Regulating Lawyers: Same Theme, New Context

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Introduction

Money laundering and terrorism cannot be tolerated in society. Such conduct requires exposure, prosecution, and punishment. The United States has passed extraordinary criminal statutes to accomplish this mission. But the road to eradication of this criminal conduct needs to focus on the actual perpetrator and not sweep his or her attorney into the purview of the criminality. Gatekeepers bear responsibility to the profession, but they also need independence in serving their client within the judicial system. As Financial Action Task Force (FATF) recommendations move from policy into practicality, it is important to consider the appropriate balance needed to maintain a strong adversarial system of justice. It is equally important to restrain legislatures in creating new statutes that will not serve significant advantages beyond existing criminal statutes.

Existing Legislation

There are more than 4,000 federal crimes existing today.[1] The American Bar Association (ABA) created the Task Force on the Federalization of Criminal Law, which issued a report in 1998 confirming this growth of federal criminal law.[2] The task force found that the "present body of federal criminal law" is "so large" "that there is no conveniently accessible, complete list of federal crimes."[3] Criminal statutes are not limited to Title 18, the U.S. Code. Rather, one finds criminal laws scattered throughout the federal statutes. In addition, the ABA Task Force on the Federalization of Criminal Law noted "that of all crimes enacted since 1865, over forty percent have been created since 1970."[4] New legislation related to financial reporting and money laundering clearly fit within this profile.

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1. *See* John S. Baker, Jr. *Measuring the Explosive Growth of Federal Crime Legislation*, Federalist Society for Law and Public Policy Studies White Paper, October 2004, *available at* http://www.fed-soc.org/publications/pubID.940/pub_detail.asp.

2. Edwin Meese III & William W. Taylor III, *Preface to the ABA Task Force on the Federalization of Criminal Law*, The Federalization of Criminal Law 2 (1998).

3. *Id*. at 9.

4. *Id*. at 2.

The Bank Secrecy Act[5] serves as the first major initiative to have financial institutions report cash transactions to the government. Passed in 1970, the Act was "designed to obtain financial information having 'a high degree of usefulness in criminal tax, or regulatory investigations or proceedings.' "[6] Title I of the Act, codified in Title 12 of the U.S. Code, provides for financial institution recordkeeping.[7] Title II, codified in Title 31 of the U.S. Code focuses on reporting requirements. As of 2001, the opening statute of the reporting requirements section includes an intent to cover "conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism."[8] This addition comes as part of Title III of the Patriot Act, the International Money Laundering Abatement and Anti-Terrorist Act of 2001.[9]

A second initiative that correlates to fighting money laundering can be seen in the passage of 26 U.S.C. § 6050I, a tax statute that criminalizes conduct omitted from the Bank Secrecy Act. In contrast to the Bank Secrecy Act that focuses on financial institutions, this tax statute requires information reporting by individuals who receive in excess of ten thousand dollars in cash in the course of their trades or businesses.[10] Lawyers are considered within the definition of a "trade or business" and prosecutions under this statute have included attorneys.[11]

A third initiative can be seen in specific money laundering statutes. Title 18 of the U.S. Code provides in Sections 1956 and 1957 money laundering statutes that emanate from the Anti-Drug Abuse Act of 1986. Although initially focused on illegal drug activity,[12] these statutes are now seen in white collar crime prosecutions.[13]

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5. Pub. L. No. 91-508, 84 Stat. 1114 (1970), codified as amended at 31 U.S.C. § 5311 et. seq.

6. California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974).

7. *See generally* ELLEN S. PODGOR & JEROLD H. ISRAEL, WHITE COLLAR CRIME IN A NUTSHELL 190-98 (2009) (providing a cursory overview of the different provisions of the Bank Secrecy Act).

8. 31 U.S.C. § 5311 (2001). This specific language was added by Pub. L. No. 107-56, § 358(a). Immediately following the statutory text, one finds a statement called "Stored Value" that references the FATF.

