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Attorney Cathy's Continuing Quandary, Or, Can the Gatekeeper Initiative Be Reconciled with the Multi-Jurisdictional Practice of Law?

JOHN W. BROOKS AND ROBERTA VASSALLO*

The terrorist attack on September 11, 2001, increased a growing concern among law enforcement authorities worldwide about money laundering in general and terrorist financing in particular. Those authorities, and their political and legislative allies, have long attempted to reduce access by criminal elements to legitimate money, but since regulations intended to prevent illegal behavior in transactions involving more than one actor are not particularly efficacious when aimed only at the potential initiator, one of the recent regulatory initiatives has been aimed at the middle men in incipient money laundering deals. This initiative is the Gatekeeper Initiative.¹ First proposed in 1999, the Gatekeeper Initiative is directed at professionals, including lawyers, who represent clients in connection with domestic and international financial transactions. One of the Gatekeeper Initiative proposals, known as Recommendation 13, requires attorneys to submit Suspicious Transaction Reports (STRs) to government authorities based on the mere suspicion that the funds involved in a client's transaction originated from illegal activity. In addition, Recommendation 13 prevents attorneys from informing their clients that they have reported the

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1. The Gatekeeper Initiative was conceived during a Conference on Combating Transnational Organized Crime in Moscow in October 1999 and framed in a *Communiqué* of the Finance Ministers of the United States, Germany, Japan, England, Italy, France, Canada, and Russia (Group of 8). The *Communiqué* called on countries to consider various means to address money laundering through the efforts of professional "gatekeepers to the domestic and international financial and business markets." American Bar Association, Task Force on Gatekeeper Regulation and the Profession, *Comments of the ABA Task Force on Gatekeeper Regulation and the Profession on the Financial Task Force Consultation*, Task Force on Gatekeeper Regulation and the Profession, Aug. 23, 2002, at 4. Ministerial Conference of the G-8 Countries on Combating Transnational Organized Crime, available at <http://www.library.utoronto.ca/g7/adhoc/crime99.htm> [hereinafter ABA Task Force].

information (the No-tipping-off Rule). The EU has adopted the Gatekeeper Initiative, and each country of the EU is now enacting legislation to implement it.²

In February 2002, the American Bar Association (ABA) created a Task Force on the Gatekeeper Regulation and the Profession (ABA Task Force). In its report in August of that year, the ABA Task Force criticized the Gatekeeper Initiative on the grounds that STRs would fundamentally distort the privileged attorney-client relationship, potentially turning a trusted advisor into a government informant, who would then be acting against the interest of his client. The ABA Task Force's comments focused on the impossibility of reconciling STRs with the duty of confidentiality that attorneys owe to their clients. However, the ABA may have failed to recognize the difficulties posed by the accelerating phenomenon of the multi-jurisdictional practice of law. In a world that has become commercially and professionally globalized, lawyers increasingly travel outside their home jurisdictions to advise on business transactions. What happens when an American attorney, licensed, for instance, in California (where the duty of confidentiality is sacred), travels on vacation to Italy, where the Gatekeeper Initiative, including Recommendation 13 on STRs, has been implemented, and helps Italian clients with a business transaction? The following fictional example of Attorney Cathy illustrates some of the intricacies of this issue that the ABA has not yet adequately addressed.³

Attorney Cathy is an established real-estate attorney in California and a member of the California Bar. She travels to Rome on vacation. While in Italy a friend of hers, attorney Mario, who is licensed in Italy, asks her to assist a young couple in acquiring a parcel of land in Southern California. Cathy, working with Mario, prepares the documents. However, when Cathy inquires about financing the acquisition, the couple say they plan to acquire the \$1.2 million parcel of land without financing.⁴ The couple doesn't appear particularly affluent, and Cathy pursues her inquiry. The young man sighs and shrugs. Cathy becomes suspicious about the couple's financial sources. What does Cathy have to report? Does she need to report anything? Does she have to comply with Italian or Californian rules in making her decision? There are two possible scenarios and potential consequences, depending on whether Cathy complies with the rules in California (where the Gatekeeper Initiative has not yet been adopted) or the rules in Italy (where the Gatekeeper Initiative was adopted in 2004).

I. Scenario One: Cathy Complies with California Rules

If Cathy decides to follow California's rules, she will not have to report the suspect transaction, because the U.S. government has not taken formal action on the Gatekeeper Initiative, and there are no other U.S. or California requirements that would mandate reporting.⁵ Cathy will have to abide by Rule 3-100 of the California Rules of Professional Conduct

2. See Edward J. Krauland & Benjamin Coats, *International Regulation of the Legal Profession: An Impending Possibility?*, GP SOLO MAGAZINE—INT'L L. 33, (2005), available at <http://www.abanet.org/genpractice/magazine/2005/mar/international.html>.

3. See Kevin L. Shepherd, *USA Patriot Act and the Gatekeeper Initiative: Surprising Implications for Transactional Lawyers*, PROB. & PROP. (2002), available at <http://www.abanet.org/rppt/publications/magazine/2002/so/shepard.html>.

