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

I. INTRODUCTION

Investigations and prosecutions of money laundering\(^1\) and terrorist financing\(^2\) crimes attract global media attention.\(^3\) Academic institutions and professional organizations are devoting more attention to these crimes and their consequences\(^4\)


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.*

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, Kenya\(^6\) and an attack in Moscow, Russia in 2013,\(^7\) both of which required significant planning and financial support.\(^8\) In the wake of


\(^{6}\) 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/oc/t/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-Shaba[ab] 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”).


\(^{8}\) 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 United States and nations worldwide perceive themselves in a dire struggle to eliminate the evils of money laundering and terrorist financing.\footnote{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).} 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.”\footnote{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 in 2011 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.} 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.”\footnote{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 terrorist financing.


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 Beckarry, The International Anti-Money Laundering and Combating the Financing of Terrorism Regulatory Strategy: A Critical Analysis of Compliance Determinants in International Law, 31 NW. J. INT’L L. & BUS. 137, 142 (2011) (“The FATF [AML and combating the financing of terrorism (CTF)] normative structure . . . constantly adapt[s] to new and changing [money laundering (ML) and terrorist financing (TF)] activities and methodologies.”).
terrorist financing. The FATF must also continually ensure that its member states are complying with the FATF’s AML and CTF standards. 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.

This article discusses the FATF and its potential impact on the delivery of legal services in the United States. 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,

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 countermeasures 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”).

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. 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. 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. The legal profession should be careful about dismissing useful changes to the practice of law merely because external authorities drive those changes. 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.

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.


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 DURRHEE, 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. There are, however, important differences between the two. For example, unlike money laundering, terrorism financing may stem from legitimate funding sources, such as private donations. Most importantly, the primary goal of money laundering is to realize criminal financial gains. By contrast, the primary goal of terrorism financing is to instill terror from acts of violence, or threats thereof, to further a political purpose. 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. 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. 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.

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 Proess & 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.

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


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).

national financial systems and the stability of individual institutions identified as money laundering participants.\footnote{See Schott, supra note 16, at II-4 to -5.} 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.\footnote{Id. at II-5.}

There are other reasons for establishing a world order against money laundering besides its potential negative impact on nations’ financial systems.\footnote{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”).} Those reasons include the desire to: (1) undermine organized crime;\footnote{Id. at 78–80.} (2) ensure morally that crime should not pay;\footnote{Id. at 89–91.} (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;\footnote{Id. at 91–92.} and (4) preclude money laundering from undermining the stability and security of countries.\footnote{Id. at 92–93.}

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.\footnote{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.”).} World leaders recognize that the ability to prevent money laundering transcends any single nation’s resources and enforcement efforts,\footnote{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).} and ultimately requires coherent standards and a globally harmonized legal approach.\footnote{Id.}
financial system and member states’ domestic systems. 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. The FATF is comprised of thirty-four countries and two regional organizations, with an additional eight associate members and thirty observers.

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. In 1990, the FATF developed a comprehensive master plan called the Forty Recommendations, which were

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.


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/2/7b91ce66-0ce1-11e4-bf1e-00144feabdc0.html#axzz3SWbFrwzxJ (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).

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 combating money laundering, and (d) international cooperation.”

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. As a political matter, each FATF member must agree in writing to support the Recommendations and policies, and submit to periodic Mutual Evaluations.

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.” The United Nations Security Council underscored the importance of the Recommendations by expressly endorsing them in 2005. 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, and today they, along with their Interpretive Notes, “constitute the international standards for combating money laundering and terrorist financing.”

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. 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/0/98e357d2-0e83-11e4-b1c4-00144feabdc0.html#axzz3SWbFwz (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 requiring] 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.  

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.  

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. These same AML preventative measures apply to terrorist financing.

The Recommendations’ preventative measures become de facto mandatory obligations for FATF members who want to avoid being found noncompliant. Generally, the Recommendations are sufficiently flexible to allow a country to adopt rules compatible with its economic circumstances and legal system. 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.” 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.”

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. The controversy caused the FATF to adopt an Interpretative Note to Recommendation 23, which provides

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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”).


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.


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.


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

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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/af5855d7-6a7f-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.


78. See Durrieu, supra note 8, at 124.


[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,” which has “developed into a credible compliance assessment process, analyzing both members’ and nonmembers’ compliance with [FATF] standards.”

The FATF Mutual Evaluation process incentivizes member countries “to become more proactive in enforcement through a higher level of participation and involvement.” 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), jeopardizing their governments’ political standing both at home and abroad. “An NCCT country is encouraged to make rapid progress inremedying its deficiencies,” as deficient countries and territories risk having their FATF membership suspended. 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)).


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.”
The mere threat of being blacklisted often causes noncompliant countries to expeditiously
cure their deficiencies.

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. In another “related enterprise” case, the prominent
accounting firm, Price Waterhouse-Coopers (PWC), settled a claim in 2014 with
the NYDFS for $25 million. 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.
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.

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.

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
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 Protess & 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

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,
public-statement-june-2014.html (providing a general list of blacklisted countries, including Iran).

