

**UNIVERSITY OF THE WESTERN CAPE
FACULTY OF LAW**

**THE IMPACT OF CLIENT RECORD KEEPING ON THE LEGAL PROFESSION IN
SOUTH AFRICA.**

**Mini-thesis submitted in partial fulfilment of the requirements for the award of the
LLM degree in the Department of Criminal Justice and Procedure**

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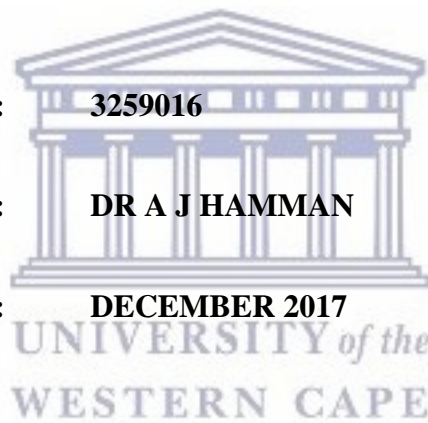
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DECLARATION

I declare that, **The Impact of Client Record Keeping on the Legal Profession in South Africa** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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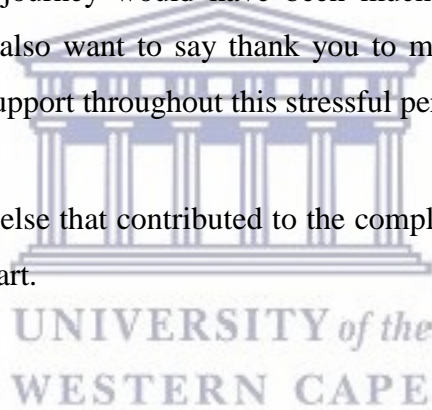
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KEYWORDS

Money Laundering

Attorney-Client Confidentiality

Record Keeping

Access to Records

USA

Canada

South Africa

Estate Agency Affairs Board

Warrantless Searches

Privilege

International Law



LIST OF ACRONYMS

ABA	American Bar Association
AML	Anti-Money Laundering
CDD	Customer Due Diligence
CFT	Combating the Finance of Terrorism
CTR	Currency Transaction Report
DNFBP	Designated Non-Financial Business Professionals
EAAA	Estate Agency Affairs Act
FATF	Financial Action Task Force
FICA	Financial Intelligence Centre Act
FINCEN	Financial Crimes Enforcement Network
FINTRAC	Financial Transactions and Reports Analysis Centre of Canada
FIU	Financial Intelligence Unit
IBA	International Bar Association
KYC	Know Your Customer
NCCT	Non Cooperative Countries and Territories
PCMLTFA	Proceeds of Crime (Money Laundering) and Terrorist Financing Act
POCA	Prevention of Organised Crime Act
POCDATARA	Protection of Constitutional Democracy against Terrorist and Related Activities Act
RBA	Risk Based Approach
STR	Suspicious Transaction Report
UNCAC	United Nations Convention against Corruption



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CHAPTER ONE

1.1 INTRODUCTION

The combating of money laundering has become crucial since it has escalated from a domestic to an international problem and *vice versa*. South Africa, in an attempt to combat money laundering has enacted anti-money laundering (AML) and anti-terrorism legislation. The legislation consists of the Prevention of Organised Crime Act 121 of 1998 (POCA); the Financial Intelligence Centre Act 38 of 2001 (FICA); and the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (POCDATARA).¹ In essence POCA² and POCDATARA³ criminalise money laundering and terrorist financing. FICA requires certain professions, such as the legal profession to maintain specific controls. Such controls include AML measures, combating the financing of terrorism (CFT) and also require the keeping of confidential client records, the filing of suspicious transaction reports (STR's) and certain cash transaction reports (CTR's).⁴

There are many money laundering definitions and this is problematic, because the definitions are tailored around the different techniques of laundering money. The South African Law Reform Commission defined money laundering as follows:

the manipulation of illegally acquired wealth in order to obscure its true source or nature which is achieved by performing a number of transactions with the proceeds of criminal activities, that if successful, will leave the illegally derived proceeds as a product of legitimate investments or transactions.⁵

Attorneys, as accountable institutions, are placed in a difficult position because when they comply with the FICA requirements, it is possible that their rights, as well as their clients' rights may be infringed upon. Reporting duties may infringe upon attorney-client

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- 1 De Koker L (2004) 'Client Identification and Money Laundering Control: Perspectives on the Financial Intelligence Centre Act 2002' *TSAR* 715-746.
 - 2 Section 1 of the Prevention of Organised Crime Act 121 of 1998.
 - 3 Section 1 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004.
 - 4 Section 1 of the Financial Intelligence Centre Act 38 of 2001.
 - 5 Millard and Vergano Hung out to dry? Attorney-client confidentiality and the reporting duties imposed by the Financial Intelligence Centre Act 38 of 2001 *Obiter* 2013; Duties imposed by the Financial Intelligence Centre Act 38 of 2001' 34(3) *Obiter* 389-427.

confidentiality, and the right to privacy when accessing records. Attorneys should be able to exercise their right to practice their profession as guaranteed in the Constitution,⁶ but the FICA requirements hinder them from fully exercising this right. This is done when a client, allegedly involved in money laundering, instructs the attorney to represent him. If the attorney does not report his client, the attorney can be guilty of money laundering.⁷ FICA and POCA offer no protection from prosecution if the attorney assists the client. On the other hand, the client's right could be infringed upon. Every person has a right to legal representation and when an attorney refuses to help a client because of the FICA requirements, the client's right to counsel is infringed upon. In addition to the possible prosecution, attorneys are required to keep detailed records of their clients' and if at a later stage requested by the police services or the Financial Intelligence Centre (FIC), they are obliged to hand over such records. Granting unlimited access to confidential client records, will affect the attorney-client relationship and clients' right to privacy.

1.2 BACKGROUND OF MONEY LAUNDERING

Bridgette Unger states that the concept of money laundering is derived from the dealings of Al Capone,⁸ as he allegedly cleaned his ill-gotten funds through laundrettes to disguise the true provenance of his income.⁹ Essentially all money launderers have this target in mind, which is to cover up the true origin of their illegal income. Ultimately the intention is for the proceeds to appear legitimate and to be integrated into the national economy. The various money laundering phases in relation to the process of record keeping is also discussed in this thesis.

'Money laundering' as a term was first used in the beginning of the 20th century. It occurred when certain proceeds of illegal activities were 'cleansed'. . It resulted in the proceeds gaining illegal entry into the economy.¹⁰ The practice of laundering money dates back to the

6 Section 22 of the Constitution of the Republic of South Africa, 1996 deals with the right to exercise a profession.

7 Section 4 of POCA 112 of 1998.

8 Al Capone was born in Brooklyn, New York. He became the most infamous gangster in American history. During the height of the prohibition, Al Capone had a multi-million dollar operation in bootlegging, prostitution and gambling. Al Capone dominated the organised crime syndicate, see <http://www.biography.com/people/al-capone-9237536#synopsis>.

9 Unger B 'A Newly Emerging Topic on the International Agenda' available at <http://www2.econ.uu.nl>.

10 Uribe R 'Changing Paradigms on Money Laundering' available at http://www.cicad.oas.org/oid/NEW/Information/Observer/Observer2_2003/MLParadigms.pdf.

middle Ages where usury (lending money at unreasonably high interest rates) was still a crime.¹¹ To counter this, merchants and money lenders evaded punishment by making their income appear legal.¹² As a result of this the law enforcement authorities and entities had to develop measures of combating money laundering.¹³

Although the true genesis of money laundering cannot be determined accurately, money laundering was present at the time of the classical pirates.¹⁴ In the year 67 AD (1950 years ago) Pompey (Military and political leader) undertook an expedition in the Mediterranean against the pirates that deprived Rome of its goods.¹⁵ The pirates were pioneers in the laundering of gold and they targeted European commercial vessels that crossed the Atlantic during and between the 16th and 18th centuries.¹⁶ In 1612, England offered to restore full pardon to all pirates who reformed and as a bonus they could keep what they stole. Today the central focus is no longer on gold, but the laundering of money.

Between 1920 and 1933, the era of prohibition in the United States, the production, transport and sale of liquor was prohibited.¹⁷ This gave rise to the underground criminal act of “bootlegging”.¹⁸ A gangster, in the underground world in Chicago named Al Capone, who made the majority of his money from the sale of bootleg alcohol, used money laundering as his main weapon to legitimise his earnings.¹⁹ Al Capone expanded his underground business by including prostitution, gambling, and a whole list of other illegal activities.²⁰ He was based on the south side of Chicago and fought gruesome wars with his competitors, who were mostly rival gangs.²¹ His organisation known as the ‘Chicago outfit’ made approximately one hundred million dollars yearly.²² He was protected against prosecution due to his corrupt

11 Uribe (2017) 1.

12 Uribe (2017) 1.

13 Uribe (2017) 1.

14 Uribe (2017) 1.

15 Uribe (2017) 1.

16 Uribe (2017) 1.

17 Peterson V ‘Chicago: Shades of Capone’ (1963) 347 *the Annals of the American Academy of Political And Social Science* 32.

18 Al Capone Biography www.biography.com.

19 Kobler J ‘The Life and World of Al Capone’ (1973) 66 *Journal of the Illinois State Historical Society* 119 1.

20 Peterson V ‘Chicago: Shades of Capone’ (1963) 347 *the Annals of the American Academy of Political And Social Science* 31.

21 Al Capone www.biography.com.

22 A+E Networks ‘Al Capone’ available at <http://www.history.com/topics/al-capone>.

connections to police officials and politicians whom he bribed. These bribes amounted to approximately thirty million dollars annually.²³

Al Capone, however kept records of his illicit activities, which led to his arrest for tax evasion and 11 years in prison, after which he passed away.²⁴ Al Capone's conviction served to deter other economic criminals. They learnt that bootlegging, prostitution; gambling and other crimes were all taxable.²⁵ The problematic nature of money laundering lies in its atypical characteristics.²⁶ Money laundering is different from other crimes like drug trafficking, armed robbery, extortion or dumping of toxic waste. Money laundering consists of a series of separate acts that can be free of crime but taken together they can give rise to proceeds of crime.²⁷

Money launderers are always looking for new ways in which to clean their dirty money and making it appear legal.²⁸ Although 'money laundering' as a term has been used in the early 1900s to describe the mafia Laundromats in the United States, it was only until the end of the 1980s that money laundering laws were adopted.²⁹ Overall there is a growing concern and a great need to combat money laundering.

1.3 STATEMENT OF THE PROBLEM

Proper and detailed record keeping is regarded as essential to combating money laundering as is evident in the Standards of the Financial Action Task Force (FATF),³⁰ the Egmond group of Financial Intelligence units,³¹ the Wolfsberg Group³² and the Basel Committee on banking supervision.³³ This research focuses on the record keeping obligations of lawyers in terms of FICA and the warrantless access thereto. The main objective of this study is to assess the

23 Al Capone Biography www.biography.com.

24 Al Capone Biography www.biography.com.

25 Al Capone Biography www.biography.com.

26 Uribe (2017) 1.

27 Uribe (2017) 1.

28 Hamman AJ (1) 'Phishing in the World Wide Web Ocean: Roestof v Cliffe Dekker Hofmeyr Inc. – A case of cyber laundering through an attorney's trust account' (2013) 17 *Law Democracy and Development* 49.

29 Heikinheimo S 'Money Laundering – a Controversial Issue' (1996) 37 *Acta Juridica* 212.

30 Financial Action Task Force Recommendations available at <http://fatf-gafi.org>.

31 Egmond Group of Financial Intelligence Units available at <http://egmontgroup.org>.

32 Wolfsberg Principles available at <http://wolfsberg-principles.com>.

33 Basil Committee on banking supervision available at <http://bis.org>.

impact of client record keeping on the legal profession. In South Africa, the record keeping requirement for lawyers is contained in chapter 3 of FICA and it deals with control measures for money laundering and the financing of terrorist and related activities. Proper record keeping could have a huge impact on the successful prosecution of money launderers. For lawyers, it includes the identification of clients,³⁴ the keeping of client-records and the accessing thereof.³⁵ These records must be kept for a period of five years after the conclusion of the transaction, or for a period of five years after a business relationship was terminated. One of the contentious issues which this research attempts to address is the access to those client records. The manner in which FICA regulates the admissibility of such records in court is also scrutinised. As stated previously it is the unlimited access to such confidential client records, which is authorised by FICA that could encroach upon the confidential attorney-client relationship and a client's right to privacy.

Accountable institutions, especially lawyers, are required by FICA to keep full and complete records of clients and the various transactions that they had entered into.³⁶ The keeping of client records is thus regarded as an important tool to combating money laundering. Proper record keeping will decrease the opportunities for clients to enter into suspicious transactions or for them to utilise multiple or fake identities. This, however, is only one of the positive outcomes in the fight against money laundering.

The main focus of this research is on the complications caused by section 45B of the Financial Intelligence Centre Amendment Act 11 of 2008. Although this section has been declared unconstitutional, it is important that its history is discussed. It is very crucial to contextualise the major problems faced by attorneys when they are required to furnish confidential client records for inspection by third parties. Among other things section 45B (6) (b) provides that an inspector of a supervisory body after consulting the Financial Intelligence Centre (FIC) may conduct any inspection other than a routine inspection.³⁷ Furthermore section 45B (7) provides that those inspections may be conducted without a warrant.³⁸

34 Section 21 of FICA.

35 Section 22 of FICA.

36 Section 22 of FICA.

37 Section 45B of FICA Amendment Act 11 of 2008.

38 Section 45B of FICA Amendment Act 11 of 2008.

Section 45B (7) inspection presented huge problems for legal practitioners and their clients. Various constitutional issues such as: the right to privacy;³⁹ the right to trade and the right to exercise your profession;⁴⁰ the right to legal representation⁴¹ were affected by these provisions. It entailed that an inspector could search the offices of an accountable institution without a warrant and could use information as provided in section 45B. Surprisingly, the issues were not raised in any court by the legal profession, despite the potentially far-reaching implications for lawyers. It was an estate agent in the matter of *Estate Agency Affairs Board v Auction Alliance*⁴² who approached the courts for the necessary relief.⁴³

In the *Estate Agency Affairs* case the Constitutional Court had to decide on the constitutionality of section 32A of the Estate Agency Affairs Act⁴⁴ and of section 45B of the FICA Amendment Act. Both section 45B and section 32A extended wide ranging powers to inspectors pertaining to search and seizure and allowed warrantless non-routine inspections. The Constitutional Court held that the impugned sections are invalid without retrospective effect and added that the invalidity was suspended for 24 months from the date of judgment to enable the legislature to remedy the defect.

The FICA Amendment Act was signed into law in April 2017.⁴⁵ This study further analysis the Amendment Act and although section 45B (6) (b) and 45B (7) were declared invalid; it still contains a number of complications for legal practitioners because of the opaque nature of the amendments. The matters such as attorney-client confidentiality and legal profession privilege are still not properly addressed in the amendment Act.

Essentially this study endeavours to find a middle-ground, where confidential attorney-client records are protected and not readily accessed for the purpose of prosecution on the one hand. On the other hand lawyers and client records should not be protected to an extent where they are immune to searches or investigations for purposes of money laundering. It is essential that the access to records kept by lawyers is not abused, whether it is by the lawyer concerned or

39 Section 14 of the Constitution.

40 Section 22 of the Constitution.

41 Section 35 of the Constitution.

42 *Estate Agency Affairs Board v Auction Alliance* 2014 (4) BCLR 373 (CC).

43 *Estate Agency Affairs Board*.

44 Act 112 of 1976.

45 FICA Amendment Act 1 of 2017.

through a *mala fide* investigator. Such warrantless or other type of searches for purposes of prosecution may compromise the confidential relationship of trust between a lawyer and his/her client.

1.4 SIGNIFICANCE OF THE STUDY

Parliament has complied with the Constitutional Court's order to correct certain shortcomings in FICA.⁴⁶ The Act has been promulgated in an attempt to fill the *lacuna* as stipulated by the Constitutional Court. However, when the amendments are closely scrutinised, it appears that not much has changed. There are still significant implications for legal practitioners. The concerns regarding the keeping and accessing of client records are not properly addressed. The aim of this research is therefore to find a compromise or mid-way between the problematic issues involving record keeping and access thereto. The confidential attorney-client records held by legal practitioners should be protected, but should not be at all costs. The admissibility of such records in court proceedings may be a determining factor in the ultimate success or failure in a money laundering prosecution. Therefore it is important that the keeping of the records and the accessibility thereof should be properly regulated.

1.4.1 IMPORTANCE OF PROSECUTING AND COMBATING MONEY LAUNDERING

The recent increase of the in the amounts of money which is laundered may be attributed to major crimes like drug trafficking etc.; hence there is a major rationale for international communities and bodies to combat money laundering.⁴⁷ Although there are rough estimates, it is impossible to quantify the actual amount of money involved.⁴⁸ The FATF has estimated that in the United States and Europe approximately 85 million dollars of illegal drug money can be used for money laundering and investment purposes.⁴⁹ That estimation was made based on world drug production, consumption needs of drug abusers and seizures of illicit drugs.⁵⁰

46 *Estate Agency Affairs Board.*

47 Heikinheimo (1996) 212.

48 Heikinheimo (1996) 212.

49 Heikinheimo (1996) 212.

50 Heikinheimo (1996) 212.

Laundered money, which has gone through all the stages successfully, which are the placement, layering and integration stages, can be safely transferred and then used in other businesses and appear to be clean and also legalised money.⁵¹ Once the money is back in the economy it is almost impossible to determine its origin. In other words the illicit money and the legitimate money will be impossible to distinguish.⁵² Presently, money laundering is closely related to organised crime and terrorism.⁵³ Thus, globally the highest incomes are derived from trading in arms and weapons as well as drugs and smuggling.⁵⁴

Money laundering and terrorist financing are not ordinarily connected to financial instability, but over time we realise that it should be.⁵⁵ Not only are they the by-products to often very serious crimes, they also taint otherwise unaffected people and institutions.⁵⁶ When a financial institution unwittingly allows itself to be used by criminals or terrorists it runs the risk of damaging its reputation.⁵⁷ If the employees of the institution collude with the criminals or terrorists by helping them channel funds or launder money, the damage can be even greater.⁵⁸ Anyone who does business with an institution found to be involved in money laundering may also suffer damage to his/her reputation. When a financial centre is widely perceived to be vulnerable to money laundering, investors will be hesitant before they invest at the institution.⁵⁹ The most serious danger lies in the fact that important financial institutions could be run by criminals, which means that the integrity and operations of the entire institution could be compromised.⁶⁰

As mentioned previously, money launderers need to invest in legitimate businesses or assets to launder their money.⁶¹ They often invest their money across jurisdictions to create various financial transactions to make the paper trail opaque. This has serious macroeconomic

51 Nyitrai 'Money Laundering and Organized Crime' (2015) 94 *J E-EUR CRIM L* 98. The three phases are discussed in detail in chapter 2.

52 Nyitrai (2015) 98.

53 Nyitrai (2015) 98.

54 Nyitrai (2015) 98.

55 Aninat E 'Combatting Money Laundering and the Financing of Terrorism' available at <http://www.imf.org/external/pubs/ft/fandd/2002/09/aninat.htm>.

