designed to detect and prevent domestic and international money  
3 laundering and terrorist financing.

4  
5 FURTHER RESOLVED, That any efforts to establish and implement international and  
6 United States policies to combat domestic and international money laundering and  
7 terrorist financing should be consistent with the following principles:

8  
9 (1) lawyers play a critical and independent role in the administration of justice and in  
10 ensuring lawful compliance by persons and entities involved in commercial and financial  
11 activities;

12  
13 (2) the judiciary and the organized bar are responsible for establishing ethical rules  
14 governing the activities of lawyers and for ensuring that the profession adheres to the  
15 highest standards of professional and lawful conduct; and

16  
17 (3) there is a critical need for confidentiality in client communications with lawyers to  
18 ensure the independence of the bar, protect the lawyer-client relationship, and support the  
19 proper functioning of the legal system;

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21 FURTHER RESOLVED, That the American Bar Association:

22  
23 (1) opposes any law or regulation that, while taking action to combat money laundering  
24 or terrorist financing, would compel lawyers to disclose confidential information to  
25 government officials or otherwise compromise the lawyer-client relationship or the  
26 independence of the bar; and

27  
28 (2) will continue to review the Model Rules of Professional Responsibility and evaluate  
29 whether the rules permitting, in appropriate circumstances, disclosure of confidential  
30 information should be modified to permit disclosure of information demonstrating the  
31 clear intent of a client to commit criminal acts such as money laundering; and

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33 (3) urges bar associations and law schools to undertake education efforts to ensure that  
34 lawyers are informed regarding the scope of money laundering laws and the anti-money  
35 laundering requirements that apply to lawyers to safeguard the profession from being  
36 used to facilitate money laundering or terrorist financing activity.

# REPORT

## I. INTRODUCTION

Governments throughout the world have long been working to combat criminal money laundering activity. More recently, this effort has been tied into the battle against international terrorism, as terrorist organizations depend in part on the ability to move economic assets through the international financial and commercial system to fund their activities. Now, the U.S. government and other governments are considering the extent to which lawyers and other professionals should be required to aid law enforcement agencies in the fight against money laundering and terrorist financing.

This report explains the American Bar Association's ("ABA") resolution regarding the appropriate role of lawyers in U.S. government efforts to combat money laundering. It analyzes the legal and ethical problems arising from any mandatory reporting obligation to the U.S. government to reveal client information that involves a "suspicion" of possible money laundering or other criminal activity. This report also discusses the already-existing legal and ethical requirements that minimize the risk that lawyers will be involved in money laundering activities or otherwise will assist their clients to engage in such activities. The resolution expands upon the ABA resolution passed by the House of Delegates at its mid-year meeting in February 2002.<sup>1</sup>

## II. BACKGROUND

### A. The Multilateral Effort to Combat Money Laundering

For more than a decade, international anti-money laundering efforts have been spearheaded by the Financial Action Task Force (FATF), an inter-governmental body consisting of twenty-nine countries and two international organizations, that was established to develop and promote anti-money laundering policies at the national and international levels.<sup>2</sup> At the heart of FATF's effort to combat money laundering is a set of forty recommendations (the "Forty Recommendations") that FATF developed in 1990, just one year after the organization was established at the G-7 summit in Paris. The Forty Recommendations originally were designed to combat misuse of financial systems by

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<sup>1</sup> During the February 2002 meeting of the ABA House of Delegates, a resolution proposed by the ABA Criminal Justice Section was approved and stated "That the American Bar Association urges the United States government to seek to protect and uphold the attorney/client relationship, including the attorney/client privilege, in dealing with international money laundering."

<sup>2</sup> The FATF members are the United States, the individual member nations of the European Union, Argentina, Australia, Brazil, Canada, the European Commission, the Gulf Cooperation Council, Hong Kong, Iceland, Japan, Mexico, New Zealand, Norway, Singapore, Switzerland, and Turkey. *See* [http://www1.oecd.org/fatf/Members\\_en.htm#MEMBERS](http://www1.oecd.org/fatf/Members_en.htm#MEMBERS).

persons laundering drug money. However, they subsequently were amended to address the laundering of money derived from serious crimes as well. FATF's Forty Recommendations have been endorsed by over 130 countries.

FATF initiated a review of its Forty Recommendations in 2001, to identify numerous ways that the Recommendations could be expanded to address increasingly sophisticated money laundering techniques. On May 30, 2002, FATF issued a "Consultation Paper" outlining various options for strengthening national anti-money laundering measures and sought comments on those options.<sup>3</sup> Among the options in the Consultation Paper were new anti-money laundering initiatives proposed for non-financial businesses and professionals.

