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## The Relevance of FATF's Recommendations and Fourth Round of Mutual Evaluations to the Legal Profession

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## ARTICLE

# THE RELEVANCE OF FATF'S RECOMMENDATIONS AND FOURTH ROUND OF MUTUAL EVALUATIONS TO THE LEGAL PROFESSION\*

*Laurel S. Terry\*\* & José Carlos Llerena Robles\*\*\**

### ABSTRACT

*More than two hundred countries in the world have agreed to abide by the anti-money laundering (“AML”) recommendations developed by the Financial Action Task Force (“FATF”), which is an intergovernmental organization. This Article focuses on the potential impact on the legal profession of FATF’s fourth round of mutual evaluations. During these mutual evaluations, which currently are underway, FATF-affiliated countries examine each other’s compliance with the FATF Recommendations and recommend follow-up action. This Article first presents the legal profession-related results from the completed Mutual Evaluation Reports. A number of these FATF Reports recommend changes that include requiring lawyers to report suspicious client transactions, greater enforcement of existing lawyer AML rules, and changing the entities that supervise lawyer AML*

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\* This Article includes information that was current through July 25, 2018, which is shortly before the Article’s editorial process began, although much of it was written before December 2017 because it was circulated to the attendees at the Fordham University School of Law *Regulation of Legal and Judicial Services Conference*. Because FATF regularly updates its documents and the FATF Mutual Evaluation process is ongoing, the Authors recommend that readers check for updates. All URLs were accurate as of July 2018.

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*efforts. The next Part of this Article examines the legal profession AML situation in the Authors' home countries of the United States and Peru, noting the current or potential impact in these countries of the FATF Recommendations, the FATF Mutual Evaluation process, and lawyer-related money laundering scandals. The final Part of this Article suggests an alternative, education-focused, peer-review approach to the legal profession portions of the FATF Mutual Evaluations that arguably would decrease lawyer facilitation of criminal money laundering activities while better protecting traditional lawyer values that are globally recognized as important components of administration of justice and rule of law systems. Because the regulatory impact of FATF's mutual evaluations may be much broader than anti-money laundering issues, everyone interested in the topic of lawyer regulation should be aware of the FATF Recommendations and the ongoing mutual evaluation process.*

ABSTRACT.....	627
I. INTRODUCTION.....	629
II. BACKGROUND: GLOBAL MONEY LAUNDERING AND THE LEGAL PROFESSION.....	630
A. The Global Money Laundering Problem.....	630
B. Lawyer Involvement in Money Laundering.....	634
III. THE ROLE OF THE FINANCIAL ACTION TASK FORCE IN SETTING ANTI-MONEY LAUNDERING (“AML”) STANDARDS.....	641
A. FATF and the FATF-Style Regional Bodies.....	641
B. FATF's Forty Recommendations and Related Documents.....	645
IV. THE LEGAL PROFESSION AND FATF'S FOURTH ROUND OF MUTUAL EVALUATIONS.....	649
A. FATF's Ongoing Fourth Round of Mutual Evaluations.....	649
B. Findings About the Legal Profession in the Completed FATF Fourth Round Mutual Evaluations.....	656
C. Three Case Studies of Legal Profession Engagement in the FATF Mutual Evaluation Process.....	668
V. THE POTENTIAL IMPACT OF AML SCANDALS AND COMPETING NARRATIVES ON LAWYER AML REGULATION.....	683

A. United States.....	684
B. Peru.....	692
C. The Use of Competing Narratives to Discuss Lawyer AML Issues: “Lawyers as Sieves” Versus “Lawyers as Atlas”.....	707
VI. CONCLUDING OBSERVATIONS ABOUT HOW TO STRUCTURE FATF MUTUAL EVALUATIONS TO REDUCE LAWYER FACILITATION OF ILLEGAL MONEY LAUNDERING.....	714
APPENDIX I.....	723

### *I. INTRODUCTION*

This Article focuses on international anti-money laundering (“AML”) standards and the “mutual evaluation” assessments that currently are underway to measure compliance with these standards. Viewed from one perspective, this Article focuses on a narrow topic that might seem of interest to a limited audience. The Authors submit, however, that this topic should be of interest to everyone interested in legal services regulation because AML regulations raise issues that address the core of what it means to be a lawyer. Moreover, the developments discussed in this Article have the potential to shape not only lawyers’ AML obligations, but lawyer regulation more broadly, including the nature of the lawyer-client relationship.

This Article proceeds in the following manner. After a brief introduction in Part I, Part II continues by explaining why governments care about money laundering issues and the ways in which lawyers previously have been involved in illegal money laundering. Part III provides an introduction to an international intergovernmental body called the Financial Action Task Force (“FATF”) and its AML recommendations. Part IV focuses on the mutual evaluation process that countries use to evaluate each other’s compliance with the FATF Recommendations. Section IV.A provides information about the FATF mutual evaluation process and Section IV.B analyzes the treatment of the legal profession in the completed reports. Section IV.C explains how the legal professions in three countries prepared for their mutual evaluations. Sections V.A and V.B examine the AML lawyer regulation situation in the United States and Peru, including scandals

that already have affected or that may in the future affect lawyer AML regulation. Section V.C highlights the polarized nature of discussions about lawyer AML issues and identifies two competing narratives that are used to discuss lawyer AML issues and regulation. Part VI sets forth a potential new approach towards FATF Mutual Evaluations of the legal profession that arguably would be more effective than the current approach in reducing lawyer facilitation of money laundering and would be more consistent with lawyers' traditional values.

## *II. BACKGROUND: GLOBAL MONEY LAUNDERING AND THE LEGAL PROFESSION*

### *A. The Global Money Laundering Problem*

Money laundering is a significant societal problem.<sup>1</sup> The United Nations has estimated that the amount of money laundered globally in one year is two to five percent of global gross domestic product, which is equivalent to US\$800 billion to US\$2 trillion.<sup>2</sup> Other global bodies concur in the significance of the problem.<sup>3</sup> Legal profession

1. The FATF Recommendations and the mutual evaluation reports cited throughout this Article address money laundering and terrorist financing. This Article, however, focuses exclusively on the problem of money laundering. Because of FATF's multi-pronged mission, some of the quotes in this Article also refer to countering the financing of terrorism ("CFT") or terrorist financing ("TF"). For additional information about CFT issues, see Shima Baradaran et al., *Funding Terror*, 162 U. PA. L. REV. 477 (2014).

2. While the UN recognizes that the margin between these two numbers is huge, it has explained that "even the lower estimate underlines the seriousness of the problem governments have pledged to address." UNITED NATIONS OFFICE ON DRUGS AND CRIMES, *Money-Laundering and Globalization*, <https://www.unodc.org/unodc/en/money-laundering/globalization.html> [<https://perma.cc/9RKN-FMQJ>].

3. See, e.g., EUROPEAN PARLIAMENT, *Report on the inquiry into money laundering, tax avoidance and tax evasion (2017/2013(INI))* 1, 10, ¶ AI (A8-9999/2017, Nov. 8, 2017) [hereinafter *EU PANA Committee Final Report*]; *The IMF and the Fight against Money Laundering and the Financing of Terrorism*, INTERNATIONAL MONETARY FUND (Apr. 2017), <https://www.imf.org/About/Factsheets/Sheets/2016/08/01/16/31/Fight-Against-Money-Laundering-the-Financing-of-Terrorism?pdf=1> [<https://perma.cc/9U8H-PYSF>] [hereinafter *IMF Factsheet*]; *The World Bank Group's Response to Illicit Financial Flows: A Stocktaking*, WORLD BANK GROUP (Mar. 22, 2016), <http://documents.worldbank.org/curated/en/502341468179035132/pdf/104568-BR-SecM2016-0112-IDAsecM2016-0071-IFC-SecM2016-00423-MIGA-SecM2016-0044-Box394878B-PUBLIC-disclosed-4-5-16.pdf> [<https://perma.cc/WQA7-SEG5>].

organizations have described the scope of the problem as “staggering.”<sup>4</sup>

It is common for countries to provide estimates of the money laundering occurring in their jurisdiction.<sup>5</sup> For example, in a 2015 report, the US government estimated that approximately US\$300 billion is laundered annually in the United States.<sup>6</sup> In 2008, the Peruvian government estimated that Peru had laundered US\$2.1 billion in illicit funds annually, although it had no data about whether that money was laundered inside or outside of Peru.<sup>7</sup> The European Union

4. *A Lawyer's Guide to Detecting and Preventing Money Laundering: A collaborative publication of the International Bar Association, the American Bar Association and the Council of Bars and Law Societies of Europe* 1, 6 (Oct. 2014), [https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014oct\\_abaguide\\_preventingmoneylaundering.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014oct_abaguide_preventingmoneylaundering.authcheckdam.pdf) [<https://perma.cc/982V-4JMH>] [hereinafter *IBA/ABA/CCBE Lawyer's Guide*]; see Jack P. Sahl, *Lawyer Ethics and the Financial Action Task Force: A Call to Action*, 59 N.Y.L. SCH. L. REV. 457, 463-65 (2015).

5. See *Money laundering and terrorist financing risks*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/publications/methodsandtrends/documents/ml-tf-risks.html> [<https://perma.cc/PW3M-9QKE>] (FATF webpage that includes links to multiple risk assessments). Countries may refer to this type of report as either a risk assessment or a threat assessment. Compare *infra* note 6 (citing the 2015 US risk assessment report), with *infra* note 12 (citing the 2005 US threat assessment report).

6. See *National Money Laundering Risk Assessment 2015*, UNITED STATES DEPARTMENT OF THE TREASURY 1, 2 (2015), [https://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/National\\_Money\\_Laundering\\_Risk\\_Assessment\\_-\\_2006-12-2015.pdf](https://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/National_Money_Laundering_Risk_Assessment_-_2006-12-2015.pdf) [<https://perma.cc/WP32-2XLL>] (“It is difficult to estimate with any accuracy how much money is laundered in the United States. However, while recognizing the limitations of the data sets utilized, this assessment estimates that about \$300 billion is generated annually in illicit proceeds.”).

7. This estimate is found in Peru's 2008 Third Round Mutual Evaluation Report. See *Informe de Evaluación Mutua Anti Lavado de Activos y contra el Financiamiento del Terrorismo (3ra Ronda), Peru [Peru Mutual Evaluation Report on Anti Money Laundering and against Terrorism Financing (3rd Round)]*, GRUPO DE ACCIÓN FINANCIERA DE SUDAMÉRICA [FINANCIAL ACTION GROUP OF SOUTH AMERICA] 1, 4 (July 31, 2008), [https://www.sbs.gob.pe/Portals/5/jer/gafi/files/IEM\\_Peru\\_Tercera\\_Ronda\\_2008.pdf](https://www.sbs.gob.pe/Portals/5/jer/gafi/files/IEM_Peru_Tercera_Ronda_2008.pdf) [<https://perma.cc/2XUL-BLFP>] [hereinafter *2008 Peru Mutual Evaluation Report*]. FATF's link to this report takes one to a FATF on Latin America (“GAFILAT”) link which is broken, but Peru's report is available on the webpage of the La Superintendencia de Banca, Seguros, which is the Peruvian Banking Regulator webpage cited above. At the time this Article was submitted, Peru had completed its risk assessment for the current round of mutual evaluations, but its Mutual Evaluation Report was not yet publicly available. See *infra*

has reported that “annual revenue losses from tax evasion and tax avoidance amounts to at least EU€1 trillion within the EU alone.”<sup>8</sup> The United Kingdom recently issued its risk assessment report and included a separate chapter devoted to AML risks in legal services.<sup>9</sup> The World Bank encourages money laundering risk assessments and has prepared a threat assessment template.<sup>10</sup> Risk assessment reports are now required by FATF Recommendation 1.<sup>11</sup> These reports can help

note 354 and accompanying text (citing an IMF report that referred to the more recent risk assessment).

8. *EU PANA Committee Final Report*, *supra* note 3, at 9 ¶ AC (noting that this figure includes losses that arguably go beyond more than money laundering). *See EU PANA Committee Final Report*, *supra* note 3, at 8 ¶¶ Q, 10 ¶ AI (November 2017 Parliament PANA Report notes that “Europol estimates that the Panama Papers account for only 0.6% of the total number of money laundering cases recorded annually” and that “money laundering cases are increasing, according to Eurojust statistics.”); *REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the assessment of the risks of money laundering and terrorist financing affecting the internal market and relating to cross-border activities*, COM (2017) 340 final (June 26, 2017).

9. *National Risk Assessment of Money Laundering and Terrorist Financing 2018*, HER MAJESTY TREASURY & HOME OFFICE 1, 49-55 (Oct. 2017), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/655198/National\\_risk\\_assessment\\_of\\_money\\_laundering\\_and\\_terrorist\\_financing\\_2017\\_pdf\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/655198/National_risk_assessment_of_money_laundering_and_terrorist_financing_2017_pdf_web.pdf) [<https://perma.cc/7G6A-WDJQ>]. Citing an earlier report, this Report stated that “the social and economic costs of the most serious and organised crimes total £24 billion per year, with most of this related to drugs supply at £10.7 billion and fraud at £8.9 billion,” *Id.* at 20.

10. *See* WORLD BANK, *Risk Assessment Support for Money Laundering/Terrorist Financing*, (Feb. 29, 2016), <http://www.worldbank.org/en/topic/financialsector/brief/antimoney-laundering-and-combating-the-financing-of-terrorism-risk-assessment-support> [<https://perma.cc/E43E-P65Y>]:

Why does a country need a national risk assessment for money laundering and terrorist financing? A framework designed to prevent money laundering and combat terrorist financing is most effective when it targets resources there where they will have most effect. This can be done only through a good analysis and understanding of the money laundering/terrorist financing (ML/TF) risks in the country. This approach is in line with the recommendations of the Financial Action Task Force (FATF). FATF recommends that countries identify, assess, and understand the ML/TF risks within their jurisdiction and then take action and apply resources to mitigate such risks, based on a risk-based approach . . . . The World Bank has developed an advisory package to guide countries in conducting their ML/TF risk assessment.

11. Since 2012, FATF Recommendation 1 has stated that “[c]ountries should identify, assess, and understand the money laundering and terrorist financing risks for the country, and should take action, including designating an authority or mechanism to coordinate actions to assess risks, and apply resources, aimed at ensuring the risks are mitigated effectively.” *THE FATF RECOMMENDATIONS*, FIN. ACTION TASK FORCE 4, 9 (2018), <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.p>

“policy makers, regulators, and the law enforcement community better understand the landscape of money laundering” and “support strategic planning efforts to combat money laundering.”<sup>12</sup>

The United Nations has identified negative consequences that flow from money laundering.<sup>13</sup> It notes that money laundering fuels corruption and organized crime.<sup>14</sup> Corrupt public officials need to launder their bribes, kick-backs, and theft of public funds; organized crime needs to launder the proceeds of illegal activity such as drug trafficking and commodity smuggling.<sup>15</sup> The United Nations has also stated that money laundering can erode a nation's economy by changing the demand for cash, making interest and exchange rates more volatile, and by causing high inflation in countries where criminals are doing business.<sup>16</sup> It observed that developing countries that attract “dirty money” as a short-term engine of growth can find it difficult “to attract the long-term foreign direct investment that is based

[http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF Recommendations\\_2012.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations_2012.pdf) [<https://perma.cc/5RKG-ZQHK>] [hereinafter FATF RECOMMENDATIONS]. For information about the FATF Recommendations, see *infra* notes 74-91 and accompanying text.

12. *2007 National Money Laundering Strategy*, UNITED STATES DEPARTMENT OF THE TREASURY 1, 16, Appendix A (2007), <https://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/nmls.pdf> [<https://perma.cc/B8PK-5EUN>] (citing this as the purpose behind the 2005 Money Laundering Threat Assessment, which was the first government-wide analysis of money laundering in the United States). See also World Bank Risk Assessment, *supra* note 10 (describing the reasons to conduct a risk assessment).

13. See UNITED NATIONS OFFICE ON DRUGS AND CRIME, *Introduction to Money Laundering*, <http://www.unodc.org/unodc/en/money-laundering/introduction.html?ref=menuaside> [<https://perma.cc/S8GT-39B9>].

14. *Id.*

15. *Id.*

16. *Id.* For US perspectives regarding the dangers of money laundering, see John McDowell & Gary Novis, *The Consequences of Money Laundering and Financial Crime*, 6(2) ECON. PERSP. 1, 6-8 (May 2001), [https://www.taxjustice.net/cms/upload/pdf/State\\_Dept\\_journal\\_2001.pdf](https://www.taxjustice.net/cms/upload/pdf/State_Dept_journal_2001.pdf) [<https://perma.cc/2WF6-6QV8>] (listing as negative consequences of money laundering: 1) undermining the legitimate private sector; 2) undermining the integrity of financial markets; 3) loss of control of economic policy; 4) economic distortion and instability; 5) loss of revenue; 6) risks to privatization efforts; 7) reputation risk; and 8) social costs that can include driving up the cost of government due to the need for increased law enforcement and health care expenditures, transferring economic power from the market, government, and citizens to criminals, and corrupting effect on all elements of society).



on stable conditions and good governance and that can help them sustain development and promote long-term growth.”<sup>17</sup>

For additional proof that countries consider money laundering and terrorist financing to be significant societal problems, one can consult the list of countries that are members of the Financial Action Task Force (“FATF”) or one of its affiliate organizations.<sup>18</sup> Most countries in the world belong to either FATF or a FATF-affiliate.<sup>19</sup> Because these countries have agreed to abide by FATF’s Recommendations, their membership demonstrates a global consensus that money laundering and terrorism financing are serious societal problems that need to be addressed.<sup>20</sup> The global consensus to fight money laundering is also reflected in United Nations General Assembly and Security Council resolutions that have stressed the importance of implementing FATF’s Recommendations.<sup>21</sup>

### *B. Lawyer Involvement in Money Laundering*

Money laundering typically involves three different stages.<sup>22</sup> The first step involves “placement” in which illegal proceeds are deposited into the financial system; the second step involves “layering,” which conceals the criminal origin of the proceeds; and the third step involves “integration,” which creates an apparent legal origin for criminal proceeds and allows the criminal to use the criminal proceeds for his or her personal benefit.<sup>23</sup> In light of this three-step process, criminals who

17. *UN Introduction to Money Laundering*, *supra* note 13.

18. *See, e.g.*, FIN. ACTION TASK FORCE, *Countries*, <http://www.fatf-gafi.org/countries/> [<https://perma.cc/YLG5-X6V3>] (webpage containing a list of countries and indicates whether it is a member of FATF or a FATF-Style Regional Body). *Id.* This webpage also contains a “map” view. *Id.*

19. *See UN Introduction to Money Laundering*, *supra* note 13.

20. *See infra* notes 55-57 and accompanying text (discussing the fact that countries that are members of FATF or a FAT-Style Regional Body have agreed to abide by the FATF Recommendations).

21. *See, e.g.*, G.A. Res. 60/288 at 6 (Sept. 20, 2006), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/60/288](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/288) [<https://perma.cc/LPH2-ZEXN>]; S.C. Res. 1617 (July 29, 2005), [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/RES/1617%20%282005%29](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1617%20%282005%29) [<https://perma.cc/3J9Q-T527>].

22. *See, e.g.*, U.N. OFFICE ON DRUGS AND CRIMES, *The Money-Laundering Cycle*, <https://www.unodc.org/unodc/en/money-laundering/laundrycycle.html> [<https://perma.cc/3AV3-UY83>], *accord IBA/ABA/CCBE Guide*, *supra* note 4, at 4.

23. *See UN Introduction to Money Laundering*, *supra* note 13.

want to launder their illicit proceeds typically require the assistance of others to do so.<sup>24</sup> Because Step Two involves creating an apparent legal origin for criminal proceeds, lawyers are among those whose assistance might be sought.<sup>25</sup>

Lawyers who assist clients in money laundering activities might do so either intentionally or unwittingly. There clearly have been lawyers who have intentionally engaged in criminal money laundering activities.<sup>26</sup> For example, in 2013, FATF published a report entitled *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals* (“*FATF Legal Profession Typologies Report*”). This Report cited a number of criminal prosecutions against lawyers who had *knowingly* engaged in criminal money laundering activities.<sup>27</sup> Some of the lawyers cited in this Report had masterminded the money laundering schemes, whereas other lawyers appear to have been brought into these criminal schemes by their clients or other

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24. *Id.* (noting that the layering stage involves “disguising the trail to foil pursuit”). See also *infra* note 25.

25. See IBA/ABA/CCBE Guidance, *supra* note 4, at 24:

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

26. See Laurel S. Terry, *U.S. Legal Profession Efforts to Combat Money Laundering & Terrorist Financing*, 59 N.Y.L.S. L. REV. 487, 499 (2015).

27. *FATF Report: Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals*, FIN. ACTION TASK FORCE 30, 30 (2013), <http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf> [https://perma.cc/2624-9BNF] [hereinafter *FATF Typologies Report*] (“Criminal prosecutions were started in sixteen countries, with Austria, Spain, Italy, and Poland joining the Netherlands, the United Kingdom, and the United States reaching double figures of prosecutions in the last five years.”).

associates.<sup>28</sup> The United States is among the countries that have prosecuted lawyers for money laundering.<sup>29</sup>

Although there have been a number of cases that involve intentional wrongdoing by lawyers, it is certainly possible that a lawyer might unwittingly assist a criminal money launderer, rather than doing so intentionally.<sup>30</sup> Recognizing this possibility, the International Bar Association (“IBA”), the American Bar Association (“ABA”), and the Council of Bars and Law Societies of Europe (“CCBE”) worked together to produce a document designed to help lawyers avoid such unwitting involvement.<sup>31</sup> The IBA/ABA/CCBE Guidance document identifies a number of “red flags” that could signal a money laundering situation.<sup>32</sup> The expectation is that if a lawyer recognizes money laundering “red flags,” that lawyer can investigate further.<sup>33</sup> If a US lawyer concludes that a client is seeking the lawyer’s assistance in money laundering activities, the lawyer must refrain from assisting that client.<sup>34</sup>

Although it is clear that some lawyers have intentionally or unwittingly assisted clients in illegal money laundering activity, there is a paucity of empirical data about the extent of lawyer involvement

28. Terry, *supra* note 26, at 499; *see generally* David J. Middleton & Michael Levi, *Let Sleeping Lawyers Lie: Organized Crime, Lawyers and the Regulation of Legal Services*, 55 BRIT. J. CRIMINOLOGY 647 (2015).

29. *See* Terry, *supra* note 26, at 499-500 n.57 (listing the twenty-nine US criminal prosecutions or discipline cases against lawyers cited in the FATF Legal Profession Typologies Report at 39-146). Peru is not listed in the FATF Typologies Report. *See generally* FATF Typologies Report, *supra* note 21.

30. *See, e.g.*, Paula Frederick, *Money for Nothing*, 18 GA. B.J. 50 (2012) (describing a lawyer that inadvertently assisted a money laundering scheme); IBA/ABA/CCBE Lawyer’s Guide, *supra* note 4 (written to help lawyers from inadvertently assisting money launderers).

31. *See IBA/ABA/CCBE Guidance, supra* note 4.

32. *Id.* A number of voluntary bar associations and lawyer regulatory bodies have produced their own documents. Links to these documents are available on the webpages of organizations such as the AML-related webpages of the ABA, CCBE, Federation of Law Societies of Canada, Law Council of Australia, and Law Society of England and Wales, among others. *See* Laurel Terry, *FATF Resources 2017*, [https://works.bepress.com/laurel\\_terry/69/](https://works.bepress.com/laurel_terry/69/) [<https://perma.cc/VV64-XUNL>] (including links to AML webpages and other resources).

33. *See IBA/ABA/CCBE Guidance, supra* note 4, at 32.

34. *See, e.g.*, MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 2018). These rules are discussed *infra* in Section V.A.

in money laundering.<sup>35</sup> Consider, for example, a 2011 report the consulting firm Deloitte prepared for the European Commission.<sup>36</sup> The Commission asked Deloitte the following:

f) **Role of lawyers in the AML system.** Specifically regarding lawyers, which is the impact of the rules on the client's access to law/legal advice? What is the perception of lawyers about their role in the AML/CFT system? What is the perception from other professions and from credit and financial institutions about the role of lawyers?<sup>37</sup>

The Deloitte Report concluded that there was a lack of empirical data about gatekeeper involvement in money laundering.<sup>38</sup> It observed that there were differing views about the degree to which lawyers are involved in illegal money laundering activities and the considerations that that should be paramount when designing AML regulations for lawyers.<sup>39</sup> The concluding sentences in this section stated: "This

35. See *European Commission: Final Study on the Application of the Anti-Money Laundering Directive, Service Contract ETD/2009/IM/F2/90*, DELOITTE ENTERPRISE RISK SERVICES (2009), [http://ec.europa.eu/internal\\_market/company/docs/financial-crime/20110124\\_study\\_aml\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/financial-crime/20110124_study_aml_en.pdf) [<https://perma.cc/4447-8E88>] [hereinafter *Deloitte Study*]; Middleton & Levi, *supra* note 28, at 663 ("The extent of intentional lawyer involvement in money laundering schemes remains only a little better understood now than a decade ago, and then, it is well evidenced mostly in a few Grand Corruption cases."). See also Baradaran, *supra* note 1 (describing a small-scale empirical study to test how service providers responded to email solicitations that were designed to raise terrorist financing red flags).

36. See *Deloitte Study*, *supra* note 35.

37. *Id.* at 310.

38. *Id.* at 294 ("Given the lack of quantitative information it is not possible to draw conclusions on the frequency with which gatekeepers are misused.").

39. *Id.* at 7, 269-73. To illustrate the differing views, see *IBA/ABA/CCBE Guidance*, *supra* note 4, at 6-7:

[W]e do not believe [the FATF Typologies] Report is as helpful as FATF intended, principally because it focuses heavily on situations in which lawyers are knowingly involved in money laundering and/or terrorist financing activities. As a result, the FATF report is in danger of creating a misleading impression of the legal profession. The profession generally believes that, contrary to what the FATF typologies report may suggest, circumstances in which lawyers are knowingly involved in criminal activities are quite rare.

Compare, *id.* with Emily M. Halter et al., *The Puppet Masters: How The Corrupt Use Legal Structures To Hide Stolen Assets And What To Do About It*, WORLD BANK STOLEN ASSET RECOVERY (STAR) INITIATIVE 1, 61 (2001), <http://documents.worldbank.org/curated/en/>

section of the study sets out the opinions of lawyers on their role in the AML/CFT system and the opinions of others on the lawyers' role. It is clear that opinions differ."<sup>40</sup>

The ongoing conversations about lawyer involvement in money laundering and the proper scope of lawyer AML regulation are not taking place in a vacuum, but instead are taking place against the backdrop of several high-profile events. One prominent event is the "Panama Papers" leak, which involved the release of millions of documents taken from the Panama law firm of Mossack Fonseca.<sup>41</sup> The Panama Papers leak has given rise to discussions about money laundering in general and lawyers' roles in illegal money laundering in particular.<sup>42</sup> For example, the Panama Papers leak led the European

784961468152973030/The-puppet-masters-how-the-corrupt-use-legal-structures-to-hide-stolen-assets-and-what-to-do-about-it [https://perma.cc/8CUC-6GFG] [hereinafter The "*Puppet Masters*"]. World Bank report highlighted the resistance by the ABA to AML regulations for lawyers. *Id.* at 65; *See also id.* at 22 (noting thirty-two "Grand Corruption" cases in which a "[p]rofessional legal advisor, solicitor, or attorney who either established a corporate vehicle or held positions of ownership or management" and suggesting widespread lawyer wrongdoing).

40. *Id.* at 296. *See also* Middleton & Levi, *supra* note 28, at 663 ("At this stage, despite international differences in both rules and practices of the regulation of the legal profession, the extent of cross-border arbitrage by those looking for lawyers to help commit or conceal crimes and their proceeds remains more alleged than proven.").

41. *See* Brian Baxter, *Dozens of Big Firms to Appear in New 'Panama Papers' Database*, AM. LAW. DAILY (May 8, 2016), <https://advance.lexis.com/api/permalink/d7f4476c-6180-4589-bf41-a40529df4e00/?context=1000516> [https://perma.cc/T2XY-LBA4] ("The International Consortium of Investigative Journalists is poised to unveil a searchable online database on Monday drawn from some of the 11.5 million documents that were leaked last month from the Panamanian law firm Mossack Fonseca.").

42. *See, e.g., id.* (listing by name AmLaw 100 firms named in the documents and the office involved. AmLaw 100 firms is a term used to refer to law firms that the American Lawyer magazine has included in their annual ranking as among the top 100 law firms according to variables such as size and profits per partner. The cited Baxter article also includes this statement: "The Am Law Daily identified dozens of major US and international firms listed in the database already posted by the ICIJ online, one whose universe figures to grow with its inclusion of data from Mossack Fonseca. . . . [The ICIJ] also stressed that being included in the database does not signal participation in illegal activities."); *see also* *Has the Legal Profession Lost its Moral Compass? The Panama Papers, Lawyers' Professional Ethics and Due Diligence Obligations*, ABA SEC. OF INT'L L., Spring Meeting Apr. 28, 2017); *see generally* Heather M. Field, *Offshoring Tax Ethics: The Panama Papers, Seeking Refuge from Tax, And Tax Lawyer Referrals*, 62 ST. LOUIS U. L.J. 35 (2017); Michael D. Goldhaber, *Americans in Panama: Did the Panama Papers scandal net few U.S. citizens because of good policy, or bad?* AM. LAW. (Aug. 1, 2016); Peter J. Henning, *Panama Papers Show How Lawyers Can Turn a Blind Eye*, N.Y. TIMES, Apr. 11, 2016, <https://www.nytimes.com/2016/04/12/business/dealbook/panama-papers-show-how-lawyers-can-turn-a-blind-eye.html> [https://perma.cc/T57L-TJCD].

Parliament to create its “PANA” Committee, which prepared a report and resolution, both of which were adopted and included a discussion about the role of lawyers.<sup>43</sup> The European Union is not alone in instituting action as a result of the Panama Papers leak. By December 2016, there reportedly had been announcements of more than 150 inquiries, audits, or investigations in seventy-nine countries, and business executives and attorneys were behind bars awaiting criminal trials in the Middle East, Europe, and Latin America.<sup>44</sup> News articles and scholarly articles, as well as government reports, have discussed whether and how lawyers are involved in money laundering activities.<sup>45</sup>

In addition to global scandals such as the Panama Papers leak, and the subsequent “Paradise Papers” leak,<sup>46</sup> there have been scandals

43. See EU PANA Committee Final Report, *supra* note 3, at ¶¶ 131-38; Eur. Parliament, Recommendation following the inquiry on money laundering, tax avoidance and tax evasion, P8\_TA-PROV(2017)0491 (adopted Dec. 13, 2017), at ¶¶ 138-40, [http://www.europarl.europa.eu/cmsdata/135340/P8\\_TA-PROV\(2017\)0491\\_EN.pdf](http://www.europarl.europa.eu/cmsdata/135340/P8_TA-PROV(2017)0491_EN.pdf) [<https://perma.cc/RG27-9J9C>] [hereinafter EU Parliament Pana Final Recommendations]. For additional PANA committee documents and a link to the subsequent committee, see <http://www.europarl.europa.eu/committees/en/pana/home.html> [<https://perma.cc/8C36-FFFQ>].

44. See, e.g., Will Fitzgibbon & Emilia Díaz-Struck, *Panama Papers Have Had Historic Global Effects — and the Impacts Keep Coming*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS: PANAMA PAPERS (Dec. 1, 2016), <https://www.icij.org/investigations/panama-papers/20161201-global-impact/> [<https://perma.cc/L3CJ-CRMW>]. As of July 2018, the Panama Papers homepage on the ICIJ website posts news items that show continued activity. See generally *Int'l Consortium of Investigative Journalists: Panama Papers*, <https://www.icij.org/investigations/panama-papers/> [<https://perma.cc/E6WC-W672>] [hereinafter *ICIJ Webpage and Database*]. The ICIJ webpage includes, *inter alia*, a database where one can search by name or country. *Id.*

45. Scholarly articles include, *inter alia*, Field, *supra* note 42, at nn.11-33 and accompanying text (citing numerous sources); Arthur J. Cockfield, *Big Data and Tax Haven Secrecy*, 18 FL. TAX REV. 483 (2016); Karin Svedberg Helgesson & Ulrika Mörth, *Client Privilege, Compliance and the Rule of Law: Swedish Lawyers and Money Laundering Prevention*, 69 CRIME, LAW & SOC. CHANGE 227 (2018); Middleton & Levi, *supra* note 28. News articles include those cited *supra* in note 42; Susan Beck, *Are US Lawyers a Weak Link in the Fight Against Money Laundering?* AM. LAW. DAILY (Dec. 22, 2016). See *infra* note 48 (citing a US government report). See also EU PANA Report, *supra* note 3.

