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Lawyer Ethics and the Financial Action Task Force: A Call to Action

JACK P. SAHL

*Professor of law and faculty director of the Miller-Becker Center for Professional Responsibility at the
University of Akron School of Law*

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Lawyer Ethics and the Financial Action Task Force: A Call to Action

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ABOUT THE AUTHOR: Jack P. Sahl is a professor of law and faculty director of the Miller-Becker Center for Professional Responsibility at the University of Akron School of Law. The author wishes to thank Art Garwin, Paul Paton, Frank Quirk, and Joann M. Sahl for their helpful comments. The author is especially indebted to Sarah Whiteman and Jarrett Wyatt for their excellent research and assistance. He would also like to thank Professors William P. LaPiana and Houman Shadab of New York Law School for the invitation to participate in the symposium entitled “Combating Threats to the International Financial System: The Financial Action Task Force,” which took place at New York Law School on April 25, 2014.

AUTHOR'S NOTE: This article is dedicated to the memory of my friend and colleague, Professor Malina Colman.

I. INTRODUCTION

Investigations and prosecutions of money laundering¹ and terrorist financing² crimes attract global media attention.³ Academic institutions and professional organizations are devoting more attention to these crimes and their consequences⁴

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1. “Money laundering is the act of converting money gained from illegal activity, such as drug smuggling, into money that appears legitimate and in which the source cannot be traced to the illegal activity.” Peter Reuter & Edwin M. Truman, *How Much Money Is Laundered?*, in CHASING DIRTY MONEY: THE FIGHT AGAINST MONEY LAUNDERING 9 (2004) (quoting U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-96-105, MONEY LAUNDERING: A FRAMEWORK FOR UNDERSTANDING U.S. EFFORTS OVERSEAS 1 (1996)).
 2. “Terrorism financing . . . typically involves money from legal pursuits that is converted into forms that facilitate acts of violence for political purposes.” Reuter & Truman, *supra* note 1, at 9.
 3. See Richard K. Gordon, *Losing the War Against Dirty Money: Rethinking Global Standards on Preventing Money Laundering and Terrorism Financing*, 21 DUKE J. COMP. & INT’L L. 503, 503–06 (2011). One example of an event attracting global attention concerns the French bank BNP Paribas’s guilty plea to charges of hiding the names of Sudanese and Iranian clients when it sent transactions through the U.S. financial system. Ben Protess & Jessica Silver-Greenberg, *BNP Admits Guilt and Agrees to Pay \$8.9 Billion Fine to U.S.*, N.Y. TIMES, July 1, 2014, at B1. The U.S. Attorney for the Southern District of New York accused BNP of “perpetrating . . . a tour de fraud.” *Id.* BNP’s chief operating officers allegedly ignored the warnings of its compliance officers in dealing with Iran and Sudan, with one BNP compliance manager stating that “[Sudan] hosted Osama bin Laden.” *Id.* BNP enlisted the help of the “highest rungs of French government” to avoid the charges, including “President Francois Hollande [who] made unusually direct and personal appeals to President [Barack] Obama” for assistance. *Id.*; see Susanne Craig & James C. McKinley, Jr., *French Bank’s Guilty Plea Is Latest Big Settlement to Bolster State’s Fiscal Position*, N.Y. TIMES, July 2, 2014, at A22 (noting that BNP “is the seventh major bank to be caught trying to evade United States sanctions in a five-year investigation” by the Manhattan District Attorney’s Office and federal authorities, and concluding that these investigations have led to approximately \$12 billion in fines, which have bolstered New York’s financial position as well as that of the District Attorney’s Office); Declan Walsh, *Britain Frees Pakistani in Financial Inquiry*, N.Y. TIMES, June 8, 2014, at A10 (reporting that British police will continue to investigate the popular Pakistani political leader, Altaf Hussain, a British citizen since 2002, who was arrested and held for four days on suspicion of money laundering, and that police are also investigating whether \$600,000 in cash seized during raids on Hussain’s home and office in 2012 and 2013 are the proceeds of criminal activity). The media attention covers a wide variety of related matters. For example, one article discussed the selection of a possible monitor for Credit Suisse and how former prosecutors of entities are selected by their former government employers to be monitors, creating an “old boys’ network” for lucrative appointments to ensure entity compliance with settlement agreements. See Ben Protess & Jessica Silver-Greenberg, *Old Foe a Monitor of Credit Suisse*, N.Y. TIMES, June 24, 2014, at B1. This network, and the lack of transparency surrounding such monitoring, raises questions about the efficacy of monitoring. See *id.* (reporting that “the consulting firm Deloitte [was fined] \$10 million and barred . . . from advising banks in New York for one year . . . [for] watering down a report about . . . the British bank, Standard Chartered,” and also noting that former Deputy U.S. Attorney Shirah Neiman was selected to monitor BNP Paribas, which was suspected of transferring millions of dollars through its U.S. operations on behalf of Sudan and other countries that the United States blacklisted, noting that the bank is expected to pay \$8 billion in penalties and plead guilty to criminal wrongdoing); *id.* at B7; Ben Protess, *Senior U.S. Prosecutor Who Fought Wall St. Is Departing*, N.Y. TIMES, June 26, 2014, at B4 (reporting that Lorin L. Reischer, the director of the criminal division of the U.S. Attorney’s Office in Manhattan, is the latest government lawyer to go “through the . . . revolving door,” back to private practice and, while in office, led BNP to move closer to pleading guilty for improperly transferring money for Sudan).
 4. See New York Law School Law Review Symposium: Combating Threats to the International Financial System: The Financial Action Task Force (Apr. 25, 2014); American Bar Association Center for Professional Responsibility Symposium, 40th ABA National Conference on Professional Responsibility (May 29, 2014); American Association of Law Schools Symposium, Professional Responsibility: The Transformative Effect

amidst a growing consensus that money laundering and terrorist financing activities pose a significant risk to the economic, political, and social order of nations.⁵

The gravity of this risk in the international context is reflected, in part, by the shopping mall killings in Nairobi, Kenya⁶ and an attack in Moscow, Russia in 2013,⁷ both of which required significant planning and financial support.⁸ In the wake of

of International Initiatives on Lawyer Practice and Regulation: A Case Study Focusing on FATF and its 2008 Lawyer Guidance (Jan. 8, 2010). The Association of American Law Schools (AALS) program produced several articles published in the *American Bar Association Journal of the Professional Lawyer*. See, e.g., Paul D. Paton, *Cooperation, Co-optation or Coercion? The FATF Lawyer Guidance and Regulation of the Legal Profession*, J. PROF. LAW., 2010, at 165, 167 (examining, in part, “[t]he potential impact of the FATF on U.S. lawyer regulation” by referencing developments in Canada and Australia); 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*, J. PROF. LAW., 2010, at 83 (highlighting the creation of the Financial Action Task Force (FATF) and dispensing advice for lawyers); Laurel S. Terry, *An Introduction to the Financial Action Task Force and Its 2008 Lawyer Guidance*, J. PROF. LAW., 2010, at 3 [hereinafter Terry, *Intro to the 2008 FATF Lawyer Guidance*] (providing an overview of the FATF and related developments, such as the governmental responses to the FATF).

5. See Peter J. Quirk, *Macroeconomic Implications of Money Laundering* (Int’l Monetary Fund, Working Paper No. 96/66, 1996), reprinted in 2 TRENDS IN ORGANIZED CRIME 10 (1997) (“[M]oney laundering can distort economic data and thus distort macroeconomic analysis and policymaking. [This may have] direct effects on saving resulting from induced changes in income distribution and from the erosion of confidence in financial markets.”). Quirk concludes that money laundering has a “depressant effect on growth.” *Id.*; see also Editorial, *Nigerian Girls Deserve Continued Attention: Our View*, USA TODAY, (Aug. 5, 2014, 7:35 PM), <http://www.usatoday.com/story/opinion/2014/08/05/nigerian-schoolgirls-boko-haram-bringbackourgirls-editorials-debates/13643531/>; Landon Thomas, Jr. & Raphael Minder, *Banco Espírito Santo Patriarch Humbled Amid Bailout*, N.Y. TIMES, Aug. 5, 2014, at B1, available at <http://www.nytimes.com/2014/08/05/business/international/banco-esprito-santo-patriarch-humbled-amid-bailout.html> (noting the arrest of Ricardo Silva Salgado, the former chairman of Portugal’s Banco Espírito Santo, for money laundering and his family’s involvement in international businesses, and reporting Europe and Portugal’s \$6.6 billion emergency bailout of the bank on August 3, 2014 to quell rattled markets that harmed investors); see generally Jack Ewing, *Legal Costs Push Deutsche Bank to a Loss*, N.Y. TIMES, Oct. 30, 2014, at B12 (highlighting that Deutsche Bank announced a net loss of approximately \$117 million (or €92 million) due to legal costs, in part, related to “questions about its role in financial transactions carried out on behalf of nations facing international sanctions”).
6. Jeffrey Gettleman & Nicholas Kulish, *Mall Becomes War Zone as Gunmen Kill Dozens in Nairobi Terror Attack*, N.Y. TIMES, Sept. 22, 2013, at A1 (describing the terrorist attack at the Nairobi mall as the most “chilling” in East Africa since al-Qaeda attacked two American embassies in 1998, and noting that a secret U.N. report described the assault as “complex” and that an African Union official described the terrorists as “trained”); Daniel Howden, *Terror in Nairobi: The Full Story Behind Al-Shabaab’s Mall Attack*, GUARDIAN, (Oct. 4, 2013, 8:09 PM), <http://www.theguardian.com/world/2013/oct/04/westgate-mall-attacks-kenya> (providing a detailed report of the terror and mayhem of the September 21, 2013 attack on Nairobi’s premier shopping mall). Nicholas Kulish et al., *Carnage in Mall Shows Resilience of Terror Group*, N.Y. TIMES, Sept. 23, 2013, at A1 (revealing “an extensive and complex financial support system” by Al-Shabaab supporters in Kenya “to sustain their own activities, sponsor the travel of recruits to Somalia . . . and provide financial contributions to the jihadist cause,” and noting that Kenyan President Uhuru Kenyatta described this as an “international war” and stating that “we have to join hands and work together to see it destroyed”).
7. See Fabien Tepper, *Volgograd Bomber Planned to Attack Moscow*, CHRISTIAN SCI. MONITOR (Oct. 22, 2013), <http://www.csmonitor.com/World/2013/1022/Volgograd-bomber-planned-to-attack-Moscow>.
8. See ROBERTO DURRIEU, RETHINKING MONEY LAUNDERING & FINANCING OF TERRORISM IN INTERNATIONAL LAW 67 (2013) (“[T]errorist[] . . . groups require financial support to finance their activities and enhance their

the horrific September 11, 2001 attacks, the United States has become particularly sensitive to terrorism and its financing.⁹

The United States and nations worldwide perceive themselves in a dire struggle to eliminate the evils of money laundering and terrorist financing.¹⁰ The Kingdom of Saudi Arabia recently donated \$100 million to the U.N. Counter-Terrorism Centre to “help provide the tools, technologies and methods to confront and eliminate the threat of terrorism.”¹¹ In acknowledging the gift, U.N. Secretary-General Ban Ki-moon stated, “The recent disturbing upsurge of terrorism in a number of countries and regions of the world, most dramatically demonstrated by the so-called Islamic State in Iraq, underscores the challenges before us.”¹²

power.”); *id.* at 66–72 (discussing the link between money laundering and terrorism financing, money laundering constituting one of the four ways to finance terrorism). Although overall financial support for a terrorist organization may be great, the cost of a particular operation may be surprisingly small. For example, the Central Intelligence Agency estimated that al-Qaeda’s pre-September 11, 2001 annual operating budget at \$30 million, whereas the cost of planning and executing the attacks was less than \$300,000. *Id.* at 67–68.