4. See *id.*

5. See Nicole M. Healy, *The Impact of September 11th on Anti-Money Laundering Efforts, and the European Union and Commonwealth Gatekeeper Initiatives*, 36 INT'L L. 733, 745 (2002).

(Rule 3-100), which holds the duty of confidentiality as a pillar of the attorney-client relationship.⁶ Specifically, Rule 3-100 prohibits an attorney from revealing information related to his representation of a client, unless the client consents to it.⁷

II. Scenario Two: Cathy Complies with Italian Rules

If Cathy decides to comply with the Italian rules, her actions toward, and her duties to, the Italian couple will be different. Under the new Italian Decree adopted pursuant to EU Directives, Cathy will have to identify the couple's transaction as suspect because of the large amount of money involved and the murkiness of the couple's financial sources.⁸ Moreover, Cathy will have to collect detailed personal data on the couple, including their tax payer's code, and she will have to keep a record of all services rendered.⁹ Finally, before carrying out any transactions on their behalf, Cathy must report the suspect transaction to the competent authority—in this case, the Italian Foreign Exchange Office. Pursuant to the Italian Decree, and contrary to Rule 3-100, reporting the information does not constitute breach of duty of confidentiality.¹⁰ If Cathy fails to follow these steps, she could be subject to a fine of €500-25,000.¹¹

As a California attorney, the major obstacle Cathy will encounter is that complying with Italian rules could violate Rule 3-100, because reporting a suspicious transaction to the authorities breaches the duty imposed upon privileged attorney-client communications under the rule. Non-California legal professionals will have to face a similar conflict between the new EU Directives and each European country's newly adopted regulations, on the one hand, and the duties of confidentiality imposed by the U.S. Model Rules, on the other.

III. Globalization and Multi-jurisdictional Practice of Law for U.S. Lawyers

Most laws are inherently local or national in scope. Others are regional (e.g., EU Directives), and some approach global reach (e.g., multi-lateral treaties). In a world that has become more commercially and professionally connected by modern communications, there is a growing need for lawyers capable of reconciling and integrating laws of different scopes and applying them usefully to their clients' issues.

6. Rule 3-100 is roughly analogous to Rule 1.6 (a) of the American Bar Association Model Rules of Professional Conduct (U.S. Model Rules), which also holds the duty of confidentiality as a pillar of the attorney-client relationship. However, Rule 3-100 has more limited exceptions to its mandate than the U.S. Model Rules. See CAL. RULES OF PROF'L CONDUCT R. 3-100 (1992), available at http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10158; MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983), available at http://www.abanet.org/cpr/mrpc/rule_1_6.html.

7. CAL. RULES OF PROF'L CONDUCT R. 3-100, *supra* note 6.

8. Tancredi Marino & Federico Passamonti, Money Laundering Meeting 6 (June 17, 2005) (unpublished conference paper, on file with authors).

9. See *id.* at 10.

10. See *id.* at 14.

11. See ABA Anti-Money Laundering Forum, available at <http://www.antimoneylaundering.org/Countrydetailprint.asp?countryid=42>.

A. MULTI-JURISDICTIONAL PRACTICE

Lawyers represent clients whose properties or activities are not confined within state boundaries, but over the last decade some U.S. state legislatures have seen troubling issues when lawyers work outside the jurisdiction in which they are licensed.¹² In response to these perceived issues, the ABA has endorsed the recommendations of its Commission on Multi-Jurisdictional Practice of Law, including revisions to U.S. Model Rule 5.5.¹³ Revised Model Rule 5.5 allows a lawyer to practice in a different jurisdiction on a temporary basis if, (1) she associates herself with a lawyer admitted in that jurisdiction, and the services rendered are reasonably related to what the lawyer is currently doing in his home state, or (2) if the lawyer is admitted in that jurisdiction *pro hac vice*.¹⁴

While the modifications to U.S. Model Rule 5.5 have been accepted by virtually all U.S. states, less frequently recognized are the problems that arise when lawyers cross national borders in response to an increasingly global economy in the legal services market.¹⁵ Because of a lack of uniform international legislation, U.S. lawyers practicing abroad face a dilemma: Either abide by the U.S. Model Rules (as enacted in the state(s) in which they are admitted) and risk violating local foreign professional responsibility laws, or comply with the foreign rules and possibly be in violation of rules of ethics in their home jurisdiction.¹⁶

B. MODEL RULE 1.6: DUTY OF CONFIDENTIALITY

Although attorneys may serve as gatekeepers to the domestic and international monetary system, they also serve as gatekeepers to the system of justice and administration of law for citizens of the United States and other countries. The duties of loyalty and confidentiality

12. See Nancy J. Moore, *Regulating Law Firm Conflicts in the 21st Century: Implications of the Globalization of Legal Services and the Growth of the "Mega Firm,"* http://www.findarticles.com/p/articles/mi_qa3975/is_200504/ai_n13499068/print, at 1.