46. See Int'l Consortium of Investigative Journalists, *Investigations: Paradise Papers*, <https://www.icij.org/investigations/paradise-papers/> [<https://perma.cc/ULV3-7B8A>]; *Paradise Papers: Who are Appleby, the lawyers at the centre of the leak?*, BBC (Nov. 5, 2017), <https://www.bbc.com/news/business-41878881> [<https://perma.cc/PQ4B-AND6>]; Max Walters,

in individual countries that have prompted discussions about lawyers' involvement in money laundering. High-profile events in the United States include a series of newspaper articles about luxury real estate transactions,<sup>47</sup> a Congressional hearing about lawyer involvement with the President of Equatorial Guinea,<sup>48</sup> and a *60 Minutes* TV episode that featured a Global Witness undercover investigation in which an actor sought legal assistance from a number of US lawyers for a simulated transaction that was intended to represent a money laundering scheme.<sup>49</sup> High profile events in Peru include arrests related to the Panama Papers leak,<sup>50</sup> as well as corruption scandals that involve

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*Paradise Papers: Legal Firms 'Ignore The Law With Impunity', Margaret Hodge Tells Parliament*, THE [UK] LAW SOCIETY GAZETTE (Nov. 14, 2017), [https://www.lawgazette.co.uk/law/paradise-papers-legal-firms-ignore-the-law-with-impunity-margaret-hodge-tells-parliament/5063696.article?utm\\_source=dispatch&utm\\_medium=email&utm\\_campaign=%20GAZ141016](https://www.lawgazette.co.uk/law/paradise-papers-legal-firms-ignore-the-law-with-impunity-margaret-hodge-tells-parliament/5063696.article?utm_source=dispatch&utm_medium=email&utm_campaign=%20GAZ141016) [<https://perma.cc/3P22-T974>].

47. See, e.g., Louise Story & Stephanie Saul, *Towers of Secrecy: Piercing the Shell Companies*, N.Y. TIMES, Feb. 7, 2015, (a five-part series), <http://nyti.ms/2iPeztb> [<https://perma.cc/AUM7-5Y5C>]. For an article analyzing the impact of these kinds of regulations, see Nicholas Nehamas & Rene Rodriguez, *How Dirty Is Miami Real Estate? Secret Home Deals Dried Up When Feds Started Watching*, MIAMI HERALD, July 18, 2018, <https://www.miamiherald.com/news/business/real-estate-news/article213797269.html> [<https://perma.cc/F6LE-HMD3>] [hereinafter *How Dirty is Miami Real Estate*].

48. S. COMM. ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, REPORT ON THE ACTIVITIES OF THE COMMITTEE COMM. 1, 129-32(2012) <https://www.congress.gov/112/crpt/srpt193/CRPT-112srpt193.pdf> [<https://perma.cc/5GVS-3DZ2>]; see also U.S. DEPT. OF JUSTICE, *Second Vice President of Equatorial Guinea Agrees to Relinquish More Than \$30 Million of Assets Purchased with Corruption Proceeds* (Oct. 10, 2014), <https://www.justice.gov/opa/pr/second-vice-president-equatorial-guinea-agrees-relinquish-more-30-million-assets-purchased> [<https://perma.cc/9VGU-BFTT>].

49. See, e.g., Steve Kroft, *60 Minutes: Anonymous Inc.*, CBS, (Jan. 31, 2016), <https://www.cbsnews.com/news/anonymous-inc-60-minutes-steve-kroft-investigation/> [<https://perma.cc/4NEZ-UW6H>] [<https://perma.cc/4NEZ-UW6H>] (includes a transcript); Global Witness, *Undercover in New York*, <https://www.globalwitness.org/shadyinc/> [<https://perma.cc/5ZBR-X69A>] (includes video clips); Louise Story, *Report Describes Lawyers' Advice on Moving Suspect Funds Into U.S.*, N.Y. TIMES, Jan. 31, 2016, at A12; Debra Cassens Weiss, *Group goes undercover at 13 law firms to show how US laws facilitate anonymous investment*, ABA J. (Feb. 1, 2016), [http://www.abajournal.com/news/article/group\\_goes\\_undercover\\_at\\_13\\_law\\_firms\\_to\\_show\\_how\\_us\\_laws\\_facilitate](http://www.abajournal.com/news/article/group_goes_undercover_at_13_law_firms_to_show_how_us_laws_facilitate) [<https://perma.cc/Y4R9-EYLJ>]; AM. B. ASS'N, *News: ABA President Paulette Brown responds to "60 Minutes" segment* (Feb. 1, 2016), [https://www.americanbar.org/news/abanews/aba-news-archives/2016/01/statement\\_of\\_abapre0.html](https://www.americanbar.org/news/abanews/aba-news-archives/2016/01/statement_of_abapre0.html) [<https://perma.cc/2BWF-HU6P>].

50. See *infra* notes 337-43 and accompanying text.

public figures, most of whom are lawyers.<sup>51</sup> One could point to additional examples, but this discussion should be sufficient to demonstrate that money laundering is viewed as a serious societal problem, that criminals might want lawyers' assistance in illegally laundering the proceeds of their crimes, that some lawyers have helped their clients with illegal money laundering, and that there are differing views about the scope of lawyer involvement.

### III. THE ROLE OF THE FINANCIAL ACTION TASK FORCE IN SETTING ANTI-MONEY LAUNDERING ("AML") STANDARDS

#### A. FATF and the FATF-Style Regional Bodies

The Financial Action Task Force ("FATF") is an international intergovernmental standard-setting body that has provided global leadership and momentum on anti-money laundering issues.<sup>52</sup> FATF was established in 1989 during the G-7 Summit in Paris.<sup>53</sup> Its objectives are to "set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system."<sup>54</sup> FATF has issued anti-money

51. See, e.g., *Head of Peru's Judiciary Resigns As Crisis Grips Justice System*, REUTERS (July 19, 2018), <https://www.reuters.com/article/us-peru-corruption-resignation/head-of-peru-judiciary-resigns-as-crisis-grips-justice-system-idUSKBN1K92OH> [<https://perma.cc/NB83-3FW9>]; *Peru ex-governor, lawyer arrested over ties to Odebrecht bribes*, REUTERS (May 17, 2017).

52. See generally *Who We Are*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/about/whoweare/> [<https://perma.cc/NWZ3-S62X>].

53. *History of the FATF*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/about/historyofthefatf/> [<https://perma.cc/JW3Y-76D7>]. Unlike some other international bodies, such as the World Trade Organization, FATF was not established by a Treaty and does not have any direct power over the countries that are FATF members. It has great indirect or "soft law" influence, however, because FATF members and FSRBs have agreed to implement FATF's Forty Recommendations. See *infra* notes 57-59 and accompanying text; Terry, *supra* note 26, at 490 n.9 (quoting a 2008 membership policy). The United States is a founding member of FATF. *Id.* at 488.

54. See *FATF Who We Are*, *supra* note 52. See also the asterisk (\*) footnote, *supra*, which explains that this Article addresses only money laundering, even though FATF's mandate also includes countering terrorist financing.



laundering recommendations that are extremely influential. These recommendations are described *infra* in Section III.B.

FATF's reach is global, even though its members only include thirty-five jurisdictions and two regional associations.<sup>55</sup> This is because FATF has nine "associate members" that are regional organizations that fight money laundering.<sup>56</sup> All of FATF's associate members have been approved as a FATF-Style Regional Body or FSRB, which means that they have satisfied certain criteria, have endorsed the FATF Recommendations, and have established processes to monitor implementation of the FATF Recommendations by their respective members.<sup>57</sup> More than 200 countries belong to either FATF itself or one of the FATF-Style Regional Bodies that are FATF associate members.<sup>58</sup> For the remainder of this Article, the term "FATF" will be used to encompass both FATF and the FATF-Style Regional Bodies. FATF also has as organizational "Observers," a number of influential organizations, such as the World Bank, the International Monetary

55. FIN. ACTION TASK FORCE, *FATF Members and Observers*, <http://www.fatf-gafi.org/about/membersandobservers/> [<https://perma.cc/WRM3-DSPX>] ("The FATF currently comprises 35 member jurisdictions and 2 regional organisations, representing most major financial centres in all parts of the globe."). The regional organizations are the European Commission and the Gulf Co-operation Council. *Id.*

56. FATF Members, *supra* note 55. FATF's nine "Associate Members" include 1) the Asia/Pacific Group on Money Laundering ("APG"); 2) the Caribbean Financial Action Task Force ("CFATF"); 3) the Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measure and the Financing of Terrorism ("MONEYVAL"); 4) the Eurasian Group ("EAG"); 5) the Eastern and Southern Africa Anti-Money Laundering Group ("ESAAMLG"); 6) the Financial Action Task Force of Latin America ("GAFILAT") (formerly known as the Financial Action Task Force on Money Laundering in South America ("GAFISUD")); 7) the Inter-Governmental Action Group against Money Laundering in West Africa ("GIABA"); 8) the Middle East and North Africa Financial Action Task Force ("MENAFATF"); and 9) the Task Force on Money Laundering in Central Africa ("GABAC"). *Id.*

57. *Financial Action Task Force Mandate (2012-2020)*, FIN. ACTION TASK FORCE (2012), <http://www.fatf-gafi.org/media/fatf/documents/FINAL%20FATF%20MANDATE%202012-2020.pdf> [<https://perma.cc/5AGX-2QV9>] ¶ 12, Annex B; *Twenty-Five Years and Beyond 20-21*, FIN. ACTION TASK FORCE (2014), <http://www.fatf-gafi.org/media/fatf/documents/brochuresannualreports/FATF%2025%20years.pdf> [<https://perma.cc/5SS4-32TN>] (describing the history of Associate Members).

58. *See, e.g., Annual Report 2016-17*, FIN. ACTION TASK FORCE 1, 53 (2018), <http://www.fatf-gafi.org/media/fatf/documents/reports/FATF-annual-report-2016-2017.pdf> [<https://perma.cc/H6TN-7BSH>] ("The FATF and FSRBs bring together over 200 countries that have each committed to implement the FATF's Recommendations.").

Fund, the Organisation of Economic Co-operation and Development, the African Development Bank, the Asian Development Bank, the European Central Bank, and the Inter-American Development Bank.<sup>59</sup> FATF's organizational Observers include among their functions a specific anti-money laundering mission or function.<sup>60</sup> Individual countries can also request Observer status if they have endorsed the FATF standards.<sup>61</sup> At the time this Article was written, Indonesia, Israel, and Saudi Arabia were FATF Observers.<sup>62</sup>

FATF members typically meet in a Plenary session three times per year.<sup>63</sup> The Plenary meetings often take place in Paris, which is the location of FATF's Secretariat or headquarters.<sup>64</sup> FATF's "Outcomes of Meetings" webpage includes summaries of these Plenary meetings.<sup>65</sup> In addition to its Plenary meetings, FATF hosts meetings on particular topics<sup>66</sup> and has a number of committee meetings.<sup>67</sup>

59. See FATF Members, *supra* note 55.

60. *Id.* See also *FATF Policy on Observers*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/about/membersandobservers/fatfpolicyonobservers.html> [https://perma.cc/462E-FK85].

61. See FATF Members, *supra* note 55. FATF Observer countries have endorsed the FATF standards. See FIN. ACTION TASK FORCE, *Process and criteria for becoming a FATF member*, <http://www.fatf-gafi.org/about/membersandobservers/membershipprocessandcriteria.html> [https://perma.cc/RF4M-D79M].

62. See FATF Members, *supra* note 55.

63. See FIN. ACTION TASK FORCE, *Calendars*, [http://www.fatf-gafi.org/calendar/eventscalendar/?hf=10&b=0&s=asc\(fatf\\_date1\)](http://www.fatf-gafi.org/calendar/eventscalendar/?hf=10&b=0&s=asc(fatf_date1)) [https://perma.cc/4MQL-PR3 ] ("During a plenary year, the FATF holds three plenary meetings, a meeting of experts on typologies, and, depending on the focus of current work, intersessional meetings and meetings of various ad hoc groups. The plenary meetings usually take place in October, February and June of each year.")

64. See *id.*; FIN. ACTION TASK FORCE, *FATF Secretariat*, <http://www.fatf-gafi.org/about/fatfsecretariat/> [https://perma.cc/Y7ST-3P8R] (noting the location of the Secretariat); *About Us: Outcomes of meetings*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/about/outcomesofmeetings/#d.en.198108> [https://perma.cc/X5BW-USMV] (listing the location of the plenary sessions).

65. See FATF Outcomes of Meetings, *supra* note 64.

66. See FATF Calendars, *supra* note 63 (describing meetings typically held during the year).

67. See FATF Secretariat, *supra* note 64 (identifies five teams that operate under the Executive Secretary and includes links to FATF's annual reports and to the FATF Mandate 2012-2020).

FATF's activities go far beyond simply adopting AML recommendations. One of its most important activities is the mutual evaluation process and resulting reports that are described *infra* in Section IV.A. FATF also issues a number of advisory papers, reports, and other documents designed to help countries effectively implement the FATF Recommendations.<sup>68</sup>

Two FATF documents that are specific to the legal profession are FATF's 2008 "RBA [Risk Based Assessment] Guidance for Legal Professionals"<sup>69</sup> and the 2013 FATF Legal Profession Typologies report cited earlier.<sup>70</sup> Legal profession organizations originally had hoped that when FATF produced its legal profession typologies document, that document would provide guidance about "red flags" that lawyers should look for in order to help them recognize money laundering and thus avoid inadvertently assisting criminals.<sup>71</sup> When the 2013 FATF Legal Profession Typologies Report was issued, however, its examples and case studies focused primarily on lawyers who had acted intentionally and were criminals, rather than lawyers who unintentionally or inadvertently helped their clients engage in money laundering activities.<sup>72</sup> FATF's focus on intentional wrongdoing led to

68. See Terry, *supra* note 64, at 490-92. As of August 2, 2018, FATF's "All Publications" webpage listed more than 700 publications. See FIN. ACTION TASK FORCE, *All Publications*, [http://www.fatf-gafi.org/publications/?hf=10&b=0&s=desc\(fatf\\_releasedate\)](http://www.fatf-gafi.org/publications/?hf=10&b=0&s=desc(fatf_releasedate)) [<https://perma.cc/H3EQ-FCWK>]. Although there are many ways that one can perform a search on this webpage, including by country or topic, a drop down menu listed the following as the categories or types of publications that FATF has produced: Report (357); News (92); Meeting (59); Speech (58); Other (28); Guidance (21); Risk Based Approach (13); Recommendations (6); and Public Consultation (5). *Id.*

69. FIN. ACTION TASK FORCE, RBA GUIDANCE FOR LEGAL PROFESSIONALS (Oct. 23, 2008), <http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Legal%20professions.pdf> [<https://perma.cc/AL6Z-9UYV>] [hereinafter FATF RBA FOR LAWYERS]. For additional information about the background and context of this document, see Terry, *supra* note 26, at 491-93; Kevin L. Shepherd, *The Gatekeeper Initiative and the Risk-Based Approach to Client Due Diligence: The Imperative for Voluntary Good Practices Guidance for U.S. Lawyers*, 2010 J. PROF. L. 83.

70. FATF Typologies Report, *supra* note 27.

71. See, e.g., IBA/ABA/CCBE *Lawyer's Guide*, *supra* note 4, at 6 ("Unfortunately, we do not believe this Report is as helpful as FATF intended, principally because it focuses heavily on situations in which lawyers are knowingly involved in money laundering and/or terrorist financing activities.").

72. See generally FATF Typologies Report, *supra* note 27 (most examples involve intentional wrongdoing by lawyers); see also IBA/ABA/CCBE *Lawyer's Guide*, *supra* note 4,

the IBA/ABA/CCBE Guidance document cited earlier, which is directed towards lawyers who might *inadvertently* assist criminals, rather than lawyers who are criminal money launderers.<sup>73</sup>

### B. FATF's Forty Recommendations and Related Documents

FATF's Recommendations have evolved over the years. They originally were adopted in 1990 to fight drug-money laundering. They were revised in 1996 to expand their scope beyond drug-money laundering, and were amended in October 2001 to include terrorist financing activities.<sup>74</sup> Significantly for lawyers, in 2003, FATF amended the Recommendations so that they applied to "designated non-financial businesses and professions" ("DNFBP") who sometimes are called "gatekeepers." DNFBPs include lawyers engaged in designated activities.<sup>75</sup>

The FATF Recommendations took their current form in 2012, when they were significantly restructured and renumbered, and amended to add some new obligations.<sup>76</sup> Subsequent to 2012, there

at 6; Terry, *supra* note 26, at n.115 (quoting an Am. Bar Ass'n letter to FATF and a CCBE letter to FATF).

73. See generally IBA/ABA/CCBE Lawyer's Guide, *supra* note 4 (providing risk assessment and due diligence guidance and identifying potential red flags).

74. See FATF RECOMMENDATIONS, *supra* note 11, at 7.

75. Compare FIN. ACTION TASK FORCE, FATF FORTY RECOMMENDATIONS (Oct. 1996) <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201996.pdf> [<https://perma.cc/A6H3-PMQB>] (no reference to DNFBPs), with FIN. ACTION TASK FORCE, FATF FORTY RECOMMENDATIONS (June 2003), <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202003.pdf> [<https://perma.cc/D9NT-8TN9>] (includes Recommendation 12, which applies Recommendations 5, 6, and 8-11 to "designated non-financial businesses and professions" which include lawyers involved in certain activities). See generally *Review of the FATF Standards and Historical Versions*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/review-and-history-of-fatf-standards.html> [<https://perma.cc/RM4K-8ASN>] (webpage includes links to prior versions). For a list of the covered activities, see *infra* note 85.

76. See, e.g., *FATF Recommendations Media Narrative*, FIN. ACTION TASK FORCE (2012), <http://www.fatf-gafi.org/media/fatf/documents/Press%20handout%20FATF%20Recommendations%202012.pdf> [<https://perma.cc/5MVK-46AG>] (FATF press release describing the changes). For an excellent discussion of the 2012 changes, see Gary W. Sutton, *The New FATF Standards*, 4 GEO. MASON J. INT'L COM. L. 68, 68-136 (2012). Gary W. Sutton

have been minor changes.<sup>77</sup> At the time this Article was written, the FATF Recommendations had most recently been updated in 2018.<sup>78</sup> The FATF Recommendations include interpretive notes and additional material such as a glossary, a list of acronyms, useful links, and a revisions summary.<sup>79</sup>

FATF-related documents and articles that are older than 2012 often refer to the “40+9 FATF Recommendations.”<sup>80</sup> This is because, in their pre-2012 format, the first forty recommendations addressed money laundering and the last nine recommendations addressed terrorist financing.<sup>81</sup> Although the Recommendations were restructured in 2012 and reduced to forty, no major concepts were deleted.<sup>82</sup> Since the 2012 restructuring, the Recommendations are called either the “FATF Forty Recommendations” or the “FATF Recommendations.”<sup>83</sup>

Not all of the forty FATF Recommendations apply to DNFBPs.<sup>84</sup> The key FATF Recommendations that apply to DNFBP lawyers are Recommendations 22 and 23. Moreover, lawyers are only covered by the DNFBP FATF Recommendations if they are engaged in one or more of five specified activities.<sup>85</sup>

was “Senior Legal Advisor for Financial Crime in the Office of the General Counsel at the U.S. Treasury Department, where he served as a member of the U.S. Delegation to the FATF and participated in the FATF’s review of the standards.” *Id.* at 68.

77. FATF RECOMMENDATIONS, *supra* note 11, at 129-30 (summarizing the changes since 2012, including the February 2018 and October 2018 changes).

78. *Id.* at 3 (showing the 2018 adoption date).

79. See FATF RECOMMENDATIONS, *supra* note 11, at 29-107 (Interpretive Notes) and *id.* at 108-28 (other items).

80. See, e.g., Laurel S. Terry, *An Introduction to the Financial Action Task Force and Its 2008 Lawyer Guidance*, J. PROF. L. 3 (2010) (referring to the 40+9 Recommendations).

81. *Id.* at 9.

82. See generally Sutton, *supra* note 76, at 74-75.

83. Compare Twenty-Five Years, *supra* note 57 (referring to FATF Forty Recommendations), with Media Narrative, *supra* note 76 (referring to the FATF Recommendations); Terry, *supra* note 26, at 489.

84. See FATF RECOMMENDATIONS, *supra* note 11, at 4 (the heading before Recommendations 22 and 23 is “Designated non-financial Businesses and Professions (DNFBPs)”).

85. See FATF RECOMMENDATIONS, *supra* note 11, at R. 22(d):

**22. DNFBPs: customer due diligence**

Recommendation 22 is entitled “DNFBPs: customer due diligence.” It specifies that the “due diligence” and record keeping requirements found elsewhere in the FATF Recommendations also apply to covered DNFBPs, including lawyers.<sup>86</sup> Recommendation 23 is entitled “DNFBPs: Other measures” and it too incorporates by reference other FATF recommendations.<sup>87</sup> Recommendation 23 incorporates by reference the following FATF Recommendations: Internal controls and foreign branches and subsidiaries (Rec. 18); Higher-risk countries (Rec. 19); Reporting of suspicious transactions (Rec. 20); and [No] Tipping-off and confidentiality (Rec. 21).<sup>88</sup> Recommendation 23, which requires suspicious transaction reporting (“STR”) and prohibits disclosure of an STR (no “tipping off” or

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The customer due diligence and record-keeping requirements set out in Recommendations 10, 11, 12, 15, and 17 apply to designated non-financial businesses and professions (“DNFBPs”) in the following situations:

...

(d) Lawyers, notaries, other independent legal professionals and accountants – when they prepare for or carry out transactions for their client concerning the following activities:

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

86. *Id.* at 17-18 (DNFBPs include lawyers engaged in one of the five activities described *supra*, are subject to the customer due diligence and record keeping requirements in Recommendations 10, 11, 12, 15, and 17). Recommendation 10 is entitled “Customer due diligence”; Recommendation 12 is entitled “Politically exposed persons;” Recommendation 15 is entitled “New technologies;” and Recommendation 17 is entitled “Reliance on third parties.” *Id.* at 12, 14-16.

87. Recommendation 23 states in pertinent part:

The requirements set out in Recommendations 18 to 21 apply to all designated non-financial businesses and professions, subject to the following qualifications:

(a) Lawyers, notaries, other independent legal professionals and accountants should be required to report suspicious transactions when, on behalf of or for a client, they engage in a financial transaction in relation to the activities described in paragraph (d) of Recommendation 22.

*Id.* at 18-19 (Recommendation 23).

88. *Id.* at 18-19.

“NTO”), has proven more controversial for lawyers than Recommendation 22.<sup>89</sup>

The Interpretive Note to Recommendation 23 adds an important qualification. Because of the importance of this Interpretive Note and the frequency with which reference to this Note is omitted,<sup>90</sup> it is reprinted below in its entirety:

INTERPRETIVE NOTE TO RECOMMENDATION 23  
(DNFBPS – OTHER MEASURES)

1. Lawyers, notaries, other independent legal professionals, and accountants acting as independent legal professionals, are not required to report suspicious transactions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.
2. It is for each country to determine the matters that would fall under legal professional privilege or professional secrecy. This would normally cover information lawyers, notaries or other independent legal professionals receive from or obtain through one of their clients: (a) in the course of ascertaining the legal position of their client, or (b) in performing their task of defending or representing that client in, or concerning judicial, administrative, arbitration or mediation proceedings.
3. Countries may allow lawyers, notaries, other independent legal professionals and accountants to send their STR to their appropriate self-regulatory organisations, provided that there are appropriate forms of cooperation between these organisations and the FIU [Financial Intelligence Unit].
4. Where lawyers, notaries, other independent legal professionals and accountants acting as independent legal professionals seek to dissuade a client from engaging in illegal activity, this does not amount to tipping-off.<sup>91</sup>

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89. See, e.g., CCBE, Anti-Money Laundering Committee, *Other Documents*, <https://www.ccbe.eu/actions/committees-working-groups/?idC=791&Committee=Anti-Money-Laundering> [<https://perma.cc/LGE4-CGKP>] (tab entitled “Other” including links to legal challenges brought in Belgium, France, and EU Courts); *Fed’n of Law Soc’ys of Can. v. Canada*, [2015] 1 S.C.R. 401 (Can.); see also Laurel S. Terry, *An Introduction to the Financial Action Task Force and its 2008 Lawyer Guidance*, J. PROF. L. 3, 39-45 (2010) (discussing “How Has the Legal Profession Responded to the FATF 40+9 Recommendations?”).

90. See *infra* notes 125-71 and accompanying text (describing the treatment of the legal profession in FATF’s 4th Round Mutual Evaluation Reports).

91. FATF RECOMMENDATIONS, *supra* note 11, at 83.

Parts IV and V, *infra*, provide additional information about the ways in which this Interpretive Note to Recommendation 23 has—or has not—been cited by FATF or FATF-Style Regional Bodies in their mutual evaluations of their members.

#### IV. THE LEGAL PROFESSION AND FATF'S FOURTH ROUND OF MUTUAL EVALUATIONS

This Part focuses on the legal profession's experience during the current round of FATF mutual evaluations. Section IV.A provides background information about the current evaluation round and identifies the documents that are most relevant to this process. Section IV.B analyzes how the legal profession has fared in the most recent round of FATF mutual evaluations. Section IV.C offers case studies from three countries that show different levels of engagement among legal profession and government representatives.

##### A. FATF's Ongoing Fourth Round of Mutual Evaluations

FATF's Mutual Evaluations are peer reviews that “assess levels of implementation of the FATF Recommendations” and provide “an in-depth description and analysis of each country's system for preventing criminal abuse of the financial system.”<sup>92</sup> FATF currently is engaged in its fourth round of mutual evaluations.<sup>93</sup> Although some countries have received fewer than four mutual evaluation reports and others have received more than four, this Article will refer to all of the current reports as FATF 4th Round Mutual Evaluation Reports.<sup>94</sup>

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92. *Mutual Evaluations*, FIN. ACTION TASK FORCE, [http://www.fatf-gafi.org/publications/mutualevaluations/?hf=10&b=0&s=desc\(fatf\\_releasedate\)](http://www.fatf-gafi.org/publications/mutualevaluations/?hf=10&b=0&s=desc(fatf_releasedate)) [https://perma.cc/4AZP-MBTS] [hereinafter *FATF Mutual Evaluations Webpage*].

93. See FIN. ACTION TASK FORCE, *Procedures for the FATF Fourth Round of AML/CFT Mutual evaluations* (updated June 2018), <http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF-4th-Round-Procedures.pdf> [https://perma.cc/E44T-T7LJ] [hereinafter *FATF 4th Round Procedures*].

94. Countries that belong to a FATF-Style Regional Body rather than FATF may have received fewer than four reports. Some countries have had more than four evaluations because



FATF's fourth round of Mutual Evaluations differs from the third round because FATF members are attempting to measure both the *effectiveness* of a country's AML measures, as well as that country's *technical compliance* with the FATF Recommendations.<sup>95</sup>

FATF's *Mutual Evaluations* webpage contains a wealth of information about what countries can expect during the current mutual evaluation process.<sup>96</sup> For example, the *Mutual Evaluations* webpage contains links to the most recent versions of a *Mutual Evaluation Methodology* document<sup>97</sup> and a *Mutual Evaluation Procedures* document.<sup>98</sup> FATF has also prepared a much shorter document entitled "Consolidated Processes and Procedures for Mutual Evaluations and Follow-Up: 'Universal Procedures,'" that states the procedures that should be followed by all assessment bodies, including the FATF-Style Regional Bodies and international financial bodies such as the World Bank.<sup>99</sup> Among other things, the longer *Mutual Evaluation Procedures* document includes a sample timetable and explains the procedure for follow-up after a Mutual Evaluation Report is approved by the FATF

there have been follow-up reports. *See generally* FIN. ACTION TASK FORCE, *Countries*, <http://www.fatf-gafi.org/countries/> [<https://perma.cc/PYU5-M5F7>]. Clicking on an individual country will lead to a webpage that usually includes links to prior mutual evaluation reports. *But see supra* note 7 (noting the broken links on FATF's Peru page).

95. *See generally Methodology for Assessing Technical Compliance with the FATF Recommendation and The Effectiveness of AML/CFT Systems* FIN. ACTION TASK FORCE (Feb. 2018), [http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf](http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%202022%20Feb%202013.pdf) [<https://perma.cc/8SBA-9VG4>] [hereinafter *FATF 4th Round Methodology*].

96. *See Mutual Evaluations Webpage, supra* note 92.

97. *See FATF 4th Round Methodology, supra* note 95. This methodology document has been updated several times.

98. *See FATF 4th Round Procedures, supra* note 93. Similar to the FATF 4th Round Methodology document, *supra* note 95, the FATF 4th Round Procedures document has been updated several times. *See, e.g.*, Procedures for the FAFT Fourth Round of AML/CFT Mutual Evaluations, <http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF-4th-Round-Procedures.pdf> [<https://perma.cc/4ZHW-3DJX>].

99. *See Consolidated Processes and Procedures for Mutual evaluations and Follow-Up "Universal Procedures,"* FIN. ACTION TASK FORCE ¶ 2 (June 2018), <http://www.fatf-gafi.org/media/fatf/FATF-Universal-Procedures.pdf> [<https://perma.cc/TY7G-HTSS>] [hereinafter *June 2018 FATF Universal Procedures*]. This document has also been updated regularly. *See, e.g.*, Consolidatd Processes and Procedures for Mutual Evaluations and Follow-Up: "Universal Procedures," <http://www.fatf-gafi.org/media/fatf/Universal-Procedures-2017.pdf> [<https://perma.cc/H7YN-Y42X>].

Plenary.<sup>100</sup> Because a FATF mutual evaluation requires extensive preparation, legal profession representatives who want to provide input to their governments will need to prepare months before the country's scheduled on-site assessment visit.<sup>101</sup>

The FATF webpage includes a "calendar" link on the main menu; if one clicks on this link, one can then select either the "events calendar" or the "assessment calendar."<sup>102</sup> Table 1 on the assessment calendar provides information about which countries have an upcoming mutual evaluation, which entity will conduct the evaluation, the date of the country's last evaluation, the proposed date for the on-site visit, and the tentative date during which that country's Mutual Evaluation Report will be discussed by the FATF Plenary.<sup>103</sup> The assessment calendar webpage also contains two search windows that allow one to search by country or by examining body (e.g., FATF or a particular FATF-Style Regional Body).<sup>104</sup> Table 2 on the Assessment

100. See *FATF 4th Round Procedures*, *supra* note 93, at 27-31 (timeline) and 16-17 (post Plenary procedures).

101. See *id.* at 27-31. Appendix 1 – Timelines For the 4th Round Mutual evaluation Process provides that at least six months before the on-site visit, the FATF assessment team will:

- 1) commence research and desk-based review on technical compliance;
- 2) confirm (or find) assessors drawn from countries which had volunteered and have the FATF President formally advise the country of the assessors once confirmed; and
- 3) invite delegations to provide information about (a) assessed country's risk situation and any specific issues which should be given additional attention by assessors and (b) their international cooperation experiences with the assessed country.

*Id.* at 26. During this same time period, the country that is being assessed is expected to: a) designate contact point(s) or person(s) and set up an internal coordination mechanisms (as necessary); and b) respond to technical compliance update by providing updated information on new laws and regulations, guidance, institutional framework, risk and context. *Id.* Four months before a country's Mutual Evaluation on-site visit, the country will have the opportunity to comment on the eleven Immediate Outcomes that are set forth in the FATF Methodology document and that will be the basis for a country's "effectiveness" rating. *Id.* Two months before the on-site visit, the country has the opportunity to comment on the technical compliance assessment prepared by the assessment team. *Id.*

102. See *Global Assessment Calendar*, FIN. ACTION TASK FORCE, [http://www.fatf-gafi.org/calendar/assessmentcalendar/?hf=10&b=0&s=asc\(document\\_lastmodifieddate\)&table=1](http://www.fatf-gafi.org/calendar/assessmentcalendar/?hf=10&b=0&s=asc(document_lastmodifieddate)&table=1) [<https://perma.cc/N5MQ-KR7X>] [hereinafter *FATF Global Assessment Calendar*]. This is the Calendar page that one sees if one clicks on the "Assessment Calendar" tab from the FATF Calendar webpage, *supra* note 63.

103. *Id.*

104. *Id.*

Calendar contains a list of countries to be assessed whose mutual evaluation dates have not yet been scheduled.<sup>105</sup> These pages show that the legal professions in most countries either have had or soon will have their AML regulatory system evaluated by FATF members.

