ANTI-MONEY LAUNDERING INITIATIVES: RAMIFICATIONS ON THE LEGAL PROFESSION

By:

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INTRODUCTION

The rise of money laundering from a domestic issue to one of global concern, highlighted by the appalling success of the 9/11 attacks in the United States, has given impetus to a series of initiatives among numerous nations designed to curtail, if not eliminate, money laundering activities worldwide. This paper focuses on anti-money laundering proposals around the world, particularly in the ASEAN region, and the challenges that they impose upon the legal profession both internationally and within the Philippine context.

BACKGROUND

Individuals or groups engaged in criminal activity, be it illegal arms sales, prostitution, smuggling, drug trafficking, or even terrorism, generate enormous

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amounts of cash, either as a means to an end or as an end in itself. Money laundering is the process by which the illegal origin of such funds is disguised not only for the protection of the illegal source but also for the proper enjoyment of the proceeds thereof by the criminals without attracting the attention of authorities. [2]

There are three independent stages in money laundering: (1) "Placement," which refers to the actual physical disposal of bulk cash proceeds obtained from illegal activity; (2) "Layering," which refers to the separation of illicit proceeds from their source by creating multifaceted and convoluted layers of financial transactions in order to cover up the audit trail and to provide anonymity; and (3) "Integration," which refers to the act of returning the laundered proceeds back into the economy or financial system in such manner as to present them as legitimate funds.[3]

Money launderers have proven to be quite adept at moving and concealing huge sums of illicit currency across international borders through the international financial system, with the assistance, wittingly or unwittingly, of professional advisers and intermediaries. Banks and financial institutions are particularly vulnerable to money laundering activities because they provide a variety of services, instruments and facilities that may be exploited to conceal the source of ill-gotten funds.

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[2] Money Laundering FAQs, *http://www.fatf-gafi.org*.
[3] http://www.unodc.un.or.th/money_laundering/

To give some perspective on the enormity of the problem, the International Monetary Fund has estimated that the aggregate volume of money laundering in the world is between two to five percent of the world's gross domestic product. Expressed in monetary terms, these percentages amount to a staggering US$1.5 trillion.[4] As early as 1989, in response to this growing concern, the Group of Seven industrialized nations (G-7) met at the Summit held in Paris and created the Financial Action Task Force on money laundering (FATF).

The FATF, whose roster has increased to 33 member states, is an inter-governmental policymaking entity tasked with developing world-wide effective measures to combat money laundering. Aside from reviewing money laundering techniques and devising appropriate counter-measures, the FATF also monitors members' progress in implementing anti-money laundering mechanisms, encourages other countries to adopt their anti-money laundering methods, and collaborates with other international bodies involved in anti-money laundering operations.[5]

ANTI-MONEY LAUNDERING MEASURES

Pursuant to its functions, the FATF issued in 1990 40 recommendations (the "40 Recommendations") to combat money laundering. The 40 Recommendations have since been updated to reflect changes in money laundering techniques,

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[4] *Manual on Countering Money Laundering and the Financing of Terrorism*, Asian Development Bank, March 2003.

[5] www.fatf-gafi.org/pages/0,2966,en_32250379_32236846_1_1_1_1_1,00.html

with the latest amendments incorporated as of 22 October 2004.[6] These Recommendations have been endorsed by over 130 countries and are the international anti-money laundering standard. Although non-binding, the members of FATF, including Singapore as the lone representative from the ASEAN region, are enjoined, if not expected, to implement the 40 Recommendations through national law, regulations and administrative practice.

Significant among these Recommendations are the Customer Due Diligence (CDD) and record keeping requirements set forth under Recommendation No. 5 and filing of Suspicious Transaction Reports (STR) under Recommendation No. 13.

