GATE KEEPING ON ANTI MONEY LAUNDERING AND COUNTER TERRORIST FINANCING: A CASE FOR THE KENYAN ADVOCATE

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INTRODUCTION

In May 2018, Kenyan lawyers were met by the news that there have been proposed amendments to the Proceeds of Crime and Money Laundering Act[1] that sought to compel lawyers to report their ' transactions to the Financial Reporting Center.

Designated Non-Financial Professionals and Businesses (DNFPBs) have been identified in the FATF recommendations as lawyers, notaries, trusts and Company Service Providers, Real Estate agents, accountants, and auditors. The obligations placed on the lawyers by the proposed amendments that would require reporting are securities and other assets, buying and selling of real estate, management of bank, savings or securities accounts, organization of contributions for the creation, management and operation of companies. The obvious rebuttal to this is the risk of compromising confidentiality which is the crux of the advocate-client relationship together.

This article will outline the concept of gate keeper and analyze the status of Transactional/Corporate and Commercial Advocates as Gatekeepers. It shall also delve further into the Gatekeeper initiative[2], and look at the evolution of and the extent of Financial Action

[1] No 9 of 2009, Laws of Kenya
[2] The Gatekeeper Initiative is an effort by governmental authorities to impose stringent anti-money laundering and counter-terrorist financing obligations on DNFBPs (also "gatekeepers") to both the domestic and international monetary systems.

Task Force (FAFT) has gone to give guidance to legal professionals on Anti Money Laundering (AML) and Counter Terrorist Financing (CTF)[3].

ADVOCATES[4] AS GATEKEEPERS

Coffee (2006) defines a gatekeeper as an independent watchdog with the capacity to point out flaws or defects or one who verifies compliance with standards or procedures. In the corporate context, it refers to one who plays one of two manifest roles: a professional positioned to be able to prevent wrongdoing by withholding co-operation or consent and one who acts as a reputational intermediary by lending its reputational capital to the client and taking on some responsibilities to monitor the accuracy of corporate disclosure.

The concept of lawyer as a gatekeeper has not been truly accepted across the world which prefers to preserve the requirement of zealous advocacy for the client. It is not far-fetched to hypothesize that very few advocates will see themselves as gatekeepers, even corporate lawyers (Ganuza & Gomez, 2007). However, the corporate lawyer's function is in a very different capacity from the mainstream advocate in two respects: one, corporate lawyers are principally transaction engineers, rarely ever attending court to litigate. The test of their skill is in planning, structuring and negotiation of transactions for their clientele. The second special skill of drafting and disclosure, including the special verification skills- due diligence that accompany the preparation of disclosure documents. This has characteristically been approached by these advocates, not as zealous defenders but as fact finders (Coffee, 2003).

Laby (2006) opines that it is because of unconscious bias that lawyers are regarded as dependent gatekeepers through their provision of advice and recommendations to assist a client in meeting its objectives, acting in a fiduciary capacity and owing a duty of care. The adversarial system is cognizant of the fact that conflict is inevitable and consensus will not always be the solution. Impartiality is not required let alone expected of him (McG. Bundy and Elhauge, 1991). Hazard & Dondi (2004) argue that "A lawyer's service consists of guiding

[3] Counter Terrorist Financing can be abbreviated as CTF but, CFT is also accepted. To maintain uniformity and clarity, this article shall use CTF

[4] The Kenyan Legal Practice terrain views advocates differently from lawyers, with lawyers yet to acquire the professional qualifications to join the profession of advocates. For purposes of this article, lawyer shall mean advocate and vice versa.

affairs for the client's private and often selfish purposes, with an eye to legal requirements that have been designed for the very purpose of limiting or regulating selfish purposes."

The differences between the corporate lawyer and the litigator suggests that the corporate lawyer will serve well as a gatekeeper. Corporate lawyers have a skill set that is focused on negotiation, drafting, business planning and the impressive ability to maintain a comprehensive almost encyclopedic, understanding of complex and integrated business transactions. His skill at oral advocacy and verbal fluency are not paramount, but the litigator is also less likely to have a tendency towards hyperbole. Corporate lawyers are also more likely to view themselves as value neutral technicians, not embattled advocates sharing the same foxhole with their clients. Their difference also lies in the characteristic relationship to their clients, especially the corporate clientele. While the litigators see themselves as guardians and defenders of their clients against the oppressive state or extortionate plaintiff's representative, corporate lawyers envision themselves as 'wise counsel' who gently guide their towards compliance through risk assessment and management, a role that represents a modest form of gate keeping. Further, while litigators are generally consulted by their client on an ex-post basis once in crisis mode, the corporate lawyers tend to advice on an ex-ante basis (Coffee, 2006).