13. See generally Edward J. Cleary, *Crossing State Lines: Multijurisdictional Practice*, BENCH & BAR OF MINN. (2000), available at <http://www.courts.state.mn.us/lprb/00bbarts/bb1000.html>; see also Anthony E. Davis, *Multijurisdictional Practice by Transactional Lawyers—Why the Sky Really is Falling*, 11 NO. 2 PROF. LAW 1, 5 (2002) (explaining that the United States made it easy for lawyers to open practices outside of their jurisdiction).

14. See MODEL RULES OF PROF'L CONDUCT R. 5.5 (1982), available at http://www.abanet.org/cpr/mrpc/rule_5_5.html.

15. Carole Silver, *Regulating International Lawyers: The Legal Consultant Rules*, 27 HOUSTON J. INT'L L. 527 (2005).

16. Each state's rules of ethics vary to some degree. In some states a lawyer could be in violation of rules of professional conduct when revealing a client's information while working in another country. In other states, where the rules of professional conduct are not as strict, the lawyer will not be in breach of his duty if he reveals information while practicing abroad. For instance, in California, an attorney's duty to keep a client's confidentiality is governed by California Business and Professions Code (B & P) § 6068(e), which provides that "[i]t is the duty of an attorney . . . to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." CAL. BUS. & PROF. CODE § 6068(e)(1) (West 2006). The main difference between U.S. Model Rule 1.6 and B & PC § 6068(e) is that B & PC does not provide for any exceptions. The duty to preserve the client's information is rigorous: An attorney cannot reveal his client's information even if made with honest intention and reasonable belief. See *id.* On the other hand, Texas Rule 1.05 (the counterpart of U.S. Model Rule 1.6) is not as strict as Rule 3-100. Texas Rule 1.05 makes disclosure mandatory if the attorney "has reason to believe that it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act." Mary Lou Soller, *Ethical Dilemmas Facing Counsel* 8 (Jan. 20, 2006) (unpublished conference paper, on file with authors). TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.05(c)(7) (1989), available at http://txethics.org/reference_rules.asp?view=conduct&num=1.05.

remain bedrock principles of the attorney-client relationship and promote the independence of attorneys and the adversarial system.¹⁷

This statement by the American Bar Association demonstrates how rock solid the duty of confidentiality is still seen in the United States. While U.S. Model Rule 1.6 prohibits a lawyer from revealing a client's information relating to his or her representation (without the client's informed consent), in a number of states there is an exception to the duty of confidentiality which can complicate matters: A lawyer may, but is not obligated to, disclose a client's misconduct when the attorney reasonably believes it necessary "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another."¹⁸

In international practice, U.S. Model Rule 1.6 conflicts with the Gatekeeper Initiative.¹⁹ The Gatekeeper Initiative, through Recommendation 13, *requires* a lawyer to disclose *any* suspicious information, "based on a mere suspicion that the funds involved in a client's transaction stemmed from some type of illicit activity."²⁰ A disparity exists between the duties of a lawyer practicing in the United States and the same lawyer practicing in countries that have enacted Gatekeeper legislation. If there is no normative rubric (or even global consensus) in place that regulates or guides lawyers' conduct when they travel to other countries, what should U.S. attorneys do? Should they follow their home jurisdiction and only disclose a client's information that, if left undisclosed, would cause great harm to other persons or property, or should they follow a foreign country's jurisprudence that would require them to disclose any information that even appears illicit, based on mere suspicion? Cathy's quandary still remains unresolved.

To understand how the Gatekeeper Legislation affects the duty of confidentiality, and a lawyer's corresponding duty to his client, it is useful to investigate the evolution of the Gatekeeper Initiative. Money laundering²¹ and its associated terrorist

17. ABA Task Force, *supra* note 1, at 6-7. For an overview of the Attorney-Client privilege, see generally Edward J. Krauland & Troy H. Cribb, *The Attorney Client Privilege in the United States: An Age-old Principle under Modern Pressures*, 2003 ABA PROF. LAW. 37 (2003).

18. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983), available at http://www.abanet.org/cpr/mrpc/rule_1_6.html.

19. Until recently, confidentiality in civil law systems was a very solid concept and absolute. The lawyer could not reveal the client's information, even if the client consented. In the common law system, this principle takes form in two interrelated bodies of law, the attorney-client privilege in the law of evidence and the rule of confidentiality in the code of ethics. The lawyer may reveal confidential information with the client's consent. See Edward J. Krauland, James E. Roselle, & Ramon Mullerat, *Comments to the ABA Task Force on Attorney-Client Privilege*, May 5, 2005, available at <http://www.abanet.org/buslaw/attorneyclient/publichearing20050421/testimony/lauding3.pdf>.

20. Financial Action Task Force on Money Laundering, *The Forty Recommendations*, June 2003, available at <http://www.fatf-gafi.org> [hereinafter *Forty Recommendations*]; see also ABA Task Force, *supra* note 1 (opposing Recommendation 13 and the proposal that after reporting suspicious client's information to the authority, the lawyer would be prevented from notifying the client that such information has been disclosed); Krauland, Roselle, & Mullerat, *supra* note 19, at 2.