FATF's *Mutual Evaluation Methodology* document sets forth "immediate outcomes" that will be used to determine a country's effectiveness rating during the FATF 4th Round of Mutual Evaluations.<sup>106</sup> Appendix II of this *Methodology* document is a template for the Mutual Evaluation Report that is prepared after the assessors' mutual evaluation on-site visit.<sup>107</sup> This template recommends an executive summary of five pages or less, a report that is 100 or fewer pages, and annexes that are sixty pages or fewer.<sup>108</sup> Many reports, however, exceed this length.<sup>109</sup> Legal profession

105. See *FATF Global Assessment Calendar*, *supra* note 102.

106. See *FATF 4th Round Methodology*, *supra* note 95, at 93-122 (these pages specify the "Immediate Outcomes" that will be used to measure the effectiveness of a country's implementation of the FATF Recommendations). See *infra* note 132 for information about the Immediate Outcomes most relevant to the legal profession.

107. See *FATF 4th Round Methodology*, *supra* note 95, at 124-45.

108. *Id.* at 124.

109. The completed reports are available on the FATF Mutual Evaluations webpage, *supra* note 92. The fifty completed FATF 4th Round Mutual Evaluation Reports are listed below. For ease of use, these citations have included the abbreviations of the FATF-Style Regional Body, if any, issuing the report. See *supra* note 56 and the accompanying text for these abbreviations and information about the FATF-Style Regional Bodies. Separate URLs are not included since all of these are available on the FATF Mutual Evaluations webpage. These are listed in alphabetical rather than chronological order. MONEYVAL, *Anti-Money laundering and Counter-Terrorist Financing counter-terrorist financing measures, Andorra, Fifth Round Mutual Evaluation Report* (Sept. 2017); MONEYVAL, *Anti-money laundering and counter-terrorist financing measures, Armenia, Fifth Round Mutual Evaluation Report* (Dec. 2015); FATF, *Anti-money laundering and counter-terrorist financing measures, Australia, Mutual Evaluation Report* (Apr. 2015); FATF, *Anti-money laundering and counter-terrorist financing measures, Austria, Mutual Evaluation Report* (Sept. 2016); CFATF GAFIC, *Anti-money laundering and counter-terrorist financing measures, The Bahamas, Mutual Evaluation Report* (July 2017); APG, *Anti-money laundering and counter-terrorist financing measures, Bangladesh, Mutual Evaluation Report*, (Oct. 2016); CFATF GAFIC, *Anti-money laundering and counter-terrorist financing measures, Barbados, Mutual Evaluation Report* (Feb. 2018); FATF, *Anti-money laundering and counter-terrorist financing measures, Belgium, Mutual Evaluation Report* (Apr. 2015); APG, *Anti-money laundering and counter-terrorist financing measures, Bhutan, Mutual Evaluation Report* (Oct. 2016); ESAAM, *Anti-money laundering and counter-terrorist financing measures, Botswana, Mutual Evaluation Report* (May 2017); APG, *Anti-money laundering and counter-terrorist financing measures, Cambodia, Mutual Evaluation Report* (Sept. 2017); FATF, *Anti-money laundering and counter-terrorist financing measures, Canada, Mutual Evaluation Report* (Sept. 2016); GIFLAT, *Mutual Evaluation Report*

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of the Republic of Costa Rica (Dec. 2015); GIFLAT, *Mutual Evaluation Report of the Republic of Cuba* (Dec. 2015); FATF, *Anti-money laundering and counter-terrorist financing measures, Denmark, Mutual Evaluation Report* (Aug. 2017); ESAAM, *Mutual Evaluation Report, Anti-Money Laundering and Combating the Financing of Terrorism, The Federal Democratic Republic of Ethiopia* (May 2015); APG, *Anti-money laundering and counter-terrorist financing measures, Fiji, Mutual Evaluation Report* (Oct. 2016); GIABA, *Anti-money laundering and counter-terrorist financing measures, Ghana, Mutual Evaluation Report* (May 2017); CFATF GAFIC, *Mutual Evaluation Report of the Republic of Guatemala* (Nov. 2016); GAFILAT, *Mutual Evaluation Report of the Republic of Honduras* (Oct. 2016); MONEYVAL, *Anti-money laundering and counter-terrorist financing measures, Hungary, Fifth Round Mutual Evaluation Report* (Sept. 2016); FATF, *Anti-money laundering and counter-terrorist financing measures, Iceland, Mutual Evaluation Report* (Apr. 2018); FATF, *Anti-money laundering and counter-terrorist financing measures, Ireland, Mutual Evaluation Report* (Sept. 2017); MONEYVAL, *Anti-money laundering and counter-terrorist financing measures, Isle of Man, Fifth Round Mutual Evaluation Report* (Dec. 2016); FATF, *Anti-money laundering and counter-terrorist financing measures, Italy, Mutual Evaluation Report* (Feb. 2016); CFATF GAFIC, *Anti-money laundering and counter-terrorist financing measures, Jamaica, Mutual Evaluation Report* (Jan. 2017); APG, *Anti-money laundering and counter-terrorist financing measures, Macao, China, Mutual Evaluation Report* (Dec. 2017); FATF, *Anti-money laundering and counter-terrorist financing measures, Malaysia, Mutual Evaluation Report* (Sept. 2015); FATF, *Anti-money laundering and counter-terrorist financing measures, Mexico, Mutual Evaluation Report* (Jan. 2018); APG, *Anti-money laundering and counter-terrorist financing measures, Mongolia, Mutual Evaluation Report* (Sept. 2017); GAFILAT, *MUTUAL EVALUATION REPORT OF THE REPUBLIC OF NICARAGUA* (Oct. 2017); FATF, *Anti-money laundering and counter-terrorist financing measures, Norway, Mutual Evaluation Report* (Dec. 2014); GAFILAT, *Mutual Evaluation Report of the Republic of Panama* (Jan. 2018); FATF, *Anti-money laundering and counter-terrorist financing measures, Portugal, Mutual Evaluation Report* (Dec. 2017); APG, *Anti-money laundering and counter-terrorist financing measures, Samoa, Mutual Evaluation Report* (Sept. 2015); MONEYVAL, *Anti-money laundering and counter-terrorist financing measures, Serbia, Fifth Round Mutual Evaluation Report* (Apr. 2016); FATF, *Anti-money laundering and counter-terrorist financing measures, Singapore, Mutual Evaluation Report* (Sept. 2016); MONEYVAL, *Anti-money laundering and counter-terrorist financing measures, Slovenia, Fifth Round Mutual Evaluation Report* (June 2017); FATF, *Anti-money laundering and counter-terrorist financing measures, Spain, Mutual Evaluation Report* (Dec. 2014); APG, *Anti-money laundering and counter-terrorist financing measures, Sri Lanka, Mutual Evaluation Report* (Sept. 2015); FATF, *Anti-money laundering and counter-terrorist financing measures, Switzerland, Mutual Evaluation Report* (Dec. 2016); FATF, *Anti-money laundering and counter-terrorist financing measures, Sweden, Mutual Evaluation Report* (April. 2017); FATF, *Anti-money laundering and counter-terrorist financing measures, Switzerland, Mutual Evaluation Report* (Dec. 2016); APG, *Anti-money laundering and counter-terrorist financing measures, Thailand, Mutual Evaluation Report* (Dec. 2017); CFATF GAFIC, *Anti-money laundering and counter-terrorist financing measures, Trinidad and Tobago, Mutual Evaluation Report* (June 2016); MENA FATF, *Anti-money laundering and counter-terrorist financing measures, Tunisia, Mutual Evaluation Report* (May 2016); ESAAM, *Anti-money laundering and counter-terrorist financing measures, Uganda, Mutual Evaluation Report* (Apr.

representatives can use this template when considering what information their governments and FATF will want to know about the country's legal profession.

FATF's *Mutual Evaluations* webpage includes useful information about completed mutual evaluations.<sup>110</sup> For example, one of the subheadings on this page is entitled "Consolidated Assessment Ratings."<sup>111</sup> Underneath this heading one can find links to both PDF and Excel versions of a document entitled *Consolidated Table of Assessment Ratings*.<sup>112</sup> These PDF and Excel documents summarize the results of the completed 4th Round FATF Mutual Evaluations.<sup>113</sup> The *Consolidated Table of Assessment Ratings* is regularly updated.<sup>114</sup> This Article relies on the July 25, 2018 version of this document.

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2016); MONEYVAL, *Anti-money laundering and counter-terrorist financing measures, Ukraine, Fifth Round Mutual Evaluation Report* (Dec. 2017); FATF, *Anti-money laundering and counter-terrorist financing measures, United States, Mutual Evaluation Report* (Dec. 2016); APG, *Anti-money laundering and counter-terrorist financing measures, Vanuatu, Mutual Evaluation Report* (Sept. 2015); ESAAM, *Anti-money laundering and counter-terrorist financing measures, Zimbabwe, Mutual Evaluation Report* (Sept. 2016).

110. See generally FATF Mutual Evaluations Webpage, *supra* note 92.

111. See *FATF Mutual Evaluations Webpage*, *supra* note 92.

112. *Id.*

113. *Id.* (including links to both PDF and Excel versions of the Consolidated Table of Assessment Ratings). See *infra* note 114 for links to the July 25, 2018 versions of the PDF and Excel documents, which are the versions that this Article relies on. Because FATF updates these ratings table after each Plenary session, it is inevitable that this Article will not be fully up-to-date when published. The current versions of the Consolidated Table of Assessment Ratings appear as links on the FATF Mutual Evaluations page, *supra* note 92. The July 25, 2018 version on which this Article is based will continue to be available at a permalink cite, which is <https://perma.cc/FSK6-57AZ> (It is perhaps worth noting that the title that appears on the FATF Mutual Evaluations Webpage, *supra* note 92, is slightly different than the title that appears on the PDF document when one selects the link and opens the document. The document itself begins with the word "Table" rather than the words "Consolidated Table.").

114. *Compare Table of ratings for assessment conducted against the 2012 FATF Recommendations, using the 2013 FATF Methodology*, FIN. ACTION TASK FORCE (updated July 25, 2018), <http://www.fatf-gafi.org/media/fatf/documents/4th-Round-Ratings.pdf> [<https://perma.cc/FSK6-57AZ>] [hereinafter *July 25, 2018 Consolidated Table of Assessment Ratings*], with FIN. ACTION TASK FORCE, *Table of ratings for assessment conducted against the 2012 FATF Recommendations, using the 2013 FATF Methodology* (updated Oct. 12, 2017), <http://www.fatf-gafi.org/media/fatf/documents/4th-Round-Ratings.pdf> [<https://perma.cc/7Y6P-RMJN>]. As explained *supra* note 94, some countries are listed more than once because the Table of Consolidated Assessment Ratings includes follow-up reports. *Id.* (showing follow-up reports for Austria).

The July 2018 *Consolidated Table of Assessment Ratings* lists the name of each country whose 4th Round Mutual Evaluation Report has been published and presents information about that country's *technical compliance* ratings and its *effectiveness* ratings.<sup>115</sup> As noted earlier, the *FATF Mutual Evaluation Methodology* document specifies that fourth round evaluations focus on both technical compliance and effectiveness, the latter of which is measured by examining eleven immediate outcomes.<sup>116</sup> For each of the forty FATF Recommendations, a country will receive one of the following *technical compliance* ratings:

- C Compliant
- LC Largely compliant—There are only minor shortcomings.
- PC Partially compliant—There are moderate shortcomings.
- NC Non-compliant—There are major shortcomings.
- NA Not applicable—A requirement does not apply, due to the structural, legal or institutional features of the country.<sup>117</sup>

For each of the eleven “Immediate Outcomes” that are specified in the *FATF Mutual Evaluation Methodology* document and that are used to measure the “effectiveness” of a country’s implementation of the FATF Recommendations,<sup>118</sup> a country will receive one of the following “effectiveness” ratings:

- HE High level of effectiveness—The Immediate Outcome is achieved to a very large extent. Minor improvements needed.
- SE Substantial level of effectiveness—The Immediate Outcome is achieved to a large extent. Moderate improvements needed.

115. See *July 25, 2018 Consolidated Table of Assessment Ratings*, *supra* note 114.

116. See *supra* notes 106, 118-19 and accompanying text for a discussion of the Immediate Outcomes.

117. *Id.*

118. See *FATF 4th Round Methodology*, *supra* note 95, at 93-122. For a discussion of the Immediate Outcomes most relevant to the legal profession, see *infra* note 132 and accompanying text.

ME Moderate level of effectiveness—The Immediate Outcome is achieved to some extent. Major improvements needed.

LE Low level of effectiveness—The Immediate Outcome is not achieved or achieved to a negligible extent. Fundamental improvements needed.<sup>119</sup>

Before a country's data is included in a *Consolidated Table of Assessment Ratings*, the FATF Plenary will discuss the report and approve its publication.<sup>120</sup> After the Plenary approves the publication of a Mutual Evaluation Report, there will be a follow-up process designed to ensure quality and consistency.<sup>121</sup> Once the required follow-up occurs, links to that country's final Mutual Evaluation Report will be available on the FATF *Mutual Evaluations* webpage.<sup>122</sup>

#### *B. Findings About the Legal Profession in the Completed FATF Fourth Round Mutual Evaluations*

Fifty jurisdictions were listed in FATF's July 25, 2018 *Consolidated Table of Assessment Ratings*.<sup>123</sup> All of these jurisdictions have received reports that evaluate both their technical compliance

119. *Id.*

120. *See, e.g., June 2018 Universal Procedures, supra* note 99, at 7-8 (including the sections on "Plenary discussion" and "Publication and other procedures following the Plenary"); FIN. ACTION TASK FORCE, *Outcomes of the Plenary meeting of the FATF, Paris, 22-24 February 2017* <http://www.fatf-gafi.org/publications/fatfgeneral/documents/outcomes-plenary-february-2017.html> [<https://perma.cc/7JLB-5L5E>] ("Discussion of the mutual evaluation report of Sweden").

121. *See, e.g., supra* note 99 (citing FATF's 4th Round Universal Procedures document). *See supra* note 120 (citing the February 2017 Plenary discussion of Sweden's Mutual Evaluation Report).

122. *See FATF Mutual Evaluations Webpage, supra* note 92 (the reports are listed chronologically, but one can also search by country or region). A few countries have requested and received a rerating. *See, e.g., Technical Analysis of FATF Recommendations – Rerating of Cuba*, GAFILAT (Oct. 2017), <http://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/FUR-Cuba-Oct-2017.pdf> [<https://perma.cc/YER7-GQ83>]. Some countries have follow-up reports, as well as the initial mutual evaluation report. *See, e.g., 1st Follow-Up Report Mutual Evaluation of Fiji*, APG (Oct. 2017), <http://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/FUR-Fiji-Oct-2017.pdf> [<https://perma.cc/WT9A-XC25>] (follow-up from Fiji's 2016 FATF 4th Round Mutual Evaluation Report, *supra* note 109).

123. *See FATF Consolidated Table of Assessments Ratings, supra* note 114. During the editing process for this Article, FATF posted November 2, 2018 versions of the Consolidated Tables of Assessment Ratings. This Article is based on the July 2018 ratings. As noted in the asterisk footnote to this Article, the FATF process is ongoing.

with the FATF Recommendations and the effectiveness of their actions with respect to eleven Immediate Outcomes.<sup>124</sup> As the discussion that follows demonstrates, the legal profession has not fared particularly well in these Mutual Evaluation Reports.

FATF Recommendation 22 is the “due diligence” provision that applies to DNFBPs, including lawyers who are engaged in one of five activities.<sup>125</sup> The July 25, 2018 *Consolidated Table of Assessment Ratings* lists the evaluated countries’ technical compliance ratings for Recommendation 22.<sup>126</sup> These ratings are as follows:

- Nine Non-Compliant Jurisdictions: Australia, Botswana, Canada, Fiji, Mongolia, Nicaragua, Sri Lanka, Thailand, and the United States.
- Twenty-Three Partially Compliant Jurisdictions: Andorra, Austria, Bahamas, Cambodia, Costa Rica, Denmark, Guatemala, Hungary, Iceland, Ireland, Jamaica, Macao China, Mexico, Norway, Portugal, Samoa, Serbia, Singapore, Switzerland, Tunisia, Uganda, Vanuatu, and Zimbabwe.
- Seventeen Largely Compliant Jurisdictions: Armenia, Bangladesh, Barbados, Belgium, Cuba, Ethiopia, Ghana, Honduras, Isle of Man, Italy, Malaysia, Panama, Slovenia, Spain, Sweden, Trinidad & Tobago, and Ukraine.
- One Fully Compliant Jurisdiction: Bhutan.<sup>127</sup>

The July 25, 2018 *Consolidated Table of Assessment Ratings* also lists the technical compliance ratings for Recommendation 23, which is entitled “DNFBPs – Other Measures.”<sup>128</sup> Recommendation 23 includes the suspicious transaction reporting (“STR”) obligation and

124. For a discussion of the Immediate Outcomes, see *supra* notes 95, 118-19 (discussing the effectiveness ratings and the content of the eleven Immediate Outcomes). See also *supra* note 94 (explaining why the reports from some jurisdictions may not be called their 4th Report); *supra* note 114 (explaining why some jurisdictions are listed more than once on the Consolidated Table of Assessment Ratings).

125. See *supra* notes 85-86 and accompanying text for a discussion of the content of Recommendation 22.

126. See *July 2018 Consolidated Table of Assessments Ratings*, *supra* note 114.

127. *Id.*

128. *Id.*



the “no tipping off” (“NTO”) prohibition on notifying the person that a suspicious transaction report has been made.<sup>129</sup> Both of these obligations apply to DNFBPs, which includes lawyers who are involved in one of the five designated activities.<sup>130</sup> The FATF 4<sup>th</sup> Round Mutual Evaluation Report ratings for Recommendation 23 are as follows:

- Six Non-Compliant Jurisdictions: Australia, Canada, Mexico, Mongolia, Nicaragua, and the United States.
- Twenty-Four Partially Compliant Jurisdictions: Andorra, Bahamas, Barbados, Bhutan, Botswana, Costa Rica, Fiji, Guatemala, Honduras, Hungary, Iceland, Isle of Man, Jamaica, Macao China, Samoa, Serbia, Singapore, Sri Lanka, Switzerland, Thailand, Tunisia, Uganda, Vanuatu, and Zimbabwe.
- Eighteen Largely Compliant Jurisdictions: Austria, Bangladesh, Belgium, Cambodia, Cuba, Denmark, Ethiopia, Ghana, Ireland, Italy, Malaysia, Norway, Panama, Portugal, Slovenia, Sweden, Trinidad & Tobago, and Ukraine.
- Two Fully Compliant Jurisdictions: Armenia and Spain.<sup>131</sup>

Immediate Outcomes 3 and 4 are the “effectiveness” ratings that are most relevant to the legal profession.<sup>132</sup> *None* of the fifty countries

129. See *supra* notes 87-88 and accompanying text for a discussion of Recommendation 23.

130. See *supra* notes 87-88 and accompanying text for a discussion of Recommendation 23, including the requirements that DNFBPs report suspicious transaction and the prohibition on DNFBPs notifying or “tipping off” the individual in question that a report has been made.

131. See *Consolidated Table of Assessments Ratings*, *supra* note 114.

132. See *FATF Methodology*, *supra* note 95, at 93-102. See *supra* notes 95, 118-19 and accompanying text for additional information about the inclusion in the fourth round of mutual evaluations “effectiveness” ratings which are measured by the “immediate outcomes.” The content of Immediate Outcomes 3 and 4 is set forth in the FATF 4th Round Methodology document, *supra* note 95, at 99-104. Some of the issues included in Immediate Outcome 3s effectiveness rating include “how well do supervisors, on a risk-sensitive basis, supervise or monitor the extent to which . . . DNFBPs are complying with their AML/CFT requirements?” and “to what extent are supervisors to demonstrate that their actions have an effect on compliance by . . . DNFBPs?” *Id.* at 100. Some of the core issues included in Immediate Outcome 4’s effectiveness rating include “how well do . . . DNFBPs understand their ML/TF risks and AML/CT obligations?”; “How well do . . . DNFBPs apply the enhanced or specific

whose Mutual Evaluation Reports were published as of July 2018 received a “high level of effectiveness” rating for either Immediate Outcome 3 or Immediate Outcome 4.<sup>133</sup> Only *six* of fifty countries received a “substantial level of effectiveness” rating on Immediate Outcome 3 and only *one* country received a “substantial level of effectiveness” rating on Immediate Outcome 4.<sup>134</sup> The majority of countries evaluated received a rating of “moderate level of effectiveness,” although more than twenty-five percent received the lowest possible rating on Intermediate Outcome 3 and almost thirty-five percent received the lowest possible rating on Intermediate Outcome 4.<sup>135</sup> As noted earlier, the FATF effectiveness ratings are for all categories of DNFBPs; the legal profession is not rated separately.<sup>136</sup> Interestingly, Australia and the United States received “noncompliant” ratings for their technical compliance with Recommendations 22 and 23, but received “moderate” effectiveness ratings for both Intermediate Outcomes 3 and 4.<sup>137</sup> Canada received a noncompliant rating on both Recommendations 22 and 23, but it received one of the very few “substantial” effectiveness ratings on

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measures for [risk]?”; “to what extent do . . . DNFBPs meet their reporting obligations on suspect proceeds of crime . . . ?”; “How well do . . . DNFBPs apply internal controls and procedures . . . to ensure compliance with AML/CFT requirements?” *Id.* at 102-03. To show that these are the most relevant to the legal profession, see *infra* notes 215-19 and accompanying text (Immediate Outcomes 3 and 4 were the outcomes for which US legal profession representatives were asked to provide information).

133. See *July 25, 2018 Consolidated Table of Assessment Ratings*, *supra* note 114.

134. *Id.* (showing that Canada, Cuba, Ireland, Macao China, Malaysia, and Spain received a “substantial” effectiveness rating on Intermediate Outcome 3 and Armenia received a substantial effectiveness rating on Intermediate Outcome 4).

135. *Id.* (showing that thirty countries received the “moderate” effectiveness rating on Immediate Outcome 3 and thirty-two countries received the “moderate” effectiveness rating on Immediate Outcome 4. Fourteen countries received the “low” effectiveness rating on Immediate Outcome 3 and seventeen countries received the low effectiveness rating on Immediate Outcome 4). *Id.*

136. See *supra* notes 95, 118-19, 132 and accompanying text regarding the effectiveness ratings.

137. See *July 25, 2018 Consolidated Table of Assessment Ratings*, *supra* note 114.

Intermediate Outcome 3 and received a “moderate” effectiveness rating on Intermediate Outcome 4.<sup>138</sup>

Despite the range of scores for DNFBPs, when lawyer AML efforts are discussed in the FATF Mutual Evaluation Reports, the tone is quite harsh. It is true that there are a few Mutual Evaluation Reports that are largely silent about the legal profession.<sup>139</sup> It is also true that there are some Reports that note that most or all of the jurisdiction’s lawyers are not engaged in the kinds of activities to which the FATF Recommendations apply.<sup>140</sup> There are also a very few Reports that contain neutral or mostly positive reviews of the legal profession.<sup>141</sup> Overall, however, it is striking how many of the FATF Mutual Evaluation Reports contain negative comments about that legal profession’s AML regulations or implementation. This is true even for countries that received “largely compliant” technical compliance ratings for Recommendations 22 and 23.<sup>142</sup>

138. *Id.* The Consolidated Table of Assessment Ratings shows that some of the countries that performed the best on the DNFBP technical compliance ratings performed poorly on the effectiveness ratings and vice-versa. *Id.*

139. *See, e.g., Bangladesh MER, supra* note 109.

140. *See, e.g., Andorra MER, supra* note 109, ¶ 130; *Cuba MER, supra* note 109, at 124 (“Under Decree-Law 317, the above professions are reporting entities when they prepare for, or carry out, transactions for customers concerning the management of client money, securities or other assets. However, at present this criterion does not apply as lawyers, notaries and other legal professionals and natural or legal persons working as accountants independent or under other forms of non-state management are not allowed to conduct this activity in accordance with the rules governing the power and activities of each sector (Decree-Law 81 for lawyers and Law 50 for state notaries).”); *Bahamas MER, supra* note 109, at 51, ¶ 133 (“Although a majority of attorneys do not comply with AML/CFT measures since they do not perform the designated activities and have concerns regarding legal professional privilege, they are aware of their obligations . . .”).

141. *See, e.g., Vanuatu MER, supra* note 109, ¶ 256 (“Some lawyers do not regularly handle client funds, e.g. where litigation is the main business focus, but may from time to time receive funds through bank accounts (not cash) on behalf of customers as part of a property settlement transaction. AML/CFT procedures appear to be adequate in the major firms at least. Not all firms appear to have updated their AML/CFT policies and procedures to encompass the 2014 legislative changes. The nature of their non-TCSP business has not warranted STRs to date.”); *see generally Austria MER, supra* note 109 (the tone seems more positive than most, citing information such as the lawyer discipline system and education efforts); *Macao, China MER, supra* note 109, ¶ 269 (“For other DNFBPs, the level of awareness of risk and AML/CFT requirements varies, with a good awareness of risks and obligations among notaries, lawyers and accountants, and a lower awareness among real estate agents and high value goods dealers.”).

142. *See, e.g., Italy MER, supra* note 109.

The types of criticisms that appear in the FATF Mutual Evaluation Reports vary. For example, some of the Reports assert that the evaluated country has an inadequate AML regime for lawyers.<sup>143</sup> This was the finding in the US Mutual Evaluation Report, which gave the United States a non-compliant ratings for its technical compliance with Recommendations 22 and 23.<sup>144</sup> The concluding sentence in the “Key Findings” section of the US Mutual Evaluation Report was that the “most significant supervisory gap is lack of comprehensive [AML] supervisory processes for the DNFBPs, other than casinos.”<sup>145</sup>

Another criticism of the legal profession that appears in the Mutual Evaluation Reports is that even when an AML regime for lawyers exists, lawyers do not understand that they are subject to those AML regulations.<sup>146</sup> Armenia, for example, received a rare

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143. See, e.g., *Nicaragua MER*, *supra* note 109, ¶¶ 353, 358; *Thailand MER*, *supra* note 109, ¶ 24 (“A significant scope gap remains with the lack of inclusion of lawyers or accountants in the AML/CFT framework in Thailand”), ¶ 373 (“include lawyers . . . in the AML/CFT framework. The particulars of obligations should reflect risk assessment findings”); *Turkey MER*, *supra* note 109, at r. 16 (Deficiency 1) (“Accountants, lawyers and other legal professionals are not required to submit STRs and are not subject to other measures covered by Recommendations 14, 15 and 21.”); *Uganda MER*, *supra* note 109, ¶ 37 (“The institutional framework providing for lawyers’ compliance with their AML/CFT CDD obligations is weak and for foreign corporate clients, lawyers heavily rely on verification information they request from their foreign counterparts without necessarily verifying it themselves.”); *Guatemala MER*, *supra* note 109, at 3 (“Activities carried out by lawyers and notaries referred to by the FATF Standards are not all subject to AML/CFT regulations and they are not supervised for such purpose.”); *Austria MER*, *supra* note 109, ¶¶ 28, 33 (“Some DNFBP sectors, such as lawyers and notaries, showed a good understanding of TFS obligations . . . Notaries, lawyers, and accountants play a key role within the economic system as they are often involved in high risk business like company formations and real estate transfers. There are concerns whether they fulfil their gatekeeper role effectively.”).

144. *Id.* at 257.

145. *United States MER*, *supra* note 109, at 5.

146. See, e.g., *Bhutan MER*, *supra* note 109, ¶ 27 (describing lack of awareness by DNFBPs, which is a category that includes lawyers); *Botswana MER*, *supra* note 109, ¶ 276 (“The real estate agents and lawyers are not aware of their CDD requirements such as due diligence measures to verify customer and conduct customer profiling.”); *Fiji MER*, *supra* note 109, at 72-73, ¶¶ 263, 273 (noting the general understanding of ML risks was low with outreach to DNFBPs, including lawyers, low); *Uganda MER*, *supra* note 109, ¶ 215 (“Lawyers and Accountants have implemented basic Know Your Client and Due Diligence procedures. Due to the fact that no AML/CFT specific supervision activities have taken place in the DNFBP sector, very limited awareness of the AML/CFT obligations exist within the sector.”); *Mexico MER*,

“compliant” rating on Recommendation 23, but its Mutual Evaluation Report stated that “the legal community has a poor understanding of the AML/CFT law.”<sup>147</sup> A third type of criticism is that the jurisdiction’s lawyers may understand as a theoretical matter that they are subject to their country’s AML regulations, but the lawyers do not understand the risks they face or they are not properly following or implementing the existing AML regulations.<sup>148</sup> Some FATF Reports have also implicitly or explicitly criticized the entities that regulate lawyers.<sup>149</sup>

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*supra* note 109, at 87 (“Key Findings . . . Discussions suggested that lawyers and accountants generally have a lower level of awareness of their AML/CFT obligations.”).

147. *Armenia MER, supra* note 109, ¶ 259. This Report stated that the “evaluation team was advised that the legal community has a poor understanding of the AML/CFT law, which suggests that risk and appropriate mitigating measures are not in place. The further provision of information to the legal sector was suggested as being necessary.” *Id.*

148. *See, e.g., Ghana MER, supra* note 109, ¶ 201 (“Most of the lawyers interviewed by the assessment team demonstrated low level of understanding of ML/TF risks associated with the services they provide and their profession as a whole”); *Mexico MER, supra* note 109, at ¶ 27 (“Reporting by DNFBSs is generally poor in both quantitative and qualitative terms, a particular concern being that professionals (lawyers and accountants) have not filed a single STR in the past three years”); *Portugal MER, supra* note 109, ¶ 267 (“Some other sectors (e.g. lawyers and notaries) do not consider that their services can be used for ML/TF purposes, even unwittingly, and therefore do not even consider the possibility that a transaction or service for a client could be suspicious. This reinforces the concerns expressed about the lack of understanding of ML risks by these professions . . .”), ¶ 115 (“However, actors like dealers in high-value goods, real estate agents and lawyers - some of which are considered at specific risk of ML/TF abuse - need to increase their AML/CFT involvement, which may require more awareness raising since their STR reporting is significantly lower than that of other entities.”); *Trinidad and Tobago MER, supra* note 109, ¶ 15 (“There is no evidence that the legal profession complies with AML/CFT measures. This is a serious deficiency having regard for the significant role played by these professionals as financial intermediaries (gatekeepers) in introducing and facilitating such a large percentage of financial transactions.”); *Uganda MER, supra* note 109, ¶ 86 (“All lawyers practicing in Uganda are subject to AML/CFT obligations. However in terms of implementation, the lawyers in general have not been doing much to comply with their AML/CFT obligations.”); *Zimbabwe MER, supra* note 109, ¶ 86 (“Although at law the DNFBSs are subject to AML/CFT requirements, there is no implementation nor supervision for compliance with requirements.”); *Hungary MER, supra* note 109, at 88 (“The level of SAR-reporting by the DNFBS sector - especially by lawyers, notaries and casinos - is not considered adequate by the assessment team considering their involvement in transactions with high-risk customers and products.”); *Panama MER, supra* note 109, ¶ 382; *see also Barbados MER, supra* note 109, ¶ 196 (not all lawyers involved in real estate dealings understand the risks they face); *Ukraine MER, supra* note 109, ¶ 400(c)-(d) (noting that lawyers did not recognize risks posed by the use of fictitious companies or by clients seeking work beyond the lawyer’s expertise).