9. Pub. L. No. 107-56, 115 Stat. 272 (2001).

10. *See generally* Ellen S. Podgor, *Form 8300: The Demise of Law as a Profession*, 5 GEO. J. LEGAL ETHICS 485 (1992) (discussing the legislative history of section 6050I and the implications to attorneys as a result of the information required by the statute being supplied with Form 8300).

11. *See, e.g.*, Mathew Mendez, *Raleigh Defense Lawyer Found Guilty*, ABC Eyewitness News, October 10, 2009, http://abclocal.go.com/wtvd/story?section=news/local&id=7056927 (describing convictions for defense attorney for structuring money transactions to avoid IRS reporting requirements).

12. *See* Trujillo v. Banco Cent. Del Ecuadar, 35 F. Supp. 2d 908, 913 (S.D. Fl. 1998) (noting that the money laundering statutes were initially enacted "to prevent organized crime from concealing the proceeds of drug trafficking by converting 'cash into manageable form.' ").

13. *See, e.g.*, United States v. Powers, 168 F.3d 741 (5th Cir. 1999) (including money laundering charges in white collar case); United States v. Piervinanzi, 23 F.3d 670 (2d Cir. 1994) (including

The breadth of the money laundering statutes was emphasized by Justice Scalia in a recent Supreme Court opinion when he stated that "[t]here are more than 250 predicate offenses for the money-laundering statute."[14] Expansion of the money laundering statutes can be seen in the Patriot Act, which included new predicate offenses, asset forfeiture for proceeds of certain foreign crimes, and new currency transaction reporting requirements.[15] Even the Fraud Enforcement Recovery Act of 2009 contained money laundering provisions, albeit legislation that responded to a Supreme Court decision that had restricted the money laundering statute.[16] Section 1957 of Title 18 recognizes the unique role of attorneys and explicitly provides that the term "monetary transaction" "does not include any transaction necessary to preserve a person's right to representation as guaranteed by the Sixth Amendment to the Constitution."[17]

In addition to these three money laundering/financial reporting crimes, there are terrorism crimes that offer prosecutors the ability to proceed against individuals both domestically and internationally.[18] One statute that was recently used relates back to the civil war.[19] Other terrorism related statutes available for prosecutors include crimes related to aircraft hijacking,[20] hostage taking,[21] and financing of terrorism.[22] In addition, generic statutes like the Racketeer Influenced and Corrupt Organization Act (RICO) include as predicate acts, violations of money laundering and terrorism statutes.[23] Prosecutors also use charges like conspiracy, false state-

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money laundering charges as part of a bank fraud prosecution); *see also* Teresa E. Adams, Note, *Tacking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing*, 17 Ga. St. U. L. Rev. 531 (2000) (discussing the use of money laundering in white collar criminal cases).

14. United States v. Santos, 128 S.Ct. 2020, 2027 (2008) (citing Dept. of Justice, Bureau of Justice Statistics, M. Motivans, Money Laundering Offenders 1994-2001, at 2 (2003), http://www.ojp.usdoj.gov/bjs/pub/pdf/mlo01.pdf).

15. Edward M. Wise, Ellen S. Podgor, & Roger S. Clark, International Criminal Law: Cases and Materials 3d 218 (2009).

16. Pub. L. No. 111-21 (2009). The statute appears to provide language for prosecutors to proceed with certain cases following the Supreme Court's decision in *United States v. Santos*, 128 S.Ct. 2020, 2027 (2008), where a plurality found that the rule of lenity applied in defining the term "proceeds" in the statute.

17. 18 U.S.C. § 1957(f)(1)(2009).

18. *See*, *e.g.*, 18 U.S. § 2332 (1996) (Terrorism: Criminal Penalties); 18 U.S. § 2332a (2004) (Use of Weapons of Mass Destruction); 18 U.S.C. § 2332b (2008) (Acts of Terrorism Transcending National Boundaries).

19. *See* 18 U.S.C. § 2384 (Seditious Conspiracy); *see also* United States v. Rahman, 189 F.3d 88 (2d Cir. 1999)(charging seditious conspiracy under § 2384).

