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REPORTING OBLIGATIONS: A CHALLENGE FOR SOUTH AFRICAN LAWYERS

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PROCEDURE

BY

NADIA DOWMAN

STUDENT NUMBER: 3176357

SUPERVISOR: DR A.J. HAMMAN

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DECLARATION

I declare that, **Reporting Obligations: A Challenge for South African Lawyers** 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.

Signed.........................

Nadia Dowman

February 2020

Signed.........................

Dr A J Hamman

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Reporting Obligations

South Africa

Suspicious transaction reporting

LIST OF ACRONYMS

ABA	American Bar Association
AML	Anti-Money Laundering
BSA	Bank Secrecy Act
CDD	Customer Due Diligence
CTR	Cash Threshold Reporting
DNFBP	Designated Non-Financial Businesses and Professionals
FATF	Financial Action Task Force
FIC	Financial Intelligence Centre
FICA	Financial Intelligence Centre Act
FINTRAC	Financial Transactions and Reports Analysis Centre of Canada
FIU	Financial Intelligence Unit
FLSC	Federation of Law Societies of Canada
IMF	International Monetary Fund
IMLA	International Money Laundering Abatement and Anti-Terrorist Funding Act
NTO	No Tip Off
PCMLTFA	Proceeds of Crime (Money Laundering) and Terrorist Financing Act
POCA	Prevention of Organised Crime Act

POCDATARA	Protection of Constitutional Democracy against Terrorism and Related Activities Act
RBA	Risk Based Approach
RICO	Racketeer Influenced and Corrupt Organizations Act
STR	Suspicious Transaction Reporting
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNCTOC	United Nations Convention against Transnational Organized Crime
UNODC	United Nations Office on Drugs and Crime
US	United States
WGEI	Working Group on Evaluation and Implementation

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CHAPTER ONE

INTRODUCING THE RESEARCH TOPIC

1. Introduction

“Threats to the independence of the legal profession have become a preoccupation for bar leaders, regulators and academics, driven by the dual pressures of globalization and the changing business structure of the profession.”[1] Money laundering is a transnational economic crime that has plagued the world economy for many decades. It is a crime that eluded the attention of most world leaders. Hence, it is this elusiveness and this non-interest in money-laundering as a serious economic crime, that afforded many individuals such as former dictators and military leaders in developing countries the chance to avoid prosecution for depleting the economic resources of their particular state.[2] Money laundering is a financial crime that involves a complex series of transactions in which the legal profession may be implicated. It is a global phenomenon that has evolved to such an extent that it is now conducted with ease and sophistication.

The South African legal profession historically is a dual profession with attorneys and advocates. While the newly adopted Legal Practice Act provides for a possible future single profession, it will take years before the two become one. Therefore, this study will refer mainly to the attorneys’ profession being affected by the reporting obligations and as the one that operates a trust account.

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

2 Mugarura N *The Global AML Framework and its Jurisdictional Limits* (published PHD thesis, University of East London, 2012) 30.

However, no matter how sophisticated money laundering becomes, money launderers are constantly searching for new even more sophisticated ways by which to “clean” their ill-gotten funds.[3] According to the Financial Action Task Force (FATF) professionals, such as attorneys and accountants, have become the main targets in extremely complex money laundering schemes.[4] According to Bell:

> …in some discussions of money laundering and the legal profession, it appears to be believed that lawyers are more ethical and moral than the remainder of society and could not therefore possibly commit money laundering offences.[5]

However, professionals, especially attorneys, run the risk of being exploited and used as a tool by money launderers to integrate their ill-gotten funds back into the legal economy. This was addressed by the Financial Intelligence Centre Act (FICA) in sections 28 and 29 which deal with reporting obligations in relation to money laundering.[6] At its core these sections place attorneys in an extremely challenging position which is, comply with the anti-money laundering obligations and report clients or risk possible prosecution as an accessory to the crime of money laundering. This conundrum represents what this study seeks to address; does the attorney comply with his legal obligation to report or does the expectation of client confidentiality and trust trump that obligation.

3 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 & Development* 49.

4 Hamman AJ (2) *The Impact of Anti-Money Laundering Legislation on the Legal Profession in South Africa* (unpublished LLD thesis, University of the Western Cape, 2015) 1.

5 Bell R.E ‘The prosecution of lawyers for money laundering offences’ (2003) *Journal of Money Laundering Control* 17-26 available at https://doi.org/10.1108/13685200310809374 (accessed 19 February 2018).

6 Financial Intelligence Centre Act 38 of 2001.

1.1. Background to study and statement of the problem

The Financial Intelligence Centre Act (FICA) is South Africa's attempt to address the issue of money laundering. According to the preamble, FICA was implemented in order to:

> combat money laundering activities and the financing of terrorist and related activities; to impose certain duties on institutions and other persons who might be used for money laundering purposes and the financing of terrorist and related activities[7]

Hence, attorneys as accountable institutions are required by FICA, as a mandatory duty, to report suspicious transactions entered into on behalf of or by clients.[8] According to Section 28, an accountable institution and a reporting institution must report to the Financial Intelligence Centre (hereinafter FIC) the prescribed particulars of a transaction concluded with a client if that transaction concerns an amount of cash that exceeds the prescribed amount.

Section 29 on the other hand provides that, a person who carries on a business or who is employed by a business and who knows or ought reasonably to have known or suspected that the business has received or is about to receive proceeds of unlawful activity or a transaction or series of transactions to which the business is a party to, has facilitated or is likely to facilitate the transfer of proceeds of unlawful activities, must within the prescribed period report to FIC.

The above evidently highlights the fact that the scope of section 29 is significantly broader than that of section 28. However, both sections inevitably place a cruel burden on attorneys. This is highlighted by Hamman and Koen when they state that clients expect all communications to be confidential and consequently privileged,

7 Preamble Act 38 of 2001.
8 Section 29 of FICA.

however the reporting requirements of FICA presents the attorney with a distasteful election which is, betray your clients confidence or betray your legal obligations to report.[9] The attorney is subsequently left to make an uncomfortable choice, and should he fail to report he runs the risk of being prosecuted for money laundering.[10] It is argued by some authors that a persons' right to complete confidentiality from his law firm is a basic fundamental right.[11] If one follows this train of thought it stands to reason that such a right then affords an individual with complete legal privilege. Yet Millard and Vergano argue that one must distinguish between the concept of confidentiality and privilege, as information has the potential to be confidential but not privileged.[12]

The above showcases the serious impediments and issues that reporting obligations have not only on the attorney, but on the clients right to privacy, attorney-client confidentiality and legal professional privilege. Therefore, this research was embarked upon to draw attention to the challenges faced by attorneys.

1.2. Suspicious Transactions

A suspicious transaction may appear to be an extremely simple concept. However, one must remember that what might raise a suspicion within one individual might not do the same in another. It is for this very reason that we highlight what constitutes a suspicious transaction and what attorneys should look out for.

According to the South African Reserve Bank a suspicious transaction is:

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9 Hamman & Koen RA '*Cave Pecuniam*: Lawyers as Launderers' (2012) 5 *PER/PELJ* 79.
10 Hamman & Koen (2012).
11 Bester 'Money Laundering Legislation: Part 2, An 'Assault' on the Attorney-client Relationship and on the independence of the Profession?' (2002) De Rebus 26.
12 Millard & Vergano 'Hung Out to Dry? Attorney-client confidentiality and the reporting duties imposed by
the Financial Intelligence Centre Act 38 of 2001' (2013) 34 Obiter 389-427.

> any transaction where there is a reasonable ground to suspect that the accountable institution has received or is about to receive the proceeds of unlawful activities or activities related to an offence to the financing of terrorist and/or related activities.[13]

The Financial Intelligence Unit of Saint Vincent and the Grenadines defines a suspicious transaction as a transaction that:

> may involve several factors that may on their own seem insignificant, but together raise suspicion that the transaction is related to the commission of a money laundering offence, a terrorist financing offence or both or any other serious offence.[14]

The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) provided attorneys and accountable institutions with what is known as Guideline 2: Suspicious Transactions. In terms of the guideline, a suspicious transaction is described as a financial transaction where an individual has reasonable grounds to suspect that the financial transaction in question relates to a money laundering offence. This includes transactions where there are reasonable grounds to suspect that the transaction is related to the attempted commission of a money laundering offence.[15] This definition evidently goes a step further to cover both completed and attempted transactions which is something that most definitions exclude. In addition, the guideline provides a definition for what constitutes reasonable grounds to

13 South African Reserve Bank 'Suspicious transactions / Advance Fee Fraud' available at https://www.resbank.co.za/RegulationAndSupervision/FinancialSurveillanceAndExchangeControl/FAQs/Pages/Suspicious%20transactions%20-%20%20Advance%20Fee%20Fraud%20.aspx (accessed 19 June 2019).

14 Financial Intelligence Unit of Saint Vincent and the Grenadines 'Identifying Suspicious Transactions' available at http://www.svgfiu.com/index.php/identifying-suspicious-transactions (accessed 19 June 2019).

15 Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) 'Guideline 2: Suspicious Transactions' (2010) 10.

suspect which is 'determined by what is reasonable in your circumstances, including normal business practices and systems within your industry.'[16]

Therefore, one can safely conclude that a suspicious transaction is any financial transaction, whether completed or attempted, that raises reasonable grounds to suspect that the transaction in question relates to an offence or the commission of an offence.

For example, if a client approaches an attorney with a mandate and the attorney instructs the client that in order for him/her to proceed he would need a deposit of R10 000.00. The client agrees to pay the deposit but advises the attorney that he/she has no fixed employment (freelances) and has no bank account, but they are able to provide the attorney with R10 000.00 in cash. Although in terms of the law this amount is below the cash reporting threshold and not reportable in terms of section 28, but in terms of reasonable circumstances, this should raise a suspicion with the client that the client could possibly be involved in illegal activity and the money comes from an illegal source or is the proceeds of a crime. This would then meet the general requirements of a suspicious transaction and would place the attorney under an obligation to report the client.

1.3. Research Question

The aim of this study is to compare these mandatory duties to the question of, legal professional privilege, attorney-client confidentiality and the independence of the legal profession. Specifically, what are the effects of section 28 and cash reporting

16 FINTRAC (2010) 10.

obligations and section 29 and suspicious transaction reporting obligations on the legal profession and legal professional privilege and what are the implications of these provisions on the attorney-client relationship. The challenge that remains is to find a balance between combating money laundering whilst respecting and protecting the integral principals of legal professional privilege and attorney-client confidentiality.

1.4 Money Laundering

Money laundering is a term derived from the underworld activity in the United States (US) during the 1920's with Al Capone and his faction during the Prohibition.[17] Their income was primarily derived from the sale of illegal liquor, prostitution and gambling. As a result, they needed to find a means by which they could conceal their illegal profits and incorporate it back into the legal economy without raising any suspicion. They subsequently opened various cash intensive businesses such as laundries, which essentially operated as a façade to conceal the illegal activities being conducted.[18]

The United Nations Office on Drugs and Crime (UNODC) performed a study to ascertain the degree of illicit funds generated by drug trafficking and organised crime.[19] According to the UNODC 'The estimated amount of money laundered

17 Richards 'Transnational Criminal Organizations, Cybercrime, and Money Laundering Boca Raton' (1999) CRC Press 43.

18 Richards 'Transnational Criminal Organizations, Cybercrime, and Money Laundering Boca Raton' (1999) CRC Press 43.

19 Financial Acton Task Force 'What is money laundering' available at http://www.fatf-gafi.org/faq/moneylaundering/#d.en.11223 (accessed 14 February 2018).

globally in one year is 2 - 5% of global GDP, or $800 billion - $2 trillion in current US dollars.'[20]

The need to combat money laundering has never been more pressing. Accordingly, the South African legislature enacted anti-money laundering laws (AML) such as the Prevention of Organised Crime Act (POCA),[21] the Financial Intelligence Centre Act (FICA)[22] and the Protection of Constitutional Democracy against Terrorism and Related Activities Act (POCDATARA).[23] As mentioned above, FICA is South Africa's "solution" to combating and addressing the crime of money laundering. However, upon closer evaluation it place's severe pressure on all accountable institutions specifically that of the legal profession which will be discussed in detail in chapter 3.

1.5 Definition of Money Laundering

Schlenther describes money laundering as '…any act that obscures the illicit nature or the existence, location or application of proceeds of crime.'[24] Unger describes it as self-directed criminal economic activity whose most important function lies in the transformation of cash or assets of an illicit origin into potential or actual purchasing power that is to be used for consumption, saving, investment or reinvestment.[25]

FICA defines money laundering as:

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20 United Nations Office on Drugs and Crime 'Money-Laundering and Globalization' available at https://www.unodc.org/unodc/en/money-laundering/globalization.html (accessed 6 November 2018).

21 Prevention of Organised Crime Act 121 of 1998.

22 Act 38 of 2001.

23 Protection of Constitutional Democracy against Terrorism and Related Activities Act 33 of 2004.

24 Schlenther B 'The taxing business of money laundering: South Africa' (2013) *Journal of Money Laundering Control* available at http://dx.doi.org/10.1108/13685201311318485 (accessed 14 February 2018).

25 Unger B 'What is Money Laundering?' (2007) In D Masciandro et al Black Finance: The Economics of Crime Edward Elgar, Cheltenham 103-148.

> 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[26]

POCA on the other hand provides an extensive definition and defines it as:

> Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and - enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement… is legally enforceable or not; or performs any other act in connection with such property…which has or is likely to have the effect – of concealing…the nature, source, location, disposition…thereof; or of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere - to avoid prosecution; or to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, shall be guilty of an offence.[27]

According to the International Criminal Police Organization also known as INTERPOL, money laundering is defined as 'any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources.'[28] The FATF describes it as 'the processing of…criminal proceeds to disguise their illegal origin.'[29] Similarly, Buchanan defines it as:

> …the processing of criminal profits through the financial system to obscure their illegal origins and make them appear legitimate.'[30] More intricately defined by Unger as 'an autonomous criminal economic activity whose essential economic function lies in the transformation of liquidity of illicit origin, or potential purchasing power, into actual purchasing power usable for consumption…[31]

The above is a clear indication that various definitions are being used to describe the crime of money laundering some more intricate than others. However, if one was to

26 Act 38 of 2001.
27 Section 4 of Act 121 of 1998.
28 Interpol 'Money laundering' available at http://www.interpol.int/Crime-areas/Financial-crime/Money-laundering (accessed 6 November 2018).
29 FATF 'What is money laundering' available at http://www.fatf-gafi.org/faq/moneylaundering/#d.en.11223.
30 Buchanan B 'Money laundering - a global obstacle' (2004) *Research in International Business and Finance* 115-127.
31 Unger (2007) 103 – 148.

describe it in lay man's terms it could simply be described as, the process whereby ill-gotten, illegal or tainted funds are concealed, placed, distributed (layered) to various jurisdictions only to be integrated back into the legal domestic and international economy by criminals making it appear legitimate. It is designed to legalise tainted income and/or assets.[32] However no matter how tainted these funds may be and no matter who or how it is laundered, the problem remains – should an attorney or law firm as an accountable institution in terms of FICA violate the trust of clients by reporting them or should they remain silent in the hope that they continue to avoid prosecution.

1.6 Stages of Money Laundering

At face value money laundering may seem like a simple exercise, however, it could involve a series of complex transactions (stages) with a copious amount of financial and legal institutions in various jurisdictions across the world.