9. See generally JOHN ROTH ET AL., NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES: MONOGRAPH ON TERRORIST FINANCING (2004), available at http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf; AM. BAR ASS’N, VOLUNTARY GOOD PRACTICES GUIDANCE FOR LAWYERS TO DETECT AND COMBAT MONEY LAUNDERING AND TERRORIST FINANCING 1 (2010) [hereinafter GOOD PRACTICES GUIDANCE], available at http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/voluntary_good_practices_guidance.pdf (noting that the September 11, 2001 terrorist attacks on New York City and elsewhere prompted the FATF to issue Special Recommendations on terrorist financing); see also Jodi Rudoren, *Deal Reached on Gaza Reconstruction, Palestinian Leader Says*, N.Y. TIMES, Sept. 12, 2014, at A8 (reflecting the United States’ concern over the financing of terrorism by reporting that the Palestinian Authority “maintains that it cannot send money to anyone affiliated with Hamas, for fear of risking financial support from . . . the United States” and other countries “that consider Hamas a terrorist group”). The Pentagon was also attacked on September 11, 2001 and United Airlines Flight 93 crashed in Pennsylvania before it could strike Washington, D.C. *September 11th Fast Facts*, CNN, <http://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/> (last updated Sept. 8, 2014, 12:54 PM).
10. See Chad Bray, *UBS and Deutsche Bank Disclose New Inquiries Over ‘Dark Pools’*, N.Y. TIMES (July 29, 2014, 8:26 AM), <http://dealbook.nytimes.com/2014/07/29/ubs-and-deutsche-bank-disclose-new-inquiries-over-dark-pools/> (discussing France’s formal investigation of UBS of Switzerland regarding charges of money laundering and tax fraud, claiming the bank helped French clients hide assets, and noting that UBS was ordered to post bail in excess of €1 billion); Jessica Silver-Greenberg & Ben Protess, *Scrutiny for Banks Is Shifting to Germany*, N.Y. TIMES, July 8, 2014, at B1 (reporting settlement talks with Germany’s second largest bank, Commerzbank, over dealings with Iran and other blacklisted countries, and that U.S. criminal sanctions cases against European banks began in 2009 with British bank Lloyds, followed by Credit Suisse, HBC, Standard Chartered, Barclays, ING of the Netherlands, and then BNP that alone paid a record \$8.9 million penalty and plead guilty to criminal charges in 2014 for processing transactions with countries on the U.S. sanction list); see generally *Members and Observers*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/pages/aboutus/membersandobservers/#d.en.3147> (last visited Apr. 10, 2015) [hereinafter *Members and Observers*] (listing the FATF’s national and regional members).
11. Rick Gladstone, *Saudis Give \$100 Million to U.N. Fight on Terrorism*, N.Y. TIMES, Aug. 14, 2014, at A8 (quoting Abdel bin Ahmed al-Jubeir, the Saudi Ambassador to the United States). The Kingdom of Saudi Arabia gave \$10 million to help create a U.N. counterterrorism committee only three years earlier. *Id.* The recent \$100 million donation reflects the Kingdom’s continuing commitment to, and faith in, the importance of international cooperation in the field of counter-terrorism. *Id.*
12. *Id.* The Islamic State of Iraq and Syria (ISIS) has ruthlessly murdered religious minorities and others in northern Iraq and elsewhere. President Obama and others described ISIS’s threat to thousands of

Addressing the United States' "Global War on Terror," David S. Cohen, the U.S. Treasury Department's Under Secretary for Terrorism and Financial Intelligence, recently said, "The United States needs to remain involved in the world, but does not necessarily need to remain involved just through military power."¹³ Officials are increasingly focused on other effective ways to project American power, in particular, by adopting global anti-money laundering (AML) and counter terrorist financing (CTF) policies.¹⁴ The United States adopted such policies more than a generation earlier when it became a founding member of the Financial Action Task Force (FATF).¹⁵

The FATF represents the gold standard in the global fight against money laundering and terrorist financing and promises to change the way lawyers practice law in the United States.¹⁶ However, the FATF, in some respects, remains a perpetual work in progress¹⁷ and must adapt its normative structure and methodologies to the increasingly sophisticated, ever-morphing criminal practices of money laundering and

Yazidis, a religious minority, as genocide. See Rod Nordland, *Despite U.S. Claims, Yazidis Say Crisis Is Not Over*, N.Y. TIMES, Aug. 15, 2014, at A8; Marlise Simons, *Spurred by ISIS Violence, Nations Mull How to Press for Justice in Conflicts*, N.Y. TIMES (Sept. 21, 2014), <http://www.nytimes.com/2014/09/22/world/spurred-by-isis-violence-nations-mull-how-to-press-for-justice-in-conflicts.html>; Rick Gladstone, *U.N. Pursues Bid to Stifle Rebels in Iraq*, N.Y. TIMES, Aug. 15, 2014, at A8 (highlighting that the United Nations is galvanized by the brutality of ISIS's human rights violations in Iraq and is adopting a resolution aimed at choking their sources of money, weapons, and foreign recruits by placing its leaders on an international blacklist, banning their travel and freezing their assets).

13. Annie Lowrey, *Aiming Financial Weapons from Treasury War Room*, N.Y. TIMES, June 4, 2014, at B1, available at <http://www.nytimes.com/2014/06/04/business/aiming-financial-weapons-from-war-room-at-treasury.html>. One way for the "United States . . . to [be] involved in the world," *id.*, is for it to subject foreign banks and other companies to the United States' regulatory scrutiny. For example, U.S. regulators recently criticized one of Europe's largest banks, Deutsche Bank, for "serious problems with the bank's financial reporting procedures and oversight." Matthew Goldstein, *Fed Is Said to Criticize Deutsche Bank's Oversight and Reporting Efforts*, N.Y. TIMES, July 23, 2014, at B3 (discussing the New York Federal Reserve Bank's letter to Deutsche Bank directing it "to fix problems in its financial reporting procedures" that have existed for several years, and the U.S. efforts to ensure the financial soundness of banks).
14. See Lowrey, *supra* note 13. "Mr. Cohen oversees the obscure Office of Foreign Assets Control, the engine that creates and administers the steadily increasing number of financial sanctions" directed against Iran's Revolutionary Guard to "Mexican drug traffickers to cronies of Russia's President Vladimir V. Putin." *Id.* Sanctions have been used to influence the policies of North Korea, South Sudan, Syria, and other nations. Although some economists question the impact of sanctions, one expert declared that "[t]here's no doubt that sanctions have become the dominant instrument of coercive statecraft." *Id.* at B5 (quoting Mark Dubowitz, executive director of the Foundation for Defense of Democracies).
15. DURRIEU, *supra* note 8, at 121 n.396.
16. See *id.* at 121 (writing that the FATF provides the key legal standards for fighting money laundering and terrorist financing); see also PAUL ALLAN SCHOTT, REFERENCE GUIDE TO ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM, at I-3 (2d ed. 2006) (referring to the FATF as the "international standard setter for anti-money laundering (AML) efforts"); see discussion *infra* Part III (describing the origin, mission, and organizational or normative structure of the FATF).
17. See Navin Beekarry, *The International Anti-Money Laundering and Combating the Financing of Terrorism Regulatory Strategy: A Critical Analysis of Compliance Determinants in International Law*, 31 N.W. J. INT'L L. & BUS. 137, 142 (2011) ("The FATF [AML and combating the financing of terrorism (CFT)] normative structure . . . constantly adapt[s] to new and changing [money laundering (ML) and terrorist financing (TF)] activities and methodologies.").

terrorist financing.¹⁸ The FATF must also continually ensure that its member states are complying with the FATF's AML and CTF standards.¹⁹ Some leaders in the legal profession are concerned with the effect that current FATF policies have on lawyers, and are especially worried about possible future changes in FATF policies that could affect the delivery of legal services.²⁰

This article discusses the FATF and its potential impact on the delivery of legal services in the United States.²¹ Part II briefly discusses the problems associated with money laundering and terrorist financing. Part III examines the history and scope of the FATF, including its expansive Recommendations designed to prevent these crimes. Part IV considers some of the ethical dimensions of the FATF's policies and their impact both on the legal profession and the delivery of legal services. Specifically,

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18. See Lucia Dalla Pellegrina & Donato Masciandaro, *The Risk-Based Approach in the New European Anti-Money Laundering Legislation: A Law and Economics View*, 5 REV. L. & ECON. 931, 936 (2009) (acknowledging that money launderers have a deep knowledge of AML detection risks and "take counter-measures to hide their financial activities," demanding greater cooperation and reporting by financial institutions); SCHOTT, *supra* note 16, at ix ("Efforts to launder money and finance terrorism have been evolving rapidly in recent years in response to heightened countermeasures."); Shima Baradaran et al., *Funding Terror*, 162 U. PA. L. REV. 477, 489 (2014) ("Traffickers constantly employ the latest technologies to keep one step ahead of law enforcement efforts.") (internal quotation marks omitted); see generally *infra* Part III.
 19. See Ben Protess & Chad Bray, *Caught Backsliding, Standard Chartered Is Fined \$300 Million*, N.Y. TIMES, Aug. 20, 2014, at B1 (reporting that Standard Chartered failed to honor an earlier promise "to weed out transactions prone to money-laundering" and was fined \$300 million, on top of \$667 million in fines in 2012 for dealing with blacklisted countries, and that the Standard Chartered, New York branch is suspended from the important business of "dollar clearing," affecting approximately 300 clients); Jessica Silver-Greenberg & Ben Protess, *British Bank Faces Action, Again, by New York State*, N.Y. TIMES, Aug. 6, 2014, at B1 (covering New York's action against Standard Chartered over a breakdown in its computer system that detects transactions vulnerable to money laundering, and the bank's claim that the problems were merely "technical" and not corporate recidivism since the bank was fined \$340 million in 2012).
 20. Professor Paul D. Paton discusses two FATF polices creating concern in the legal profession: Recommendation 12, which requires lawyers to follow certain client due diligence protocols; and Recommendation 16, which requires lawyers to report confidential client information involving suspicious transactions. See Paton, *supra* note 4, at 170. "Both [Recommendations] place demands that interfere with the traditional self-regulating approach and independence of the legal profession." *Id.* at 170–71; see also GOOD PRACTICES GUIDANCE, *supra* note 9, at 3 (expressing concern about FATF-related regulation of the profession by the federal government and describing goals "to encourage lawyers to develop and implement voluntary, but effective, risk-based approaches consistent with the [FATF] Lawyer Guidance, thereby negating the need for federal regulation of the legal profession").
 21. This article reflects my involvement in New York Law School's 2014 symposium entitled "Combating Threats to the International Financial System: The Financial Action Task Force," the first academic event hosted by a law school to address these important issues. New York Law School Law Review Symposium: Combating Threats to the International Financial System: The Financial Action Task Force (Apr. 25, 2014); see Laurel S. Terry, *U.S. Legal Profession Efforts to Combat Money Laundering & Terrorist Financing*, 59 N.Y.L. SCH. L. REV. 487, 488 (2014–2015) (noting New York Law School's groundbreaking academic symposium). The AALS Professional Responsibility Section also sponsored an academic program entitled "The Transformative Effect of International Initiatives on Lawyer Practice and Regulation: A Case Study Focusing on FATF and Its 2008 Lawyer Guidance" at the AALS's Annual Meeting in Washington, D.C. in 2010, which is available at: https://memberaccess.aals.org/eweb/DynamicPage.aspx?webcode=SesDetails&ses_key=e7ca3e51-5520-4238-b04d-5e7e7aaaed2f (last visited Apr. 10, 2015); see also Terry, *Intro to the 2008 FATF Lawyer Guidance*, *supra* note 4 (providing a broad but comprehensive overview of the topic).

Part IV asserts that the FATF's Customer Due Diligence (CDD) Recommendations offer lawyers a valuable tool for avoiding clients who are involved in money laundering or terrorist financing.²² Part IV also addresses, from an interdisciplinary perspective, the reasons why some in the legal profession resist FATF policies.

This article concludes by arguing that the FATF merits the legal profession's continued attention. Some FATF efforts are troubling, particularly Recommendation 20, which suggests that lawyers should secretly file suspicious transaction reports (STRs) on certain clients.²³ However, other FATF efforts represent positive developments for the bar. For example, lawyers are well-advised to embrace the FATF's CDD Recommendations as a good practice standard.²⁴ The legal profession should be careful about dismissing useful changes to the practice of law merely because external authorities drive those changes.²⁵ The conclusion also recommends ways for the profession to better implement the FATF's CDD Recommendations.