Under the Customer Due Diligence proposal, Financial Institutions are strictly prohibited from keeping anonymous accounts or accounts in obviously fictitious names. Financial Institutions are required to undertake CDD procedures, including identifying and verifying the identity of their customers when:

- establishing business relations;
- carrying out certain occasional transactions (i.e., when these are above the applicable designated threshold, or when they consist of wire transfers in circumstances covered by the Recommendations);
- there is a suspicion of money laundering or terrorist financing; or
- when the Financial Institution has doubts about the veracity or adequacy of previously obtained customer identification data.[7]

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[6] *The Forty Recommendations*, FATF-GAFI, October 22, 2004.
[7] Recommendation No. 5, *The Forty Recommendations*.

Under the above circumstances, Financial Institutions are required to carry out the following CDD measures:

(a) Identify the customer and verify that customer's identity using reliable, independent source documents, data or information ("identification data").

(b) Identify the beneficial owner of accounts, and take responsible measures to verify the identity of the beneficial owner such that the Financial Institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements this would also entail Financial Institutions taking reasonable measures to understand the ownership and control structure of the customer.

(c) Obtain information on the purposes and intended nature of the business relationship.

(d) Conduct ongoing due diligence on the business relationship and scrutinize transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds.[8]

According to FATF's Recommendations, Financial Institutions that are unable to comply with paragraphs (a) to (c) above should not open the account, commence business relations, or perform the transaction, or they should

[8] *Ibid.*

terminate the business relationship, and in any case must consider making a suspicious transaction report in relation to the customer.

On the other hand, if a Financial Institution suspects, or has reasonable ground to suspect, that certain funds are the proceeds of a criminal enterprise or activity, or are related to terrorist financing, the Institution should be required, directly by law or regulation, to promptly report its suspicions to the designated financial intelligence unit.[9]

What makes these particular Recommendations controversial is the fact that compliance therewith is extended to professional advisers, including lawyers.

The Customer Due Diligence and record keeping requirements apply to lawyers, notaries, other independent legal professionals and accountants when they prepare 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;
- organization 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.[10]

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[9] Recommendation No. 13.
[10] Recommendation No. 12(d)

With regard to suspicious transaction reporting, lawyers, notaries, and other independent legal professionals and accountants are required to submit STR reports when they engage in a financial transaction in relation to the activities enumerated above on behalf of a client.[11] The Recommendation further encourages extending the reporting requirement to other professional activities of accountants and auditors.

The foregoing Recommendation has sparked outrage among lawyers and professional legal organizations around the world, to put it mildly. But the Recommendation[12] that Financial Institutions and covered professionals are prohibited from disclosing that they have conveyed a suspicious transaction report to the duly designated financial intelligence unit exacerbates the already volatile situation.

This obligation of lawyers and other covered professionals to conduct due diligence compliance programs and to secretly submit suspicious transaction reports on clients is what is known as the "Gatekeeper Initiative."

THE GATEKEEPER INITIATIVE

As mentioned earlier, money launderers have employed the skills of professional advisers to implement the money laundering process. Professional advisers are of vital importance to the layering phase, perhaps the most critical stage of the

[11] Recommendation No. 16

[12] Recommendation No. 14(b)

process as it is at this point that the funds derived from illegal activity are concealed, filtered through otherwise legitimate transactions and businesses, and eventually made "clean" or legal for integration. With the help of professional advisers, including lawyers, accountants and auditors, increasingly sophisticated methods and techniques for money laundering have been developed. Lawyers, in particular, possess specialized expertise and provide services needed by money launderers to create complex schemes designed to reduce the risk of detection by authorities and protect the source of the illicit funds. Among these are[13]:

- Creating corporate vehicles such as managed investment schemes, trust, or other complex legal arrangements that operated to obscure the association between profits from criminal activity and the perpetrator thereof.

- Providing advice on the purchase or sale of real property, since certain property conveyances and mortgage arrangements may either mask the transfer of illegal funds, which embodies the layering phase of money laundering, or comprise the final investment of these proceeds after their having passed through the laundering process, or integration stage.

- Performing or carrying out financial transactions on behalf of clients such as, but not limited to, opening and managing bank accounts, depositing or withdrawing cash, issuing and cashing checks, buying and selling shares of stock, and sending and receiving international fund transfers.