The theoretical framework surrounding money laundering becomes easier to understand when one scrutinises the structure and stages of money laundering. It is common knowledge that criminals often have large sums of money derived from some form of criminal activity.[33] They then subsequently face the challenge of integrating those illegal funds back into the legal economy without any evidence as to its tainted origin.[34] Hence they launder the money.[35] Indeed like any crime, money laundering has a process. The money laundering process has three stages namely, the placement stage, the layering stage and lastly, the integration stage which will be

32 Hamman (2) (2015) 8.
33 Millard & Vergano (2013).
34 Millard & Vergano (2013).
35 Millard & Vergano (2013).

discussed below. As stated by Hamman 'The money laundering process is a triadic one…'[36]

1.6.1. Placement

The placement stage is the first stage of the money laundering process. As mentioned above criminals are often left with large amounts of money which are difficult to conceal. They are then left with the challenge of having to change this large amount of money into a more transferable and less suspicious form.[37]

It could be regarded as the most vulnerable and integral stage to the overall money laundering process. Should criminals fail to modify these large cash amounts into a less suspicious and a more transferable form, they run the risk of being detected by authorities. As confirmed by Buchanan, the purpose of placement is essentially to avoid detection by the authorities and to remove cash as far as possible from its illegal origins.[38] An example of such placement would be when a client who participates in criminal activities consults an attorney and provides the attorney with a mandate. To execute the said mandate, the attorney requires a deposit which the client subsequently pays the attorney R25000.00 in cash which is held in trust. At this point the money has already been placed and is intended to be used as if it was legal proceeds. Yet, it is also at this point that the attorney must decide, does he/she comply with FICA reporting obligations or does he/she simply continue fulfilling the clients mandate and respecting the attorney-client relationship.

36 Hamman (2) (2015) 11.
37 Hamman (2) (2015) 11.
38 Buchanan (2004) 115 – 127.

1.6.1.1 Placement stage techniques

Trafficking is essential to moving large amounts of illegal income and assets. There are thus various placement techniques used by launderers. The most known techniques being shell companies, casinos and smurfing or structuring. Shell companies are fundamentally bogus, "empty" (hence the word shell) companies where zero commercial activity occurs at companies registered address.[39] It is a front used by launderers to give the impression that money/profit is being made by the registered company and those profits are then subsequently deposited into the relevant bank account, of the registered company, as if it were legal. The same applies to casinos where people spend enormous amounts of money on gambling. The illegal/tainted money is then simply laundered through the casino as if it were money legally gambled by people who came gambling.

Nkhwashu discusses how launderers have taken things a step further by introducing new complex methods to achieve the same end.[40] According to the article new methods include "…the misuse of corporate vehicles or legal structures, aimed at hiding the true identities of those who actually own, control and benefit from these structures."[41]

However, smurfing or structuring remains extremely popular, if not the most popular technique used. It is defined as a technique where criminals convert cash into smaller amounts that is less than the reporting requirement.[42] In other words, it is the breaking up of large cash amounts, into much smaller amounts, that can be

39 Buchanan (2004) 115 – 127.
40 Nkhwashu N 'Identifying the beneficial owner' (2017) October De Rebus 22.
41 Nkhwashu (2017) 22.
42 Unger (2007) 103 – 148.

deposited into bank accounts without the fear that the transaction will be detected by the bank and the bank having to lodge what is known as a suspicious transaction report.[43]

According to section 28 of FICA, an accountable institution and a reporting institution must report to the Centre the prescribed particulars of a transaction concluded with a client if that transaction concerns an amount of cash that exceeds the prescribed amount.[44] The prescribed amount being that of R25 000.00 (Twenty-Five Thousand Rand Cash). Criminals therefore convert cash into smaller amounts, that is below the reporting threshold. This is however criminalised by section 64 of FICA.[45]

An illustration of how exactly smurfing would work in South Africa for example: a launderer could hire 5 “smurfs”. Each smurf would be required to deposit R20 000.00 into a bank account every week. That amounts to R100 000.00 per week, R400 000.00 per month and R4.8 million a year. Launderers are able to do this because one, the amount deposited is below the reporting threshold and two, by the time the bank or relevant authority becomes suspicious the money has already been wired and transferred to various offshore bank accounts where secrecy laws are formidable (layering). This then essentially makes it difficult for authorities to track the money trail and prosecute the money launderers. The money has then been successfully placed.[46] The sophistication with which these illegal proceeds are placed indicates why there would be the need for constant reporting. However,

43 Hamman (2) (2015) 12.
44 Section 28 of Act 38 of 2001.
45 Section 64 of Act 38 of 2001.
46 Hamman (2) (2015) 13.

placing attorneys in the encumbered position of having to make a potentially detrimental decision, report or face prosecution, signifies a double edge sword.[47]

1.6.2. Layering

The second stage in the money laundering process is known as layering. During this stage criminals attempt to conceal the source of illegal income through multiple transactions, moving around the illegal income.[48] It essentially focuses on the creation of a fictitious paper trail.[49] This is where countries with strong bank secrecy laws play an integral part in the launderers scheme because these jurisdictions are extremely attractive to criminals.[50] It provides money launderer with a sense of security that the origin of the tainted funds will not be revealed.

It is therefore argued that the layering phase of money laundering is far more resistant to law enforcement outlawing efforts than the placement phase.[51] Indeed this is the case as the layering stage crosses multiple jurisdictions in a matter of hours. Hence authorities lose track of what is legitimate and what is illegitimate money and its origin.

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47 Hamman & Koen (2012) 79.

48 Friedrich S, Windischbauer U 'Money Laundering: Some Facts' (2012) available at https://www.econstor.eu/bitstream/10419/119350/1/diw_econsec0025.pdf (accessed 22 February 2018).

49 Hamman (2) (2015) 13.

50 World Bank Institute 'Anti-Money Laundering Literature Search Financial/Banking Sector' available at https://siteresources.worldbank.org/PSGLP/Resources/461605-1102715152029/aml_financial-banking-sector.pdf (accessed 8 November 2018).

51 Sultzer S 'Money Laundering: The Scope of the Problem and Attempts to Combat It' (1995) 63 *Tenn. L. Rev.* 150.

1.6.2.1. The Hawala System and Attorney's Trust Account

The layering stage is primarily transaction based. It involves the constant moving of funds. However, there are other conventional means of layering money such as the use of the hawala on the one hand and the attorney on the other. The hawala system forms part of what is known as the underground banking system. Hawala is defined as "an alternative or parallel remittance system. It exists and operates outside of, or parallel to 'traditional' banking or financial channels."[52] It is a system of "…informality, confidentiality, informal control, and minimum request of information from customers…" which leaves it exposed to abuse.[53]

Unlike traditional banking, hawala makes minimal use of negotiable instruments. The transfer of money takes place based on communication between members of a network of hawaladars, or hawala dealers.[54] The hawala system is such that it can be used at any stage of the money laundering process.[55] Another means to transfer, and layer money is via an attorney and his trust account. It is common knowledge that all practising attorneys in South Africa must open a trust bank account in terms of section 86 of the Legal Practice Act.[56] Section 86(1) and (2) provides:

> Every legal practitioner referred to in section 84(1) must operate a trust account. Every trust account practice must keep a trust account at a bank with which the Fund has made an arrangement…and must deposit

52 Patrick M, Sandhu HS 'The hawala alternative remittance system and its role in money laundering' (2000) Interpol General Secretariat, Lyon, January available at https://www.peacepalacelibrary.nl/ebooks/files/hawala.pdf (accessed 22 February 2018).
53 Unger (2007) 103 – 148.
54 Patrick M, Sandhu HS 'The hawala alternative remittance system and its role in money laundering' (2000) Interpol General Secretariat, Lyon, January available at https://www.peacepalacelibrary.nl/ebooks/files/hawala.pdf (accessed 22 February 2018).
55 Patrick M, Sandhu HS 'The hawala alternative remittance system and its role in money laundering' (2000) Interpol General Secretariat, Lyon, January available at https://www.peacepalacelibrary.nl/ebooks/files/hawala.pdf (accessed 22 February 2018).
56 Legal Practice Act 28 of 2014 – Section 86.

> therein, as soon as possible after receipt thereof, money held by such practice on behalf of any person. [57]

The Legal Practice Act 28 of 2014 similarly provides that every attorney must operate a trust account.[58] The purpose of this account is for clients to deposit money into the account for work to be done. The client is then able to instruct the attorney where the money should be transferred to.[59] It could be various bank accounts allowing the money to be layered legally. Similarly, Section 86(3) and Section 86(4) provides an attorney with the authority to invest money deposited into trust into a separate trust savings or any other interest-bearing account.[60] Consequently, when the investment is cancelled, and the money returned to the client, that money becomes legal. Irrespective of the fact that when it was initially deposited into trust it was the proceeds of a crime and hence illegal money.

1.6.3. Integration

The third and final stage in the money laundering process is known as the integration stage. It is at this stage where the once tainted funds are reintegrated into the formal legal economy.[61] This is the goal of all launderers, to ensure that their illegal income becomes legal.

There are various ways to integrate illegal funds into the legal economy. One such way again is the attorneys trust account.[62] Launderers will deposit illegal funds into the attorney's trust account for "future" work to be done. Once the attorney has received instruction and performed the necessary task, the attorney will deduct his

57 Section 86 of Act 28 of 2014.
58 Legal Practice Act 28 of 2014.
59 Hamman (2) (2015) 14.
60 Section 86 of Act 28 of 2014.
61 Buchanan (2004) 115 – 127.
62 Hamman (2) (2015) 15.

fee from the money in trust and transfer it to his business account. The money has then subsequently been “washed”. The attorney will then use that funds to pay the necessary expenses.[63] And that is how illegal money is integrated into the legal economy.[64] Similarly, if the launderer deposits for example, R30 000.00 into the attorney’s trust account and the attorney only provided services to the amount of R5000.00, the attorney now has to refund R25000.00 to the launderer and obviously any money refunded from an attorneys trust account is deemed to be legitimate money, which the launderer is allowed to use at his own discretion.

This clearly indicates how vulnerable and exposed the attorneys’ profession and attorneys in general are to launderers. However, it remains imperative that a money laundering framework be created where attorneys are not faced with the double edge sword and expected to choose between self-preservation or their client.

1.7. Chapter Outline

Chapter 1 introduces and sets the background to the study. It introduces the research agenda as well as the crime of money laundering and the various stages involved with brief focus on how attorneys are or can be implicated in the money laundering process.

Chapter 2 brings attention to the international anti-money laundering framework and recommendations. It will analyse the main international instruments enacted and adopted to combat money laundering, with particular focus only on the standards and best practices developed by the FATF.

63 Hamman (2) (2015) 15 – 20.
64 Hamman (2) (2015) 15 – 20.

Chapter 3 focuses on the core arguments of the study, specifically the South African legal framework surrounding anti-money laundering. This will be done by scrutinising FICA and section 28 and 29 thereof, which places certain reporting obligations on accountable institutions. The legislation will be assessed comprehensively in order to understand the specific requirements when it comes to filing of STRs and CTRs by professionals (such as legal professionals), as well as the consequence that it has on attorney client confidentiality, legal professional privilege, the right to privacy and the rights of specifically criminal law attorneys to practice without fear of being prosecuted or breaking the trust developed by a client.

Chapter 4 focuses on providing a comparative approach between South Africa, the United States and Canada. Specifically focusing on how these countries have been able to comprehensively adopt legislation, that not only effectively prevents the occurrence of money laundering within the legal profession but prevent serious infringements on the principals of attorney client confidentiality, legal professional privilege and the right of an attorney to practice his/her profession. This chapter places significant focus on the role of the American Bar Association (ABA) in drafting the FATF guidance and the applicability of reporting suspicious transactions on American lawyers. And focuses on the 2001 Canadian case indicating how the Canadian Law Societies along with the legislature willingly reached comprehensive compromises and solutions that not only protects core legal principals, but protects the interest of society and the government in their efforts to eradicate and combat the crime of money laundering and terrorist financing. The chapter subsequently concludes by providing recommendations on how best to address the core issues raised within the study and indicating the important lessons to be learnt by South Africa.

Chapter 5 represents the concluding chapter to this study and consists of a general synopsis by reflecting on the important issues raised and the suggested solutions.

CHAPTER 2

THE INTERNATIONAL ANTI-MONEY LAUNDERING FRAMEWORK

2.1. Introduction

Chapter 1 highlighted how the crime of money laundering has plagued the world and its economies for decades. The Al Capone era and the Watergate scandal simply brought this intricate underworld phenomenon to the attention of the world. Yet, the question remains, if money laundering has eaten away at the global economy for decades what international measures and policies have been implemented to combat the crime of money laundering?

According to the United Nations Office on Drugs and Crime (UNODC) and the International Monetary Fund (IMF), efforts to curb money laundering and the financing of terrorism are the reflection of a strategy aimed at attacking the economic power of criminal organizations and individuals in order to weaken them by preventing their benefiting from, or making use of illicit proceeds and on the other hand, at preventing the cruel effects of the criminal economy and of terrorism on the legal economy.[1]

This chapter studies the international anti-money laundering framework implemented to combat money laundering with specific reference to, the United Nations and the various Conventions as well as the Financial Action Task Force ("FATF") and it's RBA Guidance for legal professionals. These instruments are examined for guidance to ascertain how suspicious transaction reporting, if at all, should be dealt with.

1 United Nations Office on Drugs and Crime (UNODC) and the International Monetary Fund (IMF) 'Model legislation on money laundering and financing of terrorism' (2005) available at *https://www.imf.org/external/np/leg/amlcft/eng/pdf/amlml05.pdf* (accessed 22 May 2018).

2.2. The United Nations

The United Nations (UN) came into existence in 1945 after World War Two had ended.[2] Article 1(3) to the Charter of the United Nations provides that its purpose is to achieve international co-operation with regard to solving, amongst other things, international economic issues.[3] Money laundering therefore clearly portrays an image of a crime that is not only a threat to world peace because of its contribution towards financing terrorist, but also an international economic issue that requires attention.

The UN drafted three international instruments which specifically addresses the combating of money laundering namely, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention) (1988), United Nations Convention against Transnational Organized Crime (UNCTOC or the Palermo Convention) (2003) and the United Nations Convention against Corruption (UNCAC) (2005). These international instruments have no specific bearing on the legal profession and its reporting obligations; however, it is essential to study and understand the framework and guidelines within which legislatures work when drafting domestic legislation which ultimately affects the legal profession.

2.2.1. UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention) (1988)

The Vienna Convention is regarded as the first international instrument to have recognised the crime of money laundering and its relationship with the smuggling of

2 United Nations 'History of the united nations' available at http://www.un.org/en/sections/history/history-united-nations/index.html (accessed 20 March 2018).

3 Charter of the United Nations (1945) available at http://www.un.org/en/sections/un-charter/chapter-i/index.html (accessed 31 March 2018).

narcotic drugs. The aforementioned is lucidly expressed in the preamble to the Convention that:

> The Parties to this Convention…Recognizing the links between illicit traffic and other related organized criminal activities which undermine the legitimate economies and threaten the stability, security and sovereignty of States… aware that illicit traffic generates large financial profits and wealth enabling transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all its levels…[4]

Although South Africa is not a signatory to the Convention, the government acceded to it on the 14 December 1998, thereby accepting the opportunity to become a party to the treaty already so signed by other States.[5] As a result the State is not bound to give effect to the provisions of the treaty, however, the Convention remains a guideline in the drafting of domestic anti-money laundering legislation.

Article 3 of the Convention criminalises the intentional selling of drugs and the laundering of money generated from the sale thereof. Article 3(1)(b)(i) reads:

> Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally: The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions[6]

In addition to the above and in corroboration with the above, Article 3(1)(b)(ii) similarly criminalises:

> …The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences…[7]

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4 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention) 1988.

5 United Nations Treaty Collection 'Narcotic drugs and psychotropic substances' available at *https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=vi-19&chapter=6&lang=en* (accessed 20 March 2018).