II. MONEY LAUNDERING: SOCIETY'S HIDDEN CANCER

A. *An Overview of the Problem*

This part of the article briefly examines money laundering to provide a context for considering lawyer ethics issues in light of the FATF's mission to eliminate this crime.²⁶

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22. In this article, "CDD" refers to "customer due diligence," and tracks the FATF's use of that abbreviation to promote consistency with FATF terminology. CDD could just as appropriately refer to "client due diligence," since "client" is a more common way of referring to a lawyer's customer.
23. FIN. ACTION TASK FORCE, THE FATF RECOMMENDATIONS 20 (Feb. 15, 2012) [hereinafter 2012 RECOMMENDATIONS], available at http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf (calling for lawyers to file suspicious transaction reports (STRs) with financial intelligence units); see also AM. BAR ASS'N, FORMAL OPINION 463: CLIENT DUE DILIGENCE, MONEY LAUNDERING, AND TERRORIST FINANCING (May 23, 2013) [hereinafter FORMAL OPINION 463], available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_463.authcheckdam.pdf. Formal Opinion 463 emphasizes that "mandatory reporting of suspicion about a client is in conflict with [the American Bar Association (ABA) Model] Rules [of Professional Conduct] 1.6 and 1.8." *Id.* at 1. Cf. Dru Stevenson, *Against Confidentiality*, 48 U.C. DAVIS L. REV. 337, 337, 393–94 n.256 (2014) (arguing from a Coasean economics perspective that the profession's confidentiality rules are unnecessary and, worse yet, "undermine public trust in the legal system and diminish transparency and cooperation in society," and reporting that empirical studies demonstrate that clients do not rely on confidentiality rules when communicating with their lawyers).
24. 2012 RECOMMENDATIONS, *supra* note 23, at 19 (Recommendation 22) (mandating that lawyers and other designated non-financial businesses and professions (DNFBPs) are subject to the FATF's extensive CDD regime).
25. See Jack P. Sahl, *Cracks in the Profession's Monopoly Armor*, 82 FORDHAM L. REV. 2635, 2636 n.6 (2014) ("[S]tate supreme courts were . . . the prime regulators [and] typically act[ed] in interplay with the bar" . . . and "lawyers drafted rules to promote their own interests in a self-regulatory context." (footnotes omitted) (quoting John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 965 (2009)).
26. See DURRIEU, *supra* note 8, at 429 ("Legal practitioners and scholars . . . dive into the legal devices against [money laundering and terrorist financing] without enough consideration to the extra-legal factors. However, it is critically important to understand the contours of the problem before any useful legal discussion and policy recommendation is derived. . . . [W]e need to understand the meaning, causes and effects of these phenomena . . .").

The line between money laundering and terrorism financing is occasionally blurry because the proceeds of money laundering may be used to fund terrorism.²⁷ There are, however, important differences between the two.²⁸ For example, unlike money laundering, terrorism financing may stem from legitimate funding sources, such as private donations.²⁹ Most importantly, the primary goal of money laundering is to realize criminal financial gains.³⁰ By contrast, the primary goal of terrorism financing is to instill terror from acts of violence, or threats thereof, to further a political purpose.³¹ Although an in-depth discussion regarding the complexities of terrorist financing is beyond the scope of this article, this distinction is important to note.

Prior to 1986, money laundering was not a crime anywhere in the world; now, over 170 countries have criminalized it.³² It is difficult to discern the amount of money being laundered at a given time for several reasons. First, the crime of money laundering is geared towards secrecy because of the desire to conceal the source of illegal funds that are later converted to legitimate purposes.³³ Second, money launderers often move funds across national borders to further obfuscate the origins of illegal funds by taking advantage of the differences between countries' political, legal, and economic regimes.³⁴

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27. See DURRIEU, *supra* note 8, at 66–72 (discussing generally the nexus between money laundering and terrorist financing, and noting that “terrorist groups also need to practice *money laundering*, after committing a crime”). “[T]he terrorist group, Al-Qaeda, [receives] about forty percent of its funds from drug trafficking, twenty percent from extortion, and about ten percent from kidnapping.” *Id.* at 69 (citing Fletcher Baldwin, *Organized Crime, Terrorism, and Money Laundering in the Americas*, 15 FLA. J. INT’L L. 3, 4 (2002)); see also Protess & Bray, *supra* note 19, (recognizing the connection between money laundering and terrorism). “If a bank fails to live up to its commitments, there should be consequences. That is particularly true in an area as serious as anti-money-laundering compliance, which is vital to helping prevent terrorism and vile human rights abuses.” *Id.* (quoting New York State’s principal bank regulator, Superintendent of Financial Services, Ben Lawsky). New York regulators recently reopened their investigation of Standard Chartered and are considering revisiting settlements with some of the world’s biggest banks. Ben Protess & Jessica Silver-Greenberg, *Prosecutors Suspect Repeat Offenses on Wall Street*, N.Y. TIMES (Oct. 29, 2014, 3:56 PM), <http://dealbook.nytimes.com/2014/10/29/prosecutors-wrestling-with-wall-streets-repeat-offenders/> (“The cycle of misbehavior [(i.e., conducting transactions involving blacklisted countries)] is difficult to break”).
28. See DURRIEU, *supra* note 8, at 9 (emphasizing that money laundering must be excluded from the definition of terrorist financing).
29. *Id.* at 71.
30. *Id.*
31. *Id.* at 66–67.
32. In 1986, the United States and the United Kingdom were the first two countries to criminalize money laundering, and criminalization moved quickly to the international level with the signature of the Vienna Convention in 1988. *Id.* at 101. Roberto Durrieu argues that money laundering first evolved in the 1970s in the United States and not in the 1980s as many scholars suggest, specifically noting the U.S. Bank Secrecy Act enacted on October 26, 1970 as “the first effective effort to detect and sanction the problem of hiding ill-gotten assets from law enforcement, [a process] which . . . later on . . . acquire[d] the label of ‘money laundering law.’” *Id.* at 99 (footnote omitted).
33. Reuter & Truman, *supra* note 1, at 9.
34. See SCHOTT, *supra* note 16, at I-6. See generally Alison Smale, *Austrian Court Unblocks Assets of Former U.S. Ambassador’s Wife*, N.Y. TIMES, Sept. 12, 2014, at A8 (reporting on an international investigation by the U.S. Department of Justice of possible money laundering and tax evasion involving a former U.S. ambassador, Zalmay Khalilzad, and his wife).

While the total amount of money currently being laundered is hard to quantify, it is generally believed to be enormous. It is estimated that “[c]riminals, especially drug traffickers, may have laundered around \$1.6 trillion, or 2.7 per cent of global [gross domestic product (GDP)], in 2009, according to a new report by [the United Nations Office on Drugs and Crime].”³⁵ This enormous amount appears to continue a trend, as the International Monetary Fund estimated in 1996, that the aggregate amount of laundered funds was between two and five percent of the world’s annual GDP, equaling between \$590 billion and \$1.5 trillion.³⁶ Another report near that time provided an even greater estimate, noting that in 1995 alone, \$2.85 trillion was laundered globally.³⁷

Money laundering often occurs in countries with complex and highly developed financial systems that facilitate the initial placement or deposit of funds into accounts, securities, or insurance instruments.³⁸ The funds are then “layered” and moved through national and international financial systems to sanitize their origin.³⁹

B. The Corrosive Effects of Money Laundering

Regardless of where it occurs, successful money laundering permits criminals to “use[] their financial gains to expand their criminal pursuits and foster[] illegal activities such as corruption, drug trafficking, [and the] illicit trafficking and exploitation of human beings.”⁴⁰ Money laundering also imperils the reputation of

35. Press Release, United Nations Office on Drugs & Crime, UNODC Estimates that Criminals May Have Laundered US\$1.6 Trillion in 2009 (Oct. 25, 2011), available at <http://www.unodc.org/unodc/en/press/releases/2011/October/unodc-estimates-that-criminals-may-have-laundered-usdollar-1.6-trillion-in-2009.html>.

36. See SCHOTT, *supra* note 16, at I-6 to -7. (citing Vito Tanzi, Money Laundering and the International Finance System 3–4 (Int’l Monetary Fund, Working Paper No. 96/55, 1996)).

37. John Walker & Brigitte Unger, *Measuring Global Money Laundering: “The Walker Gravity Model”*, 5 REV. L. & ECON. 821, 824 (2009).

38. See SCHOTT, *supra* note 16, at I-7.

39. *Id.* at II-1. A money laundering scheme generally has three phases, “placement,” “layering,” and “integration.” Diane Marie Amann, *Spotting Money Launderers: A Better Way to Fight Organized Crime?*, 27 SYRACUSE J. INT’L L. & COM. 199, 214–15 (2000). Professor Amann describes the process as follows:

During the placement phase, illegal proceeds are consolidated—often by filtering through a casino, restaurant, or other high-cash-volume front business—then sent outside the United States via electronic transfer or physical transport. During the layering phase, funds are deposited in a bank in a haven jurisdiction—so called because the jurisdiction enforces bank secrecy and permits anonymous shell corporations—then transferred to the local branch of a reputable international, often European, bank. During the integration phase, funds are wired from the branch to the main bank, then returned to the United States for use as apparently legitimate funds.

Id. at 214–15 (footnotes omitted); see also Lisa A. Barbot, *Money Laundering: An International Challenge*, 3 TUL. J. INT’L & COMP. L. 161, 167 (1995) (identifying “the Bahamas, Bermuda, the Cayman Islands, Costa Rica, Hong Kong, the Netherlands, Switzerland, [and] Panama” as “haven” jurisdictions).

40. SCHOTT, *supra* note 16, at II-1; see also Scott Shane & Ben Hubbard, *ISIS Displaying a Deft Command of Varied Media*, N.Y. TIMES (Aug. 30, 2014), <http://www.nytimes.com/2014/08/31/world/middleeast/isis-displaying-a-deft-command-of-varied-media.html> (describing the terrorist group as “flush with wealth from kidnappings, oil piracy, bank robbery and extortion,” representing a formidable challenge).

national financial systems and the stability of individual institutions identified as money laundering participants.⁴¹ For example, depositors and borrowers will transfer their business from such institutions to safer financial partners, reducing a bank's source of funding and weakening a bank's loan portfolio.⁴²

There are other reasons for establishing a world order against money laundering besides its potential negative impact on nations' financial systems.⁴³ Those reasons include the desire to: (1) undermine organized crime;⁴⁴ (2) ensure morally that crime should not pay;⁴⁵ (3) promote the administration of justice by effectively investigating the secretive crime of money laundering, which should facilitate the investigations of the predicate offenses, a key public interest;⁴⁶ and (4) preclude money laundering from undermining the stability and security of countries.⁴⁷

Ultimately, money laundering is a hidden, complex, and serious global problem that persists, and perhaps has even increased since the Great Recession despite national and international efforts to eliminate it.⁴⁸ World leaders recognize that the ability to prevent money laundering transcends any single nation's resources and enforcement efforts,⁴⁹ and ultimately requires coherent standards and a globally harmonized legal approach.⁵⁰

III. THE FATF'S GENESIS AND SCOPE

A. *The FATF Structure and Mandate*

In 1989, the ministers of the world's major industrialized nations created the FATF to coordinate efforts to prevent money laundering within the international

41. See SCHOTT, *supra* note 16, at II-4 to -5.

42. *Id.* at II-5.

43. See DURRIEU, *supra* note 8, at 76 (concluding that there is no consensus in the academy regarding the reasons for prohibiting money laundering, and noting one author's belief that the inability to control the increase in transnational crime has prompted more rhetoric and effort to establish an "international monetary movement enforcement regime").

44. *Id.* at 78-80.

45. *Id.* at 89-91.

46. *Id.* at 91-92.

47. *Id.* at 92-93.