56 Aninat (2002).

57 Aninat (2002).

58 Aninat (2002).

59 Aninat (2002).

60 Aninat (2002).

61 The World Bank 'Combatting Money Laundering and the Financing of Terrorism' available at <http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/CombattingMLandTF.pdf>.

implications.⁶² Money launderers choose their investments not based on the rates of return, but mainly to avoid detection.⁶³ As a result they put a large amount of money in less productive activities, as long as they remain undetected.⁶⁴ This has far reaching implications for the productivity as well as the efficiency of both the domestic and the world economies, because various things will occur, like the distortion of market prices.⁶⁵ In addition to this, money launderers move their money in and out of jurisdictions, sometimes very rapidly, to obscure the audit trail.⁶⁶ The problem with that is that large amounts of money moved in and out of a country can destabilise small developing economies.⁶⁷

The markets need reliable institutions to be able to function properly and effectively.⁶⁸ The rule of law is also affected by money laundering, because it creates the presumption that there is a transparent system of clear and certain rules that apply with consistency to every subject.⁶⁹ The criminals who launder money; however undermine the rule of law.⁷⁰

The financial institutions can also be involved in money laundering in various ways; either as victims, perpetrators or instrumentalities.⁷¹ Under the first category, the financial institution can be party to different types of fraud including misrepresentation of financial information, embezzlement, credit card and check fraud, securities fraud, pension fraud and insurance fraud.⁷² Under the second and less common category where the financial institution is the perpetrator, it can commit different types of fraud. Such types of fraud may include the sale of fraudulent financial products, self-dealing and misappropriation of client funds.⁷³ In the third category the financial institution could be used as an instrumentality. This happens when financial institutions are used to keep or transfer money (knowingly or unknowingly),

62 The World Bank (2009) 19.

63 The World Bank (2009) 19.

64 The World Bank (2009) 19.

65 The World Bank (2009) 19.

66 The World Bank (2009) 19.

67 The World Bank (2009) 20.

68 The World Bank (2009) 20.

69 The World Bank (2009) 20.

70 The World Bank (2009) 20.

71 Hemani K 'Importance of Anti-money Laundering Measures and Effective KYC in Financial Transactions' available at [http://kthemani.com/download/financial_market & investor protection/\[L\]%20IMPORTANCE%20OF%20ANTI-MONEY%20LAUNDERING.pdf](http://kthemani.com/download/financial_market_%20investor_protection/[L]%20IMPORTANCE%20OF%20ANTI-MONEY%20LAUNDERING.pdf).

72 Hemani <http://kthemani.com>.

73 Hemani <http://kthemani.com>.

that are the profits or proceeds of crime, whether or not the crime is of a financial nature.⁷⁴ One of the most important examples of the third category is money laundering, as financial institutions can be used as an instrumentality to keep or to transfer the proceeds of crime.⁷⁵ In fact, financial institutions are at the forefront of the on-going battle against money laundering.⁷⁶

One of the consequences of tax evasion as a result of money laundering is that the state forfeits revenue that should have been coming its way.⁷⁷ Money laundering distorts market prices, because the price of luxury goods bought by criminals' results in exorbitant price increases.⁷⁸ In addition money laundering also inhibits trade as it discourages Direct Foreign Investment.⁷⁹ The integrity of financial institutions are being compromised which ultimately harms the financial system of a country. Money is channelled through various financial institutions when corrupt banking officials fail to submit suspicious transaction reports (STR's).⁸⁰ Corrupt public servants, like certain police officials, judges and politicians, may play an important role in the money laundering process. Money laundering could also facilitate the financing of terrorism.⁸¹

It seems that the crime of money laundering has become quite prevalent and efforts to combat it must be aimed at containment as the complete elimination thereof is problematic.⁸² Taking into account the fierce and increasing global competition in the financial service industry, some continue to question and criticise the value of anti-money laundering efforts.⁸³ Money laundering controls are complex as well as expensive and difficult to administer. There are compelling political as well as economic reasons for governments to limit the extent to which they impose costly regulations on financial institutions or interfere with the financial information of ordinary citizens and businesses.⁸⁴ The keeping of detailed records is one of

74 Hemani <http://kthemani.com>.

75 Hemani <http://kthemani.com>.

76 Hemani <http://kthemani.com>.

77 Reuter P & Truman E *Chasing Dirty Money* (2004) 181.

78 Unger B *The Scale and Impact of Money Laundering* (2007) 37.

79 Unger B & van der Linde D (Eds) *Research Handbook on Money Laundering* (2013) 94.

80 Section 21 of FICA.

81 Bianchi A & Naqvi (Eds) *Enforcing International Law Norms against Terrorism* (2004) 441.

82 Myers M 'International Strategies to Combat Money Laundering' available at http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/myer_pap.pdf.

83 Myers <http://icclr.law.ubc.ca>.

84 Myers <http://icclr.law.ubc.ca>.

the factors introduced by the legislature to achieve this aim. However, by placing this burden on especially lawyers, it has resulted in unforeseen consequences for the legal profession.

1.5 RESEARCH QUESTION

The effect that FICA with its record keeping requirements has on lawyers puts them in a precarious position. They must comply with the laws of the country, but also have certain duties towards their clients.

The attorney-client relationship is an important one between an attorney and a client. It has acquired such prominence that legal professional privilege has been elevated to a fundamental right by our courts.⁸⁵ If the confidence is breached through the possible infringement of the right to privacy of communications by keeping and the subsequent accessing and divulging of confidential client records, the relationship of trust could be breached. The main question that needs to be addressed is: What is the impact of the record keeping requirements and the access thereof on the confidential attorney-client relationship and on the fundamental right of legal professional privilege in South Africa?

Should the attorney – client relationship be breached for any reason? If it is breached, it could taint the trust in the profession which could have dire consequences for practising attorneys in the future.

1.6 METHODOLOGY

The methodology of this research was mainly a desktop study which included the use of primary and secondary sources. The main anti-money laundering legislation dealing with the keeping of confidential attorney client records and the regulation of the access thereto were consulted. It includes the Constitution of South Africa, FICA, POCDATARA and POCA as well as the FICA Amendment Act. In order to supplement the research and to seek guidelines on how this type of record keeping and access to records are regulated internationally, international instruments and regional instruments will be considered to supplement this research. The FATF standards were also consulted.

85 *Mahomed v NDPP and others* [2005] ZAGPHC 90; [2006] 1 All SA 127 (W).

1.7 LITERATURE REVIEW

There is a paucity of research on the chosen topic, although it is a very important one. In this research the limited available resource materials on client record keeping and the access thereto was challenging. An attempt was made to consult the few available articles and sources to address the issues and to formulate possible solutions. There are a number of journal articles such as ‘Client Identification and Money Laundering Control’ by De Koker, which raised issues that relate to this study, but it does not really focus on the central point namely; the keeping and access of confidential client records.⁸⁶

This study also refers to a very interesting article by Hamman and Koen about how lawyers launder money, but once again the focus is not on the central point of this research.⁸⁷ In articles like ‘Hung out to dry?’ by Millard and Vergano, the authors discuss various issues like the definition and context of money laundering and also the South African legislative framework and the structures that attorneys need to comply with like ethical and professional duties.⁸⁸ The article deals with the duties of accountable institutions and also the duties under FICA.⁸⁹

Two unpublished doctoral theses deal with money laundering in South Africa; one by Van Jaarsveld⁹⁰ which focuses on aspects of money laundering and also by Hamman where he writes about the impact of anti-money laundering legislation on the legal profession.⁹¹ They however do not deal specifically with the topic at hand. There are also a few masters’ research papers by Burdette,⁹² Van der Westhuizen,⁹³ Moodaley⁹⁴ and others, but they do not specifically deal with the impact that keeping of confidential attorney client records and the

86 De Koker L (2004) 715-746.

87 Hamman & Koen (2) ‘Cave *Pecuniam*: Lawyers as Launderers’ (2012) 15 *PELJ*.

88 Millard & Vergano (2013) 389-427.

89 Millard & Vergano (2013) 389-427.

90 Van Jaarsveld I (2011) Aspects of Money Laundering in South African Law (unpublished LLD thesis, University of South Africa).

91 Hamman AJ (3) (2015) The Impact of Anti-Money Laundering Legislation on the Legal Profession in South Africa (unpublished LLD thesis, University of the Western Cape).

92 Burdette M (2010) Is The Reporting Obligation of Attorneys in Terms of Section 29 of the Financial Intelligence Centre Act 38 of 2001 a Myth or a Reality? (Unpublished LLM thesis, University of Pretoria).

93 Van der Westhuizen C (2011) Money Laundering and the Impact thereof on Selected African Countries: a Comparative Study (unpublished LLM thesis, University of Pretoria).

94 Moodley M (2008) Money Laundering and Countermeasures: a Comparative Security Analysis of Selected Case Studies with Specific Reference to South Africa (unpublished LLM thesis, University of Pretoria).

access thereto that it will have on the legal professional privilege and the attorney-client relationship in general. This study also refers to other articles, cases, legislation, books and internet sources, but as previously mentioned, unfortunately the articles do not address the pertinent issues relating to the essence of this research.

The main reason for choosing this topic was the absence of academic research on client record keeping and lawyers, despite its importance. To grant unregulated access to the confidential client records in possession of lawyers could infringe upon the fundamental rights of the clients such as the right to privacy and legal profession privilege. Such unregulated access could also affect the right to legal representation and have a significant impact on the right of attorneys to freely exercise their right of freedom of trade and occupation of choice.⁹⁵

1.8 CHAPTER OUTLINE

Chapter one introduces this study and sketches the background of the research. It contains an overview of the attorney-client record keeping and the accessing requirement and how it ties in with the importance of combatting money laundering. This chapter gives an overview of what will be discussed in this research which is the impact of record keeping and access to records on the legal profession, specifically the confidentiality aspect between attorney and client.

Chapter two focuses on the South African legal framework relating to client record keeping by lawyers. This chapter also defines important concepts like money laundering including the phases of money laundering and also goes into the background and history and also includes an analysis of certain provisions of POCA, POCDATARA and FICA. Further the focus is on relevant articles and case law which deals with the issue of record keeping and lawyers. The chapter also includes an analysis as to whether the South African legislation complies with international standards.

In Chapter three the focus is on the international framework regarding record keeping and how independent governmental bodies like the FATF has dealt with record keeping and

95 Section 22 of the Constitution.

lawyers. Other conventions and treaties are also referred to for purposes of extracting important key aspects with regard to record keeping and lawyers.

The focus of Chapter four and five is on two other jurisdictions namely Canada and the United States of America (USA). These chapters consider how they have approached the issue of record keeping and accessing those records respectively. These jurisdictions were chosen because they had to contend with similar cases with regard to record keeping, money laundering, legal practitioners and the access to client records. These jurisdictions were investigated with the aim of improving South Africa's record keeping regulations and to ascertain whether any lessons could be learnt on how to deal with the access to confidential client records of lawyers.

Chapter six is the concluding chapter where the results drawn from this research is stated. The chapter also contains recommendations for possible improvements to the South African legislation in respect to the access of confidential client record and the legal profession.



CHAPTER TWO

A SOUTH AFRICAN PERSPECTIVE

2.1 INTRODUCTION

This chapter focuses on the South African legal framework pertaining to money laundering, record keeping and access to records with specific reference to the legal profession. Lawyers face potential predicaments which arise due to the rules which they have to abide by on the one hand and their duty to represent clients on the other hand. It is evident that lawyers may be faced with situations where they are forced to decide between protecting the confidential relationship with clients and complying with their reporting duty in terms of anti-money laundering legislation. It puts lawyers in a very precarious position as clients also have the right to legal representation.¹

Record keeping by lawyers is essential,² but the controversy is the unauthorised access thereto and under which circumstances it should be permitted. The period that the records should be kept is one of the other important questions that are discussed in this chapter.³ The impact of South African legislation such as the Financial Intelligence Centre Act (FICA), (the FICA Amendment of 2008 and the 2017 FICA Act), the Prevention of Organised Crime Act 121 of 1998 (POCA) as well as the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (POCDATARA) are examined.

To illustrate the dilemma that lawyers may be exposed to, the ground breaking case of *Estate Agency Affairs Board v Auction Alliance* is examined in detail. The record keeping of lawyers in conjunction with other applicable case law is examined and the potential implications of the newly promulgated FICA act on lawyers assessed. The new act is scrutinised in order to ascertain whether it will improve or impair the important relationship between attorney and client. Before the South African regulations of record keeping and lawyers are discussed, money laundering is defined and the various stages referred to. It is essential to grasp the concept of money laundering in the context of record keeping.

1 Section 35 of the Constitution.

2 Section 22 of FICA.

3 Section 23 of FICA.

2.2 'MONEY LAUNDERING' DEFINED

There are various definitions of money laundering. Although some of these definitions are scrutinised, it is difficult to find one which is comprehensive. Money laundering has been defined as:

When the proceeds of crime are converted into assets that cannot be traced back to the concealed crime.⁴

This definition is inadequate, because it is vague and difficult to comprehend. It is perhaps more appropriate to firstly define what the proceeds of crime entail.

The proceeds of crime is defined in the Prevention of Organised Crime Act 121 of 1998 as,

any property or any service advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived.⁵

It is thus clear that the proceeds of crime can be money, property, a benefit or a service. Proceeds of crime are not limited to monetary profits derived from an unlawful or illegal activity. Property is then further defined as:

Money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof.⁶

The definitions of proceeds and property are broad and have the effect that almost anything of value may be laundered by criminals. The Financial Intelligence Centre Act defines money laundering as:

an activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds, and includes any activity which constitutes an offence in terms of Section 64 of this Act or

4 Reuter P & Truman E *Chasing Dirty Money* (2004) 1.

5 Section 1 of POCA.

6 Section 1 of POCA.

Section 4, 5 or 6 of the Prevention of Organised Crime Act (POCA).⁷

According to this definition any activity which is likely to conceal the origin of the unlawful proceeds can be defined as money laundering. FICA also makes reference to certain activities mentioned in POCA. An unlawful activity is further defined in POCA as

Any conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere.⁸

An examination of the definition of the FATF, 'the process of disguising the real origin of illegal proceeds' reveals it is a whole process.⁹ This process is of cardinal importance as it enables the criminal to enjoy the illegal proceeds without revealing the true source.¹⁰ This process has various elements. These elements are: There must be an illegal activity; Proceeds must have been gathered from this activity; thereafter the proceeds is either disguised or transformed to hide its true origin; and lastly when the proceeds come out clean, it enables the launderer to use the proceeds as if it was legitimately obtained.

The proceeds of unlawful activities can be derived from the illegal sale of guns, smuggling and the activities of organised crime, including drug trafficking and prostitution rings. All these activities can generate substantial amounts of cash.¹¹ Embezzlement, insider trading, bribery and computer fraud schemes can also produce large profits and create the incentive to legalise the proceeds of crime through the laundering process.¹²

When criminals generate substantial amounts of profit, the individual or group must find a way to deal with the money without attracting too much attention to the concealed activity or people involved.¹³ The money laundering process thus becomes vital.¹⁴

7 Section 1 of FICA.

8 Section 1 of POCA.

9 FATF 'What is Money Laundering' available at <http://www.fatf-gafi.org/faq/moneylaundering/>.

10 FATF www.fatf-gafi.org.

11 FATF www.fatf-gafi.org.

12 FATF www.fatf-gafi.org.

13 FATF www.fatf-gafi.org.

14 FATF www.fatf-gafi.org.

A more acceptable definition is 'money laundering is the process whereby money or a benefit from an illicit origin is acquired and the illegality and identities of all the persons involved are hidden'. That same money is then converted into assets that seem to be from a legitimate origin. How the money appears is very important because it determines whether the culprit is apprehended or not.¹⁵

2.3 STAGES OF MONEY LAUNDERING

Money laundering usually takes place in three stages, namely, placement, layering and integration.¹⁶ The placement phase normally involves the injection of illicit money into a financial institution.¹⁷ Then the money is moved from institution to institution to hide the source and ownership through layering.¹⁸ The process is then concluded with the reinvestment of those funds in an ostensibly legal business through integration.¹⁹

The first stage is the most crucial stage as it is here where the dirty money is detected the easiest.²⁰ The more it is integrated it gets into the financial system; the more difficult it becomes to trace the source.²¹ In the second stage, which is the layering or main wash stage, the money could be sent around the globe to hide its illegal provenance.²² An example would be where a launderer makes a money transfer to the bank of company X.²³ He uses a wire transfer system to move the money to an offshore bank in the Cayman Islands, which has lenient banking secrecy laws.²⁴ The offshore bank gives a loan to company Y, which then goes to pay a fake invoice to company X.²⁵ Now company X who can be the launderer himself or a straw man which is a person regarded as having no substance or integrity, has now received money from company Y (who can also be a launderer or a straw man) whose origin is almost undetectable.²⁶ The layering phase can become very complicated as money can be transferred across the globe a few times in a few hours making it very difficult for

15 FATF www.fatf-gafi.org.

16 Unger B 'What is Money Laundering' in Masciandro D et al Black Finance: The Economics of Crime Edward Elgar (2007) 104.

17 Myers http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/myer_pap.pdf, 2.

18 Myers <http://icclr.law.ubc.ca>, 2.

19 Myers <http://icclr.law.ubc.ca>, 2.

20 Unger (2007) 104.

21 Unger (2007) 104.

22 Unger (2007) 105.

23 Unger (2007) 105.

24 Unger (2007) 105.

25 Unger (2007) 105.

26 Unger (2007) 105.

investigators to find the source.²⁷ When the money appears legal, the money launderer will try to permanently legitimise the money through integration.²⁸ This stage entails the buying of luxury goods such as yachts, houses, expensive cars, diamonds or various investments.²⁹

The process of money laundering is not simple and straight forward, as it is tailored around the different techniques. In other words it is taken on a case by case basis. It is of cardinal importance to combat and prosecute money laundering. Lawyers can become involved in any or in all of the stages of money laundering. They can either be guilty of laundering the money themselves or they can assist their clients wittingly or unwittingly during the money laundering process.

In the year 2000, South Africa signed the United Nations Convention against Transnational organised crime (UNTOC), and committed to creating domestic laws that criminalise corruption and money laundering. Importantly in 2004 South Africa acceded to this treaty, which means legal obligations were imposed on South Africa. As part of this study the effectiveness of these pieces of legislation in relation to record keeping and legal practitioners is discussed.

As part of the efforts to combat money laundering, lawyers also have certain obligations. They must comply with record keeping duties and identify their clients in an attempt to minimise money laundering. Therefore it is essential to analyse what the record keeping duties of South African lawyers include.

2.4 RECORD KEEPING IN TERMS OF SOUTH AFRICAN LAW

There are various statutes which contain record keeping duties for lawyers which will be discussed below.

2.4.1 Prevention of Organised Crime Act

Section 4 of POCA gives a description of money laundering and criminalises it in the following terms:

27 Unger (2007) 105.

28 Unger (2007) 105.

29 Unger (2007) 105.

'Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities... shall be guilty of an offence', and then gives a number of categories where criminalisation is possible.³⁰

Section 5 further includes a third party in providing that:

Any person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into any agreement with anyone or engage in any arrangement or transaction whereby... shall be guilty of an offence.³¹

Section 6 then gives a general provision in saying that

Any person who acquires; uses; or has possession of, property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person, shall be guilty of an offence³²

Section 3 and 8 of POCA then lays out the punishment and provides that punishment for a conviction of one of the money laundering offences under Section 2, 4, 5 or 6 of POCA is a maximum fine of one hundred million rand and a period of imprisonment of no longer than 30 years if found guilty of money laundering.³³ Importantly, POCA does not specifically refer to record keeping by attorneys and access to such records. It however illustrates that lawyers may become involved in money laundering if they knew that proceeds was illegal and still enter into an agreement with a client or if they are paid with laundered money.