6 Article 3(1)(b)(i) of the Vienna Convention.

7 Article 3(1)(b)(ii) of the Vienna Convention.

It is evident from the above, that a duty is placed on all State parties to criminalise the laundering of money made from the sale of narcotic drugs.[8] However what is essentially important is that, article 3 criminalises the holding of all property derived from the sale of narcotic drugs, especially if it has been converted or concealed. Property in the Convention is defined to include all assets, whether movable or immovable, legal documents or instruments.[9] Therefore, what is clear from the above is that even though the Convention fails to make specific reference to the term money laundering, it is in fact criminalising money laundering because money is an asset and is therefore regarded as property.[10]

To assist States in formulating and adopting comprehensive anti-money laundering policies the Convention provides guidelines on how the crime could be confronted through the co-operation of States with one another. Such example would be Article 7 which deals with mutual legal assistance between States in the investigation, prosecution and judicial proceedings in relation to the crimes established in Article 3.[11]

While the Convention draws the world's attention to the crime of money laundering, it is a treaty that was drafted in 1988 when money laundering schemes lacked the sophistication it now has. Hence that could be the reason why the Convention makes no reference to the role that attorneys play in laundering money.

8 Hamman (2) (2015) 35.
9 Article 1 of the Vienna Convention.
10 Hamman (2) (2015) 35.
11 Article 7 of the Vienna Convention.

2.2.2. UN Convention against Transnational Organized Crime (UNCTOC or the Palermo Convention) (2003)

The UN Convention against Transnational Organized Crime (UNCTOC) is regarded as the main international instrument in the fight against organized crime.[12] It was adopted on the 15th November 2000 and used as a tool by Member States to indicate the gravity of the issues posed by it, as well as to address the universal intensification of money laundering.[13]

The offence of money laundering is dealt with in Article 6 of UNCTOC. According to Article 6(1)(a) State party's must adopt legislative and other measures in unison to its domestic legislation in order to establish the following as criminal offences (when committed intentionally:

> The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action; The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime.[14]

Article 6 uses the term "property" instead of money laundering. Property is defined as "assets of every kind…"[15] This is indicative of the fact that the crime of money laundering involves not only actual money, but property and various other assets too.

However, what is of paramount importance, and what is possibly most applicable to the legal profession is Article 7. Article 7(1)(a) provides that:

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12 United Nations Convention against Transnational Organized Crime and the Protocols Thereto available at *https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html* (accessed 10 November 2018).

13 United Nations Convention against Transnational Organized Crime and the Protocols Thereto available at *https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html* (accessed 10 November 2018).

14 Article 6(1) of the Palermo Convention.

15 Article 2 of the Palermo Convention.

> Each State Party: Shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer identification, record-keeping and reporting of suspicious transactions[16]

This article places emphasis on the establishment of rules and regulations that would detect money laundering. Yet, the most important requirement that necessitates compliance and creates an obligation is the reporting of suspicious transactions.[17]

UNCTOC was ratified by South Africa on 20th February 2004 and as such places a burden on the legislature to enact legislation that promotes co-operation and prevents transnational organized crime.[18] As stated by Chief Justice Ngcobo (as he then was)

> The approval of an international agreement…constitutes an undertaking at the international level, as between South Africa and other States, to take steps to comply with the substance of the agreement. This undertaking will, generally speaking, be given effect by either incorporating the agreement into South African law, or taking other steps to bring our laws in line with the agreement, to the extent they do not already comply.[19]

Thus, by mere ratification, South Africa has dedicated itself to taking and implementing measures that fight transnational organized crime.[20]

2.2.3. UN Convention against Corruption (UNCAC) (2005)

The United Nations Convention against Corruption (UNCAC) is the only legally binding international anti-corruption instrument.[21] UNCAC was negotiated during seven sessions of the Ad Hoc Committee for the Negotiation of the Convention

16 Article 7(1)(a) of the Palermo Convention.
17 Hamman (2) (2015) 33.
18 Hamman (2) (2015) 33.
19 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC).
20 Hamman (2) 2015) 40.
21 United Nations Convention against Corruption available at https://www.unodc.org/unodc/en/corruption/uncac.html (accessed 15 May 2018).

against Corruption, convened between January 2002 and October 2003.[22] South Africa became a signatory on December 9th, 2003 and later ratified the convention on November 22nd, 2004.[23]

UNCAC has no significant effect on the outcome of this study. However, reference to the treaty is important as corruption and money laundering are inextricably linked. Article 14 to UNCAC makes specific reference to legal persons (amongst other institutions) and provides that, each state party must implement a domestic regulatory regime to detect and deter all forms of money laundering. Emphasis is to be placed on the customer, owner identification, record keeping and the reporting of suspicious transactions.[24] Like many articles before it, Article 14 similarly provides for the establishment of a Financial Intelligence Unit (FIU) that is to serve as a "national centre for the collection, analysis and dissemination of information regarding potential money laundering."[25]

Article 23 to UNCAC focuses on, laundering of proceeds of crime. This article mirrors that of Article 3 in the Vienna Convention and Article 6 of the Palermo Convention. The only arguable difference would be that it introduces knowledge as a requirement.[26] However, knowledge as a requirement is quite controversial in that it places an obscure burden on practicing attorneys, especially those specialising in criminal litigation. This is so in that; a practicing attorney could fall into this category on the basis that he/she may have knowledge that their client's income has an illicit

22 United Nations Convention against Corruption available at https://www.unodc.org/unodc/en/corruption/uncac.html (accessed 15 May 2018).
23 United Nations Office on Drugs and Crime 'Signature and Ratification Status' available at https://www.unodc.org/unodc/en/corruption/ratification-status.html (accessed 15 May 2018).
24 United Nations Convention against Corruption (UNCAC) 2005. Article 14 (1)
25 Article 14(1)(b) of UNCAC.
26 Hamman (2) (2015) 41.

origin.[27] The obscure burden then materialises when you are taught as a legal scholar heading into practice that knowledge of a client's personal information (including income) is crucial. Yet, the mere knowledge of this basic information could lead to your prosecution.

2.3. The Financial Action Task Force (FATF)

The FATF is an inter-governmental body established in 1989 by the G-7 summit in Paris to develop measures to combat money laundering.[28] The purpose of the FATF is to develop guidelines/standards and encourage the effective implementation of measures adopted to combat money laundering, terrorist financing and various threats to the reliability of the international financial system.[29] The FATF is therefore described as a "policy-making body" working to bring about the necessary national legislative and regulatory reform in these areas.[30]

The FATF consists of thirty-nine member states with one hundred eighty jurisdictions having endorsed its recommendations.[31] In spite of this, the FATF still lacks binding legal authority. Yet, the impact of the FATF and its recommendations are global. Though the FATF lacks the power to directly enact binding legislation, its soft law influence is likely to be profound because, should a member fail to comply with the

27 Hamman (2) (2015) 42.
28 FATF 'Who we are' available at http://www.fatf-gafi.org/about/whoweare/ (accessed 20 March 2018).
29 FATF 'What we do' available at http://www.fatf-gafi.org/about/whatwedo/ (accessed 20 March 2018).
30 FATF 'Who we are' available at http://www.fatf-gafi.org/about/whoweare/
31 Terry, LS 'An Introduction to the Financial Action Task Force and its 2008 Lawyer Guidance' (2010) 3 *Journal of The Professional Lawyer* 5.

FATF's recommendations they risk expulsion (members are assessed through a mutual evaluation process).[32]

The FATF has developed a series of Recommendations, the first was issued in 1990, which was then revised in 1996, 2001, 2003 and 2012 to ensure that not only do they remain relevant, but they are envisioned to be for universal application.[33] In October 2001 the FATF extended its mandate to deal with the issue of funding terrorist acts and terrorist organisations.[34] This mandate was extended by creating the eight, later expanded to nine Special Recommendations on Terrorist Financing known as the 40+9 Recommendations.[35] The Special Recommendations implemented addresses the effort of the FATF to combat terrorism financing.[36]

The current objectives of the FATF include setting -

> standards and to promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.[37]

Similarly so, to revise and clarify the global standards for combating money laundering and terrorism financing; promoting global implementation of its standards; identifying and responding to new money laundering and terrorist financing threats;

32 Terry LS (2010) 7. See also FATF 'Annual Report' (2009) available at http://www.fatf-gafi.org/media/fatf/documents/reports/2008%202009%20ENG.pdf (accessed 23 May2018).

33 FATF 'Who we are' available at http://www.fatf-gafi.org/about/whoweare/

34 FATF *'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation – The FATF Recommendations'* (2012 – 2018) available at http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf (accessed 10 November 2018).

35 FATF *'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation – The FATF Recommendations'* (2012 – 2018) available athttp://www.fatfgafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf (accessed 10 November 2018).

36 Terry LS (2010) 9.

37 FATF 'What we do' available at http://www.fatf-gafi.org/about/whatwedo/

and engaging with international stakeholders throughout the world.[38] The Recommendations form what is regarded as the principal framework to anti-money laundering efforts and are universally accepted as such.[39] Still, the FATF has no authorisation to impose laws on any jurisdiction as mentioned above, the group simply exerts international political pressure on its member states to enact its recommendations.[40]

2.3.1. FATF Recommendations (2012)

The Recommendations drafted by the FATF is quite an extensive document that is not easily comprehendible. It consists of 131 pages of which 102 are interpretive notes to the FATF Recommendations. In October 2008, the FATF introduced what is known as the Risk-Based Approach (RBA) to CDD and the legal profession.[41] According to Shepherd, the RBA can be described as a theoretic and practical foundation that ensures limited use of resources to combat money laundering and terrorist financing whilst being allocated in the most resourceful manner possible so that the greatest risks receive the highest attention.[42] This subsequently means that the greatest risks to money laundering and terrorist financing will receive the most attention.[43]

38 Terry LS (2010) 6.
39 Hamman (2) (2015) 68.
40 Shepherd KL 'Guardians at the gate: the gatekeeper initiative and the risk-based approach for transactional lawyers' (2009) 43 *Real Property, Trust and Estate Law Journal* 612.
41 FATF 'RBA GUIDANCE FOR LEGAL PROFESSIONALS' (2008) available at http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Legal%20professions.pdf (accessed 10 November 2018).
42 Shepherd KL (2009) 625.
43 Shepherd KL (2009) 625.

The FATF Recommendations encourages countries to develop a RBA.[44] However, according to the FATF an effective risk-based approach involves identifying money laundering risks and developing practical legislation/regulations based on those risks identified.[45]

The crime of money laundering is vaguely addressed in Recommendation 3 which provides for the criminalisation of money laundering in accordance with the Vienna and Palermo Conventions.[46] It encourages countries to '…apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences.'[47]

Nonetheless, the FATF 40+9 Recommendations include, inter alia, prerequisites about customer due diligence, record-keeping and the obligation to report suspicious transactions which are applicable to legal professionals.[48] In terms of the recommendation's lawyers are defined as practitioners, partners or employed professionals within a professional firm.[49] However, they are categorised as Designated Non-Financial Businesses and Professionals (DNFBPs) alongside estate agents, casinos, dealers in precious metals and trust and company service providers.

In the FATF Consultation Paper it was presented that

> Professional such as lawyers, accountants, and financial advisors are believed to be in a unique position to observe transactions and identifying potential suspicious transactions that may indicate money laundering…These gatekeeper professionals, however, are subject to

44 Shepard KL (2009) 625.
45 FATF RBA GUIDANCE FOR LEGAL PROFESSIONALS' (2008).
46 Recommendation 3 of the FATF.
47 Recommendation 3 of the FATF.
48 Terry LS (2010) 10.
49 FATF Recommendations Interpretation notes – Definitions.

confidentiality commitments, professional secrecy, or legal privileges that underlie the very professional relationship that allow them to perform these necessary gatekeeper roles.[50]

According to Shepherd

Gatekeepers include lawyers, notaries, trust and company service providers (TCSPs)…and other designated nonfinancial businesses and professions (DNFBPs) who assist with transactions involving the movement of money in domestic and international financial systems.[51]

Accordingly, Recommendation 22 states that

The customer due diligence and record-keeping requirements…apply to designated non-financial businesses and professions (DNFBPs) in the following situations:…(d) Lawyers, notaries, other independent legal professionals and accountants – when they prepare for or carry out transactions for their client concerning the following activities: buying and selling of real estate; managing of client money, securities or other assets; management of bank, savings or securities accounts; organisation of contributions for the creation, operation or management of companies; creation, operation or management of legal persons or arrangements, and buying and selling of business entities…[52]

Similarly, Recommendation 23 provides

The requirements set out in Recommendations 18 to 21 apply to all designated non-financial businesses and professions, subject to the following qualifications: (a) Lawyers, notaries, other independent legal professionals and accountants should be required to report suspicious transactions when, on behalf of or for a client, they engage in a financial transaction in relation to the activities described in paragraph (d) of Recommendation 22…[53]

Therefore, the most important Recommendations applicable to lawyers as DNFBPs and this study is: R10, R11, R20 and R21. A brief explanation of each recommendation hereafter follows.

50 Hamman (2) (2015) 70. See Shepherd KL (2009) 620.
51 Shepherd KL (2009) 611.
52 Recommendation 22 of the FATF.
53 Recommendation 23 of the FATF.

2.3.1.1. Recommendation 10 - Customer Due Diligence (CDD)

Recommendation 10 deals with what is known as Customer Due Diligence (CDD). CDD can be described as the process of "know your customer". It requires all financial institutions as well as DNFBPs to implement certain measures when conducting business. Countries are obligated to make CDD a legal requirement set out in law.

Consequently, the CDD recommendation provides for four key instances when institutions should or must conduct CDD measures. The four instances are when one, establishes a business relationship; carries out occasional transactions above the designated threshold; there is a suspicion of money laundering or terrorist financing; or the financial institution has doubts about the appropriateness of previously obtained customer identification data.[54]

On face value, there seems to be no issues with conducting CDD investigations or inspections. The issues however arise when institutions such as lawyers conduct such investigations and find suspicious information or transactions. They are then legally required to report such "private" or "privileged" information.

2.3.1.2. Recommendation 20 and 21

Recommendations 20 and 21 seem to go hand in hand. Reporting of suspicious transactions in founded in Recommendation 20 which provides that

> If a financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to terrorist financing, it should be required, by law, to report promptly its suspicions to the financial intelligence unit (FIU).[55]

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54 Recommendation 10 of the FATF.
55 Recommendation 20 of the FATF.

Clearly the FATF places a mandatory obligation on legislatures to introduce legislation that require the immediate reporting of any suspicious transactions. As stated in the interpretive note to Recommendation 20, the reporting requirement must be a direct compulsory obligation, and any secondary obligation to report a suspicious transaction because of possible prosecution for a money laundering offence or otherwise is not acceptable.[56]

Tipping-off and confidentiality founded in Recommendation 21 provides that everyone involved should be

> …(a) protected by law from criminal and civil liability for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, if they report their suspicions in good faith to the FIU… (b) prohibited by law from disclosing ("tipping-off") the fact that a suspicious transaction report (STR) or related information is being filed with the FIU…[57]

This Recommendation therefore encourages the protection by law of all persons, who reports suspicious transaction in good faith from possible criminal or civil prosecution. It however in that same breath places an undesirable obligation on the individual who had lodged the report, from informing implicated persons about the suspicious transaction report. Importantly, when studying Recommendations 20 and 21 it is imperative that one looks at Recommendations 22 and 23 specifically 22(d) and 23(a) as these Recommendations limit the scope of reporting obligations for legal professionals.

Recommendation 23(a) provides that

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

56 Interpretive Note to Recommendation 20 of the FATF.
57 Recommendation 21 of the FATF.

> 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…[58]

Recommendation 22(d) provides that

> The customer due diligence and record-keeping requirements set out…apply to designated non-financial businesses and professions (DNFBPs) in the following situations: Lawyers…– when they prepare for or carry out transactions for their client concerning the following activities: buying and selling of real estate; managing of client money, securities or other assets; management of bank, savings or securities accounts; organisation of contributions for the creation, operation or management of companies; creation, operation or management of legal persons or arrangements, and buying and selling of business entities.[59]

The above highlights the fact that according to FATF requirements legal professionals are only required to lodge suspicious transaction reports when, on behalf of clients they buy or sell real estate, manage bank accounts, manage companies or buy and sell business entities, to name a few. Undoubtedly, the FATF when drafting these Recommendations in relation to the legal profession understood the complexity involved when looking at legal professional privilege as well as client-confidentiality. It provides in Recommendation 16 that '…legal professionals are not required to report their suspicions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.'[60]

However, the South African legislature in drafting FICA appears to have disregarded these fundamental principles as will be discussed in chapter 3 of this study.