48. See DURRIEU, *supra* note 8, at 445; see, e.g., Baradaran et al., *supra* note 18, at 480-84; JAMES K. JACKSON, CONGRESSIONAL RESEARCH SERVICE REPORT RS21904: THE FINANCIAL ACTION TASK FORCE: AN OVERVIEW 8 (2012) [hereinafter CRS REPORT], available at <https://www.fas.org/sgp/crs/misc/RS21904.pdf> ("The economic implications of money laundering and terrorist financing pose another set of issues that argue for gaining greater control over this type of activity. According to the [International Monetary Fund], money laundering accounts for between \$600 billion and \$1.6 trillion in economic activity annually.").

49. See DURRIEU, *supra* note 8, at 445 (reporting that the United Nations Security Council has endorsed the FATF, supporting international action to combat money laundering).

50. *Id.*

financial system and member states' domestic systems.⁵¹ The FATF is an unelected, inter-governmental body devoid of lawmaking authority; rather, it relies on the political will of its members to adopt AML and CTF standards.⁵² The FATF is comprised of thirty-four countries and two regional organizations,⁵³ with an additional eight associate members and thirty observers.⁵⁴

The FATF's mandate is broad: to combat money laundering, terrorist financing, the financing of proliferation of weapons of mass destruction, and other threats to the integrity of the international financial system.⁵⁵ In 1990, the FATF developed a comprehensive master plan called the Forty Recommendations,⁵⁶ which were

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51. See GOOD PRACTICES, *supra* note 9, at 1; 2012 RECOMMENDATIONS, *supra* note 23. The FATF initially focused on AML measures, but later adopted Recommendations specifically targeting the financing of terrorism.
52. See Shepherd, *supra* note 4, at 85; Andrew de Lotbinière McDougall, *International Arbitration and Money Laundering*, 20 AM. U. INT'L L. REV. 1021, 1029–31 (2005) (briefly summarizing the FATF's origins).
53. FATF Members include Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, the European Commission, Finland, France, Germany, Greece, the Gulf Co-operation Council, Hong Kong, Iceland, India, Ireland, Italy, Japan, Kingdom of the Netherlands (i.e., the Netherlands, Antilles, and Aruba), Luxembourg, Mexico, New Zealand, Norway, Portugal, Republic of South Korea, the Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. *Members and Observers*, *supra* note 10; see also Shepherd, *supra* note 4, at 85; Terry, *supra* note 21; DURRIEU, *supra* note 8, at 121. The FATF charter members include the United States, the United Kingdom, Germany, France, Italy, and Japan. See DURRIEU, *supra* note 8, at 121 n.396; see also Shepherd, *supra* note 4, at 85–86 nn.4–6 (noting that in 1989, world leaders created the FATF to “develop and promote national and international policies to combat money laundering and terrorist financing”).
54. The associate FATF members are: the Asia/Pacific Group on Money Laundering (APG), the Caribbean Financial Action Task Force (CFATF), the Council of Europe's Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), the Eurasian Group (EAG), the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), the Financial Action Task Force on Money Laundering in South America (GAFISUD), the Inter-Governmental Action Group Against Money Laundering in West Africa (GIABA), and the Middle East and North Africa Financial Action Task Force (MENAFATF). *Members and Observers*, *supra* note 10; see also Shepherd, *supra* note 4, at 85 n.6.
55. *Who We Are*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/pages/aboutus/> (last visited Apr. 10, 2015); see also Terry, *Intro to the 2008 FATF Lawyer Guidance*, *supra* note 4, at 5–9 (providing an excellent discussion of the FATF's origins); see generally Shawn Donnan, *A Qualified Defence of Economic Complexity*, FIN. TIMES (July 20, 2014, 7:05 PM), <http://www.ft.com/intl/cms/s/2/7b91cee6-0ce1-11e4-bf1e-00144feabdc0.html#axzz3SWbFwzxJ> (reviewing the book *The Butterfly Defect* and noting its author's warning that “globalisation is now so complex—and stretched so thin in some cases—that it is extremely vulnerable to relatively small events that pose much larger risks,” and that the hyper-interconnectedness of the world amplifies the consequences of local events).
56. Shepherd, *supra* note 4, at 85–86 & nn.4–6; see also *United States*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/countries/u-z/unitedstates/> (last visited Apr. 10, 2015); *United Kingdom*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/countries/u-z/unitedkingdom/> (last visited Apr. 10, 2015); *Germany*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/countries/d-i/germany/> (last visited Apr. 10, 2015); *France*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/countries/d-i/france/> (last visited Apr. 10, 2015); *Italy*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/countries/d-i/italy/> (last visited Apr. 10, 2015); *Japan*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/countries/j-m/japan/> (last visited Apr. 10, 2015).

designed to avoid interfering with legitimate economic transactions and “consist of four major sections: (a) the framework of the Forty Recommendations, (b) the role of national legal systems in combatting money laundering, (c) the role of financial systems in combatting money laundering, and (d) international cooperation.”⁵⁷

The FATF employs a three-pronged strategy to combat money laundering and terrorist financing. First, the FATF establishes standards; second, it promotes the “effective implementation of legal, regulatory and operational measures,” and third, it identifies money laundering and terrorist financing threats.⁵⁸ As a political matter, each FATF member must agree in writing to support the Recommendations and policies, and submit to periodic Mutual Evaluations.⁵⁹

Shortly after the September 11, 2001 attacks on the United States, the FATF adopted another eight Recommendations, and an additional Recommendation in October 2004, to help eliminate terrorist financing. These nine new Recommendations supplemented the initial forty and became commonly known as the “40+9 Recommendations.”⁶⁰ The United Nations Security Council underscored the importance of the Recommendations by expressly endorsing them in 2005.⁶¹ In 2012, the FATF replaced the 40+9 Recommendations with a set of reformulated Recommendations, now known as either the Forty Recommendations or FATF Recommendations,⁶² and today they, along with their Interpretive Notes, “constitute the international standards for combating money laundering and terrorist financing.”⁶³

The FATF Recommendations direct members to develop risk-based rules for preventing money laundering and terrorist financing. Unlike a rules-based approach, a risk-based approach offers two benefits.⁶⁴ First, it conserves members’ limited resources

57. Shepherd, *supra* note 4, at 86; *see generally* Sam Fleming et al., *Regulators Split on Too-Big-to-Fail Banks*, FIN. TIMES (July 20, 2014, 6:41 PM), <http://www.ft.com/intl/cms/s/0/98e3f7d2-0e83-11e4-b1c4-00144feabdc0.html#axzz3SWbFwzxJ> (highlighting the enormous difficulty in developing a consensus concerning “the problem of banks that are too big to be permitted to fail” because of different “countries’ legal regimes, corporate structures and banking traditions”).

58. *See Who We Are*, *supra* note 55.

59. Shepherd, *supra* note 4, at 85–86; *see infra* notes 83–87 and accompanying text (discussing the consequences for failing to support the FATF’s policies).

60. *See GOOD PRACTICES GUIDANCE*, *supra* note 9, at 1; Terry, *supra* note 21, at 489.

61. *See DURRIEU*, *supra* note 8, at 122 (citing S.C. Res. 1617, ¶ 7, U.N. Doc. S/RES/1617 (July 29, 2005)).

62. Although the 2012 consolidation reduced the 40+9 Recommendations to forty, the new Forty Recommendations fully incorporate the substance of the nine post-9/11 provisions. *See* Terry, *supra* note 21, at 489 & nn.5–7.

63. *GOOD PRACTICES GUIDANCE*, *supra* note 9, at 1; *see also* Shepherd, *supra* note 4, at 88; *DURRIEU*, *supra* note 8 at 121 (asserting that the Forty Recommendations are “the key legal standards in the global policy against [money laundering] and [terrorist financing]”).

64. *FORMAL OPINION 463*, *supra* note 23, at 2 (describing the “rules-based approach [as] requir[ing] compliance with every element of detailed laws, rules, or regulations irrespective of the underlying quantum or degree of risk”).

for combatting AML and CFT activities.⁶⁵ Second, the risk-based strategy allows members to focus their limited resources on situations and persons that pose the greatest risk of money laundering and terrorist financing.⁶⁶ For example, Recommendations 4 through 25 outline risk-based preventative measures for financial institutions and, on a more limited basis, for designated non-financial businesses and professions (DNFBPs), such as realtors and lawyers, to combat money laundering.⁶⁷ These same AML preventative measures apply to terrorist financing.⁶⁸

The Recommendations' preventative measures become de facto mandatory obligations for FATF members who want to avoid being found noncompliant.⁶⁹ Generally, the Recommendations are sufficiently flexible to allow a country to adopt rules compatible with its economic circumstances and legal system.⁷⁰ For example, Recommendation 23 provides that lawyers and other DNFBPs "should be required to report suspicious transactions when, on behalf of or for a client, they engage in financial transactions in relation to the activities described in paragraph (d) of Recommendation 22."⁷¹ The list covers a broad range of legal services including: "[the] 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."⁷²

The notion of lawyers filing STRs prompted significant controversy within legal professions from around the world, with opponents arguing that the policy violated principles of confidentiality and the attorney-client privilege and that it might interfere with the administration of justice and rule of law.⁷³ The controversy caused the FATF to adopt an Interpretative Note to Recommendation 23, which provides

65. See GOOD PRACTICES GUIDANCE, *supra* note 9, at 2–3 (encouraging "the legal profession generally" to voluntarily develop risk-based strategies that comport with "the practical realities of the practice of law"); see also Shepherd, *supra* note 4, at 85–86 (noting that in 1989, world leaders created the FATF to "develop and promote national and international policies to combat money laundering and terrorist financing").

66. GOOD PRACTICES GUIDANCE, *supra* note 9, at 2–3.

67. SCHOTT, *supra* note 16, at VI-2. Some rules sound less risk-based and generally more proscriptive, such as Recommendation 3, which suggests that members criminalize money laundering. See 2012 RECOMMENDATIONS, *supra* note 23, at 12; Shepherd, *supra* note 4, at 89.

68. SCHOTT, *supra* note 16, at II-2.

69. FATF members who are found noncompliant may face a diminished international reputation. *Id.* at III-11; see also *infra* notes 79–92 and accompanying text (explaining potential sanctions and their consequences).

70. SCHOTT, *supra* note 16, at II-1.

71. 2012 RECOMMENDATIONS, *supra* note 23, at 20.

72. *Id.*

73. See Terry, *supra* note 21, at 492 ("Given the legal profession's important role with respect to the administration of justice . . . the legal profession thought it was important to have . . . its situation [addressed separately,] rather than including it with casinos, precious metal dealers, and others."); Ellen S. Podgor, *Regulating Lawyers: Same Theme, New Context*, J. PROF. LAW., 2010, at 19 ("As [the FATF] [R]ecommendations move from policy into practicality, it is important to consider the appropriate balance needed to maintain a strong adversarial system of justice."). Professor Podgor also notes that

that lawyers “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.”⁷⁴ Reflecting the flexibility in the FATF Recommendations, and in accordance with their legal system, U.S. lawyers are not required to file STRs to Intelligence Units, unlike their counterparts in Great Britain and elsewhere.⁷⁵

B. *The FATF’s Enforcement Policies*

The FATF ultimately enforces its standards in two ways.⁷⁶ First, FATF members complete an annual self-assessment questionnaire concerning their implementation of FATF policies,⁷⁷ and the answers are reviewed by the FATF to ensure compliance with the relevant standards.⁷⁸ Second, there is a peer-review process through a “Mutual Evaluation,” in which FATF members review each other and non-FATF members for voluntary compliance with FATF’s standards.⁷⁹ This FATF

some of these policy decisions may compromise the attorney’s role as advocate for the client, *id.* at 196, and that protecting confidential attorney-client communications is an important principle, *id.* at 195.