2.4.2 Financial Intelligence Centre Act (FICA)

FICA confers various obligations on attorneys in performing their duties. Legal practitioners have a duty to verify the identity of their clients. Section 21 of FICA provides that,

An accountable institution may not establish a business relationship or conclude a single transaction with a client unless

30 Section 4 of POCA.

31 Section 5 of POCA.

32 Section 6 of POCA.

33 Sections 3 and 8 of POCA.

the accountable institution has taken the prescribed steps to establish and verify the identity of the client; if the client is acting on behalf of another person, to establish and verify the identity of that other person; and the clients authority to establish the business relationship or to conclude the single transaction on behalf of that other person; and if another person is acting on behalf of the client, to establish and verify the identity of that other person; and that other person's authority to act on behalf of the client.³⁴

Schedule 1 in FICA contains a list of accountable institutions, which include lawyers. Lawyers must identify their clients and keep detailed records. Section 22 of FICA provides that,

whenever an accountable institution establishes a business relationship or concludes a transaction with a client, whether the transaction is a single transaction or concluded in the course of a business relationship which that accountable institution has with the client, the accountable institution must keep record of the identity of the client; if the client is acting on behalf of another person, the identity of the person on whose behalf the client is acting; and the clients authority to act on behalf of that other person; if another person is acting on behalf of the client the identity of that person; and that other person's authority to act on behalf of the client ; the manner in which the identity of the persons referred to above was established; the nature of the business relationship or transaction; in the case of a transaction, the amount involved; and the parties to that transaction; all accounts that are involved in the transactions concluded by that accountable institution in the course of that business relationship; and that single transaction; the name of the person who obtained the information referred to above on behalf of the accountable institution; and any document or copy of a document obtained by the accountable institution in order to verify a person's identity in terms of section 21 (1) or 21 (2).³⁵

Subsection 2 further allows for records to be kept in an electronic format.³⁶ The records should be kept by an accountable institution for at least five years.³⁷ The time period starts when the business relationship is terminated.³⁸ This also includes a transaction which has

34 Section 21 of FICA.

35 Section 22 of FICA.

36 Section 22 of FICA.

37 Section 23 of FICA.

38 Section 23 of FICA.

been.³⁹ Records may also be kept by third parties on behalf of an accountable institution as long as the accountable institution has free and open access to the records.⁴⁰ The records referred to in section 22 and section 24 of FICA or a certified copy thereof is on its mere production before a court admissible as evidence.⁴¹ The above mentioned section 24 provides for records that may be kept by third parties.⁴²

It is required that reports must be submitted to the Financial Intelligence Centre (FIC). FIC could have access to the records as provided for in section 26. Section 26 (1) provides that an authorised representative of the FIC has access during ordinary working hours to any records kept by or on behalf of an accountable institution in terms of section 22 or section 24. He/she may also examine or make extracts from or copies of any such records for the purpose of obtaining further information pertaining to a report made in terms of section 28, 28A, 29, 30 (1) or 31.⁴³ The records may only be accessed by virtue of a warrant issued by a magistrate (district or regional) and a judge in the jurisdictional area, unless it is a public record.⁴⁴

Attorneys are not only obligated to keep records, but must also report transactions that are of a suspicious nature. Section 28 of FICA⁴⁵ deals with cash threshold reporting (CTR) and section 29⁴⁶ of FICA deals with suspicious and unusual transaction reporting (STR). Section 28 requires all lawyers to submit reports to the FIC where transactions are higher than the threshold which is R24 999.99.⁴⁷ The account can include one transaction or a number of transactions put together, which *prima facie* is below the threshold, but in combination exceeds the threshold limit.⁴⁸

Section 29 deals with whether the attorney knew or was suspicious about a particular transaction. Section 29 although similar to section 28, is broader.⁴⁹ All employees working for a particular law firm, in the case of lawyers, are obligated under section 29 to report such

39 Section 23 of FICA.

40 Section 24 of FICA.

41 Section 25 of FICA.

42 Section 24 of FICA.

43 Section 26 of FICA.

44 Section 26 of FICA.

45 Section 28 of FICA.

46 Section 29 of FICA.

47 Hamman & Koen (2) (2012) 73.

48 Hamman & Koen (2) (2012) 73.

49 Hamman & Koen (2) (2012) 74.

transactions.⁵⁰ For purposes of this research it is not essential to focus in more detail on these sections.

2.4.3 Section 45B of the Financial Intelligence Centre Amendment Act 11 of 2008

Section 45B has been declared unconstitutional⁵¹ by the Constitutional Court, but it is essential to refer to it for the purpose of this study. The context surrounding the unconstitutionality is important. One of the fundamental principles associated with the legal profession is the principle of attorney-client confidentiality.⁵² This principle allows both attorney and client to establish a healthy working relationship of trust. This principle is of paramount importance as it impacts on the relationship of trust between the attorney and the client.⁵³ The entire section 45B will not be discussed in detail, but the focus is on subsection (6) and (7). These subsections were in direct conflict with the attorney-client privilege and it is important for purposes of this research to determine the boundaries.

(a) Section 45B (6)

In the *Estate Agency Affairs Board* case, the Court declared Subsection 6 invalid. This subsection provided that an inspector of a supervisory body may conduct an inspection, other than a routine inspection (scheduled inspection) only after consultation with the Centre regarding the said inspection. This meant that if the Centre is consulted and it approves that inspection, it can take place anytime.⁵⁴ An inspector was also allowed on the request of a supervisory body to accompany and assist another inspector appointed by the head of a supervisory body in conducting an inspection in terms of this section.⁵⁵

This was one of the main reasons why the subsection was declared invalid. However, it should be noted that this section has not been fully removed and is still not properly regulated. This is despite the New FICA Act of 2017⁵⁶ has been signed into law.

50 Hamman & Koen (2) (2012) 73.

51 *Estate Agency Affairs Board v Auction Alliance* 2014 (4) BCLR 373 (CC).

52 Greef Attorney's 'Legal Professional Privilege' available at http://www.greeffattorneys.co.za/articles/legal_professional_privilege.pdf.

53 Greef www.greeffattorneys.co.za.

54 Section 45B of FICA Amendment Act 11 of 2008.

55 Section 45B of FICA Amendment Act 11 of 2008.

56 FICA Amendment Act 1 of 2017.

(b) Section 45B (7)

Section 45B (7), a repealed section, provided that no search warrant was required for the purpose of an inspection.⁵⁷ Subsections 6 and 7 are problematic, because they take matters to a whole new level and should have sparked an outrage among lawyers. This not only affected lawyers individually but the entire profession as a whole. Instead, an estate agent challenged these sections. The issue of section 45B(7) arose in the case of *Estate Agency Affairs Board v Auction Alliance* which will be discussed in more detail later in this chapter. However in a previous Constitutional Court case the matter of accessing records were also scrutinised.

2.5 *Gaertner and Others v Minister of Finance and Others* (2013) ZACC.

Gaertner and Others case primarily focused on section 4 of the Customs and Excise Act.⁵⁸ In this case inspectors of the South African Revenue Service (SARS) searched the grounds of Orion Cold Storage (OCS) and the home of a certain Mr Gaertner.⁵⁹ The Act did not require SARS to have a warrant at the time, nor was there a specific time that they had to adhere to conduct searches.⁶⁰ The Act further allowed SARS inspectors to confiscate books and files from whomever they wanted to and authorised the forceful entry onto premises. Breaking of doors, safes, where keys were unavailable, was also permitted. The only reservation was that all this needed to occur in the framework of the Act.⁶¹

The Constitutional Court came to the conclusion that section 4 unjustifiably infringes on privacy rights and that less restrictive means existed to acquire the information.⁶² The court further elaborated and held that section 4 is unclear as it does not give specifics about the searching of premises and also how the grounds should be searched.⁶³ The boundaries of searching were not specifically addressed, affording authorities' discretionary powers pertaining to search and seizure.

57 FICA Amendment Act 11 of 2008.

58 *Gaertner and others v Minister of Finance and Others* (2013) ZACC.

59 *Gaertner and Others*.

60 Section 4 of the Customs Excise Act 91 of 1964.

61 Section 4 of the Customs Excise Act 91 of 1964.

62 *Gaertner and Others*.

63 *Gaertner and Others*.

2.6 *Estate Agency Affairs Board v Auction Alliance*

A year after the Gaertner judgment was handed down; the Constitutional Court had to consider the constitutionality of section 32A of the Estate Agency Affairs Act (EAAA) and section 45B of FICA.⁶⁴ It was discovered that Real Levitt the founder of Auction Alliance violated certain provisions of the EAAA and FICA.⁶⁵ Subsequently, this information was forwarded to the FIC which led to the investigation of Auction Alliance.⁶⁶

While the Estate Agency Affairs Board (Board) worked on a plan with the Financial Intelligence Unit, it was informed that Auction Alliance was in the process of discarding and also destroying various crucial documents and information pertaining to the investigation.⁶⁷ Both provisions of the EAAA and FICA gave wide ranging powers of search and seizure to regulatory bodies.⁶⁸ The offices of Auction Alliance based in Cape Town, Durban and Johannesburg were about to be searched without warning and also without the necessary warrants.⁶⁹ The inspectors of the Board demanded to enter the buildings of Auction Alliance.⁷⁰ Auction Alliance then refused to allow them entry and launched an urgent application for both interim relief, to prevent the board from conducting the warrantless search and seizure operation, and for final relief through its constitutional challenge concerning section 32A of the EAAA and section 45B of FICA.

2.6.1 High Court

Two judgements were handed down in the Western Cape High Court (HC). In the first, the Court had to answer the question of whether it had the inherent jurisdiction to grant the Board's counter application for a warrant allowing them to search Auction Alliance premises.⁷¹ Notwithstanding the *prima facie* evidence that pointed toward serious breaches of the two pieces of legislation by Auction Alliance, which it found established a reasonable

64 *Estate Agency Affairs Board* para 1.

65 *Estate Agency Affairs Board* para 8.

66 *Estate Agency Affairs Board* para 8.

67 *Estate Agency Affairs Board* para 8.

68 *Estate Agency Affairs Board* para 8.

69 *Estate Agency Affairs Board* para 8.

70 *Estate Agency Affairs Board* para 8.

71 *Auction (Pty) Ltd v Estate Agency Affairs Board and Others (4850/2012) [2012] ZAWCHC 92, para 3.*

suspicion of wrongdoing, the HC found that it did not have the inherent jurisdiction to grant the warrant.⁷²

The second issue pertains to the constitutional validity of the two impugned provisions.⁷³ The Court noted that Auction Alliance did not challenge the 'routine' inspections of its premises.⁷⁴ Its challenge was limited to the warrantless non-routine inspections, meaning those based on a particularised suspicion of wrongdoing, as in that instance it sought to resist.⁷⁵ The Court used the limitation clause yardstick to scrutinize whether there were less restrictive means of achieving this purpose.⁷⁶

The Court found section 45B less wanting than section 32A.⁷⁷ It noted that the primary objective of the Act is to ensure transparency and regulatory compliance in the financial system. This was for the purpose of combating money laundering and preventing the financing of terrorism.⁷⁸ This meant that Auction Alliance, operating in a closely regulated industry, would have reduced expectation of privacy⁷⁹ which is very different for lawyers, as lawyers have a very high expectation of privacy in South Africa.⁸⁰

The FICA provisions were not overbroad in the opinion of the HC.⁸¹ The Court came to the finding though the inspection the Board sought to undertake was targeted and non-routine, aimed at criminal investigation, and could possibly result in penal sanction and prosecution. The Court also noted that section 45B requires that the inspection, whether routine or targeted, be for the purpose of determining compliance with FICA.⁸² The Court concluded that there was indeed less restrictive means available to retrieve the information as required by the constitution.⁸³ Both section 45B and section 32A were therefore declared unconstitutional. Because of the public considerations at issue, the declaration of

72 *Auction (Pty) Ltd para 3.*

73 *Auction (Pty) Ltd para 3.*

74 *Auction (Pty) Ltd para 11.*

75 *Auction (Pty) Ltd para 11.*

76 Constitution of the Republic of South Africa, 1996.

77 *Auction (Pty) Ltd para 9.*

78 *Auction (Pty) Ltd para 9.*

79 *Auction (Pty) Ltd para 9.*

80 Model Rules of Professional Conduct 2004 ed (2003) 2.

81 *Auction (Pty) Ltd v Estate Agency Affairs Board and Others (4850/2012) [2012] ZAWCHC 92, para 23.*

82 *Auction (Pty) Ltd para 11.*

83 Constitution of the Republic of South Africa, 1996.

unconstitutionality had to be suspended for 18 months to afford the legislature an opportunity to amend section 45B.⁸⁴

The court provided an extensive reading in of section 45B.⁸⁵ It referred with approval to the judgment in the *Gaertner and Others v Minister of Finance and Others*.⁸⁶ The Court declined to enter into a reinvention of the matter as was dealt with in the Gaertner matter. In the *Gaertner* case (based on section 4 (4) of the Customs Excise Act⁸⁷) authorised warrantless searches of premises was also an issue and the inspectors were also allowed to demand books and documents from persons believed to be in possession thereof.⁸⁸ They were permitted to break open doors, windows and walls of premises in order to search and to open any room or safe if locked and if the keys were not available.⁸⁹ The only qualification was that the premises could only be entered for purposes of the statute.⁹⁰ This matter then went to the Constitutional Court.

2.6.2 Constitutional Court

The Constitutional Court (CC) held that the High Court went too far in saying that warrantless, suspicion-based searches in regulated industries are inevitably unconstitutional.⁹¹ It is contended that this finding is a departure from South African precedent. Such finding regards the expectation of privacy of actors in regulated industries as sharply attenuated.⁹² The CC further held that endorsing the HC's conclusion would require a new development of constitutional law and a drawing of sharp lines where previously there were none.⁹³

The Board argued that this development would be inconsistent with the United States and Canadian approaches.⁹⁴ Furthermore it would put undue strain on Parliament when it seeks to remedy the constitutional problem while keeping in mind international best practice.⁹⁵ The

84 *Estate Agency Affairs Board* para 17.

85 *Estate Agency Affairs Board* para 17.

86 *Gaertner and Others*.

87 Section 4, Customs Excise Act 91 of 1964.

88 *Gaertner and Others*.

89 *Gaertner and Others*.

90 *Gaertner and Others*.

91 *Estate Agency Affairs Board*.

92 *Estate Agency Affairs Board*.

93 *Estate Agency Affairs Board*.

94 *Estate Agency Affairs Board*.

95 *Estate Agency Affairs Board*.

Board urged the Court to not do away with the possibility of authorised warrantless searches.⁹⁶

Although section 45B of FICA affects all accountable institutions, there are issues that adversely affect lawyers more. The section uses unclear language like ‘reasonable time’ and ‘reasonable notice’ and ‘where appropriate’ which bring more questions instead of clarifying the aforementioned issues. Section 45B definitely goes too far in providing that no warrants are required for searches.⁹⁷

The Constitutional Court found that the impugned sections are unconstitutional and added that the invalidity applied prospectively.⁹⁸ The invalid provisions were suspended for 24 months to afford the legislature the opportunity to cure the defect.⁹⁹

2.6.3 Implications for Legal Practitioners

Although the *Estate Agency Affairs Board* case dealt with estate agents, it is also applicable to lawyers as they are accountable institutions under FICA. Lawyers also benefitted from the order of invalidity they need the contents of their offices to be protected against warrantless searches by the Financial Intelligence Centres and law societies. The information dealt with by lawyers is much more confidential than the information dealt with by estate agents. Among other things, the files of lawyers contain intimate details of clients. Lawyers’ offices should thus not be used for gathering evidence against their clients for the purposes of prosecuting them.

2.7 Financial Intelligence Centre Amendment Act 1 of 2017

The *Estate Agency Affairs* judgment was handed down on 27 February 2014, and as was mentioned the declaration of invalidity was suspended for 24 months to afford the legislature an opportunity to cure the defect. The Financial Intelligence Centre Amendment Act 1 of 2017 (the new Act) amends section 45B by deleting section 6 and section 7 which provide for unannounced inspections and warrantless searches respectively. The new Act replaces

96 *Estate Agency Affairs Board.*

97 *Estate Agency Affairs Board.*

98 *Estate Agency Affairs Board.*

99 *Estate Agency Affairs Board.*

subsection 1 of the amendment Act with subsection 1A-1E.¹⁰⁰ Subsection 1C, however still provides for situations where an inspector may enter the premises without a warrant.

Although the new Act has come into effect, the directives set out by the Constitution Court in the *Estate Agency Affairs Board* case were not met. Although subsections 6 and 7 were removed, provision is still made IN the new Act for searches without a warrant. The provisions are not clear about the regulation of searches and access to records without a warrant.

Section 32 (1C) provides that

An inspector other-wise required to obtain a warrant under (1B) may enter any premises **without a warrant**¹⁰¹—

- (a) With the consent of the owner or person apparently in physical control of the premises after that owner or person was informed that he or she is under no obligation to admit the inspector in the absence of a warrant; or
- (b) If the inspector on reasonable grounds believes that —
 - (i) A warrant will be issued under subsection (1B) if the inspector applied for it; and
 - (ii) The delay in obtaining the warrant is likely to defeat the purpose for which the inspector seeks to enter the premises.¹⁰²

The above is almost in contempt of the Constitutional Court decision in *Estate Agency Affairs Board*, because it does not comply with the directives set out therein. The main issue was the fact that conducting searches without a warrant presents various f problems.it may be argued that the new law creates the scope for the problem we had in the first place. Furthermore the overall provision is not clear which brings more questions, problems. Surely, confidential information and access thereto must be strictly regulated.

Section 32(1D) provides that when the inspector enters the premises without a warrant he or she should do so keeping in mind: reasonable time; reasonable notice given; regard must be given to decency and good order; and the person's right to dignity, freedom and security and personal privacy should be kept in mind.¹⁰³ Even though the Act removes section 6 and 7 of

100 FICA Amendment Act 1 of 2017.

101 My emphasis.

102 FICA Amendment Act 1 of 2017.

103 FICA Amendment Act 1 of 2017.

the FICA Amendment Act which deals with non-routine and warrantless searches, section 32B (1C) and (1D) reinstates warrantless searches just in a more subtle way. The language in the provisions is not clear. Words such as ‘reasonable’ and ‘appropriate’ raises questions regarding the determination what the test for “reasonable and appropriate” should be.

2.7.1 Section 32(1C) of the new Act

As discussed above, there are still instances that warrantless searches could apply. The first instance found in paragraph (a) of section 32(1C) is when the owner gives consent or the person apparently in physical control of the premises after that owner or person was informed that they have no duty to allow the inspector to conduct the search.

This is problematic, because the person giving consent may not be the real owner and may allow the inspector to access documents that are privileged. Lawyers can be suspended, sanctioned or if it is extremely confidential, struck from the roll for breaking attorney client privilege.¹⁰⁴ When it is later discovered that the person who gave the inspector access had no authority to do so, it may be too late because then the information may not be withdrawn again which can be detrimental to the attorney and the client.

Another problem is the person posing to be an inspector may not really be an inspector from the Centre even though he/she may have all the documentation to prove his/her office. The documents could possibly be false. He/she could possibly have a person on the inside in case the owner of the premises wants to confirm his/her presence. Here also the falsifications could be discovered too late and valuable, privileged information could be compromised to the detriment of attorneys and their respective clients. Furthermore paragraph (b) of the above section makes mention of the reasonable grounds where an inspector may enter a premises without a warrant. If the inspector believes that a magistrate or judge will grant the warrant under subsection 1B if the inspector applied for it and also if the delay in waiting for the warrant will defeat the purpose of why the inspector wants to enter the premises.

This subsection is further problematic because what are the reasonable grounds that the inspector has to work with and also what happens if the warrant is not granted and the

104 Model Rules of Professional Conduct 2004 ed (2003) 1.

inspector has inspected the premises based on his interpretation of reasonable grounds that a warrant will be granted by a judge or magistrate. This could also be detrimental to the attorney and his clients, as crucial information may be leaked which could tamper the trust between the attorney and his/her client.¹⁰⁵

2.7.2 Section 32B (1D) of the new Act

The subsection also bring more questions to mind as it provides that if an inspector enters without a warrant he/she must do at a reasonable time; on reasonable notice; where appropriate and with strict regard to decency and order and consider strictly the person's right to dignity, freedom and security and personal privacy. This once again brings the question of, what is reasonable time, reasonable notice and appropriate in this circumstance. The new act is thus still authorising warrantless searches. Attorneys and other accountable institutions are thus just as vulnerable as before that confidential client records may be accessed by others without a duly authorised warrant. Such access could have detrimental effects on the attorney client relationship. A client is entitled to legal professional privilege which entails that confidential information given to his lawyer will not be made public. If records are accessed via warrantless searches the protection falls away.