58 Recommendation 23(a) of the FATF.
59 Recommendation 22(d) of the FATF.
60 FATF RBA GUIDANCE FOR LEGAL PROFESSIONALS' (2008).

2.3.2. FATF RBA Guidance for Legal Professionals (2008)

In 2007, the FATF adopted the 'Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing: High Level Principles and Procedures, which includes guidance for public authorities and guidance for financial institutions.'[61] The aim of this document was to provide all financial institutions with a guideline on how to incorporate and apply the risk-based approach in its attempt to eradicate money laundering and terrorist financing. However, it became evident that because these Recommendations applied to DNFBPs, in particular lawyers, it would only be appropriate that a similar guideline be drafted for the legal profession. As a result, the FATF's Working Group on Evaluation and Implementation (WGEI) agreed to convene a meeting (which was held in September 2007) for representatives from the DNFBPs to assess the possibility of developing Guidance on the risk-based approach for their sectors.[62] The FATF RBA Guidance for Legal Professionals (hereinafter "the Guidance") was subsequently adopted in October 2008.[63] The mere fact that this document was drafted indicates the importance of having a document regulate the implementation of AML laws within the legal profession.

It is common cause that the legal profession is a tremendously diverse profession, including the legal and professional obligations with which attorneys are required to comply.[64] However, what the Guidance does impeccably is it reiterates the importance of secrecy and legal professional privilege by providing that the

61 FATF RBA GUIDANCE FOR LEGAL PROFESSIONALS' (2008).
62 FATF RBA GUIDANCE FOR LEGAL PROFESSIONALS' (2008).
63 FATF RBA GUIDANCE FOR LEGAL PROFESSIONALS' (2008).
64 FATF RBA GUIDANCE FOR LEGAL PROFESSIONALS' (2008).

requirements contained in the Guidance '…are subject to professional secrecy and legal professional privilege.'[65]

Importantly paragraph 12 of the Guidance provides that

> Recommendation 12 mandates that the requirements for customer due diligence requirements (CDD), record-keeping, and paying attention to all complex, unusual large transactions…apply to DNFBPs in certain circumstances. Recommendation 12 applies to legal professionals when they prepare for and carry out certain specified activities: Buying and selling of real estate, managing of client money, securities or other assets, management of bank, savings or securities accounts, organisation of contributions for the creation, operation or management of companies, creation, operation or management of legal persons or arrangements, and buying and selling of business entities. This Guidance has been prepared to assist legal professionals in those situations. Unless legal advice and representation consists of preparing for or carrying out transactions relating to these specified activities, it is not subject to the FATF Recommendations.[66]

Interestingly, one could therefore conclude that the FATF Recommendations only anticipates that attorney-client confidentiality and legal professional privilege could be compromised should the lawyer enter into the transactions listed above. Hence, one could argue that a criminal attorney, providing an accused person with legal representation should be exempt from all FATF Recommendations. Be that as it may, the underlying point is that the risk-based approach should not be designed in a manner that prohibits or impedes on the attorney's ability to continue with their legitimate practice.[67]

In relation to the reporting of suspicious transactions, the Guidance does not address STR's nor the prohibition against "tipping off" simply because various countries have undertaken various approaches.[68] Fittingly it provides that

> Where a legal or regulatory requirement mandates the reporting of suspicious activity once a suspicion has been formed, a report must be made and, therefore, a risk-based approach for the reporting of the

65 FATF RBA GUIDANCE FOR LEGAL PROFESSIONALS' (2008).
66 FATF RBA GUIDANCE FOR LEGAL PROFESSIONALS' (2008).
67 FATF RBA GUIDANCE FOR LEGAL PROFESSIONALS' (2008).
68 FATF RBA GUIDANCE FOR LEGAL PROFESSIONALS' (2008).

suspicious activity under these circumstances is not applicable. STRs are not part of risk assessment, but rather reflect a response mechanism – typically to an SRO or government enforcement authority – once a suspicion of money laundering has been identified.[69]

2.4. Conclusion

The FATF as an inter-governmental organisation have played an extremely proactive role in the guidance and drafting of anti-money laundering laws. Specifically, in relation to the legal profession. One should almost admire the length that the organisation has gone to in one, ensuring that the issue of money laundering and terrorist financing are tackled, but two, and probably most importantly, being able to recognise the independence, integrity and principals that goes hand in hand with the legal profession. Thereby electing not to impose rash, impulsive and unthinkable obligations on such professionals instead opting for the risk-based approach and leaving it to legislatures to find a just solution. Surely legislatures ought to pay attention.

This issue necessitates the need for thorough discussions and thorough consideration into the implications of such legislation on respective professions. There is no denying that lawyers are used as a tool in the money laundering process. However, as informative, comprehensive and applicable the international instruments have proven to be, it still somehow falls short of addressing imminent issues facing the legal profession. In fact, it would be trivial to argue that the world has turned a blind eye to these issues, however the principles of legal professional privilege, attorney client confidentiality and the simple attorney client relationship remain at risk. The following chapter discusses the South African position with

69 FATF RBA GUIDANCE FOR LEGAL PROFESSIONALS' (2008).

regard to these core principals, as well as the effect that the implemented legislation, specifically the effect that FICA and it's reporting obligations have on these principals.

CHAPTER 3

THE SOUTH AFRICAN LEGAL FRAMEWORK

3.1. Introduction

This chapter analysis the South African anti-money laundering framework and its effects on the legal profession specifically dealing with the reporting obligations. Money laundering represents a fundamental element to the under-world economy and forces of globalisation have presented new opportunities for organised crime whilst displaying new challenges for legal systems and law enforcement.[1] Therefore, the efforts to combat and alleviate the effects of money laundering have become increasingly necessary. Reporting obligations within accountable institutions are considered one of the most effective anti-money laundering tools. Even so, the reporting obligations placed on accountable institutions in South Africa presents a challenge to the South African legal fraternity.

In this chapter the main issues regarding cash transactions above the prescribed limit and suspicious transaction reporting (STR'S) will be covered. FICA requires attorneys as accountable institutions to provide FIC with information relating to their clients.[2] Therefore, it seeks to highlight the adverse effects that the legislation has on the principal of attorney-client confidentiality, legal professional privilege and the attorney-client relationship.

1 Bell (1999) 104.
2 Hamman & Koen (1) (2012) 78.

3.2. Confidentiality and Privilege

> A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. … This contributes to the trust that is the hallmark of the client-lawyer relationship.[3]

The attorney-client relationship is something special, yet Sections 28 and 29 seem to almost render it irrelevant. The principles of attorney-client confidentiality and legal professional privilege are derived from what is known as professional ethics which is a body of rules that governs the legal profession.[4] As will be indicated, Sections 28 and 29 requires all accountable institutions to follow the requisite reporting obligations. However, the reporting provisions fail to consider the implications of such reports on the attorney-client confidentiality principle and legal professional privilege. Numerous international scholars and authors regard the principle of attorney-client confidentiality and legal professional privilege as one and the same. However, they are not. Client's expect all communication to be confidential and therefore privileged. This symbolises the exact point where these individual concepts/principles become distorted and perceived as one and the same thing. It is two completely distinct principles that sets the foundation upon which the legal profession is built.

3.2.1. Attorney-Client Confidentiality

The duty of confidentiality is established in terms of professional ethics and is comparatively new.[5] However, it is safe to argue that the decision of an individual to

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3 Michmerhuizen S 'Confidentiality, Privilege: A Basic Value in Two Different Applications(2007) Centre for Professional Responsibility available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/confidentiality_or_attorney.authcheckdam.pdf (accessed 24 July 2018).

4 Millard & Vergano (2013) 389 – 427.

5 Popp J 'The Cost of Attorney-Client Confidentiality in Post 9/11 America' (2007) 20 *The Georgetown Journal of Legal Ethics* 876.

disclose, to another private information, may well be founded on the autonomous acceptance of silence.[6] Attorney-client confidentiality embodies a fundamental principle underlying the attorney's relationship with existing and prospective clients. Accordingly, at the beginning of every attorney-client relationship there is an undertaking of a mandate. In most instances, it is implied between the attorney and client that the attorney will safeguard by means of confidentiality, all communications between himself/herself and the client.[7] Thus, there is a presumption by all clients that all communication exchanged are protected and thus privileged. It could be argued that without a right and corresponding duty of confidentiality, between the client seeking legal advice and the attorney offering legal advice, those seeking legal advice might then suffer an incapacitating unwillingness to disclose information to the attorney.[8]

The same concept applies to an individual seeking medical assistance. The patient, out of fear that his/her personal information will be disclosed to a 3rd party might withhold information from the surgeon which could possibly be essential to the ultimate prognosis.[9] Yet, the situation would be entirely different had the client or patient been guaranteed absolute confidentiality. Therefore, if complete confidentiality was not an option for a client seeking legal advice, the client would knowingly withhold crucial information from the attorney out of fear, thereby resulting in the attorney-client relationship suffering the same prognosis.[10]

6 Perry C 'The Scope of Attorney Confidentiality' (2015) 37 Reason Papers 110 available at https://reasonpapers.com/wp-content/uploads/2015/04/rp_371_10.pdf (accessed 24 July 2018).
7 Millard & Vergano (2013) 389 – 427.
8 Perry C 'The Scope of Attorney Confidentiality' (2015) 37 Reason Papers 110 available at https://reasonpapers.com/wp-content/uploads/2015/04/rp_371_10.pdf (accessed 24 July 2018).
9 Perry (2015) available at https://reasonpapers.com/wp-ontent/uploads/2015/04/rp_371_10.pdf
10 Perry (2015) available at https://reasonpapers.com/wp-ontent/uploads/2015/04/rp_371_10.pdf

Confidentiality however, differs from legal professional privilege in that it concerns more than only the legal representation of a client. The concept is considerably broader than that of legal professional privilege in terms of what information is protected too.[11]

> It applies not only to matters communicated in confidence by the client but also to all information relating to the representation...[12]

It is considered '…a gap-filler, attaching to any situation in the scope of legal representation that the privilege does not.'[13] According to Millard, information may be confidential but not protected by legal professional privilege because 'Confidentiality is a necessary condition for claiming privilege but it is not a sufficient condition…'.[14]

3.2.2. Legal Professional Privilege

As indicated above, privilege is different to confidentiality. At one stage, privilege was considered to be that of the attorney rather than of the client and only midway through the nineteenth century did it apply only in respect of communications that related to pending or anticipated litigation.[15] Privilege is only bestowed if the statement is made for the purpose of receiving legal advice. If the statement is unrelated to obtaining legal advice it will not be privileged even if such statement was made in confidence.[16] Legal professional privilege is presumed to be a rule of evidence which means that communication between an attorney and his/her client

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11 Millard & Vergano (2013) 389 – 427.
12 Michmerhuizen S 'Confidentiality, Privilege: A Basic Value in Two Different Applications' (2007) Centre for Professional Responsibility available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/confidentiality_or_attorney.authcheckdam.pdf (accessed 24 July 2018).
13 Popp J 'The Cost of Attorney-Client Confidentiality in Post 9/11 America' (2007) 20 *The Georgetown Journal of Legal Ethics* 877.
14 Millard & Vergano (2013) 389 – 427.
15 *A Company and Others v Commissioner for the South African Revenue Services* (16360/2013) [2014] ZAWCHC 33; 2014 (4) SA 549 (WCC) (17 March 2014)
16 Millard & Vergano (2013) 389 – 427.

may not be used as evidence.[17] Privilege does not define confidentiality. Privilege essentially protects a fine group of possible confidential communication between the client and the attorney concerning the representation of the client.[18]

According to Chief Justice Langa in the matter of *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others*, legal professional privilege is a general rule of our common law which essentially provides that communications between an attorney and his/her client are protected from disclosure, provided that certain requirements are met.[19] Similarly, these communications:

> should be protected in order to facilitate the proper functioning of an adversarial system of justice, because it encourages full and frank disclosure between advisors and clients. This, in turn, promotes fairness in litigation…Accordingly, privileged materials may not be admitted as evidence without consent.[20]

Therefore, the general rule in our law is that in order for privilege to attach itself to information or communication, it must satisfy the requirements - the attorney must have been acting in a professional capacity at the time; the attorney must have been consulted in confidence; the communication must have been made for the purpose of obtaining legal advice and the advice sought must not facilitate the commission of a crime or fraud.[21]

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17 Millard & Vergano (2013) 389 – 427.
18 Perry (2015) available at https://reasonpapers.com/wp-ontent/uploads/2015/04/rp_371_10.pdf
19 *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* (CCT 89/07, CCT 91/07) [2008] ZACC 13; 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) (31 July 2008)
20 *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* (CCT 89/07, CCT 91/07) [2008] ZACC 13; 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) (31 July 2008)
21 *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* (CCT 89/07, CCT 91/07) [2008] ZACC 13; 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) (31 July 2008) note 124.

Interestingly, the High Court of Australia provides a notable explanation that, on the face of it, appears to be the most correct interpretation of exactly what legal professional privilege is and the impact thereof on the legal profession. The High Court held that:

> legal professional privilege extends beyond communications made for the purpose of litigation to all communications made for the purpose of giving or receiving advice and this extension of the principle makes it inappropriate to regard the doctrine as a mere rule of evidence. It is a doctrine which is based upon the view that confidentiality is necessary for proper functioning of the legal system and not merely the proper conduct of particular litigation....[22]

Similarly, in the case of *S v Safatsa*[23] the court confirmed that legal professional privilege extends beyond communication made for the purpose of litigation to all communications made for the purpose of receiving advice and that any claim to the reduction of this privilege must be approached with caution. The difficulty that one finds with adopting these interpretations exclusively is that, judgment in these matters were handed down in 1983 and 1988 respectively. The law has evolved. Still, you cannot deviate from the essential component, which is that legal professional privilege is inherent to the legal profession. The legal profession will not survive without it. Therefore, it simply cannot be disregarded, and attorneys simply cannot have a *laissez-faire* attitude towards legislation that disregards it.

Indeed, legal professional privilege may be waived by the client and his/her attorney as the agent, either expressly, implied or imputed.[24] However, by no means does it grant the legislature the right to simply disregard it when drafting legislation. It remains the decision of the client based on the advice received from his/her legal representative. Legal representatives should always consider the best interest of

22 *Baker v Campbell* [1983] HCA 39, (1983) 153 CLR 52, (1983) 49 ALR 385.
23 *S v Safatsa and Others* 1988 (1) 868 (A) / [1988] 4 All SA 239 [AD].
24 Frans CB *The impact of client record keeping on the legal profession in South Africa* (unpublished LLM thesis, University of the Western Cape, 2017) 31.

clients and that of justice.[25] And surely there is no justice when strategically disregarding this essential principal.

3.2.3. FICA - Section 37

Section 37 of FICA is the mechanism implemented to preserve only legal professional privilege. It is an attempt by the legislature to reassure the legal fraternity as to the protection of legal professional privilege.[26]

Section 37(1) reads as follows:

> Subject to subsection (2), no duty of secrecy or confidentiality or any other restriction on the disclosure of information, whether imposed by legislation or arising from the common law or agreement, affects compliance by an accountable institution, supervisory body, reporting institution, the South African Revenue Service or any other person with a provision of this Part.[27]

It undeniably disregards attorney-client confidentiality by providing that, reporting obligations in terms of which attorneys provide FIC with information are not affected by confidentiality rules. Therefore, whatever confidentiality obligation the attorney owes his client, the reporting obligations in Sections 28 and 29 trumps such confidentiality.[28]

Section 37(2) on the other hand provides as follows:

> (2) Subsection (1) does not apply to the common law right to legal professional privilege as between an attorney and the attorney's client in respect of communications made in confidence between- (a) the attorney and the attorney's client for the purposes of legal advice or litigation which is pending or contemplated or which has commenced; or (b) a third party and an attorney for the purposes of litigation which is pending or contemplated or has commenced.[29]

25 Frans (2017) 31.
26 Hamman (2) (2015) 106.
27 Act 38 of 2001.
28 Hamman & Koen (1) (2012) 78.
29 Act 38 of 2001.

Distinctly the principal of legal professional privilege is covered. However, it is limited to confidential attorney-client communication that is made in respect of legal advice or litigation. Thus, the protection afforded to legal professional privilege 'is not a blanket one'.[30] Its only protects information or communications made concerning pending or on-going litigation.

