

The conflict between anti-money laundering reporting obligations and the doctrine of confidentiality for legal practitioners in Kenya

Legal practitioners in Kenya

Njaramba E. Gichuki
*School of Law, University of Nairobi, Nairobi,
Kenya and Wanyaga and Njaramba Advocates, Nairobi, Kenya*

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Abstract

Purpose – The purpose of this paper is to assess the balance between anti-money laundering reporting obligations and the doctrine of advocate–client confidentiality for legal practitioners.

Design/methodology/approach – The methodology adopted for this research is secondary research and analysis.

Findings – The doctrine of confidentiality between advocates and clients and reporting obligations under the anti-money laundering regime are relevant issues today more than ever. The equitable doctrine of confidentiality seeks to protect confidential information provided by one party to another in circumstances that import an obligation not to disclose that information or to use it for unauthorised purposes. The Constitution guarantees fair trial. Money laundering is a menace that should be fought from all fronts. Self-regulation is the best bet to address money laundering for legal practitioners.

Originality/value – This paper is the work of the author and has not been submitted for publication elsewhere.

Keywords Money laundering, Reporting obligations, Advocate–client confidentiality

Paper type Research paper

1. Introduction

1.1 Money laundering

Money laundering refers to the introduction of illegally or otherwise illegitimately acquired money into the system with the aim of concealing the illegitimate source thereby sanitising the money. It is the process by which funds derived from criminal activity are made to appear as though they have been legitimately obtained, through a series of transactions aimed at providing a cover for the actual source of the money (Stessens, 2000). In essence, it is the process of making illegally gained proceeds appear as legal (Gichuki, 2013).

The Proceeds of Crime and Anti-Money Laundering Act [1] (POCAMLA) defines money laundering as an offence involving the knowingly or negligently engagement, transaction or otherwise involvement in connection to property that is or forms part of proceeds of crime. This may be with an intention to disguise the nature and/or the source of such property, or to aid culprits in avoidance of prosecution [2]. Money laundering is also defined to include acquisition, possession or use of proceeds of crime [3], as well as financial promotion of an offence [4].

Money laundering is one of the most reported illegal practice around the world (Ali Raweh *et al.*, 2017). Efforts are being made worldwide to enact legislation to control financial systems and regulate all the channels that may be used to conceal illegally obtained money (Ali Raweh *et al.*, 2017).



Consequently, various entities have been made reporting institutions in a bid to tackle the crime. Reporting institutions include financial institutions and Designated Non-Financial Businesses and Professions (DNFBPs) (Gikonyo, 2018). The Act prescribes obligations for Reporting Institutions including putting measures in place to combat money laundering, registering with the Financial Reporting Centre, and submitting specified reports thereof [5]. Lawyers, notaries and other independent legal professionals are currently not covered by the POCAMLA as reporting institutions.

A reporting institution may be in a business sector with or without a regulator. Where a sector is regulated, the Financial Reporting Centre (FRC) works closely with the regulator in ensuring the regulated institutions properly implement their anti-money laundering obligations. In sectors where there is no regulator, the Financial Reporting Centre engages directly with the reporting institutions.

All financial institutions and DNFBPs must have in place internal anti-money laundering systems which cover Customer Due Diligence (CDD) requirements including “Know Your Customer” (KYC) standards and identification of beneficial owners, ongoing monitoring of transactions, record keeping, enhanced due diligence in higher risk situations and reporting of suspicious transactions.

1.2 The doctrine of confidentiality

The equitable doctrine of confidentiality seeks to protect confidential information provided by one party to another in circumstances which import an obligation not to disclose that information or to use it for unauthorised purposes. The rationale underlying the protection of confidential information is that a diverse range of commercial, professional and other relationships require confidentiality in order to function effectively and that the protection of these relationships will serve the public interest (Koomen, 1994). The rationale for the doctrine of confidentiality in law practice can be found in the decision by Jessel M.R. in the Chancery Division in *Anderson v. Bank of British Columbia* [6].

There are circumstances, however, in which courts will refuse to protect information given pursuant to an express or implied duty of confidence on the basis that to do so would be contrary to other public interests. Where the party to whom the duty of confidence is owed is not a government, the circumstances in which information may be disclosed and to whom is the subject of continuing judicial debate and has been so for over a century⁶.