Hamdani (2004) Legal pundits have long recognized that gatekeeper liability may affect the market for gatekeeper services. There however seems to be little agreement over the precise nature of this effect. Some have argued that gatekeepers, to minimize their exposure to liability, will refuse to contract with clients who intend to commit misconduct (Lehman, 1995). Others like Kraakman (1986) have argued that gatekeeper liability will prevent access to the relevant market for clients with no wrongful intentions, and might even lead to the collapse of the market for gatekeeper services. The gatekeeper is trusted to the extent that it is a repeat player who possesses significant reputational capital that would be lost or depreciated if it were found to have condoned wrongdoing (Cunningham, 2007).

CONFIDENTIALITY: THE ELEPHANT IN THE ROOM

(Coffee, 2003) narrates that imposition of gatekeeping obligations on lawyers will adversely affect client-advocate communication and thereby in the end reduce law compliance. Scholars have recognized the tension between the lawyer's fidelity to his client on the one hand, and his

role as gatekeeper on the other—and lawyers are at the center of the compliance debate (Kirkbride & Letza, 2003).

An advocate is obligated to maintain the secrets of the client at all times during the subsistence of the advocate and client relationship and even after the relationship ceases. This duty flows from the fiduciary nature of the relationship which makes all the communications between an advocate and the client privileged thus protected from disclosure unless the client waives that right. This position is premised under sections 134[5], 135[6], 136[7] of the Evidence Act[8] (Ojienda & Juma, 2011).

Section 18 of the Proceeds of Crime and Money Laundering Act (POCAMLA) [9] provides that the client-advocate relationship is not affected by the provisions of the statute. Of interest is that the preceding section provides that secrecy obligations shall be overridden by the Act. It goes further to absolve liability based on breach of an obligation to secrecy or any restriction on the disclosure of information in compliance with any obligation imposed by the Act. The application of the privileged information under this statute is however limited to proffering of advice to the client in the course and purposes of the professional employment and for purposes of any legal proceedings on the client's behalf. A Judge of the High Court may also , on application made to him relating to an investigation under the Act, order an advocate to disclose information available to him in respect of any transaction or dealings being investigated unless it's within the confines of giving advice then it becomes privileged.

Therefore, the issue of confidentiality, as under the Act is limited and thus does not insulate the client from reporting of transactions by the advocate.

[5] Provides for privilege of advocates and prohibits disclosure of information the advocate found in the course of and for employment purposes except where the information is made in furtherance of any illegality.
[6] Extends the privileges of confidentiality to interpreters, the advocate's clerks and servants
[7] Provides that where a party consents to waiver of privilege by calling on the advocate, clerks and servants of the advocate during a suit, the witness would not be able to disclose information unless otherwise questioned on it specifically.
[8] Cap 80, Laws of Kenya
[9] No. 9 of 2009, Laws of Kenya

THE GATEKEEPER INITIATIVE

FATF is an intergovernmental policy making body formed to develop and promote national and international policies to combat money laundering and terrorist financing. By its own admission seeks to "generate the necessary political will to bring about legislative and regulatory reforms" in the money laundering and terrorist financing areas[10]. FATF thus has no independent ability to enact laws but instead relies on its political muscle to achieve reforms in these areas.[11]

Circa 1999, since the organization's creation in 1989, the G8[12] interior and justice ministers met and adopted the Moscow Communiqué that specifically adopted the term gatekeeper birthed the Gatekeeper Initiative. It is an effort by governmental authorities to enlist the support of gatekeepers to combat money laundering and terrorist financing.

In 2002, in its published consultation paper, FATF highlighted several areas that it (FATF) could make changes to the AML framework that would include legal professionals with several coverage options dealing with lawyers, customer due diligence, Suspicious Transaction Reporting (STRs), beneficial ownership of corporate vehicles and inherent liability arising from the application of AML obligations to lawyers (Shepherd, 2009).