3.3. South African Legal Framework

The anti-money laundering legislation one could argue, is as comprehensive as money laundering legislation could be. It consists of three primary pieces of legislation namely, the Prevention of Organised Crime Act (POCA)[31], the Protection of Constitutional Democracy against Terrorism and Related Activities Act (POCDATARA)[32] and most importantly, the Financial Intelligence Centre Act (FICA).[33] POCA was largely formed upon the Racketeer Influenced and Corrupt Organisations statute (RICO) of the United States of America.[34] It was essentially enacted to combat organised crime and criminal activities of gangs.[35] Its main aim as stated in the preamble is to

> introduce measures to combat organised crime, money laundering and criminal gang activities; to prohibit certain activities relating to racketeering activities; to provide for the prohibition of money laundering and for an obligation to report certain information…[36]

Although it criminalises the act of money laundering in sections 4 – 6, and, provides in section 7A[37] that, the act of reporting suspicious transactions may be used as a

30 Hamman & Koen (2012) 78.
31 Prevention of Organised Crime Act 121 of 1998.
32 Protection of Constitutional Democracy against Terrorism and Related Activities Act 33 of 2004.
33 Financial Intelligence Centre Act 38 of 2001.
34 *De Vries v The State* (130/11) [2011] ZASCA 162 (28 September 2011)
35 Hamman (2) (2015) 86.
36 Act 121 of 1998.
37 Act 121 of 1998.

defence, even so, POCA fails to fully and comprehensively address the crime of money laundering. Similarly, POCDATARA, which outlaws the facilitating and financing of terrorism. Since the financing of terrorism is a predicate offence for money laundering.[38] POCA sets out the substantive provisions in the anti-money laundering regime, whereas, FICA, provides all administrative duties necessary to combat money laundering.[39] FICA is therefore pivotal in the anti-money laundering regime. As founded in the preamble, the purpose of FICA is

> To establish a Financial Intelligence Centre in order to combat money laundering activities and the financing of terrorist and related activities; to impose certain duties on institutions and other persons who might be used for money laundering purposes and the financing of terrorist and related activities…[40]

As a result, the Financial Intelligence Centre (FIC) was established, to implement the provisions of both POCA and FICA. The key responsibilities of FIC is to detect the proceeds of crime, combat money laundering and terror financing.[41] This is done by enforcing various methods, not limited to, supervising and enforcing compliance with FICA; receiving financial data from accountable and reporting institutions; disclosing information with law enforcement authorities and maintaining the international obligations and commitments required in respect of anti-money laundering.[42]

3.4. FICA – Reporting Obligations

None of the anti-money laundering legislation in the South African framework focuses on attorneys and their trust accounts.[43] Nor do they highlight the use of

38 Hamman (2) (2015) 87.
39 Hamman (2) (2015) 87.
40 Act 38 of 2001.
41 Financial Intelligence Centre 'Who we are' available at https://www.fic.gov.za/aboutus/Pages/WhoWeAre.aspx (accessed on 17 July 2018).
42 Financial Intelligence Centre 'Who we are' available at https://www.fic.gov.za/aboutus/Pages/WhoWeAre.aspx (accessed 17 July 2018).
43 Hamman & Koen (1) (2012) 72.

these accounts as a possible tool to launder money.[44] Yet, FICA is regarded as South Africa's "solution" to the issue of money laundering. It is described as a control measure intended to facilitate the detection and investigation of money laundering.[45]

FICA is based on three elementary principles of money laundering detection one, intermediaries in the financial system must know with who they are doing business with, secondly, the paper trail of transactions must be preserved and lastly, possible money laundering transactions must be brought to the attention of FIC.[46] In an attempt to implement these elementary principles, FICA provides various obligations such as specific internal control methods, record-keeping requirements, customer identification and reporting obligations.

FICA establishes two types of reporting obligations, one that requires all businesses to report suspicious transactions (Section 29)[47] and the second that provides reporting obligations for accountable institutions and reporting institutions (Section 28).[48]

44 Hamman & Koen (1) (2012) 72.
45 Financial Intelligence Centre 'Guidance Note 05A on section 28 of the Financial Intelligence Centre Act, Act 38 of 2001' available at *https://www.fic.gov.za/Documents/160331%20GN%2005A%20CTR%202016%20(web%20submission).pdf* (accessed 19 November 2018).
46 Financial Intelligence Centre 'Guidance Note 05A on section 28 of the Financial Intelligence Centre Act, Act 38 of 2001' available at *https://www.fic.gov.za/Documents/160331%20GN%2005A%20CTR%202016%20(web%20submission).pdf* (accessed 19 November 2018).
47 Act 38 of 2001.
48 Act 38 of 2001.

3.4.1. Cash Threshold Reporting (CTR)

Section 28 provides that an accountable institution and a reporting institution must report to FIC, the prescribed particulars of a transaction concluded with a client if that transaction concerns an amount of cash that exceeds the prescribed amount.[49]

> An accountable institution and a reporting institution must, within the prescribed period, report to the Centre the prescribed particulars concerning a transaction concluded with a client if in terms of the transaction an amount of cash in excess of the prescribed amount- (a) is paid by the accountable institution or reporting institution to the client, or to a person acting on behalf of the client, or to a person on whose behalf the client is acting; or (b) is received by the accountable institution or reporting institution from the client, or from a person acting on behalf of the client, or from a person on whose behalf the client is acting.[50]

An accountable institution is defined in Schedule 1 as, inter alia, an attorney in terms of the Attorneys Act of 1979, a board of executors or a trust company or any other person that invests, keeps in safe custody, controls or administers trust property and an estate agent as defined in the Estate Agents Act of 1976.[51] A reporting institution on the other hand is defined in Schedule 3 as, persons who carries on a business of dealing in motor vehicles or Kruger Rands.[52]

According to Regulation 22B of the Regulations, the prescribed limit is R24 999.99 or the equivalent foreign rate calculated at the time that the transaction is concluded. Therefore, all cash transactions exceeding the amount of R25 000.00 must be reported to FIC in terms of section 28.[53] The accountable institution must file the CTR within two working days of becoming aware that a cash transaction exceeds the

49 Act 38 of 2001.
50 Act 38 of 2001.
51 Act 38 of 2001.
52 Act 38 of 2001.
53 Financial Intelligence Centre 'Guidance Note 05A on section 28 of the Financial Intelligence Centre Act, Act 38 of 2001' available at *https://www.fic.gov.za/Documents/160331%20GN%2005A%20CTR%202016%20(web%20submission).pdf* (accessed 19 November 2018).

prescribed threshold.[54] It is argued by Hamman and Koen that section 28 encompasses a statutory suspicion that if an attorney receives cash of R25 000 or more from a client, then he/she has been paid with tainted funds.[55] Which essentially means that when the attorney spends the cash received, he/she would then have legitimized/laundered that money into the legal economy via the trust account. It is therefore argued that for most attorneys R25 000 is hardly a huge sum, and the duty to submit CTRs may be more trouble than it is worth.[56] Significantly section 28 applies not only to single transactions, but an accumulation of transactions, which, individually falls below the reporting threshold but together amounts to R25000.00 or more.[57]

Arguably the most threatening feature for the attorney, apart from filing the CTR, would be the fact that he/she faces possible prosecution should they fail to file a CTR. According to section 51

> An accountable institution or reporting institution that fails, within the prescribed period, to report to the Centre the prescribed information in respect of a cash transaction in accordance with section 28, is guilty of an offence.[58]

The penalties prescribed is a maximum of 15 years imprisonment or a fine of R10 million.[59]

54 Hamman (2) (2015) 101.
55 Hamman & Koen (2) '*Pecunia non olet*: dirty money as legal fees' (2017) 1 *Journal of Anti-Corruption Law* 113.
56 Hamman & Koen (2) (2017) 113.
57 Hamman & Koen (1) (2012) 73.
58 Act 38 of 2001.
59 Act 38 of 2001.See Hamman &, Koen (1) (2012:76)

3.4.2. Suspicious Transaction Reporting (STR's)

Section 29(1)(a):

> A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or ought reasonably to have known or suspected that- (a) the business has received or is about to receive the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities…must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.[60]

The above section provides for what is known as STR's. It simply expresses that, if you are an owner or employee of a business and you know or ought reasonably to have known or suspected that the business has received or is about to receive the proceeds of unlawful activities you must report such knowledge or suspicion to FIC. This section therefore creates what is regarded as a reporting onus in relation to STR's.[61]

Knowledge and suspicion provide what is known as trigger points to Section 29 and thus requires some deliberation.

3.4.2.1. Knowledge and Suspicion

Knowledge is best described as twofold, consisting of 'real' or 'constructive' knowledge.[62] Section 1(2) of FICA makes provision for both positive and negative knowledge and states

> …person has knowledge of a fact if- the person has actual knowledge of that fact; or the court is satisfied that- the person believes that there is a reasonable possibility of the existence of that fact; and the person fails to obtain information to confirm or refute the existence of that fact.[63]

60 Act 38 of 2001.
61 Hamman (2) (2015) 102.
62 Hamman & Koen (1) (2012) 75.
63 Act 38 of 2001.

Real knowledge consists of actual/positive knowledge, where the individual who is required to file the relevant STR knows of money laundering taking place within particular transaction, as well as negative knowledge which is defined as "wilful ignorance" where an individual consciously decides to ignore the transaction in question in order to fabricate an absence of the requisite knowledge.[64]

Constructive knowledge on the other hand is acknowledged in Section 1(3) and brings about the test of reasonableness and the reasonable person. According to Section 1(3) of FICA

> …a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached, are those which would have been reached by a reasonably diligent and vigilant person having both- the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and the general knowledge, skill, training and experience that he or she in fact has.[65]

It asks the question whether the individual left with the obligation to file the STR, reasonably ought to have known that the transaction in question was the subject of money laundering operations.[66] Therefore, an individual will be deemed to have constructive knowledge of money laundering if a reasonable person in his/her position would have judged the particular transaction to be tainted.[67]

Suspicion too is covered by Section 1(3) in that, should the person obligated to file the STR have the suspicion that a transaction is tainted, and a reasonable person in his/her position would have had the same suspicion, then that person is by law obligated to file the STR based solely on that suspicion.[68] The suspicion is therefore

64 Hamman & Koen (1) (2012) 75.
65 Act 38 of 2001.
66 Hamman & Koen (1) (2012) 75.
67 Hamman & Koen (1) (2012) 75.
68 Hamman & Koen (1) (2012) 75.

an objectively reasonable one.[69] Consequently, in accordance with Regulation 24 the STR must then be filed within 15 days of becoming aware of the transaction.[70]

The burden created in section 29(1) and (2) is significantly wider than that of section 28. Hence, all personnel in a firm automatically incurs a legal obligation to file an STR should they have the requisite knowledge or suspicion that suspicious transactions are happening.[71] This then subsequently requires the attorney to train employees on how to report clients. Double edge sword, the attorney battles to retain the sacred principle of attorney-client confidentiality yet his employees could render it all null and void.

Be that as it may, like the criminalisation of failure to report a CTR, failure by an attorney or his personnel to report a suspicious transaction is criminalised by section 52. According to section 52 any person who knows, who reasonably ought to have known or suspected that any of the facts referred to in section 29 exists and who fails, within the prescribed period, to report to FIC the stipulated information regarding a suspicious transaction or a series of transactions is guilty of an offence.[72] The penalties prescribed is a maximum of 15 years imprisonment or a fine of R10 million.[73]

3.4.2.2. No Tipping Off (NTO)

Sections 29(3) and (4) provides for what is known as the no tipping off clauses in FICA. Thus, in terms of section 29(3) no person who files or must file a report may disclose this fact or any information relating to the STR to any other person including

69 Hamman & Koen (1) (2012) 75
70 Regulation 24 of the regulations to Act 38 of 2001.
71 Hamman & Koen (1) (2012) 74.
72 Section 52 of Act 38 of 2001.
73 Section 52 of Act 38 of 2001. See Hamman &, Koen (1) (2012:76)

the person in question, unless it falls within the realm of the provided exceptions.[74] Section 29(3) is further supported by section 29(4) which prohibits any person who has knowledge or a suspicion that an STR has been filed, from disclosing such knowledge or suspicion to any person including the person who is the subject of the STR.[75] Collectively, section 29(3) and 29(4) provides an all-round, comprehensive tool against possible tipping off.[76] Importantly, these Sections carry their own penalties in the case of non-compliance. Any individual who contravenes these Sections could face prosecution in terms of Sections 53(1) and 53(2) respectively.[77]

Interestingly, within the "no tip off clause" there lies a fundamental flaw, which most certainly leaves the attorney with a bitter taste. Report the client who he/she suspects of being involved in suspicious transactions, possibly in future testify against that client should prosecution be pursued, whilst in the meantime continue pretending that a confidential relationship exists and deducting fees. This is absurd and violates everything that a legal relationship is based upon – trust, honesty, confidentiality. It is most eloquently put by Cromwell J when he justly states that:

> Clients and the broader public must justifiably feel confident that lawyers are committed to serving their clients' legitimate interests free of other obligations that might interfere with that duty. Otherwise, the lawyer's ability to do so may be compromised and the trust and confidence necessary for the solicitor-client relationship may be undermined.[78]

3.5. Reporting obligations: a challenge for South African Lawyers

FICA's reporting obligations contained in Sections 28 and 29 requires an attorney to provide FIC with information acquired during the attorney-client relationship. It is said

74 Hamman (2) (2015) 104.
75 Hamman (2) (2015) 104.
76 Hamman (2) (2015) 105.
77 Hamman & Koen (1) (2012) 77.
78 *Canada (Attorney General) v Federation of Law Societies of Canada (2015) SCC 7*

that in premise the reporting obligations do not transgress upon the right to legal professional privilege, however, there is a probability that an attorney who complies with his/her reporting duty will breach that trust upon which the attorney-client relationship is based.[79]

For example, a client consults with an attorney regarding a conveyancing transaction and the purchasing of property. Thus, the first order of business would be for the attorney to establish all relevant information relating to the client. The attorney establishes that the client is an entrepreneur but refuses to divulge any other information relating to the type of business he runs. Be that as it may, during consultation the client is advised that the attorney would require a deposit of R40 000.00 cash to commence with his/her mandate. The client deposits the required amount immediately after consultation into the attorney's trust fund account. Instantaneously one realises that, the amount is above the cash threshold set by Section 28 and thus reportable and two, some suspicion would be raised if an individual, unable to divulge information regarding his business, is able to immediately deposit an amount of R40 000.00. Thus, once this suspicion occurs, regardless of the course by which the money came into the trust account, the attorney or relevant person would need to file an STR with FIC. The challenge faced by South African attorneys then presents itself, break attorney-client confidentiality and legal professional privilege or risk being prosecuted as a money launderer. As stated by Justice Allan in the case of the *Law Society of British Columbia v Attorney General of Canada* 2001 which dealt with analogous issues:

79 Hamman & Koen (1) (2012) 78.

> The principles of fundamental justice that are said to be threatened by this legislation include the independence of the bar, solicitor-client confidentiality, and the duty of loyalty owed by lawyers to their clients.[80]

The issue with section 28 and section 29 is that it essentially compromises the confidential relationship between an attorney and his/her client.[81] Should an attorney file a CTR or STR against any client, the attorney-client confidentiality is immediately rendered null and void. The client will in all likelihood never trust the attorney again. The client may even ensure that all other clients and potential clients are made aware of the break in trust which will essentially lead to the demise of the attorney's career.