20. 49 U.S.C. app. § 1472(n) (1994); United States v. Rezaq, 134 F.3d 1121 (1998) (appealing a conviction on one count of aircraft piracy).

21. 18 U.S.C. § 1203 (1996) (Hostage Taking).

22. 18 U.S.C. § 2339C (2006) (Prohibitions Against the Financing of Terrorism)

23. 18 U.S.C. § 1961 (2006).

ments, or obstruction of justice when terrorism or money laundering activities are involved.

It is clear that the United States has not been shy in providing legislation against terrorism and money laundering. Equally prominent is that many of these statutes are new and that throughout recent years there has been a growth in terrorism and money laundering related legislation. The growth of these statutes have provided increased prosecutorial discretion in charging criminal conduct, often resulting in multiple different statutes being used in an individual prosecution. One need only look at the recent prosecution of attorney Lynne Stewart to recognize that prosecutors use an array of statutes in proceeding against alleged criminal conduct.[24]

Regulating Lawyers

A growth in regulating lawyers by statute and court regulation is also apparent. Clearly lawyers have been subject to state or court regulation that may proceed against the lawyer's license for violations of codes and standards of conduct. While the initial ethics standards were passed via lectures to bar members and students,[25] today we find the Rules of Professional Conduct as the main rules governing lawyers' professional conduct. Although these ethics rules have on occasion been used in the criminal trials of attorneys or judges,[26] they are not criminal provisions that provide for criminal penalties. Ethics rules routinely provide that "it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."[27] Even federal prosecutors are mandated to abide by ethics rules via recent legislation.[28] But again, a criminal violation does not normally accrue from mere non-compliance of an ethics provision.

What has become apparent is that the growth of criminal statutes, the breadth of these statutes, and prosecutorial targeting of lawyers has resulted in increased prosecutions of attorneys.[29] In some cases the lawyers were indicted in their role as a gatekeeper who exceeded the lawyering role to participate in the client's conduct.

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24. Lynn Stewart was charged with Conspiracy to Defraud the United States (18 U.S.C. § 371); Conspiracy to Provide and Conceal Material Support to Terrorist Activity (18 U.S.C. §§ 371 and 2339A); Providing and Concealing Material Support to Terrorist Activity (18 U.S.C. §§ 2339A and 2); and two counts of Making False Statements (18 U.S.C. § 1001). *See* Indictment, United States v. Sattar, Si 02 Cr. 395, *available at* http://lynnestewart.org/IndictmentSuperceding.pdf.

25. *See generally* Ellen S. Podgor, *Criminal Misconduct: Ethical Rule Usage Leads to Regulation of the Legal Profession*, 61 TEMPLE L REV. 1323 (1988) (discussing the historical development of ethics rules).

26. *Id*. at 1336-46.

27. MODEL RULES OF PROF'L CONDUCT R. 8.4(b).

28. *See* 28 U.S.C. § 530B (McDade Act). This author strongly supports this legislation.

29. *See generally* Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669 (2005) (discussing the effect of overcriminalization on the targeting of legal advice).

But it is also clear that there is increased regulation of lawyers that is affecting the lawyer's role in representation of clients. Statutes related to money laundering and terrorism are particularly noteworthy in this regard.

Form 8300, an outgrowth of 26 U.S.C. § 6050I, requires the individual filling out the form to include pertinent information regarding the individual who paid in excess of ten thousand dollars in cash.[30] As lawyers are a "trade or business" they are mandated to comply with this statute and the requirements of Form 8300. The form includes a box for the filer to designate whether the transaction is a "suspicious transaction." Attorneys can be placed in the problematic position of complying with this law, yet also advocating for the client. Although courts have not directly confronted a lawyer's noncompliance with checking this box, there have been decisions that provide that attorneys are not exempt from the general information requirements of this statute.[31]

There also has been increased targeted monitoring in prison facilities, including monitoring of attorney-client conversations, when a "reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism."[32] Despite strong opposition to attorney-client monitoring in prisons,[33] the regulations were codified with protections provided by a government sponsored privilege team.[34]

A final example can be seen in the recent prosecution of Attorney Ben Kuehne, a well-respected attorney[35] who was indicted after providing opinion letters on the source of funds that were being used to pay attorney fees in a drug related case.[36] If the funds were tainted, then the attorneys could be forced to forfeit

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30. The statute provides a broad definition of what constitutes cash. *See* 26 U.S.C. § 6050I (d) (1996).