149. *See, e.g., Portugal MER, supra* note 109, at 95 (“For some DNFBSs (lawyers), AML/CFT supervision is not exercised at all.”); *Ghana MER, supra* note 109, ¶ 201 (although the IBA has AML/CFT guidelines for its members, the Ghana Bar Association, which is an IBA

There have also been criticisms of lawyers related to the Mutual Evaluation Process itself. In some countries, the legal profession has been criticized because its representatives did not participate in the country's preparation of its national risk assessment report.<sup>150</sup> In other countries, the legal profession contributed to the preparation of the national risk assessment report, but that country's FATF Mutual Evaluation Report was critical of the conclusions about the legal profession found in the risk assessment report.<sup>151</sup> A related criticism is

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member, has "yet to appreciate and adapt or develop similar guidance for its members"); *Barbados MER*, *supra* note 109, ¶ 233 ("Lawyers are obligated to become members of the Barbados Bar Association and are required to register with the supreme court, however no evidence was provided to the Assessors to demonstrate the integrity of the registration process."); *Iceland MER*, *supra* note 109, ¶ 292 ("There is no designated supervisor in law for lawyers, and the [Iceland Bar Association, which is the mandatory professional body] did not demonstrate an understanding or consideration of the potential ML/TF risks within the legal sector."); *Macao, China MER*, *supra* note 109, at 86 ("AAM [the Macao Lawyers Association, which is the chief supervisory body,] has undertaken no AML/CFT on-site inspections (off-site monitoring only) of lawyers since 2011 and the DSF on-site inspection visits have been irregular."); *Malaysia MER*, *supra* note 109, ¶ 28 ("The DNFBP sectors, with the exception of the casino are under-supervised for AML/CFT compliance due mainly to a shortage of AML/CFT supervisory staff in FIED, although risk-based approaches and cooperation with SRBs is allowing for steps to mitigate risks in the high-risk DNFBP sectors." Elsewhere, however, the MER stated that "The Bar Council has a well-established track record of applying the fit and proper controls under the Legal Professions Act 1976." *Id.* at 107); *Thailand MER*, *supra* note 109, ¶ 416 ("Comprehensive fit and proper checks do not extend to DNFBPs. [The Lawyer Council includes] licensing criteria that cover some fit and proper elements, however these are not broad enough."); *see also Mexico MER*, *supra* note 109, at 101, ¶¶ 270, 309 (noting that less than 3% of lawyers belong to one of seven bar associations and that lawyers who were not bar members were less aware of their AML/CFT obligations and recommending passage of the delayed legislation that would require that lawyers belong to professional bodies).

150. *See, e.g., Serbia MER*, *supra* note 109, ¶ 448:

The Bar Association does not undertake supervision and lawyers did not respond to the questionnaires issued with the intention of informing the ML NRA. The NRA designates the sector as low risk, which does not appear to be adequate in light of the systematic refusal of the sector to meet its AML/CFT obligations and the significant role played by lawyers in relation to legal persons and real estate transactions.

*Bhutan MER*, *supra* note 109, at 29, ¶ 67 (noting the participation of all key stakeholders in the National Risk Assessment Working Group, except for various kinds of DNFBPs, including lawyers, who lack a professional association); *see also Austria MER*, *supra* note 109, ¶ 247 ("There seems to be no sufficient overall approach within the profession of lawyers to analyse risks and develop AML/CFT systems to reduce these risks for the whole sector.").

151. *See, e.g., Sri Lanka MER*, *supra* note 109, at 75–76 ("The NRA considers notaries to have low exposure to foreign and high-risk customers, but does not elaborate on the basis for

that the legal profession has not properly acknowledged the risks lawyers present in facilitating money laundering activities.<sup>152</sup> Some countries have been criticized because the lawyers who met with the on-site assessment team were unfamiliar with the national risk assessment.<sup>153</sup> Finally, some Reports seemed to criticize the legal profession because the FATF team did not meet with any lawyers during the mutual evaluation team's on-site visit.<sup>154</sup>

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this assessment beyond professional judgment. There have been cases of ML investigations reported in relation to the legal profession and notaries in the last five years.”); *Mexico MER*, *supra* note 109, ¶ 321 (“The upgrading of the professional service providers (especially lawyers) to medium-risk in the SAT model appears to be more appropriate than the categorization in the NRA.”); *Panama MER*, *supra* note 109, ¶ 347 (“Although the National Strategy affirms that the impact of the [lawyers] sector’s vulnerabilities is low, recent events, particularly the “[Panama] Papers” case, indicate the opposite.”).

152. *See, e.g., Belgium MER*, *supra* note 109, ¶ a5 101:

The reservations expressed by the accountancy and legal professions, lawyers in particular, about the national risk assessments are problematic. The supervisory bodies for these professions did not provide a contribution to the national ML risk assessment, and although they say that they started to consider risk once they became aware of these analyses, they do not share the assessment’s conclusions, which present their professions as particularly risky in terms of ML. They consider that they have adequate controls in place to counter the main threats and that misconduct is largely the preserve of those outside the regulated professions.

*Honduras MER*, *supra* note 109, ¶ 104 (“It is important to mention that lawyers and notaries do not agree with being obliged subjects and expressed that they should not be subject to any requirements established by the law. This represents a lack of awareness related to their role regarding AML/CFT.”); *Italy MER*, *supra* note 109, ¶ 250 (“There is no common appreciation of lawyers’ vulnerability to being used by ML facilitators, although most agreed that risks are highest in real estate transactions, advising on project capital, and/or providing tax advice.”); *Spain MER*, *supra* note 109, ¶ 5.4141041:

Lawyers have a low level of awareness of ML/TF risks, do not recognise the level of risk in their profession, and feel that their AML/CFT obligations pose an unnecessary burden. . . . Lawyers have played a central role in establishing and operating the organised ML networks which have been at the centre of a number of high-profile ML prosecutions. . . . However, the involvement of lawyers in these cases is not seen as representative of the risks: the lawyers involved are considered as complicit criminals (Malaya) or as acting recklessly (White Whale).

*Mexico MER*, *supra* note 109, ¶ 270 (“Representatives of these professions [including lawyers] who were met with do not seem to appreciate that the misuse of legal persons is a major ML risk facing their professions.”).

153. *See, e.g., Andorra MER*, *supra* note 109, ¶ 197 (“The evaluation team met a lawyer that had not participated in the NRA process, and had not seen its output . . .”).

154. *See, e.g., Samoa MER*, *supra* note 109, at 74–75, ¶ 251:

While the evaluation team did not meet with the Law Society, the AGO asserts that lawyers should be aware of their obligations under the MLP Act 2007, however this could not be verified by the evaluation team; nor was it possible to determine whether

Although there are many criticisms of lawyers in the FATF Mutual Evaluation Reports, only a few Reports cite or discuss the Interpretive Note to Recommendation 23 or the administration of justice and rule of law concerns that underlie the Interpretive Note to Recommendation 23.<sup>155</sup> One of the rare exceptions is Austria's Mutual Evaluation Report, which talked about the need to balance AML goals and lawyer privilege.<sup>156</sup> The Report observes, however, that the "evaluation team is not convinced that Austria has succeeded to find the right balance."<sup>157</sup>

Although a number of FATF Mutual Evaluation Reports urged the examined country to adopt AML regulations for lawyers,<sup>158</sup> these Reports arguably use a "one size fits all" solution. For example, none of the Reports cited the Interpretive Note to Recommendation 23 or examined the degree to which the country in question had weighed the competing arguments in order to determine for itself "the matters that

lawyers accept their AML/CFT obligations . . . . However, no supervision of the legal profession has been undertaken by the SFIU and the understanding of risks, by both the profession and the regulator is uncertain. Authorities believe that lawyers are aware of the risks associated with onboarding clients or when offering financial advice to clients or when they are involved in handling accounts or opening/operating trust accounts on behalf of their clients, but it is not known whether lawyers are meeting their AML/CFT obligations.

155. See, e.g., *Andorra MER*, *supra* note 109, ¶ 290 (citing the FATF MER footnote that referred to the interpretive note privilege issue); *Ukraine MER*, *supra* note 109, ¶ 210 (noting that the legal privilege-based exemption to lawyers' and others' reporting obligations do not appear to unduly or unreasonably obstruct the requirement of a legal professional to submit an STR and so is in line with the FATF standards).

156. See *Austria MER*, *supra* note 109, ¶ 150.

157. *Id.* It also stated:

The strict conditions for obtaining/compelling information and the scope of professional privilege were mentioned as deficiencies already in the third mutual evaluation of Austria. The problems faced by prosecutors when pursuing ML investigations due to the factors mentioned above seems to prolong investigations and most probably also contribute to the high rate of dismissed investigations.

*Id.* The Austria Mutual Evaluation Report cited with approval, however, a 2012 Austrian Supreme Court case. The case "stated in its decision that legal privilege does not cover instruments used for criminal acts, having facilitated criminal acts or having been produced by criminal acts . . . nor other pieces of evidence, in particular written documents which are not a communication between the professional and his client." *Id.* ¶ 155.

158. See, e.g., *supra* notes 143-44 and accompanying text.



would fall under legal professional privilege or professional secrecy.”<sup>159</sup> Although FATF’s *RBA [Risk Based Assessment] Guidance for Legal Professions* discusses the “unique position of lawyers in society” and the importance of lawyers to the rule of law,<sup>160</sup> none of the FATF 4th Round Mutual Evaluation Reports cited this FATF document.<sup>161</sup> FATF’s *RBA Guidance for Legal Professions* includes the following language which echoes Recommendation 23’s Interpretive Note and emphasizes the important role that lawyers play in preserving the rule of law and administering a country’s system of justice:

Lawyers are members of a regulated profession and are bound by their specific professional rules and regulations. Their work is fundamental to promoting adherence to the rule of law in the countries in which they practice. Lawyers hold a unique position in society by providing access to law and justice for individuals and entities, assisting members of society to understand their increasingly complex legal rights and obligations, and assisting clients to comply with the law.<sup>162</sup>

None of the Reports contains an extended discussion of the potential tension between anti-money laundering goals, on the one hand, and the rule of law goals identified in the RBA and the Interpretive Note to Recommendation 23, on the other hand.<sup>163</sup> None of the fifty Mutual Evaluation Reports issued by July 2018 discussed whether the country had done the type of balancing and evaluation that the Interpretive Note to Recommendation 23 contemplates.<sup>164</sup> In those Mutual Evaluation Reports in which privilege is cited at all, the Reports rather cavalierly dismiss the privilege and do not address the implications for the

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159. Compare *supra* note 91 (Recommendation 23’s Interpretive Note language), with the *Mutual Evaluation Reports*, *supra* note 109.

160. See FATF *RBA Guidance for Legal Professionals*, *supra* note 69, at 5-6.

161. See generally FATF Mutual Evaluation Reports, *supra* note 109 (word search for “RBA” revealing no results).

162. *FATF RBA Guidance*, *supra* note 69, at 5-6, ¶ 11.

163. See generally *Mutual Evaluation Reports*, *supra* note 109.

164. *Id.*

administration of justice or the rule of law if one fundamentally changes the nature of the lawyer-client relationship.<sup>165</sup>

Consider, for example, Serbia's Mutual Evaluation Report.<sup>166</sup> This Report referred to the legal profession's interest in client confidentiality as a "negative cultural approach."<sup>167</sup> This section of the Report did not include any discussion of whether client confidentiality might be warranted or whether lawyers in Serbia were invoking confidentiality inappropriately. Instead, it said:

In particular, [the Serbian Bar Association] is aware that lawyers consider that AML/CFT obligations conflict with those emanating from legal privilege and as a result consider their priority to be their duty to their customer, leading to a lack of compliance by the legal sector with its AML/CFT obligations. The views expressed by the Bar Association, however, mirrored the negative cultural approach of the legal profession to AML/CFT obligations and it did not accept the existence of other risks connected with the legal sector or the gatekeeper role lawyers should hold.<sup>168</sup>

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165. See, e.g., *Botswana MER*, *supra* note 109, ¶ 30:

[L]egal practitioners have been identified by both the private and public sectors as being high risk for ML yet these sectors have a very limited awareness of the ML/TF risks and the AML/CFT requirements that apply to them. Whilst, this is mostly attributed to the lack of supervision and monitoring of these sectors by their supervisors due to lack of internal capacity, the Law Society of Botswana is also of the view that application of the AML/CFT requirements will be in conflict with the client lawyer privilege.

*Id.* ¶ 74; *Ghana MER*, *supra* note 109, ¶ 201 (noting that lawyers "feel that their AML/CFT obligations pose an unnecessary burden" without addressing the issue further other than to say that "[a]lmost all of the Lawyers do not fully understand the essence of their gatekeeper role within the AML/CFT regime and the responsibility and integrity that it requires.").

166. See *Serbia MER*, *supra* note 109, ¶ 448.

167. *Id.*

168. *Id.* The reference to "AML/CFT" refers to anti-money laundering ("AML") and countering the financing of terrorism ("CFT"), both of which are topics addressed by the FATF Recommendations. See *supra* notes 1 (citing the CFT acronym), 11 (citing the FATF Recommendations), 81 and accompanying text (explaining the expansion of the FATF Recommendations after the 9/11 attack to include a focus on terrorist financing).

Costa Rica's Mutual Evaluation Report provides another example. It observes that the "reluctance showed by some professionals, such as lawyers, to provide information on their customers by virtue of professional secrecy significantly affects the transparency of legal persons domiciled in Costa Rica."<sup>169</sup> Despite this reference to privilege, Costa Rica's Mutual Evaluation Report did not refer to Costa Rica's privilege law, the Interpretative Note to Recommendation 23, the FATF *RBA Guidance for Legal Professions*, or the underlying rule of law concerns that might lie behind lawyers' attitudes.<sup>170</sup>

There are additional examples that one could cite.<sup>171</sup> These examples, however, illustrate a tone that is commonly found in the FATF Mutual Evaluation Reports. Thus, the overall impression from reading these Reports is that few of the FATF Mutual Evaluation Reports, if any, are balancing AML obligations and rule of law-privilege concerns, or evaluating whether privilege is warranted or how it has been applied. The bottom line is that the Reports show that few, if any, of the legal professions around the world are doing what FATF wants or expects of them.

### *C. Three Case Studies of Legal Profession Engagement in the FATF Mutual Evaluation Process*

This Section provides information about how the legal professions in three countries prepared for their FATF mutual evaluations. Legal profession representatives in Australia, Canada, and the United States appear to have had quite different levels of engagement with their governments. It appears that the US legal profession representatives likely had the most interaction with their government, followed by Australia, and then Canada. Although this sample size is small and the results may not be representative of other countries' experiences, the range of experiences incurred by these countries may prove useful to

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169. *Costa Rica MER*, *supra* note 109, ¶ 450. *But see Nicaragua MER*, *supra* note 109, ¶ TC 345 (noting that Mutual Legal Assistance cannot be refused MLA for reasons of secrecy or confidentiality except that it is obtained in circumstances in which it applies the legal professional privilege or legal professional secrecy).

170. *See generally Costa Rica MER*, *supra* note 109.

171. *See, e.g., Honduras MER*, *supra* note 109.

legal profession representatives in countries that have not yet undergone their FATF 4th Round Mutual Evaluation.

Australia not only was the first of these three countries to undergo its evaluation, but it was one of the first countries overall to complete its FATF 4th Round Mutual Evaluation.<sup>172</sup> The Law Council of Australia interacted with FATF on behalf of Australia's legal profession.<sup>173</sup> Law Council representatives shared with this Article's Authors a description of their involvement and preparation efforts.<sup>174</sup>

The Law Council reports that Australian government authorities did not seek any input from the Law Council when the government prepared Australia's risk assessment or when preparing documents for the FATF on-site visit.<sup>175</sup> It was, however, invited to participate in the on-site visit.<sup>176</sup>

Before meeting with the FATF representatives, the Law Council representatives prepared for the on-site interview by:

- Analyzing the ML risk assessment and the TF threat assessment (prepared by Australian government authorities) to ascertain the risks as they apply to the legal services sector;

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172. See *Australia MER*, *supra* note 109. Australia's report is dated April 2015. *Id.* Only Norway and Spain have reports dated earlier—both of their reports are dated December 2014. See *July 2018 Consolidated Table of Assessment Ratings*, *supra* note 114, at 1 (includes the date of the final report).

173. See *About Us*, LAW COUNCIL OF AUSTRALIA, <https://www.lawcouncil.asn.au/about-us> [<https://perma.cc/3CGE-77JZ>]:

The Law Council of Australia (Law Council) is the peak national representative body of the Australian legal profession. The Law Council represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice. The Law Council is a federal organisation representing 65,000 Australian lawyers through their bar associations and law societies and Law Firms Australia (the Constituent Bodies).

174. See Email and attachments from Margery Nicoll, Deputy Chief Executive Officer & Director, International, Law Council of Australia, to Laurel S. Terry (Oct. 29, 2017) (on file with Author) [hereinafter Nicoll Email].

175. See Nicoll Email, *supra* note 174.

176. *Id.*

- Undertaking research to understand how and to what extent the risks are mitigated; and
- Attempting to understand the assessment mechanism of the 2013 Methodology particularly in reference to *effectiveness* in the particular sense intended by the Methodology.<sup>177</sup>

The Law Council proactively pursued regular engagement with Australian government authorities (both policy and regulatory authorities) and developed, where possible, areas of shared understanding.<sup>178</sup> This process highlighted areas of concern for matters where little information seemed to be available, such as a cost/benefit analysis of AML/CTF regulation and evidence of whether the regime was impacting/reducing the incidence of serious crime.<sup>179</sup>

When the FATF representatives made their on-site mutual evaluation visit, Law Council of Australia representatives had the opportunity to meet with them.<sup>180</sup> The Australian Attorney General's department, which is responsible for AML policy development, coordinated these meetings.<sup>181</sup> The practitioners who met with FATF representatives had volunteered in response to a memo sent by the Law Council to its members and the profession.<sup>182</sup> The Law Council representatives were chosen based on their expertise and knowledge of AML/CTF regulation, legal profession regulation, ethics, and the international picture.<sup>183</sup> The Law Council sought the opportunity to provide documents directly to the mutual evaluation team without consultation with government.<sup>184</sup>

Australia's Mutual Evaluation Report rated it as "non-compliant" for Recommendations 22 and 23.<sup>185</sup> Australia was rated as having a "moderate level of effectiveness" on Intermediate Outcomes 3 and 4, although the language regarding the legal profession was more critical

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177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Australia MER*, *supra* note 109, at 23 (showing noncompliant ratings for Recommendations 22 and 23).

than these effectiveness ratings might suggest.<sup>186</sup> In essence, the Report placed some of the “burden of proof” on the legal profession and found that it had failed to carry that burden.<sup>187</sup> For example, Australia’s Report stated that:

[S]ector [legal profession] representatives were unable to demonstrate to or convince the assessors how existing professional standards were sufficient to mitigate ML/TF risks over and above their personal business interests, or had enabled them to be an effective contributor in combating system-wide ML/TF risks. . . . [T]here is no conclusive evidence that these non-regulated DNFBPs are rejecting customers due to suspected ML/TF activities. They also do not have obligations to report suspicious matters to AUSTRAC, and do not do so in practice.<sup>188</sup>

Canada provides this Article’s second case study regarding legal profession-government interaction. Canada had its on-site FATF mutual evaluation visit in November 2015, several months after Australia’s Mutual Evaluation Report was approved.<sup>189</sup> The Federation of Law Societies of Canada [the Federation] is a coordinating body for Canada’s legal profession regulatory bodies.<sup>190</sup> The Federation’s preparation was, in many respects, similar to the experience of the Law Council of Australia. The Federation was not involved in the preparation of the Canadian government’s risk assessment document, nor was it asked to provide information that would help the Canadian

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186. *Australia MER*, *supra* note 109, at 94, 102-03, ¶¶ 6.1, 6.31-6.32 (Immediate Outcome 3); 87-88, 91, ¶¶ 5.27-5.30, 5.51 (Immediate Outcome 4); 168, ¶ a5.105 (technical compliance with Recommendation 22); and 168, ¶ a5.108 (technical compliance with Recommendation 23).

187. *See infra* note 188.

188. *Australia MER*, *supra* note at 109, ¶¶ 5.28-5.30.

189. *See Canada MER*, *supra* note 109, at 3.

190. *See About Us*, FED. L. SOC’YS OF CANADA, <https://flsc.ca/about-us/> [<https://perma.cc/FN42-M6PJ>] (“The Federation of Law Societies of Canada is the national coordinating body of Canada’s 14 provincial and territorial law societies, which regulate more than 120,000 lawyers and 3,800 Quebec notaries and Ontario’s nearly 9,000 licensed paralegals in the public interest.”).

government prepare the legal profession portion of the documents required before Canada's mutual evaluation on-site assessment.<sup>191</sup>

Two representatives from the Federation met with FATF's on-site assessment team.<sup>192</sup> The Canadian Department of Finance initially had proposed that the FATF team meet with representatives of the Law Society of British Columbia.<sup>193</sup> Following internal discussions, the Federation proposed that the meeting be with Federation representatives in order to ensure that the assessors received a more complete picture of the anti-money laundering and terrorist financing activities of Canadian law societies.<sup>194</sup> Departmental officials made those arrangements with the FATF team.<sup>195</sup>

Before the FATF on-site visit, the Federation reviewed the risk assessment the Canadian government had prepared and made it publicly available.<sup>196</sup> The Canadian government's risk assessment had placed legal professionals in the "high vulnerability" category, indicating that lawyers presented the same level of anti-money laundering risk as bricks and mortar casinos, virtual currencies, and dealers in precious metals and stones, among others, and a greater risk than Provincial online casinos, accountants, and money services businesses.<sup>197</sup>

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191. See Email and attachment from Frederica Wilson, Senior Director, Regulatory and Public Affairs, FLSC, to Laurel S. Terry (Oct. 31, 2017) (on file with Author) [hereinafter Wilson Email]. For information about the Mutual Evaluation process and required documents, see *supra* notes 92-110 and accompanying text.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* See also *Assessment of Inherent Risks of Money Laundering and Terrorist Financing in Canada*, CANADA DEPT. OF FINANCE, (2015), <https://www.fin.gc.ca/pub/mltf-rpcf/mtf-rpcf-eng.pdf> [<https://perma.cc/ZF5N-DJSX>] [hereinafter *Canada Risk Assessment*].

197. Canada Risk Assessment, *supra* note 196, at 32 (listing in the "High Vulnerability" category Brick and Mortar Casinos; Life Insurance Companies; Company Services Providers; Registered Charities; Credit Unions and Caisses Populaires; Open-Loop Prepaid Access; Dealers in Precious Metals and Stones; Real Estate Agents and Developers; Foreign Bank Branches Securities Dealers; Foreign Bank Subsidiaries Smaller Retail MSBs; Internet-Based MSBs Trust and Loan Companies; Legal Professionals; and Virtual Currencies. The Canadian report gave a "very high vulnerability" rating to five types of entities: Corporations; National Full-Service MSBs; Domestic Banks; and Small Independent MSBs; Express Trusts. *Id.* Life Insurance Intermediary Entities and Agencies were the only kind of entity that received a "low

During FATF's on-site visit, Federation representatives described the Canadian legal profession regulators' commitment to fighting money laundering and terrorist financing, including the relevant rules and regulations and their enforcement.<sup>198</sup> Federation representatives were also prepared to discuss their successful constitutional challenge to the government's attempts to extend its regulatory scheme to members of the legal profession.<sup>199</sup>

Canada's Mutual Evaluation Report treats the legal profession rather harshly and does not appear to reflect the information that the on-site inspectors heard from the representatives of the Federation of Law Societies of Canada during the on-site visit.<sup>200</sup> For example, Canada's Mutual Evaluation Report does not cite or refer to any of the mandatory AML rules that apply to Canadian lawyers.<sup>201</sup> Indeed, for those who are unfamiliar with the AML rules in Canada's lawyer regulatory system, the broad statements in Canada's Mutual Evaluation Report might give the misleading impression that Canadian lawyers are not subject to any AML regulation at all.<sup>202</sup> In addition to the broad

vulnerability" rating. The five types of entities that received a "Medium Vulnerability" rating were Accountants; Provincial Online Casinos; British Columbia Notaries; Wholesale and Corporate MSBs; and Independent Life Insurance Agents and Brokers). *Id.*

198. Wilson Email, *supra* note 191.

199. *Id.*

200. *Canada MER*, *supra* note 109, at 207 (explaining that Canada received a rating of "noncompliant" for Recommendations 22 and 23. With respect to the effectiveness evaluation, it was one of the few countries so far that was rated as having a substantial level of effectiveness for Immediate Outcome 3; it was rated as having a moderate level of effectiveness with respect to Immediate Outcome 4).

201. All Canadian lawyer regulators have implemented the FLSC's Model Rule on Client Identification and Verification Requirements. See FED. L. SOC'YS OF CANADA, *Model Rule on Client Identification and Verification Requirements*, FED. L. SOC'YS OF CANADA (Dec. 12, 2008), <https://flsc.ca/wp-content/uploads/2014/10/terror2.pdf> [<https://perma.cc/DC9J-7WQ9>]; FED. L. SOC'YS OF CANADA, *Model Rule on Cash Transactions*, FED. L. SOC'YS OF CANADA (July 2004), <https://flsc.ca/wp-content/uploads/2014/10/terror1.pdf> [<https://perma.cc/F3WN-GTY3>]; see generally FED. L. SOC'YS OF CANADA, *Model Rules to Fight Money Laundering and Terrorist Financing*, FED. L. SOC'YS OF CANADA, <http://flsc.ca/national-initiatives/model-rules-to-fight-money-laundering-and-terrorist-financing/> [<https://perma.cc/877Q-LFCH>].

202. See, e.g., *Canada MER*, *supra* note 109, at 205 ("1. Assessing risks & applying a risk-based approach: Lawyers, legal firms and Quebec notaries are not legally required to take enhanced measures to manage and mitigate risks identified in the NRA"); *id.* at 207 ("22.



statements that suggest that Canadian lawyers are not subject to AML regulation, the FATF Report on several occasions cited the “high vulnerability” characterization of lawyers found in Canada’s 2015 Risk Assessment.<sup>203</sup> Moreover, when the Report referred to the recent Canadian Supreme Court case as an “impediment” to Canada’s AML scheme,<sup>204</sup> it did not explain that the Supreme Court case was a lengthy one that had carefully weighed the competing interests and Canada’s constitution.<sup>205</sup>

The United States provides the third case study of legal profession mutual evaluation preparations. The US legal profession was aware of the US government’s June 2015 National Risk Assessment, but it did

DNFBPs: Customer due diligence: AML/CFT obligations are inoperative for legal counsels, legal firms and Quebec notaries.”).

203. *See, e.g., Canada MER, supra* note 109, at 15 nn.7, 16, 78.

204. *See, e.g., Canada MER, supra* note 109, at 7:

AML/CFT requirements are inoperative towards legal counsels, legal firms and Quebec notaries. These requirements were found to breach the constitutional right to attorney-client privilege by the Supreme Court of Canada on 13 February 2015. In light of these professionals’ key gatekeeper role, in particular in high-risk sectors and activities such as real-estate transactions and the formation of corporations and trusts, this constitutes a serious impediment to Canada’s efforts to fight ML.

The case that was an “impediment” was *Canada (Attorney General) v. Fed’n of Law Soc’ys of Can.*, [2015] 1 S.C.R. 401 (Can.) (striking portions of Canada’s Proceeds of Crime (Money Laundering) and Terrorist Financing Act as inconsistent with Canada’s Charter).

205. *See supra* note 204 and accompanying text (explaining one of the ways in which Canada’s Mutual Evaluation Report discussed this case). *Compare* FATF RECOMMENDATION Interpretive Note to Recommendation 23, *supra* note 91, at 83, with *Canada MER, supra* note 109, ¶ 266:

The legal profession is not currently subject to AML/CFT supervision due to a successful constitutional challenge that makes the PCMLTFA inoperative in respect of legal counsels, legal firms, and Quebec notaries. There is therefore no incentive for the profession to apply AML/CFT measures and participate in the detection of potential ML/TF activities. The exclusion of the legal profession from AML/CFT supervision is a significant concern considering the high-risk rating of the sector and its involvement in other high-risk areas such as the real estate transactions as well as company and trust formation. This exclusion also has a negative impact on the effectiveness of the supervisory regime as a whole because it creates an imbalance amongst the various sectors, especially for REs that perform similar functions to lawyers.

This discussion failed to acknowledge the fact that Canada’s Supreme Court case seems to be the country-specific approach recognized by Recommendation 23’s Interpretive Note. *Compare* Interpretive Note to Recommendation 23, *supra* note 91 and accompanying text, with *Canada MER, supra* note 109.

not contribute to this document.<sup>206</sup> However, in contrast to the situation in Australia and Canada, the US legal profession *was* able to submit information to government officials as they prepared the United States' required mutual evaluation paperwork.<sup>207</sup> In contrast to the situation in Canada and Australia, in the United States, it was primarily lawyers from the private sector and voluntary bar associations, rather than the professional staff from regulatory bodies or coordinating groups, who took the lead in preparing for the United States' mutual evaluation. Most of the efforts were coordinated by Kevin Shepherd who is a lawyer in private practice who previously had served as Chair of the ABA Task Force on Gatekeeper Regulation and the Legal Profession.<sup>208</sup> The members of this ad hoc FATF mutual evaluation working group included lawyers who were in private practice and active in the FATF-related ABA and ACTEC groups, legal academics, and staff lawyers from the ABA Center for Professional Responsibility. The working group consulted with, and drew upon, the resources of others, including malpractice insurers and officers in the National Organization of Bar Counsel ("NOBC"), which is a national organization that brings together state government officials who

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206. See *Nat'l Money Laundering Risk Assessment*, *supra* note 6. This document contained a discussion of some DNFBP sectors, such as the casino sector and money service businesses, but it did not contain a section dedicated to DNFBPs or the legal profession. *Id.* at Table of Contents. Nor does a word search reveal a discussion of lawyers or the legal profession. *Id.*

207. Compare *supra* notes 175 (Australia) & 191 (Canada) and accompanying text, with *infra* notes 218-19 and accompanying text (United States).

208. *Id.* For additional information about the ABA Task Force, see *Task Force on Gatekeeper Reg. and the Profession*, AM. BAR. ASS'N, [https://www.americanbar.org/groups/criminal\\_justice/gatekeeper.html](https://www.americanbar.org/groups/criminal_justice/gatekeeper.html) [<https://perma.cc/PJK8-SLVR>] [hereinafter *ABA Gatekeeper Task Force Webpage*]. Organizations whose representatives have participated in these efforts include The American College of Trust and Estate Counsel ("ACTEC"); the American College of Real Estate Lawyers; the American College of Mortgage Attorneys; and the American College of Commercial Finance Lawyers and staff lawyers from the ABA Center for Professional Responsibility. See, e.g., Terry, *supra* note 26, at 501 n.61 (noting the cosponsors of ABA resolutions regarding AML issues). In addition to the ABA Gatekeeper Task Force Webpage, there is information on a webpage maintained by the ABA Governmental Affairs office. See *Gatekeeper Regulations on Lawyers*, AM. BAR. ASS'N, [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/independence\\_of\\_the\\_legal\\_profession/bank\\_secretcy\\_act/](https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/bank_secretcy_act/) [<https://perma.cc/QR9K-4K2S>] [hereinafter *ABA Gatekeeper Advocacy Webpage*].

regulate lawyers. For example, after being requested to do so by Kevin Shepherd, NOBC representatives sent out a listserv message asking their members for relevant information, such as lawyer discipline cases.<sup>209</sup> The ad hoc working group was also able to draw upon information that the ABA Gatekeeper Task Force had prepared for an internal ABA review called the “Scope” review and information in a document previously submitted to FATF.<sup>210</sup>

Because of the timing of the US mutual evaluation, US legal profession representatives had the advantage of being able to speak to legal profession representatives from other countries about their experiences with the FATF mutual evaluation process. US legal profession representatives were aware that the US FATF mutual evaluation was on the horizon and regularly sought input from US government officials about the likely timetable and how the US legal profession could most effectively provide information and be of service as the United States completed its mutual evaluation paperwork. One of the reasons why lines of communication existed between US government officials and legal profession representatives was because of groundwork that had been laid in the preceding years.<sup>211</sup> For example, representatives from the US Department of the Treasury had

209. See Email from author to Kevin Shepherd (July 10, 2015) (on file with Author). The NOBC is the organization that brings together those who discipline and regulate lawyers (on file with Author).

210. See, e.g., Kevin L. Shepherd, *Self Regulatory Bodies Call for Information and Cases*, AM. BAR ASS'N, [https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012nov26\\_gatekeeperreg.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012nov26_gatekeeperreg.authcheckdam.pdf) [https://perma.cc/6G2W-MHQC] (undated document prepared by the ABA in 2012 for FATF; it is available as a link from the ABA Gatekeeper webpage, *supra* note 208); see also Email from Kevin Shepherd to the Members of the ABA Gatekeeper Task Force (Jan. 9, 2015) (on file with Author).

211. See, e.g., Duncan E. Osborne, *The Financial Action Task Force and the Legal Profession*, 59 N.Y.L. SCH. L. REV. 421 (2014), which states:

For the past ten years, I along with others—as representatives of The American College of Trust and Estate Counsel (ACTEC) and of the American Bar Association (ABA)—have engaged with both the FATF and the U.S. Department of the Treasury. . . . I would interject here that the interactions with officials from the Treasury Department have differed markedly from those with the FATF bureaucrats. Treasury personnel have certainly not always agreed with representatives of the US legal profession, but their communications have been open, rational, and reasoned. These substantive and meaningful dialogues have helped all parties find common ground and avenues for progress in the areas of AML and CFT.