Known as the "Gatekeeper Initiative", FATF is proposing that certain professionals, such as lawyers,<sup>4</sup> should be enlisted to serve as "gatekeepers" to the international financial and business markets. The Consultation Paper proposes that certain anti-money laundering measures be extended to lawyers, such as (1) increased regulation and supervision of the profession, (2) increased due diligence requirements on clients, (3) new internal compliance training and record-keeping requirements for lawyers and law firms, and perhaps most significant, (4) new "suspicious transaction reporting" ("STR") requirements mandating that lawyers report to a government enforcement agency or a self-regulatory organization ("SRO") information that triggers a "suspicion" of money laundering relating to a client activity. Furthermore, the Consultation Paper indicates that lawyers would be prohibited from informing their clients when an STR has been filed with the government. This is the so-called "no tipping off" rule, which is incorporated into the existing FATF Recommendations and already applied to financial institutions that have suspicious activity reporting requirements under existing law. The Consultation Paper proposes that the STR requirement be enforced through criminal, administrative, or other sanctions.<sup>5</sup>

The Consultation Paper recognizes that "[t]he particular role, history and status of the legal profession and the rules that attach to it means that very careful attention will need to be given when considering the application of anti-money laundering obligations to such professionals."<sup>6</sup> In this regard, it recognizes that any STR requirement imposed on lawyers should be subject to the notion of the attorney-client privilege and need for confidentiality in representing clients in litigation.

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<sup>3</sup> See Financial Action Task Force on Money Laundering, *Review of the FATF Forty Recommendations: Consultation Paper*, May 30, 2002.

<sup>4</sup> The FATF consultation paper covers "independent legal professionals" (i.e., outside as opposed to inside counsel), notaries, accountants, auditors and company formation agents. *Id.*, at p. 98.

<sup>5</sup> *Id.*, at p. 103.

<sup>6</sup> *Id.*, at p. 97.

FATF requested comments on the Consultation Paper. The ABA Task Force on Gatekeeper Regulation and the Profession, established in February 2002, developed and submitted comments to FATF on August 23, 2002. The ABA Board of Governors approved those comments for submission to FATF as Task Force comments.<sup>7</sup> In addition, the ABA Task Force, along with numerous other legal profession groups, participated in an open forum convened by FATF on October 8, 2002 to obtain input from the private sector on the Consultation Paper. The FATF is expected to develop new or modified Recommendations, including a position on the Gatekeeper Initiative, sometime in 2003. While non-binding, the members of FATF are expected to implement the Recommendations through national law, regulations or administrative practice. The U.S. Government has not yet developed a position on the Gatekeeper Initiative. However, it is anticipated that the U.S. Government will begin to do so in the near future, given FATF's actions to date, as well as the activities of other governments around the world.

#### B. Activities of Other Governments

Other governments throughout the world have either undertaken certain Gatekeeper Initiative legislation and regulation, or are now considering such laws and regulations in light of the FATF effort.<sup>8</sup> Suffice it to say that organized bar associations throughout the world have expressed grave concerns regarding the potential impact of Gatekeeper Initiative-type laws, especially STR requirements, on the attorney-client relationship, the independence of the legal profession from the government, and the confidentiality of communications between a lawyer and a client. For example, on October 18-19, 2002, a European conference was held in Antwerp, Belgium, to discuss the issue of legal professional secrecy and the impact of the Gatekeeper Initiative on the profession. Participants in this conference included representatives from Germany, France, Spain, Belgium, the Netherlands, the United Kingdom, Luxembourg, Italy, and the United States.

Of particular concern to the conference participants was the European Union's ("EU") anti-money laundering Directive, as amended by the Commission in October

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<sup>7</sup> See Attachment 1.

<sup>8</sup> Some European countries, such as the United Kingdom and Switzerland, already have implemented certain Gatekeeper Initiative requirements, including the STR requirement. These laws are quite detailed. However, summaries of these laws can be viewed at the web site of the ABA Task Force on Gatekeeper Regulation and the Profession -- [www.abanet.org/crimjust/taskforce/home.html](http://www.abanet.org/crimjust/taskforce/home.html). However, the effectiveness and observance by the bar of the STR requirement has been questioned. For example, in the United Kingdom, the National Criminal Intelligence Service, the government agency responsible for receiving and reviewing suspicious transaction reports, has publicly noted that the incidence of reporting by U.K. solicitors is extremely low and appears to reflect non-observance by the legal profession in the United Kingdom.

2001.<sup>9</sup> This amendment to the Directive requires European governments to take action to impose on “independent legal professionals” and notaries Gatekeeper Initiative requirements similar to those outlined in the FATF Consultation Paper. These requirements include an STR obligation. Lawyers within the EU would be prohibited from informing their clients of any report that is filed with the government or an SRO, and there would be civil and criminal penalties available to enforce the STR and no-tipping off requirement. Although the STR requirement may be subject to the privilege that applies in litigation and in “ascertaining the legal position” of a client, serious concerns remain among the various European bar associations regarding the effect that any Gatekeeper Initiative requirements will have on the legal profession throughout Europe.<sup>10</sup> According to the Directive, European member countries are expected to

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<sup>9</sup> European Union, Directive of the European Parliament and the Council of Ministers Amending Council Directive 91/308/EEC on the Prevention of the Use of the Financial System for the Purpose of Money Laundering, Directive 2001/97/EC, Brussels, December 4, 2001.