2.8 THE EFFECT OF WARRANTLESS SEARCHES ON THE RELATIONSHIP BETWEEN ATTORNEY AND CLIENT

In South Africa legal professional privilege consists of a number of components.¹⁰⁶ For communications between lawyers and clients to be privileged and protected certain requirements must be met. The lawyer must be acting in a professional capacity; the communications must have been made in confidence, this confidence covers all oral and documentary information pertaining to the clients affairs gained in acting for the client, whether it is from the client himself or any other source.¹⁰⁷ The attorney must do his best to prevent the confidence being broken between him/herself and the client. This also applies to

105 Model Rules of Professional Conduct 2004 ed (2003) 1.

106 DLA Piper 'Legal Professional Privilege' available at [file:///C:/Users/Administrator/Desktop/MT%20SOURCES1/CHAPTER%203/Legal-Professional-South-Africa%20\(1\).pdf](file:///C:/Users/Administrator/Desktop/MT%20SOURCES1/CHAPTER%203/Legal-Professional-South-Africa%20(1).pdf).

107 Greef www.greeffattorneys.co.za.

other members of his staff that work with the confidential information.¹⁰⁸ The communication must have been made for the sole purpose of obtaining or giving legal advice and the advice should not have been sought after for illegal purposes.¹⁰⁹ Even if the lawyer was not aware of the clients plan to commit a crime at the time of the communication, it is not privileged information.¹¹⁰

According to Greef Attorneys there is also litigation privilege which protects communications between lawyers and/or their clients. This privilege also protects third parties. Provided the following are met. The lawyer must have been acting in a professional capacity as a legal practitioner, the communications must have been made in confidence, or communications must have been made for purposes of being placed before the lawyer in order to enable him/her to advise accordingly.

Communications must have been made for the purpose of intended or contemplated litigation, if a client makes a confession to an attorney without seeking that attorney's legal advice in connection therewith, then the confession is not privileged information.¹¹¹ In example of this is found in the case of *S v Kearney*, where the accused, an employee of a particular company, had confessed to theft to a shareholders attorney.¹¹² The court accordingly held that the confession was not privileged because the accused had not made the statement for the purpose of obtaining legal advice;¹¹³ and the communication or advice should not be for illegal purposes.¹¹⁴ It should be noted that the contents of a document containing privileged information need not be disclosed, but it should be declared that such a document exists.¹¹⁵

Privilege is the right of the client and has to be claimed by the client or the lawyer acting on his/her behalf.¹¹⁶ Therefore if a legal subject is asked during legal proceedings to reveal what was communicated during consultation with a lawyer then the subject or his legal

108 Greef www.greeffattorneys.co.za.

109 DLA Piper 'Legal Professional Privilege'.

110 Greef www.greeffattorneys.co.za.

111 Greef www.greeffattorneys.co.za.

112 *S v Kearney* 1964 (2) SA 495 (A).

113 *S v Kearney* 1964 (2) SA 495 (A).

114 DLA Piper 'Legal Professional Privilege'.

115 DLA Piper 'Legal Professional Privilege'.

116 Greef www.greeffattorneys.co.za.

representative must object to the disclosure of such information on the grounds of privilege.¹¹⁷ This right may, however, be waived.

Only the client or his/her agent can waive the legal professional privilege.¹¹⁸ Waiver can be express, implied or imputed.¹¹⁹ It is implied if the person who claims the privilege discloses the contents of a document, or relies upon it in its pleadings or during court proceedings.¹²⁰ It would also be implied if only part of the document is disclosed or relied upon.¹²¹ For a waiver to be implied the test is objective, meaning that it must be judged by its outward manifestations.¹²² Imputed waiver occurs when fairness requires the court to conclude that the privilege was waived.¹²³

In fulfilling his duties, a legal practitioner represents his clients and also the public and he always should act in the interest of justice.¹²⁴ This means that when a lawyer acts, he does so professionally and to the best of his ability. When acting as a legal practitioner acts in the best interest of his clients, openly and honestly.¹²⁵ Not only should he be professional, but he should act effectively yet swiftly to the best of his ability.¹²⁶

There are circumstances where there is a conflict of responsibilities faced by the lawyer.¹²⁷ Virtually all ethical problems arise when a lawyer's responsibilities toward his client conflicts with his responsibilities to the legal profession and also his own interests, in remaining an ethical person while earning a living.¹²⁸ These rules are spoken of but not covered from every angle.¹²⁹ When dealing with these rules, it should not be taken lightly. THESE rules should be guided by precedent on the issue and should be improved upon where loopholes exist.¹³⁰ These principles Include that lawyers should act in the best interest of their clients while still

117 Greef www.greeffattorneys.co.za.

118 DLA Piper 'Legal Professional Privilege'.

119 DLA Piper 'Legal Professional Privilege'.

120 DLA Piper 'Legal Professional Privilege'.

121 DLA Piper 'Legal Professional Privilege'.

122 DLA Piper 'Legal Professional Privilege'.

123 DLA Piper 'Legal Professional Privilege'.

124 Model Rules of Professional Conduct 2004 ed (2003) 1.

125 Model Rules of Professional Conduct 2004 ed (2003) 2.

126 Model Rules of Professional Conduct 2004 ed (2003) 2.

127 Model Rules of Professional Conduct 2004 ed (2003) 2.

128 Model Rules of Professional Conduct 2004 ed (2003) 2.

129 Model Rules of Professional Conduct 2004 ed (2003) 2.

130 Model Rules of Professional Conduct 2004 ed (2003) 2.

complying with the law and further should maintain the professional work ethic that is required from them.¹³¹

2.9 Legal Developments in South Africa Pertaining to Privilege

In the case of *Competition Commission v Arcelormittal South Africa Ltd*, which was handed down by the Supreme Court of Appeal (SCA) in May 2013, the Court held that reference to a part of a document is sufficient to constitute waiver by the client. This destroys the legal professional privilege attached to the entire document, and not just the part in question unless the document consists of several parts and is capable of severance.¹³²

The reporting requirements in terms of Section 37(2) of FICA, trump the secrecy and confidentiality obligations an attorney owe his/her client.¹³³ However, the legal professional privilege between attorney and client has survived,¹³⁴ but it is limited to confidential attorney-client communications made in respect of legal advice given or litigation pending, proposed or in progress.¹³⁵ If the communications does not resort to the conditions laid down under section 37(2) of FICA, it is not protected. In theory the FICA obligations do not infringe upon the common law right to legal professional privilege.¹³⁶ However, in practice it is different as there is every likelihood that an attorney will violate the trust relationship with his client by complying with the duty to render a CTR or STR.¹³⁷

The reporting duty puts the attorney in an unenviable position because he/she must either betray a client's confidence or betray the legal obligations to report.¹³⁸ FICA makes no attempt to resolve or regulate this major problem. The attorney is left to his own devices, because if he/she fails to report he/she runs the risk of being prosecuted as a launderer.¹³⁹ On the other hand if he does comply with the reporting obligations, he will most certainly

131 Model Rules of Professional Conduct 2004 ed (2003) 2.

132 *Competition Commission of South Africa v Arcelormittal South Africa Ltd and Others* (680/12) [2013] ZASCA 84 (SCA).

133 Hamman & Koen (2) (2012) 78.

134 Hamman & Koen (2) (2012) 78.

135 Section 37(2) of FICA.

136 Hamman & Koen (2) (2012) 78.

137 Hamman & Koen (2) (2012) 78.

138 Hamman & Koen (2) (2012) 79.

139 Hamman & Koen (2) (2012) 79.

undermine the principle of attorney-client confidentiality.¹⁴⁰ This is a huge ethical burden that is placed on the attorney. He is between the proverbial rock and a hard place.

In the case of *A Company and Two Others v The Commissioner for the South African Revenue Service*¹⁴¹, it was held that where a fee note sets out the substance of the privileged communications only certain parts, but not the whole document, would be amendable to the privilege.¹⁴² The test is whether upon an objective assessment, the references disclose the content, and not just the existence, of the privileged material.¹⁴³ The privilege should be asserted by blacking out the information, so as to disclose those parts of the document that were not subject to the privilege and covering up those that were. The party asserting the legal professional privilege should generally be able to provide a rational justification for such a claim without needing to disclose the content or substance of the matter in respect of which the privilege is claimed.¹⁴⁴

The right to privilege is also recognised by the Promotion of Access to Information Act 2 of 2002, which was ultimately enacted to give effect to the right to access information.¹⁴⁵ This statute upholds privilege by excluding its application to pending litigation where the rules of discovery remain the same and the Act also prohibits access to privileged records.¹⁴⁶

In the case of *Munisamy v Hefer NO and Others*, the Court held that the applicant, a newspaper journalist, was required to attend proceedings and also had to be sworn in¹⁴⁷ thereafter she or her legal advisors could raise questions to what she found objectionable.¹⁴⁸

In another case of *S v Forbes*, the Court due to public policy, allowed a psychiatrist to withhold communications made to him while he conducted a professional examination. This was done to remove suspicion among patients about professional investigations done in the interest of justice.¹⁴⁹ Further in the case of *S v Makhaye* the Court allowed a statement made

140 Hamman & Koen (2) (2012) 79.

141 *A Company and Two Others v The Commissioner for the South African Revenue Service* 2014 (4) SA 549 (WCC).

142 *A Company and Two Others*.

143 *A Company and Two Others*.

144 *A Company and Two Others v The Commissioner for the South African Revenue Service* 2014 (4) SA 549 (WCC).

145 Promotion of Access to Information Act 2 of 2002.

146 Promotion of Access to Information Act 2 of 2002.

147 *Munusamy v Hefer N.O and others* (3637/2003) [2003] ZAFSHC 28.

148 *Munusamy v Hefer N.O and others* (3637/2003) [2003] ZAFSHC 28.

149 *S v Forbes* 1970 (2) SA 594 (C) at 599.

to a priest.¹⁵⁰ The courts looked at these cases on their own merits. Each situation is different and requires a different reasoning depending on the facts of the case. It is thus clear that confidential information protected by attorney client confidentiality and legal professional privilege is contained in records kept by lawyers. Thus accessing such records via warrantless searches will effectively nullify the legal professional privilege.

2.9.1 Conclusion

In conclusion, South African legislation regarding record keeping and access to lawyers' records requires improvement. It is crucial that a balance is struck between when client records should be made available by attorneys and when it should be kept confidential. Sometimes records are accessed for malicious reasons and this places strain on the legal profession. On the other hand lawyers could abuse their powers and use their trust accounts for illegal reasons. Even so, the wording in the new FICA Act is unclear and instead of solving the problem as the *Estate Agency Affairs* case, it presents us with more questions. In the next chapter the international instruments, regional instruments and policy documents will be consulted to garner some guidelines with regards to record keeping and the accessing of confidential client records in the context of international regulation.



150 *Makhaye v S* (AR103/10) [2011] ZAKZDHC 12; 2011 (2) SACR 173 (KZD).

CHAPTER THREE

INTERNATIONAL PERSPECTIVE

3.1 INTRODUCTION

Due to the impact of globalisation, the challenges faced by domestic communities have rapidly escalated to international problems.¹ This chapter focuses on the international framework and development regarding record keeping and access to client records held by legal practitioners. The investigation is mainly aimed at how the international community dealt and still deals with issues relating to the keeping of records, attorney-client privilege and the accessing of client records. Part of the study is to analyse how such records should be handled if they are required for purposes of prosecution or any other investigation.

International regulation can eliminate money laundering, because in the absence of such regulation there will realistically be no effective way of combating or at least significantly curbing money laundering.² Although there is widespread support for the combating of money laundering the mechanisms and reasons are not clear.³ The controls in some countries are not stringent which makes it easy for offenders to abuse the system which heightens the need for global regulation.⁴ Despite the need it is very important that due deference is given to the respective domestic regimes because there should not be an over-emphasis of the international framework.⁵

The increase production of narcotics has given rise to greater levels of use and trade in this industry. This has in turn led to monetary increases in the sale and purchase of drugs.⁶ The result of this is that international money transfers are constantly improving which makes it simpler for criminals to transfer money from anywhere on the globe from one account to the next in a matter of seconds.⁷ These improvements also make it easier for regulators to keep

1 Hamman & Koen (2) (2012) 5.

2 Morris-Cotterill N 'Money Laundering' (2001) 124 *Foreign Policy* 20.

3 Alldridge P 'Money Laundering and Globalization' (2008) 35 *Journal of Law and Society* 443.

4 Morris-Cotterill N (2001)20.

5 Morris-Cotterill N (2001)20.

6 Goldsworth, Kalin & Goldsworth (Eds) *Anti-Money Laundering: International Law and Practise* (2007) 6.

7 Goldsworth, Kalin & Goldsworth (Eds) (2007), 6.

an eye on international money movements and to detect the abnormal flow of money.⁸ Below international instruments which deal with money laundering will be discussed.

3.2 INTERNATIONAL INSTRUMENTS AND POLICY DOCUMENTS

South Africa has ratified various instruments. We are bound thereto and cannot ignore it. The Constitution provides that international law must be considered.⁹ The Constitution recognises the importance of international law and emphasises that it must be considered.

The United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances (Vienna Convention), 1988,¹⁰ was ratified by South Africa on the 14th of December 1998. Although this Convention does not directly focus on the issues in this study, it has significant relevance for money laundering as it contains the requirements for criminalising money laundering.¹¹ Article 2 provides that parties should co-operate with each other with regard to addressing the international dimension of drugs and other substances, which includes putting legislative and administrative measures into place which is in accordance with international standards.¹² Clients could use legal practitioners to launder funds that have been derived from illicit activities and these transactions should be prevented.¹³

Article 7 of the Vienna Convention encourages parties to give the highest level of mutual legal assistance in investigating money laundering offences.¹⁴ The mutual legal assistance can be requested for the following purposes: statements and evidence taken from persons; affecting the service of judicial documents and executing searches and seizures.¹⁵ The

8 Goldsworth, Kalin & Goldsworth (Eds) (2007), 6.

9 Section 39 of the Constitution.

10 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, Adopted by 106 Countries including South Africa at the Vienna Conference in 1988, known as the first internationally acknowledged instrument to deal with the problem of illicit drug trade, see Hamman (3)(2015:34).

11 Zagari B 'Trends in International Money Laundering from a U.S. Perspective' (2000) 3 *the International Lawyer* 2 840.

12 Article 2, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.

13 Hamman (1) (2013) 49.

14 Article 7, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.

15 Article 7, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.

execution of searches and seizures is especially problematic for this research as shall become apparent later in this chapter.

Various international developments led to the G7 summit in 1987. At this summit it was decided that worldwide action was required to combat the increase in the misuse of money by criminals. They would launder money which they either obtained through drug sales or for the financing of terrorism and many other reasons.¹⁶ This summit established the intergovernmental body called the Financial Action Task Force (FATF).¹⁷ The original aim was to fight money laundering and as a global initiative. In 1990 the FATF issued 40. THESE recommendations are standards for Anti-money Laundering (AML) for domestic countries.¹⁸

This has proven to be a very powerful tool because various countries have changed their legislation to adhere to the standards of the FATF.¹⁹ Some countries who did not want to adhere to these recommendations were put on a special list and were labelled 'Non Cooperative Countries and Territories (NCCT)'.²⁰ When a country's name appeared on this list it could have a negative impact on the country. In October 2006, Burma was the last country to be removed from the list.²¹

The United Nations Convention against Transnational Organised Crime (UNCTOC)²² is another important convention. Article 6 of UNCTOC provides for the criminalisation of money laundering and gives specific examples with regard to what constitutes acts of criminalisation. Examples include the conversion or transfer of property knowing that the said property is the proceeds of crime;²³ also concealing or disguising the true nature, source, location of the illicit origin of the proceeds of crime.²⁴ Article 7 of UNCTOC deals with the measures to combat money laundering. It states that each state party shall institute comprehensive domestic regulations for banks and non-bank financial institutions and also other bodies susceptible to money laundering.²⁵ State parties are required in terms of articles

16 Goldsworth, Kalin and Goldsworth (Eds) (2007) 6.

17 Goldsworth, Kalin and Goldsworth (Eds) (2007) 6.

18 Goldsworth, Kalin and Goldsworth (Eds) (2007) 6.

19 Goldsworth, Kalin and Goldsworth (Eds) (2007) 6.

20 Goldsworth, Kalin and Goldsworth (Eds) (2007) 6.

21 Goldsworth, Kalin and Goldsworth (Eds) (2007) 6.

22 United Nations Convention against Transnational Organised Crime, 2000.

23 Article 6 of UNCTOC.

24 Article 6 of UNCTOC.

25 Article 7 of UNCTOC.

18 and 27 of this Convention to ensure that all relevant authorities have the ability to cooperate and exchange information nationally and internationally.²⁶ A further requirement demands that state parties consider the implementation of feasible measures to monitor and detect the movement of cash and appropriate negotiable instruments across their respective borders.²⁷

The United Nations Convention against Corruption (UNCAC)²⁸ creates a number of corruption crimes and also criminalises the laundering of money. Article 14 of UNCAC deals with the measures to prevent money laundering and provides that each party shall create a comprehensive domestic regulatory and supervisory regime for financial institutions (bank and non-bank).²⁹ There should be strict requirements when it comes to issues involving beneficial owner identification, record keeping and the reporting of suspicious transactions.³⁰ Furthermore, Article 23 elaborates on article 14 and provides for the offence of laundering the proceeds of crime. It states that each state party shall in line with their respective domestic law, adopt legislation among other things, to necessitate the criminalisation of money laundering.³¹ This includes the transfer or conversion of property with the knowledge that the property is derived from the proceeds of crime. If a person conceal or camouflage the illegal origin of the property. It further includes the assisting of a person who is involved in money laundering or a crime linked to money laundering in order to evade the punishment for his/her crime.³²

The Financial Action Task Force (FATF) emphasises that states should have anti-money laundering and combating of terrorist financing policies in place. Such policies should be kept, regularly reviewed and there should be a designated authority to constantly improve the

26 Article 7 of UNCTOC.

27 Article 7 of UNCTOC.

28 UNCAC was adopted on 4 December 2000 and was the first comprehensive document which addressed corruption on both national and international levels. The focus areas of UNCAC are prevention; criminalisation; international co-operation; asset recovery and technical assistance. See Hamman (3) (2015:41).

29 Article 14 United Nations Convention against Corruption, 2000.

30 Article 14 of UNCAC.

31 Article 23 of UNCAC.

32 Article 23 of UNCAC.

policies which are in place.³³ The FATF has a set 40 recommendations on legal requirements, financial and banking affairs as well as external affairs.³⁴

The FATF is an independent, inter-governmental body that promotes and develops policies to protect the global financial system against things such as money laundering and the financing of terrorism.³⁵ An important recommendation by the FATF which is highly relevant to this research, is that financial institutions should be prohibited from keeping anonymous or obviously questionable accounts.³⁶ When proper records are kept, not only by financial institutions but also by legal practitioners, then the risk of money laundering and terrorist financing will be substantially reduced. The FATF standards have contributed immensely to the global regulation through its 40 recommendations on combating money laundering and the financing of terrorism.³⁷ The FATF has conducted mutual evaluations of member states in order to ascertain if they have implemented the recommendations and examined the effectiveness of the AML methodology in the various member states.³⁸ In January 2005 the FATF performed various evaluations for a third time, but the focus was more on the financing of terrorism as a result of the additional nine special recommendations which were implemented in 2004.³⁹

The importance of combating money laundering is recognised internationally. The Egmont Group of Financial Intelligence Units (FIU), which is the main FIU, acknowledges that fighting money laundering must be done in collaboration with various international and national organisations such as the Justice and Finance ministries and the police.⁴⁰ In early 1990 an informal world-wide system of FIUs came into existence.⁴¹ In June 1995, there was a meeting in the Egmont Arenburg Palace in Brussels, Belgium.⁴² The Egmont Group was established as an informal group of government operated agencies with confidential

33 FATF Recommendation 2, 2012.

34 Zagari B 'Trends in International Money Laundering from a U.S. Perspective' (2000) 3 the International Lawyer 2 840.

35 International Standards on Combatting Money Laundering and the Financing of Terrorism and Proliferation, the FATF Recommendations, (2012:7).