The same applies to legal professional privilege. If the attorney acted in a professional capacity at the time; was consulted in confidence; the communication was made to obtain legal advice and the advice sought did not facilitate the commission of a crime or fraud, but the advice sought was not for pending or on-going litigation, and there is the element of knowledge or suspicion, Section 37(2) then becomes impractical, the attorney still has to file the necessary report and this principle would be irretrievably broken. As stated by Hamman and Koen "…legal professional privilege may be decisive, the attorney-client relationship transcends it, comprehending also such crucial ethical matters as trust, confidence, security and reliability."[82]

The scope of Section 29 is much wider than that of Section 28. However, both sections inevitably place a cruel burden on attorneys. This is highlighted by Koen

80 *Law Society of British Columbia v Attorney General of Canada* (2001).
81 Millard & Vergano (2013) 389 – 427.
82 Hamman & Koen (1) (2012) 78.

and Hamman when they state that clients expect all communications to be confidential and consequently privileged, however the reporting requirements of FICA presents the attorney with a distasteful election which is, betray your client's confidence or betray your legal obligations to report.[83] The attorney is left to make a painful choice, and should he fail to report he simply runs the risk of being prosecuted for money laundering.[84] This fundamentally represents a concern because of the simple fact that, an attorney's duty of commitment and loyalty to the client is indispensable in maintaining confidence in the honesty of the legal system.[85] Hence Bester argues that a persons' right to complete confidentiality from his law firm is a basic fundamental right[86] and if one follows this train of thought one would think that such a right then affords an individual with complete legal privilege. Yet Millard provides that one has to distinguish between the concept of confidentiality and privilege, as information has the potential to be confidential but not privileged.[87] This in itself indicates a challenge that requires urgent attention.

3.6. Conclusion

FICA was enacted in 2001, it is the year 2019, the law has changed, and the crime of money laundering has evolved. When the FATF first provided its list of recommendations in 1999 attorneys in America immediately identified the issues with regard to reporting obligations and challenged those recommendations. As a result, the FATF issued as mentioned in Chapter 2, the RBA Guidance for Legal Professionals (2008) which specifically states that reporting of suspicious transactions is a complex matter that should be dealt with by the legislature of a

83 Hamman & Koen (1) (2012) 79.
84 Hamman & Koen (1) (2012) 79.
85 *Canada (Attorney General) v Federation of Law Societies of Canada (2015) SCC 7*
86 Bester (2002) 26.
87 Millard & Vergano (2013) 389 – 427.

country. Yes, these recommendations provide what is known as soft law, but they are drafted as guidelines for a reason. Legislatures need to adopt ways to best deal with financial crimes. However, the South African legislature has done nothing to amend provisions dealing with reporting obligations but instead chose to focus the 2017 amendment of FICA on Section 45 only.

As indicated, attorney-client confidentiality and legal professional privilege are functionally different with similar underlying guidelines. Both encourage clients to communicate freely and openly with the attorney so that the attorney is fully informed and best suited to represent the client. This open communication is vital to effective legal representation as failure to disclose critical information may lead to the client suffering prejudice, and the attorney not being able to prepare effectively for the matter.[88]

However, by inserting Section 28 and 29 the legislature ensured "…that attorneys do fulfil their gatekeeping duties…"[89] possibly at the cost of providing effective representation. These reporting obligations places severe strain not only on the attorneys right to free exercise of his profession, but on the attorney-client relationship through breaching confidentiality and the attached professional privilege which is vital to having a successful career within the legal profession..[90] The expectations and regulation of the legal profession in terms of its reporting obligations, which demands greater accountability, leads to attorney's themselves expressing concern that their public image will suffer and with that their careers. Hence why the anti-money laundering legislation, specifically the reporting

88 Popp J 'The Cost of Attorney-Client Confidentiality in Post 9/11 America' (2007) 20 *The Georgetown Journal of Legal Ethics* 877.
89 Hamman & Koen (1) (2012) 80.
90 Hamman (2) (2015) 86.

obligations of FICA, fundamentally fails the legal profession and must be addressed. Unfortunately, there are no simple rules that determine when the distribution of confidentially obtained information is justifiable[91] but to compel an attorney to file reports against clients based on such information and suspicion surely cannot be justified. As stated in *Canada (Attorney General) v The Federation of Law Societies of Canada*:

> It should be recognized as a principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes.[92]

Similarly, by John Basten:

> The independence of lawyers is further being reduced by increasing outside intervention in the government of the profession as a whole…The setting of standards, their enforcement…were allowed to rest in the hands of the professional organizations, which were typically immune from public oversight and from public accountability.[93]

Chapter 3 focused primarily on the South African legal framework. However, chapter 4 represents the culmination of this study. It will discuss the various approaches adopted by legal professionals in the US and Canada, with specific reference being made to the way the American Bar Association (ABA) and Canadian Federation of Law Societies fought against legislation obligating attorneys to file CTR's and STR's. In that way, highlighting possible lessons to be learnt by South Africa.

91 Snyder LB 'Is Attorney-Client Confidentiality Necessary' (2002) 15 *The Georgetown Journal of Legal Ethics* 478.
92 *Canada (Attorney General) v Federation of Law Societies of Canada* (2015) SCC 7.
93 Basten J 'Control and the Lawyer-Client Relationship' available at https://www.law.ua.edu/pubs/jlp_files/issues_files/vol06/vol06art01.pdf (accessed 6 August 2018).

CHAPTER 4

AN EVALUATION OF INTERNATIONAL LEGISLATION

4.1 Introduction

This chapter encompasses a comparative study of the South African, United States and Canadian jurisprudence in relation to the reporting obligations of attorneys. The Law Societies in both Canada and the United States played an active role in establishing effective money laundering rules for their members. This analysis is undertaken to determine whether their members are obligated to file STR's. Perhaps there is something in these jurisdictions that their South African counterparts can learn from and possibly use in future.

As indicated in the previous chapter, reporting obligations place attorneys in an uncomfortable position where they have to choose between their client or the law.[1] Though the issue of non-reporting by attorneys have not resulted in any successful prosecutions in South Africa yet, the possibility that it might happen, still exists.[2] Hence why it is important to draw comparisons from leading jurisprudence and provide recommendations on how this could be remedied before it becomes problematic. As stated by Paton,

> it is clear that elected officials are no longer willing to accept as an article of faith that the lawyer-client relationship is impenetrable; the challenge for the legal profession is to recognize that in an era when expectations of lawyers as gatekeepers have been fundamentally altered, the profession needs to be proactive in assessing where its rules might better serve the public interest, and in making better arguments to protect those values it articulates as fundamental.[3]

1 Hamman (2) (2015) 192.
2 Hamman (2) (2015) 192.
3 Paton P 'Cooperation, Co-option or Coercion? The FATF Lawyer Guidance and the Regulation of the Legal Profession' (2010) *Journal of the Professional Lawyer* 167.

Attorneys across several jurisdictions faced similar issues with regard to reporting obligations. However, they were vigilant enough to identify the implications of such requirements on the legal profession. Therefore, significant focus will be placed on the manner in which Canada and their Law Societies, and the United States and the American Bar Association opposed the reporting obligations, insofar as it relates to the legal profession, and how the legislature, courts and societies in efforts to compromise, addressed the conflict and concerns raised. This will then be compared to the South African position, ultimately indicating a clear gap and *laissez-faire* attitude on the part of everyone involved in the legal profession and the legislature.

4.2 Canada

As highlighted in chapter 2, the FATF is an inter-governmental body established in 1989 in order to develop measures that could be used to combat money laundering.[4] As a result, the FATF developed a series of Recommendations, the first being issued in 1990, which was then revised in 1996, 2001, 2003 and 2012 to ensure that not only do they remain relevant, but they are intended to be for universal application.[5]

In an attempt to implement the FATF Recommendations into law, Canada enacted what is known as the Proceeds of Crime (Money-Laundering) and Terrorist Financing Act S.C 2000, c. 17 (PCMLTFA).[6] The purpose of the PCMLTFA is described in Section 3 as putting measures in place, to detect and deter the crime of money laundering and terrorist financing, and to facilitate the investigation and

4 FATF 'Who we are' available at http://www.fatf-gafi.org/about/whoweare/ (accessed 20 March 2018).
5 FATF 'Who we are' available at http://www.fatf-gafi.org/about/whoweare/ (accessed 20 March 2018).
6 Paton (2010) 172.

prosecution thereof.[7] This is to be done inter alia by ‘requiring the reporting of suspicious financial transactions and of cross-border movements of currency and monetary instruments’[8] The PCMLTFA was assented to in June 2000. The new legislation was partly brought into force, with a declaration that the balance and new regulations under it be postponed to September of the year 2001. Hence, it was this November 2001 regulations which made provisions of the PCMLTFA, specifically section 7 and 10, applicable to lawyers which caused a downpour of objections.[9]

In terms of the legislation, lawyers (in addition to other institutions) were to report any transactions exceeding $10,000 in cash (including international transactions) as well as suspicious transactions to the new Financial Transactions and Reports Analysis Centre of Canada also known as FINTRAC.[10] FINTRAC was established by the PCMLTFA and became operational in October 2001. FINTRAC is known as Canada’s financial intelligence unit, its anti-money laundering and it’s anti-terrorist financing regulator, playing a vital role in helping combat money laundering in Canada.[11] Section 41 of the PCMLTFA deals with the establishment and powers of FINTRAC.[12] The purpose of FINTRAC is to detect, prevent and deter the occurrence of money laundering and terrorist financing.[13] On the face of it, it appears virtually impossible to ensure that these goals are met. However, Canada has established comprehensive mechanisms to assist in the facilitation of this mandate and

7 Proceeds of Crime (Money Laundering) and Terrorist Financing Act 2000, c. 17 – section 3(a). See also *Canada (Attorney General) v Federation of Law Societies of Canada* (2015) SCC 7.
8 *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* 2000, c. 17 – section 3(a)(ii)
9 Paton (2010) 174.
10 Paton (2010) 172.
11 FINTRAC Strategic Plan 2019 -24 ‘Vision and Priorities’ available at https://www.fintrac-canafe.gc.ca/fintrac-canafe/strategic_plan-eng.pdf (accessed 18 August 2019).
12 Proceeds of Crime (Money Laundering) and Terrorist Financing Act 2000, c. 17 – section 41.
13 Frans (2017) 55.

achieving these goals. These mechanisms are inter alia, receiving financial transaction reports and information on money laundering and terrorist financing; ensuring compliance of reporting entities; investigating and analysing data received from a variety of sources that indicate possible trends and patterns in money laundering.[14] Despite concerns expressed by the Federation of Law Societies, in November 2001 the Federal government promulgated regulations making the Act applicable to lawyers, and requiring legal counsel to secretly report suspicious transactions by their clients to FINTRAC.[15] This ultimately granted FINTRAC the authority to execute warrantless searches of the offices and computers belonging to people or entities that are subject to the legislation, and sets out penal sanctions for non-compliance with its provisions.[16]

Canadian lawyers immediately realised the implications of the said provisions on the attorney-client relationship and legal professional privilege and instituted litigation proceedings in an attempt to prevent the applicability of these provisions on its members, compelling them to report STR's and CTR's.[17]

4.3. The Canadian Law Societies

The Canadian legal profession is somewhat complex. Within the Canadian federal democracy, provincial legislators are constitutionally responsible for legislation governing the legal profession. It consists of fourteen law societies convened across Canada with each running its own regulatory administration. A coordination and

14 Frans (2017) 55.
15 Macdonald R 'Money Laundering Regulation – What can be learned from the Canadian Experience?' (2010) *Journal of the Professional Lawyer* 143 - 150.
16 Bromwich, R. '(Where is) the Tipping Point for Governmental Regulation of Canadian Lawyers: Perhaps it is in Paradise: Critically Assessing Regulation of Lawyer Involvement with Money Laundering After Canada (Attorney General) v Federation of Law Societies of Canada.' (2018) *Manitoba Law Journal, 41(4),* 1-26.
17 Hamman (2) (2015) 193.

facilitation function as between the law societies is performed by what is known as the Federation of Law Societies of Canada (FLSC). The FLSC is an umbrella association composed of provincial and territorial legal self-regulating bodies.[18] The FLSC acts as the coordinating and facilitating body trying to coordinate the workings of each individual law society. It is not in itself a regulator, but together form an association of agencies with no binding power over any of its constituent parts.[19]

4.4 The Realisation

In 2001 when the remaining provisions of the PCMLTFA came into effect attorneys/lawyers in Canada immediately opposed the proposed legislation arguing that it '…infringed on solicitor-client confidentiality and the professional independence of Canadian lawyers.'[20] Additionally, one of the focal arguments essentially raised by the Canadian Lawyers were that,

> …the legislation made lawyers "secret agents of the state", collecting information about clients against their interests and reporting to a government agency; this threatened not only the sanctity of the solicitor-client relationship but also fundamental Canadian constitutional principles and the integrity of the administration of justice…if a transaction were subject to the reporting requirements of the legislation, a lawyer would be required to report a client's name, address and occupation and the source of the client's funds. Further, the lawyer would be prohibited from disclosing to the client that such a report had been made and would be subject to serious criminal penalties for violating the new rules.[21]

It was these very reasons that the Law Societies decided to institute litigation proceedings, and which set this steam train in motion. According to Macdonald, the FLSC supported by the Canadian Bar Association, initiated proceedings in the Supreme Court of the province of British Columbia challenging the constitutionality of the legislation and seeking interlocutory relief from the applicability of the legislation

18 Bromwich (2018) 1 – 26.
19 Bromwich (2018) 1 – 26.
20 Paton (2010) 174.
21 Paton (2010) 174.

on legal professionals.[22] The crux of the constitutional challenge was that the legislation, specifically the obligation to report a suspicious transaction required attorneys to act as a secret agent of the state.[23] This was to be done through collecting private information about clients, that were against the client's interests and subsequently reporting to a government agency (FINTRAC). The argument was therefore that -

> the legislation threatened fundamental Canadian Constitutional principles, which require that lawyers maintain undivided loyalty to their clients, consistent with the independence of the bar and the integrity of the administration of justice.[24]

However, in order to understand the development of Canadian jurisprudence with regard to reporting obligations, the single judgment handed down in *Law Society of British Columbia v Canada* 2001, plays an imperative role.

In 2001 the Law Societies embarked on a constitutional challenge of the legislation as it applies to the legal profession requesting that the court determine its constitutionality based on the Canadian Charter of Rights and Freedoms (the Charter). The application Judge was of the view that 'the challenged provisions violate section 7 of the Charter and the infringement is not saved under section 1 of the Charter.'[25] The British Columbia Supreme Court subsequently granted an interlocutory order which relieved lawyers of their reporting requirements in terms of the Act and its regulations. In 2003, the British Columbia Supreme Court ordered the adjournment of the constitutional challenge following a decision by the government to revoke numerous regulations subjecting Canadian lawyers to the reporting requirements. Ultimately in 2005 the British Columbia Supreme Court adjourned the

22 Macdonald (2010) 143 - 150.
23 Macdonald (2010) 143 - 150.
24 Macdonald (2010) 143 - 150.
25 *Canada (Attorney General) v Federation of Law Societies of Canada* (2015) SCC 7.

matter sine die.[26] Interestingly, this particular case spanned across a period of 15 years trying to find clarity on various other issues and constitutional challenges that was brought about through the implementation of the PCMLTFA. All matters were finally adjudicated and settled in the year 2015. However, for purposes of this study, the only relevant case would be the one instituted and decided in 2001 as the Canadian court decided on the applicability of the relevant legislation to attorneys instantaneously.