The Doctrine of Confidentiality is one of the oldest doctrines and yet it faces vast controversy (Heather, 1976, p. 685). With the recent developments in technology and law, various individuals are using legal professionals to further money laundering activities which sabotages the fight against money laundering and aids the criminals to be sheltered through the confidentiality doctrine.

This has therefore led to anti-money laundering regulations to be focused on legal professionals. The FATF has made various recommendations that focus on risk approach to clients that could implicate legal professionals (Heather, 1976, p. 18), and Kenya recently made an unsuccessful attempt to pass a Bill [7] that intended to amend the POCAMLA by imposing an obligation of reporting on legal professionals. Were the attempt to be successful, the result would be that legal professionals would become reporting institutions [8]. The Finance Bill, 2019, attracted concerted opposition from legal professionals as it contradicts advocates’ duty of confidentiality towards their clients and various other reasons that arguably undermine the legal profession.

2. Historical background

2.1 *Development of anti-money laundering legislation*

The term money laundering was first used at the beginning of the 20th century to label the operations that in some way intended to legalise the income derived from illicit activity, thus facilitating their entry into the monetary flow of the economy. The practice of disguising income derived from illicit activities dates back to the Middle Ages when usury was declared a crime. Merchants and money lenders evaded the laws that punished usury and covered it up through ingenious mechanisms (Uribe, 2003).

However, the categorisation of money laundering as a crime itself or in connection with the attempt to launder the products of crime, is indeed recent. Traditionally, attention was centred on the crime that gave origin to the money. The seizure of goods, when applied to crimes with economic motivation, was considered a punishment against the underlying crime. Recently, there has been a radical change. The tendency to punish the act of laundering money and establishing this as a crime in and of itself, emerged in the United States in 1986 [9], and has quickly spread throughout the world. It is considered a separate crime because it is an independent complement of the underlying crime, and thus considered a motive for the confiscation of goods [10].

The anti-money laundering initiatives to tackle money laundering then rose to global prominence in 1989, with the establishment of the Financial Action Task Force (FATF). The FATF is an international framework that is the standard for money laundering and it was established in the 1980s with the enactment of the a “Measures Against the Transfer and Safeguarding of Funds of Criminal Origin” that was adopted by the Committee of Ministers and the Council of Europe. Three important landmarks in the work of the FATF are as follows: The Forty Recommendations in 1990, the Revised Forty Recommendations in 2003 and Eight Special Recommendations on Terrorist Financing in 2001 (FATF Website, 2019).

In October 2001, shortly after the 9/11 terrorist attacks in the United States, FATF expanded its mandate to include efforts to combat terrorist financing (Angell and Demetis, 2005). Moreover, various other recommendations on reporting institutions were also published. The KYC and anti-money-laundering (AML) legislation came onto the scene in the early 1990s.

In 2010, focus went to the issue of gatekeepers. In a FATF report, it was concluded that, increasingly, money launderers seek out the advice or services of specialised professionals to help facilitate their financial operations. This trend toward the involvement of various legal and financial experts, or gatekeepers, in money laundering schemes has been documented previously by the FATF and appears to continue today. “Gatekeepers are, essentially, individuals that “protect the gates to the financial system” through which potential users of the system, including launderers, must pass in order to be successful” (Ferguson, 2018).

The most significant cases involve schemes of notable sophistication, which were possible only as a result of the assistance of skilled professionals to set up corporate structures to disguise the source and ownership of the money. In 2010, FATF published its Global Money Laundering and Terrorist Financing Threat Assessment, which described gatekeepers as a “common element” in complex money laundering schemes. The report noted that gatekeepers’ skills are important in creating legal structures that could be used to launder money and for their ability to manage and perform transactions efficiently and to avoid detection (Ferguson, 2018, p. 315).

Recommendation 22 of the FATF now acknowledges the role that such gatekeepers can play by recommending that such individuals engage in due diligence and record keeping when engaged in certain activities. The review of the cases illustrates the variety of ways in

which gatekeepers, in particular lawyers, are used to launder the proceeds of corruption. They have been used to create corporate vehicles, open bank accounts, transfer proceeds, purchase property, courier cash, and take other means to bypass AML controls. In addition, lawyers have subsequently used rules of attorney-client privilege to shield the identity of corrupt politically exposed persons (Ferguson, 2018).