*Id.* at 423, 430.

met periodically with various legal profession representatives in order to discuss topics of mutual interest.<sup>212</sup>

In March 2015, before the United States was required to provide its paperwork to FATF,<sup>213</sup> Kevin Shepherd had reached out by email to officials at the US Department of the Treasury and offered to gather AML information related to the legal profession.<sup>214</sup> Although government officials did not immediately respond, they ultimately accepted the offer and asked for assistance in gathering information relevant to the legal profession and the mutual evaluation's "effectiveness" prong.<sup>215</sup> US legal profession representatives provided information about each of the six "core issues" listed under Immediate Outcome 3 and the six "core issues" listed under Immediate Outcome 4.<sup>216</sup>

The US legal profession's informal working group exchanged a number of internal drafts during July 2015 before transmitting its responsive document to US Department of the Treasury officials.<sup>217</sup> The final version of this document was lengthy—in excess of fifty pages.<sup>218</sup> This document addressed the core issues in Immediate Outcomes 3 and 4 and covered a range of topics.<sup>219</sup> This document provided information regarding licensing requirements, discipline requirements, continuing education requirements, the role of malpractice insurance, and financial auditing mechanisms, among other things. In addition to providing narrative responses to the core issues, the ad hoc group's document included seven Appendices.<sup>220</sup> The titles of these Appendices, which are listed below, illustrate the type of information provided:

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212. See Osborne, *supra* note 211.

213. Author Laurel Terry has personal knowledge of these facts. See also *FATF Procedures*, *supra* note 93 (including a timetable of preparatory work).

214. Author Laurel Terry has personal knowledge of these facts.

215. *Id.*

216. *Id.* See *supra* note 118 and accompanying text for a list of the Intermediate Outcomes 3 and 4 core issues.

217. Author Laurel Terry has personal knowledge of these facts.

218. *Id.*

219. *Id.*

220. *Id.*

- Appendix 1: Rules and Regulations Relevant to a Lawyer's Entry into the Profession;<sup>221</sup>
- Appendix 2: Ongoing Governmental Supervision of Lawyers' Conduct;<sup>222</sup>
- Appendix 3: Governmental and Nongovernmental Sources That Educate State Regulators, Educators, Supervisors, Insurers, and US Lawyers about AML/CFT Issues and Lawyers' Legal and Ethical Obligations;<sup>223</sup>
- Appendix 4: Articles Used in the "Cradle to Grave" AML/CFT Education Approach (targeting regulators, legal educators, insurers, individual lawyers, law firms, and others involved in private ordering);
- Appendix 5: Selected Presentations Since 2008 Used in the "Cradle to Grave" AML/CFT Education Approach (targeting regulators, legal educators, insurers, individual lawyers, law firms, and others involved in private ordering);
- Appendix 6: Tools Used in US Legal Profession Stakeholder Education Efforts;<sup>224</sup> and
- Appendix 7: Representative Sample of Money-Laundering Related Disciplinary Proceedings.<sup>225</sup>

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221. *Id.* This Appendix included links and other information related to legal education accreditation requirements and bar admission requirements.

222. *Id.* This Appendix included a wide range of items such as a summary of the criminal laws that would apply to money laundering activities by lawyers; as well as rules of professional conduct that would subject a lawyer to discipline; government supervision programs such as random audit programs; required ongoing education requirements; and financial recordkeeping requirements. This Appendix also referenced the National Lawyer Regulatory Data Bank, surveys on lawyer discipline, and resources of the National Organization of Bar Counsel, which is an umbrella organization for those who regulate lawyers.

223. *Id.* Among other things, this Appendix identified state and local bar association and specialty bar association websites that educated their members about AML issues.

224. *Id.* This Appendix referenced the FATF-related items that US lawyers have used in their education efforts, including the FATF Recommendations, the FATF RBA for Legal Professionals, the FATF "Typologies" report for the legal profession, as well as a number of US-based education items such as the ABA/IBA/CCBE Lawyer's Guide cited *supra* note 4. It also cited items discussed in Terry, *supra* note 26, such as ABA Formal Ethics Opinion 463, *infra* note 235, and the ABA's Voluntary Good Practices Guide, *infra* note 233.

225. *Id.* This Appendix was in the form of a table that showed disciplinary action taken by the supervising authority, typically a state's highest court, against lawyers who were charged with, or convicted of, money laundering offenses. The Appendix included a caveat that the list

When the FATF on-site assessment team came to the United States in February 2016, it met with Kevin Shepherd and William Clark, who were the past and future chairs of the ABA Gatekeeper Task Force.<sup>226</sup> The US Department of the Treasury had requested that these two individuals meet with the evaluation team.<sup>227</sup> US officials did not participate in that meeting.<sup>228</sup> After the meeting concluded, Kevin Shepherd reported to the ad hoc working group that the meeting had lasted approximately two hours and that the FATF team was familiar with the materials about the legal profession the US government had submitted.<sup>229</sup> The FATF team asked the US legal profession representatives to provide follow-up information on two topics: 1) disciplinary actions taken by state disciplinary authorities, especially disbarment and suspension statistics; and 2) the circumstances under which US lawyers might consider advising the creation of non-US trusts for their clients and the implications of that advice.<sup>230</sup> The working group provided follow-up information to the US Department of the Treasury which presumably transmitted the information to the FATF team.<sup>231</sup>

One reason why the US working group was able to prepare its lengthy submission to the US government over the course of only a few weeks was that most of its members had been heavily involved in AML efforts for a number of years.<sup>232</sup> Members of the working group

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it provided should not be construed as containing an exhaustive catalog of disciplinary action taken against these lawyers. This Appendix noted that criminal cases against US lawyers had been included in the FATF Typologies report described *supra* note 27.

226. See Email from Kevin Shepherd to author (July 6, 2016) (on file with Author) (reporting on the individuals who were asked to meet with the FATF on-site evaluation team).

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. See Email from Kevin Shepherd to various US Treasury Officials (July 29, 2015) (on file with Author).

232. See, e.g., Kevin L. Shepherd, *Guardians at the Gate: The Gatekeeper Initiative and the Risk-Based Approach for Transactional Lawyers*, 43 REAL PROP. TR. & EST. L.J. 607 (2009); John A. Terrill II & Michael A. Breslow, *The Role of Lawyers in Combating Money Laundering and Terrorist Financing: Lessons from the English Approach*, 59 N.Y.L. SCH. L. REV. 433, 435-36 (2014) (describing some of these efforts); Terry, *supra* note 26, at 501-10. Some, but not all, of the group's efforts appear on the webpage of the ABA Gatekeeper Task

included lawyers who had led ABA AML initiatives that included the ABA's Voluntary Good Practices Guide,<sup>233</sup> the ABA-IBA-CCBE Guide mentioned earlier,<sup>234</sup> ABA Formal Ethics Opinion 463 that focused on lawyers' AML efforts,<sup>235</sup> as well as efforts that contributed to the Conference of Chief Justices' adoption of a resolution regarding AML and follow-up education efforts.<sup>236</sup> The working group's members, which also included lawyers from ACTEC and other groups, had also been heavily involved in additional AML education efforts, many of which have been documented in a law review article entitled *U.S. Legal Profession Efforts to Combat Money Laundering and Terrorist Financing*.<sup>237</sup>

Despite the existence of, and enforcement of, criminal and regulatory lawyer AML provisions, and education efforts, the United

Force, such as the letters sent by various ABA Presidents to state and local bar leaders notifying them of new AML resources for their lawyers. See *ABA Gatekeeper Task Force Webpage*, *supra* note 208 (includes links to a July 31, 2013 letter from ABA President Laurel Bellows and an April 8, 2011 letter from ABA President Stephen Zack to state and local bars leaders regarding AML issues). But not all of the efforts described here appear on this webpage.

233. *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing*, AM. BAR ASS'N (Apr. 23, 2010), [https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voluntary\\_good\\_practices\\_guidance.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voluntary_good_practices_guidance.authcheckdam.pdf) [<https://perma.cc/8NCA-EKZN>] [hereinafter *ABA AML Guidance*]; see also AM. BAR ASS'N, ADOPTED BY THE HOUSE OF DELEGATES, RESOLUTION 116 ADOPTING THE VOLUNTARY GOOD PRACTICES GUIDANCE FOR LAWYERS TO DETECT AND COMBAT MONEY LAUNDERING AND TERRORIST FINANCING (2010), [https://www.americanbar.org/content/dam/aba/directories/policy/2010\\_am\\_116.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/2010_am_116.authcheckdam.pdf) [<https://perma.cc/2ZSV-YHG9>] [hereinafter ABA RESOLUTION 116] (August 2010 ABA adoption of the endorsement of the ABA AML Guidance); Laurel Terry, *Summary & Supplement to the Voluntary Good Practices Guidance*, <http://tinyurl.com/VGPG-ABA> [<https://perma.cc/G5XB-YU6F>] (two-page summary of the red flags found in the ABA Voluntary Good Practices Guidance document).

234. See *supra* notes 4, 32, 73 and accompanying text (discussing the IBA/ABA/CCBE Guide).

235. AM. BAR ASS'N, FORMAL OPINION 463: CLIENT DUE DILIGENCE, MONEY LAUNDERING, AND TERRORIST FINANCING (2013), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/formal\\_opinion\\_463.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_463.authcheckdam.pdf) [<https://perma.cc/C93X-9V99>] [hereinafter ABA FORMAL OPINION 463].

236. CONFERENCE OF CHIEF JUSTICES, RESOLUTION 7: IN SUPPORT OF THE VOLUNTARY GOOD PRACTICES GUIDANCE FOR LAWYERS TO DETECT AND COMBAT MONEY LAUNDERING AND TERRORIST FINANCING (2014), <http://ccj.nesc.org/~media/microsites/files/ccj/resolutions/07232014-support-of-voluntary-good-practices-for-lawyers.ashx> [<https://perma.cc/9KJU-63CB>].

237. See Terry, *supra* note 26.

States received a technical compliance rating of “noncompliant” for both Recommendations 22 and 23 in its December 2016 FATF Mutual Evaluation Report.<sup>238</sup> The FATF Mutual Evaluation Report started out by noting that the US anti-money-laundering framework was “well-developed and robust.”<sup>239</sup> The Report acknowledged that US lawyers are subject to ethical and licensing requirements that differ from those of other DNFBPs and that this mitigated some of the risks.<sup>240</sup> The Report also acknowledged US lawyers’ increased awareness of AML issues,<sup>241</sup> although it observed that this awareness was less than systematic.<sup>242</sup> But the Report nevertheless found that comprehensive AML regulation did not apply to US DNFBPs, including lawyers, and that “the vulnerability of these minimally covered DNFBP sectors is significant, considering the many examples identified by the national risk assessment process.”<sup>243</sup> The Report specifically highlighted the fact that the US had not implemented for the legal profession Recommendation 23, which includes a suspicious transaction reporting (“STR”) obligation.<sup>244</sup> There was no discussion in this Report of the

238. See *supra* notes 114-15 and accompanying text (reporting the compliance results for the United States and other countries).

239. See *United States MER*, *supra* note 109, at 3.

240. *Id.* at 120, ¶ 280 (“[E]thical obligations placed on lawyers and accountants[] mitigate some of these risks.”).

241. *Id.* at 9, ¶ 22:

Of late, there appears to be greater appreciation of ML/TF vulnerabilities and implementation of preventive measures by casinos; and some professional guidance exists for other sectors (in particular, lawyers) on AML/CFT issues. However, DNFBPs other than casinos and dealers in precious metals and stones have limited preventive measures applied leaving vulnerabilities particularly in respect of the high-end real estate sector and those sectors involved in the formation of legal persons.

242. *Id.* at 10, ¶ 22 (“Lawyers . . . [and other DNFBPs] are not subject to comprehensive AML/CFT requirements, and are not systematically applying basic or enhanced due diligence processes and other preventive measures, as needed; and this is further exacerbated by the deficiencies in the Beneficial Ownership requirements.”).

243. *Id.*

244. See, e.g., *id.* at 22, ¶ 42(b) (“Technical compliance of DNFBPs not subject to comprehensive AML/CFT measures: A number of DNFBPs that do perform activities listed in Recommendations 22 and 23 (real estate agents, trust and company service providers, lawyers, and accountants) are not subject to comprehensive AML/CFT measures.”); *id.* at 10, ¶ 24:

[O]ther DNFBPs are subject to less supervision as they are not subject to comprehensive AML/CFT preventive measures. This is mitigated somewhat for



Interpretive Note to Recommendation 23 or the FATF RBA Guidance for Legal Professions.<sup>245</sup> While one might argue that the relevant “Priority Action” item left room for interpretation,<sup>246</sup> the recommendation found in the body of the Mutual Evaluation Report is more direct.<sup>247</sup> It states that “on the basis of a specific vulnerability analysis, appropriate AML/CFT obligations particularly relating to CDD and SAR filing, should be imposed on lawyers, accountants, and trust and company service providers as a matter of priority.”<sup>248</sup>

Although the information that US legal profession representatives provided to their government and to the FATF on-site assessment team may not have changed the technical compliance ratings the United States received, the documentation US legal representatives provided may have influenced the tone in the US Mutual Evaluation Report.<sup>249</sup> For example, although Canada has an explicit legal profession due diligence rule and an annual reporting obligation, and the United States does not, Canada’s Mutual Evaluation Report arguably uses a more hostile tone towards lawyers than the tone in the US Mutual Evaluation Report.<sup>250</sup> Moreover, Canada’s Mutual Evaluation Report does not cite the extensive efforts by its regulators to combat lawyer involvement in money laundering. The omission of information about Canada’s AML system in its Mutual Evaluation Report may be due to the fact that the Federation was not invited to submit any documentation before the FATF on-site assessment team visit.

In sum, these three case studies illustrate differing levels of engagement among governments and legal profession representatives regarding the FATF Mutual Evaluation process. The level of engagement a profession has may be significant because FATF Mutual Evaluation Reports appear to rely heavily on each country’s risk assessment report and on the information that country submits *before*

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lawyers and accountants who have strong professional entry and continuing ethical requirements, though these do not adequately address ML/TF vulnerabilities or require reporting of suspicious activity to authorities.

245. *See generally id.*

246. *See generally id.*

247. *See United States MER, supra* note 109, at 118.

248. *See id.*

249. US Mutual Evaluation Report, *supra* note 109.

250. *Compare supra* notes 200-05 (Canada MER) and accompanying text, *with supra* notes 238-48 and accompanying text (United States MER).

the FATF on-site visit.<sup>251</sup> Thus, in the future, legal profession representatives may find it useful to consider these and other case studies and the ten suggestions contained in the Appendix to this Article.<sup>252</sup>

#### V. THE POTENTIAL IMPACT OF AML SCANDALS AND COMPETING NARRATIVES ON LAWYER AML REGULATION

This Part of the Article focuses on the United States and Peru, which are the Authors' home countries. This Part discusses the anti-money laundering regulatory structure in each country, the role of FATF, and highlights scandals in each country that already have influenced or may in the future influence discussions of lawyer AML regulation. This Part concludes by identifying two competing narratives about lawyer AML issues in anticipation of Part VI, which

251. See generally FATF MER REPORTS, *supra* note 109. The reports also include information the FATF assessment team obtains during the on-site visit. *Id.*

252. Some countries have access to case studies beyond the three described in this Article. For example, the Authors are aware that the CCBE has facilitated discussions on this topic among European legal profession representatives and that different EU Member States have had differing levels of engagement with their governments. See, e.g., Telephone Interview with Peter McNamee, Senior Legal Advisor, CCBE, by Laurel Terry (Nov. 29, 2017). Legal profession groups that want to reach out to other countries can use the resources of the Bar Issues Commission of the International Bar Association and the International Conference of Legal Regulators ("ICLR"). The ICLR is a relatively new, and entirely free, organization whose goal is to provide an international forum where those who regulate legal services can meet one another and exchange ideas and resources. For additional information about the ICLR, see INT'L CONFERENCE OF LEGAL REGULATORS, <https://iclr.net/> [<https://perma.cc/8CKJ-CXGV>]. The ICLR held its fifth-ever conference in September 2017 in Singapore. See *Int'l Conf. Legal Regulators 2017*, INT'L CONFERENCE OF LEGAL REGULATORS <https://iclr.net/conference/international-conference-of-legal-regulators-2017/> [<https://perma.cc/8VJG-VC5Z>]. One of the sessions was entitled "Anti-money laundering and Counter-Financing of Terrorism" and it "explore[d] the role which regulators can and should take in better educating the legal profession about its obligations, the steps that regulators can take in combating money-laundering and terrorist financing, and issues of client confidentiality and legal professional privilege." Int'l Conf. Legal Regulators, *Singapore 2017 Programme: Legal Regulation in a Borderless World: Building Networks*, THE LAW SOCIETY (Oct. 5, 2017), [http://www.lawsociety.org.sg/conference/ICLR2017/pdf/Programme%20Outline\(02102017\).pdf](http://www.lawsociety.org.sg/conference/ICLR2017/pdf/Programme%20Outline(02102017).pdf) [<https://perma.cc/YXE4-ZF9H>]. See also Laurel S. Terry, *Creating an International Network of Lawyer Regulators: The 2012 International Conference of Legal Regulators*, 82(2) THE BAR EXAMINER 18 (June 2013) (short article about the creation of the ICLR).

offers suggestions on how to improve the FATF Mutual Evaluation process.

#### *A. United States*

US lawyers are subject to a number of different federal criminal laws that prohibit money laundering activities by lawyers and others. These criminal laws include the 1970 Bank Secrecy Act, the 2001 Patriot Act, the Intelligence Reform & Terrorism Prevention Act of 2004, and the Money Laundering Control Act.<sup>253</sup> For example, the Money Laundering Control Act makes it illegal to knowingly “(i) conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or (ii) to avoid a transaction reporting requirement under State or Federal law.”<sup>254</sup> “Structuring” cash payments to avoid the reporting requirements is also a crime.<sup>255</sup>

In addition to these criminal laws, US lawyers are required to abide by lawyer regulatory provisions as a condition of receiving a law license.<sup>256</sup> These regulatory provisions include the rules of professional conduct from the state(s) in which the lawyer is licensed or is practicing.<sup>257</sup> The rules of professional conduct are enacted by the highest court in each state and are based on the ABA Model Rules of

253. See U.S. Dept. of Treasury, *History of Anti-Money Laundering Laws*, Fin. Crimes Enf't Network, <https://www.fincen.gov/history-anti-money-laundering-laws> [<https://perma.cc/7XB9-8VJC>].

254. See 18 U.S.C. § 1956(a)(1)(B)(i)–(ii) (2013). The Internal Revenue Code governs the receipt of more than US\$10,000 in cash and authorizes the existing reporting requirements. See, e.g., 31 U.S.C. § 5331 (2011) (reports relating to coins and currency received in nonfinancial trade or business).

255. See, e.g., 31 U.S.C. § 5324 (2004) (prohibiting structuring transactions to evade reporting requirement); 26 U.S.C. § 6050I(f)(1) (1996) (prohibiting structuring transactions to evade reporting requirements). Thus, it would be a crime for a lawyer to deposit US\$9,500 and thereafter deposit US\$600 in order to avoid the IRS US\$10,000 reporting requirement.

256. See *infra* note 258 and accompanying text.

257. See, e.g., *Policy Implementation Committee, Variations of the ABA Model Rules of Professional Conduct, Rule 8.5: Disciplinary Authority; Choice of Law*, ABA CTR. FOR PROF'L RESPONSIBILITY (Sept. 29, 2017), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_8\\_5.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_5.authcheckdam.pdf) [<https://perma.cc/QKU2-S3K4>] (state implementation of Rule 8.5(a) regarding disciplinary authority).

Professional Conduct.<sup>258</sup> Thus, for ease of reference, this Article will use the ABA Model Rules as a proxy to describe lawyer regulation in US jurisdictions.

The ABA Model Rules contain at least three different rules that are relevant to lawyer AML obligations. ABA Model Rule 1.2(d) provides that “a lawyer shall not counsel a client to engage, or assist a client, in conduct the lawyer knows is criminal or fraudulent . . . .”<sup>259</sup> ABA Model Rule 1.1 establishes a duty of competence.<sup>260</sup> It defines competence to include knowledge of the relevant facts.<sup>261</sup> ABA Model Rule 1.16(a) creates a mandatory duty on the part of the lawyer to reject certain clients.<sup>262</sup> The rule states that “a lawyer shall not represent a client . . . if: (1) the representation will result in violation of the rules of professional conduct or other law[.]”<sup>263</sup> In addition to creating a mandatory *duty to reject* certain client matters, ABA Model Rule 1.16(a)(1) creates a mandatory *duty to withdraw* if the lawyer’s continued representation of the client “will result in a violation of . . .

258. See, e.g., Laurel S. Terry et al., *Adopting Regulatory Objectives for the Legal Profession*, 80 *FORDHAM L. REV.* 2685, 2719-22 (2012) (describing the regulatory system for US lawyers). As of 2018, California’s rules are also based on the ABA Model Rules and thus all fifty US states use the ABA Model Rules. See generally ST. B. CALIF., *Current Rules of Professional Conduct*, <http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Current-Rules> [<https://perma.cc/E8W8-ZVRL>] (webpage shows that California’s new rules, which took effect Nov. 1, 2018, use the ABA Model Rules format).

259. MODEL RULES OF PROF’L CONDUCT, *supra* note 34, at r. 1.2(d).

260. *Id.* at r. 1.1 (stating that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”). *Id.*

261. *Id.* at r. 1.1, cmt. [5] (“Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.”). *Id.*

262. MODEL RULES OF PROF’L CONDUCT, *supra* note 34, at r. 1.16(a).

263. *Id.* at r. 1.16(a)(1). For a UK article that cited the potential benefits of a regulatory approach in addition to criminal law provisions, see Middleton & Levi, *supra* note 28, at 663:

For us, the notion that if crime is committed, the response should be either criminal justice or nothing seems absurd: the licensing and inspection regime for professionals may be expected to have a preventative effect on the scale of criminality, even if ex post facto professional sanctions do not deter completely, and especially if professional inspections and sanctions are much more likely than criminal conviction to happen.

other law.”<sup>264</sup> As noted previously, the United States has criminal laws that prohibit lawyers from engaging in money laundering or assisting money laundering activities.<sup>265</sup>

When read together, Rules 1.1, 1.2(d), and 1.16(a) arguably impose a “due diligence” obligation on lawyers.<sup>266</sup> Moreover, the “duty to reject” provisions in US lawyer regulation arguably go further than FATF Recommendations 22 and 23 because Rule 1.16(a)(1) puts responsibility on the lawyer to stop interacting with the criminal/client.<sup>267</sup> The FATF Recommendations, in contrast, transfer that responsibility from the lawyer to a supervisory body. Transferring responsibility to a supervisory body might work adequately in jurisdictions in which the AML supervisor is well-resourced. It is also possible, however, that a system that removes the “stop work” responsibility from the lawyer and transfers it to another entity will result in *more* money laundering rather than *less* money laundering.

As this paragraph explains, in addition to the mandatory *duty to reject* and the mandatory *duty to withdraw* provisions to which US lawyers are subject, US lawyers have broad *discretion* to reject or withdraw from representation in additional circumstances. This discretion to reject or withdraw from a lawyer-client relationship exists at both the front [acceptance] end of the relationship and the back [termination] end of the lawyer-client relationship.<sup>268</sup> With respect to the front end of the lawyer-client relationship, it is noteworthy that, except for a very narrow exception regarding court appointments,<sup>269</sup> US lawyers do not have a general “duty to accept” any client who

264. MODEL RULES OF PROF'L CONDUCT, *supra* note 34, at r. 1.16(a)(1).

265. *See supra* notes 253-55 and accompanying text.

266. *See supra* notes 259-64, *infra* note 294 (explaining how these three rules work together).

267. *Compare* r. 1.16(a), *supra* note 264 (imposing a duty to reject the money laundering client), *with* FATF Recommendation 23, *supra* note 87, (imposing a duty to file a suspicious transaction report).

268. The discretion to withdraw from representation appears in Rule 1.16(b). The discretion to reject representation can be inferred from the fact that the only rule that requires a lawyer to accept a case is Rule 6.2 regarding court appointments.

269. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT, *supra* note 34, at r. 6.2. *See also* Russell Pearce et al., PROFESSIONAL RESPONSIBILITY, A CONTEMPORARY APPROACH, 94 (Interactive Casebooks) (West 2d ed. 2013) (“Because the general rule is that a lawyer is not “a public utility” who must provide service to every client that requests it, a lawyer has great freedom in deciding which clients to represent.”).

wishes to retain that lawyer's services and is able to pay for the lawyer's service.<sup>270</sup> The US situation, which gives a lawyer broad discretion to reject potential clients, is different than the situation that one sometimes finds in other countries.<sup>271</sup> With respect to the back-end or termination of the lawyer-client relationship, Rule 1.16(b) makes it clear that US lawyers have tremendous discretion to decide to part company with the client.<sup>272</sup> Under Rule 1.16(b), so long as a lawyer is not representing a client in litigation, that US lawyer may withdraw from representation at any time and for any reason provided that the withdrawal can be accomplished without material adverse effect on the interests of the client.<sup>273</sup> Moreover, even if the withdrawal would cause material adverse effects on the client's interests, the US lawyer has the discretion to withdraw if any of several rather broad enumerated provisions are satisfied.<sup>274</sup>

Both the AML criminal laws and the relevant disciplinary rules have been enforced against US lawyers.<sup>275</sup> The FATF Legal Profession Typologies Report, for example, lists a number of lawyers who have

270. Compare MODEL RULES OF PROF'L CONDUCT, *supra* note 34, at r. 6.2, with the remainder of the ABA Model Rules. In some states, lawyers may also be subject to anti-discrimination provisions. See, e.g., *Nathanson v. Commonwealth of Massachusetts Commission Against Discrimination*, 16 Mass. L. Rptr. 76, 2003 WL 224806881 (Mass. Super. Ct. 2003).

271. Compare the lack of a mandatory duty to accept rule in the ABA Model Rules, *supra* note 269, with the "cab rank" rule that applies to barristers in England and Wales and that specifies that barristers have a duty to accept a mandate unless an exception applies. For a discussion of the cab rank rule, see Bar Standards Board, Consultation, *The Cab Rank Rule: Standard contractual terms and the list of defaulting solicitors* (March 2015), [https://www.barstandardsboard.org.uk/media/1657974/cab\\_rank\\_rule\\_consultation\\_final\\_-\\_march\\_2015.pdf](https://www.barstandardsboard.org.uk/media/1657974/cab_rank_rule_consultation_final_-_march_2015.pdf) [<https://perma.cc/5P55-QWH7>].

272. MODEL RULES OF PROF'L CONDUCT, *supra* note 34, at r. 1.16(b)(1).

273. *Id.*

274. *Id.* at r. 1.16(b).

The enumerated reasons include the following that are relevant to this Article:

- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; [or]
- (7) other good cause for withdrawal exists.

*Id.*

275. See *infra* notes 276 & 279 (citing discipline and criminal cases).

been convicted of violating these federal AML laws.<sup>276</sup> A 2016 plea bargain by a San Diego lawyer demonstrates that federal prosecutors are willing to prosecute lawyers on the basis that the lawyer knew or *should have known* that the activity involved illegal money laundering.<sup>277</sup> The San Diego lawyer in that case agreed to a plea bargain and was sentenced to a five-year prison term.<sup>278</sup> US lawyers have also been disciplined for AML-related involvement and have lost their licenses to practice law.<sup>279</sup>

As noted in Section III.B, although the US was rated noncompliant for Recommendations 22 and 23, it was rated as having a moderate level of effectiveness for Immediate Outcomes 3 and 4.<sup>280</sup> US lawyer organizations, including the ABA and ACTEC, have put considerable effort into educating lawyers about their AML obligations and helping them spot money laundering red flags.<sup>281</sup> To date, however, neither the ABA nor ACTEC has gone on record as supporting efforts to impose on US lawyers mandatory federal laws that impose due diligence obligations.<sup>282</sup> The ABA's policy webpage related to lawyer AML issues notes the ABA's opposition to several specific bills and expresses the ABA's overall concerns about proposed federal legislation.<sup>283</sup> Some of the ABA's policy statements have

276. See Terry, *supra* note 26, at 499 nn.54, 57 (listing in one place the criminal cases cited throughout the lengthy FATF Typologies Report, *supra* note 27). The US has been one of the jurisdictions that has prosecuted the most lawyers. *Id.* at 499.

277. See Laurel Terry, *5 Year Prison Term for a Lawyer Using his IOLTA Account to Launder Money*, CONTEMPORARY PROFESSIONAL RESPONSIBILITY BLOG (Sept. 7, 2016), <https://contemporaryprofessionalresponsibility.com/2016/09/07/5-year-prison-term-for-a-lawyer-using-his-iolta-account-to-launder-money/> [<https://perma.cc/2KM3-GKLW>].

278. *Id.*

279. See Terry, *supra* note 26, at 500 nn.57-58 (listing, *inter alia*, discipline cases in the FATF Typologies Report, *supra* note 27); *Att'y Grievance Comm'n of Md. v. Blair*, \_\_\_ A.3<sup>rd</sup> \_\_\_, 2018 WL 3414216 (Md. Ct. of Appeals, July 13, 2018) (discussing a suspended lawyer who was permanently disbarred for money laundering activities).

280. See *supra* notes 238-48 and accompanying text (describing the results of the US Mutual Evaluation Report).

281. See Terry, *supra* note 26, at 501-10.

282. The ABA's 2010 red flags guide uses the word "voluntary" in its title. See *ABA AML Guidance*, *supra* note 233. See also *infra* note 283.

283. See *Policy: Gatekeeper Regulations on Lawyers*, AM. BAR ASS'N, [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/independence\\_of\\_the\\_legal\\_profession/bank\\_secrecy\\_act.html](https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/bank_secrecy_act.html) [<https://perma.cc/ASP6-7DK5>]:

The ABA supports reasonable and necessary domestic and international measures designed to combat money laundering and terrorist financing. However, the

included in one document discussion of lawyer regulation principles and discussion of substantive corporate law beneficial ownership disclosure rules.<sup>284</sup>

The discussions about US lawyer AML obligations have taken place against the backdrop of AML scandals, several of which were previously cited in Section II.B, as well as debates about corporate secrecy laws and the overall robustness of the US' AML regime. For example, US law firms did not figure as prominently in the Panama Papers leak as law firms from some other countries, but their involvement has been noted.<sup>285</sup> After several high profile news stories about the use of shell corporations to purchase luxury US real estate,<sup>286</sup> the United States imposed "Geographic Targeting Orders" ("GTOs") that require disclosure of beneficial ownership information in certain high-value real estate markets and thus affect lawyers and others who are assisting clients with certain kinds of real estate transactions.<sup>287</sup> While the full impact of these GTOs is not yet known, a July 2018 headline in the *Miami Herald* stated: *How Dirty Is Miami Real Estate? Secret Home Deals Dried Up When Feds Started Watching.*<sup>288</sup> Because

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Association opposes legislation and regulations that would impose burdensome and intrusive gatekeeper requirements on lawyers, including bills that would subject the legal profession to key anti-money laundering compliance provisions of the Bank Secrecy Act. If adopted, these measures would undermine the attorney-client privilege, the confidential lawyer-client relationship, and traditional state court regulation of the legal profession, while also imposing excessive new federal regulations on lawyers engaged in the practice of law.

284. See *supra* note 208 and accompanying text (citing the ABA webpage that contains multiple policy statements).

285. See, e.g., Baxter, *supra* note 41; John Cassidy, *Panama Papers: Why Aren't There More American Names?*, THE NEW YORKER (Apr. 5, 2016).

286. See, e.g., Story & Saul, *supra* note 47 and accompanying text.

287. See, e.g., U.S. DEP'T OF TREASURY, Press Release: *FinCEN Expands Reach of Real Estate "Geographic Targeting Orders" Beyond Manhattan and Miami*, FIN. CRIMES ENF'T NETWORK (July 27, 2016), <https://www.fincen.gov/news/news-releases/fincen-expands-reach-real-estate-geographic-targeting-orders-beyond-manhattan> [<https://perma.cc/L8A7-T2XD>].