<sup>10</sup> The views expressed by various legal professional associations throughout the world to FATF, regarding the Gatekeeper aspects of the Consultation Paper, underscore the widespread concerns with an intrusion into client confidential information and the attorney-client relationship. *See, e.g.*, Comments of the German Federal Bar, dated September 23, 2002, p.2 (“A relationship based on trust between the client and his lawyer is a fundamental prerequisite for the lawyer to be able to fulfill his tasks, which constitute considerably the maintenance and the defense of a free society and the rule of law.”); Comments of the Danish Bar and Law Society, dated August 27, 2002. p. 1 (“Any substantial limitation in the client’s right to confidentiality can very well lead to a violation of the client’s civil rights, and his access to justice. . . . The client should not be denied this fundamental right, unless it must be considered to be an absolute necessity in order to defend democracy or to prevent the loss of life.”); Comments of the Japanese Federation of Bar Associations, dated August 28, 2002, p.2 (“The attorney’s duty to protect secrets that he has come to know in the performance of his duties is a basic principle of the legal profession that has been formed and whose importance and validity has been confirmed through the long process of history. The attorney’s confidential[ity] obligation is indispensable for the protection of legitimate rights of the client, and in order for the justice system to work properly, [and] such obligation must be respected as much as possible.”); Comments of the Council for the Bars and Law Societies of the European Union, dated September 11, 2002, p.2 (“It is vital to understand therefore, that the professional secret . . . and clients’ rights to privilege . . . are not reserved for the benefit of professional bodies, as in this case the lawyers’ professional bodies, but . . . are fundamental rights of the citizen [recognized in the jurisprudence of the European Court of Human Rights and the European Court of Justice]. . . . In addition, the lawyer . . . plays a vital role in the prevention of crime in advising clients of their legal obligations. The lawyer is both the client’s advisor and also the guardian of the rule of law. This role will be compromised unless the lawyer is fully aware of all the relevant circumstances regarding the client’s instructions. Clients are more than likely to be inhibited in disclosing such circumstances where they believe the lawyer . . . is under an obligation to

implement the Gatekeeper Initiative requirements by June 2003. It remains to be seen whether this timetable will be met, or whether litigation or other action is undertaken to challenge the Directive's Gatekeeper Initiative requirements.

In that regard, the Canadian government has also implemented certain Gatekeeper Initiative requirements, including an STR requirement for the Canadian legal profession.<sup>11</sup> However, the Canadian bar initiated litigation challenging the constitutionality of the STR requirement on lawyers, even though the Canadian law contained an exception to the reporting requirement for privileged communications between the lawyer and client. On November 20, 2001, a justice of the British Columbia Supreme Court issued an injunction against implementation of the reporting requirement, noting that the law raised serious constitutional concerns and could compromise the independence of the bar from the government.<sup>12</sup>

“The harm identified by the petitioners is serious . . . .

It should be noted that, even without the obligations imposed by this legislation, lawyers are subject to codes of conduct and ethical obligations imposed by Law Societies and to the provisions of Part XII.2 of the Criminal Code. They cannot engage in money laundering schemes or be a party to any transactions with clients that conceal or convert property or proceeds that they believe to involve money laundering. . . .

The proclamation of s.5 [the suspicious transaction reporting provision] of the Regulations authorizes an unprecedented intrusion into the traditional solicitor-client relationship. The constitutional issues raised deserve careful consideration by the Court. The petitioners seek a temporary exemption from the legislation until the merits of their constitutional challenge can be determined. I conclude that the petitioners have satisfied the tripartite test for the exemption they seek. . .

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make reports [to the government].”) All the comments to FATF can be accessed at [www1.oecd.org/fatf/40RecReviewCmts\\_en.htm](http://www1.oecd.org/fatf/40RecReviewCmts_en.htm).

<sup>11</sup> Proceeds of Crime (Money Laundering) Act, S.C. 2000, c. 17, and the implementing regulations, Proceeds of Crime (Money Laundering) Suspicious Transaction Reporting Regulations, PC 2001-1500, August 28, 2001, effective November 8, 2001.

<sup>12</sup> *The Law Society of British Columbia v. Attorney General of Canada, and Federation of Law Societies v. Attorney General of Canada*, 2001 BCSC 1593, Docket No. L013116 (November 20, 2001).

<sup>13</sup> *Id.*, at para. 103, 104 & 108.

Other provincial courts followed suit, enjoining the reporting requirement within their respective jurisdictions. The Canadian federal government agreed to suspend implementation of the reporting requirement, until a final decision on the merits of the case was issued. A trial on the merits of the constitutional challenge is expected in early summer of 2003.

Expressing similar concerns, the bar of the Bahamas has also instituted legal proceedings against the Gatekeeper Initiative legislation passed by the Bahamian government, again citing constitutional concerns with the affect of any mandatory reporting obligation on the attorney-client relationship and independence of the bar.<sup>14</sup>

### C. The Situation in the United States

The U.S. Government has not yet developed or passed any legislation or regulation concerning the Gatekeeper Initiative. According to the National Money Laundering Strategy Report of 2000,<sup>15</sup> issued jointly by the Department of Justice and the Department of the Treasury, the Justice Department was tasked with reviewing the professional responsibilities of lawyers and making recommendations to the Attorney General and the Secretary of the Treasury, “ranging from enhanced professional education, standards or rules, to legislation, as might be needed.”<sup>16</sup> A similar theme was set forth in the National Money Laundering Strategy Report for 2001. An interagency working group has been established, consisting of representatives from the Departments of Justice and the Treasury, the Securities and Exchange Commission, the Financial Crimes Enforcement Network, the U.S. Customs Service, and others. This working group is charged with developing the U.S. policy on Gatekeeper Initiative requirements for the legal profession. Moreover, the working group was heavily involved in developing the Gatekeeper Initiative aspects of the FATF Consultation Paper of May 30, 2002.