36 FATF Recommendation 10, 2012.

37 Morris-Cotterill N 'Money Laundering' (2001) 124 *Foreign Policy* 20.

38 Goldsworth, Kalin and Goldsworth (Eds) (2007) 8.

39 Goldsworth, Kalin and Goldsworth (Eds) (2007) 8.

40 Egmont Group of Financial Intelligence Units, The Hague, 2001.

41 Goldsworth, Kalin and Goldsworth (Eds) (2007) 7.

42 Goldsworth, Kalin and Goldsworth (Eds) (2007) 7.

information at their disposal.⁴³ The Group has the common goal for providing a platform of enhancing mutual cooperation and to share information with the intention of effectively combating money laundering and terrorist financing.⁴⁴

The issue of confidentiality was also highlighted by the Egmont Group and essentially meant that all information that is exchanged by FIU's conformed to stringent controls and safeguards. This is to ensure that the information is used only in an authorised manner which is in line with the national protocols on privacy and the protection of data.⁴⁵ Information exchanged in this manner must be protected by the same confidentiality provisions as national sources which are obtained by the receiving FIU.⁴⁶

The circumstances, under which an infringement of confidentiality will occur, must be evaluated very carefully. This could become a major problem and a definite line should be drawn between confidentiality and the access of client records. Legal practitioners are aware that ethical problems may surface when they represent clients, especially when the client has entered into various transnational transactions.⁴⁷ An ethical problem may also arise when the attorney has to make a choice which could potentially expose his/her client to prosecution.⁴⁸

Article 23 of UNCAC, further describes 'money laundering' as the 'concealment or disguise' of the real nature, source, providence, disposition and knowledge that the proceeds originate from a crime can be described as money laundering.⁴⁹ This also includes participating, being in association with or conspiring to commit the aforesaid offence.⁵⁰

There are also initiatives that have the same goal of combating money laundering. The Basil Committee on Banking Supervision (BCBS) is a good example of a private initiative that advocates for the combating of money laundering and terrorist financing.⁵¹ In October 2001,

43 Goldsworth, Kalin and Goldsworth (Eds) (2007) 7.

44 Goldsworth, Kalin and Goldsworth (Eds) (2007) 7.

45 Egmont Group of Financial Intelligence Units, The Hague, 2001.

46 Egmont Group of Financial Intelligence Units, The Hague, 2001.

47 Colares J 'The Evolving Domestic and International Law against Foreign Corruption: Some New and Old Dilemmas Facing the International Lawyer' (2006) 5 *Washington University Global Studies Law Review* 1 2.

48 Colares J (2006) 2.

49 Article 23 United Nations Convention against Corruption 2000.

50 Article 23 United Nations Convention against Corruption 2000.

51 Goldsworth, Kalin and Goldsworth (Eds) (2007) 8.

the BCBS set the standards for Customer Due Diligence (CDD) for banks.⁵² It expanded on this in 2003 by adding the importance of customer identification. This initiative is important because money laundering needs to be fought nationally, internationally as well as from private initiatives.⁵³

Importantly measures need to be introduced to combat money laundering because money laundering is an organised crime. The measures to effectively combat money laundering should be done in an organised manner. Part of combating money laundering is record keeping and the access of the client records. The study will now further examine if international guidance exist as to how it should be regulated.

3.3 Record Keeping

The FATF recommends that a financial institution should keep records of its client's transactions for at least five years. This includes all domestic and international transactions and will enable such institutions to speedily reply to requests regarding information from other competent authorities.⁵⁴ The records must be sufficient to allow the re-development of single transactions for purposes of prosecution.⁵⁵

The precise details regarding to which records must be kept differs from country to country.⁵⁶ A common factor amongst countries is that a law firm or a similar firm is supposed to provide details to relevant authorities should the client be investigated.⁵⁷ These records include the information of the client; various transactions; internal and external suspicion reports; investigation records; MLRO annual reports; information not acted upon and actions taken resulting from agency requests; training and compliance monitoring and information about the effectiveness of training.⁵⁸ Firms need to effectively keep records by reducing the amount

52 Goldsworth, Kalin and Goldsworth (Eds) (2007) 8.

53 Goldsworth, Kalin and Goldsworth (Eds) (2007) 8.

54 FATF Recommendation 11, 2012.

55 FATF, Recommendation 11, 2012.

56 Cox D *An Introduction to Money Laundering Deterrence* (2011) 232.

57 Cox (2011) 232.

58 Cox (2011) 232.

of records while still complying with legislative requirements and rules.⁵⁹ Some will require that all the original scripts be retained.⁶⁰

Designated Non-Financial Businesses and Professions (DNFBP's) especially lawyers must comply with the record keeping requirements when they prepare for or carry out transactions on behalf of the client. The following transactions attract the record keeping requirement: buying and selling of property or real estate; the management of the clients finances, securities or other assets; the management of a bank, savings or securities account; the organisation of contributions for the creation, operation or management of companies and also creation, the operation or management of legal persons or arrangements; and the buying or the selling of business entities.⁶¹

Countries are encouraged to join the FATF, which now consists of 37 countries, and to comply with the 40+9 recommendations.⁶² It became clear that financial institutions are the source of information pertaining to suspicious or unusual transactions.⁶³ The obligations imposed under domestic law, based on the FATF recommendations, mandate financial institutions to report such transactions to the money laundering bodies which are usually called Financial Intelligence Units (FIUs) or sometimes even Financial Investigation Units.⁶⁴ The information between member countries is a crucial and effective mechanism to combat money laundering and terrorist financing properly.⁶⁵ It was important to institutionalise the information because to effectively use the information, the confidentiality aspect needs to be considered.⁶⁶

Countries should create Financial Intelligence Units as envisioned by the Egmont Group, and the FIUs shall serve the function of a national centre that receives suspicious transaction reports. Such a centre should also receive other information that is relevant to money

59 Cox (2011) 234.

60 Cox (2011) 234.

61 It is important to note Recommendation 23 as well which related to this footnote as it says that lawyers, notaries, other independent legal professionals and accountants should be required to report suspicious transactions when, on behalf of or for a client, they engage in a financial transaction in relation to the activities described in paragraph (d) of Recommendation 22. See FATF Recommendation 22(d), 2012.

62 Goldsworth, Kalin and Goldsworth (Eds) (2007), 7.

63 Goldsworth, Kalin and Goldsworth (Eds) (2007), 7.

64 Goldsworth, Kalin and Goldsworth (Eds) (2007), 7.

65 Goldsworth, Kalin and Goldsworth (Eds) (2007) 7.

66 Goldsworth, Kalin and Goldsworth (Eds) (2007) 7.

laundering which includes predicate offences and terrorist financing.⁶⁷ The FATF also highlights the fact that the FIU should be able to access additional information from reporting entities and should on a timeous basis have access to the financial, administrative and law enforcement information that it needs to execute its duties in an effective way.⁶⁸

The 1980s were often referred to as the decennium of 'total greed', whereas the 1990s were referred to as the decennium of 'cleaning up'. In the 2000s, however we see the world as a time to clean up the financial world.⁶⁹

Anti-money laundering and combating the financing of terrorism is the core focus of the FATF as well as the Gatekeepers initiative.⁷⁰ The FATF created a working group known as the Gatekeepers Initiative and they identified a few professions including the legal profession, as gatekeepers regarding money laundering.⁷¹ In May 2002, the FATF drew up a consultation paper which raised several issues involving anti-money laundering framework.⁷² The paper mentioned areas lawyers should give more attention to which include customer due diligence; suspicious transaction reports and others.⁷³ The FATF also raised a concern, which is that organised crime groups through money laundering schemes make use of professional including legal professionals to increase the possibility of success.⁷⁴

Financial experts, accountants, auditors and lawyers play an important role in giving advice to clients. In some instances it could be to criminals who intend to launder money.⁷⁵ However it is important to note that money laundering carried out on a national level is susceptible to investigation where even the best thought out schemes can be caught out.⁷⁶

67 FATF Recommendation 29, 2012.

68 FATF Recommendation 29, 2012.

69 Goldsworth, Kalin and Goldsworth (Eds) (2007) 6.

70 Shepherd K 'Guardians at the Gate: The Gatekeepers Initiative and the Risk-Based Approach for Transactional Lawyers' (2009) 43 *Real Property, Trust and Estate Law Journal* 4 613.

71 Shepherd (2009) 620.

72 Shepherd (2009) 620.

73 Shepherd (2009) 620.

74 Shepherd (2009) 620.

75 Trehan J Mechanics and Typologies of Money Laundering in J Trehan Crime and Money Laundering – The Indian Perspective (2004) 109.

76 Trehan J (2004), 110.

3.4 Access to records and implications for lawyers

There are various guiding principles given by the International Bar Association (IBA). A lawyer should be independent when fulfilling his duties, and should be given the necessary protection to effectively execute his mandate.⁷⁷ The independence of the lawyer should be evident in the advice and general representation he affords to his client.⁷⁸ This independence extends to the professional judgement of the attorney when giving the determination of the possibility of success of a client's case.⁷⁹

A lawyer should always maintain a high level of honesty, integrity and also fairness towards his clients, his colleagues, the court and the legal profession as a whole.⁸⁰ Unless allowed by applicable rules, law, and professional conduct or authorised by a client, a legal practitioner should not put himself into a position where his conduct conflicts with the interests of his client or a colleague.⁸¹

A lawyer should always adhere to the principles of confidentiality and also be afforded the necessary protection with regard to these principles. This extends to current and former clients unless stated otherwise.⁸² An important concept that comes to mind is the know your customer/client (KYC) concept, which is also known as Client Due Diligence (CDD), which involves verifying the clients identity as well as checking if the clients identity corresponds with his activities.⁸³ The information needed by a client includes: identification documents; proof of residence; a photograph of the client and other important documents like the nature of the clients business and also financial status.⁸⁴ Lawyers should always keep in mind that professional secrecy cannot be invoked in situations where the lawyer is complicit in a particular crime.⁸⁵ When records of clients need to be accessed all these factors and more

77 FATF 'Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals' (2013) available at <http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf>, 16.

78 FATF (2013) 16.

79 FATF (2013) 16.

80 FATF (2013) 16.

81 FATF (2013) 16.

82 FATF (2013) 16.

83 Credit Suisse 'Anti-Money Laundering (AML) Standards and Know Your Client (KYC) Requirements' (2010) available at <https://www.credit-suisse.com/media/assets/corporate/docs/homepages/india-aml-standards.pdf> (accessed 3 November 2017).

84 Credit Suisse www.credit-suisse.com.

85 FATF (2013) 16.

need to be taken into account, but in essence, records cannot be readily accessed without being duly authorised by a warrant or a similar form of authorisation.

Clients' interests should be of paramount importance to a legal practitioner, however keeping in mind his duties he owes to the profession as a whole and the court and also the interest of justice.⁸⁶ The overall duty is to maintain ethical standards, meaning a lawyer should refrain from involving himself in unlawful activity, and should not encourage his client to commit unlawful crimes and generally obstruct the course of justice.⁸⁷

When considering all of the above, the records held by lawyers are confidential. When those records are accessed by third parties, the relationship is brought into question. This is because the relationship is one of trust.⁸⁸ Although the international conventions and policy documents do not deal much about the access to attorney records as they do about record keeping; there is sufficient evidence to suggest that accessing records from an attorney without a warrant adversely affects the attorney and the client as well and the legal profession as a whole.⁸⁹ An international document about managing legal records states that the right of the public to access records is closely tied to the legal and political notions of the sovereignty of the people.⁹⁰ Further, Roper expresses that privacy is an important right and should always be given full adherence to. These records must only be accessed in as far as privacy rights were not infringed upon. However, the *sui generis* relationship between the attorney and client should take priority.⁹¹ At the same time, however, provision must be made that some personal information be retained for evidentiary, informational or for research purposes once the primary reason has served its purpose.⁹² These conventions do not deal specifically with circumstances under which records can be accessed. However, there is enough evidence to confirm that records should not just be accessed without giving due deference to the relationship of the lawyer and the client.

86 FATF (2013) 16.

87 FATF (2013) 16.

88 Schneeman Paralegal Ethics (2000) 61.

89 Schneeman Paralegal Ethics (2000) 61.

90 Roper M Managing Legal Records (1999) 9.

91 Roper (1999) 9.

92 Roper (1999) 9.

The FATF's revised recommendations have a number of ethical implications for legal practitioners.⁹³ Although the recommendations themselves have no direct legal effect domestically, it has been expanded upon to include legal professionals. This was achieved through direct regulation because lawyers oversee their clients' matters and one of the money laundering techniques employed could be through legal professionals.⁹⁴ The question is what principle components of the FATF recommendations apply to legal practitioners?⁹⁵ The answer is the usual record keeping and customer due diligence duties regarding certain activities facilitated by lawyers such as: buying and selling real estate; managing the money and other assets of clients; the management of bank, savings or security accounts; the organising of the creation, operation or the management of companies; the creation, operation or management of legal persons or arrangements and buying and selling of business entities.⁹⁶

The customer due diligence provisions require lawyers to verify the identities of parties and also beneficial owners and the purpose of the transaction.⁹⁷ Sometimes it is required of lawyers to conduct enhanced due diligence when it comes to particular situations such as when politically exposed persons are involved.⁹⁸ Importantly, lawyers are required to properly maintain all 'necessary records' and must report all suspicious transactions that they come across and keep it for at least five years.⁹⁹ Suspicious transactions reporting related to involvement of criminal activity or terrorist financing and is a very controversial and problematic area especially for lawyers because of their confidentiality obligations which bring about a clash of ethics versus duty.¹⁰⁰ The whole enquiry is conducted objectively and may not apply if lawyers refuse to assist or represent the client.¹⁰¹ However, the recommendations contain an exception with regards to suspicious transaction reporting. The exception is that 'if the information regarding the suspicious activity is obtained in circumstances where the lawyer is subject to professional secrecy or legal professional privilege'.¹⁰² But this is still unclear, because we ought to interpret 'professional secrecy' and its application. It is clear that the 'no-tipping rule' affects the relationship between the

93 Krauland E and Coats B 'International law: International Regulation of the Legal Profession: an Impending Possibility' (2005) 22 *GP Solo* 2 38.

94 Krauland & Coats (2005) 38.

95 Krauland & Coats (2005) 38.

96 Krauland & Coats (2005) 38.

97 FATF Recommendation 10, 2012.

98 Krauland & Coats (2005) 38.

99 Krauland & Coats (2005) 38.

100 Krauland & Coats (2005) 38.

101 Krauland & Coats (2005) 38.

102 FATF Recommendation 21, 2012.

attorney and the client.¹⁰³ The no tipping off rule refers to the non-disclosure to clients or third parties (except regulators) that particular parts of information have been forwarded to a FIU or even that an investigation involving money laundering or terrorist financing will be conducted.¹⁰⁴ When not adhered to, it constitutes an offence and is punishable by law.¹⁰⁵

A client's right to be legally represented is an important right. This right gives the client the peace of mind that he can have the type of relationship with his lawyer, that allows him to be able to share any information with his lawyer without fear that the information will be disclosed in a way that will adversely affect him.¹⁰⁶ The right of confidentiality is recognized as a fundamental right in the Universal Declaration of Human Rights.¹⁰⁷ It should be kept in mind that this is subject to the STRs to be given by lawyers and the various laws in the respective domestic countries.¹⁰⁸

The terms, confidentiality, legal professional privilege and professional secrecy, are often used interchangeably to explain the rights afforded to clients. In the legal context, however, they mean different things and carry a different consequence depending on the country in question.¹⁰⁹ Legal professional privilege and professional secrecy are intricate terms with minimal differences, with a different application when we go from country to country.¹¹⁰ Confidentiality, on the other hand, is a collective term used to describe the sensitive nature of the information shared between attorney and client, which can be waived in most if not all countries.¹¹¹ When we compare these terms we see that professional privilege and professional secrecy seems to carry a stronger level of protection than confidentiality. These rights are tied to fundamental rights in various treaties and international documents and mandates.¹¹²

103 FATF Recommendation 21, 2012.

104 Cox (2011) 57.

105 Cox (2011) 57.

106 FATF (2013) 19.

107 FATF (2013) 19.

108 FATF (2013) 20.

109 FATF (2013) 20.

110 FATF (2013) 20.

111 FATF (2013) 20.

112 FATF (2013) 20.

When the aforementioned rights are breached, the consequences also differ from country to country. In some countries the breach will constitute a crime and the lawyer will either be imprisoned or pay a substantial fine. IN other countries the breach will lead to disciplinary action, where the lawyer may in all likelihood be sued by the client.¹¹³ Therefore lawyers should take heed when neglecting to fulfil their STR obligations as it may lead to personal liability depending on the jurisdiction.¹¹⁴ A number of countries report that there are certain restrictions that prevent them from effectively searching the offices of lawyers.¹¹⁵

The independence of the legal profession is threatened by globalisation, the ever-changing structure of the profession as well as the impact of money laundering and the financing of terrorism.¹¹⁶ Serious questions are being raised regarding the existence of ethical rules and regulations and whether they effectively address the real challenges faced by the lawyer in the 21st century.¹¹⁷ The Lawyer Guidance that was issued in October 2008 by the FATF can be viewed as the mid-way point where the balance is struck between governmental actions in their endeavour to protect and uphold public interest and the traditional concept of attorneys that regulate themselves and their independence.¹¹⁸ The various FATF documents and debates point towards a relationship between the government and lawyers that has far reaching implications on the legal profession nationally and internationally.¹¹⁹

Although the FATF gives comprehensive guidance on record keeping and various DNFBPs like legal practitioners, nothing is really said about the access of client records from attorneys. The other international treaties and policy documents also lack in giving guidance on access to records of clients by attorneys. This is one area that the international body has not given much attention to and this area should be addressed by the relevant authorities.

When the FATF initiative is examined in view of recent developments, we note that attorneys are labelled as ‘gatekeepers’. This affirms the importance of the FATF recommendations and its guidance for lawyers.¹²⁰ There is a constant need to strike a balance between the

113 FATF (2013) 21.

114 FATF (2013) 21.

115 FATF (2013) 21.

116 Paton P ‘Cooperation, Co-Option or Coercion - The FATF Lawyer Guidance and Regulation of the Legal Profession FATF Symposium’ (2010) 2010 *Journal of the Professional Lawyer* 165.

117 Paton (2010) 165.

118 Paton (2010) 166.

119 Paton (2010) 166.

120 Paton (2010) 166.

responsibility a legal practitioner owes society and his client.¹²¹ All this creates a daunting task for the attorney, because a distinction should be made between these responsibilities. Additionally the relationship between an attorney and his client cannot be protected at all costs in all situations because there is a duty to uphold the public interest as well.¹²² The FATF has put lawyers among the professionals who have become the main target in complex money laundering operations.¹²³

3.5 Conclusion

Money laundering and terrorist financing are actions that are fought not only domestically but internationally too. We have seen the various efforts from international organisations like the FATF to combat money laundering. Legal practitioners carry a huge load on their shoulders because they can be instrumental in combating money laundering. By keeping records and also reporting suspicious transactions they can help in combating money laundering. Unfortunately these duties all too often clash with other fundamental duties that they have towards their clients.

As alluded to above, a legal practitioner should be independent and should always protect his clients' interests through strict professional secrecy and client confidentiality. For a lawyer to be independent there should be no undue influence deterring him/her from being independent. Consequently the records of lawyers cannot be accessed without a competent court issuing a duly authorised warrant. No authority could be found to justify the warrantless searches of attorneys' offices. The terms of the warrant should be strictly applied and should not be abused. It is essential that a balance is established, where legal practitioners can effectively carry out their duties they owe to their various clients while upholding their ethical duties they inherently take up when assuming office as a lawyer.

Now that the international framework with regards to record keeping and access to attorney records has been examined, the focus shifts to two foreign jurisdictions namely, Canada and the USA. The reason for focusing on these jurisdictions is because of the analogous cases dealing with keeping and accessing records. The study will focus on how Canada and the

121 Paton (2010) 166.

122 Paton (2010) 166.

123 Hamman & Koen (2) (2012) 73.

USA have dealt with similar issues in this research and what can be learned from them to improve the current loophole in South African legislation.



CHAPTER 4

THE RECORD KEEPING REQUIREMENT

4.1 INTRODUCTION

This chapter focuses on the approaches pertaining to the record keeping and access to confidential client records in possession of lawyers of two foreign jurisdictions, namely, the United States of America (USA) and Canada. Their roles are discussed with reference to the combating of money laundering. It contains an explanation on how they have handled similar situations pertaining to record keeping and lawyers. These jurisdictions were chosen, because similar issues have arisen pertaining to money laundering, record keeping and access to client records.