[13] *Issues Paper 5,* Anti-Money Laundering Law Reform, Australian Attorney-General's Department.

- Managing assets in property or managed investment schemes by acting as office bearers, partners and nominee shareholders, and by providing infrastructure services such as a registered office and business address on behalf of clients.
- Providing financial and tax advice to minimize or avoid tax liabilities.
- Gaining introductions and access to financial institutions.

Furthermore, confidentiality obligations of lawyers prove to be especially appealing to those who engage in money laundering activities without drawing unwelcome attention from authorities.

Consequently, in the context of money laundering, lawyers and other professional advisers are viewed as "gatekeepers" to the domestic and international monetary system.[14] The Gatekeeper Initiative, as embodied in relevant provisions of the 40 Recommendations, defines the roles and responsibilities of lawyers in combating money laundering activities with the objective of monitoring and thwarting the entry of ill-gotten money into the financial system.

THE LEGAL PROFESSION AND THE GATEKEEPER INITIATIVE

Clearly, the obligation impressed by gatekeeper legislation on lawyers to report "suspicious transactions" of their clients is quite perilous and very much

[14] *USA PATRIOT Act and the Gatekeeper Initiative: Surprising Implications for Transactional lawyers.* Kevin L. Shepherd, Probate & Property, September/October 2002.

unacceptable to lawyers and bar associations around the globe. Chiefly, there is the question of legal ethics and professional conduct to be considered. Also, there is a belief that money laundering cannot be effectively controlled by compelling lawyers to report transactions that they deem to be "suspicious"[15] since financial transactions that may be resorted to in money laundering operations can be done without the assistance of lawyers.

The American Bar Association opposes the STR requirement on the following grounds: [16]

- It undermines the independence of the Bar as it turns the Bar into an agent of the government. Lawyers must be capable of having honest and confidential discussions with their clients in order to dispense reliable legal advice as well as to help them understand the requirements of the law and to avoid illegal conduct.

- It endangers the attorney-client relationship because the confidentiality expected of a lawyer by the client is seriously impaired by the requirement that the lawyer secretly report to designated government authority what he, subjectively, deems to be "suspicious activity" on the part of the client. This requirement flies in the face of the lawyer's duty of loyalty to the client; the trust between lawyer and client, which is essential

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[15] *Position Paper from the Japan Federation of Bar Associations to the Eleventh United Nations Congress on Crime Prevention and Criminal Justice,* Japan Federation of Bar Associations (JFBA), April 2005

[16] *Independence of the Legal Profession: Gatekeeper Initiative*, The American Bar Association, 2005 Legislative Priorities, December 1, 2004

to the proper functioning of the rule of law, would be destroyed by compliance with this gatekeeper initiative.

- It erodes the attorney-client privilege. The filing of an STR is inconsistent with the client-attorney privilege, the right against self-incrimination, as well as ethical norms regarding the maintenance of client confidences.

- It presents considerable law practice management issues. According to the ABA, "ethical obligations with regard to a client after the lawyer has filed a suspicious transaction report are problematic. Continuing to advise or assist the client would be risky, exposing the lawyer or law firm to possible criminal prosecution. But ending the relationship in the middle of a case or undertaking may lead to liability on the part of the lawyer for breach of contract or malpractice should the transaction in question collapse. Consequently, lawyers may become less accessible to clients. The cost of legal services could conceivably escalate as well.[17]

The nature of the attorney-client privilege is an evidentiary concept. Generally, where a client, whether current or potential, makes a communication to a lawyer in confidence for the purpose of ascertaining his legal position or procuring legal services, and not for the purpose of furthering an ongoing crime, then the communication is considered privileged.