74. 2012 RECOMMENDATIONS, *supra* note 23, at 83. The FATF Interpretive Notes provide clarification and guidance concerning the application of particular Recommendations. *See* Shepherd *supra*, note 4, at 87.
75. *See* FORMAL OPINION 463, *supra* note 23 (“[M]andatory reporting of suspicion about a client is in conflict with Rules 1.6 and 1.18, and reporting without informing the client is in conflict with Rule 1.4(a)(5).”); *see also* James T. Gathii, *The Financial Action Task Force and Global Administrative Law*, J. PROF. LAW., 2010, at 197, 207 & n.48 (noting that the ABA has resisted the mandatory reporting of STRs, even though STRs are required for financial institutions and DNFBPs under the USA PATRIOT Act); *see generally* ARNOLD & PORTER LLP, THE ROLE OF LAWYERS IN THE FIGHT AGAINST CORRUPTION: A SUMMARY REPORT (2013) [hereinafter ROLE OF LAWYERS], available at <http://www.trust.org/contentAsset/raw-data/af585d7d-6a7f-4c65-9b5c-3b5534118c74/file> (considering legal issues surrounding corruption and, in part, the different ethical approaches to disclosure and reporting for lawyers based on a comparative survey of seventeen international jurisdictions including the United States). “[T]here is no universal approach to the . . . responsibilities of lawyers when dealing with corrupt practices,” but “it seems likely that more . . . countries will follow the trend of increased disclosure championed by the European Union and the United States.” *Id.* at 5–6.
76. *See generally* FIN. ACTION TASK FORCE, METHODOLOGY FOR ASSESSING TECHNICAL COMPLIANCE WITH THE FATF RECOMMENDATIONS AND THE EFFECTIVENESS OF AML/CFT SYSTEMS (Feb. 2013) [hereinafter METHODOLOGY], available at <http://www.fatf-gafi.org/media/fatf/documents/methodology/fatf%20methodology%2022%20feb%202013.pdf>.
77. *See* SCHOTT, *supra* note 16, at III-9. For an example of a completed questionnaire, see Gibraltar’s 2002 self-assessment, which is available at: <http://www.fsc.gi/download/terrorism/terrorisselfassess.pdf>.
78. *See* DURRIEU, *supra* note 8, at 124.
79. *See* FIN. ACTION TASK FORCE, AML/CFT EVALUATIONS AND ASSESSMENTS (2009), available at <http://www.fatf-gafi.org/media/fatf/documents/reports/Handbook%20for%20assessors.pdf>. The Handbook provides the following:

[A] typical assessment team will consist of four experts who should come from different countries, and whose expertise must cover all aspects of the fight against money laundering and the financing of terrorism. For larger or more complex jurisdictions, additional experts could be required. Each evaluation/assessment team should therefore be comprised of: a legal expert (a judge, a prosecutor or a Ministry of Justice representative); two financial experts (experts in regulatory matters: from a Finance Ministry, a Central

comprehensive peer review mechanism integrates international law concepts and has been described as the “landmark achievement of the FATF regime,”⁸⁰ which has “developed into a credible compliance assessment process, analyzing both members’ and nonmembers’ compliance with [FATF] standards.”⁸¹

The FATF Mutual Evaluation process incentivizes member countries “to become more proactive in enforcement through a higher level of participation and involvement.”⁸² The United States and others wish to avoid being judged as noncompliant with FATF standards, in part, to avoid being identified on a publicly available list as a “non-cooperative countr[y] and territor[y]” (NCCT),⁸³ jeopardizing their governments’ political standing both at home and abroad. “An NCCT country is encouraged to make rapid progress in remedying its deficiencies,” as deficient countries and territories risk having their FATF membership suspended.⁸⁴ Noncompliance adversely reflects on

Bank or a regulatory authority. Expertise regarding the preventive measures is necessary both for the financial sector and for the experts in preventive measures applied by designated non-financial businesses and professions); and a law enforcement expert (from operational services such as the police, customs or a financial intelligence unit).

Id. at 6; *see also* METHODOLOGY, *supra* note 76, at 120 (Evaluation Template published for use by assessors).

80. Beekarry, *supra* note 17, at 143.

81. *Id.*

82. *Id.* at 144; *see also* Navin Beekarry, *The International Anti-Money Laundering and Combating the Financing of Terrorism Regulatory Strategy*, 31 NW. J. INT’L L. & BUS. 137, 144 (2011) (reporting an increase in the number of countries participating “in the global AML/CTF initiatives and . . . adopt[ing] legislation” as a “good indication of countries’ changing [their] behavior” and that 184 jurisdictions endorsed the FATF standards, constituting more than eighty-five percent of the world and underscoring the long reach of the compliance process); *see generally* 2012 RECOMMENDATIONS, *supra* note 23, at 26 (“Countries should ensure that there is a range of effective, proportionate and dissuasive sanctions, whether criminal, civil or administrative, available to deal with natural or legal persons covered by Recommendations 6, and 8 to 23, that fail to comply with the AML/CTF requirements. Sanctions should be applicable not only to financial institutions and DNFBPs, but also to their directors and senior management.” (Recommendation 35)).

83. *See* SCHOTT, *supra* note 16, at III-10. The United States will have its Fourth Mutual Evaluation in 2015. *See* FIN. ACTION TASK FORCE, GLOBAL ASSESSMENTS CALENDAR (2014), *available at* <http://www.fatf-gafi.org/media/fatf/documents/assessments/Global-assessment-calendar.pdf>. The last evaluation, in 2006, found the United States partially compliant on four points and noncompliant on three. *See* Terry, *Intro to the 2008 FATF Lawyer Guidance*, *supra* note 4 (providing a helpful explanation and chart of the noncompliant and partially compliant ratings for the United States from the 2006 FATF Third Mutual Evaluation).

84. SCHOTT, *supra* note 16, at III-10. As James K. Jackson, a Specialist in International Trade and Finance at the Congressional Research Service, noted in his 2012 report: “[The] FATF has no enforcement capability, but can suspend member countries that fail to comply on a timely basis with its guidelines. Recently, the FATF warned Turkey that its membership will be suspended in 2013 unless it becomes more aggressive in criminalizing money laundering.” CRS REPORT, *supra* note 48, at 1. The following year, however, the FATF reported:

On 7 February 2013, the Turkish Grand National Assembly adopted the *Law on the Prevention of the Financing of Terrorism*, which was signed into law on 15 February 2013. The new law addresses many of the shortcomings identified in Turkey’s terrorist financing offence and creates the legal basis for the freezing of terrorist assets. The FATF welcomes this significant step made by Turkey, which improves the country’s compliance with the international standards. As a consequence, the FATF has decided not to suspend Turkey’s membership.

nations' reputations to honor their international obligations and potentially exposes them to a system of sanctions, such as "blacklisting . . . accompanied by countermeasures."⁸⁵ The mere threat of being blacklisted often causes noncompliant countries to expeditiously cure their deficiencies.⁸⁶

There are potentially severe consequences for financial institutions and related enterprises that deal with blacklisted countries. For example, in 2012, the New York State Department of Financial Services (NYDFS) fined the British bank Standard Chartered \$667 million for processing transactions for Iran and other countries blacklisted by the United States.⁸⁷ In another "related enterprise" case, the prominent accounting firm, Price Waterhouse-Coopers (PWC), settled a claim in 2014 with the NYDFS for \$25 million.⁸⁸ In that case, the Bank of Tokyo-Mitsubishi UFJ was under regulatory scrutiny for conducting business with Iran and other blacklisted countries, including routing some transactions through its New York branch.⁸⁹ PWC reviewed the transactions and submitted a report to regulators that it certified as objective and impartial but, at the bank's request, deleted language noting the bank's "special instructions" to employees to avoid drawing attention to transactions with countries under U.S. sanctions.⁹⁰

In spite of this positive step, there still remain a number of ongoing shortcomings in the Turkish counter-terrorist financing regime. Turkey must address these shortcomings in order to reach a satisfactory level of compliance with the FATF standards. Turkey has committed to addressing these deficiencies and will submit, prior to the next FATF meeting in June 2013, a report on how these deficiencies are being addressed.

Outcomes of the FATF Plenary, 20–22 February 2013, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/countries/s-t/turkey/documents/outcomesofthefatfplenary20-22february2013.html> (last updated Mar. 8, 2013).

85. Beekarry, *supra* note 17, at 143 (noting the international concepts of "compliance, implementation and effectiveness"); *see also* J.C. Sharman, *Power and Discourse in Policy Diffusion: Anti-Money Laundering in Developing States*, 52 INT'L STUD. Q. 635, 652–53 (2008) (discussing how blacklisting, along with other forces, have promoted the international spread of AML policies in developing countries); Shepherd, *supra* note 4, at 83.
86. J.C. SHARMAN, *THE BARK IS THE BITE: INTERNATIONAL ORGANIZATIONS AND BLACKLISTING* 3 (2004), *available at* http://citation.allacademic.com/meta/p_mla_apa_research_citation/0/5/9/9/4/pages59944/p59944-1.php (noting that in all twenty-three instances where FATF blacklisting occurred, or was about to occur, FATF compliance was achieved).
87. *See* Protes & Bray, *supra* note 19 (highlighting a new settlement for failing to live up to an earlier promise to adopt AML measures). Individual countries set fines for violating laws that are designed to implement FATF guidelines. *See* 2012 RECOMMENDATIONS, *supra* note 23, at 26.
88. Ben Protes, *Altered Study Draws Fine for Auditor*, N.Y. TIMES, Aug. 19, 2014, at B1. A "related enterprise" is an entity that facilitates the underlying illegal activity. *See id.*
89. *Id.*; *see also* Public Statement, Fin. Action Task Force, High-Risk and Non-cooperative Jurisdictions (June 27, 2014), *available at* <http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/documents/public-statement-june-2014.html> (providing a general list of blacklisted countries, including Iran).
90. Protes, *supra* note 88.

IV. THE FATF: GATEKEEPING AND LAWYER ETHICS—REFLECTIONS

A. Gatekeeping

A decade after its genesis, the FATF identified several professions—such as accountants and lawyers—as “gatekeepers” who were capable of assisting the FATF in carrying out its mission.⁹¹ Recommendation 22 labels such professions as DNFBPs⁹² and transfers to them many of the same AML and CTF responsibilities in the preceding Recommendations that apply primarily to financial institutions.⁹³

The underlying rationale for lawyer gatekeeping is that lawyers are in a special position to monitor and shape both current and prospective client behavior by counseling them to follow the law.⁹⁴ Lawyers’ specialized training in the art of communication and persuasion, high professional ethics standards, and commitment to justice and the public good⁹⁵ make them an attractive choice to be societal gatekeepers.⁹⁶

91. FIN. ACTION TASK FORCE, RBA GUIDANCE FOR LEGAL PROFESSIONALS ¶ 11 (2008) [hereinafter FATF RBA], available at <http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Legal%20professions.pdf> (“Lawyers hold a unique position in society by providing access to law and justice for individuals and entities . . .”). For a general example of how U.S. policy has balanced the FATF Recommendations on “gatekeepers” with the legal profession’s concerns about the attorney-client relationship, see the prepared remarks of Treasury Deputy Secretary Stuart Eizenstat before a congressional committee in 2000:

We are aggressively pursuing programs aimed at the lawyers, accountants and auditors who function as “gatekeepers” to the financial system. While legal rules properly insulate professional consultations from overly broad scrutiny and create a zone of safety within which professionals can advise their clients, those rules should not create a cover for criminal conduct.

Press Release, U.S. Dep’t of the Treasury, Treasury Deputy Secretary Stuart Eizenstat House Committee on Banking and Financial Services. (Mar. 9, 2000), available at <http://www.treasury.gov/press-center/press-releases/Pages/ls445.aspx>; see also Paton, *supra* note 4, at 171 (discussing the conception of the role of lawyer as “gatekeeper” and its close relationship to the “role of government in determining the parameters of professional responsibility and regulation of the legal profession”); Shepherd, *supra* note 4, at 89; Terry, *Intro to the 2008 FATF Lawyer Guidance*, *supra* note 4, at 9–10; GOOD PRACTICES GUIDANCE, *supra* note 9, at 1.

92. 2012 RECOMMENDATIONS, *supra* note 23, at 19.