The same was seen in the *Duvalier case* [11] whereby the Haitian government assets were diverted by Jean-Claude Duvalier and also disguised by the use of lawyers as intermediaries, who would hold accounts for the Duvalier family. The use of professional secrecy was used to attempt to prevent an inquiry into the nature of the funds. Similarly, in the *Chiluba case*, the court, in its factual findings, described in great detail the use of certain lawyers and law firms to distribute and disguise money embezzled from the coffers of the Zambian government [12]. In Kenya, no finding has been made against a lawyer, though attempts have been made by investigators to connect some lawyers with corruption suspects.

In 2000, the Central Bank of Kenya issued regulations to combat money laundering in the financial sector in Kenya. These regulations were based on the due diligence policy. The regulations attempted to create transparency in the banks in Kenya. In 2001, Kenya took another step by criminalising money laundering. In 2004, Kenya introduced the Anti-Money Laundering Bill to Parliament, which was passed and assented to in December of 2009. This was the first legislation in Kenya specific on anti-money laundering [13]. POCAMLA was then amended three times. The first amendment was in 2013, followed by 2015 and 2017.

2.2 Development of the doctrine of Advocate-Client confidentiality

Advocate-client confidentiality finds its origins in solicitor-client privilege in Common Law. As originally conceived, what we now call solicitor-client privilege was an evidentiary rule limited to protecting from disclosure any material passing between client, solicitor, and barrister during the conduct of litigation (Prescott and Waldkirch, 2016). Over time, the rule was broadened to include all communications between solicitor and client, in whatever context. By the mid-nineteenth century, there began to emerge a sub-rule of solicitor-client privilege designed to protect from disclosure documents obtained by the litigator in the course of preparing to argue his client's case. In the United States, a similar doctrine emerged in 1947 when it was recognised by the US Supreme Court in *Hickman v. Taylor* [14] as the "work product doctrine".

In some jurisdictions, litigation privilege came to be seen as a branch of the larger solicitor-client privilege, with legal advice privilege as the other branch. Indeed, under English law this remains the case. On the other hand, in the United States the work product doctrine was seen to be separate and distinct from solicitor-client privilege, and indeed was denied the status of a true privilege. In Canada, most courts accepted the English position that litigation privilege was a branch of solicitor-client privilege. However, in some Canadian courts this idea was challenged, with the suggestion that litigation privilege had become a separate and distinct privilege having an entirely different basis and rationale. This view received its pre-eminent statement in the Ontario Court of Appeal's decision in *General Accident Assurance Company v. Chrusz in 1999* [15]. Whether one viewed it as a branch of solicitor-client privilege or unique privilege, litigation privilege was seen as attaching to all documents created for the purpose of litigation, whether reasonably anticipated or ongoing¹⁵. The rationale for litigation privilege rests on an expanded version of the general rationale for legal professional privilege.

Currently, the Doctrine of confidentiality is still encoded in most jurisdictions with various exceptions to the rule. In Kenya, the doctrine of confidentiality is prominent since Kenya adopted the common Law system [16]. With the increase in anti-money laundering

laws, however, the doctrine of confidentiality finds itself challenged as being contrary to the rules of justice. As such many jurisdictions currently give a stricter approach to the doctrine of confidentiality¹⁶.

3. Theoretical framework

3.1 *Transparency-Stability theory*

Regulation is not all about public authority being exerted on private interests and creating a conflict. It is more about protecting the private interests through regulation (Hancher and Moran, 1989). This has therefore encouraged regulation as a means of achieving transparency. As such this theory suggests that banking crisis could be decreased if regulated disclosures were to be practiced (Hancher and Moran, 1989). Regulatory action brings about expansive practices by building upon participants' shared understandings of problems and solutions (Tadesse, 2006). In propagating this theory, Tadesse holds that greater disclosure, and thus greater transparency, facilitates efficient resource allocation by reducing informational asymmetry (Tadesse, 2006).