The USA and SA use different prosecutorial systems. The USA uses an inquisitorial system which is judge centred and where the rules of evidence are relaxed.¹ SA uses the accusatorial/adversarial system where an impartial adjudicator presides and the parties are represented by counsel and strict rules of evidence apply.² However, the USA and SA both use common law principles, where the courts not only apply and interpret the law, but also develop the law.

South Africa has a rather recent anti-money laundering (AML) regime and therefore has but a few cases that deal with record keeping and lawyers in the context of money laundering. The USA, however, was the first to enact anti-money laundering laws, influencing many other jurisdictions around the world to also enact such laws.³ The first judgment was *California Bankers Association v Schultz*⁴ after which a considerable number of other cases were decided which impacted the AML regime in the USA.⁵

1 US Legal 'Inquisitorial System' available at <https://definitions.uslegal.com/i/inquisitorial-system/> (accessed 24 April 2017).

2 Quadri K and Kadaouf H et al, 'Acquisitorial: The Mixing of Two Legal Systems' (2015) 3 *IJHMS* 1 31.

3 Hamman (3) (2015).

4 *California Bankers Association v Schultz* 39 L Ed 2d 812 (1974).

5 Hamman (3) (2015).

Canada was chosen because of this country has dealt with issues that are raised in this thesis comprehensively. SA, USA and Canada all aggressively resist interference into the independence of the legal profession. Unlike SA, Canada like America has also build up a sizable jurisprudence concerning the conduct of the legal profession in relation to Canadian money laundering laws.⁶ Canada's legal professionals have challenged their AML legislation for a period of 15 years. It is therefore important to consider how the USA and Canada have interpreted the issues which are mentioned in this thesis.

The term 'money laundering' as previously mentioned was coined during the Watergate scandal in the USA,⁷ during the presidency term of Richard Nixon. His committee moved dirty campaign contributions to Mexico, which was then brought back through a company in Miami.⁸ The Guardian, a British newspaper, referred to the process as 'laundering'⁹ The position of Canada and the USA pertaining to record keeping will be discussed next and then contrasted with the South African position.

4.2 CANADIAN PERSPECTIVE

Money laundering laws in Canada were first enacted in 1989 and were subsequently amended in 1997, 2001 and 2005.¹⁰ The core elements of the Canadian AML regime were set out originally in the Proceeds of Crime (Money Laundering) Act of 2000 (PCMLA).¹¹ In December 2001, subsequent to the passing of the Anti-terrorism Act or Bill C-36, the scope of the PCMLA was expanded to include Anti-terrorism financing (ATF), the Act was renamed to include this development to Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA).¹²

Part one of the PCMLTFA requires financial intermediaries to do customer identification, due diligence and record keeping and to report suspicious and prescribed transactions relevant to the combatting of money laundering, terrorist financing and the possession of

6 Hamman (3) (2015).

7 Watergate Scandal <http://www.history.com>.

8 Watergate Scandal <http://www.history.com>.

9 Watergate Scandal <http://www.history.com>.

10 Chapter 4 'Money Laundering' September 2015 46 available at <http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/Chapter%204%20.pdf>.

11 Department of Finance Canada 'Enhancing Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime' June 2015 5 available at https://www.fin.gc.ca/activty/pubs/enhancing_e.pdf.

12 Department of Finance Canada www.fin.gc.ca.

terrorist property.¹³ Part two will not be discussed in this chapter as it falls outside the scope of this research. Part three of the PCMLTFA Establishes the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC).¹⁴ FINTRAC became operational in October 2001.¹⁵ The primary functions of FINTRAC are to receive reports under the PCMLTFA from reporting entities, to analyse those reports for information relevant to money laundering and terrorist financing, and to provide key identifying information (account holder, transaction amount and date) to Canadian law enforcement agencies and other agencies such as the Canada Border Services Agency, the Canada Revenue Agency and the Canadian Security Intelligence Service in certain circumstances.¹⁶

The mandate of FINTRAC is to facilitate the detection, prevention and deterrence of money laundering and the financing of terrorism, while ensuring the protection of personal information under their control.¹⁷ This mandate is fulfilled through: receiving financial transaction reports and voluntary information on money laundering as well as terrorist financing in accordance with legislation and regulations while protecting personal information under their care; ensuring compliance of reporting entities with legislation and regulations; producing financial intelligence relevant to money laundering, terrorist activities and threats to the security of Canadian investigations; researching and analysing data from a variety of information sources that shed light on trends and patterns in money laundering and terrorist financing; maintaining a registry of money services businesses in Canada; and enhancing public awareness and understanding of what money laundering and terrorist financing is.¹⁸

To date, Canada has one of the best KYC regulations.¹⁹ It relates to record keeping and requires a track record of clients. Even though issues arise with regard to the exemption of lawyers from certain provisions in FINTRAC (which will be discussed in chapter 5), a Model Rule was created for purposes of customer identification and record keeping. To eliminate the risk of lawyers aiding clients with questionable dealings (whether knowingly or

13 Department of Finance Canada www.fin.gc.ca.

14 Department of Finance Canada www.fin.gc.ca.

15 Department of Finance Canada www.fin.gc.ca.

16 Department of Finance Canada www.fin.gc.ca.

17 Money laundering <http://icclr.law.ubc.ca>.

18 Money laundering <http://icclr.law.ubc.ca>.

19 Macdonald R 'Money Laundering Regulation—What Can be Learned from the Canadian Experience' (2010) 2010 *Journal of the Professional Lawyer* 145.

unknowingly), all lawyers must ensure that their clients identity as represented to them is legitimate. .²⁰ The Model Rule is in accordance with the ethical rules that attorney's face, which is a good preventative measure, keeping the attorney and the client in check.²¹ This information is not exclusively for purposes of presenting potential evidence against a client in an investigation that might prospectively take place.²²

The Model Rule apply when an attorney provides a service to a client. The information taken by the lawyer is considered when the lawyer is paid or makes a payment for the client or gives instructions regarding a transaction on behalf of a client.²³ Attorneys are exempted from these requirements in situations where: he/she does such a transaction on behalf of his/her employer; an attorney is used as an agent by a lawyer for a particular client or the matter has been referred to him or her by another lawyer who has already complied with the rule; and also when involved in provincial or otherwise territorial legal help initiatives.²⁴

When identifying a particular client there are various requirements that need to be met regarding the personal information of the said client. Such information includes, the full name(s) of the client; the client's house or work address; the clients work or house telephone number; if the client is a natural person, and then the client's occupation is required.²⁵ If the client is an organisation which does not include a financial institution or public company the normal business that the client does must be stated, also the individuals who have decision making powers must also be listed and where the client is acting on behalf of someone, that person's details should be given.²⁶

The information given by the clients should not just be accepted on face value but must be verified with the relevant documents like government issued identification, which includes, but is not limited to drivers licence, a birth certificate, health information or passport.²⁷ When dealing with organisations, incorporating papers or information on the government register

20 Macdonald (2010) 147.

21 Macdonald (2010) 147.

22 Macdonald (2010) 147.

23 Macdonald (2010) 147.

24 Macdonald (2010) 147.

25 Macdonald (2010) 147.

26 Macdonald (2010) 147.

27 Macdonald (2010) 147.

which should have the name and details of the organization, including personnel.²⁸ When dealing with individuals, verification must take place whether the lawyer performs a function or payment occurs.²⁹ For organisations, verification must happen within 60 days of these transactions.³⁰ Re-identification is not necessary when working with the same client provided that the lawyer acknowledges previous transactions with said client.³¹ The model rule also requires lawyers to keep a duplicate of the information regarding the client's identification details.³² These documents may be held in a readable device or electronically and must be kept for as long as the relationship with the client or as long as reasonably necessary but not less than 6 years.³³

The case of *Canada (Attorney General) v. Federation of Law Societies Canada*, provides a number of noteworthy principles about record keeping. Section 33.3 of the Proceeds of Crime Regulations make lawyers subject to the Proceeds of Crime Act (the Act) when receiving or paying funds or giving instructions to pay funds other than in respect of professional fees, disbursements, expenses or bail or when acting on behalf of their employers.³⁴ Section 62, 63 and 63.1 of the Act provide details about search and seizure powers. Section 64 of the Act provides limitations on search and seizure powers in relation to material for which solicitor-client privilege is claimed.³⁵

The rationale behind requiring lawyers to comply with client identification and record keeping requirements, according to the Attorney General's submissions, is to dissuade illegal transactions, and if such transactions occur, to help find a paper trail that, with proper judicial clearance, could be accessed by the relevant authorities.³⁶

The record keeping requirements dissuade illegal transactions in at least two ways. Firstly, they help make sure that lawyers do not become 'unwitting dupes' of clients who want to use them to help with illegal transactions. Secondly, the requirements make it difficult for clients

28 Macdonald (2010) 147.

29 Macdonald (2010) 147.

30 Macdonald (2010) 147.

31 Macdonald (2010) 148.

32 Macdonald (2010) 148.

33 Macdonald (2010) 148.

34 *Canada (Attorney General) v Federation of Law Societies of Canada* 2015 SCC 7.

35 *Canada (Attorney General)*.

36 *Canada (Attorney General)*.

to take part in illegal activities with the help of their lawyers.³⁷ In the interim, the Federation has encouraged Canadian provincial and territorial law societies to take on rules prohibiting lawyers from conducting big money transactions and requiring client identification, verification and record keeping measures when lawyers affect certain financial transactions on behalf of clients.³⁸ The record keeping requirements are straight forward in the case and do not present huge complications. What stands out about this Canadian case is the fact that the protection of the attorney-client relationship is always emphasised while maintaining due deference to the ethical standards of the legal profession by not over-emphasizing the importance of the relationship between attorney and client.

4.3 USA PERSPECTIVE

As early as the 1960s, the United States law enforcement agencies succeeded in persuading Congress that the following three phenomena had come to characterise the financial transactions in the USA: the growth of financial institutions gave rise to an increase use of such institutions by petty criminals, white-collar criminals and tax evaders and that billions were made through the illegal drug trade, but none of the illegal money that was forfeitable; Secondly, crime prevention depends hugely on good financial record keeping, but despite this the record keeping practises by banks had become less stringent and in many cases, abolished.

Thirdly, there has been an increasing use by American citizens and residents of foreign financial institutions situated in what was then called “secrecy jurisdictions” for purposes of frustrating the USA law enforcement agencies.³⁹ On the basis of these three grounds, Congress enacted the Bank Secrecy Act.⁴⁰

4.3.1 Bank Secrecy Act (BSA)

The BSA consists of two major titles, each of which is found in different parts of the US code.⁴¹ The first title deals with record keeping requirements and contains the universally known ‘Know Your Customer (KYC) provisions’, which obligates financial institutions to

37 *Canada (Attorney General).*

38 *Canada (Attorney General).*

39 Global Financial Integrity ‘Tax Havens/Bank Secrecy’ available at <http://www.gfintegrity.org/issue/tax-havens-bank-secrecy/>.

40 Bank Secrecy Act of 1970.

41 Bank Secrecy Act of 1970.

maintain records of the identity of each individual account holder at the bank, as well as each individual authorised to use the account.⁴² It also requires financial institutions to keep a record of any individual who engages in any transaction that is required to be recorded or reported under the Act.⁴³ Financial institutions should also keep a copy of each cheque, draft or similar instrument drawn on the bank.⁴⁴

The second title deals with reporting requirements. It requires financial institutions to report any domestic transaction involving payment or transfer in currency of more than \$10 000.⁴⁵ This is the most well-known provision of the Act. Persons are also required to report the transportation of monetary instruments into or out of the United States if either involves instruments of a value in excess of \$5000.⁴⁶ Lastly, it requires all persons who conduct business in the US to file reports of their relationship with foreign financial institutions.⁴⁷

4.3.2 *California Bankers Association v Schultz*⁴⁸

The BSA caused a huge controversy and the constitutionality of the Act was brought into question by the California Bankers Association and the American Civil Liberties Union on two grounds: The first ground was that the plaintiffs argued before the district court that both the record keeping and reporting requirements in the BSA to delegate congressional power to the executive, in that the Act gave the Secretary of the Treasury authority to prescribe regulations requiring the maintenance of appropriate type records where the Secretary determines that they have a 'high degree of usefulness in criminal, tax or regulatory investigation'.⁴⁹

The plaintiffs also argued that the Act empowers the Secretary the unlimited power to determine the time, manner and detail in which currency transactions are to be reported.⁵⁰ The second ground, the plaintiffs argued was on the basis that the record keeping and

42 Hinterseer K *Criminal Finance: The Political Economy of Money Laundering in a Comparative Legal Context* (2002) 174.

43 Hinterseer (2002) 174.

44 Hinterseer (2002) 174.

45 Bank Secrecy Act of 1970.

46 Bank Secrecy Act of 1970.

47 Bank Secrecy Act of 1970.

48 *California Bankers Association v Schultz* 39 L Ed 2d 812 (1974).

49 *California Bankers Association*.

50 *California Bankers Association*.

reporting requirements give the government a sweeping access to private information and this transforms financial institutions into government agents.⁵¹ They further argued that these requirements amount to search and seizure without procedural safeguards mandated by the Fourteenth Amendment to the US Constitution.⁵² This is remnant of the same predicament we face in the FICA Act in South Africa with regards to how much discretion should be given when it comes to accessing information whether through the banks or through the offices of attorneys.

The Court, however, came to the conclusion that the domestic banking system is abused too often by money launderers. Therefore it is very important to safeguard the banks from being abused.⁵³ The consequences of this decision were that although prosecutions were rare, a significant number of banks began filling in the required reports. This led the customers to seek other ways of concealing the placement of cash. One of the ways was structuring or smurfing which is, breaking up large transactions into smaller ones to avoid reporting requirements.⁵⁴ This caused a huge problem and ultimately the BSA was amended in 1986 to prevent structuring. This gave way to more AML control efforts.

In November 2003, the US Department of treasury and the US department of justice released a joint report called the 2003 National Money Laundering Strategy.⁵⁵ The three most important goals of the report are to; safeguard the international financial system from money laundering and terrorist financing; enhance the US governments' ability to identify, investigate and prosecute major money laundering organisations and systems; and to ensure effective regulation.⁵⁶ During 2003 these goals were vigorously pursued.⁵⁷

Senator Joseph Biden Jr., the ranking minority member of the Senate Committee of the judiciary, when he introduced the Money Laundering Control Act 1986 (MLCA) in the United States Senate:

51 *California Bankers Association.*

52 *California Bankers Association.*

53 *California Bankers Association.*

54 Unger B 'What is Money Laundering?' In Masciandro D et al Black Finance: The Economics of Crime Edward Elgar (2007) 131.

55 Krauland & Hutman (2007) 510.

56 Krauland & Hutman (2007) 510.

57 Krauland & Hutman (2007) 510.

Money laundering is a crucial financial underpinning of organised crime and narcotics trafficking. Without money laundering, drug traffickers would literally drown in cash. Drug traffickers need money laundering to conceal the billions of dollars in cash generated annually in drug sales and to convert his cash into manageable form. Regrettably, every dollar laundered means another dollar available to support new supplies of cocaine and heroin on the streets in this country.⁵⁸

The MLCA creates three substantive money laundering offences namely, a financial transaction, a monetary instrument, and an international transportation offence.⁵⁹ The emotive words of Congressman Shaw, one of the MLCA's sponsors, illustrate what motivated Congress to create a money laundering offence:

I am sick and tired of watching people sit back and say, 'I'm not part of the problem, I am not committing the crime, and, therefore, my hands are clean even though I know the money is dirty I am handling'.⁶⁰

The intention of congress was clear, as they wanted to create a Federal offence against money laundering: to authorise forfeiture of the profits earned by launderers and to encourage financial institutions to come forward with information about money laundering without fear of civil liability: to provide Federal law enforcement agencies with additional tools to investigate money laundering; and to enhance the penalties under existing law in order to further deter the growth of money laundering.⁶¹

4.3.3 USA Patriot Act

The USA Patriot Act was signed into law on the 26 October 2001 by George W Bush. Since its enactment in 2001 the Patriot Act has played a key part and often leading role in quite a few successful operations to protect Americans from the plans of terrorism dedicated to destroying America.⁶² The Patriot Act expanded the scope of the BSA by including credit

58 Hinterseer K *Criminal Finance: The Political Economy of Money Laundering in a Comparative Legal Context* (2002) 169.

59 Hinterseer (2002) 192.

60 Hinterseer (2002) 192.

61 Hinterseer (2002) 192.

62 USA Patriot Act article 1.

unions, future commission merchants, and commodity trading advisers, commodity pool operators and informal or unlicensed transmitters of money.⁶³

Section 352 of the Patriot Act requires all financial institutions to establish an AML program within a specific period of time.⁶⁴ At the very least the AML programme must include: the development of internal policies, procedures and controls which should be appropriate for the level of risk of money laundering; the designation of a compliance officer; and an on-going employee training programme and an independent audit function to test programmes.⁶⁵

The Financial Crimes Enforcement Network (Fin CEN) is a bureau of the United States Department of the Treasury that collects and analyses information about financial transactions in order to combat domestic and international money laundering, terrorist financing, and other financial crimes.⁶⁶ This is similar to the Financial Intelligence Centre in South Africa. After Fin CEN initiated two extensions to the statutorily mandated time period within which financial institutions were required to establish AML programmes, which resulted in a delay of almost a year, Fin CEN issued an advanced notice of proposed rulemaking on the 10 April 2003 for persons involved in real estate closures.⁶⁷

In April 2010, the American Bar Association (ABA) published the Voluntary Good Practises Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing (The Good Practice Guide).⁶⁸ The goal of the Good Practice Guide is to help lawyers to understand how to identify clients who are potentially laundering money.⁶⁹ It is intended to provide a broad framework for implementing a risk-based approach to client due diligence for the legal profession.⁷⁰ The Good Practises Guide draws strongly from the Financial Action Task Force (FATF) publication on the Risk-Based Approach (RBA) guidance for legal practitioners.⁷¹ Using the FATF guidance, the Good Practices Guide aims to help the

63 Department of Justice United States of America 'The USA PATRIOT Act: Preserving Life and Liberty' available at <https://www.justice.gov/archive/ll/highlights.htm>.

64 Shepherd K 'The USA PATRIOT Act: The Complexities of Imposing Anti-Money Laundering Obligations on the Real Estate Industry' (2004) 39 *Real Property, Probate and Trust Journal* 2 409.

65 Shepherd (2004) 409.

66 United States Department of Treasury 'Fin CEN' available at <https://www.fincen.gov/>.

67 Shepherd (2004) 409.

68 Gordon M 'U.S. and International Anti-Money Laundering Developments' (2011) 45 *the International Lawyer* 1 368.

69 Gordon (2011) 368.

70 Gordon (2011) 368.

71 Gordon (2011) 368.

USA based legal professionals to understand which specific activities are covered under the FATF guidance and calculate risk in common practice situations.⁷² The guide includes hypotheticals that point out to lawyers which factors they may wish to consider when seeking to minimise money laundering exposure by and from clients.⁷³

To date the United States has not taken serious steps to regulate lawyers as part of their AML regime.⁷⁴ According to an article on the International Bar Association's Anti-Money Laundering Forum:

...the American legal system regards legal professional privilege as fundamental to the attorney-client relationship. Therefore, it is inclined towards modifying its current anti-money laundering legislation to include professionals such as lawyers. Trust and confidence are considered as cornerstone principles to the legal professional relationship. They would be eroded indefinitely, if lawyers were required to reveal information relating to the client to third parties, based upon mere suspicions. A client must feel free to seek legal assistance and be able to communicate with his representative fully and frankly".⁷⁵

Despite the strong sentiments expressed, it is important to note that US lawyers are not subject to any mandatory reporting requirements, with the exception.⁷⁶ Any cash transaction greater than \$10 000 which must be reported to the IRS.⁷⁷ Other than that their work is outside the US AML framework.⁷⁸

4.4 SOUTH AFRICAN PERSPECTIVE

An in depth discussion regarding record keeping in South Africa is contained in §3 and a brief overview will suffice for this chapter. As may be recalled, section 21 of FICA creates a prohibition which provides that a business relationship shall not be entered into with a client

72 Gordon (2011) 368.

73 Gordon (2011) 368.

74 Chapter 4 'Money Laundering' September 2015 34 available at <http://icclr.law.ubc.ca>.

75 Money laundering <http://icclr.law.ubc.ca>.

76 Money laundering <http://icclr.law.ubc.ca>.

77 Money laundering <http://icclr.law.ubc.ca>.

78 Money laundering <http://icclr.law.ubc.ca>.

unless the client is properly identified.⁷⁹ In terms of section 22 of FICA, records should be kept in accordance with section 21.⁸⁰ Furthermore section 23 of FICA states that records should be kept for at least five years and this time period starts after the termination of the relationship with the client.⁸¹

The South African Constitution emphasises the importance of the right of legal representation in section 35 and this fundamental right is afforded to everyone in South Africa.⁸² This right coupled with the client's right to a confidential attorney-client relationship creates a responsibility that a lawyer has toward his client.⁸³ However, a conflict of interest arises and this places the lawyer in a very difficult position, because he has to either protect his relationship with the client or uphold all the ethical values of the legal profession.