On the other hand, the lawyer's duty of confidentiality to his client is a fiduciary one. The duty of confidentiality applies to all information relating to the

[17] *Independence of the Legal Profession: Gatekeeper Initiative*, American Bar Association, 2005 Legislative Priorities, December 1, 2004.

representation of a client, and must remain inviolate as it forms the basis of the trust relationship between client and lawyer. This duty is not limited to privileged information, nor is it limited to information received from the client. The scope of information encompassed by the duty of confidentiality is therefore broader than information covered by the attorney-client privilege. Not much imagination is required to realize that gatekeeper legislation obligating lawyers to conduct customer due diligence and to submit suspicious transaction reports without informing their client conflicts with these concepts of attorney-client privilege and lawyer-client confidentiality.

Another practical consideration is fairness in the manner by which gatekeeper legislation is implemented among lawyers themselves. Noteworthy is that FATF's 40 Recommendations define the term "designated non-financial businesses and professions," which term encompasses those entities covered by CDD and STR requirements, as including:

> (e) Lawyers, notaries, other independent legal professionals and accountants- *this refers to sole practitioners, partners or employed professionals within professional firms*. It is not meant to refer to "internal" professionals that are employees of other types of businesses, nor to professionals working for government agencies, who may be already be subject to measures that would combat money laundering.[18] (Emphasis supplied).

Essentially, the Recommendations put sole practitioners on equal footing with partnerships and professional firms as far as compliance with the Customer Due Diligence and Suspicious Transaction Report requirements is concerned. This condition is inequitable and prejudicial, considering that sole practitioners

[18] Glossary, *The Forty Recommendations*

normally have limited time, staff, and resources to adopt and comply with effective anti-money laundering laws or programs as compared with partnerships or professional firms.

To be fair, the Recommendations do provide that "it is for each jurisdiction to determine what matters would fall under legal professional privilege or professional secrecy,"[19] and that this would "*normally* cover information lawyers, notaries, or other independent legal professionals receive from or obtain through one of their clients: (a) in the course of ascertaining the legal position of their client, or (b) in performing their task of defending or representing that client in, or concerning judicial administrative, arbitration, or mediation proceedings."[20]

But note that the aforesaid Recommendation does not expressly bar each jurisdiction from violating the norms of professional conduct and ethics observed in its area, or from making a determination of what could be excluded from the embrace of legal professional privilege and confidentiality. The provision referred to is in fact subtly worded to afford the State concerned much latitude to turn the rules of professional conduct and ethics upside down in an effort to pass anti-money legislation with teeth.

At any rate, the fact that lawyers are coerced into informing on their clients, whatever the content of such information, coupled with the proscription against tipping off the client about such action, is damning in itself as it undermines the

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[19] Recommendation 16, *Interpretative Notes to the Forty Recommendations*,

[20] *Ibid.* (Emphasis supplied).

confidence that a client reposes in the lawyer, which trust forms the foundation of the attorney-client relationship.

ANTI-MONEY LAUNDERING LEGISLATION AND THE GATEKEEPER INITIATIVES IN THE ASEAN REGION

As much as industrialized nations provide quality infrastructure in their financial networks for money laundering purposes, developing economies in the third-world, coupled with corruption and lax security procedures, are a boon to money launderers as they afford a great deal of cover and obscurity. Most countries in the Asia-Pacific region are susceptible to money laundering operations for this reason, and three out of the 23 countries on the FATF's Non-Cooperative Countries and Territories (NCCT) List in 2000 and 2001 come from the ASEAN region.[21] As of 10 June 2005, only Myanmar, Nauru, and Nigeria remain on the NCCT list[22], mainly because many of countries previously on the list, including several in the Association of South East Asian Nations (ASEAN) region, have strengthened their anti-money laundering policies and legislation.[23] Enumerated below are particulars on anti-money laundering policies of selected ASEAN countries, their respective designated reporting authorities, and whether said countries have adopted the gatekeeper initiative in their national laws.

Indonesia[24]

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[21] *Annual and Overall Review of Non-Cooperative Countries or Territories,* FATF-GAFI, June 10, 2005.

[22] *Ibid*.

[23] *Ibid.*

[24] Information on Indonesia's anti-money laws and policies were obtained from the International Money Laundering Information Network at http://www.imolin.org.