93. GOOD PRACTICES GUIDANCE, *supra* note 9, at 2. Examples of DNFBPs include “lawyers, notaries, trust and company service providers (‘TCSPs’), real estate agents, accountants, and auditors.” *Id.* at 1.

94. FORMAL OPINION 463, *supra* note 23, at 1 (“The underlying theory behind the ‘lawyer-as-gatekeeper’ idea is that the lawyer has the capacity to monitor and to control, or at least to influence, the conduct of his or her clients and prospective clients in order to deter wrongdoing.”); Shepherd, *supra* note 4, at 88 n.28 (quoting FIN. ACTION TASK FORCE, REPORT ON MONEY LAUNDERING TYPOLOGIES 2000–2001, at 12 (2001), available at <http://fincen.gov/pdf/fatftypologie.pdf>) (noting that lawyers are viewed as good “gatekeepers” because of their ability to provide access “to the various functions that might help the criminal move or conceal” funds).

95. See ANTHONY T. KRONMAN, THE LOST LAWYER 18 (1993) (discussing the lawyer-statesman ideal and the classic role of lawyers to serve justice and the public not for personal gain, but to promote the public good).

96. See Elizabeth J. Hubertz, *Public Interest, Professional Bargains: Ethical Conflicts Between Lawyers and Professional Engineers*, 31 WASH. U. J.L. & POL’Y 83, 91 (2009) (quoting MODEL CODE OF PROF’L RESPONSIBILITY pmbl. ¶ 13 (2002)) (“Lawyers play a vital role in the preservation of society.”); see also MODEL RULES OF PROF’L CONDUCT pmbl. ¶ 13 (2014) [hereinafter MODEL RULES].

Although this theory is not new, empirical evidence supporting its efficacy in shaping client conduct is difficult to find.

Lawyer conduct that fails to exhibit a concern for professional ethics, justice, and the public good is especially troublesome because lawyers have a special, governmentally sanctioned role in protecting individual rights and promoting justice.⁹⁷ The significant increase in external regulation of the profession by governmental and other authorities during the last generation is one consequence of lawyers failing this expectation by engaging in unethical conduct.⁹⁸

The concept that lawyers are gatekeepers has generated considerable debate both in the legal academy and the profession.⁹⁹ The American Bar Association (ABA) recently noted this debate in Formal Opinion 463: Client Due Diligence, Money Laundering, and Terrorist Financing, which was partly a response to “intergovernmental standards-setting organizations and government agencies . . . suggest[ing] that lawyers should be ‘gatekeepers’” to combat money laundering and terrorist financing.¹⁰⁰ The Opinion concluded that the “[r]ules do not mandate that a lawyer perform a ‘gatekeeper’ role,” but nevertheless endorsed the ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing.¹⁰¹ The Guidance provides lawyers with a voluntary, risk-based approach consistent with the useful FATF guidelines for CDD.¹⁰²

The FATF has pressured the U.S. government to require lawyers to follow more closely all of the Recommendations.¹⁰³ The legal profession has responded, in part, by asserting that such pressure is unnecessary since lawyer ethics rules already accomplish

97. The very first sentence of the ABA’s Model Rules of Professional Conduct (“Model Rules”) underscores the fundamental and central notion that lawyers “hav[e] a special responsibility for the quality of justice” as “member[s] of the legal profession.” MODEL RULES, *supra* note 96, at pmb1. ¶ 1; *see also* TIM DARE, THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER’S ROLE 1 (2009) (“Ironically, the profession most obviously charged with the protection and defense of ‘justice’ is commonly regarded as being inimical to that very virtue.”). Dare goes on, however, to argue that lawyers have moral grounds for their duties to clients that “may allow or require them to act in ways which would be immoral were they acting outside of their professional roles.” *Id.* at 4; *see generally* ROLE OF LAWYERS, *supra* note 75, at 5 (“[T]he traditional role of lawyers is that of defender of justice and representative of individuals before the law[.] [T]he fall-out from lawyers being involved in corrupt practices can be far greater than that of other professions, and rightly so.”).

98. *See generally* John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959 (2009).

99. FORMAL OPINION 463, *supra* note 23, at 1 (“Many have taken issue with this theory and with the word ‘gatekeeper.’”) (footnote omitted). The ABA “do[es] not mandate that a lawyer perform a ‘gatekeeper’ role” in its Model Rules. *Id.*

100. *Id.*

101. *Id.* at 1–4 (commenting on the “usefulness” of the Voluntary Good Practices Guidance to lawyers for avoiding unwitting involvement in money laundering and terrorism financing crimes).

102. *Id.* at 1–2.

103. GOOD PRACTICES GUIDANCE, *supra* note 9, at 3 (“The federal government is under pressure from [the] FATF and others (including development agencies . . . The World Bank, and the United Nations) to adopt legislation implementing some or all of the provisions of the Recommendations . . .”).

many of the FATF's AML and CTF goals.¹⁰⁴ Most notably, for example, lawyers may not assist clients in their criminal conduct,¹⁰⁵ and lawyers risk professional discipline, including disbarment, suspension, and even civil or criminal liability, for aiding in such conduct.¹⁰⁶

B. Lawyer Ethics Rules, the FATF, and CDD

The ABA Model Rules of Professional Conduct ("Model Rules") reflect, and help shape, the legal profession's behavioral norms.¹⁰⁷ Nearly every jurisdiction in the United States has adopted the Model Rules to some degree,¹⁰⁸ and lawyers must follow their jurisdiction's version or risk being disciplined for ethical transgressions. In a sense, these rules and the Recommendations share a common purpose in deterring lawyer participation in money laundering and terrorist financing.¹⁰⁹ Several Model Rules are consistent with—and arguably promote—the FATF's AML and CTF goals. In particular, Recommendation 10, entitled "Customer Due Diligence and Record Keeping," imposes certain CDD measures on lawyers similar to those required by the Model Rules, albeit more generally.¹¹⁰

The FATF's CDD acts like an early warning or detection system for financial institutions and lawyers because it produces information regarding the likelihood of money laundering and terrorist financing at the outset of the relationship.¹¹¹ Since

104. *Id.* at 2 (noting the intense debate within the profession over concerns that the FATF might "undermine the attorney-client privilege or the duty of client confidentiality or otherwise impede the delivery of legal services generally").

105. MODEL RULES, *supra* note 96, R. 8.4(b).

106. *See, e.g.*, Cincinnati Bar Ass'n v. Kellogg, 933 N.E.2d 1085 (Ohio 2010) (suspending a lawyer convicted of money laundering); Disciplinary Counsel v. Gittinger, 929 N.E.2d 410 (Ohio 2010) (suspending an attorney convicted of money laundering and conspiracy to commit bank fraud).

107. *See* Jack P. Sahl, *Real Metamorphosis or More of the Same: Navigating the Practice of Law in the Wake of Ethics 20/20*, 47 AKRON L. REV. 1, 22 (2013) (Andrew Perlman, chief reporter for Ethics 20/20, "stated that marketplace developments are the 'predominant' reason for changes in [lawyers'] behavioral norms and that 'ethics rule changes reinforce those normative developments in the marketplace and may even cause some changes in the marketplace.' Perlman does not think 'it's a one-way direction'").

108. *See State Adoption of the ABA Model Rules of Professional Conduct*, AM. B. ASS'N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Apr. 10, 2015) [hereinafter *ABA State Adoption*].

109. *See* SCHOTT, *supra* note 16, at VI-2. (noting that, in an earlier version of the Recommendations, many of the same preventative measures could be found in Recommendations 5 through 25).

110. Recommendation 22 directs lawyers and other DNFBPs to follow the CDD and reporting requirements aimed primarily at financial institutions as set out in earlier Recommendations. *See* 2012 RECOMMENDATIONS, *supra* note 23, at 19–20. Recommendation 22 specifically cites Recommendations 10, 11, 12, 15, and 17 as containing the CDD and reporting provisions. *Id.* DNFBPs also include: casinos, real estate agents, and dealers in precious metals or stones and trust and company service providers—for example, persons acting as a formation agent or as a director or partner of a trust or company, as well as notaries, who are listed in the same subsection as lawyers. *Id.*

111. Both the FATF and the legal profession's CDD standards also increase the chances for money laundering and terrorism financing detection later in the attorney-client relationship because both regulatory regimes

the CDD standards apply to all DNFBPs, the FATF creates an army of professionals to serve on the front line of information gathering with respect to money laundering and terrorist financing.¹¹² As “front-line professionals,” these DNFBPs “furnish access to the various [commercial, financial, and governmental] functions that might help criminals move or conceal funds.”¹¹³ Potential money launderers or terrorist financiers likely need to involve DNFBPs—especially lawyers—in the early stages of their criminal scheme to avoid mistakes that may draw attention to them, which underscores the need to identify such suspicious activity at its onset.

Recommendation 22 specifically requires lawyers and other DNFBPs to follow the FATF’s CDD directives beginning in Recommendation 10. These directives require lawyers to follow CDD procedures when “prepar[ing] for or carry[ing] out transactions . . . concerning the following activities: (1) buying and selling of real estate; (2) managing of client money, securities or other assets; (3) management of bank, savings or securities accounts; (4) organisation of contributions for the creation, operation or management of companies; [and] (5) [the] creation, operation or management of legal persons or arrangements, and buying and selling of business entities.”¹¹⁴

The CDD outlined in the Recommendations preceding Recommendation 22 is comprehensive and well-suited to achieving the FATF’s AML and CFT goals.¹¹⁵ For example, CDD procedures in Recommendation 10 require lawyers to: verify the customer’s identity using reliable independent source documents, data, or information; identify the beneficial owner of the customer; understand the purpose and intended nature of the customer’s business or, in the case of lawyers, their professional relationship to the client; and conduct ongoing due diligence throughout the relationship to ensure that the transactions being conducted are consistent with the lawyer’s knowledge of the client and the client’s business and risk profile. This ongoing duty also extends to ensuring that the client’s source of funds is consistent with the lawyer’s knowledge of the client’s legitimate endeavors. When the lawyer cannot comply with the due diligence above, Recommendation 10 directs the lawyer to terminate the relationship.¹¹⁶

The level of necessary due diligence depends on the client’s identity, the countries involved, and the type of service requested.¹¹⁷ Lawyers must apply their independent

require lawyers to continue monitoring their customer relationships. *See* 2012 RECOMMENDATIONS, *supra* note 23, at 14 (mandating “ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution’s knowledge of the customer, their business and risk profile, including, where necessary, the source of funds”).

112. *See* 2012 RECOMMENDATIONS, *supra* note 23, at 19.

113. FORMAL OPINION 463, *supra* note 23, at 1 n.2.

114. 2012 RECOMMENDATIONS, *supra* note 23, at 19–20.

115. *Id.* at 14–16, 17, 18 (CDD and reporting provisions).

116. *Id.* at 14–15.

117. The ABA Voluntary Good Practices Guidance notes “three major risk categories [for] legal engagements: (a) country/geographic risk, (b) service risk, and (c) client risk.” GOOD PRACTICES GUIDANCE, *supra* note

judgment in weighing each of these risk categories. The overall assessment will inevitably “vary from one lawyer or firm to another because of the size, sophistication, location, and nature and scope of services offered by the lawyer or the firm.”¹¹⁸

C. The Intersection: Lawyer Ethics Rules and the FATF

Although less detailed than the FATF requirements, lawyers are currently obligated to engage in their own type of CDD. Model Rule 1.1 requires lawyers to—at minimum—be competent in delivering legal services.¹¹⁹ Competency is a multifaceted concept and arguably involves more than simply being a good legal technician or knowledgeable in legal doctrine and procedure. It also involves empathizing with the human dimensions of the client’s problems in an attempt to support, counsel, and help the client reach a positive resolution of his problem.

Competency begins at either the initial interview or the intake stage, when Rule 1.2 requires the lawyer to reach a clear understanding with the client regarding the scope of legal services to be provided.¹²⁰ Further, the lawyer bears the burden of effectively establishing the parameters of the representation with the client under Rule 1.4.¹²¹ The client-intake stage, in many ways, is the cornerstone of the attorney-client relationship. The lawyer learns important facts about the client and the client’s problem, identifies the legal issues, starts to formulate a representation strategy, considers possible conflict of interests (both business and professional), and makes an initial assessment of the client’s personality.¹²² For example, does the client impress the lawyer as articulate and trustworthy? Also during the client-intake stage, important professional and administrative matters are covered, and hopefully memorialized, concerning fees, expenses, billing protocol, the ongoing responsibility of both lawyer and client to communicate, and the confidentiality of their communications.