21. Money laundering has been defined as "the process whereby money that is the product of some illegal activity is cleaned and its source disguised, and it is placed inside the banking or other mainstream financial system." U.S. Department of Justice, *Terrorist Financing*, 51 No. 4 UNITED STATES ATTYS' BULLETIN 7 (2003), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5104.pdf.

financing techniques²² brought about the initial push to create a gatekeeper system. Money launderers are known to use lawyers' client accounts to conceal funds, sometimes meant for terrorist activities, to take advantage of the secrecy imposed on the attorney by the duty of confidentiality.

International collaboration is seen as vital in making the Gatekeeper Initiative successful. Indeed, the G-8 meeting of 1999, which brought about the Gatekeeper Initiative, represented a coming together of nations that were already moving in the direction of international money laundering legislation with the creation of the Financial Action Task Force (FATF) in 1989.²³

C. FATF: THE FORTY RECOMMENDATIONS

The FATF Forty Recommendations on Money Laundering (The Forty Recommendations) represent the international standard for the war against money laundering. The FATF was created in 1989 at the G-7²⁴ Summit in Paris in response to mounting concerns over money laundering and threats to banking systems and financing institutions.²⁵ In 1990, the FATF introduced the Forty Recommendations that required member countries to monitor money laundering trends and report suspicious transactions.²⁶ The FATF has regularly updated the Forty Recommendations, and in 2001 it created the Eight

22. According to the *9/11 Commission Report*, between \$400,000 and \$500,000 was used to plan and carry forward the attacks on the World Trade Center in New York on September 11, 2001. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final report of the National Commission on Terrorist Attacks Upon the United States* 169 (W.W. Norton & Co., 2004) [hereinafter *9/11 Commission Report*]. The report of the 9/11 Commission shows that hardly any money came from Osama Bin Laden's personal wealth. See Juan Castaneda, *Gatekeeper Legislation: Civil Attorneys in a Criminal World 9* (December 2004) (unpublished paper, on file with authors). The majority of funds came from a group of financial facilitators who raised money from donors and fundraisers located primarily in Saudi Arabia. *Id.* at 10. Al-Qaeda then protected the money it raised by *hawala*, an old trust-based system for transferring funds. *Id.* The *hawala* transfer system, operating throughout the Middle East, worked very efficiently, and 9/11 terrorists were able to access massive amounts of money through wire transfers or through foreign accounts opened in the United States. See *9/11 Commission Report*, *supra* at 172. The U.S. federal government has certainly become more aware of the desirability of disrupting terrorist financing through the *hawala* system. Castaneda, *supra*, at 11. However, the terrorists continue to finance their goals. More specifically, terrorists earn funds through contraband cigarettes, illicit drugs, counterfeit goods and other illegal schemes. See United States Gen. Acct. Off., *Report to Congressional Requesters: Terrorist Financing*, available at <http://www.gao.gov/new.items/do4163.pdf>. Of all these activities, drug trafficking provides the most money to terrorist groups. Castaneda, *supra*, at 14. The CIA claims that money laundered through the international financial system is a considerable source of untraceable funds that elude financial controls and are used to further illegal activities. Central Intelligence Agency, *National Strategy to Combat Terrorism 8* (2003) (on file with authors). For instance, money is laundered through a perfectly legal financial system, including the use of U.S.-based shell corporations and banks to transfer and circulate the money. See *REPORT TO CONGRESSIONAL REQUESTERS*, *supra*, at 6.

23. American Bar Association, *Independence of the Legal Profession: Gatekeeper Initiative* (2005), available at <http://www.abanet.org/poladv/priorities/gatekeeper.html>.

24. The G-7 (Group of Seven) countries were, before the admission of Russia: the United States, Germany, Japan, England, Italy, France, and Canada. See Previous G-8 Summits in France—Paris 1989, available at http://www.g8.fr/evian/english/navigation/the_g8/previous_g8_summits_in_france/paris_-_1989.html.

25. See Financial Action Task Force, *History of the FATF*, <http://www.fatf-gafi.org> [hereinafter *History of the FATF*]; see also Castaneda, *supra* note 22, at 16; Andrew de Lotbiniere McDougall, *Emerging Dilemmas in International Economic Arbitration: International Arbitration and Money Laundering*, 20 AM. U. INT'L. L. REV. 1021, 1022 (2005) (giving an overview of the Financial Action Task Force and why it was created).