Indonesia's first anti-money laundering law, Law No. 15, Year 2002, was considered insufficient, and an amendment thereto was issued in 2003 by way of Law No. 25 in order to meet international standards.

The central reporting authority in Indonesia is the Financial Transactions Reporting and Analysis Center (PPATK), which is an independent agency of the government.

Although not expressly covered, lawyers may be deemed a provider of "Financial Services," which is the financial field *or other services in relation to finance*, if so engaged. Providers of Financial Services may include, but are not limited to, banks, financial institutions, securities companies, mutual fund managers, custodians, trust agents, depository and settlement agencies, foreign exchange traders, pension funds, insurance companies and the post office, and thus subject to reporting requirements.

Providers of Financial Services must report suspicious financial transactions or cash financial transactions totaling 500 million rupiah or equivalent currency (approximately US$50,000), within one business day to the PPATK, save in the case of transactions specifically exempted by law. The law provides immunity from civil and criminal prosecution against informants or their officials and employees for carrying out these reporting obligations.

Regarding customer due diligence, providers of Financial Services are required to ascertain the identity of clients and customers, and are likewise required to confirm whether the client or customer act is acting on his or her own behalf or

that of another person. Should the client be acting on behalf of another then the identity of the principal must also be satisfactorily established.

The foregoing examples illustrate that, slowly but surely, the trend in anti-money laundering legislation in the ASEAN region appears to be geared toward incorporating gatekeeper initiatives. Singapore, Malaysia and Vietnam already expressly require lawyers to conduct customer due diligence and to report suspicious transactions. In Indonesia, lawyers would be obligated to do the same if they provide Financial Services for their clients.

While the objective of anti-money laundering laws is commendable, the use of gatekeeper provisions in national policy and legislation poses a serious hazard to fundamental legal institutions and traditions.

Malaysia

Malaysia enacted the Anti-Money Laundering Act 2001 (the Act) on 15 January 2002. Under said Act the central reporting authority is the Financial Intelligence Unit (FIU) of the Central Bank of Malaysia (Bank Negara Malaysia).

Lawyers in Malaysia are covered by money laundering legislation as the Act includes Solicitors and Advocates in the definition of "Reporting Institution." Beginning last 30 September 2004, a lawyer who provides relevant services is given the legal responsibility to report suspicious transactions pertaining to money laundering to the FIU. If a lawyer fails to report such suspicious transaction, he will be deemed to have committed a money laundering offense

and may be penalized with a maximum fine of RM250,000 imposed under the Act.

Lawyers are given immunity from civil and criminal liability when disclosing or supplying information pursuant to the Act, except when such disclosure is done in bad faith. Professional privilege between a lawyer and his client is superseded by the provisions of the Act for the purpose of complying with the reporting obligation, and said privilege will not acquit the lawyer for failure to report a suspicious transaction.

On the matter of due diligence, Malaysia's Bar Council is currently in the process of establishing appropriate guidelines and procedures.

Singapore[25]

Of the countries that form the ASEAN, Singapore is the only member of the FATF. The central reporting authority in Singapore is comprised of both the Singapore Commercial Affairs Department and the Singapore police.

Singapore's anti-money laundering regime is quite robust being underpinned by the key legislation known as the 'Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act ("CDSA"). The CDSA was passed on 6 July 1999. Under the CDSA, the laundering of proceeds from all drug trafficking offences and 182 serious

[25] Data on gatekeeper initiatives in Singapore, Malaysia and Vietnam were obtained from the International Bar Association Money Laundering Forum at http://www.anti-moneylaundering.org.

crimes specified in schedule 2 to the CDSA constitutes a money laundering offence.

Lawyers in Singapore are covered by anti-money laundering legislation. As long as a person, including a lawyer, has reasonable basis to suspect a money laundering offense, he must report the same to the reporting authority. A lawyer who fails to submit a report would be considered to have committed a money laundering offense because reporting is mandatory. Singapore anti-money laundering laws do, however, provide immunity to lawyers against breach of professional conduct when he or she reports clients suspected to be involved in money laundering activities.