9, at 15. For a helpful discussion of each risk category, see *id.* at 119–30. See also Shepherd, *supra* note 4, at 94; Terry, *Intro to the 2008 FATF Lawyer Guidance*, *supra* note 4, at 16 & nn.88–89.

118. Shepherd, *supra* note 4, at 94.

119. The Model Rules have been adopted with some modifications by every state in the nation. See *ABA State Adoption*, *supra* note 108.

120. MODEL RULES, *supra* note 96, R. 1.1 (Competence), R. 1.2 (Scope of Representation); see Jack P. Sahl, *A 2014 Update: What Every Entertainment Lawyer Needs to Know—How to Avoid Being the Target of a Legal Malpractice Claim or Disciplinary Action*, in 1 PRACTISING L. INST., COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 2014, at 1-1069, 1-1105 (2014) [hereinafter COUNSELING CLIENTS] (“[C]ompetent handling of a matter starts with the initial client and case screening.”).

121. MODEL RULES, *supra* note 96, R. 1.4(a)(3), (5) (directing the lawyer “to keep the client reasonably informed about the status of the [representation]” and to “consult . . . about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the [Model Rules] or other law”); see *id.* R. 1.2.

122. See Sahl, *supra* note 120, at 1-1084 (emphasizing the importance of screening a client at the intake stage and listing steps for minimizing the likelihood of a malpractice or disciplinary action).

LAWYER ETHICS AND THE FINANCIAL ACTION TASK FORCE: A CALL TO ACTION

Rule 1.18 imposes a duty on lawyers to protect confidential communications with a prospective client, even if an attorney-client relationship is never formed.¹²³ This significant ethical obligation is designed to facilitate the flow of information from the client as early as possible and set a precedent for the entire professional relationship, promoting better-informed decisionmaking by the lawyer and a better understanding of the client's identity and needs.¹²⁴

It is also important at the intake stage to highlight Rule 1.2(d), which prohibits the lawyer from assisting a client in fraudulent or criminal conduct.¹²⁵ Rule 8.4 expressly identifies such assistance as "misconduct," and further states that any attempt to circumvent an ethics rule subjects the lawyer to professional discipline and possible termination of the relationship.¹²⁶ The intake stage provides a special opportunity for the lawyer to remind the client at the outset that, although they have a professional relationship, he is bound both ethically and legally by Rule 1.2(d).¹²⁷ The confluence of the mandates in Rules 1.1, 1.2(d), and 8.4 should result in the lawyer obtaining substantial client information and underscoring his duty to refrain from facilitating any illegal conduct the client may wish to carry out. This result is designed to accomplish the same AML and CFT goals reflected in the FATF CDD directives for DNFBBs.¹²⁸

The lawyer may also wish to discuss Rule 1.16(a)(1) at the intake stage because this rule prohibits him from performing services that violate any law or ethical rule¹²⁹ and

123. MODEL RULES, *supra* note 96, R. 1.18. Model Rule 1.18(b) recognizes that, under Model Rule 1.9, information concerning a former client may be revealed, which constitutes an exception to the general rule against revealing information learned in consultation with a prospective client. *Id.* R. 1.18(b)

124. *See* Sahl, *supra* note 120, at 1-1082 n.33. "Honest and full communication with the lawyer is promoted by educating the client about the attorney-client evidentiary privilege and the lawyer's ethical obligation to protect information relating to representation. It is important that the lawyer discuss these concepts and their limitations with the client as soon as possible." *Id.*

125. GOOD PRACTICES GUIDANCE, *supra* note 9, at 8 ("CDD is not intended to place the lawyer in an adversarial relationship with the client; rather, the purpose is to make sure the lawyer knows the true identity and business goals of the client." (emphasis added)); *see also* FATF RBA, *supra* note 91, at 31-32 (containing a principal at paragraph 114 under the subheading, "Customer Due Diligence/Know Your Customer," and "intend[ing] to enable a legal professional to form a reasonable belief that [he] has appropriate awareness of the true identity of each client").

126. MODEL RULES, *supra* note 96, R. 8.4(a)-(c). It is also misconduct "to knowingly assist or induce another [to violate, or attempt to violate, the Model Rules], or do so through the acts of another." *Id.* R. 8.4(a).

127. COUNSELING CLIENTS, *supra* note 120, at 1-1078 to -1079.

128. *See* FORMAL OPINION 463, *supra* note 23.

129. MODEL RULES, *supra* note 96, R. 1.16(a)(1). Lawyers representing organizations, such as real estate partnerships or charities, may wish to inform their entity clients that they cannot facilitate unlawful client conduct, such as money laundering, and that they may have to report any information regarding such conduct to higher authorities in the organization. *Id.* R. 1.13(b). Entity lawyers are even authorized to reveal confidential information relating to the representation of persons outside the organization if "necessary to prevent substantial injury to the organization." *Id.* R. 1.13(c)(2). *See generally* Louise L. Hill, *The Financial Action Task Force Guidance for Legal Professionals: Missed Opportunities to Level the Playing Field*, J. PROF. LAW., 2010, at 163 (criticizing the FATF's decision to exclude in-house counsel from the definition of legal professionals and, thus, not subject to the Recommendations); Paul D. Paton,

requires him to withdraw if he has already undertaken representation.¹³⁰ Raising the possibility of withdrawal at the intake stage sends the client a powerful message regarding the lawyer's continuing ethical obligations to avoid illegal conduct, which promotes a positive ethical tone for the duration of the attorney-client relationship.¹³¹

The possibility of withdrawal from representation under Rule 1.16 may raise questions, however, about the lawyer's duty to protect client information. Rule 1.6 generally prohibits the lawyer from revealing client information that could be harmful or embarrassing to the client.¹³² However, Rules 1.6(b)(1) through (3) permit the lawyer to reveal client information in certain circumstances, including to prevent reasonably certain death or substantial bodily harm to a third party.¹³³ The lawyer may also reveal information under Rule 1.6(b)(2) "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another" when the client has used or is using the lawyer's services to further the activity.¹³⁴ Rule 1.6(b)(3) permits similar disclosures to rectify or mitigate substantial injury to the financial and property interests referenced in Rule 1.6(b)(2) if the client has used the lawyer's services to commit a crime or fraud.¹³⁵ These three exceptions to the duty of confidentiality provide substantial breathing room for the lawyer to disclose client information with respect to money laundering and terrorist financing, which furthers, in effect, the FATF's efforts to prevent these crimes.¹³⁶

In addition to Rule 1.6's protection of client confidences and other information, the attorney-client evidentiary privilege also protects against the disclosure of confidential client communications.¹³⁷ While the scope of the attorney-client

Corporate Counsel as Corporate Conscience: Ethics and Integrity in the Post-Enron Era, 84 CANADIAN B. REV. 533 (2006) (discussing the heightened tensions and demands on in-house lawyers and their ethical responsibilities).

130. MODEL RULES, *supra* note 96, R. 1.16. Model Rule 1.16(a) provides mandatory withdrawal provisions; Model Rules 1.16(b)(1) and (2) permit a lawyer to withdraw if "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent" or if "the client has used the lawyer's services to perpetrate a crime or fraud." *Id.*

131. Lawyer withdrawal must be accomplished in a manner that minimizes harm to the client, such as protecting client confidences. *See id.* R. 1.16(b), (d).

132. *Id.* R. 1.6.

133. *Id.* R. 1.6(b)(1).

134. *Id.* R. 1.6(b)(2).

135. *Id.* R. 1.6(b)(3).

136. The client must be using, or has used, the lawyer's services in connection with the commission of the crimes before the lawyer may reveal the information under Model Rules 1.6(b)(2) and (3). There is no similar limitation under Rule 1.6(b)(1) concerning the lawyer's disclosure of client information to prevent reasonably certain death or bodily injury—arguably a "reasonably certain result" from the financing of terrorism. MODEL RULES, *supra* note 96, R. 1.6.

137. *See In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995) ("[I]t is well-established that communications that otherwise would be protected by the attorney-client privilege or the attorney work product privilege are not protected if they relate to client communications in furtherance of contemplated or ongoing criminal or

evidentiary privilege is different than the ethical rules, it too does not protect a client's confidential communications in the furtherance of a crime.¹³⁸ Thus, since the FATF policy defers to members' policies regarding privileged attorney-client communications,¹³⁹ U.S. lawyers are not required to keep confidential client communications that facilitate money laundering or terrorist financing.¹⁴⁰

CDD is a fundamental obligation for any entity or professional furthering the FATF's AML and CFT goals.¹⁴¹ Similarly, CDD constitutes a core ethical responsibility for lawyers delivering competent legal services. This duopoly of concern with CDD highlights the common ground between the legal profession and the FATF in helping lawyers to avoid unwittingly assisting clients in money laundering and terrorist financing schemes.¹⁴² Of course, there will be some lawyers who will knowingly aid miscreants in these crimes.¹⁴³ No amount of CDD—under the FATF regime, the Model Rules, or otherwise—will deter them from their criminal ends. “Bad apples” aside, the current CDD regimes in both the FATF and legal ethics codes

fraudulent conduct.” (internal quotation marks omitted) (citing *Marc Rich & Co. v. United States* (*In re Grand Jury Subpoena Duces Tecum* dated September 15, 1983), 731 F.2d 1032, 1038 (2d Cir. 1984))).

138. *See id.* at 40; *see generally* CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* §§ 6.1–7 (1986) (discussing both the ethical obligation of confidentiality and the attorney-client evidentiary privilege).
139. 2012 RECOMMENDATIONS, *supra* note 23, at 83 (“Lawyers . . . 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.”); *see also* Shepherd, *supra* note 4, at 90 n.32 (noting that the FATF “opposed any law or regulation that would compel lawyers to disclose privileged or confidential information to government officials based on ‘suspicious’ activity of the client, or otherwise compromise the attorney-client relationship or independence of the bar”).
140. *See supra* notes 132–35 and accompanying text. ABA Formal Opinion 463 notes that lawyers are ethically prohibited from filing STRs about clients. *FORMAL OPINION 463*, *supra* note 23. While this is a good policy, the attorney-client evidentiary privilege does not protect client communications for the purpose of furthering criminal activity. Model Rule 1.6(b)(3) permits lawyers to disclose communications if the lawyer reasonably believes that disclosure is reasonably necessary “to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.” *MODEL RULES*, *supra* note 96, R. 1.6(b)(3). The Rules also allow disclosure when necessary “to prevent the client from committing a crime or fraud” under similar conditions. *Id.* R. 1.6(b)(2).
141. *See* 2012 RECOMMENDATIONS, *supra* note 23, at 19–20. Recommendation 20 states that if a bank suspects that “funds are the proceeds of a criminal activity, or are related to terrorist financing, it should be required, by law, to report promptly its suspicions” to authorities. *Id.* at 19.
142. *See* Lawton P. Cummings & Paul T. Stepnowsky, *My Brother’s Keeper: An Empirical Study of Attorney Facilitation of Money Laundering Through Commercial Transactions*, *J. PROF. LAW.*, 2011, at 30–34.
143. *See, e.g.*, Office of Lawyer Regulation v. Kranitz (*In re Kranitz*), 848 N.W.2d 292 (Wis. 2014) (disciplining a lawyer convicted of securities fraud by suspending his license for two years); Office of Lawyer Regulation v. Berman (*In re Berman*), 841 N.W.2d 50 (Wis. 2014) (same); Office of Lawyer Regulation v. Stern (*In re Stern*), 830 N.W.2d 674 (Wis. 2013) (lawyer involved in assisting client in bankruptcy convicted of money laundering); *see also* Richmond v. N.H. Sup. Ct. Comm. on Prof’l Conduct, 542 F.3d 913 (1st Cir. 2008) (noting that the state supreme court had inherent power to regulate the profession for violating the professional conduct rules); Terry, *supra* note 21, at 499 & nn.55–56 (listing several cases and revealing that lawyers have been convicted of money-laundering and terrorist financing, with some lawyers “mastermind[ing] the money laundering schemes” and others “appear[ing] to have been brought into these criminal schemes by their clients or other associates”).

should significantly protect both the bar and the public from lawyers unwittingly participating in money laundering and terrorist financing crimes.

