

ARTICLE

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

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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

* 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.

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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.¹ 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.² Other global bodies concur in the significance of the problem.³ 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>].

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.⁴⁰⁹ 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.⁴¹⁰ 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.⁴¹¹ 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.⁴¹² 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

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.⁴¹³ 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:⁴¹⁴

- 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,⁴¹⁵ 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

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.⁴¹⁶ 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.⁴¹⁷

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

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.⁴¹⁸ 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.⁴¹⁹ 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."⁴²⁰ 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

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.⁴²¹ A country might also find it helpful to examine practices and examples from other countries.⁴²² 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

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.⁴²³

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.⁴²⁴ 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.⁴²⁵ 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.⁴²⁶ 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

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.⁴²⁷

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.⁴²⁸ 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.⁴²⁹ Because of the three-step process of money laundering,⁴³⁰ criminals are likely to seek out the services of lawyers.⁴³¹ 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.⁴³² 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.

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).