Although Singapore law does not impose any "know-your-client" requirements, guidelines have been provided for lawyers with regard to due diligence compliance.

Thailand[26]

Thailand enacted its Anti-Money Laundering Act of 2542 on 20 August 1999. The central reporting authority is Thailand's Anti-Money Laundering Office (AMLO), an agency under the Office of the Prime Minister.

Lawyers are not expressly included in the definition of "Financial Institution" required to report suspicious transactions to the AMLO, as these are limited to the Bank of Thailand and other commercial banks created under the Commercial

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[26] Information on anti-money laundering legislation in Thailand was taken from Thailand's Anti-Money Laundering Office website at http://www.amlo.go.th.

Bank Act or specific law; finance business and credit companies; the Industrial Funds Corporation of Thailand; life insurance companies and casualty insurance companies; savings cooperative companies; and any juristic person undertaking non-bank business related to finance as provided by the Act.

Section 13 of the Act requires a financial institution to file a report of a transaction to the AMLO if such transaction:

(1) involves cash in an amount equal to or exceeding the amount set forth under the Ministerial Regulations;

(2) involves an asset equal to or exceeding the value set forth in the Ministerial Regulation; or

(3) is suspicious, whether or not it is in accordance with (1) and (2) above.

With regard to customer due diligence, the Act stipulates that financial institutions must require their customers to show proper identification prior to conducting any transaction on behalf of the customer, as provided by the Ministerial Regulations, unless that customer has previously been identified.

Vietnam

The Government of Vietnam enacted Decree No. 74/2005/ND-CP on 07 June 2005 as its anti-money laundering legislation. Under said Decree, the central reporting authority is the Hanoi People's Committee and Ministry of Justice, but reports may also be submitted to the State Bank of Vietnam or the Anti-Money Laundering Centre under the State Bank of Vietnam.

Lawyers are likewise covered by Vietnam's anti-money laundering law, as they are subject to the Decree's reporting obligations when acting on behalf of and for their client in any financial or real estate transaction. Reports are required to be submitted within 24 hours in special cases defined by the Decree, or 48 hours in normal cases, following the identification of the relevant transaction. In addition, money and/or asset-related transactions valued in excess of VND200 million, or approximately US$13,000, done by an individual or an institution within a day must be registered and reported. The same applies to cash deposits worth more than VND500 million, or approximately US$33,000.

GATEKEEPER INITIATIVES AND THEIR IMPACT ON THE LEGAL PROFESSION: THE PHILIPPINE CONTEXT

In the Philippines, the "Anti-Money Laundering Act of 2001" or "AMLA" (Republic Act No. 9160) was subsequently strengthened by way of amendment through the passage of Republic Act No. 9194 in March 2003.

The AMLA does not require lawyers to submit reports or to conduct customer due diligence. Institutions covered by the reporting and customer due diligence requirement are limited to those regulated by the Central Bank of the Philippines (the Bangko Sentral ng Pilipinas, or BSP), the Philippine Insurance Commission, and the Philippine Securities and Exchange Commission.[27] Transactions in cash or other equivalent monetary instrument involving a total amount in excess of 500,000 pesos (approximately US$9,000) within one business day and suspicious transactions must be reported to the Anti-Money Laundering Council (AMLC),

[27] Republic Act No. 9160, Section 3(a), sub-paragraphs (1), (2), and (3).

the central reporting authority in the country.[28] The AMLC is composed of the Governor of the BSP, the Commissioner of the Insurance Commission, and the Chairman of the Securities and Exchange Commission.

With reference to customer due diligence, the AMLA expressly prohibits the creation of anonymous accounts and those opened under fictitious names. Covered institutions must establish and record the true identity of its clients based on official documents, and a verification process must likewise be established.[29]

As evident from the specific terms of the AMLA, gatekeeper provisions have not yet taken root in the Philippines legal framework, unlike in some of its ASEAN neighbors. Moreover, it is unlikely that gatekeeper initiatives will succeed in the Philippine context, for a variety of reasons.

