

YOUR LAWYER IS NO PRIEST

HERVE DUVAL SC

18th JULY 2018

LAWYERS v/s PRIESTS

- | | |
|---|---|
| <ul style="list-style-type: none">• The Priest• Confidentiality & Trust• The vows• The seal of the confessional• The standard of secrecy | <ul style="list-style-type: none">• The Lawyer• Confidentiality & Trust• The oath• Duty of confidentiality• Duty to the Court.• And now duty towards authorities??? |
|---|---|

YOUR LAWYER IS NO PRIEST

- THE RELEVANCE OF THE MBA
- CASE STUDY
- ROLE OF THE LAWYER IN AML
- LAWYERS AND THEIR CODE OF ETHICS (Barristers)
- NEW OBLIGATIONS ON LAWYERS
- ARE REPORTING OBLIGATIONS THE EFFECTIVE APPROACH?
- IMPACT OF EXTERNAL REGULATOR?
- FITTING LAWYERS IN THE BIGGER PICTURE
- THE INTEGRITY INITIATIVE

THE RELEVANCE OF THE MBA

- Today’s topic is centered on Compliance Risk & Economic Crime.
- How is MBA concerned by today’s theme?
- MBA’s aims and objectives.
 - Advancing the rule of law
 - Interests of profession and members
- Other “regulatory bodies” for lawyers.

CASE STUDY

YOU have an established working relationship with Fidelis Management Company Ltd (“Fidelis”), a management company licenced by the Financial Services Commission (“FSC”). You have provided legal services to Fidelis on many occasions as well as to the global entities administered by Fidelis.

At a social event recently organised by Fidelis you were introduced to a number of foreign investors including the flamboyant Congolese billionaire Ahman Madouffe.

The Managing Director of Fidelis writes to you as follows:

The Managing Director of Fidelis writes to you as follows:
Page 1 of 3

Dear YOU,
I trust this email will find you well.
We are busy looking at a new investment structure for a very good client of ours who is setting up a new fund in the Caymans – See Attached.

Can you free sometime to draw up the usual documents (Constitution, Shareholders Agreement etc) and provide the standard advice as to the regulatory framework?

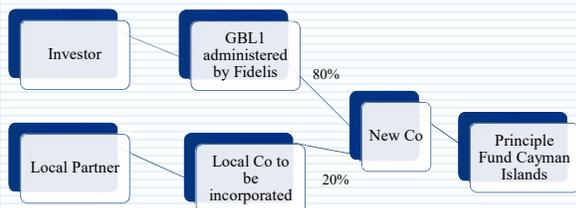
Page 2 of 3

If in the affirmative, I will get organised for payment of the usual retainer + an urgency premium.

Best regards,
Bobby Axelrod
Managing Director
Fidelis Management Company Ltd

Please do not print unless it is necessary. Save a tree!

Page 3 of 3
Attachment 1:
Proposed Schema



Who is the Client?

• Section 17(a) of the FIAMLA

Other measures to combat money laundering

Without prejudice to section 3(2), every ... member of a relevant profession ... shall - verify, in such manner as may be prescribed, the true identity of all customers and other persons with whom they conduct transactions.

• **Guidelines On The Measures For The Prevention Of Money Laundering And Countering The Financing Of Terrorism For Law Practitioners**

Guideline 9 - Factors to take into consideration to determine risk involved with (i) Clients, (ii) the Products/Services they require and (iii) the geographical location of their business.

CASE STUDY continued

You have accepted the assignment. Your account has been credited with RS 172,500- (Your usual retainer X 3 + VAT); It is a bank to bank transaction. The paying account is in the name of Ahman Madouffe.

You also find out that Mr Madouffe's local partner is the infamous Mr Karapat, former Head of a Financial Organisation was asked to step down pending inquiry in an allegation that he had engaged in corrupt practices.

Mr Karapat wants you to draw a "contre lettre" to bear testimony to the fact that Mr Madouffe is the true owner of the shares to be issued in the new local company to be formed and he, Karapat, will only hold these shares in trust and will not be responsible for meeting any call made on those shares.