31. *See, e.g.*, United States v. Goldberger & Dubin, P.C., 935 F.2d 501 (2d Cir. 1991) (holding that there was no constitutional violation in requiring attorneys to provide client this information); United States v. Sindel, 53 F.3d 874 (8th Cir. 1995) (holding that one client's payment information could not be released while another client's information could be provided to the government). In *Sindel*, the court noted that the suspicious transaction box had not been checked and that this issue was not "ripe for adjudication." *Id*. at 877.

32. 28 C.F.R. § 501.3 (Prevention of acts of violence and terrorism).

33. *See* Comments of the National Association of Criminal Defense Lawyers on the Attorney General's Order Regarding Monitoring of Confidential Attorney-Client Communications [66 Fed. Reg. 55062 (Oct. 31, 2001)], *available at* http://www.criminaljustice.org/public.nsf/PrinterFriendly/Leg-atclientdoc?openDocument.

34. 28 C.F.R. § 501.3(d)(3).

35. *See* Jeralyn, TalkLeft Blog, *Justice Department Indicts Respected Miami Lawyer*, Feb. 8, 2008, *available at* http://www.talkleft.com/story/2008/2/8/0492/94117 (discussing Kuehne's reputation in the legal community).

36. Indictment, United States v. Gloria Florez Velez, Benedict P. Kuehne and Oscar Saldarriaga Ochoa, U.S. S.D. Fl., Case No. 0520770-Cr-Cook(s), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/us_v_kuehne_indictment_oct_2007.pdf; *see also* Ellen S. Podgor, White Collar Crime Prof Blog, *Indicted for Writing Opinion Letters*, Feb. 9, 2008, *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/2008/02/indicted-for-wr.html.

this money. The government claimed that "Kuehne advised Ochoa's legal defense team that the funds Ochoa used to pay his attorneys fees and expenses were free from any taint of illegal activity" and that the funds "were not commingled with proceeds of drug trafficking." Finding this untrue, the government charged Kuehne with money laundering and obstruction of justice offenses. The Eleventh Circuit Court of Appeals noted that the clear language of the money laundering statute 18 U.S.C. § 1957(f)(1) provided an exemption for "attorneys' fees paid for representation guaranteed by the Sixth Amendment in a criminal proceeding."[37] The district court dismissed this count of the indictment and this dismissal was upheld when the government appealed to the Eleventh Circuit.[38] Following the ruling of the Eleventh Circuit, the government dismissed the case against attorney Kuehne.[39]

Conclusion

Few criminal defense attorneys are directly involved in policy initiatives. It is not surprising to therefore surmise that few are aware of the FATF Recommendations. Divorced from the policy considerations, these attorneys are engaged in the representation of real people who have been accused of committing criminal conduct. Yet, the effect of some of these policy decisions may eventually cause concern if the role of the attorney as a client advocate becomes compromised.

It is noteworthy here that there are already many U.S. federal statutes to curtail terrorism and money laundering. Equally apparent is that lawyers are becoming subject to increased regulation. As the FATF continues its activities, it is hoped that any direction of new statutes and increased regulation of lawyers be reconsidered. To achieve compliance with existing law, betters efforts should be made to educate lawyers on how best to avoid being used by a client to further his or her criminal activity. Educating advocates can be accomplished without needing to compromise important attorney-client safeguards that are crucial to our legal system.

37. United States v. Velez, 586 F.3d 875, 877 (11th Cir. 2009).

38. *See id*.

39. *See* Government's Motion to Dismiss Third Superseding Indictment With Prejudice, United States v. Kuehne, U.S. S.D. Fl., Case No. 0520770-Cr-Cook(s), *available at* http://lawprofessors.typepad.com/files/kuehne-dismissal-order.pdf.