4.4.1 *Law Society of British Columbia v Canada* 2001

As mentioned above, in 2001 when the PCMLTFA came into force the Law Society of British Columbia together with the FLSC instituted legal proceedings seeking interlocutory relief exempting lawyers from the force of the impugned legislation specifically Section 5 of the Regulations.[27] The FLSC is the coordinating body of the 14 governing bodies in Canada that has the responsibility of governing Canada's lawyers and notaries.[28]

For purposes of this study and in order to comprehensively understand what the lawyers in Canada were arguing it is imperative that one becomes familiar with the legislation and likewise expectations placed upon lawyers at the time.

Section 5 provides:

> Every legal counsel is subject to Part I of the Act when they engage in any of the following activities on behalf of any person or entity, including the giving of instructions on behalf of any person or entity in respect of those activities: receiving or paying funds, other than those received or paid in respect of professional fees, disbursements, expenses or bail; purchasing

26 Paton (2010) 177 – 178.
27 *Law Society of British Columbia v Canada* 2001 (BCSC) 49.
28 Macdonald (2010) 143 – 150.

> or selling securities, real property or business assets or entities; and transferring funds or securities by any means.[29]

Section 7 of the Act requires the reporting of suspicious transactions:

> ...every person or entity shall report to the Centre, in the prescribed form and manner, every financial transaction that occurs in the course of their activities and in respect of which there are reasonable grounds to suspect that the transaction is related to the commission of a money laundering offence.[30]

Section 75 of the Act makes the failure of a lawyer to comply with section 7 punishable by fine of up to $2,000,000 and imprisonment for up to five years.[31] In terms of Section 9 of the Regulations a report under section 7 must contain certain information as set out in the Schedule to the Regulations which comprehensively also identifies the extensive information that must be included in such a report.[32] According to Section 10 of the Regulations, a Suspicious Transaction Report must be sent to FINTRAC within thirty days after the person or entity "first detects a fact respecting a transaction that constitutes reasonable grounds to suspect that the transaction is related to the commission of a money laundering office."[33]

Section 8 then subsequently makes use of the no-tip off clause which prevents a legal practitioner from informing clients that they have lodged a suspicious transaction report, nor can they inform clients on the content of the report in terms of section 7. Failure to comply with section 8 is then punishable in terms of Section 76 which could mean imprisonment of up to two years.[34] Section 11 provides that

29 *Law Society of British Columbia v Canada* 2001 (BCSC) 49.
30 *Law Society of British Columbia v Canada* 2001 (BCSC) 49.
31 *Law Society of British Columbia v Canada* 2001 (BCSC) 49.
32 *Law Society of British Columbia v Canada* 2001 (BCSC) 49.
33 *Law Society of British Columbia v Canada* 2001 (BCSC) 49.
34 *Law Society of British Columbia v Canada* 2001 (BCSC) 49.

nothing in Part I "requires a legal counsel to disclose any communication that is subject to solicitor-client privilege."[35]

As mentioned above, the issue was whether legal practitioners in Canada should be exempted from the provisions of section 5 of the Regulations.[36] The argument was that section 5 of the legislation threatened the independence of the bar and solicitor-client confidentiality which will essentially create a conflict between the lawyer and his duty to his clients and the obligation to report confidential information to FINTRAC.[37] They therefore sought immunity from the legislation thereby allowing them to continue with the status quo. The respondents in this matter provided the court with multiple arguments such as the fact that, the petitioners are not eligible to be granted interlocutory relief and that they lack the necessary locus standi to bring these proceedings inter alia.[38]

The petitioners subsequently argued that

> the legislation forces lawyers to choose between two evils. They must either (1) breach solicitor-client confidentiality, or (2) breach the Act by failing to report clients in order to maintain solicitor-client confidentiality, thus incurring stiff penal sanctions. Either course of action would impose upon the Law Society the obligation to investigate, and discipline where necessary, lawyers who have either breached solicitor-client confidentiality, or who have breached the Act and brought their professional reputation into question.[39]

In response, the respondents argued that legal practitioners are fully protected by section 11.[40] The court noted that the solicitor-client relationship is a rare one and the fundamental principles of justice exposed to the legislation include the

35 *Law Society of British Columbia v Canada* 2001 (BCSC) 49.
36 *Law Society of British Columbia v Canada* 2001 (BCSC) 49.
37 *Law Society of British Columbia v Canada* 2001 (BCSC) 49.
38 *Law Society of British Columbia v Canada* 2001 (BCSC) 49.
39 *Law Society of British Columbia v Canada* 2001 (BCSC) 49.
40 *Law Society of British Columbia v Canada* 2001 (BCSC) 49.

independence of the bar, solicitor-client confidentiality, and the duty of loyalty owed to clients.[41]

4.4.2 The Supreme Court

The Court in determining whether it had the jurisdiction to grant the petitioners the interlocutory order/relief sought, stated that the test used in order to make such a determination is threefold. It requires the affirmation of three imperative questions. These questions are: Whether or not there is a serious constitutional issue that needs to be determined; Will the applicants in the matter suffer irreparable harm if the requested relief is not granted; And lastly, does the balance of convenience, taking public interest into account, favour the granting of such relief?[42]

On the other hand, and more importantly, the court needed to consider whether the independence of the bar is a constitutionally protected right and, if so, whether the challenged legislation violates that right and will the petitioners suffer irreparable harm if the relief sought is not granted.[43]

In answering this question, the court subsequently found that the argument that section 11 provides sufficient protection is inaccurate for the sole reason that the protection afforded in section 11 falls significantly short of the traditional nature of the solicitor-client relationship that the legal fraternity is seeking to protect.[44] Therefore, the court held that

> It is clear that if interlocutory relief is not granted, lawyers will be compelled to report information relating to "suspicious transactions" to the Centre for months, or perhaps years, while the constitutional challenge

41 *Law Society of British Columbia v Canada* 2001 (BCSC) 49.
42 *Law Society of British Columbia v Canada* 2001 (BCSC) 49.
43 *Law Society of British Columbia v Canada* 2001 (BCSC) 49.
44 *Law Society of British Columbia v Canada* 2001 (BCSC) 49.

> proceeds through the hearing of the petitions and the inevitable appeals. Should the legislation ultimately be read down to exempt lawyers, irreparable harm will have been done. Information will have been collected and reported unconstitutionally. The public's confidence in an independent bar will have been shaken and the lawyer-client relationship irrevocably damaged.[45]

In conclusion the court held that, should the application not be granted, and legal practitioners not be excluded from the legislation specifically the reporting of suspicious transactions, then legal professionals in conjunction with their clients may suffer an irreparable harm.[46]

> The harm identified by the petitioners is serious. The harm to the Government by exempting lawyers until the merits of the issues are fully argued is minimal. The Act itself does not impose a reporting duty on legal counsel. By exempting lawyers from the Regulations, the Act remains intact and applicable to all other persons and entities described in the Act and the Regulations.

This landmark judgment confirmed the fact that Canada's Provincial and Territorial Law Societies have the sole jurisdiction to regulate the conduct of lawyers sufficiently, in order to prevent and deter an attorney's involvement in possible money laundering schemes, thereby in some way removing the jurisdiction of government authorities, which otherwise regulate and control money laundering in Canada.[47]

This judgment indicates the importance in protecting the core principles that form the foundation of a successful legal profession. The potential harm suffered by all would be indescribable, should legislatures be afforded the opportunity to dictate the manner in which attorneys conduct business with clients and the overall independence of the profession. As stated by the court in *LaBelle v Law Society of Upper Canada* (2001):

45 *Law Society of British Columbia v Canada* 2001 (BCSC) 49.
46 *Law Society of British Columbia v Canada* 2001 (BCSC) 49.
47 Bromwich (2018) 1 – 26.

> An independent bar is essential to the maintenance of an independent judiciary. Just as the independence of the courts is beyond question so the independence of the bar must be beyond question. The lawyers of the independent bar have been the constant source of the judges who comprise the independent judiciary in English common law history. The "habit" of independence is nurtured by the bar. An independent judiciary without an independent bar would be akin to having a frame without a picture.[48]

4.5 The Aftermath

Following the decision of the Supreme Court, the Attorney General of Canada in May 2002 made the decision to suspend the applicability of the legislation to all legal professionals, pending the Constitutional outcome of the matter.[49] However, the FLSC did not see this as an opportunity for them to merely buy time. Instead, they engaged in consultation with the appropriate bodies in order to find solutions that not only combats money laundering but protects the legal profession and the Canadian society as well. The first solution was the establishment of the "No-Cash Rule" and soon thereafter the Client Identification rule.[50] Both rules indicate the proactive stance of the FLSC in ensuring that lawyers not only comply with legislation but do their part in the fight against money laundering.

4.5.1 The "No-Cash Rule"

As mentioned above, in order to show the commitment to the fight against money laundering and the potential infiltration of the perpetrators on the legal profession, the FLSC and provincial law societies adopted a model "no cash" rule which essentially prohibits lawyers from receiving $7,500 or more in cash from a client in the course of

48 *Law Society of British Columbia v Canada* 2001 (BCSC) 49.
49 Macdonald (2010) 143 - 150.
50 Macdonald (2010) 143 - 150.

one transaction. The rule has been adopted by all Canadian law societies and done by an independent self-regulating bar.[51]

4.5.2 The "Know Your Client" Model Rule

In 2007 the Canadian government adopted rules making the identification verification section of the Act applicable to members of the legal profession.[52]The government insisted that the implementation of the FATF Recommendations relating to client identification must be by legislation or government regulation and cannot be accomplished by relying on self-regulating organizations. However, in an effort to convince government that direct regulation by law societies is not only necessary but more effective, representatives of the FLSC held several meetings with the government.[53]

With little to no success, the government enacted the regulations subjecting members of the legal profession to the verification requirements established. The Model Rule sets out the client identification information a lawyer is required to obtain when retained by a client.[54] The Model Rule essentially codifies the steps that a sensible lawyer would take in the normal course of events in order to verify a client's identity upon being retained as their attorney. According to Macdonald it is implemented in order to:

> …to eliminate the risk of unknowingly assisting in some form of illegal activity, all lawyers should ensure the person they deal with as a client is actually who they say they are. The Model Rule is consistent with the ethical obligations of members of the legal profession and duty to their clients to obtain and keep information relevant to providing the legal services in question. It is not designed or intended for the member of the profession to obtain information that would serve only to provide potential

51 Macdonald (2010) 143 - 150.
52 Macdonald (2010) 143 - 150.
53 Macdonald (2010) 143 - 150.
54 Macdonald (2010) 143 - 150.

> evidence against the client in a future investigation or prosecution by State authorities.[55]

The Model Rule applies whenever a lawyer provides legal services to a client. The identity verification requirements become necessary when the lawyer receives, pays or transfers funds on behalf of a client or gives instructions for such activities to be done on behalf of a client.[56] There are however instances where a lawyer would be exempt from complying with the identification process, specifically when they provide legal services on behalf of an employer, where a lawyer is engaged as an agent or is referred a matter from another lawyer who has complied with the rule.[57] Lawyers must retain a copy of the information recorded. The document's may be kept in machine-readable or electronic form and must be retained for the duration of the relationship with the client and for as long as is necessary to fulfil the requirements of the retainer, but no less than six years.[58]

The "no-cash" and "know your client" rules adopted by the Canadian legal profession effectively meets the FATF requirements, showing the commitment on the part of the FLSC not only to its members but ordinary members of society, while continuing to uphold the sanctity of the solicitor-client relationship and independence of the legal profession.[59]

4.6 The United States

The United States (US) potentially has the most comprehensive anti-money laundering regime in the modern world today. The history of how its anti-money laundering legislation continuously adapted to the changing time and the implicit and

55 Macdonald (2010) 143 - 150.
56 Macdonald (2010) 143 - 150.
57 Macdonald (2010) 143 - 150.
58 Macdonald (2010) 143 - 150.
59 Macdonald (2010) 143 - 150.

continuous change in the crime of money laundering is impeccable. Yet, lawyers in the US faced the same impasse - report suspicious transactions or protect lawyer-client confidentiality and legal professional privilege. However, the American Bar Association (ABA) played a significant role in successfully challenging the filing of STR's and they do not apply the NTO rule in practice.[60]

4.6.1 US Anti-Money Laundering Legislation

Contemporary anti-money laundering legislation in the US has its origins in what is known as the Bank Secrecy Act (BSA).[61] The purpose behind enacting the BSA is twofold, one, it was enacted in order to fight the American war on drugs and stop the flow of illegitimate money being reinvested[62] and two, prevent financial institutions such as the banks from being used as financial intermediaries to hide deposits essentially derived from criminal activity.[63] In 1986, the BSA was supplemented by the Money Laundering Control Act which was the first Act to codify money laundering as a crime in the US with the view of closing loopholes exploited by money launderers.[64] The US Patriot Act was signed into law on 26 October 2001 following the September 11 terrorists attack on the Twin Towers. This Act represented a further supplementary to the BSA. However, the main instrument in the battle against money laundering is, the International Money Laundering Abatement and Anti-Terrorist Funding Act (IMLA). This Act enhances earlier enacted laws in an attempt to make it more difficult for criminals to use the US financial institutions.[65] Most

60 Hamman (2) (2015) 193.
61 Kazmerski NS 'Applying Anti-Money Laundering and Anti-Terrorist Financing Controls to the United States Legal Profession: A Response to the Senate Permanent Subcommittee Report on the Proceeds of Foreign Corruption' (2011) *Dartmouth Law Journal* 78 – 117.
62 Cummings & Stepnowsky 'My Brother's Keeper: An Empirical Study of Attorney Facilitation of Money-Laundering Through Commercial Transactions' (2011) *Journal of the Professional Lawyer* 1 – 36.
63 Kazmerski (2011) 78 – 117.
64 Kazmerski (2011) 78 – 117.
65 Kazmerski (2011) 78 – 117.

importantly, US legal professionals are not defined as financial institutions and do not fall under the anti-money laundering compliance obligations instituted in the IMLA.[66]

4.6.2 US Lawyers versus the "Gatekeeper Approach"

A "gatekeeper" is defined as an individual who controls access to a particular thing. In money laundering terms that would be the legal economy. The concept of the "gatekeeper initiative" arose in 1999 at the FATF conference in Moscow. The idea behind the initiative was to enlist certain professions (like the legal profession) who operate as potential gatekeepers for dirty money to flow into the legal economy, to the anti-money laundering course.[67] It was argued by the FATF that legal professionals, through trust accounts, play an integral role as the "gatekeeper" for criminals and it would therefore be reasonable to require of them to implement anti-money laundering measures.[68] This instantly presented itself as problematic to the US legal profession in that applying STR's cannot easily be reconciled against the robust traditions of attorney-client privilege and attorney-client loyalty.[69]

In 2006, through the use of its "name and shame" policy the FATF gave the United States a non-compliant rating.[70] The thinking behind the rating was based on the fact that FATF Recommendations require the implementation of its Gatekeeper regulations. However, individuals such as lawyers were not subject to customer identification, record keeping requirements or the filing of STR's. The FATF

66 Kazmerski (2011) 78 – 117.
67 Kazmerski (2011) 78 – 117.
68 Kazmerski (2011) 78 – 117.
69 Kazmerski (2011) 78 – 117.
70 Kazmerski (2011) 78 – 117.

subsequently allowed the US two years to implement all necessary steps making it compliant with FATF Recommendations or possible risk sanctions by the FATF.[71]

4.6.3 The American Bar Association (ABA)

In February of 2002, the ABA established its own Gatekeeper Task Force in order to challenge any issues arising from the FATF Gatekeeper initiative.[72] The Task Force has four functions, review and evaluate policy and rules, develop positions on the gatekeeper initiative, develop educational programmes for legal professionals and co-ordinate the distribution of resources allowing legal professionals to comply with anti-money laundering responsibilities.[73]

The Task Force has worked assiduously to counter the obligation of the gatekeeping regulations on legal professionals by working directly with the FATF and Treasury on voluntary guidelines, preparing reports and recommendations to the ABA House of Delegates.[74]