26. See McDougall, *supra* note 25, at 1030.

Special Recommendations on Terrorist Financing, which contain a set of specific measures aimed at fighting the funding of terrorist acts and organizations.²⁷

The first set of the Forty Recommendations proposed changes to the legal systems of the G-7 member countries.²⁸ These changes included the need for each country to criminalize money laundering and extend criminal liability to both legal persons and individuals.²⁹

The second set of the Forty Recommendations focused on changes that should be adopted by financial institutions in member countries. For instance, financial institutions should not keep anonymous accounts or accounts with fictitious names, should undertake due diligence measures to verify at all times the identity of their customers, and should pay special attention to large complex transactions and report any suspected criminal activity to the authorities.³⁰

The third set of the Forty Recommendations suggested that member countries establish a national center for receiving and analyzing suspected transactions, and that they support and develop investigative techniques aimed at breaking up money laundering and terrorist financing.³¹

The last set of the Forty Recommendations promoted international cooperation to combat money laundering. Countries were encouraged to adopt the Vienna Convention, the Palermo Convention, and the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism. They were further urged first, to provide assistance and legal support to other countries in their fight against money laundering, including investigations and prosecutions; second, to recognize money laundering as an extraditable offense; and third, to cooperate with each other in all aspects of prosecution.³²

IV. Disputed Recommendation 13 and the Role of Lawyers—Suspicious Transactions

Where do lawyers fit in all of this? The Gatekeeper Initiative addresses the question of how countries should treat professionals such as lawyers, accountants, and financial advisors in the context of money laundering enforcement. These professionals typically are involved in financial transactions and may be in a position to observe and identify activities that could potentially involve money laundering, terrorist financing, or other illegal conduct.³³ Among the new anti-money laundering measures that lawyers will be exposed to are: increased regulation of their profession; increased supervision of record keeping; stricter due diligence requirements with regard to clients; and the heavily debated STRs requirement.³⁴

27. See generally *History of the FATF*, *supra* note 25.

28. *Id.* at 4

29. *Id.*

30. *Id.* at 7.

31. *Id.* at 17.

32. *Id.* at 19-21.

33. Krauland, Roselle & Mullerat, *supra* note 19, at 516.

34. Nicole M. Healy & Judith A. Lee, *Ad Hoc Task Force on Professional Responsibilities Regarding Money Laundering: PATRIOT Act and Gatekeeper Update*, 37 INT'L L. 631, 636 (2003).

A. ABA TASK FORCE OPPOSITION TO RECOMMENDATION 13

Codified in Recommendation 13, STRs require that lawyers, engaging in a transaction for a client, report to government enforcement agencies any suspicious activity, involving funds that are reasonably suspected to be the proceeds of a criminal act without telling their client they have done so.³⁵

The ABA considered the application of STRs to lawyers and its implications for the attorney-client privilege and provided FATF with comments on the Gatekeeper Legislation and the legal profession, notably opposing Recommendation 13.³⁶ The ABA asserted that it would negatively affect the confidentiality of the attorney-client relationship. In the words of the ABA Task Force, the attorney would turn into a “potential government informant” acting against her client’s interests.³⁷ The ABA Task Force was also concerned about the possible criminal and civil liabilities that could accrue to the attorney if he complied with the reporting obligation.³⁸

Yet, the ABA Task Force admitted that Revised Recommendation 13 implicitly acknowledges the existence of the attorney-client privilege in stating that STRs would not apply if the information at issue is obtained in situations covered by the privilege. However, the extent of this exception is not clear as the rules of each jurisdiction can decide which matters fall into the category of professional secrecy.³⁹

B. PRESENT STATUS OF THE GATEKEEPER INITIATIVE
IN THE UNITED STATES

In light of the concerns discussed above, the United States has not yet adopted the Gatekeeper Initiative. In 2001, representatives from the Departments of Justice and Treasury, the Securities and Exchange Commission, the Financial Crimes Enforcement Network, the U.S. Custom Service, and others met for the purpose of developing U.S. policy on the effect of the Gatekeeper Initiative on the legal profession. More recent reports from these representatives have not discussed the Gatekeeper Initiative, but a provision of Title III of the USA PATRIOT Act promulgates anti-money laundering requirements.⁴⁰

In 2003, the Financial Crimes Enforcement Network requested comments from interested parties on the issue and made clear that any anti-money laundering requirements circulated in the future would not include STRs.⁴¹ The ABA Task Force argued that even if the Gatekeeper Initiative were to include exceptions for privileged communications, such exceptions would not cover the extent of information that the client reveals to his attorney during representation or even when just seeking advice.⁴² U.S. parties seem to find themselves pulled in opposing directions concerning the Gatekeeper Initiative.

35. *History of the FATF*, *supra* note 25, at 12.

36. Healy & Lee, *supra* note 34, at 637.

37. Castaneda, *supra* note 22, at 22.

38. *Id.* at 23.

39. Krauland, Roselle & Mullerat, *supra* note 19, at 3.

40. *Id.* at 5.

41. *Id.*

42. *Id.* at 8.