90. Protess, supra note 88.
A. Gatekeeping

A decade after its genesis, the FATF identified several professions—as accountants and lawyers—as “gatekeepers” who were capable of assisting the FATF in carrying out its mission.\textsuperscript{91} Recommendation 22 labels such professions as DNFBPs\textsuperscript{92} and transfers to them many of the same AML and CTF responsibilities in the preceding Recommendations that apply primarily to financial institutions.\textsuperscript{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.\textsuperscript{94} Lawyers’ specialized training in the art of communication and persuasion, high professional ethics standards, and commitment to justice and the public good\textsuperscript{95} make them an attractive choice to be societal gatekeepers.\textsuperscript{96}

\begin{itemize}
  \item 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:
  
  \begin{quote}
  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.
  \end{quote}

  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.

\item 2012 Recommendations, supra note 23, at 19.

\item 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.” \textit{Id.} at 1.

\item 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).

\item 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).

\end{itemize}
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. 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.

The concept that lawyers are gatekeepers has generated considerable debate both in the legal academy and the profession. 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. 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. The Guidance provides lawyers with a voluntary, risk-based approach consistent with the useful FATF guidelines for CDD.

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

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97. The very first sentence of the ABA’s Model Rules of Professional Conduct (“Model Rules”) underscores the fundamental and central notion that lawyers “ha[e] a special responsibility for the quality of justice” as “member[s] of the legal profession.” Model Rules, supra note 96, at pmbl. ¶ 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.”).


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. 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).

101. Id. at 1–2.

102. 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.\textsuperscript{104} Most notably, for example, lawyers may not assist clients in their criminal conduct,\textsuperscript{105} and lawyers risk professional discipline, including disbarment, suspension, and even civil or criminal liability, for aiding in such conduct.\textsuperscript{106}

\section*{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.\textsuperscript{107} Nearly every jurisdiction in the United States has adopted the Model Rules to some degree,\textsuperscript{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.\textsuperscript{109} Several Model Rules are consistent with—and arguably promote—the FATF's AML and CFT 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.\textsuperscript{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.\textsuperscript{111} Since

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\item \textsuperscript{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").
\item \textsuperscript{105} Model Rules, supra note 96, R. 8.4(b).
\item \textsuperscript{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).
\item \textsuperscript{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').
\item \textsuperscript{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).
\item \textsuperscript{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.
\item \textsuperscript{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
\end{itemize}
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
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.”

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. 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. Further, the lawyer bears the burden of effectively establishing the parameters of the representation with the client under Rule 1.4. 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.

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.

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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.


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).
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.\(^\text{123}\) 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.\(^\text{124}\)

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.\(^\text{125}\) 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.\(^\text{126}\) 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).\(^\text{127}\) 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 DNFBPs.\(^\text{128}\)

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 rule\(^\text{129}\) and

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{137} While the scope of the attorney-client

\footnotesize{\textbf{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).}

\textsuperscript{130.} \textit{Corporate Counsel as Corporate Conscience: Ethics and Integrity in the Post-Enron Era}, 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.” 116. Id.

\textsuperscript{131.} Id. R. 1.6.

\textsuperscript{132.} Id. R. 1.6(b)(1).

\textsuperscript{133.} Id. R. 1.6(b)(2).

\textsuperscript{134.} Id. R. 1.6(b)(3).

\textsuperscript{135.} Id. R. 1.6(b)(3).

\textsuperscript{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.

\textsuperscript{137.} \textit{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.\textsuperscript{138} Thus, since the FATF policy defers to members’ policies regarding privileged attorney-client communications,\textsuperscript{139} U.S. lawyers are not required to keep confidential client communications that facilitate money laundering or terrorist financing.\textsuperscript{140}

CDD is a fundamental obligation for any entity or professional furthering the FATF’s AML and CFT goals.\textsuperscript{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.\textsuperscript{142} Of course, there will be some lawyers who will knowingly aid miscreants in these crimes.\textsuperscript{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

\textsuperscript{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).

\textsuperscript{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”).

\textsuperscript{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).

\textsuperscript{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.


\textsuperscript{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. 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] relate[e] to the legal profession.” 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. 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.

The legal profession’s attention to the FATF is poignantly illustrated by the ABA’s adoption of the Voluntary Good Practices Guidance and the related Formal Opinion 463. These guidelines, in particular, offer lawyers a valuable tool for “designing and implementing effective risk-based approaches consistent with the


145. Good Practices Guidance, supra note 9, at 3.


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, “taking into account the practical realities of the practice of law in an increasingly complex environment.” Good Practices Guidance, supra note 9, at 2.

broad contours of the [FATF] Lawyer Guidance.” It provides detailed direction on applying the risk-based approach to preventing money laundering and terrorist financing in specific practical situations. 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. Traditionally, the legal profession has resisted any regulation by external forces—governmental or private. According to sociologists and other experts studying professional culture, lawyers (like other professionals) claim that their specialized training and ethics code warrant their

150. Good Practices Guidance, supra note 9, at 3.
151. Id.
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.


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. 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. 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. 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” and the “entity client,” 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.
Designated Nationals and Blocked Persons List. These CDD suggestions are the kind of good practice skills that law schools should be imparting to their students. 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. For example, the ABA Gatekeeper Task Force should continue its important mission of educating U.S. lawyers about FATF issues. 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. 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.”).


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).