Requirements and regulations regarding South African record keeping are contained in various pieces of legislation and case law. FICA contains the most information and regulation on record keeping with regards to lawyers. FICA provides that records should be kept for five years and terminates only once the business relationship terminates.⁸⁴ Furthermore these records may also be kept by third parties as long as the accountable institution has free and open access to records.⁸⁵ Lawyers have to keep records and also report suspicious transactions. Section 28 of FICA provides for CTRs and section 29 provides for STRs.⁸⁶ Section 28 requires lawyers to report all cash transactions in excess of R24 999.99 and this includes transactions that add up cumulatively and exceed the threshold.⁸⁷ Section 29 deals with suspicious transactions that need to be reported and is similar to section 28 but is slightly broader.⁸⁸ These sections form part of the problem we mentioned earlier about conflicts of interest, because reporting means the attorney have to compromise the attorney-client relationship. The record keeping regulation in South Africa is clear and quite similar compared to the international standards of the FATF. The record keeping system in SA is not as problematic as the access to records. This will be discussed in more detail in chapter 5.

79 Section 21 of FICA.

80 Section 22 of FICA.

81 Section 23 of FICA.

82 Section 35 of the Constitution.

83 Greef Attorney's www.greeffattorneys.co.za.

84 Section 23 of FICA.

85 Section 24 of FICA.

86 Sections 28, 29 of FICA.

87 Section 28 of FICA.

88 Section 29 of FICA.

4.5 COMPARATIVE OBSERVATIONS

When comparing the three countries with regard to record keeping there is not much of a difference. All three countries are members of the FATF and therefore have a similar stance with regard to record keeping. The importance of identifying clients is highlighted as well as the keeping of the information of those clients. It must be noted that record keeping is a vital aspect of all three countries and is contained in the various domestic statutes of the respective jurisdictions.

In the USA like SA, proper record keeping is regarded as crucial when it comes to crime prevention. Like South Africa and Canada the record keeping element is well-defined in the USA because it conforms to international standards. Fin CEN requires that full and proper records be kept for a period of five years and all the particulars of the client should be recorded onto the system.⁸⁹ When perusing the Bank Secrecy Act, the USA Patriot Act and also Fin CEN, it is noted that the USA adopts the approach of the FATF in that it identifies risks, pursues to combat money laundering and terrorist financing.

In Canada, the situation is similar in SA and the USA. The record keeping requirements are precise and it complies with international standards when it comes to combating money laundering, terrorist financing and other crimes. The PCMLTFA as well as FICA and Fin CEN require clients to be identified properly. This entails that due diligence should be applied when keeping records and suspicious and prescribed transactions should be reported.⁹⁰ FINTRAC is the Canadian counterpart of the USA's Fin CEN and South Africa's FICA and the scope is virtually the same. As mentioned previously, the mandate of FINTRAC is to detect, prevent and deter money laundering and terrorist financing, while ensuring the protection of personal information in its control.⁹¹ Canada has one of the best KYC regulations which directly ties in with record keeping, even though lawyers are exempted from certain provisions in FINTRAC

89 Fin CEN 'Record Keeping' available at <https://www.fincen.gov/record-keeping>.

90 Department of Finance Canada <https://www.fin.gc.ca>.

91 Money laundering icclr.law.ubc.ca/sites/icclr.law.ubc.ca.

When a lawyer provides a service, the information the attorney puts on record should not be taken on face value, but should be verified.⁹² According to the submissions made by the Attorney General in the Canadian case, it is important that the record keeping requirements are fulfilled because it prevents illegal transactions from occurring and if they do occur there is a paper trail for purposes of investigation.⁹³ The PCMLTFA, similar to FICA and Fin CEN require clients to be identified properly and due diligence should also be applied when keeping records. It is further required that suspicious and prescribed transactions must be reported.⁹⁴ FINTRAC is the Canadian counterpart of the USA's Fin CEN and South Africa's FICA and the scope is quite similar.

4.6 CONCLUSION

Record keeping is an important aspect of combating money laundering and the financing of terrorism. Lawyers need to be able to keep proper records in order to effectively control the prospect of money laundering by their clients. It is evident that the record keeping requirements in South Africa, Canada and the USA are quite similar and all three jurisdictions are in line with international standards. It is apparent that the record keeping element of this research is well-defined, but it is the access to such records that is problematic. The controversial issue that needs to be addressed is; who should have access to those records and under which circumstances should it be allowed. In the next chapter the accessing of records in South Africa, Canada and the USA is examined.

92 Macdonald (2010) 147.

93 *Canada (Attorney General)*.

94 Department of Finance Canada <https://www.fin.gc.ca>.

CHAPTER 5 ACCESS TO RECORDS

5.1 INTRODUCTION

In this chapter the accessing of confidential client records is examined. The relationship between a client and an attorney is of paramount importance.¹ Keeping of records is an essential duty of all lawyers. The questions which arise are who can access those records and under which circumstances? The information shared between attorney and client should always be protected. When this confidentiality is breached, the relationship is damaged. The breach has grave consequences for the attorney because the relationship is dependent on the confidentiality between the parties.

In this chapter an attempt is made to clarify a number of issues. Such issues are access to records, the circumstances regulating access and the protection of records. It is envisaged that a compromise should be reached between the unnecessary accessing of attorneys' records while ensuring that the inaccessibility of records is not abused by lawyers.

Once again the focus is on the approaches of two other jurisdictions, namely, USA and Canada pertaining to the access to confidential client records in possession of lawyers. As stated in chapter 4, their roles are discussed with reference to the combating of money laundering and how they have handled similar situations pertaining to the accessing of attorney-client records keeping. Canada in particular has developed quite an extensive jurisprudence pertaining to the access of records.

5.2 CANADIAN PERSPECTIVE

1 Garner B 'The Year 2012 in Language and Writing' (2013) 3 *Journal of Law* 341 2.

The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) is authorised by legislation to provide information to foreign FIUs, and to receive information from FIUs and law enforcement agencies in other jurisdictions.² FINTRAC has broad powers to conduct searches without a warrant and to investigate and submit reports to police authorities.³ Normal criminal law protections do not apply.⁴ For example, FINTRAC can enter any premises without a warrant unless the premises are a dwelling.⁵ Terrence Hall states that

There is tension between the values placed on privacy and the protection of personal information and the public policy goals of deterring criminal activity and the financing of terrorism by requiring the collection and disclosure of personal and proprietary information.⁶

FATF Recommendation 22 and 23 states that lawyers should be required to engage in Customer Due Diligence (CDD) measures when performing transactions for clients and to report suspicious transactions.⁷ Many members of the legal profession including the Canadian Bar Association have strongly made known their disagreement with these Recommendations.⁸ The interpretive note of Recommendation 23 provides that legal practitioners are not required to report suspicious transactions where they fall under professional secrecy or legal professional privilege.⁹

The Canadian government has tried unsuccessfully to subject lawyers to reporting and CDD requirements much like those that are imposed on financial institutions.¹⁰ When they were promulgated, the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and Regulations applied to lawyers.¹¹ They imposed reporting and CDD requirements, and allowed searches of law offices and seizure of evidence.¹² The application of the Act and Regulations to lawyers was challenged by the *Federation of Law Societies* on constitutional

2 Money laundering <http://icclr.law.ubc.ca>.

3 Money laundering <http://icclr.law.ubc.ca>.

4 Money laundering <http://icclr.law.ubc.ca>.

5 Money laundering <http://icclr.law.ubc.ca>.

6 Money laundering <http://icclr.law.ubc.ca>.

7 FATF Recommendation 22 and 23, 2012.

8 Money laundering <http://icclr.law.ubc.ca>.

9 FATF Interpretive Note to Recommendation 23, 2012.

10 Money laundering <http://icclr.law.ubc.ca>.

11 Money laundering <http://icclr.law.ubc.ca>.

12 Money laundering <http://icclr.law.ubc.ca>.

grounds.¹³ In a 2015 ruling, the Supreme Court upheld the federation's position and read down the relevant provisions to effectively exclude lawyers from the Act and Regulations.¹⁴ Canada has boycotted the implementation of the gatekeeper initiative legislation giving rise to the protest against the European Union Directive as these initiatives clash with other duties of the lawyer such as the constitutional right of client guaranteed confidentiality.¹⁵

Between 2001 and 2002 lawyers in Canada, who were represented by the Law Society of British Columbia, the Canadian Bar Association and also the Chamber Des Notaires du Quebec and Bureau du Quebec, filed for exemptions from the law for attorneys in quite a few provincial courts. Their request was granted.¹⁶ They argued that the regulations of the federal government mandated the reporting of suspicious activity was inconsistent with not only attorney-client privilege, but also the Constitution, which was despite the fact that provision was made for communications under privilege.¹⁷

5.2.1 *Canada (Attorney General) v Federation of Law Societies of Canada*

The issue in this case was whether Canada's anti-money laundering and anti-terrorist financing legislation, as it applies to the legal profession, infringes upon the right to be free of unreasonable search and seizure mechanisms.¹⁸ Lawyers must keep the confidence of their clients and they must act with commitment to serving and protecting their clients' legitimate interests.¹⁹ Both these duties are important for the due administration of justice.²⁰ However, some provisions of Canada's anti-money laundering and anti-terrorist financing legislation are repugnant to these duties.²¹ Lawyers could have been imprisoned if they did not obtain and retain necessary information of their clients'.²² The British Columbia courts held that these provisions are therefore unconstitutional.²³ They unjustifiably limit the right to be free

13 Money laundering <http://icclr.law.ubc.ca>.

14 Money laundering <http://icclr.law.ubc.ca>.

15 Krauland & Hutman 'Money Laundering Enforcement and Policy' (2004) 38 *the International Lawyer* 2 516.

16 Krauland & Hutman (2004) 519.

17 Krauland & Hutman (2004) 516.

18 *Canada (Attorney General)*.

19 *Canada (Attorney General)*.

20 *Canada (Attorney General)*.

21 *Canada (Attorney General)*.

22 *Canada (Attorney General)*.

23 *Canada (Attorney General)*.

of unreasonable searches and seizures under section 8 of the Canadian Charter of Rights and Freedoms.²⁴

One of the main reasons for the constitutional litigation was the question of access to attorneys' files and offices. There were a number of issues and lawyers felt threatened. They had to verify the identity of clients by way of strict customer due diligence exercises and were required to keep detailed client records. Access was granted to FINTRAC to inspect their files, and these inspections could be warrantless.²⁵ Section 74 of the PCMLTFA included a penalty clause which stated that every person or entity that knowingly contravenes a number of sections or the regulations is guilty of an offence.²⁶ The prescribed punishment for the contravention and a summary conviction was a fine of not more than \$50 000 or imprisonment of not more than six months or both.²⁷ The sentence for a conviction on an indictment was a fine of not more than \$500 000 or imprisonment of not more than five years or both.²⁸

Section 62 of the PCMLTFA dealt with the contentious issues of third party access to client records, the entering of premises, the use of computers to examine data, the reproducing of records, and the use of any copying equipment. It was also required that records should be made available to FINTRAC within thirty days after a request was made to examine them.²⁹ This meant that lawyers should have granted access to a third party to enter their offices and allow them to examine confidential, private client records. In essence, the PCMLTFA authorised FINTRAC to examine the client records of lawyers.

On the 27th of September 2011, the British Columbia Supreme Court held that sections 62 to 64 of the PCMTLFA were unconstitutional.³⁰ This was further endorsed on appeal in 2013, and the Supreme Court of Canada confirmed the invalidity of the sections in February 2015.³¹

24 *Canada (Attorney General).*

25 Section 62 of the PCMTLFA.

26 Section 74 of the PCMTLFA.

27 Section 73 of the PCMTLFA.

28 Section 73 of the PCMTLFA.

29 Section 62 of the PCMTLFA.

30 *Canada (Attorney General).*

31 *Canada (Attorney General).*

The Supreme Court stated that warrantless searches, such as those permitted under PCMLTFA, were unreasonable and unconstitutional.³²

The Supreme Court of Canada confirmed what was emphasised in the 2011 judgment of Gerow J who referred with approval to the following statement by Lebel J in *Maranda v. Richer*, where it was stated that: “it is important that lawyers, who are bound by stringent ethical codes not have their offices turned into archives for the use of prosecution”.³³

Canadian lawyers are therefore not likely to be prosecuted for money laundering offences unless they deliberately facilitate a money laundering scheme.³⁴ Canadian offences require that the accused have actual knowledge that the funds were obtained through committing an indictable offence.³⁵ Wilful blindness to the exclusion of subjective recklessness will usually suffice as actual knowledge.³⁶

The FATF assesses compliance with the AML recommendations through a process of mutual evaluation.³⁷ Canada’s previous evaluation occurred in 2008, and the results of the review were mixed with different viewpoints.³⁸ It is thus clear that in Canada the warrantless access of confidential records of lawyers will not be tolerated. Their legal profession engaged in a 15 year legal dispute to ensure the confidentiality of records and the protection of legal professional privilege.

5.3 USA PERSPECTIVE

In the USA, FINCEN, established under the Bank Secrecy Act, has a number of functions such as, the gathering of data, the regulation, researching and analysing thereof.³⁹ Congress has entrusted FINCEN with a specific mandate. The mandate is the central collection, analysing and disseminating of data which is reported under the regulation of FINCEN. It

32 *Canada (Attorney General).*

33 *Maranda v. Richer* [2003] 3 S.C.R. 193, 2003 SCC 67.

34 Money laundering <http://icclr.law.ubc.ca>.

35 Money laundering <http://icclr.law.ubc.ca>.

36 Money laundering <http://icclr.law.ubc.ca>.

37 FATF ‘Mutual Evaluations’ available at [http://www.fatf-gafi.org/publications/mutualevaluations/?hf=10&b=0&s=desc\(fatf_releasedate\)](http://www.fatf-gafi.org/publications/mutualevaluations/?hf=10&b=0&s=desc(fatf_releasedate)).

38 Money laundering <http://icclr.law.ubc.ca>.

39 Money laundering <http://icclr.law.ubc.ca>.

also deals with other related data in support of government and financial industry supporters at the Federal, State, local and international levels.⁴⁰

FINCEN essentially issues and interprets regulations authorised through legislation. It supports and enforces compliance and analyses data pertaining to compliance and examination functions. Furthermore FINCEN is entrusted to collect, process, and store, disseminate, and protect data. FINCEN also fulfil a supporting role to law enforcement investigations and prosecutions. Parts of its other duties are that FINCEN shares information with other foreign FIUs regarding anti-money laundering and terrorist financing.⁴¹ Lawyers in the USA will in all likelihood escape the countries' anti-money laundering offences when they conduct their work in the ordinary course of their business. In the US money laundering offences require that the lawyer should have actual knowledge that the money in question originated from a criminal source.⁴² In essence it is not likely that lawyers' records will be checked for purposes of prosecution if they are not wilful in committing a money laundering offence.⁴³

The controversy lies in the question of how professionals such as attorneys, accountants and legal advisors should be regulated when it comes to money laundering enforcement. More specifically how should the access to the records of attorneys as 'gatekeepers' be regulated.⁴⁴ A lawyer is in a position *sui generis* as he observe transactions and is in a position to detect suspicious activity that may point to money laundering, terrorist financing or other unlawful activities.⁴⁵

However, the pertinent issue to consider is the constitutional duty of confidentiality that a lawyer has toward his/her client.⁴⁶ Lawyers in the USA expressed their concern regarding the gatekeeper provisions as they were in conflict with their duties of confidentiality and legal privilege and their general role of being an attorney.⁴⁷ The USA has not adopted any gatekeeper requirements for lawyers as these initiatives raise controversial questions

40 Money laundering <http://icclr.law.ubc.ca>.

41 Money laundering <http://icclr.law.ubc.ca>.

42 Money laundering <http://icclr.law.ubc.ca>.

43 Money laundering <http://icclr.law.ubc.ca>.

44 Krauland & Hutman (2004) 516.

45 Krauland & Hutman (2004) 516.

46 Krauland & Hutman (2004) 516.

47 Krauland & Hutman (2004) 516.

regarding legal ethics in the form of attorney-client privilege and the overarching duty to act with confidentiality by making sure that clients receive the best legal advice and general assistance.⁴⁸

The Fourth Amendment in the USA constitution deals with search and seizure.⁴⁹ It states that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but against probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁵⁰

The constitution of the USA, specifically the Fourth Amendment, protects people from unreasonable searches and seizures by the government.⁵¹ The Fourth Amendment however, is not a remedy protecting people from all searches and seizures. it only applies to unreasonable searches and seizures.⁵²

The law balances two essential interests. These are on the one hand, the violation of the Fourth Amendment rights and on the other hand the legitimate government interests such as public safety.⁵³ In the USA, the extent of the person's Fourth Amendment rights partly depends on where the person is searched.⁵⁴ When the search is conducted at home without a warrant, the search is presumed to be illegal.⁵⁵ Warrantless searches may be lawful, however, when an authority figure has given consent to search the property,⁵⁶ if the search is incidental to a lawful arrest;⁵⁷ if there is probable cause and compelling circumstances to search;⁵⁸ and if the items in question are in plain sight.⁵⁹

48 Krauland & Hutman (2004) 517.

49 Schulhofer SJ *More Essential than Ever: The Fourth Amendment in the Twenty First Century* (2012).

50 Schulhofer (2012).

51 What Does the Fourth Amendment Mean? <http://www.uscourts.gov>.

52 What Does the Fourth Amendment Mean? <http://www.uscourts.gov>.

53 What Does the Fourth Amendment Mean? <http://www.uscourts.gov>.

54 *Minnesota v. Carter*, 525 U.S. 83 (1998).

55 *Payton v. New York*, 445 U.S. 573 (1980).

56 *Davis v. United States*, 328 U.S. 582 (1946).

57 *United States v. Robinson*, 414 U.S. 218 (1973).

58 *Payton v. New York*, 445 U.S. 573 (1980).

59 *Maryland v. Macon*, 472 U.S. 463 (1985).

The Fourth Amendment was clearly drafted with the intention of preventing unreasonable and unlawful searches and seizures. In the USA, as was established earlier, the lawyer-client relationship is an important one and it can easily be inferred that the Fourth Amendment right must be applied as strictly as possible when it comes to confidential information shared between a lawyer and the client. A duly authorised warrant should be issued at all times and the terms of the warrant should be adhered to in the strictest regard.