Who is the Client? 1 of 4

• **Guidelines On The Measures For The Prevention Of Money Laundering And Countering The Financing Of Terrorism For Law Practitioners**

9.1.1.1 Risk of Client base makes a list of type of clients and the level of risk associated with them.

- Individual clients: May be perceived to present a lower risk than legal entities.
- Trusts/ Charities/Limited Liability Companies or structures: Susceptible to be used for concealing the source and control of funds.
- Politically exposed persons (PEPs): They are seen as high risk clients.
- Persons whose assets have been frozen under section 45 of the Dangerous Drugs Act :They are seen as very high risk clients
- Non face to face client: They are seen as high risk clients.
- Clients with an affiliation to countries with high levels of corruption or from which terrorist organizations: They are seen as high risk clients.

The Guideline also lists the types of who clients might be considered high-risk for money laundering e.g: Casinos, Offshore corporations, travel agencies, cash-intensive businesses, etc

Who is the Client? 2 of 4

Guideline 9.1.1.2 Risk of Products/ Services: Some example of services that can be used to conceal the ownership or the source of property:

- Services in relation to complex transactions/ enabling significant volumes of transactions to occur rapidly
- Services allowing customer to engage in transactions with minimal oversight by the institution
- Services allowing levels of anonymity to the users
- Setting up trusts to distribute funds
- Setting up corporate structures, particularly where ownership is not clear
- Other services may be used to aid the movement of illicit funds, such as those involving: (i) payments to or from third parties (ii) payments made in cash or by electronic transfer and (iii) cross-border dimensions; among others.

Who is the Client? 3 of 4

Guideline 9.1.1.3 Geographical location of Client/Business/Products being used

Possible elements to be taken into consideration when assessing the jurisdictional risks:

- (i) lists published by authorities in different jurisdictions e.g. the European Union, the World Bank and the United Nations Security Council Committee
- (ii) whether the country is a member of the FATF or of a FATF-style regional body and has AML requirements equivalent to international best practices
- (iii) overall reputation of the country
- (iv) Political Stability Regime
- (v) High levels of internal drug production or to be in drug transit regions.

Who is the Client? 4 of 4

• **Guideline 12** lists out ML/TF Indicators For Law Practitioners, which include:

- Client comes with a significant amount of cash e.g. a person with no fixed employment comes with MUR 100, 000
- Client purchases property in the name of a nominee such as an associate or a relative (other than a spouse), or on behalf of minors or incapacitated persons or other persons who lack the economic capacity to carry out such purchases
- Client says or admit being involved in criminal acts
- Client is under investigation for an act related to money laundering or the financing of terrorism.
- Client provides suspicious or unclear information.

ROLE OF THE LAWYER IN AML

- Why have lawyers come under the radar?
- Gatekeeper legislations imposing new obligations on lawyers.
- The consequences of the lawyer as a GATEKEEPER?
- Would there be a threat to the independence of lawyers and a democratic society?

LAWYERS AND THEIR CODE OF ETHICS (Barristers)

Barristers are bound by their code of ethics:

2. Purpose and application of the Code:

2.1 Rules of professional conduct are designed to ensure the proper performance by the barrister of a function which is recognised as essential in all civilised societies. Failure to observe these rules will render the barrister liable to disciplinary proceedings.

LAWYERS AND THEIR CODE OF ETHICS (Barristers)

Barristers are bound by their code of ethics:

3.11 A practising barrister shall not –

- (a) permit his absolute independence and freedom from external pressures to be compromised;
- (b) do anything (for example accept a present even from third parties) in such circumstances as may lead to any inference that his independence may be compromised or undermined in any way;
- (c) compromise his professional standards in order to please his client, the Court or a third party.

LAWYERS AND THEIR CODE OF ETHICS (Barristers)

5. Confidentiality

5.1 It is of the essence of a barrister's function that he should be told by his client things which the client would not tell to others, and that he shall be the recipient of other information on a basis of confidence. Without the certainty of confidentiality, there cannot be trust. Confidentiality is, therefore, a primary and fundamental right and duty of the barrister.

5.2 A barrister shall respect the confidentiality of all information given to him by his client, or received by him about his client or others in the course of rendering professional services to his client.