288. See *How Dirty is Miami Real Estate*, *supra* note 47. This news story included a summary of a study entitled *Anonymous Capital Flows and U.S. Housing Markets* written by an employee of the Federal Reserve Bank of New York and a professor at the University of Miami. It concluded that the transparency order affected markets beyond the high-priced markets where it was enforced. *Id.*



of the manner in which lawyer AML obligations and substantive corporate disclosure laws related to beneficial ownership have been intertwined in FATF Mutual Evaluation Reports and public discussions,<sup>289</sup> the US author of this Article believes that beneficial ownership real estate scandals such as those in New York and Miami are likely to create additional pressure in the United States for lawyer regulation reform.<sup>290</sup>

What arguably has gotten the most attention in the United States, however, is the *60 Minutes/Anonymous Inc.* TV program. As noted earlier, a number of individuals have criticized the behavior of the US lawyers who were the subjects of the Global Witness “sting” in which an actor sought legal assistance for a simulated transaction that it intended to represent a money laundering scheme.<sup>291</sup> Although the American Bar Association<sup>292</sup> and a prominent US legal ethics expert<sup>293</sup>

289. *See, e.g., supra* note 242 and accompanying text (US Mutual Evaluation Report combined discussions of lawyer AML obligations, lawyer privilege, and beneficial ownership rules) & note 49 (citing a number of articles that discussed both substantive corporate law beneficial ownership disclosure rules and lawyer regulation and privilege issues). The US Author finds it regrettable that lawyer regulation and beneficial ownership issues have become commingled. In her view, the desirability of substantive corporate law disclosure rules—that is, beneficial ownership rules—is not a lawyer regulation issue. Discussions that equate these two issues and that commingle discussion of corporate beneficial ownership rules with lawyer regulation issues arguably put the traditional role of lawyers at risk.

290. In addition to these real estate scandals discussed *supra* notes 286-88, US lawyers’ representation of Equatorial Guinea’s president Teodoro Obiang Nguema, has often been the subject of scathing critique. *See, e.g.,* Michael D. Goldhaber, *Little Theodor’s Big Troubles*, AM. LAW. 62, Feb. 1, 2013). US lawyers’ representation of Obiang has been the subject of Congressional Hearings and other reports. *See* S. Comm. on Homeland Sec. and Gov’t Affairs, *supra* note 48; *Puppet Masters*, *supra* note 39.

291. *See supra* note 49 and accompanying text; Michael D. Goldhaber, *When A Kleptocrat Comes Calling*, AM. LAW, Mar. 2016, at 18.

292. *See ABA President Paulette Brown responds to “60 Minutes” segment*, *supra* note 49 (explaining that the ABA supports the highest ethical standards for lawyers as well as reasonable efforts to combat money laundering and that “both 60 Minutes and Global Witness confirm Silkenat acted legally and ethically.”).

293. *See, e.g.,* Weiss, *supra* note 49, at 3:

Silkenat provided the ABA Journal with an opinion by ethics expert Stephen Gillers of New York University School of Law. ‘A preliminary meeting with a prospective client,’ he wrote, ‘is ordinarily not the place to voice suspicions about what the prospective client has said or to accuse the prospective client of dissembling, lying or violating the law.’ Generally explaining vehicles for home ownership is not unethical, Gillers said.

have defended the actions of the former ABA President who was one of the targets of the sting, the US Author's anecdotal impression is that US lawyers are embarrassed by the *60 Minutes/Anonymous Inc.* TV program. The *60 Minutes/Anonymous Inc.* TV program arguably has contributed to greater interest in, and discussion of, the topic of lawyer involvement in money laundering activities.

Regardless of the reason, there seems to be growing interest in the United States in creating or making more explicit<sup>294</sup> lawyers' due diligence obligations.<sup>295</sup> The ABA "Gatekeeper" Task Force has been the primary group responsible for initiating discussions about ethics rule changes.<sup>296</sup> Task Force representatives have spoken with members and staff of the ABA Standing Committee on Ethics and Professional Responsibility and the ABA Standing Committee on Discipline.<sup>297</sup> They have asked these committees to amend the ABA Model Rules of Professional Conduct in order to add or make more explicit lawyers' AML due diligence obligations.<sup>298</sup> Although the phrase "due diligence" is not one that is used in the ABA Model Rules, the idea that

*But see* Memorandum from John Leubsdorf, Distinguished Professor of Law and Judge Frederick B. Lacey Distinguished Scholar, Rutgers School of Law & William H. Simon, Arthur Levitt Professor, Columbia Law School, and Gertrude and William Saunders Professor Emeritus, Stanford Law School, to Global Witness (Jan. 28, 2015), [https://www.globalwitness.org/documents/18209/Opinion\\_of\\_John\\_Leubsdorf\\_and\\_William\\_Simon.pdf](https://www.globalwitness.org/documents/18209/Opinion_of_John_Leubsdorf_and_William_Simon.pdf) [<https://perma.cc/4C6R-UYFH>] ("In our opinion, the conduct by the above-named lawyers shown in these interviews does not comply with the professional responsibilities of lawyers asked for assistance with potentially unlawful transactions.").

294. Author Laurel Terry is among those who have argued that if read together, Rules 1.1, 1.2(d), and 1.16(a) create a due diligence obligation. For a discussion of these Rules, see *supra* notes 259-64.

295. See Kevin Shepherd, *ABA Needs a New Model Legal Ethics Rule*, LAW 360 (Apr. 6, 2017), <https://www.law360.com/articles/910316/aba-needs-a-new-model-legal-ethics-rule> [<https://perma.cc/AKG5-GFFG>].

There may also be growing interest in the United States in "decoupling" US lawyer AML regulation issues from substantive corporate law issues about disclosure of beneficial owners and the optimal level of corporate transparency. There arguably are quite strong reasons to support this decoupling, but this issue is beyond the scope of this Article. See *supra* note 289.

296. Author Laurel Terry has personal knowledge of this fact.

297. *Id.* This Committee is now known as the ABA Standing Committee on Regulation.

*Id.*

298. *Id.*

a lawyer may have a duty to make a factual inquiry is a familiar one.<sup>299</sup> For example, it is the US Author's impression that few people would allow a lawyer to avoid the mandatory conflicts of interest provisions by simply failing to inquire about the identity of the opposing party. A New York City Bar ethics opinion recently concluded that when a lawyer is asked to assist in a transaction that the lawyer suspects may involve a crime or fraud, a duty of inquiry in some circumstances is implicit in the Rules.<sup>300</sup>

In sum, the US has both a criminal law system and a lawyer regulatory system that prohibits lawyers from assisting clients or others in money laundering activities. Moreover, there are ongoing conversations in the United States about the scope of a lawyer's ethical duties, including whether Rule 1.1 or another rule imposes a "due diligence" obligation on lawyers, and whether the ethical rules should be amended to supplement or make more explicit existing obligations. Meanwhile, the US's AML system for DNFBPs has been rated "noncompliant" by other FATF Members. Moreover, one of the action items in the 2016 US Mutual Evaluation Report called on the United States to apply "appropriate AML/CFT obligations" on lawyers. This FATF Report and the recent money laundering scandals are likely to create pressure for change in the US AML-lawyer regulatory situation.

### *B. Peru*

This Section begins with background information about Peru and its lawyers. In 2016, Peru's population was approximately 32 million.<sup>301</sup> It has one of the fastest growing economies in Latin

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299. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 1.1, cmt. [5] ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.").

300. NEW YORK CITY BAR, *Formal Opinion 2018-4: Duties When an Attorney Is Asked to Assist in a Suspicious Transaction*, [https://s3.amazonaws.com/documents.nycbar.org/files/2018415-Assisting\\_Suspicious\\_Activity.pdf](https://s3.amazonaws.com/documents.nycbar.org/files/2018415-Assisting_Suspicious_Activity.pdf) [<https://perma.cc/AQ3F-ARKH>].

301. *World Bank, Country Profile: Peru*, WORLD BANK, [http://databank.worldbank.org/data/views/reports/reportwidget.aspx?Report\\_Name=CountryProfile&Id=b450fd57&tbar=y&d=y&inf=n&zm=n&country=PER](http://databank.worldbank.org/data/views/reports/reportwidget.aspx?Report_Name=CountryProfile&Id=b450fd57&tbar=y&d=y&inf=n&zm=n&country=PER) [<https://perma.cc/M4QG-93WG>] [hereinafter *World Bank Data Peru*]. During 2016, its inflation rate was 2.9%. *Id.*

America.<sup>302</sup> Between 2007 and 2012, it had an average GDP growth of almost seven percent<sup>303</sup> and in 2016, Peru's annual GDP growth was four percent.<sup>304</sup> In addition to growing its economy overall, Peru has made impressive progress in reducing its poverty rate.<sup>305</sup> The World Bank describes Peru as an "upper middle income" country.<sup>306</sup>

Peru is a member of the World Trade Organization,<sup>307</sup> as well as a number of other international organizations.<sup>308</sup> Peru is also a party to more than fifteen bilateral or regional free trade agreements, including an agreement with the United States.<sup>309</sup> The US-Peru Trade Promotion Agreement entered into force in 2009.<sup>310</sup> In July 2018, the Office of the US Trade Representative described trade between the United States and Peru as follows:

302. THE WORLD BANK IN PERU, <https://www.worldbank.org/en/country/peru/overview> [<https://perma.cc/V7X8-5ZD7>] ("Between 2002 and 2013, Peru was one of the fastest-growing countries in Latin America, with an average GDP growth rate of 6.1 percent annually.").

303. *Trade Policy Review, Report by the Secretariat, Peru*, WORLD TRADE ORG., WT/TPR/S/289 ¶¶ 3, 6 (Oct. 9, 2013), [https://www.wto.org/english/tratop\\_e/tpr\\_e/s289\\_e.pdf](https://www.wto.org/english/tratop_e/tpr_e/s289_e.pdf) [<https://perma.cc/B7EM-WN4J>].

304. *World Bank Data Peru*, *supra* note 301.

305. *See id.* (showing a drop in poverty from 30.8% in 2010 to 20.7% in 2016); *World Bank, Poverty headcount ratio at national poverty lines*, WORLD BANK, <https://data.worldbank.org/indicator/SI.POV.NAHC?locations=PE> [<https://perma.cc/G9H6-KU5N>] (poverty has been reduced from 59% in 2004 to 21% in 2016).

306. *World Bank, Peru*, WORLD BANK, <https://data.worldbank.org/country/peru> [<https://perma.cc/DS6Q-A5TR>] [hereinafter *World Bank Peru Data Choices*].

307. *See Trade Policy Review, supra* note 303.

308. *See Peru Factsheet U.S. Relations with Peru*, U.S. DEP'T OF STATE, <https://www.state.gov/r/pa/ei/bgn/35762.htm> [<https://perma.cc/8AWH-ULC3>] ("Peru and the United States belong to a number of the same international organizations, including the United Nations, Organization of American States, Asia-Pacific Economic Cooperation forum, International Monetary Fund, World Bank, and World Trade Organization.").

309. *See CIA, The World Factbook: Peru*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/pe.html> [<https://perma.cc/B8A5-55ZC>] [hereinafter *World Factbook*] ("[S]ince 2006, Peru has signed trade deals with the US, Canada, Singapore, China, Korea, Mexico, Japan, the EU, the European Free Trade Association, Chile, Thailand, Costa Rica, Panama, Venezuela, Honduras, concluded negotiations with Guatemala and the Trans-Pacific Partnership, and begun trade talks with El Salvador, India, and Turkey.").

310. *See Final Text, U.S.-Peru Trade Promotion Agreement Peru TPA*, OFFICE OF U.S. TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text> [<https://perma.cc/8VXA-HARM>] [hereinafter *US-Peru Trade Agreement*].

U.S. goods and services trade with Peru totaled an estimated \$20.5 billion in 2015 (latest data available). Exports were \$12.6 billion; imports were \$7.9 billion. The U.S. goods and services trade surplus with Peru was \$4.7 billion in 2015. Peru is currently our 35th largest goods trading partner with \$14.3 billion in total (two way) goods trade during 2016.<sup>311</sup>

The US-Peru Trade Promotion Agreement applies to professional services, including legal services.<sup>312</sup>

Peru is a civil law country.<sup>313</sup> It has a divided legal profession that includes Abogado(a) and notaries.<sup>314</sup> Information in English about Peru's legal profession can be found in the 2016 International Bar Association ("IBA") Directory of Regulators,<sup>315</sup> the 2014 IBA Global Legal Services Report,<sup>316</sup> and on the IBA Anti-Money-Laundering

311. *Peru*, OFFICE OF U.S. TRADE REP., <https://ustr.gov/countries-regions/americas/peru> [<https://perma.cc/BGM5-3CW9>].

312. For a discussion of the treatment of legal services in this agreement, see THE U.S.-PERU FREE TRADE AGREEMENT REPORT OF THE INDUSTRY TRADE ADVISORY COMMITTEE ON SERVICES AND FINANCE INDUSTRIES (ITAC 10) (Feb. 1, 2006), [https://ustr.gov/archive/assets/Trade\\_Agreements/Bilateral/Peru\\_TPA/Reports/asset\\_upload\\_file209\\_8983.pdf](https://ustr.gov/archive/assets/Trade_Agreements/Bilateral/Peru_TPA/Reports/asset_upload_file209_8983.pdf) [<https://perma.cc/58HD-BZXR>]; Laurel S. Terry, *From GATS to APEC: The Impact of Trade Agreements on Legal Services*, 43 AKRON L. REV. 875, 937-38 (2010) (comparing the legal services portion of the US-Peru TPA to those found in fourteen other US free trade agreements).

313. See, e.g., *World Factbook*, *supra* note 309.

314. Compare INT'L BAR ASS'N, *IBA Global Regulation and Trade in Legal Services Report* 2014 (Oct. 2014), at Peru, 363-366, <https://www.ibanet.org/Document/Default.aspx?DocumentUid=1D3D3E81-472A-40E5-9D9D-68EB5F71A702> [<https://perma.cc/BJ8F-4HMB>] [hereinafter *IBA Global Legal Services Report*] (discussing the rules applicable to the profession of abogado (male) and abogada (female) and citing the regulatory body of the Junta de Decanos de los Colegios de abogados del Perú), with Junta de Decanos de los Colegios de Notarios del Perú, <http://www.juntadedecanos.org.pe/> [<https://perma.cc/H57T-5E3S>] (website of the regulatory body of the Peruvian profession of notary).

315. See also *Directory of Regulators of the Legal Profession*, INT'L BAR ASS'N (2016), 144, [https://www.ibanet.org/Legal\\_Regulators\\_Directory.aspx](https://www.ibanet.org/Legal_Regulators_Directory.aspx) [https://www.ibanet.org/Legal\\_Regulators\\_Directory.aspx](https://www.ibanet.org/Legal_Regulators_Directory.aspx) [<https://perma.cc/MRN4-PQ3G>] [hereinafter *IBA Directory of Regulators*].

316. See *IBA Global Legal Services Report*, *supra* note 314.

Forum webpage,<sup>317</sup> as well as in other sources.<sup>318</sup> The US Library of Congress hosts a website about Peru that includes links to Peruvian laws and government websites, as well as a number of additional useful links.<sup>319</sup>

According to the IBA Global Legal Services Report, in order to be admitted to practice, a lawyer in Peru must meet the following requirements: “The requirements for admission to practise are a five year university education, followed by registration with the [Superintendencia Nacional de Educación Superior Universitaria (SUNEDU)] and . . . incorporation into a [Regional] Bar Association of Peru.”<sup>320</sup>

Regional bar associations in Peru belong to the *Junta De Decanos De Los Colegios De Abogados Del Perú*—this might be translated as the National Board of Deans of the Bar Associations of Peru.<sup>321</sup> This

317. See INT’L BAR ASS’N, *Peru*, ANTI-MONEY LAUNDERING FORUM (last updated 01/07/2017), <https://www.anti-moneylaundering.org/southamerica/Peru.aspx> [<https://perma.cc/Z57S-L39Y>]. As noted *infra* notes 356-63 and accompanying text, Peru has adopted new AML laws that apply to lawyers. These new laws are not yet listed on the IBA website. *Id.*

318. See, e.g., Ana Cecilia MacLean, *Legal Education in Peru: Are We Ready for Integration and Globalization*, 19 LAW & BUS. REV. AM. 201, 216 (2012) (noting that Peru had seventy-six law schools, of which nineteen were public universities (25%) and fifty-seven were private universities (75%)); THE CYRUS R. VANCE CENTER FOR INTERNATIONAL JUSTICE INITIATIVES, *Country Report, Peru* (2011) <http://www.vancecenter.org/vancecenter/images/stories/vancecenter/country%20report%20-%20peru.pdf> [<https://perma.cc/N5XQ-VWU9>]; Latham & Watkins, *Pro Bono Practices and Opportunities in Peru*, LATHAM & WATKINS, 489 (Sept. 2015), <https://www.lw.com/admin/Upload/Documents/Global%20Pro%20Bono%20Survey/pro-bono-in-peru.pdf> [<https://perma.cc/23HP-G38E>] (stating that in 2014, Peru had 130,000 Bar-affiliated lawyers, which was approximately one lawyer for every 234 inhabitants.”).

319. *Guide to Law Online: Peru*, U.S. LIBRARY OF CONGRESS, (last visited Oct. 5, 2018) <https://www.loc.gov/law/help/guide/nations/peru.php> [<https://perma.cc/QVY7-FE4E>]. See also *Peru*, USAID, <https://www.usaid.gov/peru> [<https://perma.cc/34SG-QZSE>].

320. IBA GLOBAL LEGAL SERVICES REPORT, *supra* note 314, at 363. This IBA Report indicates that although an abogado/a must register with a regional bar association, that lawyer may practice throughout the country and need not work in the region in which he or she registered. *Id.*

The language in brackets was provided by one of this Article’s Authors, who is Peruvian. It corrects the registration entity listed in the IBA Report and deletes the statement that a lawyer must register with the Superior Court of Lima. *Id.* at 363.

321. See COLEGIO DE ABOGADOS DE LIMA, *Junta De Decanos De Los Colegios De Abogados Del Perú*, [http://www.cal.org.pe/junta\\_decanos\\_peru.html](http://www.cal.org.pe/junta_decanos_peru.html) [<https://perma.cc/CN8Q->

national organization, which is established by law and represents more than thirty bar associations, meets periodically.<sup>322</sup>

The *Junta De Decanos De Los Colegios De Abogados Del Perú* has certain overarching responsibilities related to lawyer regulation. For example, it adopted Peru's 2012 legal ethics code<sup>323</sup> and lawyer disciplinary procedures.<sup>324</sup> A preface to the 2012 ethics code includes interesting background information, including the fact that it was modeled after the ABA Model Rules of Professional Conduct.<sup>325</sup>

Peru's 2012 ethics code has been well publicized. For example, the *Colegio de Abogados de Lima* (Bar Association of Lima)<sup>326</sup> has a

T8LT] [hereinafter *National Board webpage*] (this page, which is available as a link from an older webpage of the *Colegio de Abogados de Lima* (Bar Association of Lima) includes links to a number of items, including its governing document, the *Estatuto De La Junta De Decanos De Los Colegios De Abogados Del Peru*). See also *Colegios Profesionales*, CONSEJO NACIONAL DE DECANOS DE LOS COLEGIOS PROFESIONALES DEL PERÚ SIGA EL SIGUIENTE ENLACE (CDCP), <http://cdcp.org.pe/colegios-profesionales/> [<https://perma.cc/C89H-6MQ3>] (includes links to members, as well as links to the Peruvian laws that created these organizations).

322. See, e.g., *Junta Nacional de los Colegios de Abogados del Perú*, COLEGIO DE ABOGADOS DE LIMA (July 25, 2018), <http://www.cal.org.pe/v1/junta-nacional-de-los-colegios-de-abogados-del-peru/> [<https://perma.cc/5WTR-XRQW>] (reporting on a July 20, 2018 meeting of the national board); JUNTA DE DECANOS DE LOS COLEGIOS DE ABOGADOS DEL PERÚ, [http://www.cal.org.pe/junta\\_decanos\\_peru.html](http://www.cal.org.pe/junta_decanos_peru.html) [<https://perma.cc/2AN7-GWGX>] (linking to several meetings).

323. See generally *Junta Law No. 001- 2012-JDCAP-P, Código De Ética Del Abogado* [The Code of Ethics for Lawyers], COLEGIO DE ABOGATOS DE LIMA (Apr. 14, 2012), [http://cal.org.pe/archivos\\_oficiales/2015/etica/codigo\\_de\\_etica\\_del\\_abogado\\_051114.pdf](http://cal.org.pe/archivos_oficiales/2015/etica/codigo_de_etica_del_abogado_051114.pdf) [<https://perma.cc/FQE7-E22Z>]. Links to this ethics code are available in a number of different locations. See, e.g., *IBA Directory of Regulators: Peru*, *supra* note 315, at 144.

324. *Law No. 002-2012-JDCAP-P, Reglamento Del Procedimiento Disciplinario De Los Órganos De Control Deontológico De Los Colegios De Abogados Del Perú* [Disciplinary Regulations for Peruvian Lawyers], COLEGIO DE ABOGATOS DE LIMA (Apr. 14, 2012), [http://cal.org.pe/archivos\\_oficiales/2015/etica/reglamento\\_de\\_los\\_procedimiento\\_disciplinario\\_051114.pdf](http://cal.org.pe/archivos_oficiales/2015/etica/reglamento_de_los_procedimiento_disciplinario_051114.pdf) [<https://perma.cc/TRX9-93NR>].

325. See *Prefacio*, RAMA JUDICIAL, 2-3, <http://www.ramajudicial.pr/reglas-de-conducta/Cap-1a.pdf> [<https://perma.cc/7U9T-K7YJ>]. A link to this preface is included in the Peru entry in the IBA Directory of Regulators, *supra* note 315, at 144. The preface explains that the drafters consulted a number of resources including the ALI's Restatement of the Law Governing Lawyers, the ABA Model Rules of Professional Conduct, and ethics codes from Spain and the European Union, among other items. *Prefacio*, *supra*, at 1-2. As the Preface explains, the drafters ultimately decided to use the ABA Model Rules as the model for Peru's revised ethics code. *Id.* at 2-3. This preface identifies the drafters and the difference in approach in the 2012 ethics code compared to the earlier version. *Id.* at 1-2.

326. See, e.g., COLEGIO DE ABOGADOS DE LIMA, (last visited Oct. 5, 2018), <http://www.cal.org.pe/v1/> [<https://perma.cc/6DG4-AWUT>]. Peru also has a bar association for

professional ethics office which has a webpage.<sup>327</sup> This webpage includes, *inter alia*, links to the 2012 ethics code, the 2012 disciplinary enforcement rules, a complaint form for consumers, directions to consumers about the grounds for a complaint and how to fill out the form, as well as a list of lawyers who have been disciplined.<sup>328</sup> The Bar Association of Lima's Ethics webpage also includes links to various reports and its workplan.<sup>329</sup>

Although there is relatively little demographic data about Peru's legal profession,<sup>330</sup> Peru has fewer large law firms than the United States, and the largest firms are smaller.<sup>331</sup> There are also relatively

North Lima and South Lima. *Pronouncement of the Board of Deans*, COLEGIO DE ABOGADOS DE LIMA, <http://www.cal.org.pe/v1/28482-2/> [<https://perma.cc/F633-ECUS>].

327. See *Dirección De Ética Profesional*, COLEGIO DE ABOGADOS DE LIMA, <http://www.cal.org.pe/v1/etica-profesional/> [<https://perma.cc/D43H-ZFDT>] [hereinafter *Lima Bar Ethics Webpage*].

328. See *id.*

329. *Id.* The Lima Bar's older webpage also included a robust ethics page with information about the implementation plan for the 2012 ethics code. See *Ética Profesional*, COLEGIO DE ABOGADOS DE LIMA, <http://www.cal.org.pe/etica.html> [<https://perma.cc/7U98-48CU>] [hereinafter *Older Lima Bar Ethics page*]. The older Lima Bar Ethics page included a link to a document that had interesting implementation information: the Plan de Trabajo. COLEGIO DE ABOGADOS DE LIMA, *Plan de Trabajo* (2014) <http://www.cal.org.pe/pdf/etica/2014/marzo/P-T-Etica.pdf> [<https://perma.cc/ZP2E-RJMC>].

330. See, e.g., *Los abogados en el Perú*, LE LEY (Apr. 1, 2014), <http://laley.pe/not/1215/los-abogados-en-el-peru/> [<https://perma.cc/TA93-BNM6>] (containing demographic information); See also Cyrus Vance Peru Report, *supra* note 318, at 13-14 (citing a report that in May 2010, there were approximately more than 97,000 lawyers in Peru, also noting city concentration and law student practice area interests, but noting that there is no direct data that reflects the geographic concentration of lawyers or distribution of lawyers across sectors).

331. Compare 2018 *Latin Lawyer* 250, LATIN LAWYER (2018), <https://latinlawyer.com/ll250/countries/2257/peru> [<https://perma.cc/7G6N-Y5D5>] (2018 Latin Lawyer 250 ratings list only four Peruvian firms that have more than one-hundred lawyers), with *Global 100: Most Lawyers*, AM. LAW. 42-46 (Oct. 2018) (listing many US law firms with more than 700 lawyers and no Peruvian firms). A 2013 ABA report noted in that in 2005, approximately seventy-five percent of lawyers were in private practice and of those, approximately seventy-five percent practiced as solos or in firms of twenty or fewer lawyers. See AM. B. ASS'N, *Lawyer Demographics [2012]*, [https://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer\\_demographics\\_2013.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2013.authcheckdam.pdf) [<https://perma.cc/P6MH-5CR2>]. It seems logical that most Peruvian lawyers also practice as solos or in small law firms.



few “global” law firms with offices in Peru.<sup>332</sup> For example, the 2014 IBA Global Legal Services Report stated that the “Spanish firm Uría Menéndez and the legal arms of the large accountancy networks (PwC legal and Ernst and Young) have for some time been the only foreign firms with a foothold in Peru. Baker and McKenzie recently tied up with a local firm.”<sup>333</sup> After the IBA Report was written, a Peruvian law firm merged with Dentons, which is one of the world’s largest law firms.<sup>334</sup> Other global law firms now have a presence in Peru.<sup>335</sup> In 2018, Chambers & Partners has offered the following description of the Peruvian legal market:

The fast-growing Peruvian economy has opened many doors for both multinational companies wanting to take advantage of the country’s business reputation, as well as local entities that are using the current momentum to expand beyond their borders. This has therefore increased the need for advice of an international standard and cross-border legal advice in the country. It then comes as no surprise that Peru has recorded historic M&A transactional amounts in the last decade especially in 2007 (USD5.3 billion), 2013 (USD6.8 billion) and 2014, a record-breaking year with over USD11 billion. The mergers and acquisitions market for 2016 saw a 20% growth when compared to 2015, with a reported 131 significant transactions.

As a result, international law firms have started to enter Peru over the past four years, either independently or by incorporating an existing national firm into their structure. In return, Peruvian lawyers that have chosen to remain independent have embraced the need for increasing their regional profile, building a strong

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332. See *infra* notes 333-36 and accompanying text.

333. IBA GLOBAL LEGAL SERVICES REPORT, *supra* note 314, at 364.

334. *Dentons combines with Peru’s Gallo Barrios Pickmann*, DENTONS (Oct. 2, 2017), <https://www.dentons.com/en/whats-different-about-dentons/connecting-you-to-talented-lawyers-around-the-globe/news/2017/october/dentons-combines-with-perus-gallo-barrios-pickmann> [<https://perma.cc/QHC7-AA9W>]; Paula Kulig, *Dentons plans combination with Peruvian law firm*, THE LAW. DAILY (May 24, 2017), <https://www.thelawyersdaily.ca/family/articles/3803/dentons-plans-combination-with-peruvian-law-firm> [<https://perma.cc/P58N-LAM9>] (noting the proposed merger with Gallo Barrios Pickmann and the fact that Peru is “one of the strongest and fastest-growing economies in Latin America”).

335. *Compare 2018 Latin Lawyer 250*, *supra* note 331 (recommended firms include CMS Grau, DLA Piper Pizarro Botto Escobar, and Garrigues (Peru)), with *Global 100*, *supra* note 331 (CMS and DLA Piper are among the ten largest firms listed).

reputation to prove to their current and potential clients that they are more than capable of handling complex and even cross-border transactions with the required international standard of quality.<sup>336</sup>

When evaluating the AML situation for Peru's lawyers, one must take note of the fact that Peru has faced significant corruption issues,<sup>337</sup> including the 2018 resignations of its president<sup>338</sup> and the head of its judiciary.<sup>339</sup> Lawyers, as well as Peru's president, have been caught up in the massive "Lava Jato" scandal that prominently featured bribery, money laundering, and the Brazilian construction firm Odebrecht.<sup>340</sup>

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336. See *Peru Overview*, CHAMBERS & PARTNERS, <https://www.chambersandpartners.com/guide/latin-america/9/171/1> [https://perma.cc/3NT7-EUSD].

337. See, e.g., Adriana Peralta, *Peru's Most Wanted Gangster Captured after 4 Months on the Run*, Panampost (Nov. 2014), <https://panampost.com/adriana-peralta/2014/11/14/peru-most-wanted-gangster-captured-after-4-months-on-the-run/?cn-reloaded=1> [https://perma.cc/SYU4-3RBN]. See also TRANSPARENCY INT'L, Peru, <https://www.transparency.org/country/PER> [https://perma.cc/B4HN-BV98] (ranking Peru ninety-sixth out of 180 countries for 2017).

338. Peru's President Pablo Kuczynski resigned in March 2018 after an impeachment threat related to a corruption scandal tied to Brazilian construction company Odebrecht. See Marcelo Rochabrún & Andrea Zarate, *'We've Had Enough' Says Peru's New President*, N.Y. TIMES (March 23, 2018), <https://www.nytimes.com/2018/03/23/world/americas/peru-kuczynski-vizcarra.html?rref=collection%2Ftimestopic%2FPeru> [https://perma.cc/X8DQ-E7BN private]; Nicholas Casey & Andrea Zarate, *Corruption Scandals with Brazilian Roots Cascade Across Latin America*, N.Y. TIMES (Feb. 13, 2017) (noting the arrest warrant for former president Toledo and the conviction of former president Alberto K. Fujimori). See also Miller & Chevalier, *Latin America Corruption Survey* (2016), <https://www.millerchevalier.com/sites/default/files/resources/2016-Latin-America-Corruption-Survey-Full-Report.pdf> [https://perma.cc/QX3T-RNGJ].

339. See, e.g., *Head of Peru's Judiciary Resigns as Crisis Grips Justice System*, REUTERS (July 19, 2018), <https://www.reuters.com/article/us-peru-corruption-resignation/head-of-peru-judiciary-resigns-as-crisis-grips-justice-system-idUSKBN1K92OH> [https://perma.cc/NB83-3FW9].

340. See, e.g., Óscar Castilla et. al, *La lista negra del Caso Lava Jato*, Ojo Publico, (Feb. 5, 2017, updated 02/28/2018), <https://lavajato.ojo-publico.com/articulo/lista-negra-caso-lavajato/> [https://perma.cc/6LN2-4872]; Fabiano Angelico, *Brazil: Open Data Just Made Investigating Corruption Easier*, Transparency Int'l (May 12, 2017), [https://www.transparency.org/news/feature/brazil\\_open\\_data\\_just\\_made\\_investigating\\_corruption\\_easier](https://www.transparency.org/news/feature/brazil_open_data_just_made_investigating_corruption_easier) [https://perma.cc/2TYR-HCJ8] (referring to the "Lava Jato" money laundering scandal and explaining its relationship to Odebrecht). See also Aquino, *infra* note 341.

The Panama Papers scandal has also reached Peru. For example, in 2016, Peruvian authorities raided the Lima office of the now-closed law firm, Mossack Fonseca, whose leaked papers launched the Panama Papers scandal.<sup>341</sup> The Panama Papers database maintained by the International Consortium of Journalists lists a number of firms with Peruvian connections.<sup>342</sup> Recently, the Lava Jato Commission of the Peruvian Congress agreed to waive the tax secrecy of fifty of the main Peruvian large law firms hired by the Brazilian construction company Odebrecht.<sup>343</sup> While these developments are discouraging to read about, one of the authors of this article believes that from a legal ethics perspective, the Lava Jato/Odebrecht scandal may be—and *needs to be*—to Peru what Watergate was to the United States—the catalyst that leads to legal ethics becoming more prominent.<sup>344</sup>

Peru has taken a number of steps to fight corruption and money laundering. For example, in July 2018, Peru became a party to the Organisation of Economic Cooperation and Development (“OECD”) Anti-Bribery Convention and the Multilateral Convention on Mutual

341. See Marco Aquino, *Peru Raids Local Mossack Fonseca Office, Seizes Documents* (April 11, 2016), <https://www.reuters.com/article/us-panama-tax-peru/peru-raids-local-mossack-fonseca-office-seizes-documents-idUSKCN0X82MD> [https://perma.cc/S7F7-DWQ4].

342. See ICIJ Database, *supra* note 44. At Search Results for Peru, <https://offshoreleaks.icij.org/search?utf8=%E2%9C%93&q=peru&=&commit=Search> [https://perma.cc/CGC7-BB2F]. As the “consent” box that one must agree to before accessing this database prominently notes, being listed in the database does not mean that the person or firm has done anything illegal or improper.