FATF's increasing concern over the use of professional by criminals to assist them launder funds by providing expert advice (FATF, 2002). The FAFT 40 recommendations provide that Customer Due Diligence and record keeping requirement set out in Recommendations 5, 6 and 8 to 11 shall apply to lawyers in the following situations: purchase and sale of real estate; management of client money, securities or any 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.[13] Forty Recommendations represents the basic framework for AML efforts and is designed to be applicable universally.

[10] What Is the FATF?, http://www.fatf-gafi.org
[11] Money Laundering FAQ, http://www.fatf-gafi.org
[12] The Group of Eight (G8) refers to the group of eight highly industrialized nations – Canada, France, Germany, Italy, Japan, Russia, the UK and the USA.
[13] The Financial Action Task Force On Money Laundering, The Forty Recommendations (2004),

Part of the Gatekeeper initiative was the mutual evaluation[14] process. Of each country's AML Systems to determine their compliance with the standards set by FATF. Its purpose is also to ensure that the 40+9 recommendations are implemented effectively by all countries. [15]

According to Shepherd (2009), FATF has focused its efforts on three main activities: setting standards, ensuring effective compliance with those standards, and identifying money laundering and terrorist financing threats. The organization attempts to set standards, ensure compliance, and identify threats by conducting Mutual Evaluations on member countries and by rating each country on compliance with relevant standards.

FATF employs a four-level grading system to rate compliance with FATF's standards. These compliance levels consist of compliant, largely compliant, partially compliant, and noncompliant.[16] It is noteworthy that because the Mutual Evaluation Teams are comprised of different representatives, laws and practices in one country commonly may receive a passing grade, but fail in another.[17]

EVOLUTION OF THE FAFT GUIDANCE FOR LEGAL PROFESSIONALS

The development of a risk-based approach for the legal profession arguably began at the Amsterdam consultative meeting in 2006 between FATF and DNFBPs about the practical difficulties of applying the recommendations to these private sectors. Since then, there have been consultative meetings that have seen risk based approaches developed for the legal profession. Financial Action Task Force, RBA Guidance for Legal Professionals (2008),

[14] The FATF conducts peer reviews of each member on an ongoing basis to assess levels of implementation of the FATF Recommendations, providing an in-depth description and analysis of each country's system for preventing criminal abuse of the financial system.
[15] Financial Action Task Force, AML/CFT Evaluations and Assessments, Handbook For Countries and Assessors (2007)
[16] A compliant rating means that the country is observing fully the Recommendation with respect to all "essential criteria." A largely compliant rating means that there are "minor shortcomings, with a large majority of the essential criteria being fully met." A partially compliant rating indicates that a "country has taken some substantive action and complies with some of the essential criteria." Finally, a noncompliant rating means "There are major shortcomings, with a large majority of the essential criteria not being met." In exceptional circumstances a Recommendation also may be rated as not applicable. A not applicable rating means that all "or part of a requirement does not apply, due to structural, legal or institutional features of a country."
[17] A comparison of the recent Mutual Evaluations of China, the United Kingdom, Australia, and the United States illustrates this phenomenon

hereinafter *Lawyer Guidance* derives in large part from the inaugural risk-based guidance produced by a collaboration between FATF and financial institutions.[18]

The subsequent meetings between private sector representatives and FATF were held in London on September 11, 2007, with subsequent meetings held in Bern, Switzerland (December 2007), Paris (April 2008), London (June 2008), and Ottawa (September 2008). These meetings were critical in defining and narrowing the universe of issues and exploring possible solutions to the scope and content of *Lawyer Guidance* (Shephard 2009).

Although FATF has no authority to impose laws on any jurisdiction, the group exerts international political pressure on its member states to enact its AML and CTF recommendations. FATF's efforts create unprecedented challenges to the sanctity of the attorney–client privilege, the duty of client confidentiality, and the delivery of legal services generally in the legal system.[19]

DEVELOPMENT OF THE RISK- BASED APPROACH

The FATF Recommendations encourage countries to develop a risk based approach to AML/CTF efforts. The theoretical and practical underpinning of the risk-based approach is to ensure that limited resources to combat money laundering and terrorist financing are employed and allocated in the most efficient manner possible so that the greatest risks receive the highest attention. In this fashion, the risk-based approach differs fundamentally from a rules-based approach. Under a rules-based approach, a lawyer is required to comply with particular laws, rules, or regulations irrespective of the underlying quantum or degree of risk.[20]