Apart from the interagency working group effort and FATF exercise, Title III of the USA PATRIOT Act contains a provision requiring the Treasury Department to promulgate anti-money laundering requirements for persons involved in certain real estate transactions. Regulations pertaining to the real estate industry have been delayed as the Treasury Department is continuing to consult with industry and determine how

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<sup>14</sup> “Lawyers File Constitutional Challenge to Anti-Money Laundering Laws”, Offshore News Online, December 17, 2001 available online at <<http://www.offshore.com/articles/2156.asp?docid=2156>>..

<sup>15</sup> Pursuant to the Money Laundering and Financial Crimes Strategy Act of 1998, Pub. L. No. 105-310 (October 30, 1998), the Justice Department and Treasury Department are directed to issue a national money laundering strategy every year, outlining a plan of action to enhance U.S. anti-money laundering efforts.

<sup>16</sup> U.S. Department of Justice and U.S. Department of the Treasury, The National Money Laundering Strategy for 2000, issued March 8, 2000, p. 45.

best to implement this portion of the statute. It is not clear if the proposed regulations will explicitly address or impose STR requirements for lawyers or law firms involved in certain real estate transactions.

The Secretary of the Treasury can also designate any business as a “financial institution” for purposes of extending anti-money laundering requirements, including suspicious activity reporting requirements to that business.<sup>17</sup> It is questionable whether this provision of the law could be used by the Treasury Department to impose Gatekeeper Initiative requirements, including any STR or suspicious activity reporting requirement, on the legal profession as a whole. It is expected that the U.S. government will be developing a position over the course of the next six to twelve months regarding the Gatekeeper Initiative, in parallel with the effort of FATF to develop its final recommendation on this issue. Moreover, it is anticipated that the U.S. government will need to seek legislative authority, or otherwise engage in a rule-making proceeding, before imposing any Gatekeeper Initiative requirements on the profession.<sup>18</sup>

### III. OBJECTION TO MANDATORY REPORTING OF “SUSPICIOUS” TRANSACTIONS

#### A. Introduction

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<sup>17</sup> Specifically, 31 U.S.C. § 5312(a)(2), provides that a “financial institution” includes “(Y) any business or agency which engages in any activity which the Secretary of the Treasury determines, by regulation, to be an activity which is similar to, related to, or a substitute for any activity in which any business described in this paragraph is authorized to engage; or (Z) any other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.”

<sup>18</sup> Apart from the Gatekeeper Initiative, the recently-enacted Sarbanes-Oxley Act of 2002, 15 U.S.C. §§ 7201 et seq., mandates the Securities and Exchange Commission (“SEC”) to prescribe minimum standards of professional conduct for attorneys appearing and practicing before the SEC. These standards are to include a rule requiring an attorney to report evidence of a material violation of U.S. securities laws or breach of fiduciary obligation duty or similar violation by a corporate issuer to the chief in-house legal counsel or chief executive officer; and in some circumstances to report to the board of directors or a subcommittee of the board. On December 2, 2002, the SEC published a proposed rule regarding this aspect of the Sarbanes-Oxley Act. See 67 Federal Register 71669-71707 (Dec. 2, 2002). The ABA has established a Task Force on Corporate Responsibility that is examining, inter alia, the issue of whether attorneys’ should disclose knowledge of corporate criminal activity and fraud. Furthermore, a separate ABA Task Force on Implementation of Section 307 of the Sarbanes-Oxley Act of 2002 is examining the proposed SEC rules regarding disclosure of information and “noisy withdrawal” from client representations before the SEC.

The ABA recommends that the U.S. government not impose a mandatory reporting obligation on lawyers or the legal profession so as to require lawyers or legal professionals to disclose information concerning clients to law enforcement authorities based on a “suspicion” of money laundering or other criminal or fraudulent activity, where such disclosure would compromise client confidences or the attorney-client relationship. Such a requirement would undermine the independence of the bar from the government, erode the essential trust relationship between the attorney and the client that is a bedrock of the U.S. administration of justice and rule of law, and compromise the principle of confidentiality in communications between a lawyer and the client. Moreover, the so-called “no tipping off” rule creates an inherent conflict between the lawyer’s duty of loyalty to the client and compliance with anti-money laundering requirements. Finally, the enforcement of an inherently indefinable notion of “suspicious” activity through criminal sanctions raises serious questions of fairness and due process, and would encourage over-reporting of client information or lawyers to refuse client requests for representation and advice.