V. CONCLUSION

The FATF and its policies promise to generate increased governmental and public attention as the world grapples with the ever-persistent crimes of money laundering and terrorist financing, especially with the latter seemingly spiraling both in the amount of money involved and horror of the crimes it facilitates.¹⁴⁴ This attention is especially likely in the United States where the FATF, along with development agencies such as The World Bank and the International Monetary Fund, are pressuring the U.S. government “to adopt legislation implementing . . . the Recommendations [that] relat[e] to the legal profession.”¹⁴⁵ In addition, a New York federal court has held for the first time that terrorist attack victims and their families could recover damages from an international bank for knowingly processing transactions that supported the attacks.¹⁴⁶ This decision should lead both the public and the bar to pay more attention to terrorist financing and make banks more cautious when processing financial transactions with potential terrorist links.¹⁴⁷

The legal profession’s attention to the FATF is poignantly illustrated by the ABA’s adoption of the Voluntary Good Practices Guidance¹⁴⁸ and the related Formal Opinion 463.¹⁴⁹ These guidelines, in particular, offer lawyers a valuable tool for “designing and implementing effective risk-based approaches consistent with the

144. See, e.g., Scott Bronstein & Drew Griffin, *Self-Funded and Deep-Rooted: How ISIS Makes Its Millions*, CNN (Oct. 7, 2014, 9:54 AM), <http://www.cnn.com/2014/10/06/world/meast/isis-funding/> (noting that ISIS “probably makes between \$1 million and \$2 million per day, but probably on the lower end”); Andy Brownfield, *Luxury Cars, Foreign Buyers and a First-of-Its Kind Ruling in Cincinnati*, CINC. BUS. COURIER (June 12, 2014, 1:08 PM), <http://www.bizjournals.com/cincinnati/news/2014/06/12/luxury-cars-foreign-buyers-and-a-first-of-its-kind.html> (reporting a federal court decision concerning the seizure of luxury vehicles and the “nationwide effort by the U.S. Secret Service and Department of Homeland Security to crack down on the so-called ‘gray market’ of American companies buying luxury vehicles stateside for resale overseas,” for fear that foreign purchasers are laundering money).

145. GOOD PRACTICES GUIDANCE, *supra* note 9, at 3.

146. Stephanie Clifford & Jessica Silver-Greenberg, *Terrorism Trial of Mideast Bank Worries the Financial World*, N.Y. TIMES, Aug. 14, 2014, at A17 (involving 297 plaintiffs who claimed injuries from twenty-four attacks by the terrorist organization Hamas, and asserting that a branch of the Arab Bank in Beirut, Lebanon, knowingly financed Hamas by processing its banking transactions); Stephanie Clifford, *Hamas Transactions Got Through in Error, Bank Says*, N.Y. TIMES, Aug. 15, 2014, at A20.

147. See Stephanie Clifford, *Jury Finds Arab Bank Liable for Aiding Terror*, N.Y. TIMES, Sept. 23, 2014, at A1 (reporting that a New York District Court jury found Arab Bank, a major Middle Eastern bank, liable for supporting terrorist enterprises when it handled transactions for Hamas, which led to multiple attacks).

148. As a direct response to the FATF’s adoption of its Risk Based Approach (RBA) Guidance for Legal Professionals, the ABA Voluntary Good Practices Guidance offers U.S. lawyers a more detailed direction on the application of the RBA guidelines to specific factual situations, “tak[ing] into account the practical realities of the practice of law in an increasingly complex environment.” GOOD PRACTICES GUIDANCE, *supra* note 9, at 2.

149. The ABA’s Formal Opinion 463 endorsed the Voluntary Good Practices Guidance. FORMAL OPINION 463, *supra* note 23, at 1.

broad contours of the [FATF] Lawyer Guidance.”¹⁵⁰ It provides detailed direction on applying the risk-based approach to preventing money laundering and terrorist financing in specific practical situations.¹⁵¹ Moreover, the ongoing efforts of the ABA Gatekeeper Task Force promise to help shape the profession’s involvement with various governmental and private entities that ensure FATF compliance by keeping the profession apprised of FATF developments.

Even with this backdrop of heightened attention to money laundering, terrorist financing, and the FATF, there is concern that attorneys in the field will resist making necessary changes to their practice.¹⁵² Traditionally, the legal profession has resisted any regulation by external forces—governmental or private.¹⁵³ According to sociologists and other experts studying professional culture, lawyers (like other professionals) claim that their specialized training¹⁵⁴ and ethics code¹⁵⁵ warrant their

150. GOOD PRACTICES GUIDANCE, *supra* note 9, at 3.

151. *Id.*

152. James E. Moliterno, *Ethics 20/20 Successfully Achieved Its Mission: It “Protected, Preserved, and Maintained”*, 47 AKRON L. REV. 149, 160–61 (2014) (“The profession has resisted change” during its “history of . . . self-regulation,” and the changes made were “in service of the status quo”).

153. *Id.* (concluding that generally a “change [to the legal profession] has been forced by influences of society, culture, technology, economics, and globalization, and not by the profession itself”); *see* Leubsdorf, *supra* note 98, at 1018 (“Section 307 of [the] Sarbanes-Oxley [Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 784] required the SEC to issue rules requiring lawyers to report material breaches of securities law or of fiduciary duty to the corporation’s chief counsel or chief executive officer, and if they did not respond appropriately to go to a committee of the board of directors.”). For example, in order to avoid legislation and continue self-regulation, Canada’s legal regulators recently passed two reforms, the “No Cash” rule and the “Know Your Client” rule, in an effort to address the FATF Recommendations. For a more in-depth analysis of Canada’s legal reform in light of the Recommendations and its implication of self-regulation, *see* Paton, *supra* note 4.

154. [T]he professional project tends toward the monopolization of opportunities for income in a market of services or labor and toward the monopolization of status and work privileges in an occupational hierarchy. The necessary means to these ends is the control and monopolization of relatively standardized professional education. The institutionalized production of professional producers mediates and reveals the contradictions inherent in the structure of the professional project.

MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM* 51 (1977); *see also* ELIOT FREIDSON, *PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE* (1986).

Since the nineteenth century . . . some kind of formal higher education marks professionals off from other workers, distinguishing both the nature of their training and the nature of their skill. Such education is a basic credential for professionals; it delineates the foundation of their expertise. The distinction has lain at the root of thinking about professions as a special class or category of occupations.

Id. at 26; WILLIAM SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 21–22 (2007) (“A significant mark of professional privilege and social responsibility is the authority that professions wield to require of their members training in specialized institutions and to assess the fitness of candidates for admission to practice.”).

155. *See* Jonathan Macey, *Occupation Code 541110: Lawyers, Self-Regulation, and the Idea of a Profession*, 74 FORDHAM L. REV. 1079, 1084 (2005) (“Given the contours of this ethical dilemma, rules of professional conduct are valuable because such rules solve the prisoners’ dilemma facing lawyers. If the sanctions for

deciding how best to deliver their services and to protect the public's interest.¹⁵⁶ This claim supports the bar's ongoing monitoring of the FATF's efforts, which may fundamentally alter the profession's historic role in protecting clients' rights and access to justice.

For example, the bar correctly resisted the FATF's efforts to impose a duty on lawyers to file STRs.¹⁵⁷ The bar needs to recognize, however, that such resistance is unwarranted with respect to the FATF's CDD principles, which promote both lawyers' and the public's interests. The FATF's CDD protects lawyers from unwittingly assisting clients with money laundering or terrorist financing crimes.

Educating lawyers about the FATF and the risks associated with the crimes of money laundering and terrorist financing is important if the bar hopes to preclude governmental entities under pressure from the FATF from regulating the delivery of legal services. One way to inform the bar is to incorporate the FATF's CDD into law school legal ethics courses, which are required courses that are especially well-suited for examining good lawyer practices. The ABA Voluntary Good Practices Guidance two-page Client Intake Form (CIF) is a particularly effective way to introduce students to the CDD procedures advocated by the FATF.¹⁵⁸ The CIF underscores the increasingly globalized nature of legal practice, the risks involved, and the need to develop good practice protocols. For example, the CIF's procedures provide specific questions for identifying both the "natural person client"¹⁵⁹ and the "entity client,"¹⁶⁰ and recommend checking the Office of Foreign Assets Control's Specially

unprofessionalism are high enough, then lawyers and law firms no longer would have any incentive to cheat by acting unprofessionally.").

156. See Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1148 n.9 (2009) ("The public must have confidence that the legal profession, which is self-regulated, will not look the other way when its members break the law.").

157. See *supra* notes 23, 71–75 and accompanying text; see also FORMAL OPINION 463, *supra* note 23, at 1 (rejecting the filing of STRs as unethical).

158. GOOD PRACTICES GUIDANCE, *supra* note 9, at 38.

[D]epending upon the nature of the representation and level of initial concern the lawyer may have regarding the intentions or background of the client, the lawyer may need to obtain some or all of the following information: the client's name, employment background, place of birth, prior residential addresses, current residential address, business address, phone numbers, date of birth, marital status, names of prior or current spouses and/or names of children, dates of birth and social security numbers of any such spouses and/or children, the name and contact information of any other lawyers with whom the client regularly deals, the name and contact information of the client's certified public accountant, prior criminal convictions, pending lawsuits, and status of tax filings with governmental authorities.

Id.

159. *Id.*

160. *Id.* Under certain circumstances, the guidelines recommend investigating the entity's "beneficial ownership, as discussed in more detail in the main body of this guidance." *Id.* at 39.

LAWYER ETHICS AND THE FINANCIAL ACTION TASK FORCE: A CALL TO ACTION

Designated Nationals and Blocked Persons List.¹⁶¹ These CDD suggestions are the kind of good practice skills that law schools should be imparting to their students.¹⁶² In short, the CIF simply lays out a sound roadmap for practicing law regardless of the practice field or the degree of risk involved in representing a client.

In addition to law schools teaching students about the FATF, courts and bar associations should help inform lawyers about the FATF and its policies.¹⁶³ For example, the ABA Gatekeeper Task Force should continue its important mission of educating U.S. lawyers about FATF issues.¹⁶⁴ Ideally, the practicing bar and legal academia would collaborate to offer conferences focusing on the FATF, similar to the symposium held at New York Law School.¹⁶⁵ To be sure, lawyers who learn about the FATF and adopt the CDD procedures outlined in the CIF will be less likely to unwittingly become involved in money laundering, terrorist financing, or other criminal schemes. The time for the bar to act and to answer the call for CDD change is now—not later.

161. *Id.* at 39 (“It would also be prudent for the lawyer to check the Office of Foreign Assets Control’s Specially Designated Nationals and Blocked Persons list . . . for the name of the client, the client’s spouse, the client’s beneficial owners, and/or other related persons, and any relevant business entities.”).

162. *See generally* Douglas Godfrey, *Transactional Skills Training: All About Due Diligence*, 10 TENN. J. BUS. L. 357 (2009) (suggesting how due diligence training can be incorporated into a law student’s training).

163. *See* Terry, *supra* note 21, at 505 (“There also have been concerted efforts to educate ethics experts The goal is to have a ‘cradle-to-grave’ approach to [legal ethics] education that begins in law school and concludes by educating [those] responsible for disciplining lawyers.” (citations omitted)).

164. *See id.* (highlighting existing sources and recommending additional ways to inform lawyers about the FATF).

165. New York Law School Law Review Symposium: Combating Threats to the International Financial System: The Financial Action Task Force (Apr. 25, 2014). For more information and recordings of this symposium, visit: <http://www.nylawreview.com/fatf/>.