343. See *Levantarán secreto tributario de 60 estudios de abogados por contratos con Odebrecht*, LA REPÚBLICA (July 28, 2018), <https://larepublica.pe/politica/1284591-lava-jato-secreto-bancario-60-estudios-abogados-contratos-odebrecht> [https://perma.cc/N9J3-QB9L].

344. As many US lawyers know, the involvement of lawyers in the Watergate scandal that led President Nixon to resign was one of the main reasons why the American Bar Association changed the legal education accreditation requirements to include a legal ethics education requirement. See, e.g., Mark Curriden, *The Lawyers of Watergate: How a “Third-Rate Burglary” Provoked New Standards for Lawyer Ethics*, 98 A.B.A. J. 36 (2012). For a Peruvian article that cites this Watergate article and makes this analogy, see José Carlos Llerena Robles, *De los Petroaudios a Odebrecht ¿estamos en el caso de un Watergate peruano en la enseñanza del derecho?*, CAFELEGAL (Feb. 6, 2017), <https://cafelegal.lamula.pe/2017/02/06/de-los-petroaudios-a-odebrecht-estamos-en-el-caso-de-un-watergate-peruano-en-la-ensenanza-del-derecho/jcllerena84/> [https://perma.cc/5BHR-R69Q] (discussing current and past scandals and whether they might prompt reforms).

Administrative Assistance in Tax Matters.<sup>345</sup> Most significantly for purposes of this Article, Peru is a member of GAFILAT, which is one of the FATF-Style Regional Bodies described earlier.<sup>346</sup> GAFILAT was established in 2000 and consists of sixteen countries from South, Central, and North America.<sup>347</sup> GAFILAT uses training measures and mutual evaluations to support its members in the “implementation of the 40 Recommendations and the creation of a regional prevention system against money laundering.”<sup>348</sup>

Peru’s most recent completed mutual evaluation is its 3rd Round Mutual Evaluation Report, which is dated July 2008.<sup>349</sup> According to a summary of that report, Peru was deemed compliant with ten recommendations, largely compliant with fourteen recommendations,

345. See OECD, *Newsroom: Peru to join two major OECD Conventions: Anti-Bribery Convention and multilateral Convention on Mutual Administrative Assistance in Tax Matter*, <http://www.oecd.org/newsroom/peru-to-join-two-major-oecd-conventions-anti-bribery-convention-and-multilateral-convention-on-mutual-administrative-assistance-in-tax-matters.htm> [<https://perma.cc/UBT2-RQMA>] (Peru became the forty-fourth party to the OECD Anti-Bribery Convention on July 27, 2018 and acceded to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, effective September 1, 2018).

Peru has ratified the Inter-American Convention against Corruption (“CICC”) in 1997 and the United Nations Convention against Corruption (“UNCAC”) in 2004. See, e.g., PERU PODER JUDICIAL, *Lucha contra la Corrupción*, [https://www.pj.gob.pe/wps/wcm/connect/cooperacion/s\\_corte\\_suprema\\_utilitarios/as\\_inicio/as\\_normas\\_internacionales/as\\_lucha\\_contra\\_corrupcion](https://www.pj.gob.pe/wps/wcm/connect/cooperacion/s_corte_suprema_utilitarios/as_inicio/as_normas_internacionales/as_lucha_contra_corrupcion) [<https://perma.cc/U2W7-VVQZ>].

346. See *supra* notes 55-56 and accompanying text for information about the FATF-Style Regional Bodies. See *infra* note 347 regarding Peru’s membership.

347. See, e.g., GAFILAT, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/countries/#GAFILAT> [<https://perma.cc/FG3P-YJWG>] (shows that Peru is a member of GAFILAT, which former was known as GAFISUD). It can be difficult to find an English version of the GAFILAT webpages. Compare GAFILAT: Home, <http://www.gafilat.org/index.php/en/> [<https://perma.cc/S4M6-2M4D>], with <http://gafilat.org.iplan-unix-03.toservers.com/content/quienes/&lang=en> [<https://perma.cc/A5UJ-HAAN>].

348. See *FATF GAFILAT*, *supra* note 347.

349. See *2008 Peru Mutual Evaluation*, *supra* note 7. Unlike some of the FATF 4th Round reports for Spanish-speaking countries, Peru’s 2008 Mutual Evaluation Report is available only in Spanish. Compare *2008 Peru Mutual Evaluation Report*, *supra* note 7 (available only in Spanish), with *Mexico MER*, *supra* note 109 (available in English and Spanish); *Nicaragua MER*, *supra* note 109 (available in English and Spanish). Peru received several progress reports after its third mutual evaluation report. See, e.g., III Informe de Avance de la Evaluación Mutua de Perú, Informe de la Secretaría Ejecutiva (These reports are not listed on the FATF Peru page and currently are password protected on the GAFILAT website).

and partially compliant or non-compliant with four of the six core recommendations.<sup>350</sup> At the time of Peru's 3rd Round Mutual Evaluation Report, Peru's lawyers were not subject to Peru's anti-money laundering regime.<sup>351</sup>

Peru's 4th Round Mutual Evaluation Report has not been issued, but the FATF Plenary discussion of this Report currently is scheduled for December 2018.<sup>352</sup> Peru has a webpage with extensive materials related to its 2017-18 Mutual Evaluation, although most are exclusively in Spanish.<sup>353</sup> This government webpage includes documents related to Peru's national threat assessment and action plan.<sup>354</sup> A July 2018 IMF report contains an English summary of Peru's national threat assessment.<sup>355</sup>

350. See Know Your Country, Peru, <https://www.knowyourcountry.com/peru1111> [<https://perma.cc/4KAW-DRYB>].

351. See *2008 Peru Mutual Evaluation Report*, *supra* note 7, at 67. Accord IBA AML Forum, Peru, *supra* note 317, at 1 (“There’s no regulation regarding money laundering guidance for lawyers.”).

352. See *FATF Global Assessment Calendar*, *supra* note 102, at Peru, [http://www.fatf-gafi.org/calendar/assessmentcalendar/?hf=10&b=0&r=%2Bf%2Ffatf\\_country\\_en%2Fperu&s=asc\(document\\_lastmodifieddate\)&table=1](http://www.fatf-gafi.org/calendar/assessmentcalendar/?hf=10&b=0&r=%2Bf%2Ffatf_country_en%2Fperu&s=asc(document_lastmodifieddate)&table=1) [<https://perma.cc/GW4Y-TC4P>].

353. See SUPERINTENDENCIA DE BANCA, SEGUROS Y AFP, *Guías para el proceso de Evaluación Mutua*, <http://www.sbs.gob.pe/prevencion-de-lavado-activos/Sistema-de-Lucha-Contra-el-LA-FT/Evaluacion-Mutua-Peru-2017-2018/Guias-para-el-proceso-de-Evaluacion-Mutua> [<https://perma.cc/N424-L6QJ>].

354. SUPERINTENDENCIA DE BANCA, SEGUROS Y AFP, *Plan Nacional contra el Lavado de Activos (LA) y el Financiamiento del Terrorismo (FT) 2018-2021*, <http://www.sbs.gob.pe/prevencion-de-lavado-activos/Sistema-de-Lucha-Contra-el-LA-FT/Plan-Nacional-contra-el-Lavado-de-Activos-y-el-Financiamiento-del-Terrorismo-2018-2021> [<https://perma.cc/XFM5-PGLY>].

355. See INT’L MONETARY FUND, *Peru, Financial Sector Stability Assessment*, IMF Country Report No. 18/238 (July 2018), <https://www.imf.org/~media/Files/Publications/CR/2018/cr18238-PeruFSSA.ashx> [<https://perma.cc/T7CD-K6T7>]. This IMF report stated, *inter alia*, that “drug trafficking, corruption, and environmental crimes were identified as key threats, while the informal economy’s size and the inadequate controls over movement of cash were listed as major vulnerabilities. The acquisition of real estate was recently noted as a significant ML typology.” *Id.* at 28. See also U.S. DEPARTMENT OF STATE, *International Narcotics Control Strategy Report, Volume I Drug and Chemical Control 272-73* (March 2014), <https://www.state.gov/documents/organization/222881.pdf> [<https://perma.cc/TXM3-4GS8>] (“The Government of Peru has demonstrated increasingly strong political will to address drug production and trafficking in Peru, both through funding a significant share of eradication operations for the first time and through its successful operations in the VRAEM to bring down high-ranking members of Shining Path.”). See also *supra* note 353 (SBS Mutual Evaluation webpage).

When Peru's 4th Round Mutual Evaluation Report is published, the legal profession portion will look very different than Peru's prior Mutual Evaluation Report. As this paragraph explains, this is because Peru has now added lawyers to the groups who are subject to Peru's AML laws.<sup>356</sup> In November 2016, the Peruvian government enacted a new law known as Legislative Decree No. 1249.<sup>357</sup> Legislative Decree 1249 includes attorneys among the professionals who are obliged to report suspicious transaction under Peruvian anti-money laundering rules.<sup>358</sup> Legislative Decree 1249 provides that an attorney who is in solo practice or in a law firm, who, on a habitual basis and on behalf a third party or on his own, is required to report the following activities:

- a) Purchase and sale of real estate;
- b) Management of money, securities, accounts of the financial system or other assets;
- c) Organization of contributions for the incorporation, operation or administration of legal entities;
- d) Incorporation, management, or reorganization of legal entities or other legal structures; and
- e) Purchase and sale of shares or social participations of legal persons.<sup>359</sup>

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356. Compare *infra* notes 357-62 and accompanying text (discussing Decree 1249), with *IBA Anti-money Laundering Forum webpage for Peru*, *supra* note 317 ("ARE LAWYERS COVERED BY ANTIMONEY LAUNDERING LEGISLATION? Anti[-]money laundering legislation does not cover lawyers specifically. Nevertheless, Notaries are obligated to inform any suspicious

Operation to the UIF Perú. In general they are supervised by the Council of Notaries.").

357. See Decreto Legislativo N° 1249 que dicta medidas para fortalecer la prevención, detección y sanción del lavado de activos y el terrorismo, [Legislative Decree 1249], [http://www.leyes.congreso.gob.pe/Documentos/2016\\_2021/Decretos/Legislativos/01249.pdf](http://www.leyes.congreso.gob.pe/Documentos/2016_2021/Decretos/Legislativos/01249.pdf) [<https://perma.cc/4PLU-4KZH>]. This law is available as a link from the webpage of Peru's AML supervisor. See SUPERINTENDENTA DE BANCA, SEGUROS Y AFP

*Normas de aplicación general en materia de LAFT*, <http://www.sbs.gob.pe/prevencion-de-lavado-activos/normas-de-aplicacion-general-en-materia-de-laft> [<https://perma.cc/L2W4-LS3H>].

358. See Legislative Decree 1249, *supra* note 357.

359. *Id.*

Legislative Decree 1249 establishes that the information mentioned above and reported to the AML Peruvian Authority shall not be protected by attorney-client privilege.<sup>360</sup> In March 2018, the Peruvian Banking Regulator, *Superintendencia de Banca, Seguros y AFP*, issued Resolution 789-2018.<sup>361</sup> This twenty-four page Resolution provides additional detail about the regulation contained in Decree 1249.<sup>362</sup> Resolution 789-2018 includes information about topics such as the content of the Transactions Registers that attorneys must keep as part of a prevention system, the requirement that attorneys report, and the sanctions applicable to the breach of AML duties by lawyers.<sup>363</sup>

According to this Article's Peruvian Author, the Peruvian legal community has not yet started to have an open and deep debate about the consequences of Resolution 789 and Decree 1249. There are not yet clear parameters about what kind of information an attorney shall report to the Peruvian AML Authority without breaching the attorney-client privilege that is regulated by Peruvian Political Constitution<sup>364</sup> and the Peruvian Code of Legal Ethics.<sup>365</sup> In the Peruvian Author's view, this is a challenge that the Peruvian legal community needs to tackle in the short term in order to have clearer knowledge about

360. Legislative Decree 1249, *supra* note 357, at art. 3.29.

361. See República del Perú, *Resolución SBS N° 789-2018, Norma para la prevención del lavado de activos y del fi nanciamiento del terrorismo aplicable a los sujetos obligados bajo supervisión de la UIFPerú, en materia de prevención del lavado de activos y del financiamiento del terrorismo*, EL PERUANO <http://epdoc2.elperuano.pe/EpPo/DescargaIN.asp?Referencias=MTYyMjE0NV8xMjAxODAzMDM=> [<https://perma.cc/TK3M-AQ2G>] [hereinafter *Resolution 789-2018*].

362. *Id.*

363. *Id.* This law excludes law firms as legal entities obliged to report. *Id.*

364. See República del Perú, *Constitución de 1993 incluyendo reformas hasta 2005*, POLITICAL DATABASE OF THE AMERICAS, <http://pdba.georgetown.edu/Constitutions/Peru/per93reforms05.html> [<https://perma.cc/8F2G-RN2P>]. One of the Author's translation is as follows:

Article 2 of Peruvian Political Constitution

Every person has the right:

( . . . )

18. To keep his political, philosophical, religious or any other type of conviction private, as well as to keep professional secrets.

365. See Peruvian Code of Legal Ethics, *supra* note 323, at art. 30. Article 30 might be translated as follows: "Attorney client privilege is the duty of reserve that the lawyer has to protect and maintain in the strictest confidentiality the facts and information referred to a client or potential client who knows on the occasion of the professional relationship." (translation by one of the Authors).

attorneys' new regulatory duties. However, because of the deep and wide presence of illegal activities related to drug trafficking in Peru, the Peruvian AML Authority does not have enough resources and political support to deal with all the issues related to money laundering activities.<sup>366</sup> Because of this, the activities that are prioritized in the struggle against money laundering are things such as the construction sector, real estate companies, and entertainment, rather than legal services.<sup>367</sup>

Peru's 2012 legal ethics code will be an important part of the legal profession's AML discussions and an important tool in Peru's fight against money laundering and corruption. Before 2012, Peru had been using an ethics code based on the 1908 ABA Canons of Ethics.<sup>368</sup> As the Preface to Peru's new 2012 ethics code recognizes, the 1908 ABA Canons do not provide a useful basis for lawyer discipline.<sup>369</sup> Peru now has a set of ethics *rules*—as opposed to aspirational principles—that can provide a basis for regulating and disciplining Peru's lawyers who assist clients in money laundering activities.<sup>370</sup>

In 2016, Legislative Decree 1249 established a national register of disciplined lawyers.<sup>371</sup> The names of disciplined lawyers from around the country and the sanctions they received are prominently listed on a Peruvian Government webpage managed by the Peruvian Ministry of Justice and Human Rights.<sup>372</sup> As noted earlier, the Lima

366. See, e.g., *supra* notes 337-43 and accompanying text (describing widespread corruption scandals); National Action Plan, *supra* notes 354-55 (showing that lawyers are not a primary target of Peru's AML efforts).

367. See generally National Action Plan, *supra* notes 354-55 (setting forth Peru's AML priorities).

368. See Prefacio to the 2012 Peru Ethics Code, *supra* note 325, at 2 (“Como se sabe, los Cánones de Ética Profesional de 1935 fueron una traducción directa al castellano de los Cánones de 1908 aprobados por la A.B.A.”).

369. *Id.* at 3-4.

370. See Prefacio, *supra* note 325 (describing Peru's new 2012 ethics code and noting that the prior ethics code was modeled on the 1908 ABA Canons of Ethics).

371. See *supra* note 357. Disciplined lawyers also are listed on the webpages of regional bar associations such as the Bar Association of Lima. See *supra* note 329 and accompanying text.

372. See *Registro Nacional De Abogados Sancionados Por Mala Práctica Profesional*, <https://rnas.minjus.gob.pe/rnas/> [<https://perma.cc/4XPH-Y8Q5>], which is linked from Gov't of



Bar Association's ethics webpage includes a link to the lawyers that it has disciplined.<sup>373</sup>

Peru and its legal profession have taken a number of additional steps to fight lawyer involvement in money laundering. For example, in 2018, Peru created a register of lawyers involved in corruption.<sup>374</sup> In June 2018, the Lima Bar Association held a conference on anti-money laundering.<sup>375</sup> In July 2018, the *Junta De Decanos De Los Colegios De Abogados Del Perú* held a press conference in which it called for a quick investigation against the judges and members of the National Council of the Magistracy ("CNM") involved in cases of corruption.<sup>376</sup> Some of these recent steps may have been triggered or accelerated by lawyer involvement in the Lava Jato/Odebrecht and Panama Papers scandals.<sup>377</sup> But as the US experience with Watergate demonstrates, sometimes a scandal can prompt useful and radical reforms in order to really change the structural roots that create trouble and to recover the population's confidence in institutions.<sup>378</sup> In Peru, the FATF Recommendations may provide support for those who want additional tools to identify and resist lawyer involvement in corruption and money laundering.

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Peru, Defensa, Seguridad y Justicia, <https://www.gob.pe/categorias/15-defensa-seguridad-y-justicia> [<https://perma.cc/6PZE-623W>].

373. See *Lima Bar Association Ethics Webpage*, *supra* note 327.

374. See COLEGIO DE ABOGADOS DE LIMA, *Se Creará El Registro De Abogados Implicados En Actos De Corrupción* (Jan. 25, 2018), <http://www.cal.org.pe/v1/se-creara-el-registro-de-abogados-implicados-en-actos-de-corrupcion/> [<https://perma.cc/WP7M-AFSS>].

375. COLEGIO DE ABOGADOS DE LIMA, *Lavado de Activos* (May 31, 2018), <http://www.cal.org.pe/v1/conferencia-lavado-de-activos/> [<https://perma.cc/D3LB-Q6MG>].

376. See *Conferencia de Prensa: Colegios de Abogados del Perú piden una rápida investigación y una drástica sanción*. See COLEGIO DE ABOGADOS DE LIMA (July 11, 2018), <http://www.cal.org.pe/v1/conferencia-de-prensa-colegios-de-abogados-del-peru-piden-una-rapida-investigacion-y-una-drastica-sancion/> [<https://perma.cc/8MY9-CKS2>] ("Junta de Decanos de los Colegios de Abogados del Perú pidió una rápida investigación y una drástica sanción contra los jueces y miembros del Consejo Nacional de la Magistratura (CNM) involucrados en casos de corrupción y tráfico de influencias.").

377. See, e.g. *supra* notes 338-40 and accompanying text for articles about these developments.

378. See *supra* note 344.

C. *The Use of Competing Narratives to Discuss Lawyer AML Issues: "Lawyers as Sieves" Versus "Lawyers as Atlas"*

This Article asserts that when one reads about lawyer involvement in money laundering and lawyer AML regulation issues, one encounters quite different starting premises and perspectives. This disconnect between the perspectives is dramatic and evocative of the movie *Rashomon*, in which the same event is told from very different perspectives.

It is a thesis of this Article that one of the two competing narratives one encounters is a narrative that this Article has labeled the "lawyer as sieve" narrative.<sup>379</sup> In the lawyer as sieve narrative, lawyers who assist criminal money launderers are not an occasional aberration, but are the "sieve" through which criminal proceeds regularly flow. Lawyers are seen as either the equivalent of other "gatekeeper" DNFBPs such as casinos or precious metal dealers or as something even worse because of lawyers' willingness to help criminals launder money. If one consciously or unconsciously accepts this narrative, then there is little or no need to weigh the costs and benefits of AML lawyer regulation or the effect of such regulation on lawyer-client privilege or the rule of law because strict lawyer AML regulation is obviously necessary.

The lawyer as sieve narrative frequently appears in media reports. Section II.B cites a number of examples that use this perspective.<sup>380</sup> The following statement by Michael Goldhaber may be one of the most memorable examples of this perspective: "Unfortunately, if a kleptocrat seeks a more respectable middleman, American lawyers seem only too happy to comply."<sup>381</sup> The international organization *Global Witness* which sponsored the "sting" operation that was shown on the TV show *60 Minutes* has used language that evokes the lawyer as sieve narrative.<sup>382</sup>

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379. See *infra* notes 404-09 and accompanying text.

380. See, e.g., *supra* notes 39-49 and accompanying text.

381. Michael D. Goldhaber, *The Global Lawyer: The Money Laundering Mills of Panama and You*, AM. LAW. DAILY (April 4, 2016).

382. See *Global Witness*, *supra* note 49.

The lawyer as sieve narrative also appears in FATF Mutual Evaluation Reports and in other intergovernmental documents. For example, the Serbia Mutual Evaluation Report's description of professional secrecy as a "negative cultural approach" arguably reflects this perspective.<sup>383</sup> The Authors submit that the lawyer as sieve narrative might also explain the hostility towards the legal profession that appears in Canada's Mutual Evaluation Report.<sup>384</sup> That Report cavalierly dismissed a lengthy and thoughtful Canadian Supreme Court case that had tried to balance the government's interest in fighting money laundering and the constitutional rights associated with lawyer privilege, describing the case as an "impediment" to Canada's AML system.<sup>385</sup> The World Bank's Puppets Masters Report, which was cited in Section II.B, also seems to use this perspective.<sup>386</sup>

One characteristic of the lawyer as sieve narrative the Authors have identified is the tendency to apply or recommend stringent AML provisions for lawyers with limited or no discussion about lawyers' roles in the legal system or the potential impact on administration of justice or the rule of law.<sup>387</sup> Those who espouse an extreme version of this narrative typically want lawyers regulated in a manner identical to other DNFBPs and do not explore whether there might be reasons to regulate lawyers differently than other potential money-laundering conduits.<sup>388</sup>

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383. See *supra* note 168 and accompanying text (describing Serbia's MER).

384. See *supra* notes 200-05 and accompanying text for a discussion of Canada's Mutual Evaluation Report.

385. See, e.g., *Canada MER*, *supra* note 109, ¶ 27: ("[AML/CFT] requirements were found to breach the constitutional right to attorney-client privilege by the Supreme Court of Canada on 13 February 2015. In light of these professionals' key gatekeeper role . . . this constitutes a serious impediment to Canada's efforts to fight ML."). *Id.* The Canadian Supreme Court decision, which is more than fifty pages long, struck down parts of the government's AML regulations directed towards lawyers, but refused to adopt the more profession-friendly reasoning of the Court of Appeals. *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7.

386. See, e.g., *Puppets Masters*, *supra* note 39, at 94-97 (this discussion of the way in which the attorney-client privilege impedes AML enforcement contained little to no discussion of what might be lost by changing lawyers' regulatory structure).

387. See, e.g., *id.*; *Canada MER*, *supra* note 109.

388. It is worth noting, however, that the lawyer as sieve narrative is sometimes intertwined with criticisms of substantive corporate law rules, such as those found in Delaware, Wyoming, and elsewhere, that do not require disclosure of the corporation's "beneficial owners." These kinds of "shell" corporations make it easier to hide the proceeds of crime. See,

Although the lawyer as sieve narrative is prevalent in AML discussions, it is not the only narrative that has been used to discuss AML lawyer regulation discussions. This Article asserts that there is a competing narrative, which this Article refers to as the “lawyer as Atlas” narrative. In Greek mythology, Atlas held up the sky on his shoulders.<sup>389</sup> The narrative that this Article has labeled the lawyer as Atlas narrative focuses on the role of lawyers in upholding the rule of law and ensuring a robust administration of justice system.

A number of international documents recognize lawyers’ unique role and provide support for the lawyer as Atlas perspective. For example, the *United Nations Basic Principles on the Role of Lawyers* includes the following clause: “Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession.”<sup>390</sup>

The *United Nations Basic Principles on the Role of Lawyers* further provides that “[g]overnments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.”<sup>391</sup> Additional

*e.g.*, *Costa Rica MER*, *supra* note 109, ¶¶ 450-51; *Zimbabwe MER*, *supra* note 109, at 97-98, 102-03; *Hungary MER*, *supra* note 109, at 38 n.19; *United States MER*, *supra* note 109, ¶ 22; Goldhaber, *supra* note 381 (“The even bigger embarrassment is the ABA’s obstruction of commonsense reform such as the Incorporation Transparency Act . . .”). As explained *supra* notes 289, 295, there may be advantages to “decoupling” AML lawyer regulation issues, on the one hand, and beneficial ownership corporate transparency laws on the other hand, but that issue is beyond the scope of this Article.

389. See Edith Hamilton, MYTHOLOGY: TIMELESS TALES OF GODS AND HEROES 25 (Warner 1969); see also Lynne S. Wilcox, *Who Holds Up the World?*, 4(2) Preventing Chronic Dis. A20 (Apr. 2007), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1893119/> [<https://perma.cc/TA27-5PTX>] (“In Greek mythology, for example, Atlas was forced to support the earth after fighting unsuccessfully against Zeus, the leader of the Olympian gods. . . . Fortunately, countries throughout the world today are approaching their responsibility to support their citizens’ health more willingly than Atlas approached his task.”).

390. Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, 27 August–7 September 1990, Basic Principles on the Role of Lawyers, UN Doc A/CONF.144/28/Rev.1 (1990), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx> [<https://perma.cc/4EQW-S9EL>] [hereinafter UN Basic Principles].

391. *Id.* ¶ 22.

statements about the role of lawyers in upholding the rule of law are found in the Council of Europe's Recommendation about the Legal Profession,<sup>392</sup> European Parliament resolutions,<sup>393</sup> IBA resolutions, such as the International Bar Association Resolution on the Regulation

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392. Council of Europe Recommendation Rec (2000) 21 of 25 October 2000 on the freedom of exercise of the profession of lawyer, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804d0fc8> [<https://perma.cc/6PBY-Y93N>]. The "whereas" clauses include the following:

Underlining the fundamental role that lawyers and professional associations of lawyers also play in ensuring the protection of human rights and fundamental freedoms;

Desiring to promote the freedom of exercise of the profession of lawyer in order to strengthen the Rule of Law, in which lawyers take part, in particular in the role of defending individual freedoms;

Conscious of the need for a fair system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any improper restriction, influence, inducement, pressure, threats or interference, direct or indirect, from any quarter or for any reason;

Aware of the desirability of ensuring a proper exercise of lawyers' responsibilities and, in particular, of the need for lawyers to receive sufficient training and to find a proper balance between their duties towards the courts and those towards their clients.

*Id.* at 1.

393. *European Parliament resolution on the legal professions and the general interest in the functioning of legal systems*, P6TA (2006)0108 (March 23, 2006), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2006-0108+0+DOC+PDF+V0//EN> [<https://perma.cc/BW7Y-8N5L>]. This resolution included the following paragraphs relevant to the role of lawyers in establishing and maintaining the rule of law:

1. Recognises fully the crucial role played by the legal professions in a democratic society to guarantee respect for fundamental rights, the rule of law and security in the application of the law, both when lawyers represent and defend clients in court and when they are giving their clients legal advice; . . .

3. Notes the high qualifications required for access to the legal professions, the need to protect those qualifications that characterise the legal professions, in the interests of European citizens, and the need to establish a specific relationship based on trust between members of the legal professions and their clients;

4. Reaffirms the importance of rules which are necessary to ensure the independence, competence, integrity and responsibility of members of the legal professions so as to guarantee the quality of their services, to the benefit of their clients and society in general, and in order to safeguard the public interest[.]

of the Legal Profession,<sup>394</sup> statements by the CCBE,<sup>395</sup> rule of law initiatives,<sup>396</sup> the IBA/ABA/CCBE Typologies document previously

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394. See, e.g., International Bar Association, *Resolution on the Regulation of the Legal Profession* (adopted at the IBA Council Meeting Vienna, 1998), <https://www.ibanet.org/Document/Default.aspx?DocumentUid=4094F728-9035-4C6C-8AB6-DE645546D26C> [<https://perma.cc/L6AX-KJYN>] [hereinafter *IBA Core Values Resolution*]. The “whereas” quotes include the following:

HAVING due regard to the overriding public interest that the legal profession should fulfil a special function in serving society which distinguishes it from other service providers in that it has

- c) a role in facilitating the administration of, and guaranteeing access to, justice;
- d) a duty to the courts;
- e) a duty to uphold the rule of law;
- f) a duty to keep client matters confidential;
- g) a duty to avoid conflicts of interest;
- h) a duty to uphold specific ethical and professional standards;
- i) a duty to provide clients with the highest and most beneficial quality of advice, representation and legal services;
- j) a duty, in the public interest, of securing its independence, professionally, politically and economically, from any influence affecting its service; and

HAVING due regard to the Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress meeting in Havana on 7 September 1990; . . .

*Id.*

395. CCBE, *Position of the Council of the Bars and Law Societies of the European Union (CCBE) on the requirements on a lawyer to report suspicions of money laundering and on the European Commission Proposal for a Third EU Directive on Money Laundering Regulations* (Nov. 2004), ¶¶ 19-20, [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/ANTI\\_MONEY\\_LAUNDERING/AML\\_Position\\_papers/EN\\_AML\\_20041104\\_CCBE\\_position\\_on\\_the\\_requirements\\_on\\_a\\_lawyer\\_to\\_report\\_suspicions\\_of\\_money\\_laundering\\_and\\_on\\_the\\_European\\_Commission\\_Proposal\\_for\\_a\\_Third\\_EU\\_Directive\\_on.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/ANTI_MONEY_LAUNDERING/AML_Position_papers/EN_AML_20041104_CCBE_position_on_the_requirements_on_a_lawyer_to_report_suspicions_of_money_laundering_and_on_the_European_Commission_Proposal_for_a_Third_EU_Directive_on.pdf) [<https://perma.cc/2PRQ-BX3T>]:

19. . . . The CCBE cannot stress enough that requirements on a lawyer to report suspicions regarding the activities of clients based upon information disclosed by clients in strictest confidence is a violation of a fundamental right.

20. The CCBE requests that the Commission, Council and the Parliament bear in mind that a lawyer is a member of a regulated profession, is part of the process which ensures the rule of law, and has the duty to apply the law and have it applied. The CCBE emphasises that when lawyers actually provide legal advice on money laundering, they are party to an offence and should not benefit from any exemption.

396. See, e.g., ABA RULE OF LAW INITIATIVE, *Legal Profession Reform Index Factors*, [https://www.americanbar.org/advocacy/rule\\_of\\_law/publications/assessments/lpri/lpri\\_factors.html](https://www.americanbar.org/advocacy/rule_of_law/publications/assessments/lpri/lpri_factors.html) [<https://perma.cc/G8HV-2X8W>] (“Factor 4. Lawyer-Client Confidentiality The state recognizes and respects the confidentiality of professional communications and consultations between lawyers and their clients.”). See also ABA ROLI Annual Report 2016-17, <https://www.americanbar.org/content/dam/aba/directories/roli/misc/aba-rol-annual-report->

cited,<sup>397</sup> and the FATF RBA Guidance for Legal Professions cited earlier.<sup>398</sup>

The lawyer as Atlas narrative emphasizes the fact that there is a global consensus that a lawyer's duty of confidentiality, or professional secrecy or privilege, is one of the core values and key attributes of the legal profession and often cites one or more of the documents listed above.<sup>399</sup> The lawyer as Atlas narrative recognizes that lawyers should not be permitted to assist their clients in illegal activities,<sup>400</sup> but it highlights the lack of empirical data about intentional or unwitting lawyer involvement in illegal money laundering activities.

In the same way that examples of the lawyer as sieve narrative sometimes omit references to concerns involving the lawyers' role in upholding the rule of law and administration of justice, examples of the lawyer as Atlas narrative sometimes omit or minimize discussion of the money laundering concerns that have given rise to the competing perspective. Consider, for example, the report accompanying ABA Resolution 104, which was the first of the ABA's three resolutions on

2016-2017.authcheckdam.pdf [https://perma.cc/TAV2-JWLY] ("An independent, fair and efficient justice system requires clear and transparent laws, skilled and ethical professionals, and effective and accountable institutions.").

397. See *supra* note 4 (IBA/ABA/CCBE Typologies document).

398. See *FATF RBA Guidance for Legal Professionals*, *supra* note 69.

399. See, e.g., UN Basic Principles, *supra* note 390, ¶ 22; IBA Resolution, *supra* note 394, at (f); Council of Europe Recommendation, *supra* note 392, at Principle 1, ¶ 6. Because of space limitations, this footnote does not cite the many other examples available including the Charter of Core Principles of the European Legal Profession and the 2005 Statement of Core Principles of the Legal Profession signed by the presidents of more than 100 legal profession organizations. While countries differ from one another with respect to the exact terminology they use and the exact parameters of these doctrines, the *UN Basic Principles*, the *IBA Core Values Resolution*, and the other documents cited *supra* demonstrate the deeply-embedded and global nature of legal profession values such as confidentiality, loyalty, and independence. These documents also highlight lawyers' important role in ensuring a robust rule of law culture.