It is evident that insufficient information has been obtained and analysis conducted to determine the relative costs and benefits of any STR requirement for the legal profession. Concerns with lawyers who participate in money laundering schemes or who are otherwise complicit in illegal activities can be addressed by existing anti-money laundering laws which are applicable to all American citizens, independent of their profession or business. Lawyers engaged in such activities can be prosecuted to the full extent of the law.<sup>19</sup> Such lawyers, who represent the clear exception in the legal profession, are not likely to abide by any new reporting obligation pertaining to the suspicious activities of their clients (and themselves).

The legal profession already is subject to extensive ethical requirements and enforcement of those requirements. Lawyers who engage in illegal or unethical conduct, including money laundering, can be and have been disbarred. Lawyers are obligated under existing ethical rules to counsel their clients to abide by the law. If a client refuses to do so, a lawyer is obliged to withdraw from the representation. Existing state ethical rules permit -- not mandate -- a lawyer to disclose client confidential information when the lawyer has reason to “know” that a client intends to engage in criminal activity. In these circumstances, the better course would be to ensure that lawyers are well-informed and educated about the nature and typologies of money laundering activity, so they can continue to uphold their ethical obligations, self-police themselves, and make disclosures when appropriate based on knowledge of intended criminal conduct.

#### B. Legal and Public Policy Concerns with a Reporting Obligation

One of the touchstones of the American legal system is the independence of the legal profession from government regulatory and enforcement authorities. The United States Supreme Court has time and time again noted the importance of the legal

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<sup>19</sup> See, e.g., *United States v. Abbell*, 271 F.3d 1286 (11<sup>th</sup> Cir. 2001); *United States v. Tarkoff*, 242 F.3d 991 (11<sup>th</sup> Cir. 2001).

profession, and its independence, to the administration of justice in the United States.<sup>20</sup> “An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice.”<sup>21</sup> Indeed, the Supreme Court has noted that the vitality of our judicial system and our judges depends in part on informed and independent lawyers. As Chief Justice Warren Burger and then-Justice William Rehnquist observed: “The very independence of the lawyer from the government on the one hand and the client on the other is what makes law a profession . . . It is as crucial to our system of justice as the independence of judges themselves.”<sup>22</sup>

Lawyers in the United States are not, and cannot be, agents of the U.S. government. Rather, they are independent professionals positioned between the state and the persons under its jurisdiction. However, lawyers effectively will be transformed from trusted counselors into potential government informants if the U.S. government mandates that they report any suspicious activities or transactions of their clients, even when those clients may be coming to the lawyer to seek legitimate legal advice to ensure compliance with the law.

The relationship of trust between an attorney and a client is expressed in numerous existing laws and ethical rules, including the ABA Model Rules of Professional Conduct (“Model Rules”) and the ethical rules adopted by the states to govern lawyers’ professional conduct. These laws and rules govern the attorney-client relationship and prescribe the limited instances in which disclosure of confidential information relating to a client is permissible.

Two duties essential to the trust relationship between the attorney and the client are the lawyer’s duty of loyalty and the obligation of confidentiality to the client. Each of these is expressed in the Model Rules. The lawyer’s duty of loyalty to the client is expressed in Model Rule 1.2, which requires an attorney to abide by the client’s decisions and represent the client’s interests above all else unless the attorney knows the client’s conduct is unlawful or unethical. The duty of loyalty is also expressed in Model Rules 1.7 through 1.11, which prohibit attorneys from representing clients in the face of conflicts of interest. Clearly, to require a lawyer to disclose client information based on an undefined concept of “suspicion”, particularly where the lawyer is facing criminal sanctions for failure to report and cannot even inform the client of any such disclosure,

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<sup>20</sup> *See, e.g.*, *In Re McConnell*, 370 U.S. 230 (1962) (reversing the conviction of an attorney for criminal contempt); *see also*, *Sacher v. United States*, 343 U.S. 1, 39 (1952) (“Our whole conception of justice according to the law, especially criminal justice, implies an educated, responsible, and independent Bar.”) (Frankfurter, J., dissenting).

<sup>21</sup> *In Re McConnell*, 370 U.S. at 236. *See also* *Legal Services Corporation v. Velaquez*, 531 U.S. 533, 545 (2001) (“An informed, independent judiciary presumes an informed, independent bar.”).

<sup>22</sup> *Application of Griffiths*, 413 U.S. 717, 732 (1973) (Burger, C.J. & Rehnquist, J., dissenting).

flies in the face of the duty of loyalty, creates conflicts, and therefore necessarily compromises the independence of the bar vis-à-vis the state.

Similarly, the attorney's obligation of confidentiality is expressed in Model Rule 1.6. This rule prohibits an attorney from revealing "information relating to representation of a client unless the clients consents after consultation" subject to certain limited exceptions set forth in subsection (b) of the rule. This obligation of confidentiality extends well beyond the notion of "privileged" information. And the exceptions to the obligation are based on an attorney's "knowledge" of intended unlawful activity of a grave nature, where fraud is being perpetrated on a tribunal of the law, or where the attorney is entitled to necessary representation.

