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Presents

Lawyers as Gatekeepers: Attorney AML Responsibilities

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Presenter: Vivian Rivera Drohan

Presenter

Vivian Rivera-Drohan is a founding partner of Drohan Lee LLP and heads the firm's Litigation group. Her practice centers on representation of financial services clients.

- Contract Litigation
- Regulatory Enforcement
- Financial and Investment Fraud
- Alternative Dispute Resolution
- Intellectual Property
- Trade Secret and Infringement Actions

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LAWYERS AS GATEKEEPERS

INTRODUCTION

Numerous articles have put forth that if money laundering and terrorist financing represent serious threats to society, and a lawyer has a "vital role in the preservation of society," it is not surprising that lawyers may have a unique role relative to the threat. That role is defined by (i) laws and regulations that may be generally applicable to all persons, (ii) laws and regulations that may be directly and uniquely applicable to defined groups that include lawyers and/or their clients, or (iii) professional rules specifically applicable to lawyers. As the world gets more sophisticated and global in nature, so must the lawyer look carefully at their clients and protect themselves from unsuspectingly becoming the means to launder money.

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INTRODUCTION –WHAT IS MONEY LAUNDERING

Essentially the criminal practice of filtering ill-gotten gains or “dirty money” through a series of transactions in which the money is “cleaned” so they appear to be proceeds from legal activities.

Criminal Money Laundering occurs when:

- Conducts a transaction with knowledge that the funds were the proceeds of criminal activity (federal, state, local, or foreign);
- The proceeds were derived from the unlawful activity specified in the statute (e.g., drug trafficking, violent crimes, terrorism, fraud, bribery, theft, smuggling, human trafficking, etc.); and
- The transaction is designed in whole or part to conceal or disguise the nature, location, source, ownership, destination or control of the criminal proceeds or to avoid a transaction reporting requiring under state or federal law.

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INTRODUCTION –AML AND ATTORNEYS

One of the most significant developments in financial crime prevention over the past three decades has been the application of anti-money laundering (AML) requirements to legal professionals. This evolution has fundamentally altered the traditional relationship between lawyers and their clients in many jurisdictions, creating new obligations that must be balanced against longstanding principles of attorney-client privilege and professional secrecy.

Where AML requirements apply to lawyers, they typically cover specific types of activities rather than all legal services. Common triggers include participation in financial transactions, real estate transactions, corporate formation and management, trust and estate planning, and the handling of client funds or assets.

The requirements generally do not extend to traditional legal advice, litigation representation, or other core legal services where attorney-client privilege concerns are most acute. This targeted approach attempts to balance financial crime prevention objectives with the need to preserve essential attorney-client relationships.

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KEY LAWS AND REGULATIONS

BANK SECRECY ACT OF 1970 (BSA)

- 31 U.S.C. 5311 – Provides for recordkeeping and requirements for financial institutions;
- 31 U.S.C. 5322-establishes penalties for violations of the Bank Secrecy Act, including fines equal to the profit gained from the violation and repayment of bonuses for certain individuals;
- 31 U.S.C. 5318-Outlines requirements for anti-money laundering compliance, including the 120-hour rule for financial institutions to provide information upon request and the authority to subpoena foreign bank records related to correspondent accounts in the United States for investigations of criminal law violations, civil forfeiture actions, or other related matters;

SAR Safe Harbor – 31 U.S.C. 5318(g)(3) – Reporting requirement;

FINANCIAL CRIMES ENFORCEMENT AGENCY (FinCEN) - FinCEN is the designated administrator of the BSA;

MONEY LAUNDERING CONTROL ACT of 1986 – 18 U.S.C.S. §1956 Establishes Money Laundering as a Federal Crime;

MONEY LAUNDERING SUPPRESSION ACT OF 1994 – Recommend states adopt rules to prevent money laundering by money service businesses (MSB);

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KEY LAWS AND REGULATIONS

ANTI-MONEY LAUNDERING ACT OF 2020;

Although the ENABLERS ACT was not passed in 2022 its impact is still felt with respect to professional services and may at some point be reintroduced. The Act was initially introduced in October 2021 by a bipartisan group of lawmakers in response to the release of the "Pandora Papers". The act aimed to close loopholes that allowed "enablers" to launder illicit funds in the U.S. by extending anti-money laundering (AML) requirements to professional service providers, including accountants, lawyers, and third-party payment services. This extension sought to hold these professionals accountable and encourage greater transparency.

ABA VOLUNTARY GOOD PRACTICES

Management of Client Money, Securities or Other Assets – Any time lawyers "touch the money" they should satisfy themselves as to the legitimacy of the sources and ownership of the funds in some manner. Lawyers should consider using third party escrow agents to avoid responsibility generally.

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ABA VOLUNTARY GOOD PRACTICES

In August 2023, after three rounds of Discussion Drafts, four public roundtables, and over a year and a half of deliberations, the ABA amended the Model Rules to formalize an ongoing duty to inquire under **Model Rule 1.16(a)**. The amendments are aimed at avoiding lawyers unwittingly facilitating money laundering, terrorist financing, and other forms of illicit finance and activity.

- Rule 1.16 and accompanying Comments, has expanded a firm's duty to inquire whether continued representation is warranted or if a firm should withdraw from representation.

- ABA Formal Opinions 463, 491, 513 relating to client due diligence.

    - *ABA Formal Opinion 463 - Client Due Diligence, Money Laundering and Terrorist Financing.* Formal Op. 463 states "[i]t would be prudent for lawyers to undertake Client Due Diligence ("CDD") in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity."