400. See, e.g., CCBE, *European Parliament Committee of Inquiry into Money Laundering, Tax Avoidance and Tax Evasion (PANA) Committee of inquiry questions to the Council of Bars and Law Societies of Europe (CCBE)*, 1, 4 (Jan. 24, 2017), [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/ANTI\\_MONEY\\_LAUNDERING/AML\\_Position\\_papers/EN\\_AML\\_20170124\\_Responses\\_of\\_inquiry\\_questions\\_to\\_the\\_CCBE\\_from\\_EP\\_Committee\\_of\\_Inquiry\\_into\\_Money\\_Laundering\\_Tax\\_Avoidance\\_and\\_Tax\\_Evasion\\_PANA.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/ANTI_MONEY_LAUNDERING/AML_Position_papers/EN_AML_20170124_Responses_of_inquiry_questions_to_the_CCBE_from_EP_Committee_of_Inquiry_into_Money_Laundering_Tax_Avoidance_and_Tax_Evasion_PANA.pdf) [https://perma.cc/8VXT-DS73] ("Professional secrecy/legal professional privilege do not apply if a lawyer takes part in illegal actions of the client. This is the case in every EU Member State.").

this topic.<sup>401</sup> The opening paragraph of the Resolution mentions the need for “reasonable and balanced initiatives designed to detect and prevent domestic and international money laundering and terrorist financing,”<sup>402</sup> but the accompanying report arguably does not convey the scope of the money laundering problem or explain why criminals need to seek out others, such as lawyers, to help them achieve the “layering” and “integration” stages of money laundering.<sup>403</sup> In other words, it omits the type of discussion found in Section II.A of this Article that explains why AML laws exist and the role that lawyers might play in addressing a serious societal issue by decreasing money laundering activities.

Outside of the FATF Mutual Evaluation Reports, it is common to find both the lawyer as sieve and lawyer as Atlas narratives, although rarely in the same document.<sup>404</sup> For example, popular press articles often use the lawyer as sieve perspective.<sup>405</sup> Bar association documents, on the other hand, often use the lawyer as Atlas perspective.<sup>406</sup> Inside the four corners of the FATF Mutual Evaluation Reports, however, the lawyer as sieve narrative seems dominant, with little acknowledgment of the issues raised by the lawyer as Atlas narrative. Some Mutual Evaluation Reports, such as the previously cited Serbia report,<sup>407</sup> are explicitly hostile to the issues that underlie the lawyer as Atlas narrative.<sup>408</sup> Other FATF Mutual Evaluation

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401. Compare Section II.A, *supra* (discussing the extent of the problem and the stages of money laundering), with ABA Resolution 104, *infra* note 402. See also *supra* notes 295, 388, which cite the commingling of lawyer regulation AML issues, on the one hand, and substantive corporate law and beneficial ownership issues, on the other hand, but note that this issue is beyond the scope of this Article.

402. AM. BAR. ASS'N, ADOPTED BY THE HOUSE OF DELEGATES, RESOLUTION 104 (2003), [https://www.americanbar.org/content/dam/aba/directories/policy/2003\\_my\\_104\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/2003_my_104_authcheckdam.pdf) [<https://perma.cc/B8PE-M54D>].

403. *Id.* at 3-16.

404. See *infra* notes 405-06 and accompanying text.

405. See, e.g., *supra* notes 41-47 and accompanying text.

406. See generally *ABA Gatekeeper Advocacy webpage*, *supra* note 208; *CCBE Anti-Money Laundering Committee*, <https://www.ccbe.eu/actions/committees-working-groups/?idC=791&Committee=Anti-Money-Laundering> [<https://perma.cc/2FEJ-4BKS>].

407. See *Serbia MER*, *supra* notes 165-69 and accompanying text.

408. See generally *supra* notes 139-70 and accompanying text.



Reports implicitly demonstrate their hostility to the lawyer as Atlas issues by their failure to respond meaningfully to the privilege arguments raised by the legal profession during the FATF mutual evaluation process.<sup>409</sup> As noted previously, none of the fifty FATF Mutual Evaluation Reports discussed in this Article provides a nuanced discussion of the difficult issues involved and the valid points that have given rise to both the lawyer as sieve and lawyer as Atlas perspectives.<sup>410</sup> Part VI, *infra*, argues that the polarized nature of the lawyer AML discussions has been counterproductive and offers suggestions about how the FATF Mutual Evaluation process could more effectively harness the energy of the legal profession and reduce lawyer involvement in illegal money laundering activities.

*VI. CONCLUDING OBSERVATIONS ABOUT HOW TO  
STRUCTURE FATF MUTUAL EVALUATIONS TO REDUCE  
LAWYER FACILITATION OF ILLEGAL MONEY LAUNDERING*

Reading the legal profession sections of FATF Mutual Evaluation Reports can be quite depressing. On the one hand, the FATF Mutual Evaluation Reports express frustration with the legal profession's failure to adopt or implement the FATF Recommendations in the same manner as other DNFBPs.<sup>411</sup> Legal profession representatives, on the other hand, seem frustrated by the lack of acknowledgement in the Mutual Evaluation process of the role that lawyers play in establishing a vibrant rule of law culture and the ways in which FATF's approach undermines the fundamental nature of the lawyer-client relationship and widely-accepted values within the legal profession.<sup>412</sup> In short, both sides seem frustrated with the current situation.

This Article submits that there is a better way forward than the approach that has been used in FATF's ongoing Mutual Evaluations. Lawyers can be *and should be* powerful tools in the fight against criminal money laundering. But instead of the current counterproductive approach that diverts energy by trying to fit a square peg (lawyers) into a round hole (FATF's existing DNFBP rules and mutual evaluation process), society arguably would be much better off

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409. *See generally supra* notes 165-69 and accompanying text.

410. *See supra* notes 163-65 and accompanying text.

411. *See supra* notes 139-71 and accompanying text.

412. *Id.*

if the FATF Mutual Evaluation process could recognize and harness the differences that exist between lawyers on the one hand and DNFBPs such as casinos, precious metal dealers, and real estate brokers, on the other hand. It is fully consistent with lawyers' professional values to ask them to be robust gatekeepers at the front end of the lawyer-client relationship and to avoid assisting criminals in their money laundering efforts.<sup>413</sup> By focusing on the "front end" of the lawyer-client relationship and by bringing together AML and legal profession experts, FATF could harness a tremendous amount of energy and arguably would make greater progress in reducing lawyer facilitation of illegal money laundering.

Consider, for example, what might happen if FATF and its stakeholders could agree on the following three goals:<sup>414</sup>

- Reducing the overall amount of money laundering;
- Reducing lawyer facilitation of money laundering; and
- Having a vibrant rule of law system.

Asking stakeholders to endorse these three goals or regulatory objectives and to address them in the legal profession portion of a FATF Mutual Evaluation could have a significant impact on AML conversations. Those who articulate an extreme version of the lawyer as Atlas narrative could be reminded of the need to acknowledge the global consensus that money laundering is a serious societal problem that needs to be addressed, the fact that criminal money launderers are likely to seek out lawyers for assistance during the *layering* and *integration* stages of money laundering,<sup>415</sup> and the need to have a robust lawyer AML regulatory and education system in order to achieve the agreed-upon goal of minimizing lawyer involvement in, and facilitation of, criminal money laundering. Those who articulate an

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413. See *supra* notes 260-66, 400 and accompanying text (citing the CCBE's response to the EU Pana Committee and traditional legal profession documents and US legal ethics rules).

414. See, e.g., Laurel S. Terry et al., *Adopting Regulatory Objectives for the Legal Profession*, 80 FORDHAM L. REV. 2685 (2012) (arguing in support of explicit regulatory objectives).

415. See *supra* note 23 and accompanying text.

extreme version of the lawyer as sieve narrative could be reminded of the importance of having a robust rule of law system not only because it is healthy for a society, but because a robust rule of law culture can help a jurisdiction reduce money laundering.<sup>416</sup> These individuals could also be reminded of the important role that lawyers play in ensuring a robust rule of law culture and the fact that loyalty and confidentiality are recognized as universal lawyer values that are core to lawyers' self-identity, even if countries differ in the exact manner in which they implement these values.<sup>417</sup>

The Authors submit that using the three goals listed above as the framework for the legal profession portion of a Mutual Evaluation not only could lead to changed conversations, but it likely would lead to improved outcomes and a reduction in lawyer involvement in money laundering. These goals retain the concept of "lawyer as gatekeeper" and include as a critical goal the reduction of lawyer facilitation of money laundering. But instead of treating lawyers in a manner that is identical to all other DNFBPs but inconsistent with traditional lawyer values, a principles-based approach based on the three goals listed above could take advantage of, and leverage, the strengths, expertise, and values of the legal *profession* in the fight against money laundering.

What might a principles-based FATF Mutual Evaluation of the legal profession look like? Consider how much progress might be made if the legal professions in FATF jurisdictions were asked to address the following four questions during the FATF Mutual Evaluation process. First, the legal profession portion of a FATF Mutual Evaluation might begin by asking the country in question to confirm that it has a regulatory system that makes it clear that money laundering is illegal and that lawyers are aware of these criminal laws. Having clear, well-publicized, and well-understood AML laws is a

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416. *See supra* note 13 and accompanying text (citing UN statements regarding the harm caused by money laundering).

417. *See supra* note 399 and accompanying text (citing documents that set forth these values). Ignoring these traditional values can lead to an AML approach that treats lawyers identically to other DNFBPs but changes the fundamental nature of *lawful* lawyer-client relationships. This change could have negative consequences for the rule of law. If clients view their lawyers as arms of the state who have a very low threshold for reporting potential misconduct, clients may be less willing to raise concerns with their lawyers and lawyers may have less opportunity to dissuade their non-criminal clients from improper activity. It could also contribute to societal distrust of the legal system.

critical prerequisite to reducing lawyer facilitation of money laundering. The Authors believe that in each of their countries, there is room for improvement in educating lawyers about the underlying AML criminal laws. Lawyers may not currently understand that actions that may be perfectly legal in one context, such as setting up a corporation, will be illegal if the client's motive is to conceal the illegal proceeds of criminal activities. Thus, the first set of questions that a FATF Mutual Evaluation might focus on is whether the country has adopted anti-money laundering criminal laws and whether the lawyers in that country understand what conduct constitutes criminal money laundering activity.

Second, the legal profession portion of a FATF Mutual Evaluation might ask the country in question to confirm that it has a regulatory system in place that makes it clear that lawyers are prohibited from assisting their clients in illegal money laundering activities. Many countries already include such provisions in their lawyer regulatory systems.<sup>418</sup> As numerous legal profession documents, including some cited earlier in this Article, have made clear, assisting a client in illegal conduct is *not* a core value of the legal profession.<sup>419</sup> The CCBE made this point to a Panama Papers committee when it observed that "Professional secrecy/legal professional privilege do not apply if a lawyer takes part in illegal actions of the client. This is the case in every EU Member State."<sup>420</sup> Thus, even if a country has not yet adopted explicit laws on this point, the legal profession should not object to adopting ethical rules or other regulatory provisions that make it clear that a lawyer may not assist a client with his or her illegal money laundering.

Third, if a country has the appropriate AML criminal laws and lawyer regulatory system in place, this portion of the FATF Mutual Evaluation could focus on how the country *implements* its regulatory system that prohibits lawyers from facilitating money laundering. It

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418. See, e.g., *supra* notes 259-74 and accompanying text (discussing ABA Model Rules 1.1, 1.2(d), and 1.16(a)).

419. See *supra* notes 390-98 and accompanying text (citing documents about the legal profession).

420. See *supra* note 400 and accompanying text (citing the CCBE's statement to the EU PANA Committee). This is also true in the United States. See *supra* notes 275-79 and accompanying text (discussing US criminal and lawyer discipline provisions).

might begin by asking whether the jurisdiction is doing all it could to ensure that its lawyers *understand* why criminals who launder money are likely to seek the assistance of lawyers. This section of the Mutual Evaluation might continue by asking the jurisdiction what steps it has taken to educate its lawyers so that they *recognize* money laundering situations and *recognize* when they have been asked to assist a client with the client's criminal money laundering. As noted in the prior paragraph, lawyers would be forbidden by both criminal law and the lawyer regulatory system from assisting criminals in their money laundering efforts and this stage of the Mutual Evaluation process would focus on education efforts that would teach lawyers to recognize when clients were seeking such services.

The fourth section of the legal profession portion of a FATF Mutual Evaluation could focus on *enforcement* of the lawyer regulatory system. This section would ask whether and how the jurisdiction enforces its regulatory provisions that prohibit lawyer facilitation of money laundering and whether there is room for improvement in the enforcement system. During this stage of the Mutual Evaluation, countries could be asked to explain whether their lawyer regulatory enforcement actions are *publicized* since publication can serve both education and deterrent functions.

In responding to these four sets of questions, a FATF country might find it helpful to consult the questions found in Outcomes 3 and 4 of the *Effectiveness Assessment* in the FATF Mutual Evaluation Methodology document.<sup>421</sup> A country might also find it helpful to examine practices and examples from other countries.<sup>422</sup> It seems likely that if this type of Mutual Evaluation approach were used, FATF or legal profession representatives might decide that it would be helpful to have a legal profession-specific master document that listed examples from around the world of lawyer regulatory provisions, implementation efforts, and enforcement mechanisms. Thus, even if a country was not using a particular AML tool at the time of its Mutual Evaluation, it could use the Mutual Evaluation process as an opportunity to educate itself about what other jurisdictions were doing

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421. *See supra* note 132 and accompanying text.

422. *See supra* notes 220-25 and accompanying text (the Appendices listing various US initiatives and efforts).

and obtain feedback about the strengths and weaknesses of its own approach.<sup>423</sup>

As a corollary to this latter point, FATF might want to consider whether and how it might facilitate in-depth peer-to-peer evaluations by legal profession representatives. Lawyers from different jurisdictions are accustomed to talking to each other, exchanging ideas with one another, and learning from one another.<sup>424</sup> It is beyond the scope of this Article to document the contexts in which multi-jurisdictional legal profession conversations have occurred, but these kinds of conversations are common and influential in the legal profession.<sup>425</sup> If FATF combined these kinds of peer-to-peer conversations with its existing AML expertise, it would be harnessing

423. For information about how US lawyer regulation use peer review, see Email from Ellyn Rosen, ABA Center for Professional Responsibility Regulation and Global Initiatives Counsel and Counsel to the Professional Regulation Committee, to Laurel Terry (Nov. 11, 2018). This email discussed the domestic US impact of peer review:

The ABA Standing Committee on Professional Regulation (formerly Discipline) has, since 1980, provided to state supreme courts a lawyer and judicial discipline system consultation service. At the invitation of a state supreme court, the Committee conducts a comprehensive study of the jurisdiction's disciplinary system that includes a multi-day onsite visit. At the conclusion of its review, the Committee submits to the court, on a confidential basis, a report that highlights the system's strengths and makes recommendations for improvements using ABA policies as guidelines, as well as noting, where appropriate, practices in other jurisdictions that have proven successful. A consultation report is submitted to the court on a confidential basis, and it is left to the court to determine whether and when to make it public. More frequently courts have decided to do so. The Committee has conducted over 65 consultations, and adoption of its recommendations have resulted in the adoption of changes that have improved the effectiveness, efficiency, fairness, transparency, and resourcing the system.

*Id.* See also Laurel S. Terry, *Preserving the Rule of Law in the 21st Century: The Importance of Infrastructure and the Need to Create a Global Lawyer Regulatory Umbrella Organization*, 2012 MICH. ST. L. REV. 735 (discussing, *inter alia*, the power of regulatory networks, model standards, and peer review).

424. See, e.g., Laurel S. Terry, *The Impact of Global Developments on U.S. Legal Ethics During the Past Thirty Years*, 30 GEO. J. LEGAL ETHICS 365, 381-85 (2017); Laurel S. Terry, *Creating an International Network of Lawyer Regulators: The 2012 International Conference of Legal Regulators*, 82(2) BAR EXAMINER 18, 18-19 (June 2013); Laurel S. Terry & Carole Silver, *Transnational Legal Practice* [2014], 49 ABA/SIL (n.s.) 413 (2015) (discussing TLP-Nets that interact in the legal services and legal services regulation space).

425. See *supra* note 424 (cited sources provide numerous examples of conversations among legal professionals).

tremendous knowledge, skill, experience, expertise, energy, cooperation, and engagement. Legal professions could learn from one another regulatory design options, implementation and education tools that have proven effective, and enforcement systems and options. The focus would be on the front-end of the lawyer-client relationship and making sure that lawyers know that it is improper for them to assist clients in money laundering activities and teaching lawyers to recognize when potential clients are seeking the lawyer's services for this purpose. Peers might not always agree with all of the methods or choices that others have made, but a peer review system could provide a mirror through which legal profession representatives could reflect on the strengths and weaknesses of their own system and introduce them to new ideas.

Despite the education and information-sharing that would take place through a peer-evaluation process, it is highly likely that there will continue to be a few "bad apple" individual lawyers who will choose to become criminals and who will knowingly help their clients illegally launder money.<sup>426</sup> But if these "bad apple" lawyers are not deterred by the existing criminal law sanctions, it is unlikely that they will be deterred by a lawyer regulatory system, even a well-designed and well-implemented system. Thus, if a primary goal is to reduce, if not completely eliminate, lawyer facilitation of illegal money laundering, surely it is better to enlist the full support of lawyer regulators and law-abiding members of the legal profession and focus on educating those lawyers who would *not* knowingly and willingly become criminal money launderers.

To implement this approach, jurisdictions should work to ensure that they have in place laws that criminalize money laundering, that lawyers know what those criminal laws say, that there are lawyer regulatory provisions that prohibit lawyers from assisting criminal money laundering clients, that lawyers are educated so that they recognize when they are being asked to assist in money laundering, and that there are enforcement mechanisms for lawyers who ignore these obligations. FATF Mutual Evaluations that helped jurisdictions achieve these steps arguably would be much more effective in reducing

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426. In the future, there will likely be disagreements about how aberrational it is for lawyers to knowingly assist criminals in their efforts to launder money. The Authors hope, however, that we can agree that not all lawyers would knowingly and willingly assist those who are engaged in money laundering.

lawyer facilitation of money laundering than the Mutual Evaluation approach currently used and would be more likely to affect permanent change. Treating lawyers as gatekeepers who have a duty not to assist criminal money laundering activity leverages lawyers' identity as "professionals" and is fully consistent with the traditional values that gave rise to the lawyer as Atlas narrative.<sup>427</sup>

FATF Members have accurately recognized that lawyers can be powerful tools in the important fight against criminal money laundering, but they arguably have not yet harnessed the full power of the legal profession in this fight. One of the reasons why this has not occurred is that the legal profession views FATF's one-size-fits-all-DNFPBs approach as fundamentally at odds with lawyers' historic and globally-accepted values.<sup>428</sup> This Article recommends that, in the future, the legal profession portions of FATF Mutual Evaluations should focus on the three goals listed previously and should help countries develop a culture in which their lawyers internalize AML sensitivity in the same way that lawyers have internalized conflicts of

427. See *supra* notes 259-74, 400 and accompanying text (citing ABA Model Rules that prohibit lawyers from assisting clients in illegal activities and the CCBE's statement to the EU PANA Committee making a similar point).

428. See, e.g., Helgesson & Morth, *supra* note 45, at 234-37, 244 (their interviews with Swedish lawyers highlighted the clash between professional norms and FATF obligations). In the Authors' view, this study illustrates the benefits that might come from an education-heavy approach that seeks to have lawyers better understand ML risks and internalize their responses, rather than perform a "check off the box" exercise or expect many suspicious transaction reports. The article concluded:

A remaining question is thus whether it would be possible for lawyers to better help prevent crime among their clients, and contribute to the quest for security in society, with recourse to other types of regulatory tools. To that end, further research could focus on the political willingness to give lawyers possibilities to combine activities of 'true' pro-active crime prevention with their strong professional norm of client confidentiality. So far, the FATF recommendations and EU directives do not appear to make enough of a distinction between the banking sector and the non-banking sector. Here, our case suggests that the reluctance among lawyers to become engaged in 'true' pro-active crime prevention, and not only in being compliant enough in order to avoid punishment and sanctions, is dependent on if and how the FATF can listen more closely to how the front-line workers perceive and handle the regulations on AML/CTF in practice.

*Id.* at 241. See also Middleton & Levi, *supra* note 28, at 656-57 (examples cited arguably illustrate the benefit that might come from additional education).



interest sensitivity. This type of approach truly could result in lawyers being the type of gatekeepers who would help stop the flow of illegal money laundering.

In closing, it is worth noting that the treatment of lawyers in the FATF Mutual Evaluations—and the aftermath—is an issue that all legal services regulation stakeholders and AML stakeholders should care about. As Part I of this Article explains, money laundering is a serious societal problem with widespread negative consequences.<sup>429</sup> Because of the three-step process of money laundering,<sup>430</sup> criminals are likely to seek out the services of lawyers.<sup>431</sup> While improvements have been made, AML scandals in the United States, in Peru, and elsewhere show that there is room for improvement in the way in which lawyers are handling their gatekeeping role.<sup>432</sup> Moreover, AML regulation of lawyers implicates a number of much broader issues, including issues related to the type of lawyer regulation that promotes or impedes a robust rule of law system. Thus, it is in the interests of those who care about AML issues and those who care about lawyer regulation to consider the current and future design of FATF's Mutual Evaluations and the best way to advance the goal of reducing lawyer facilitation of illegal money laundering activities.

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429. *See supra* notes 2-21 and accompanying text.

430. *See supra* notes 22-23 and accompanying text.

431. *See supra* notes 24-25 and accompanying text.

432. *See, e.g., supra* notes 266, 295 and accompanying text (discussing the US author's views about needed improvements), *supra* notes 365-66, 378 and accompanying text (discussing the Peruvian Author's views about needed improvements).

## APPENDIX I

**Checklist of Ten Issues for Legal Profession Representatives Whose FATF Mutual Evaluations Have Not Yet Occurred**

This Appendix summarizes information discussed elsewhere in this Article. It is based in large part on the advice from the three “case study” jurisdictions and offers a checklist of issues for jurisdictions that have not yet undergone their FATF 4th Round Mutual Evaluation.

1. **Confirm Timing**: The FATF webpage contains a searchable calendar that indicates the timetable for each country’s Mutual Evaluation Report.<sup>433</sup> The FATF Procedures document explains the steps and timetable. Legal profession representatives should recognize the significant lead time involved and become familiar with the deadlines for the national risk assessment and the documents submitted before the on-site assessment visit.<sup>434</sup>

2. **Identify Relevant Government Authorities**: Jurisdictions differ with respect to the government body that takes the lead in interacting with FATF.<sup>435</sup> If the legal profession representatives are able to locate the relevant government entity and establish a relationship with the government representatives in advance of the mutual evaluation, that should be helpful.<sup>436</sup> Government representatives might welcome this kind of relationship because the legal profession representatives have knowledge that will make the

433. See FATF Global Assessment Calendar, *supra* note 102 and accompanying text.

434. See *FATF 4th Round Methodology*, *supra* note 95 (discussing the FATF 4th Round Methodology document, its Timeline appendix, and the fact that tasks that are performed two, four, and six months before the FATF on-site visit).

435. If legal profession representatives are not sure whom they should reach out to, one source that can provide a starting point is the International Bar Association’s Anti-Money-Laundering Forum webpage. This webpage has listings for many countries in the world and these listings identify the relevant government bodies *Anti-Money-Laundering Forum*, INT’L B. ASS’N, <https://www.anti-moneylaundering.org/Default.aspx> [https://perma.cc/7YAN-YT9P].

436. Cf. 2017 *Canada Risk Assessment*, *supra* notes 196-97, which assigned a high vulnerability rating to Canada’s legal profession and did not note professional regulation initiatives. At the time the Canadian government issued its threat assessment report, it had recently lost in the Supreme Court a fourteen-year legal fight with lawyer regulators regarding the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and regulations pertaining to the legal profession.

government representatives' jobs easier in completing the necessary paperwork.

### 3. **Recognize the Importance of the National Risk Assessment:**

A country's national risk assessment plays a key role in the FATF Mutual Evaluation. Some of these risk assessments have been prepared with little input from the legal profession in their countries. In order to maximize their chance of input, legal profession representatives should familiarize themselves with any prior risk assessments performed by their country and consider whether and how they can participate in the country's forthcoming risk assessment.<sup>437</sup> Because countries have been criticized for "stale" or weak threat assessments, governments should welcome the participation of the legal profession.<sup>438</sup> The participation, however, must be meaningful. FATF Reports have expressed criticism of countries that painted too optimistic a picture of the risks posed by legal professionals.<sup>439</sup>

437. There are three different reasons why legal professions might want to consider, in advance of the mutual evaluation, how they could contribute to the national risk assessment. First, legal professions that have ignored requests to participate have been criticized in their country's FATF mutual evaluation Report. *See supra* note 150 (noting that Serbia's MER criticized the legal profession for not responding to a questionnaire that solicited information for the National Threat Assessment). Second, legal professions might want to participate in the development of the risk assessment, rather than simply critiquing it later as unfounded, because the FATF Mutual Evaluation Reports give great deference to these national reports. *See, e.g., FATF 4th Round Methodology, supra* note 95, ¶ 7 ("Assessors should use the country's own assessment(s) of its risks as an initial basis for understanding the risks, but should not uncritically accept a country's risk assessment as correct, and need not follow all its conclusions."); *id.* at 8, ¶ 15 ("Assessors are not expected to conduct an independent risk assessment of their own when assessing Recommendation 1 and Immediate Outcome 1, but on the other hand should not necessarily accept a country's risk assessment as correct. In reviewing the country's risk assessment, assessors should consider the rigour of the processes and procedures employed; and the internal consistency of the assessment. . . .") A third reason to participate and help shape the findings is because FATF reports have been critical of legal professions that are unfamiliar with or disagree with the findings contained in their country's national risk assessments. *See, e.g., supra* note 153 (citing Andorra MER); *Portugal MER, supra* note 109, ¶ 300 ("[The regulator] could not provide an analysis of the conclusions of the [National Risk Assessment] that directly targeted their specific sector(s), nor clarify the source(s) of data.").

438. *See, e.g., Australia MER, supra* note 109, ¶ 2.8 ("The [National Threat Assessment's] conclusions reasonably reflect most of Australia's main risks (which likely still prevail), but the NTA is now three years old and assessors are not confident that it is current for all risks, including where subsequent assessments have superseded it in some areas . . .").

439. *See, e.g., supra* notes 151-52 and accompanying text.

#### **4. Look Outside the Country for Ideas About Risk**

**Assessment:** One of the recurring themes about lawyer AML issues is how little empirical data is available. Given the lack of data that legal profession representatives are likely to encounter, they may want to look outside their own country for ideas to consider in a risk assessment.

#### **5. Become Familiar with FATF's Mutual Evaluation**

**Template Documents:** It is important for legal profession representatives to realize that their own country likely will submit information to the FATF on-site assessment team using the FATF template found in the FATF 4th Round Methodology document.<sup>440</sup> FATF's 4th Round Mutual Evaluation Report is also likely to follow the structure in the template. Legal profession representatives would be wise to familiarize themselves with these documents and strive to collect the requested data. They will also need to learn how to present the information they consider relevant using the terminology and framework that the FATF assessors consider relevant.

#### **6. Document and Communicate Profession-Based AML**

**Requirements:** Legal profession representatives should understand that the assessment team, and perhaps the profession's own government representatives, may not fully understand the nature and scope of professional regulation unless they are educated on that point. Moreover, the FATF assessment team is likely to assume that if a lawyer is not subject to the same AML regulations as all other DNFBPs, then the lawyer's AML obligations are deficient. Legal profession representatives need to be familiar not only with their own regulations, but with the AML regulations applicable to other kinds of DNFBPs so that they can explain where there is overlap and why aspects of the national AML scheme applicable to other DNFBPs may be duplicative and thus unnecessary for lawyers.<sup>441</sup>

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440. See *FATF 4th Round Methodology*, *supra* note 95.

441. See, e.g., Nicoll Email, *supra* note 174 (recommending additional education about the relationship of FATF to professional regulations). There may also be additional regulations with the forum, including regulatory requirements that overlay obligations for example of identification, verification in real estate transactions, foreign investment, company, trust formation, charities, and not for profit organizations that mimic or duplicate some or most of the

**7. Develop, Document, and Communicate Professional Regulation Implementation Data:** Legal profession representatives should be prepared to present documentation to support the jurisdiction's lawyer AML education efforts and regulatory enforcement, including education efforts and criminal and disciplinary cases.<sup>442</sup> The legal profession in one country, for example, was criticized for not providing the FATF on-site team with its educational materials.<sup>443</sup> Legal profession representatives might want to use a forthcoming visit as an opportunity to educate or reeducate the jurisdiction's lawyers using existing or new tools. For example, the Ghana Bar, which is a member of the IBA, was criticized for not circulating the IBA/ABA/CCBE Typologies Guide.<sup>444</sup>

**8. Identify Appropriate Legal Profession Representatives to Speak with the FATF On-Site Team:** According to the FATF Procedures document, two months before the FATF assessment team's on-site visit, the country must provide the assessment team with the program for its visit, which will include the private sector bodies the team will meet with. Legal profession representatives should work with government authorities to ensure that the appropriate legal profession representatives are invited to meet the FATF on-site team.<sup>445</sup> They should also make sure that the individuals tasked to meet with FATF representatives have all of the information that would be helpful.

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AML/CTF regulatory requirements). *Id.* Many such regulatory obligations arise pursuant to state based legislative schemes. *Id.*

442. *See, e.g., supra* notes 230-31 and accompanying text (noting FATF interest in some of the information the US legal profession collected).

443. *See Iceland MER, supra* note 109, ¶ 315 (observing, in an arguably critical manner, that the Iceland Bar Association had not provided the FATF on-site assessors with a copy of the guidance it provided to its members).

444. *See Ghana MER, supra* note 148 (citing Ghana's Mutual Evaluation Report).

445. *See Wilson Email, supra* notes 193-95 and accompanying text (reporting on discussions within Canada about whether the legal profession representatives should be from British Columbia or from the Federation, which had broader representation). If government representatives do not reach out to the legal profession representatives, legal profession representatives may want to take the initiative because countries have been criticized for their failure to have legal profession representatives meet with the on-site assessment team. *See supra* notes 153-54 and accompanying text (noting countries whose legal profession had been criticized because it had not met with the FATF on-site inspectors or the representatives were unfamiliar with the country's risk assessment).

**9. Consider Reaching Out for Advice to Legal Professions that Have Already Undergone Their Mutual Evaluations:** Legal profession representatives who are planning for their country's mutual evaluation may find it useful to consult with individuals from other countries who have already gone through the process.<sup>446</sup> Countries that have done so have found it useful.<sup>447</sup> Among other points, legal profession representatives may want to speak with one another to learn how they can most effectively remind the FATF on-site assessors (and perhaps their own government) of the points made in the FATF Interpretive Note to Recommendation 23.<sup>448</sup>

**10. Consider Cost-Benefit Arguments and Data:** FATF has been criticized for not adequately taking into the account the costs imposed by its Recommendations. The costs may be tangible, such as the financial cost of administering an AML system.<sup>449</sup> However, the costs may also be intangible, such as a loss of confidence in the rule of law that might result under certain circumstances if lawyers are required to act as agents of the government and report suspicious transactions. Additional costs might include the loss of opportunities in which a lawyer persuaded a client to avoid money laundering activities. While this undoubtedly would not work for all clients, there might be some clients for which it would work. If legal profession

446. See *supra* note 252 (recommending that countries that are looking for a venue in which to meet each other and have these kinds of conversations might consider using the webpage and resources of the International Conference of Legal Regulators ("ICLR") and the IBA Bar Issues Commission).

447. See *supra* notes 210-11 and accompanying text (describing Case Study #3 and US-Australian information-sharing).

448. See *supra* notes 91, 159-60 and accompanying text (describing the Interpretive Note to Recommendation 23 and the lack of discussion about this Note in the reports).

449. The Law Society of England and Wales is one of the few groups that has collected empirical data about the costs and benefits of lawyer AML efforts. See Law Soc., *The costs and benefits of anti-money laundering compliance for solicitors: Response by the Law Society of England and Wales to the call for evidence in the Review of the Money Laundering Regulations 2007* (Dec. 2009), <http://www.lawsociety.org.uk/support-services/risk-compliance/anti-money-laundering/documents/law-society-response-to-the-hm-treasury-money-laundering-review-2009/> [<https://perma.cc/8VZP-4NQW>] (noting that solicitors filed a number of SARs, but few required government follow-up action; also includes cost information). See also Terry, FATF Introduction, *supra* note 89, at 29-32 (summarizing the data the Law Society presented to its government).

representatives want to offer cost-benefit arguments, they should consider how best to develop and frame those points.