C. IN EUROPE: EU DIRECTIVES

The original FATF efforts to fight money laundering and terrorist financing have led the EU to enact Gatekeeper Initiative regulations similar to those outlined in the FATF Forty Recommendations.⁴³ These requirements include STRs obligations. Lawyers within the EU would be prohibited from informing their clients of any suspicious reporting filed with the authorities, and there would be criminal and civil penalties to enforce the No-tipping-off Rule.⁴⁴ In late 2001, the EU issued a Directive requiring European governments to require lawyers and notaries to direct any suspicious information related to financial and corporate transactions to national authorities (2001 Directive).⁴⁵ The 2001 Directive's goal was to prevent clients from using the services of professionals—lawyers and notaries—to further criminal activity.⁴⁶

On September 20, 2005, the European Parliament and the Council of the EU formally adopted Directive 2005/60/EC on “the prevention of the use of the financial system for money laundering and terrorist financing purposes” (2005 Directive).⁴⁷ The 2005 Directive was published in the Official Journal of the EU, L309, on November 25, 2005, and was largely the same as the preceding 2001 Directive. However, the 2005 Directive for the first time introduced firm deadlines: member states have two years to adopt and enforce appropriate measures.⁴⁸

D. SPECIFIC EXAMPLES OF EU MEMBER COUNTRY REGULATIONS

EU directives function as a guide for EU member states. Each state must develop and adopt regulations implementing EU directives on specific issues, such as when a lawyer or other professional knows or has reason to know that the purpose for which a client is seeking legal advice or entering into a financial transaction is illegal.⁴⁹

1. Italy

In Italy, EU directives have been implemented by the enactment of Legislative Decree Number 56 on February 20, 2004 (Decree 56/2004), currently in force, and the Ministry of Economy and Finance Regulation, which is not yet in force.⁵⁰ Decree 56/2004 applies to notaries and other independent legal professionals such as lawyers and accountants when they participate in: financial and real estate transactions concerning buying and selling real property or business entities; manage client money, securities, or other assets; open or manage bank, savings, or securities accounts; organize contributions necessary for the creation, operation, or management of companies; and create, operate, or manage trusts,

43. Healy, *supra* note 5, at 743.

44. *Id.* at 737.

45. EUR. PARL. DIRECTIVE PE-CONS 3654/01 (2001).

46. Healy, *supra* note 5, at 743; *see also* Paul Waller and Katrin Roth Von Szepesbela, *Money Laundering and Crime Management: Silence is Golden—Or is it? Fintrac and the Suspicious Transaction Reporting Requirements for Lawyers*, 4 ASPER REV. INT'L BUS. & TRADE L. 85, 97 (2004).

47. IBA Anti-Money Laundering Forum (2006), available at <http://www.anti-moneylaundering.org/countrylistingeurope.asp>.

48. *Id.* at 1.

49. Healy, *supra* note 5, at 745.

50. Marino & Passamonti, *supra* note 8, at 2.

companies, or similar structures.⁵¹ Under Decree 56/2004, legal professionals are also subject to three duties: identification, data collection, and information.⁵²

a. Duty to Identify

The duty to identify requires that lawyers advising clients in Italy verify, through a valid identification or other valid certification, the identity of the client for any transaction with an amount involving more than €12,500. This duty applies to any transaction in which the money involved is suspected to give rise to money laundering or in cases when the sum involved in the transaction is not known.⁵³

b. Duty to Collect

Under the data collection duty, lawyers advising clients in Italy must collect complete personal data of the client, or the person on behalf of whom the client is acting,⁵⁴ and keep records of the services rendered and the value of the services rendered, if known.⁵⁵

c. Duty to Inform

The duty to inform requires that lawyers advising clients in Italy report to the competent authority (the Italian Foreign Exchange Office) any “transaction involving money or assets that are suspected of giving rise to money laundering” before carrying out services.⁵⁶ According to Decree 56/2004, reporting this information does not constitute a breach of the duty of confidentiality, if performed in good faith, does not create any responsibility for the lawyer who reported it,⁵⁷ and tipping off is not permitted.⁵⁸ However, there is no duty to report if the lawyer is retained solely to provide a legal opinion or when information is obtained while defending a client before judicial proceedings.⁵⁹ Italy, it would seem, has fully integrated the Gatekeeper Initiative and yet has still retained guards against breaching attorney-client confidentiality.

2. Germany

In Germany, the EU Directive has been implemented with the enactment of The Money Laundering Act of August 15, 2002, published in the Federal Law Gazette 1 of August 14, 2002.⁶⁰ Lawyers and other professionals to whom this Act applies have the duty to identify and collect personal data of clients from whom they receive €15,000 or more in cash, or from clients who are involved in financial, real estate, or business transactions, and money laundering is suspected, even if the amount is less than €15,000. The lawyers must report this data to the authorities—in this case the Federal Bureau of Criminal Investigation.⁶¹ It is illegal to inform the client that a report has been filed or that a criminal investigation has been initiated.

51. *Id.* at 5.

52. *Id.* at 4.

53. *Id.* at 6.

54. *Id.* at 10.

55. *Id.*

56. *Id.* at 14.

57. *Id.*

58. IBA Anti-Money Laundering Forum, *supra* note 47, at 2.

59. *Id.* at 15.

60. *Id.* at 2.

61. *Id.* at 3.

3. Georgia

While Italy and Germany have both implemented the EU Directives and have promulgated the Gatekeeper regulations, some other European countries have not followed this path. Georgian legal professionals neither have to collect nor verify a client's identity regarding transactions. Also, there are no references in Georgian legislation to lawyers' responsibilities regarding their prosecution for money laundering offences.⁶²

For U.S. lawyers practicing cross-border, in particular representing European clients, compliance with EU Directives implementing the Gatekeeper Initiative could violate U.S. rules governing confidentiality of attorney-client communications. The heart of the matter lies in the disparity between Recommendation 13 and U.S. Model Rule 1.6. The principal question lingers: can anything be done to reconcile the Gatekeeper Initiative and the multi-jurisdictional practice of law? The following figures illustrate the complexity of this question.