The comments to Model Rule 1.6 explain the basis for this rule:

"A fundamental principle in the client-lawyer relationship is that [in the absence of the client's informed consent] the lawyer maintain confidentiality of information relating to the representation .... The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.... Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld."<sup>23</sup>

The obligation of confidentiality is also expressed in the attorney-client privilege. As the oldest common law privilege for confidential communications, dating back well before the U.S. Constitution to 16th century England, it is considered indispensable to the lawyer's function as advocate on the theory that the advocate can adequately prepare a case only if the client is free to disclose everything.<sup>24</sup> However, the importance of the privilege extends well beyond litigation and advocacy of a client's interests. Just as important, the privilege ensures that the "legal counselor can properly advise the client what to do" since this requires that the client is "free to make full disclosure" to his/her counselor.<sup>25</sup> As the Supreme Court noted in its seminal decision concerning the attorney-client privilege, the purpose of the privilege is to "encourage full and frank communication between attorneys and their clients, [which in turn] promote[s] broader public interests in the observance of law and administration of justice."<sup>26</sup>

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<sup>23</sup> MODEL RULES OF PROF'L CONDUCT, RULE 1.6, comments 3, 4 and 9 (1983).

<sup>24</sup> 8 John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW, § 2290, at 542 (McNaughton Rev. 1961).

<sup>25</sup> Geoffrey C. Hazard, Jr., An Historical Perspective on the Attorney-Client Privilege, 66 CAL. L. REV. 1061, 1061 (1978).

<sup>26</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

A requirement that lawyers report suspicious transactions or activities regardless of the interests of their clients will predictably undermine the essential confidentiality of communications between clients and lawyers, and thereby adversely affect the administration of justice and the interests of society in promoting adherence to the rule of law. Even if the Gatekeeper Initiative were to include an exception for “privileged” communications, such an exception would not extend to the full panoply of information provided by a client to an attorney for purposes of representation or seeking advice. The attorney would be duty-bound to inform the client, at the outset of a representation, that some quantum of information, which may raise a “suspicion” in the attorney’s mind, could be disclosed to the government. This will lead to apprehension in clients -- clients who are seeking advice for current and prospective compliance with the law, clients who may have engaged in activity that violated the law but wish to obtain advice on their exposure and possible remedial actions, clients who are under investigation or fear prosecution and need appropriate representation -- and cause such clients to forego legal advice and representation. As the Court of Appeals for the Ninth Circuit has observed:

“[The] valuable social service of counseling clients and bringing them into compliance with the law cannot be performed effectively if clients are scared to tell their lawyers what they are doing, for fear that their lawyers will be turned into government informants.”<sup>27</sup>

This is all the more true today, as the world becomes increasingly complex and interdependent; as the laws in the United States and elsewhere become more pervasive and complicated in dealing with the intricacies of commerce, new social issues, and the rights of individuals; and as the U.S. government and other governments promote the rule of law throughout the world as the preferred method for dealing with relationships among individuals, entities and governments.

Although not set forth in the U.S. Constitution, the attorney-client privilege and the integrity of the attorney-client relationship find both foundation and support in various aspects of the Constitution. The Sixth Amendment to the Constitution guarantees individuals effective assistance of counsel in criminal proceedings, for example, as noted above, in permitting a client faced with potential criminal prosecution to secure adequate legal advice on the best course of conduct to follow. Government mandates that intrude on the confidentiality of the attorney-client relationship may, in some circumstances, raise legitimate Sixth Amendment concerns. Indeed, in discussing the issue of whether a lawyer can be required to check a box on IRS Form 8300 (a form that requires U.S. persons, including lawyers, to report receipt of over \$10,000 in cash) to indicate if the receipt of the cash was “suspicious”, the U.S. Court of Appeals for the Eighth Circuit noted “the serious Sixth Amendment implications of [the] claim that an attorney becomes

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<sup>27</sup> United States v. Chen, 99 F.3d 1495, 1500 (9th Cir. 1996).

a de facto agent for the government when compelled to offer an opinion as to whether a particular cash payment was a ‘suspicious transaction’.”<sup>28</sup>

There also are potential Tenth Amendment concerns with any U.S. government mandate that lawyers file STRs with the federal government. As has been noted by the Supreme Court:

“Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers.”<sup>29</sup>

Thus, if the U.S. government were to issue anti-money laundering requirements applicable to lawyers, especially a requirement that could conflict with a state-administered ethical requirement pertaining to maintaining client confidences and privileged information, there could be an issue under the Tenth Amendment to the Constitution. The federal government has successfully asserted regulatory jurisdiction over lawyers in various instances. The Supreme Court has noted on several occasions that lawyers can fall within the regulatory ambit of the federal government.<sup>30</sup> Nonetheless, these cases have tended to involve situations where the lawyer’s conduct was commercial in nature and indistinguishable from other non-lawyer personnel subject to the same regulatory policy. These cases do not explicitly address federal regulation that intrudes a core authority of the state vis-à-vis the attorneys it licenses to practice within its jurisdiction, especially where the state authority pertains to ethical requirements pertaining to the integrity of the attorney-client relationship.