By adopting a risk-based approach, it is possible to ensure that measures to prevent or mitigate money laundering and terrorist financing are commensurate with the risks identified. This will allow resources to be allocated in the most efficient ways. The principle is that resources should be directed in accordance with priorities so that the greatest risks receive the highest attention. The alternative approaches are that resources are either applied evenly, or that resources are

[18] Financial Action Task Force, Guidance On the Risk-Based Approach To Combating Money Laundering and Terrorist Financing: High Level Principles and Procedures (2007), http://www.fatf-gafi.org/dataoecd/43/46/38960576.pdf [hereinafter Financial Institution Guidance]
[19] Financial Action Task Force, FATF Revised Mandate 2008–2012 (2008), para. 2
[20] Financial Action Task Force, RBA Guidance for Legal Professionals (2008) (Lawyer Guidance)

targeted, but on the basis of factors other than risk. This can inadvertently lead to a "tick box" approach with the focus on meeting regulatory requirements rather than on combating money laundering or terrorist financing efficiently and effectively.

IDENTIFIABLE RISKS

Risk categories, risk factors, and variables that affect risk

Forty Recommendations addresses risk in three principal areas for legal professionals: Customer Due Diligence (CDD); the internal control systems for legal professionals and firms; and the approach to oversight and monitoring of legal professionals.

a) Customer Due Diligence

The three "most commonly used risk criteria are: country or geographic risk; client risk; and risk associated with the particular service offered." FATF recognizes that no set categories of risk universally exist (Shepherd, 2009).

i. Country Risk

There has been no consensus on whether a transaction's ties to a particular geography represents a higher risk[21]. Those that have been identified include client's domicile, location of transaction and sources of funds.

ii. Client Risk

Determining the potential money laundering or terrorist financing risks posed by a client, or category of clients is critical to the development and implementation of an overall risk-based framework.[22] The vision of *Lawyer Guidance* is that a lawyer will undertake to develop her own risk criteria to determine whether a client poses a higher risk. If it is the determination of

[21] These higher risk countries include those that are subject to sanctions, embargoes, or similar measures issued by certain bodies, such as the United Nations, and those identified by credible sources as having significant levels of corruption or criminal activity, or from which funds or support are provided to terrorist organizations
[22] Lawyer Guidance, para. 109

the lawyer that a client poses a higher risk, the lawyer then will need to determine whether there are any mitigating factors potentially affect that determination[23].

Lawyer Guidance identifies a barrel of situations in which a client's activities may point to a higher risk. These higher risk activities include PEPs[24] in certain situations these include; Clients conducting their business relationship or requesting services in unusual or unconventional circumstances, as evaluated in all the circumstances of the representation; Clients where the organization or nature of the entity or relationship makes it complicated to identify in a timely fashion the true beneficial owner or controlling interests, such as the unexplained use of legal persons or legal arrangements, nominee shares or bearer shares; that are cash and cash equivalent intensive businesses, including money services businesses and casinos; Charities and other not for profit organizations that are not subject to monitoring or supervision, especially those operating on a cross-border basis by designated competent authorities or Self-Regulatory Organizations (SROs); Clients using financial intermediaries, financial institutions or legal professionals that are not subject to adequate AML/CTF laws and measures and that are not adequately supervised by competent authorities or SROs; Clients having been previously convicted for economic crimes who instruct the legal professional who has actual knowledge of such convictions to undertake specified activities on their behalf; Clients without any address, or have multiple addresses without legitimate reasons; Clients who alter their settlement or execution instructions without appropriate and adequate explanation; and The use of legal persons and arrangements without any apparent legal or legitimate tax, business, economic or other reason.