Attorney Cathy is licensed in California, Texas, and the United Kingdom. Her clients are an engaged couple, Mario (an Italian citizen) and Suzie, (an American citizen), and Suzie is unaware of the money scheme. In Figure 1, Attorney Cathy travels to London to discuss the sale of property located in California. Mario is buying a house in California for his future wife. In the course of the transaction, Cathy comes to suspect that the money to be used to purchase the house is laundered money. What should Cathy do? In this case, Cathy must disclose the suspicious transaction because under UK law, which implemented the Gatekeeper Initiative in 2003 and included STRs, every person must, in the course of relevant business carried on by him in the United Kingdom, comply with the disclosure

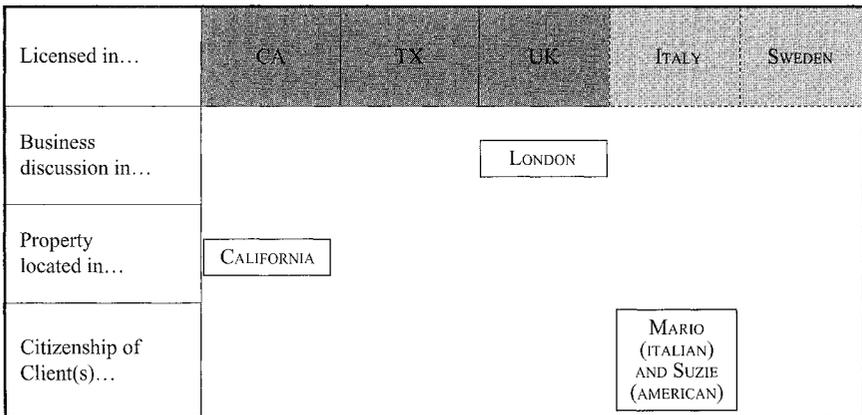


Figure 1. California property discussed in London, England by attorney Cathy with client Mario, who is an Italian citizen, and Suzie, who is an American citizen. Suzie is unaware of the money scheme.

62. See LAW OF GEORGIA ON SUPPORT OF PREVENTION OF LEGISLATION OF ILLEGAL PROCEEDS OF JUNE 2003. *Id.* at 1. Georgia is just one example of many European countries that have not implemented the Gatekeeper Initiative through the 2001 Directive: Greece, Romania, Turkey, and Luxembourg have all foregone these regulations.

Licensed in...	CA	TX	UK	ITALY	SWEDEN
Business discussion in...				ROME	
Property located in...			LONDON		
Citizenship of Client(s)...				MARIO (ITALIAN)	

Figure 2a. London property discussed in Rome, Italy by attorney Cathy *only* with client Mario, an Italian Citizen. Suzie unaware of money scheme.

requirements according to anti-money laundering regulation.⁶³ The regulation applies if two persons form or agree to form a business relationship, in respect of any one-off transaction⁶⁴ or regular business, and if the attorney knows or suspects that the transaction involves money laundering.⁶⁵ Figure 1 demonstrates that under UK law the nationality of the parties involved, the jurisdiction where the attorney is licensed and the location of the property are irrelevant when the business discussion occurs in the UK.

In Figure 2a, Attorney Cathy travels to Rome to discuss the sale of property located in London. If Cathy suspects money laundering, she will not have to report the illegal action unless she was admitted to practice in Italy permanently or on a temporary basis. This is because the Italian anti-money laundering regulation (Decree 56/004) applies only to “Italian notaries and other independent legal professionals . . . when they assist in the planning or execution of transactions for their client, whether executed in Italy or abroad.”⁶⁶

To be admitted to practice in Italy on a temporary basis, foreign attorneys must offer their services “out-of-Court in their own national law or International Public Law.”⁶⁷ In Figure 2a, Cathy discussed with Mario the purchase of property located in the UK, and Cathy is licensed in the UK. Therefore, Cathy is offering Mario services in her own national law and she would be admitted to practice in Italy on a temporary basis. Consequently, Cathy would be subject to disclosure procedures under Decree 56/2004.

The result would be different if Cathy were not licensed in the United Kingdom. In that situation, she would not be offering services in her own national law; therefore, she would not be admitted to practice temporarily in Italy. She would have to follow the rules of professional conduct of her jurisdiction. Under California law, for example, Cathy would not be allowed to disclose the suspected illicit activity because she owes Mario,

63. The Money Laundering Regulation 2003 No. 3075, art. 3.1 (U.K.).

64. See *id.* art. 4.2(a).

65. See *id.* art. 4.2(b)(i).

66. Marino & Passamonti, *supra* note 8, at 6.

67. CCB, Jan. 25, 2005.

Licensed in...	CA	TX	UK	ITALY	SWEDEN
Business discussion in...					LUND
Property located in...			LONDON		
Citizenship of Client(s)...				MARIO (ITALIAN)	

Figure 2b. London property discussed in Lund, Sweden by attorney Cathy with *only* client Mario, an Italian Citizen. Suzie unaware of money scheme.

her client, a strict duty of confidentiality. In Figure 2a, then, the location of the property and the jurisdiction where Cathy is licensed matter, because they will dictate whether Cathy will have to abide by the local rules of professional conduct or the rules of her own jurisdiction.