A. Attorney-Client Privilege

First, the rule on privilege and confidentiality is firmly entrenched in the Philippine legal system, so much so that the Revised Penal Code has made it a crime for a lawyer to reveal clients' secrets acquired by him with a view to professional employment.[30] Also, the Philippine Rules of Court disqualifies a lawyer from testifying on communications between him and the client without the latter's consent, provided that an attorney-client relationship exists and the privilege is

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[28] Republic Act No. 9160, Section 3(b in relation to Section 9(c), as amended by Republic Act No. 9194.

[29] *Ibid,* Section 9(c), as amended.

[30] ARTICLE 209. Betrayal of trust by an attorney or solicitor. — Revelation of secrets. — In addition to the proper administrative action, the penalty of prisión correccional in its minimum period, or a fine ranging from 200 to 1,000 pesos, or both, shall be imposed upon any attorney-at-law or solicitor (procurador judicial) who, by any malicious breach of professional duty or of inexcusable negligence or ignorance, shall prejudice his client, or reveal any of the secrets of the latter learned by him in his professional capacity.

invoked with respect to confidential information passed on during the course of professional employment.[31] As the Supreme Court so eloquently explained in the landmark case of *Regala vs. Sandiganbayan*,:[32]

> In the creation of lawyer-client relationship, there are rules, ethical conduct and duties that breathe life into it, among those, the fiduciary duty to his client which is of every delicate, exacting and confidential character, requiring a very high degree of fidelity and good faith, that is required by reason of necessity and public interest based on the hypothesis that abstinence from seeking legal advice in a good cause is an evil which is fatal to the administration of justice. It is also the strict sense of fidelity of a lawyer to his client that distinguishes him from any other professional in society. This conception is entrenched and embodies centuries of established and stable tradition. Considerations favoring confidentiality in lawyer-client relationships are many and serve several constitutional and policy concerns. In the constitutional sphere, the privilege gives flesh to one of the most sacrosanct rights available to the accused, the right to counsel. If a client were made to choose between legal representation without effective communication and disclosure and legal representation with all his secrets revealed then he might be compelled, in some instances, to either opt to stay away from the judicial system or to lose the right to counsel. If the price of disclosure is too high, or if it amounts to self incrimination, then the flow of information would be curtailed thereby rendering the right practically nugatory.
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> An effective lawyer-client relationship is largely dependent upon the degree of confidence which exists between lawyer and client which in turn requires a situation which encourages a dynamic and fruitful exchange and flow of information. It necessarily follows that in order to attain effective representation, the lawyer must invoke the privilege not as a matter of option but as a matter of duty and professional responsibility.

In the Philippines, as elsewhere, a lawyer cannot be expected to render effective legal service unless there is full, unreserved, and confidential

[31] Rule 130, Section 24(b), Rules of Court
[32] G.R. No. 10813 and 105938, Septmeber 20, 1996

communication between him and his client. Gatekeeper initiatives would effectively destroy such privacy and privilege. Even the perception that a lawyer is obliged to secretly reveal information conveyed to him, regardless of the nature of such information, will have a chilling effect on the attorney-client relationship.

The Philippine Code of Professional Responsibility, a compilation of legal ethics that every Filipino attorney must adhere to, also mandates that a lawyer shall be bound by the rule on privileged communication in respect of matters disclosed to him by a prospective client.[33] Furthermore, a lawyer owes fidelity to the cause of his client and shall always *be mindful of the trust and confidence reposed in him*.[34] A lawyer must even preserve the confidences or secrets of his client even after the attorney-client relation is terminated.[35]

B. Crime-Fraud Exception

There are, of course, exceptions to the rule on privilege. For one, the Philippine Supreme Court has decreed that communications from a client to a lawyer that would perpetrate or facilitate a crime or fraud or other illegal purpose would not be subject to legal privilege. As held by the Supreme Court in *People vs. Sandiganbyan*:[36]

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[33] *Ibid,* Canon 15, Rule 15.02.

[34] *Ibid,* Canon 17. (Emphasis supplied).