PEP representation presents potentially difficult issues. In its most basic form, *Lawyer Guidance* requires enhanced due diligence if the client is a PEP or a PEP is the beneficial owner of the client because PEPs are considered higher risk. *Lawyer Guidance* provides insight into those situations in which a PEP does not fall within either of those categories but is nonetheless involved with a client. Lawyer Guidance states that, in these situations, the lawyer needs to analyze the risk in light of all relevant circumstances. These circumstances include the character of the relationship between the client and the PEP, the nature of the client,

[23] Lawyer Guidance, Para. 24

[24] A Politically Exposed Person (PEP) has defined by the Financial Action Task Force (FATF) as an individual who is or has been entrusted with a prominent public function. Due to their position and influence, it is recognised that many PEPs are in positions that potentially can be abused for the purpose of committing money laundering (ML) offences and related predicate offences

whether public or privately owned, and the nature of the legal services sought. *Lawyer Guidance* notes that lower risks may exist in which a PEP is not the client but a director of a client that is a public listed company and the client is purchasing real property for adequate consideration.

iii. Service Risk

Service risk means the potential risks carried by the services offered by a legal professional. *Lawyer Guidance* recognizes that lawyers provide a broad and diverse range of services, thereby accentuating the one size does not fit all nature of the risk-based approach. *Lawyer Guidance* identifies eighteen separate factors that a lawyer should take into account in assessing the risks involved in providing one of the Specified Activities; however, no one factor, standing alone, may constitute a high-risk circumstance.[25] High-risk circumstances can be determined only by the careful assessment of a range of factors that after taking into account any mitigating conditions which cumulatively would warrant increased risk assessment. For transactional lawyers, several service risk factors are particularly relevant. For instance, one risk factor includes: Services where legal professionals, acting as financial intermediaries, in point of fact handle the receipt and transmission of funds through accounts that are under their control in the act of closing a business transaction. This "touching the money" factor presumably would apply to real estate lawyers acting as escrow agents in real estate transactions. While not per se a high-risk circumstance under Lawyer Guidance, a lawyer may need to take this factor into account with the other service risk factors to determine whether the provision of the services embodies a high-risk circumstance.

According to Shephard (2009) FATF declined to add language the private sector anticipated that would have clarified this risk factor by stating, that these services should be distinguished from those legitimately intended to screen ownership. A service risk factor specific to real estate includes a transfer of property between parties in a time period that is unusually short for similar transactions with no apparent legal, tax, business, economic or other legitimate reason. One service risk factor requires the lawyer to make an assessment as to the adequacy of the consideration involved in a transaction falling within the purview of a Specified Activity. *Lawyer Guidance* describes this service risk factor as "Transactions where it is readily apparent to the legal professional that there is inadequate consideration, such as when the client does not

[25] LAWYER GUIDANCE, para. 110.

identify legitimate reasons for the amount of the consideration." *Lawyer Guidance* does not elaborate on what would constitute readily apparent inadequate consideration and suggests that the lawyer may be required to insist that the client identify legitimate reasons for the amount of the consideration. In some business transactions that fall within the Specified Activity category, a lawyer's ability to evaluate the adequacy of consideration may be complicated. Whether *Lawyer Guidance* intends this readily apparent determination to be made on an objective or subjective basis (so as to take into account the relative business acumen of the lawyer involved) remains unclear. Another service risk factor calls on the lawyer to review whether a client's expressed desire for anonymity is unusual or abnormal. *Lawyer Guidance* characterizes this service risk as services that have deliberately been provided or purposely dependent upon more anonymity in the client identity or participants than is normal under the circumstances and experience of the legal professional. The creation of tiered ownership structures for the purpose of legitimate tax and liability insulation reasons may be normal to sophisticated transactional counsel, but under *Lawyer Guidance* may be considered a risk factor for less sophisticated counsel with limited experience in these tiered structures[26].

iv. Variables That May Affect Risk

Once a lawyer identifies and assesses the country, client, and service risk factors, the lawyer then must take into account whether any variables affect the risk assessment[27]. *Lawyer Guidance* cautions that appreciation must be accorded to the immense and profound differences in practices, size, scale and expertise, amongst legal professionals. Legal practices range from multinational global law firms to sole practitioners. FATF recognizes the impracticality and unreasonableness of a one size fits all approach to an effective risk-based system. For this reason, *Lawyer Guidance* acknowledges that sole practitioners are not expected to devote an equivalent quantity of resources similar to large law firms to create, implement, and manage a reasonable risk-based approach. At the same time, though, FATF notes that all lawyers are required to assess whether the client and proposed work would be unusual, risky or suspicious for the particular lawyer. Lawyers must assess this factor in the context of the lawyer's individualized and specific practice. To take into account the variables affecting the risk determination, *Lawyer Guidance* identifies thirteen factors that may impact the risk assessment either upward or downward. If one or more of the variables exist, the