The American Bar Association (ABA) in a newsletter posed a critical question. Is a lawyer a confidant or an informant?⁶⁰ The answer is not straight forward at all, because it must be questioned what weighs more, the client's right to privilege or the duty of the attorney to disclose suspect information. A great unease exists in the legal community because there is now a trend towards greater disclosure of information by attorneys.⁶¹ Law enforcement officials are in turn also dissatisfied because privileges create too great of a cover for attorneys and clients with criminal intentions.⁶² The ABA has established a task force and what distresses the task force the most is the suspicious transaction reports that need to be submitted by attorneys.⁶³ This fundamentally changes the attorney-client relationship because the attorney is moving from trusted advisor to government informant which means that the attorney is no longer acting in the clients' interests.⁶⁴ The task force emphasises that the relationship between attorney and client should not be overemphasised, but it should be protected.⁶⁵

The USA rejects proposals that lean towards greater disclosure as it adversely affects the attorneys and the legal profession.⁶⁶ When a client engages or plans to engage in criminal activities, it is not always obvious to the attorney. This places him/her in a difficult position because now the attorney has to guess whether the client is acting suspiciously and

60 Krauland E 'The Attorney-client Privilege in the United States an Old Age Principle under Modern Pressures' available at https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_taskforce_articles_attorney_client.authcheckdam.pdf.

61 Krauland (2004) 10.

62 Krauland (2004), 10.

63 Krauland (2004) 12.

64 Krauland (2004) 12.

65 Krauland (2004) 12.

66 Krauland (2004) 15.

unlawfully.⁶⁷ Questions arise such as what if the attorney is mistaken and if the attorney does not disclose, is the attorney subject to criminal liability. When the attorney discloses the client can sue the attorney for malpractice.⁶⁸ Clients come to attorneys for legal advice, but they also come with the impression that confidentiality will be upheld during communications. It is absolutely essential that any new mandates for attorney due diligence must be carefully weighed to not be counterproductive to the legal profession in any way.⁶⁹

McMillion notes that the increase of money laundering laws raise concerns about attorney-client privilege.⁷⁰ Privilege is an important aspect in the legal profession and refers to a relationship of trust between USA lawyers and their respective clients.⁷¹ The ABA has warned against the policies stemming from anti-money laundering which cause the attorney-client relationship to be questioned.⁷²

In February the USA government was urged to 'protect and uphold the attorney-client relationship even when dealing with money laundering'.⁷³ It has also been brought to the attention of regulators that there are less restrictive means available that do not contravene the principles of the USA justice system or the relationship between the attorney and his/her clients.⁷⁴ However, in the USA client confidentiality is held in high regard and suspicious activity reports are not reported to government authorities without speaking to the client first, this is to preserve the relationship between attorney and client.⁷⁵ What needs to be duly noted is the fact that the USA money laundering laws surrounding the regulation of lawyers still needs improvement as there are still a few significant gaps like the money laundering legislation that President Bush signed in 2001 is opaque which creates uncertainty.⁷⁶

The USA was evaluated by the FATF in 2006, which was their last evaluation and it was recommended that the USA government continue to improve their money laundering laws,

67 Krauland (2004) 15.

68 Krauland (2004) 15.

69 Krauland (2004) 15.

70 McMillion R 'Washington Report: Gatekeepers Burden: Money Laundering Proposals Raise Concerns About Attorney-Client Privilege' (2002) 88 *ABA Journal* 12 72.

71 McMillion (2002) 72.

72 McMillion (2002) 72.

73 McMillion (2002) 72.

74 McMillion (2002) 72.

75 McMillion (2002) 72.

76 McMillion (2002) 72.

especially the CDD requirements and the regulation of lawyers and how they are affected, keeping in mind the ABA and other associations related to the bar.⁷⁷ It seems unlikely that the USA Will allow warrantless searches of attorneys' offices to access confidential attorney client records. The ABA regards legal professional privilege as of the utmost importance and warrantless searches are prohibited under the Fourth Amendment.

5.4 SOUTH AFRICAN PERSPECTIVE

Chapter 4 and chapter3 contain a detailed discussion of South African law. Access to attorney records in South Africa will only be briefly highlighted. As noted, Canada and the USA hold the issue of attorney-client privilege in high regard, which is also the case in South Africa. Under the Constitution of South Africa, a client is guaranteed legal representation with all the benefits accompanying it, including the right to have a confidential relationship with an attorney.⁷⁸

On April 29th 2017, it was announced that President Zuma, as he then was, has signed the FICA Bill into law. The Act is now known as the Financial Intelligence Centre Amendment Act 1 of 2017 (the new Act).⁷⁹ This Act originates from the *Estate Agency Affairs Board v Auction Alliance* case, which dealt with the question of access to records of estate agents, but has a greater relevance and implication on legal practitioners.⁸⁰ The pertinent issue was that provision was made for warrantless searches. The authority was also given to FIC to gain access to highly confidential documents which could be protected under attorney-client privilege.⁸¹ The new Act was supposed to remove those powers of warrantless searches, but when closely examined, it is found that warrantless searches are still in certain circumstances authorised under the new Act.

The amendment of section 45B, contained in section 32(1C) lists the grounds where premises may be entered without a warrant and they are essentially as follows: the inspector may enter without a warrant if the person in charge or someone who is 'apparently' in charge and in

77 Money laundering <http://icclr.law.ubc.ca>.

78 Section 35 of the Constitution.

79 Herald Live 'Zuma Signs FICA Bill into Law' available at <http://www.heraldlive.co.za/news/2017/04/29/zuma-signs-fica-bill-law/>.

80 *Estate Agency Affairs Board*.

81 *Estate Agency Affairs Board*.

physical control of the premises after the said person has been told that he/she is under no obligation to let the person in without a warrant.⁸²

Secondly, if the inspector believes on reasonable grounds that the warrant will be issued by a magistrate or judge in terms of subsection (1B) which the inspector has applied for or the inspector has reason to believe that waiting for the warrant will defeat the purpose of his search then he or she may do so.⁸³ When doing so the inspector must act within reasonable time frames on reasonable notice, where appropriate and 'with strict regard to decency and good order, including the person's right to, respect for and protection of dignity, freedom and security and personal privacy.'⁸⁴

It is submitted that the revised section is just a differently worded section 45B of the previous Act. Subsection (1C) (a), the latter part of the paragraph refers to 'apparent owner or in physical control' could be problematic. The inquiry is therefore subjective. It could be someone who seems apparently in control, but who might not have the authority that he/she claims to have. Even if it later transpires that the person was not the owner, the inspector may have had access to highly confidential information which he/she was not supposed to see which directly conflicts with the right of the client. This could be information that is protected by attorney-client privilege. Surely, additional precaution needs to be taken by the owners. It must be realised that this type of confidentiality needs to be protected in the same manner as is Canada and USA.

In terms of paragraph (b) of the subsection, the questions of what are the reasonable grounds that a warrant will be given and what if the warrant is disallowed, arise. Even more disconcerting is the second part of paragraph (b) which refers to the delay in the warrant which could lead to the defeat of the purpose of entering. This provision gives the inspector the discretion to decide which could be dangerous. He can claim that reasonable grounds existed and if later established that reasonable grounds did not exist, it would be too late. By this time the content of confidential files would have been compromised and the rights of the attorney and his clients infringed

82 Section 32(1C) of FICA Amendment Act 1 of 2017.

83 Section 32(1C) of FICA Amendment Act 1 of 2017.

84 Section 32(1D) of FICA Amendment Act 1 of 2017.

It is further submitted that the reasonable time and reasonable notice in subsection (1D) is too subjective. These situations could be used merely to access confidential documents. Even if it is later established that the inspector was at fault or made a mistake, whatever documents has been accessed would have been compromised. This could be detrimental to the legal profession in South Africa, because the question of attorney-client privilege itself as a right is now brought into question, and this could have far reaching implications. The situation for South African lawyers when dealing with accessing confidential client records looks dismal. This is despite a Constitutional Court case which declared warrantless searches of the offices of certain professions unconstitutional⁸⁵.

5.5 COMPARATIVE OBSERVATIONS

In Canada, FINTRAC authorises various searches without a warrant which means FINTRAC can enter any premises without a warrant, unless that premises is a dwelling.⁸⁶ This originally included lawyers, but the Canadian government was unsuccessful in trying to subject lawyers to reporting and CDD requirements which are similar to the requirements imposed on financial institutions.⁸⁷ The PCMLTFA authorised the reporting and CDD requirements and furthermore allowed the offices of lawyers to be searched and whatever evidence was found could be seized.⁸⁸ Unlike South Africa, the Federation of Law Societies challenged this. Subsequently, the Supreme Court held in favour of the federation and concluded that lawyers are excluded from the Act and Regulations.⁸⁹ Canadian lawyers has rejected the gatekeeper's legislation and fought for the constitutional right of confidentiality between lawyers and their clients.⁹⁰

Canadian lawyers were unhappy about the fact that a constitutional right to confidentiality between lawyers and their clients existed, yet authority existed for the search and seizure of records of lawyers. They were subjected to strict customer due diligence requirements and had to keep detailed records which could be easily accessed by FINTRAC without a warrant.⁹¹ After taking the matter to court, the Court declared the provisions authorising

85 *Estate Agency Affairs Board.*

86 Money laundering <http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca>.

87 Money laundering <http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca>.

88 *Estate Agency Affairs Board.*

89 *Estate Agency Affairs Board.*

90 Krauland & Hutman (2004) 516.

91 Section 62, Proceeds of Crime (Money Laundering) and Terrorist Financing Act 2000.

searches without a duly authorised warrant unconstitutional.⁹² The Supreme Court quoted the *Maranda* case which said that the offices of lawyers should be used as an archive for prosecution.⁹³ In Canada, confidential records of lawyers will not be accessed without a duly authorised warrant.

Like Canada, lawyers in the USA will in all probability not be liable for money laundering offences when they perform their normal duties as practitioners. The chances of being prosecuted will be limited to instances where they have actual knowledge about the crime.⁹⁴ Their records will in all likelihood not be accessed for purposes of prosecution if not wilful in committing a money laundering offences.⁹⁵ Lawyers are in a position *sui generis* because of the scope of their duties. Regardless of their gatekeeping duties, they owe a duty of trust to their client which is constitutionally guaranteed in terms of the Fourth Amendment.⁹⁶ It should be noted that in the USA, the gatekeeper requirements for lawyers have not been adopted because of the controversy regarding the confidentiality between attorney and client.⁹⁷

The USA, like Canada, rejects situations where a lawyer has to disclose confidential information that should be protected.⁹⁸ The USA has also emphasised the importance of protecting and upholding the attorney-client relationship by saying that less restrictive means exist that do not hamper the relationship between the attorney and the client.⁹⁹ In the USA there is still room for improvement, like the opaque nature of the money laundering legislation that President Bush signed in 2001 which creates a level of uncertainty but what stands out is the fact that the relationship between the attorney and client is held in high regard.¹⁰⁰

When it comes to accessing records of lawyers in South Africa, the answer is not straightforward and this is a major problem. It is important that when a client consults a lawyer, that the discussions are confidential. In both Canada and the USA lawyers' offices are

92 *Estate Agency Affairs Board*.

93 *Maranda v. Richer*, [2003] 3 S.C.R. 193, 2003 SCC 67.

94 Money laundering <http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca>.

95 Money laundering <http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca>.

96 Krauland & Hutman (2004) 516.

97 Krauland & Hutman (2004) 517.

98 Krauland (2004) 12.

99 McMillion (2002) 72.

100 McMillion (2002) 72.

protected from warrantless searches and almost immune against the warrantless accessing of confidential client files. This is illustrated in the *Estate Agency Affairs Board* case where the accessing of records was in question.¹⁰¹ The Court declared that certain provisions in FICA were unconstitutional and time was given to the legislature to correct the invalidity. A new FICA Act was enacted which was supposed to provide a solution to the problem.

Regrettably, the new Act still allows for warrantless searches and even though the Constitutional Court of South Africa has given a direct order, this order was completely ignored. The legislature simply re-phrased the Act, but when analysed, the problem that existed which is the warrantless access to client records, still exist. The South African situation is thus quite different from the Canadian and USA. Lawyers in South Africa are not as protected as lawyers in the USA and Canada. Unfortunately warrantless searches of confidential client information can still be authorised under the new Act.¹⁰²

The new FICA amendment Act¹⁰³ was supposed to cure the defect caused by the previous sections 45B, 45B (6) and 45B (7). These subsections provide for non-routine inspections and warrantless searches respectively. Sections 32 (1C) and 32(1D) of the new Act as discussed in chapter 3, creates further problems for lawyers because these two new sections do not comply with the order granted by the Constitutional Court. It does not properly address the problems and shortcomings highlighted in the *Estate Agency Affairs Board* case. The access to client records are not properly addressed, neither is the issue of warrantless searches. This is problematic for South African lawyers and should be addressed as soon as possible.

When contrasting the situation in South Africa with Canada and the USA, a major difference pertaining to access to client records is obvious. Canada and the USA protect their lawyers from strict anti-money laundering laws, while still not over-emphasising the protection afforded to lawyers. Both Canada and the USA by utilising FINTRAC and FINCEN respectively, provide that lawyer's records can be accessed only by way of a duly authorised warrant. There are no other exceptions as those contained in FICA. It is submitted that it is possible that lawyers can be regulated by legislation and rules and be protected at the same time.

101 *Estate Agency Affairs Board*.

102 Section 32(1) (D) of the FICA Amendment Act 1 of 2017.

103 FICA Amendment Act 1 of 2017.

5.6 CONCLUSION

In conclusion, this chapter dealt with the access of the client records in the [possession of attorneys in Canada, USA and South Africa. Though the situation in Canada and in the US can still improve, it should be noted that they protect attorney-client privilege. Despite that confidentiality is also regarded as important in South Africa, the legislature needs to improve on the mechanisms which regulate the access of confidential client records. It is important that lawyers are not given the right of absolute protection, but it is important that the legislature is clear on how the access of records will be regulated. Chapter 6 will briefly conclude and propose certain recommendations.



CHAPTER 6

CONCLUSION

6.1 INTRODUCTION

The aim of this research was to examine the implications of the FICA Amendments on the legal profession in South Africa. The fact that the relationship between the attorney and client is a crucial one has been emphasised throughout this study. Lawyers are sometimes presented with precarious situations where they have to make critical decisions. These could have negative consequences for themselves as well as their clients. It is also important to note that even though lawyers should not be over-regulated, under-regulation could also cause problems. It is more than possible that lawyers could use their resources to commit money laundering crimes themselves therefore there should be a middle ground.

The issue in this thesis is whether the record keeping requirements and the access of those confidential records has an impact on the attorney-client relationship and on the fundamental right of legal professional privilege in South Africa. In other words this research focuses on the records kept by lawyers and the question of who can access those records and under which circumstances. In order to address these questions, international law, the jurisprudence of South Africa, Canada and the USA was examined.

6.2 INTERNATIONAL LAW

On the issue of record keeping, International Law offers critical guidance and it coincides with the situations in South Africa, Canada and the USA. The record keeping aspect was analysed in detail in the previous parts of this study.¹ It was emphasised that even lawyers have a duty to keep proper record keeping of their clients' details. On the issue of accessing those confidential records, international law leans towards protecting the legal professional privilege. International law places emphasis on the fact that lawyers should fulfil their duties to the best of their abilities.² The FATF brings to our attention that a lawyer should adhere to

1 See §§ 3.2, 4.2 and 4.3.

2 See § 3.2.

the principles of confidentiality and should at all times be honest and have integrity. The conduct towards clients and colleagues should be fair and situations where conflicts with clients or colleagues are created should be avoided.³ With the above being said, a lawyer should be given the necessary protection to fulfil these duties.⁴ International law clearly states that when confidential client records need to be accessed it should be done with a duly authorised warrant.⁵ Although not much detail is contained in the international instruments, it is clear that International law is geared toward protecting and upholding the attorney-client relationship.

6.3 LESSONS LEARNT FROM CANADA AND THE USA

The position regarding the keeping of records and the access thereto in Canada and the US was discussed in detail in §4 and §5. Some of the key points are that in Canada and in the US, confidential client records will not be accessed without a duly authorised warrant.⁶ Although the lawyers in these jurisdictions do not have automatic immunity from prosecution, they have the necessary protection regarding the keeping and accessing of records.⁷

In the US the relationship between attorney and client is regarded as a relationship that requires protection, therefore legal professionals are not included in the anti-money laundering legislation.⁸ Trust and confidence is considered as cornerstone principles in the context of the relationship between attorney and client.⁹ The ABA makes it clear that this relationship is a crucial relationship and should it be compromised, the legal profession could suffer damage.¹⁰ With that being said, if lawyers were required to reveal information relating to clients to third parties based on a suspicion, then the relationship of trust will be broken.¹¹ According to the ABA a client must always feel free to seek legal advice from legal practitioners and they should feel assured that their information is in confidential and capable hands.¹²

3 See § 3.2.

4 FATF (2013), 16.

5 See §3.2.

6 See §5.5.

7 See §5.5.

8 Money laundering <http://icclr.law.ubc.ca>.

9 Money laundering <http://icclr.law.ubc.ca>.

10 Money laundering <http://icclr.law.ubc.ca>.

11 Money laundering <http://icclr.law.ubc.ca>.

12 Money laundering <http://icclr.law.ubc.ca>.

On the issue of record keeping, South Africa, Canada and the US have similar laws on record keeping.¹³ Furthermore all of the above jurisdictions comply with the international standards therefore further deliberation is not required here.

The situation in Canada is analogous to that in South Africa, because in both jurisdictions legal challenges were lodged regarding the access to confidential client records.¹⁴ Canada succeeded to afford protection to their lawyers while still keeping them regulated. The question is” why can South Africa not do the same? One of the essential qualities that a lawyer should possess is that he should keep certain information confidential.

As can be recalled chapter 5 contains a detailed discussion regarding accessing of records. Only an attorney should have exclusive access to his client’s records. This is in accordance with the attorney-client relationship. When a situation should occur where attorneys and their clients are involved in illegal transactions such as money laundering, access thereto should only be granted by way of duly authorised warrant. Without this warrant access should not be granted to these confidential records. When we examine Canada and the US, they apply this concept strictly without fail. However, in South Africa, a loophole exists in our law. Warrantless searches and access to confidential records is still being authorised by FICA and the legislature should attend to this matter immediately. It must be seen as a priority to effect change immediately.

Unfortunately, the warrantless searches of confidential client records, authorised by FICA, does not protect them like their Canadian and US counterparts. It is proposed that South Africa adopt the same approach as Canada and the US. The accessing of records issue, should exclude lawyers from the provisions of FICA. Only a duly authorised warrant is issued by a competent court, after careful consideration should allow access to records. The legal profession in South Africa will be undermined if proper measures and mechanisms are not put into place to rectify the defects in the amended FICA Act.

13 See §§ 2.4, 3.2, 4.2 and 4.3.

14 *Canada (Attorney General) v Federation of Law Societies of Canada* 2015 SCC 7.

6.4 RECOMMENDATION

It is recommended that the unclear wording in the FICA amendment Act be changed. Instead of bringing clarity, the Act poses more questions which could be problematic for the legal profession. Documents kept by lawyers are of a highly confidential nature. The main concern is to protect attorney client and legal professional privilege. This can only be effectively achieved if and when the relationship between an attorney and a client is protected.¹⁵

Furthermore a lawyer has the right to exercise his profession in terms of section 22 of the Constitution.¹⁶ It is in the nature of an attorneys' work to deal in confidence with clients. As a result thereof there is an establishment of a relationship of trust between attorney and client.¹⁷ This relationship is special and requires protection. When the relationship of trust is broken between the attorney and client because of the warrantless access to client records, the rights of the attorney as well as the clients are infringed. It could be that the information fall in the wrong hands which could jeopardise lawyers' right to practice and it could infringes upon the clients right to privacy and proper legal representation.¹⁸

6.5 CONCLUSION

During the course of this research, a journey was undertaken and at the end of all journeys, a destination was reached. When evaluating the South African legislation on keeping records no real problem is encountered as it corresponds with international law and with the two foreign jurisdictions examined in this study. Unfortunately, in South Africa the accessing of those confidential records is problematic. South Africa needs to change the regulation on the access to confidential records and model it towards that of US and especially Canada. If this is done, it will finally rectify the defect created by the FICA amendment Act.

15 Greef Attorney's www.greeffattorneys.co.za.

16 Section 22 of the Constitution.

17 Greef Attorney's www.greeffattorneys.co.za.

18 Section 35 of the Constitution.

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