### C. Practical Concerns with Reporting “Suspicious” Transactions or Activities

Independent of the serious legal and public policy concerns with imposing a mandatory STR requirement on lawyers, there are a number of important practical

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<sup>28</sup> *United States v. Sindel*, 53 F.3d 874, 877 (8th Cir. 1995). It is noteworthy that the Court was only addressing the issue of checking a box to indicate a “suspicious transaction”. Form 8300 does not require any disclosure of information regarding the suspicious transaction, as would be required in the context of the Gatekeeper Initiative. *See also* *In re Grand Jury Subpoenas*, 906 F.2d 1485, 1488 (10th Cir. 1990).

<sup>29</sup> *Leis v. Flynt*, 439 U.S. 438, 442 (1979) (per curiam).

<sup>30</sup> *See, e.g.*, *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (noting that a county bar association is subject to federal anti-trust regulation in its commercial activities); *Sperry v. State of Florida*, 373 U.S. 379 (1963) (holding that while a non-lawyer’s practice of patent law may constitute the unauthorized practice of law within Florida, a federal statute nonetheless authorized a Florida non-lawyer person to practice before the federal Patent Office).

considerations that have not been addressed by the U.S. government or otherwise given sufficient attention. First, as noted earlier, there is not likely to be any specific or clear definition of when information received by an attorney raises a “suspicion” of possible money laundering or other criminal activity. The concept of “suspicion” is a malleable one, and is likely to be left to the individual interpretation of each lawyer subject to any such requirement. As such, it will result in uneven application and interpretation across the legal profession. The U.S. government may even consider that lawyers report instances where they “should have been” suspicious based on information received from a client. Imposing an objective notion of “suspicion” on lawyers will mean only more difficulty for attorneys trying to adhere in good faith to any such disclosure requirement.

Second, the anti-money laundering laws of the United States are complex and comprehensive. There are over 100 criminal offenses that constitute predicate acts of “specified unlawful activities” (“SUAs”) that can trigger a money laundering offense. In all likelihood, the list of SUAs will continue to grow. Attorneys not intimately familiar with the nuances of U.S. anti-money laundering law will be at risk of criminal prosecution or civil liability if they fail to identify all possible permutations of a money laundering offense in each client representation they undertake.

Third, the vague and imprecise notion of “suspicion” along with the breadth and complexity of U.S. anti-money laundering laws likely will cause many lawyers to decline representations due to unknown personal risks under any mandatory STR regime backed up by criminal sanctions. In the alternative, lawyers will “over report” information acquired from their clients -- adding to the already substantial number of suspicious activity reports (“SARs”) filed each year with the Financial Crimes Enforcement Network, and which largely go ignored or without further action.

Fourth, there are many unanswered questions regarding what an attorney should do if he/she files an STR regarding a client. Should the lawyer withdraw from the representation, without explanation which would be required under the “no-tipping off” rule? Would withdrawing, even without explanation, constitute “tipping off”? What if the lawyer withdraws from the representation, causing the transaction or representation to proceed in a manner adverse to the client -- would the lawyer be liable for breach of contract or malpractice, particularly if the U.S. government takes no action on the STR or otherwise determines that the information does not raise a risk of money laundering? What if the lawyer remains engaged in good faith with the client, and the U.S. government later determines that the client was engaged in money laundering -- is the lawyer at risk of money laundering complicity based on his/her “suspicion” as evidenced by the STR?

Fifth, there is the issue of cost for the legal profession and the clients, as well as the cost and availability of insurance in the event of a mandatory STR regime. Government regulators involved in the Gatekeeper Initiative often point to banks as entities that have accepted and managed STR (or SAR) requirements. However, the vast majority of lawyers in the United States are solo practitioners or work in small law practices. Unlike the large banks, they do not have the institutional resources to

implement extensive anti-money laundering requirements, such as those pertaining to STRs. Unlike banks, most law firms do not have an independent commercial need for sophisticated data transfer networks and software that can track and correlate hundreds of pieces of information to determine whether a particular transaction is “suspicious”. Even if possible, the costs of these requirements will likely impact the cost of legal services, making such services more expensive, less available to the disadvantaged or less fortunate, and perhaps uninsured for some practitioners.

Finally, there has been little if any assessment by the U.S. government or other regulatory authorities of the costs and benefits of the STR requirement as applied to the legal profession. Information regarding the deliberate or accidental involvement of lawyers in money laundering activities is scarce and virtually all anecdotal. As noted earlier, lawyers can be and have been prosecuted, convicted and disbarred for money laundering activity and complicity. There has been little explanation of the objectives or additional benefit to be achieved by applying an STR requirement to lawyers, and there has been no assessment of the economic, social, and client-related consequences of any such requirement. In short, for as serious and sweeping a proposal as this presents to the administration of justice, the breadth and level of analysis is clearly inadequate.

In sum, there are many difficult questions, potential costs, and unintended trade-offs or consequences that would arise if the U.S. government were to impose a mandatory STR requirement on the profession. And, as noted earlier, there is no indication that the U.S. government has undertaken any meaningful examination, consideration, or cost-benefit analysis of these issues. Any such effort would take a substantial amount of time and dialogue with the legal profession throughout the United States. At a minimum, this should be done before the U.S. government formulates any policy on the Gatekeeper Initiative. And, as noted in section III.B above, overcoming the practical problems with an STR requirement does not necessarily mean that mandatory reporting advances the broader public interest. Indeed, any such cost-benefit analysis concerning the practical difficulties must be sensitive to the fact that mandatory disclosure could lead to less compliance with U.S. law and a weakening of the system of justice within the United States.

