

**INTER-AMERICAN BAR ASSOCIATION
WORKING GROUP ON COMBATTING CORRUPTION AND MONEY LAUNDERING
COMMENTS ON GATEKEEPER PROVISIONS OF THE
FATF CONSULTATION PAPER
April 30, 2003**

The Inter-American Bar Association (IABA), through its Working Group on Combatting Corruption and Money Laundering, appreciates this opportunity to comment on the FATF consultation paper discussed at the April 3 meeting in Brussels in which we were represented by Mr. Jan van Haaren.

The IABA represents all of the national bar associations of Latin America, as well as other associations and individual members. All of its members are lawyers or legal associations. Their collective numbers are approximately 340,000. Through its Working Group on Combatting Corruption and Money Laundering, and other committees, the IABA has been involved in educating its members about anti-corruption and anti-money laundering norms and compliance at the international and national levels for several years. Last year, for example, at the IABA Annual Meeting in Cochabamba, Bolivia, more than 1,000 persons attended a program on Anti-Money Laundering co-sponsored by the Inter-American Development Bank and the Organization of American States (CICAD) where the role of lawyers in combating money laundering was discussed by international experts.

The IABA shares the views presented by other bar associations that suspicious activity reporting requirements should not be applied to lawyers who are providing legal services on behalf of clients. Such requirements, we believe, would compromise fundamental aspects of the lawyer-client relationship. In expressing this conclusion we are in complete accord with the views expressed to you by other bar organizations, including the American Bar Association, and the Council of Bars and Law Societies of the European Union, and we endorse their comments. We would like to add to those comments, however, the perspective of a bar association that represents a number of countries at a different stage of development than many of those represented by the organizations that you have heard from to date.

In many countries in Latin America, there are ongoing efforts to strengthen the rule of law. The World Bank, other international institutions, and many national governments spend large sums of money promoting the development of the rule of law and the administration of justice in the region, among other parts of the world.

Promotion of a strong and independent legal profession is an essential component of the rule of law. But it is not enough to have a strong and independent legal profession in training and theory -- lawyers must also be engaged to provide services. Clients of lawyers must believe that they will benefit from consultations with legal counsel or they will not engage counsel. To encourage such consultations, obligations of confidentiality or professional secrecy of lawyers have been recognized, and this is true in the Americas as well as other parts of the world from which you have heard in this process.

As others have pointed out, requiring the lawyer who has been engaged by a client to report suspicions about that client to authorities creates a direct conflict with the lawyer's fundamental obligations as a lawyer and undermines the basis of the confidential relationship. We agree with other commentators' observations that, particularly if a reporting obligation were to be triggered by objective (i.e., "should have known") circumstances rather than subjective ones (knowledge or belief), not only will the client be discouraged from seeking legal counsel but the lawyer will be deterred from representations that may not, in fact, pose legal risks.

We strongly support limitation of the suspicious activity reporting obligation to the circumstances specified in the second alternative to Recommendations 13 and 14, that is, when the lawyer has undertaken to act as a financial intermediary in a transaction, and not when he or she is rendering legal services in connection with a business or financial transaction. Any FATF principles developed in this regard should clearly recognize that where an obligation of professional secrecy or confidentiality exists, no reporting duty arises.

Regarding due diligence obligations of lawyers in accepting client engagements, we believe that any such obligations should be tailored to the circumstances of the legal profession, and should take into account the fact that most lawyers do not practice as part of large institutions nor do they necessarily have the technical capacity to perform electronic and other database searches that are typically performed by financial institutions. Any such obligations must also take into account the fact that many legal engagements occur by way of referral from other lawyers or other professionals and that referral practices are legitimate and indeed desirable means of conducting the practice of law.

We believe it is premature for FATF to determine what due diligence should apply to lawyers and would encourage additional consultations between FATF and representatives of the legal profession on these issues before any obligations are actually imposed on the profession. While we appreciate the additional time FATF has given us to submit these comments, in general, we believe additional time and consultations are necessary in order to develop well-grounded rules in this area. This includes assuring not only the appropriate obligations are imposed, but also that the problems have been adequately identified in the proper context. Furthermore, we believe substantial time and resources should be devoted to the education of our member (individuals and institutions) about these issues. At the end of the day, the most effective approach to preventing misuse of the attorney-client relationship by money laundering will be to heighten awareness among members of the legal profession of money laundering risks and typologies. Such awareness, we believe, will lead to voluntary measures that will be far more effective and appropriate than mandatory requirements. Thus, we view education as the critical next step and urge FATF to partner with ourselves, and other bar associations in the process.

We would be pleased to answer any questions FATF may have about these comments and look forward to continued participation in this process.

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