This theory looks at disclosures such as accounting information as a public good. As such, it makes the notion of banks providing extensive disclosures as reasonable and in line with the public's right of attaining information (Yeandle *et al.*, 2005). Various other scholars have argued that there is now a global acceptance that the struggle against organised crime cannot be won unless some kind of enforcement is put in place. Such enforcement should be found in the contribution of financial institutions extensive disclosure practices (Smellie, 2004). This theory supports the inclusion of advocates as reporting institutions, as it proposes that disclosure is the best way in which financial crimes can be minimised.

3.2 *Theory of "crying wolf"*

Excessive reporting, called "crying wolf", can dilute the information value of reports. Banks already monitor transactions and report suspicious activities to government agencies, which use these reports to identify investigation targets. Banks face fines should they fail to report money laundering. Instructing law firms to do the same and imposing excessive fines on them, forces institutions to report transactions which are less suspicious, thereby diluting information. Excessive reporting fails to identify what is truly important by diluting the information value of reports (Becker, 1968).

Excessive reporting fails to identify what is truly relevant. Increasing the number of reporting agents leads to excessive reporting. In Kenya there are already various financial institutions such as banks that are already supposed to report such activities. By including advocates, it is creating excessive reporting which is more harmful than beneficial (Becker, 1968).

3.3 *The theory of absolute confidentiality*

The theory of absolute confidentiality resolves all conflicts between confidentiality and other values in favour of the lawyer's duty to preserve the client's confidences. The theory is based on the premise that confidentiality cannot be subordinated to other values without undercutting both the constitutional rights of the client and public confidence in the sanctity of the attorney-client relationship (Heather, 1976). Dean Monroe Freedman, a leading advocate of this theory, envisions one exception to the duty of confidentiality: the very life of an innocent third party must not be subordinated (Freedman, 1966).

3.4 *Utilitarianism theory*

Utilitarianism is a normative ethical theory that places the *locus* of right and wrong solely on the outcomes (consequences) of choosing one action/policy over other actions/policies. As such, it moves beyond the scope of one's own interests and takes into account the interests of others (Harsanyi, 1995). More than 150 years ago, Jeremy Bentham attacked the attorney–client privilege as benefiting the guilty. Bentham mocked the traditional justification of the privilege as necessary to foster candid communications between clients and their attorneys. Bentham thought it was a benefit, in other words, for the guilty to withhold information from their attorneys. They would then receive lower quality legal advice and be more likely to be convicted (Fischel, 1998). In the instant discourse, if we are to agree with Bentham, catering for privilege or confidentiality is “wrong” as the advocate knows the truth and yet keeps quiet, making the choice of letting a guilty person go free.

4. Legal framework

4.1 *International instruments*

4.1.1 *International standards on combating money laundering and the financing of terrorism and proliferation (the FATF recommendations 2012)*. The FATF was set up as the global standard setting body for anti-money laundering compliance (FATF Recommendations, 2012-2019). The United Nations has recognised the FATF Recommendations as the universal standard for anti-money laundering compliance. With specific reference to legal professionals, FATF has issued a Guidance Note which advocates for the implementation of a risk-based approach when carrying out due diligence on clients [17].

Under the Guidance Note, legal professionals are expected to put in place appropriate measures to detect and prevent suspicious money laundering/terrorist financing activities arising from the client relationships. Under the FATF Guidance Note, advocates and legal firms are required to apply a risk based approach in the identification methods and the levels of verification that are applied to all relevant clients; the greater the risk, the higher the level of verification, and the more secure the verification measures should be. Identification of the money laundering risks, and terrorist financing risks associated with certain clients or categories of clients, and certain types of work will allow legal professionals to determine and implement reasonable and proportionate measures and controls to mitigate these risks [18].

Advocates are to carry out a risk assessment of their clients based on various risk categories such as country or geographic risk, client risk, and risks associated with the particular service offered. The weight given to these risk categories (individually or in combination) in assessing the overall risk of potential money laundering or terrorist financing may vary from one legal professional and/or firm to another, particularly given the size, sophistication, nature and scope of services offered by the legal professional and/or firm. A significant factor to consider is whether the client and proposed work would be unusual, risky or suspicious for the particular legal professional with a higher standard of controls [19].