#### IV. The Role of the Organized Bar in Education, Training and Self-Policing

The ABA recognizes that anti-money laundering and anti-terrorist financing initiatives are important and that law enforcement authorities believe more tools are needed to combat criminal money laundering and terrorist financing activities. Certain options set forth in the FATF Consultation Paper, and under consideration by the U.S. government, make sense for the legal profession. Specifically, and as noted above, given the increasing complexity of anti-money laundering laws and international business transactions, there is a significant role for the organized bar in promoting education of the profession regarding the legal requirements, risks, “red flags” and ways to avoid inadvertent involvement in illicit activity. In this regard, the ABA believes that a collaborative effort with U.S. government officials, other non-governmental organizations, and other bar associations (within the United States and elsewhere) should

be pursued, to increase awareness and understanding of legal professionals throughout the world on these issues.

The ABA embraces the concept of providing reasonable compliance training to legal professionals and ensuring opportunities for legal professionals to seek advice regarding compliance. Of course, as in any training and compliance situation, the nature and content of such training needs to take into account the circumstances of individual practitioners, in terms of their practice specialty, the risk of money laundering activity in their client representations, the existing ethical rules to which they are subject, their economic circumstances, and the institutional structure of their practice. In this regard, the ABA also believes that lawyers should conduct reasonable due diligence on their clients, consistent with existing ethical rules and practice within the profession, to minimize the risk of involvement in any illegal money laundering activity. Attachment 1 to this report contains further information regarding the types of due diligence, training, and record keeping activities that legal professionals can and do adopt for purposes of discharging ethical and legal responsibilities, including those that may be imposed as a result of U.S. government anti-money laundering initiatives.

Finally, the ABA believes that bar associations, professional ethics committees, and the courts should continue to have the responsibility for policing the professional conduct of lawyers. The practice of law requires ethical conduct by the members of the profession. The ABA has long upheld the highest ethical standards for lawyers licensed to practice within the United States. There is no demonstrable need to deviate from this tradition and system of oversight in the area of money laundering. Existing laws that are fully applicable to individual members of the profession provide a compelling incentive to lawyers to comply with U.S. government anti-money laundering requirements. Combined with high ethical standards, education, training, and continuing use of disciplinary procedures within the profession, there is little likelihood of the legal profession becoming a weak link in the fight against international money laundering and terrorist financing.

Respectfully submitted,

Edward J. Krauland  
Chair, Task Force on Gatekeeper Regulation  
And the Profession

February 2003

## GENERAL INFORMATION FORM

### 1. **Summary of Recommendation.**

The recommendation expresses the appropriate role of lawyers in U.S. government efforts to combat money laundering.

### 2. **Approved by Submitting Entity.**

The recommendation was approved by the ABA Task Force on Gatekeeper Regulation and the Profession on November 20, 2002. The Criminal Justice Section approved it at its November 16 –17, 2002 meeting. The Real Property, Probate and Trust Law Section approved it on November 21, 2002. The International Law and Practice Section also approved it.

### 3. **Similar Recommendations Submitted Previously.**

No similar recommendations are known to have been submitted previously.

### 4. **Relevant Existing ABA Policies and Affect on These Policies.**

The recommendation expands upon Recommendation 101C passed by the House of Delegates at its mid-year meeting in February 2002. Other relevant ABA policies include Recommendation 110A (February 1987), Recommendation 111C (February 1986), and Model Rule of Professional Conduct 1.6., pertaining to the confidentiality of information.

### 5. **Urgency Requiring Action at this Meeting.**

Approval of the recommendation is needed as soon as possible in order to permit the ABA to be a participant in helping shape the disposition of decisions related to these issues by governmental agencies and legislative bodies.

### 6. **Status of Congressional Legislation (If applicable).**

No legislation is currently pending.

### 7. **Cost to the Association.**

The recommendation's adoption would not result in direct costs to the Association. The only anticipated costs would be indirect costs that might be attributable to lobbying to have the recommendation adopted or implemented at the state and federal levels. These indirect costs cannot be estimated, but should be negligible.

since lobbying efforts would be conducted by existing staff members who already are budgeted to lobby Association policies.

**8. Disclosure of Interest (If Applicable).**

No known conflict of interest exists.

**9. Referrals.**

Concurrently with submission of this report to the ABA Policy Administration Office for calendaring on the February 2003 House of Delegates agenda, it is being circulated to the following:

Sections, Divisions and Forums:

Administrative Law  
Business Law  
Government and Public Sector Lawyers  
International Law and Practice  
Judicial Division  
Law Student Division  
Litigation  
Senior Lawyers Division  
State and Local Government Law  
Young Lawyers Division

Affiliated Organizations:

Association of American Law Schools  
National Association of Attorney Generals  
National Association of Bar Councils  
National Association of Criminal Defense Lawyers  
National District Attorneys Association

**10. Contact Person (Prior to 2003 Midyear Meeting).**

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**11. Contact Persons (Who will present the report to the House).**

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