[35] Code of Professional Responsibility, Canon 21.

[36] *People vs. Sandiganbayan*, G. R. Nos. 115439-41, July 16, 1997.

> "It is postulated that despite such complicity of Sansaet at the instance of Paredes in the criminal act for which the latter stands charged, a distinction must be made between confidential communications relating to past crimes already committed, and future crimes intended to be committed, by the client. Corollarily, it is admitted that the announced intention of a client to commit a crime is not included within the confidences which his attorney is bound to respect. Respondent court appears, however, to believe that in the instant case it is dealing with a past crime, and that respondent Sansaet is set to testify on alleged criminal acts of respondents Paredes and Honrada that have already been committed and consummated.
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> "The Court reprobates the last assumption which is flawed by a somewhat inaccurate basis. It is true that by now, insofar as the falsifications to be testified to in respondent court are concerned, those crimes were necessarily committed in the past. But for the application of the attorney-client privilege, however, the period to be considered is the date when the privileged communication was made by the client to the attorney in relation to either a crime committed in the past or with respect to a crime intended to be committed in the future. In other words, if the client seeks his lawyer's advice with respect to a crime that the former has theretofore committed, he is given the protection of a virtual confessional seal which the attorney-client privilege declares cannot be broken by the attorney without the client's consent. The same privileged confidentiality, however, does not attach with regard to a crime which a client intends to commit thereafter or in the future and for purposes of which he seeks the lawyer's advice.
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> "Statements and communications regarding the commission of a crime already committed, made by a party who committed it, to an attorney, consulted as such, are privileged communications. Contrarily, the unbroken stream of judicial dicta is to the effect that communications between attorney and client having to do with the client's *contemplated criminal acts, or in aid or furtherance thereof, are not covered by the cloak of privileges* ordinarily existing in reference to communications between attorney and client. "(Emphasis supplied.)

C. Client Identity as a Privileged Matter

Another stumbling block for the application of the gatekeeper initiative in the Philippines is a decision of the Supreme Court in *Regala vs. Sandiganbayan*, which ruled that a lawyer cannot be pressured by the courts to disclose the

name of his client under certain cases. In this case, the Supreme Court held that while the general rule is that the identity of the client is not a privileged matter, the rule is qualified by some important exceptions, namely: (1) where a strong probability exists that revealing the client's name would implicate that client in the very activity for which he sought the lawyer's advice; (2) where disclosure would open the client to civil liability; (3) where the government's lawyers have no case against an attorney's client unless, by revealing the client's name, the said name would furnish the only link that would form the chain of testimony necessary to convict an individual of a crime, the client's name is privileged; (3) the content of any client communication to a lawyer lies within the privilege if it is relevant to the subject matter of the legal problem on which the client seeks legal assistance; and (4) where the nature of the attorney-client relationship has been previously disclosed and it is the identity which is intended to be confidential, the identity of the client has been held to be privileged, since such revelation would otherwise result in disclosure of the entire transaction.

CONCLUSION

The insistence by FATF and other proponents of anti-money laundering legislation on gatekeeper initiatives, while laudable, is clearly not the solution as these initiatives create a dire host of tribulations. The fact that law enforcement has

needs does not mean that these needs should be met by legislation at the expense of hallowed legal traditions. If a lawyer believes that his client's proposed course of action is illegal, then it is the lawyer's obligation to advise the client of the unlawfulness thereof and to refuse to accede to the client's illegitimate wishes. Certainly, his responsibility is not to turn into a government informant; that would be an ironic development since the traditional role of the lawyer is to interpose himself between the State and the client in order to offset the often strong-handed nature of the former.

In sum, gatekeeper initiatives run roughshod over the principles of independence of the lawyer from government influence and interference, loyalty owed by the lawyer to the client and his secrets, and the confidence enjoyed by the lawyer from the client, which is inculcated by such steadfast and unwavering fidelity. All these are key values that the legal profession has developed over the centuries. To countenance the existence and proliferation of these initiatives would jeopardize the rule of law and inflict irreparable harm to society.

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