    - *ABA Formal Opinion 491 - Obligations Under Rule 1.2(d) to Avoid Counseling or Assisting in a Crime or Fraud in Non-Litigation Setting*. Formal Op. 491 provides a deep dive into when a lawyer is obligated to inquire further into a client's conduct in order to avoid assisting or advising on criminal or fraudulent

ABA VOLUNTARY GOOD PRACTICES

activity in violation of Model Rule 1.2(d), particularly in reference to when a client may be seeking to use a lawyer's transactional services to carry out money laundering or other illegal acts.

Management of Bank, Savings or Other Accounts – Lawyers must avoid situations where they are essentially providing banking services as opposed to merely holding client money for a legitimate transaction i.e. a real estate transactions. If a lawyer is asked to make payments not just to mainstream lending institutions but to more obscure recipients whose identities are hard to verify, the lawyer should exercise caution or treat this as a high-risk situation.

Creation, Operation or Management of Legal Person or Arrangement and buying and selling business entities. Includes routine work that is done by real estate attorneys, corporate and business attorneys and trust and estate attorneys.

Keep in **Mind High Risk Geographies**. Some countries and/or regions represent a higher risk that the accounts or transactions may be related to illegal activity i.e. Cypress, Malta, Venezuela, Iran, Myanmar. This is partly due to the fact that there is no corporate or low corporate recordkeeping requirements. (many digital asset companies are located currently in Cypress and/or Malta).

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CUSTOMER DUE DILIGENCE

Know Your Customer and Managing Customer Potential Risk

Documenting client information consistently can prevent unsuspecting use of a firm as a means to a criminal end. If something does go wrong proper onboarding and due diligence will protect the firm.

Client Intake and Recordkeeping:

Individuals:

- Collect appropriate government IDs (drivers license and/or passport);
- Ensure you have Name, Date of Birth, Physical Address;
- Run clients who are unknown through google to determine bad publicity (we have defended individuals and funds that were sued for fraud because the drafter of the offering memorandum failed to put negative news of principals and offers into their documents.)

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CUSTOMER DUE DILIGENCE

Entity Clients:

Oftentimes entities are more problematic than individuals.

- Articles of Organization/Incorporation;
- Collect appropriate government IDs (drivers license and/or passport) of beneficial owners;
- Ensure you have Name, Date of Birth, Physical Address;
- Ownership v. Control – Top four (President, Vice President, Treasurer, Secretary);
- Publicly traded companies are usually a lower risk.

Masking Beneficial Ownership – Most common in offshore corporate vehicles. (Often independent directors are listed in control).

Industries that can be used to funnel illicit funds include transactions in Trade Finance, Real Estate Transactions; Machinery or Automobile Exporting Sales Cash Intensive Business – restaurants, bars, car washes, parking lots, nail salons, residential housing and lodging, pawnshops.

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Protecting Your Trust Accounts

- Law Firms, especially solo and small firms need to be knowledgeable on how clients may take advantage of law firms to further criminal activity;
    - Real Estate;
    - Estate;
    - Corporate Law
    - Firms need to conduct appropriate due diligence on their clients.
- By simply receiving and distributing funds from / to your trust accounts a client can implicate your account and firm in the money laundering process.

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CASES IN THE NEWS

- Lawyer convicted in money laundering conspiracy case (December 29, 2021), https://apnews.com/article/lee-boyd-malvo-maryland-baltimore-conspiracy-crime-245345843fd14884066b1c1d35b30c93;
- Prominent Dallas Lawyer gets 5 years in federal prison for money laundering (Rayshun Jackson, Jackson Law Firm) https://www.dea.gov/press-releases/2021/04/16/dallas-attorney-charged-narcotics-money-laundering-scheme;
- Lawyer gets prison for laundering drug money, October 7, 2022, https://apnews.com/article/mexico-california-san-diego-drug-cartels-54d574cc33fdb921d808e4cf789f94f2;
- Koreatown lawyer charged with money laundering, tax evasion and obstructing probe of 2.1-million-dollar payment from Swiss oil company IRS investigation, Jan. 11, 2024, https://www.irs.gov/compliance/criminal-investigation/koreatown-lawyer-charged-with-money-laundering-tax-evasion-and-obstructing-probe-of-2-point-1-million-dollar-payment-from-swiss-oil-company;
- Former Big Law Lawyer Sentenced to 10 Years in Prison for Allegedly Laundering $400 Million in Crypto Client Funds –February 12, 2024, https://www.moneylaunderingnews.com/2024/02/former-big-law-lawyer-sentenced-to-10-years-in-prison-for-allegedly-laundering-400-million-in-crypto-client-funds/

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CASES IN THE NEWS

- In United States v. Flores, 454 F.3d 149. the court found that the defendant, an attorney, was willfully blind to the unlawful source of funds involved in money laundering transactions. The defendant failed to ask follow-up questions when faced with evidence of false social security numbers and suspect financial transactions, and the government proved that he knew or was willfully blind to the fact that the funds originated from unlawful activity. The court clarified that the government did not need to prove that the defendant knew the funds specifically came from drug trafficking, only that they were proceeds of some form of unlawful activity.

- In State v. Harris, 373 N.J. Super. 253. an attorney was convicted of money laundering for facilitating illegal real estate transactions. She failed to record title documents, concealed pre-existing mortgages, and used her attorney trust account to manage illicit funds. The court affirmed her conviction, noting that her actions promoted and facilitated the illegal real estate business, which constituted money laundering under N.J. Stat. Ann. § 2C:21-25 . The attorney was disbarred in New York in addition to New Jersey.

- In Matter of Grossman, 36 AD3d 170, the attorney admitted in the plea allocution that he agreed with another person to accept a check in the amount of $ 125,000, knowing that it constituted the proceeds of unlawful activity, and that, prior to transferring the funds to a third party, to deposit the check into his attorney trust account in order to conceal the origin of the funds and to avoid a transaction reporting requirement imposed by