[26] Lawyer Guidance, Para. 111
[27] Lawyer Guidance Para.112

lawyer may be required to perform enhanced due diligence (EDD) and monitoring, or on the other hand, the lawyer's CDD and monitoring may be reduced, modified, or simplified. These risk variables apply specifically and individually to the particular client and the type of work in question. A risk variable that reduces the risk posed by a particular client or type of work is the reputation and publicly available information about a client. Legal persons that are transparent and well known in the public domain and have operated for a number of years without being convicted of proceeds generating crimes may have low susceptibility to money laundering. The regularity or duration of a client relationship also is a risk variable. Presumably, a long-standing relationship involving frequent client contact poses less risk. *Lawyer Guidance* has recognized that lawyers typically have client relationships with a strong element of duration and frequent client contact. This type of close advisory relationship arguably allows a lawyer to identify potential AML issues early in the process. Conversely, client relationships of a transitory or short duration may suggest more risk, but this risk variable should not apply mechanically. A related risk variable involves the proportionality between the magnitude or volume and longevity of the client's business and its legal requirements, including the nature of professional services sought.

DEVELOPING RISK-BASED GATEKEEPER REGIME FOR THE KENYAN TERRAIN

Since devising an optimal regime of gatekeeper liability requires an answer to a complex set of empirical questions, policymakers will likely make their decision under conditions of uncertainty (Bebchuk & Hamdani 2002). Given the potential for substantial costs associated with gatekeeper liability, policymakers responding to enforcement failures can resort to two relatively safe strategies: adopting knowledge-based standards, and explicitly requiring gatekeepers to implement policing measures that are known to be cost effective (Choi, 1998).

The heart of Lawyer Guidance, and the reason Lawyer Guidance is of importance to transactional lawyers, is its emphasis on the need for the legal profession to develop good practice in the design and implementation of an effective risk-based approach.

I. Law Society of Kenya

The Law Society of Kenya (LSK) is a professional body established to regulate the conduct of its members. In carrying out its mandate as prescribed under Section 4 of the Law Society of Kenya Act[28], the LSK has the objective to maintain and improve the standards of conduct and learning of the legal profession in Kenya; to facilitate the acquisition of legal knowledge by members of the legal profession and others; to represent, protect and assist members of the legal profession in respect of conditions of practice and otherwise: all objects tasked with instilling professionalism in its members.

By virtue of its powers in assisting members in conditions of practice, the LSK could develop a practice risk-based guidelines based on *Lawyer Guidance* that would encompass 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.

II. Central Bank of Kenya Prudential Guidelines

The Central Bank of Kenya (CBK) empowered to come up with guidelines for AML and CTF may provide guidelines that focus on:

a) Ascertainment of the client's domicile, location of transaction and the source of funding. Lawyers need to identify where the client resides or has its principal place of business, the *situs* of the transaction, and who is providing the funding to close the transaction. Transactions occurring wholly within the country's boundaries do not increase the risk, but an extraterritorial transaction may elevate the risk factor depending on the location of the transaction.
b) The guidelines could provide that lawyers should take into account the following in providing legal services:

- Lawyers acting as financial intermediaries should seek to avoid or minimize the handling of cash in connection with a transaction involving a Specified Activity. While this may be expressly stated, the wisdom of the lawyer may need to be exercised in identifying the risk.

[28] Cap 18 Laws of Kenya

- Transactions arising out of a Specified Activity that have no apparent legal, tax, business, economic, or other legitimate reason should trigger increased scrutiny by the lawyers. In the vernacular, this is the "smell test," meaning that the lawyer should be attuned to transactions that do not "smell" right.
- Based on the lawyer's experience with the client, a lawyer should assess whether the client's desire for anonymity is abnormal. When a client suddenly desires anonymity, a lawyer should inquire into the rationale for this newly expressed desire.
- A lawyer should analyze the source of funds for the transaction and the client's source of wealth.[29]

c) Client Risk

Client intake is a critical point in identifying the risk of money laundering or terrorist financing. First and foremost, lawyers need to identify the client—to assess both potential conflicts and the risk of money laundering or terrorist financing (Zagaris, 2002). This would mean that Lawyers will need to have Know Your Customer (KYC) assessment Tool. For ethical reasons also and to ensure that the local counsel is not representing a client on a governmental watch list, local counsel should identify the client. Local counsel then should make the following determinations to assess whether the engagement requires identification and performing CDD on the client's beneficial owner:

i. Determine whether the scope of representation by the local counsel involves a Specified Activity.
ii. Determine whether the local counsel is "preparing for or carrying out" a Specified Activity. The degree of the local counsel's

