

Using Lawyers to Launder Money A talk with Professor William Simon

I. Lawyers Involved in Money Laundering - Global Witness Report and Panama Papers

A. A Global Witness undercover operation

1. Global Witness is a nonprofit activist organization that works to fight environmental and human rights abuses driven by the exploitation of natural resources and corruption in the global political and economic system.¹
2. Undercover operation – In 2016, an undercover Global Witness investigator approached 13 law firms in New York. He told the lawyers that he was advising an African minister who had accumulated a large sum of money and wanted to bring the money into the U.S.
3. During these preliminary meetings, 12 of the firms suggested various ways to move the funds, including using anonymous companies or trusts to hide the minister's assets, or using their firms' accounts.
4. A number of the lawyers said they would need to have more information before they agreed to take the representation. Most asked for some information about the minister and source of funds. Some indicated they would need to carry out more checks before they could take the investigator on as a client.
5. Only 1 of the lawyers approached flat out refused to represent the client and further entertain the conversation.

B. Panama Papers

1. Starting in 2015, anonymous sources leaked 11.5 million files and 2.6 terabytes of information from Mossack Fonseca, a Panama-based global firm known for asset protection, tax and estate planning. The leak implicated world leaders and their families, celebrities, and business moguls.
 - a. E.g. Iceland Prime Minister Sigmundur Davíð Gunnlaugsson was revealed to have a previously undisclosed connection to a foreign company that had been a creditor of some failed Icelandic banks. Amid calls for his resignation, he resigned in 2016.
 - b. E.g. Prime Minister Nawaz Sharif's children were revealed to own property in London through a shell company. The assets had not been declared. At the time the purchase was made, the children were minors. In 2017, Pakistan's Supreme Court disqualified Sharif from office for not being honest and morally upright.

¹ Global Witness, Mission Statement: <https://www.globalwitness.org/en/about-us/>

2. Though creating the offshore vehicles are not illegal where they were registered, many of those vehicles appeared to have been used for illegal purposes like fraud and tax evasion.
3. In 2017, the firm's founders were detained on money laundering charges and the firm under investigation.

II. Money Laundering Laws Basics

A. What is money laundering

1. Criminal practice of filtering “dirty money,” money obtained through illegal means, through a series of transactions to “clean” the money.
2. Money Laundering Control Act of 1986
 - a. Established money laundering as a federal crime.
 - b. 18 U.S.C § 1956 - Laundering of monetary instruments²
 - i. Criminalizes promotional, concealment, structuring, and tax evasion laundering of the proceeds of generated by illegal activities through certain financial transactions, international transfers, and stings.
 - c. 18 U.S.C. § 1957 – Engaging in monetary transactions in property derived from specified unlawful activity³
 - i. Prohibits monetary transactions of more than \$10,000 of the proceeds from illegal activities.
 - ii. Applies to offenses that take place in the United States or the offender is a “United States person” (as defined in 18 U.S.C. § 3077(2)) which includes U.S. nationals, permanent residents, and U.S. corporations.
3. Tax Code violations
 - a. IRC § 61(a) defines gross income as “... all income from whether source derived.” Courts have held gross income includes funds from criminal activities like drug trafficking, extortion, types of fraud, and others.
 - b. Primary tax code violations for money laundering include tax evasion, filing false returns, and failure to file tax returns.
4. Bank Secrecy Act of 1970
 - a. Established recordkeeping and reporting requirements for private individuals, banks, and other financial institutions.
 - b. Requires banks to: 1) report cash transactions over \$10,000 using the Currency Transaction Report; 2) properly identify persons conducting transactions; and 3) maintain records of the transactions.

² 18 U.S.C § 1956: <https://www.law.cornell.edu/uscode/text/18/1956>

³ 18 U.S.C. § 1957: <https://www.law.cornell.edu/uscode/text/18/1957>

B. Typical stages of money laundering

1. Dirty money is introduced into legitimate financial system: e.g. currency change, change in denomination, cash deposits, etc.
2. The illegal source of the money is disguised through a series of complex financial transactions. May include creating tiered or shadowy entities to complicate the entity structures. May include multiple wire transfers, cash deposits into other accounts, splitting accounts, etc.
3. The clean money is now returned to a state that can be used by the criminal group. May involve turnover or sales of property, creating false deeds or financial statements.

III. Legal Ethics and Good Practices

A. Lawyers' involvement in money laundering

1. Lawyers may become involved in money laundering operations intentionally or unwittingly during the course of representing clients in real estate transactions, asset management, securities accounts management, creating or operating business entities
2. ABA Model Rule 1.2(d) prohibits lawyers from knowingly counseling or assisting a client to commit a crime or fraud.⁴

B. Potential risk factors

1. Disproportionate size in source of funds and income, e.g. client is drawing upon large amount of assets that are disproportionate to the income generating potential of the source of funds. Cash-based businesses are commonly used as fronts for this purpose – to hide the apparent disproportionality.
2. Client holds multiple foreign accounts for no apparent good purpose.
3. Assets purchased with cash that are soon after used as collateral.
4. Client is vague about source of funds or reluctant to disclose information or documents.
5. Use of shell companies or legal trusts for no seemingly good purpose.

C. Client due diligence

1. The lawyer cannot escape liability by avoiding inquiry. Pursuant to the lawyer's duty of competent representation, she may have duty to inquire further.

⁴ ABA Model Rule of Professional Conduct 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer:
https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_2_scope_of_representation_allocation_of_authority_between_client_lawyer.html

2. The appropriate level of due diligence may vary depending on the risk profile of the client, the client's country or geographic area of origin, and the type of legal services involved.
 - a. E.g. heightened due diligence of a political advisor or government official may be justified because of the potential or opportunity for corruption.
 - b. E.g. clients who want the lawyer to accelerate real estate transfers for no apparent reason.
 3. The lawyer should identify the client or the beneficial owner and ensure that due diligence accords with the lawyer's knowledge of the source of funds.
- D. Record keeping
1. Lawyers should keep records of client due diligence measures and business correspondence for a period of time after the end of the client-lawyer relationship, typically 5 to 7 years in many states in the U.S.
 2. The documented due diligence should be sufficient to potentially serve as evidence in a prosecution.
- E. Terminating representation
1. Once representation has commenced, the lawyer may terminate the relationship even if the lawyer does not know for certain that the client is engaged in criminal activity but has reason to believe so.
 2. Rule 1.16(b)(2) provides that a lawyer may withdraw from representation if the "client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent."⁵
- F. Client confidentiality
1. Client confidentiality rules generally forbid the lawyer except in limited circumstances from divulging confidential information without the client's consent.
 2. Model Rule 1.6 requires client's informed consent to information relating to the representation. A lawyer may reveal client information to the extent the lawyer reasonably believes necessary "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantially injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services."⁶
 3. States' rules for permissive voluntary disclosure vary. Many states have a broad exception for disclosure to prevent the client from committing a crime or fraudulent act. A few states have adopted the Model Rule language of

⁵ ABA Model Rule of Professional Conduct 1.16 Declining or Terminating Representation: https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_16_declining_or_terminating_representation.html

⁶ ABA Model Rule of Professional Conduct 1.6 Confidentiality of Information: https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html

voluntary disclosure when the client's criminal act will lead to substantial financial injury to another.