4.6.3.1 Resolution 104 of 2003

In February of 2003, the ABA House of Delegates adopted Resolution 104. In terms of the resolution the ABA opposed -

> …any law or regulation that, while taking action to combat money laundering or terrorist financing, would compel lawyers to disclose confidential information to government officials or otherwise compromise the lawyer-client relationship or the independence of the bar.[75]

The above opposition to the federal anti-money laundering Gatekeeper regulation is based upon three primary grounds, fear that the regulations will have a negative

71 Cummings & Stepnowsky (2011) 1 – 36.
72 Cummings & Stepnowsky (2011) 1 – 36. Hamman (2) (2015) 193.
73 Hamman (2) (2015) 194-195.
74 Cummings & Stepnowsky (2011) 1 – 36.
75 Cummings & Stepnowsky (2011) 1 – 36.

impact on the attorney-client relationship, confidentiality, attorney-client privilege, attorney independence, and the attorney's obligation of loyalty.[76] However, in an attempt to show government that they are not merely opposing federal legislation and showing no accountability, the ABA proposed that the model rules of professional responsibility be reviewed, and recommended that law schools and bar associations educate professionals on money laundering concerns and risks.[77]

4.6.3.2 Resolution 300 of 2008

In 2008 the ABA Task Force drafted what is known as Resolution 300. In August 2008 at the ABA annual meeting, the ABA House of Delegates (policy making body) adopted a recommendation opposing federal legislation that would bring persons involved in the corporate formation process, under the BSA regulations. Resolution 300 encourages state and bar associations, with the aid of the Task Force -

> to develop appropriate guidance on adopting voluntary risk-based approaches to client due diligence that will inform legal professionals of the risks of money laundering and terrorist financing, and assist them in taking appropriate steps for compliance with anti-money laundering and anti-terrorist financing legal requirements.[78]

Even though the ABA adopted Resolutions 104 and 300 and opposed the applicability of federal legislation on legal professionals, they too realised that rigid leadership is needed in order to ensure that a risk-based guidance is developed for US attorneys. Inclusive of the inherit fear that because there was no development of rules-based guidance based on the FATF Lawyer Guidance, government would see

76 Cummings & Stepnowsky (2011) 1 – 36.
77 Hamman (2) (2015) 196.
78 Shepherd K.L. 'Guardians at the Gate: The Gatekeeper Initiative and the Risk-Based Approach for Transactional Lawyers' (2009) *Real Property, Trust and Estate Law Journal* 608 – 671.

this as an opportunity to impose legislation. This resulted in the Task Force developing the Good Practice Guidance.[79]

4.6.4 Lawyer Guidance / Good Practices Guidance

It is common knowledge that the FATF strongly recommends the establishment of domestic good practices for legal professionals.[80] The Lawyer Guidance encourages the evolution of good practices for legal professionals in order to assist in executing of a risk-based approach.[81] In an effort to counteract the need for government regulation of the US legal profession, the ABA Task force in partnership with the American College of Commercial Finance Lawyers and ABA Criminal Justice Section founded the Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing (Good Practices Guidance).[82]

The Good Practices Guidance is an all-inclusive guide incorporating the FATF's risk-based approach to customer due diligence with the ultimate goal of educating legal professionals on client risk-assessment.[83] Interestingly, the Good Practices Guidance does not include an ethical responsibility to report a suspicion. Instead instructs if a "client presents an unacceptable risk," the attorney should decline or recuse himself/herself from the representation.[84]

4.7 Comparative Evaluation

As indicated in Chapter 3, FICA in terms of Sections 28 and 29 make it obligatory for attorneys to report their clients. Section 28 providing that, should an attorney receive

79 Hamman (2) (2015) 197.
80 Hamman (2) (2015) 198.
81 Shepherd (2009) 608 – 671.
82 Cummings & Stepnowsky (2011) 1 – 36.
83 Cummings & Stepnowsky (2011) 1 – 36.
84 Cummings & Stepnowsky (2011) 1 – 36.

cash exceeding the threshold of R24 999.99, whether in total or smaller cash amounts totalling the threshold or more, he/ she has an obligation to report this to FIC or face possible prosecution.[85] Section 29 similarly provides that an attorney has to report suspicious, unusual transactions to the FIC.[86] In addition, FICA provides a non-tip off (NTO) clause which essentially means that attorneys may not, under any circumstances, inform their clients that they have reported them to FIC. Be that as it may, the importance of this study dictates that one compares the jurisprudence of the more developed world to that of South Africa in order to paint the picture of just how tardy the law-making bodies are.

4.7.1 Canada versus South Africa

The Canadian and South African jurisprudence relating to deterring the crime of money laundering can to a large extent be seen as similar. It is similar in that Canada has FINTRAC, South Africa FIC, Canada the no-cash rule and South Africa has section 28 of FICA relating to cash transactions above the prescribed limit rule, the Canadian know your client rule and section 21's identify client rule, and lastly the reporting of suspicious transactions. Only, the reporting of suspicious transactions is applicable to attorneys in South Africa and not the Canadian counterpart because of the immediate action by Canada's Law Societies. Possibly more impressive is the fact that the Canadian Law Societies recognised the issue of money laundering and took it upon themselves to implement the moral rules to which their attorneys are bound to. This is not the case in South Africa. Naturally, one would think that the finger should be pointed in the direction of the State for failing to give sufficient

85 Act 38 of 2001.

86 Act 38 of 2001. Hamman AJ *The Impact of Anti-Money Laundering Legislation on the Legal Profession in South Africa* (unpublished LLD thesis, University of the Western Cape, 2015) 192.

thought to the legislation implemented. However, as attorneys and members of the law society it is imperative to ask what has the law society done?

The answer to this question is absolutely nothing and therein lies the problem. As indicated above as soon as the Canadian government implemented the PCMLTFA the law societies across Canada instituted legal action requesting that the requirement of reporting suspicious transactions as it applies to legal professionals be set aside. They immediately recognised the threat posed by the legislation on the attorney client relationship and most importantly legal professional privilege. Having been successful in its challenge against the applicability of STR's in the legal profession, the law society took a proactive approach, essentially saying to the Canadian government, allow us to manage and implement rules applicable to attorneys that will collectively benefit all in the fight against money laundering. There was a compromise and recognition of what was most important for society.

As previously mentioned, the South African Law Societies are tasked with serving and protecting the legitimate interests of its members. However, in recent years more attention was given to the implementation of the Legal Practice Act and the regulation of the legal profession thereafter. Surely this cannot be accepted, surely the attorney client relationship and legal professional privilege means as much to South African attorneys as it did to our Canadian counterparts.

The same consideration should be given to the issue of record keeping as these are all inextricably linked. As a rule, attorneys are required to keep records for a period of 5 years. Should an attorney's office be subjected to a search (with a warrant) and it is established that 3 years prior the attorney was aware of a suspicious transaction and did not report it the attorney could then quite easily be prosecuted for one, failing to report a suspicious transaction and two, keeping such a transaction a secret. Yet the law society's in South Africa have other pressing issues requiring their immediate attention. The possible prosecution of an attorney for performing his/her job and protecting the attorney client relationship is a matter of "cross that bridge when we get there".

Like Canada has FINTRAC, South Africa has FIC. Yet in all honesty FIC, seems at this stage to be a toothless tiger, established to create the façade that South Africa is serious about combating money laundering. There is no indication that FIC has ever successfully prosecuted an attorney for failure to report. One simply has no idea whether South African attorneys are complying with their statutory reporting obligations.

4.7.2 US versus South Africa

Perhaps fortunately, there is not much to compare the South African legislation to that of the US. However, there certainly is so much that the South African Law Society can take from the effort of the ABA in protecting its members from the infiltration of government.

For the ABA, government intervention whether it be statutory or regulatory intervention, would be an unwelcome development and be seen as an unjustified intrusion upon the sanctity of the attorney–client privilege and attorney-client confidentiality.[87] It is this very belief that resulted in the ABA adopting Resolutions 104 and 300 opposing any law or regulation compelling attorneys to report suspicious activities. It has safeguarded its members despite the non-compliant report by the FATF on the US.[88] They even acted upon FATF soft law as soon as it

87 Shepherd (2009) 608 – 671.
88 Hamman (2) (2015) 206.

was implemented. Almost immediately objecting to the applicability thereof upon members. The ABA then took it a step further, and went as far as implementing the Good Practices Guidance, thereby circumventing any possible interference by the US Federal government.

In the mind of individuals working on the ABA Task Force there will simply never be a prosecution of its members in the legal profession for failing to file STR's and an attorney will never be faced with the decision of having to choose between abiding the law or loyalty towards a client. The principles of attorney-client confidentiality, attorney-client privilege and loyalty will never be interfered with. They are aware of the law, they act upon the law and like an owl they have a large, broad head with binocular vision waiting for the government to pounce.

Unlike the US, the South African Law Society did not oppose the legislation. At no point in time have they lodged any opposition towards the implementation of FICA's reporting obligations, specifically sections 28 and 29 on its members, nor have they encouraged the development of a Lawyer Guidance in accordance with the FATF Recommendations that best suits the South African legal profession. Instead, when registering to practice as an attorney you are obligated to register as an accountable institution in terms of FICA which opens the door to an attorney possibly being prosecuted for doing his/her job. It is highly unlikely that they do not know that this risk exists. It seems that they simply have much more pressing issues to focus on.

The South African justice system similarly continues to fail all of South Africa. Regrettably, it does not have individuals capable of instituting prosecutions for the crime of money laundering, let alone track the reporting of CTR's and STR's by attorneys. It is this very reason why all will continue on this path of self-destruction until it is too late.

As things stand, legal professionals in Canada and the US are able to practice their profession with the freedom of knowing that the principles of attorney-client confidentiality and legal professional privilege are protected. The same cannot be said for South African attorneys. These fundamental principles remain under threat and unprotected.

4.8 Conclusion

After examining the jurisprudence of Canada and the US, it is obvious that their legal professionals are in a more favourable position than that of their South African contemporaries. In hindsight, South African attorneys are probably in a more precarious position than first thought. The professional has a fundamental duty of loyalty to the client. Requiring a legal professional to go behind his client's back would materially demoralise the traditional attorney-client relationship.[89] However, the onus is on the Law Societies to fix this hazardous situation before it all explodes. Yet little evidence currently exists to indicate that this will be fixed or that it is even regarded as an issue.

89 Kazmerski (2011) 78 – 117.

Chapter 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The aim of this study was to examine the effects of FICA, specifically cash threshold reporting and suspicious transaction reporting in the legal profession. More specifically, the aim was to compare these mandatory duties to the question of, legal professional privilege, attorney-client confidentiality and the independence of the legal profession. As emphasised throughout this study, the relationship between the attorney and client is of a special nature. It is not one where the legal profession can afford to have a *laissez-faire* attitude. However, attorneys in South Africa find themselves between a rock and a hard place, where they are left to choose between obeying the law and avoiding prosecution and as a result breaking the clients trust, or vice versa. Surely it would be naive to conclude that attorneys are not used in the greater scheme of things when it comes to the crime of laundering money. However, it is as important to realise that the legal profession cannot be over-regulated nor under-regulated. It is striking this balance that presents a conundrum.

Therefore, the issue identified in this thesis was whether the reporting obligations had an effect on legal professional privilege, attorney-client confidentiality and the attorney-client relationship. In order to adequately answer these questions this study focused on International Law, South African, United States and Canadian jurisprudence.

5.2 International Law and the FATF Recommendations

International law played a crucial part in the development of anti-money laundering legislation. It recognised the potential impact that the crime could have on the global economy as far back as 1988 with the Vienna Convention. Impressively the soft law did not end there. The fight continued with the implementation of various other international instruments, enacted to aid domestic legislatures in the process of implementing domestic legislation. The most prolific event however, was the establishment of the FATF. The FATF as an inter-governmental body has been at the forefront of establishing policies that combat money laundering, terrorist financing and other threats to the international financial system.[1] The development of the 40+9 Recommendations has been recognised universally as the principle framework to anti-money laundering efforts.[2] The FATF similarly, played a crucial role in establishing the RBA and later the RBA Guidance for Legal Professionals. This guidance recognised the importance of having policy in place that assists the implementation of anti-money laundering laws within the legal profession. More importantly, it acknowledged the importance of the attorney-client relationship, attorney-client confidentiality and legal professional privilege, by drafting a policy which indicates that a RBA should not be designed in a way that impedes on the attorneys ability to practice and that the filing of STR's should be examined at the domestic forefront and implemented in accordance with what works domestically.

1 See chapter 2 at 27.
2 See chapter 2 at 28.

5.3 Salient features which may be instructive for South Africa

Throughout this study, the importance of the attorney-client relationship and legal professional privilege has been emphasised. As well as the negative effects that the filing of CTR's and STR's would have on these principles. Chapter 4 provides an in-depth discussion on the positions of Canada and the US in relation to the filing of STR's by members of their legal profession. Although, attorneys in these jurisdictions are not completely free from any responsibility in relation to efforts combatting money laundering, they are protected from the filing of STR's against any client.

In the US the ABA played a crucial, proactive role in successfully challenging the expectation that an attorney should file an STR's and abide by the NTO rule. Trust represents the foundation upon which the relationship between an attorney and client is built. The ABA directly collaborated with the FATF in drafting the RBA Lawyer Guidance and drafting its own Voluntary Guidelines and adopting resolutions. However, leaving attorneys to face the double edge sword was never an option. This demonstrates a concerted commitment to the attainment of justice.

The legislation enacted in Canada is almost analogous to FICA in South Africa. The only difference is that Canadian Law Societies in the form of the FLSC, immediately challenged the obligation placed on attorneys to file CTR's and STR's. They recognised and argued that the legislation makes them "secret agents of the state"[3] which threatened Constitutional principles and an attorneys undivided loyalty. Needless to say, the challenge was successful and Canadian attorneys are not required to file STR's. The same, however, cannot be said of South Africa. FIC serves no purpose. Attorneys do not file CTR's and STR's. In fact, FICA was

3 See chapter 4 at 63.

enacted in the year 2001, at the time of this study in 2019 nothing has changed. Section 233 of the South African Constitution provides:

> When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.[4]

Yet, exactly when FICA was assented to in 2001, bringing into effect sections 28 and 29, Canada had the biggest breakthrough with the Supreme Court passing judgment that the filing of STR's by attorneys will completely undermine the legal profession. The South African legislature on the other hand has also not contributed to finding a solution. Which, should an attorney in South Africa be prosecuted, will come back to haunt them. The current legislation is simply too inconsistent with international law and where the modern world is heading.

5.4 Recommendations

It is evident from the above that if proper mechanisms and measures are not enforced to remedy the flaws within FICA, the legal profession and society will suffer tremendously.

It is therefore recommended that FICA be completely re-examined by the legislature preferably individuals who has knowledge on the crime of money laundering. Specifically looking at sections 28 and 29 and the applicability thereof on the legal profession. Taking into consideration the arguments and decisions put forth by Canadian and US counterparts. It is also recommended that the legislature completely removes section 37. This provides limited protection of legal professional

4 The Constitution of the Republic of South Africa – Section 233.

privilege, and as was indicated in this study this is a principle in the legal profession that cannot be afforded limited protection.

I also recommended that the Law Societies in South Africa play a more pro-active role in challenging legislation that adversely affects the profession. They should be enacting rules like the Canadian Model Rules or the US Voluntary Guidance. In the event that the Law Society fails to be more pro-active, attorneys should start instituting procedures where these societies are brought to task.

5.5 Conclusion

The purpose of this study was to indicate the fine line that attorneys in South Africa are threading as a result of sections 28 and 29. This outcome was ultimately achieved. It is therefore concluded that, on the face of it, FICA complies with international soft law guidance. However, upon closer examination the cracks begin to appear. The obligation placed on attorneys by sections 28 and 29 are problematic and need to be resolved. Only once this has been achieved will the flaws be somewhat rectified.

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