According to Recommendations 13 through 16 which deal with suspicious transaction reporting (STR), Recommendation 13, which articulates the general STR rule, states 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," the financial institution must notify the appropriate Financial Intelligence Unit (FIU) of its suspicions by filing an STR. Recommendation 14 embodies the corollary "no tipping off" (NTO) rule. Under the NTO rule,

[29] Under *Lawyer Guidance*, the "source of funds is the activity that generates the funds for a client, while the source of wealth describes the activities that have generated the total net worth of a client – Par 110

if the financial institution files an STR with the FIU, the financial institution cannot inform its customer that it made such a report. The STR requirement and the NTO rule have been a controversial aspect of Forty Recommendations' application to the legal profession.

It is however imperative that the CBK clarify whether lawyers will need to file STRs. During the Paris (2008) meeting, the issue was resolved by acknowledgement that the STR are not part of Risk Assessment, rather response mechanism once suspicion of money laundering has been identified. It was however noted that in those jurisdictions where a law mandates the filing of an STR report, the risk-based approach does not apply and the legal profession must comply with the rules.[30]

Recommendations 33 and 34 focus on the need to ensure the transparency of legal arrangements and on the unlawful use of legal persons to prevent money laundering and terrorist financing. Recommendation 33 provides in pertinent part that Countries should take measures to prevent the unlawful use of legal persons by money launderers. Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities. Recommendation 34 states that "Countries should take measures to prevent the unlawful use of legal arrangements by money launderers

III. Capital Markets Authority

The ambiguity of corporate and securities law is a recipe for indeterminacy. It is riddles with many technical provisions on responsibilities of issuers and market professionals which are often fulfilled by best practices guidelines (Hopt, 2003).

The Capital Markets Authority (CMA) is a statutory body established by Section 5 of the Capital Markets Authority Act[31] that empowers the body corporate to frame rules on all matters within the jurisdiction of the Authority under the statute[32]and this includes all aspects of the capital markets[33]

[30] Paris 2008 Memo
[31] Cap 485 A, Laws of Kenya
[32] Section 11(2)(d) , Cap 485A, Laws of Kenya
[33] Section 11 (1) (a), Cap 485A, Laws of Kenya

As the securities regulator, CMA can develop guidelines that may steer lawyers on the materiality requirement that is at the heart of every claim of fraud under the securities law.

It is noteworthy that once a client and an advocate are steadfast a particular course of action, the advocate may be biased toward the client's directional goals at the expense of accuracy and fail to put a halt to the course of action previously determined. Coffee (2002) has suggested that the regulator could adopt a rule requiring a securities lawyer to certify that he has reviewed the non-financial disclosure in publicly filed reports, and that the attorney believes the statements are true and he is not aware of any material omissions

Moreover, the certification, according to Coffee (2002), ideally would include a statement that the attorney undertook reasonable inquiry, which would establish a due diligence obligation. While this proposal has merit, it is narrow in scope because it would be limited to the relatively small group of lawyers who are principally responsible for preparing a document or report filed with the regulator.

CONCLUSION

According to FATF's publication dated June 2014 on Improving Global AML/CFT Compliance: On-going process, Kenya had established the legal and regulatory framework to meet its commitments in its action plan regarding strategic deficiencies earlier identified. It was therefore no longer subject to FATF's monitoring process[34].

This paper has outlined the concept of gate keepers and analyzed the status of Advocates as Gatekeepers. It has looked into the initiative b y FATF in consultation with the private sector arm of the DNFBPs under the 40+9 Recommendations. It has given a proposed terrain of the gate-keeper function that seeks to insulate the gatekeepers from liability. The regime would set out also the guidelines of practice, especially because it is a foreign concept.

Notwithstanding controversies as to the practicality of enlisting lawyers as gatekeepers, the risk-based approach is sure to prove effective in guiding the lawyers in these murky waters.

[34] http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/documents/fatf-compliance-june-2014.html#Kenya

Proper gate-keeping liability regime would outline the least interference with advocates' duties to their client and avoid the petrifying effect of liability for not adhering to the obligations under AML and CFT.

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