In Figure 2b, Cathy travels to Lund, Sweden to discuss the purchase of property located in London. In this scenario, if Cathy suspects illicit activity, she will have to abide by Swedish law. Sweden has implemented the Gatekeeper Initiative, and therefore Cathy will have to report any suspicious activity. Swedish law states that “no monopoly for lawyers exists in Sweden; anyone may provide legal advice or appear as counsel in Court.”⁶⁸ The Swedish anti-money laundering regulation is even more inclusive than the Italian regulation: foreign attorneys can do business in Sweden without restraint, but they have to abide by Swedish rules independently from the location of the property or the jurisdiction where they are licensed.

In Figure 3, attorney Cathy travels to Houston, Texas, to discuss the purchase of property located in Rome. If Cathy suspects illegal activity, Texas Rule 1.05 makes disclosure mandatory if the attorney “has reason to believe that disclosure is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.”⁶⁹ Therefore, Cathy has to report Mario’s fraudulent activity under the Texas rule. But because Suzie is unaware of the money laundering scheme, Cathy owes Suzie a duty of confidentiality. She will only have to report Mario’s illicit scheme; Suzie is not involved in it.

In Figure 4, attorney Cathy and her client Mario, an Italian citizen, are in California discussing the purchase of property located in Rome. In this scenario, if Cathy suspects illicit activity, she will have to follow California’s Rule 3-100. She will not have to follow Italian law even if the property is located in Rome, because she is not licensed in Italy nor is she temporarily admitted to practice there. Following California rules, Cathy will not

68. *Id.*

69. See Soller, *supra* note 16, at 8.

Licensed in...	CA	TX	UK	ITALY	SWEDEN
Business discussion in...		HOUSTON			
Property located in...				ROME	
Citizenship of Client(s)...				MARIO (ITALIAN) AND SUZIE (AMERICAN)	

Figure 3. Rome property discussed in Houston, Texas, by attorney Cathy with clients Mario and Suzie. Suzie is unaware of the money scheme.

Licensed in...	CA	TX	UK	ITALY	SWEDEN
Business discussion in...	CALIFORNIA				
Property located in...				ROME	
Citizenship of Client(s)...				MARIO (ITALIAN)	

Figure 4. Rome property discussed in San Diego, California, by attorney Cathy only with client Mario, an Italian Citizen. Suzie unaware of money scheme.

be able to disclose her suspicion to anyone because Rule 3-100 makes no exceptions to the duty of confidentiality and prohibits an attorney from revealing information related to his representation of a client, unless the client gives informed consent.

V. Conclusion

The United States has not yet adopted the Gatekeeper Initiative, but the European Union has. In its Task Force comments the ABA opposed STRs on the grounds that they would violate client-attorney privilege. Revised Model Rule 5.5 on the multi-jurisdictional practice of law allows attorneys to travel outside their jurisdiction to advise on transactions for their clients. However, the ABA did not address confidentiality issues for U.S. attorneys traveling overseas to help clients with their business transactions. The figures also illustrate that in the absence of either uniform rules of ethics and state-by-state exculpatory provisions aimed at addressing the Gatekeeper issue, conducting international legal transactions will require a nimble use and understanding of each Gatekeeper country's legal code.

In this sense, then, the ABA's Task Force comments have created more questions than answers. A proper analysis of the ramifications for an American attorney traveling to Europe—or any other country that has instituted the Gatekeeper Initiative—was not conducted. For instance, in the situation presented in Figure 1, will attorney Cathy be punished in any way in California if she discloses—as she must—suspicious transactions during business discussions in London? What would the punishment or censorship consist of? What would the rationale be?

A second point of contention is Europeans (or other foreigners) conducting transactions in the United States. An Italian lawyer working with an American lawyer in California, for example, would be required to report suspicious activities, while his American associate would be prohibited by confidentiality rules. The possible outcomes to such situations are varied, problematic, and, at this point in time, unresolved.

Perhaps the most interesting challenge that emerges from this issue lies in the lap of the United States. The driving force behind anti-terrorist activities since September 2001, the United States may now find itself in the difficult position of stonewalling STRs through strict adherence to confidentiality rules. This difficult and somewhat ironic situation is not easily remedied, but should nevertheless remain in full focus for the ABA when they revisit this issue.

The Gatekeeper Initiative arose out of sound, ethical aims of the international community to combat money laundering and terrorist financing. Likewise, confidentiality rules are strongly supported out of principled goals. Unfortunately, attorney Cathy remains for now in her continuing quandary.