5.3 The obligation of confidentiality shall not be limited in time

NEW OBLIGATIONS ON LAWYERS

- The FIAMLA provisions

14. Reporting obligations of banks, financial institutions, cash dealers and members of relevant professions or occupations

(1) Every bank, financial institution, cash dealer or member of a relevant profession or occupation shall, as soon as practicable, but not later than 15 working days, make a report to the FIU of any transaction which the bank, financial institution, cash dealer or member of the relevant profession or occupation has reason to believe may be a suspicious transaction.

(1A) Where the FIU receives a report under subsection (1), it shall provide feedback in writing on the outcome of the report to the bank, financial institution, cash dealer or member of the relevant profession or occupation and to the relevant supervisory authority.

(2) Nothing in subsection (1) shall be construed as requiring a law practitioner to report any transaction of which he has acquired knowledge in privileged circumstances unless it has been communicated to him with a view to the furtherance of a criminal or fraudulent purpose.

NEW OBLIGATIONS ON LAWYERS

- **Guideline 8 on Tipping off and Legal Professional Privilege**

Law Practitioners are under a duty to keep the affairs of their clients confidential, and the circumstances in which they are able to disclose client communications are strictly limited. However, the Law Practitioners have to make proper decision as to when a report on a suspicious transaction shall be made to the FIU. In doing so, the Law Practitioners may consider whether the information acquired from their clients is covered by a legal professional privilege. You may also seek advice from your AML/CFT Regulatory Body to determine whether you should report a particular transaction to the FIU.

ARE REPORTING OBLIGATIONS THE EFFECTIVE APPROACH?

- What is the current state of compliance?
 - Low to Non compliance
- FATF recommendations – What ought to have been implemented?
- FATF recommendations – Will it work in Mauritius?
- Are external regulatory bodies (e.g FIU) best suited to regulate the legal professionals?

Perception of Mauritius today

« Black money risk alarm could put to test India's ties with close friend Mauritius »

The Economic Times India 07 July 2018

Perception of Mauritius today

« China, UAE, Cyprus and **significantly, Mauritius**, along with 21 other countries **have been tagged as “high-risk jurisdictions”** by global banks acting as custodians for foreign funds which comprise the largest group of investors in the Indian stock market. »

The Economic Times 05 July 2018

Perception of Mauritius today

« Mauritius struggles with tax haven crackdown. OECD says island must not base future on leaching tax revenue from African neighbours. »

The Financial Times 05 October 2017

IMPACT OF EXTERNAL REGULATOR?

- Will we not be giving off the image that lawyers as professionals have lost their bearing?
- What will be the repercussions of regulation/sanctions of legal profession by external bodies?

“The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of the law profession by the state must so far as by human ingenuity it can be so designed be free from state interference (...), with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally.”

Canada (AG) v Law Society (British Columbia) [1982] 2 SCR 307 at 335-336

FITTING LAWYERS IN THE BIGGER PICTURE

- What is the ultimate goal?
 - Attractive platform for investment; Financial hub
- What do we need to establish to reach that goal?
 - Economic innovation + Legal professionalism (efficiency + independence)
- How can lawyers contribute to this goal?

THE STATUS QUO

- MBA: namesake regulatory body.
- Members' admission/Training/Regulations aspect/Sanctioning.
- Effective power lies with the Supreme Court; but Supreme Court is insufficiently equipped to tackle disciplinary issues of profession.

The function of a regulatory body should be:

- Setting the education and training requirements for becoming a barrister;
- Setting continuing training requirements to ensure that barristers' skills are maintained throughout their careers;
- Setting standards of conduct for barristers;
- Authorising organisations that focus on advocacy, litigation, and specialist legal advice;
- Monitoring the service provided by barristers and the organisations we authorise to assure quality;
- Handling complaints against barristers and taking disciplinary or other action where appropriate.

How much does this coincide with the MBA?

POSSIBLE SOLUTIONS

- Can current system be overhauled?
- Should the enforcement laws be amended?

**THE INTEGRITY INITIATIVE –
THE LONGTERM SOLUTION**

- What is the INTEGRITY INITIATIVE?
- How to implement the initiative?
- Why a move towards self/co regulation will bring better outcome?

**THE INTEGRITY INITIATIVE –
THE LONGTERM SOLUTION**

- What is being done abroad?
- Co-disciplining the profession along with financial authorities?
- Allowing lawyers to set the right example.

**THANK YOU
FOR YOUR
ATTENTION!**