4.2 *National framework*

4.2.1 *The proceeds of crime and anti-Money laundering act of 2009 (POCAMLA)*. The Act defines a “reporting institution” as “a financial institution and a designated non-financial business and profession [20].” Moreover, the Act overrides any obligation as to secrecy or other restriction on disclosure of information imposed by any other law or otherwise [21]. The act also highlights on client–advocate relationships and basically asserts that nothing

in the Act shall affect or be deemed to affect the relationship between an advocate and his client with regard to communication of privileged information between the advocate and the client [22].

However, the Act goes ahead to state that this provision will only apply in connection with the giving of advice to the client in the course and for purposes of the professional employment of the advocate or in connection and for the purpose of any legal proceedings on behalf of the client. Despite the foregoing, the Act also states that, the High Court may, on application, order an advocate to disclose information available to him in respect of any transaction or dealing relating to the matter under investigation. In addition, it is asserted that the same shall not require an advocate to comply with an order to the extent that such compliance would be in breach of privileged information [23]. The provisions of Subsections 3 and 4 are both confusing and contradictory to the general principle, but they can be treated as exceptions to the main rule.

The Act also provides for anonymity [24]. It highlights that where any information relating to an offence under the Act is received by the Financial Reporting Centre (FRC) or an authorised officer, the information and the identity of the person giving the information shall be kept confidential [25].

Further, the Act highlights on reporting of suspicious activities where upon suspicion of any of the transactions or activities to be a money laundering scheme, or any other transaction or activity that could constitute or be related to money laundering or to the proceeds of crime, a reporting institution has to report the suspicious or unusual transaction or activity to the FRC [26]. The reporting must be done in the prescribed form immediately and, in any event, within 7 days of the date the transaction or activity that is considered to be suspicious occurred²⁶.

If legal practitioners were to be given reporting obligations, even with POCAMLA highlighting anonymity, the advocate will only be anonymous in theory and not in practice. This is because, a client that confided in an advocate, or a client that is involved in a transaction with an advocate would know exactly who he has given his information to. As such, after being reported, the client would obviously be able to tell that the advocate broke the confidence and reported him. As such the anonymity provision is flawed if it were to apply to legal professionals.

4.2.2 LSK code of standards of professional practice and ethical conduct (SOPPEC) 2016. The LSK Code highlights on confidentiality between advocates and their clients [27]. The advocate has a duty to keep confidential the information received from, and advice given to, the client. Unauthorized disclosure of client confidential information amounts to professional misconduct. The code also highlights on the exceptions to the advocate–client confidentiality where confidential information can be disclosed if the matter being disclosed affects an advocate’s statutory and professional duty to safeguard against the use of the advocate’s client account for money laundering or other unlawful financial transactions [28]. This is an attempt at self-regulation. It follows that an Advocate would be at liberty to disclose in that exceptional case and therefore doesn’t have to be compelled to do so.

4.2.3 LSK guidelines on the application of the proceeds of crime and anti-money laundering act, 2019. In a further attempt at self-regulation, the LSK has come up with guidelines which imposes an obligation upon legal professionals to put in place systems and measures to comply with POCAMLA and safeguard against the use of the client account for money laundering or other illegal transactions. These guidelines are divided into three parts: Part I encompasses the introduction, statutory basis, and the reasons why and how advocates are exposed to risks of Money laundering because of their clients [29], Part II highlights the general provisions for combating money laundering and the financing of terrorism [30]. It

highlights relevant sections on FATF recommendations, relevant sections of POCAMLA Act, 2009, and the POCAMLA regulations, Part III highlights the requirements that must be met by advocates when rendering legal services. These requirements are divided into various categories.

4.2.4 Evidence act. Section 134 of the Evidence Act gives advocates the privilege of not exposing any information to anyone against the clients wishes. The reporting of the activities of a client can lead to breach of privilege. The Evidence Act also gives various exceptions to the general rules of privilege under section 134 (1) when it's a matter of illegal activities in which money laundering is captured which makes the other provisions of the Finance Bill [31] and POCAMLA irrelevant.

4.3 Analysis

Any new reporting requirements on lawyers appear unnecessary and duplicitous because other mechanisms already exist. Further, the duplicity can be captured by the fact that banks and other financial institutions already have the obligation to report activities and have to practise due diligence with the accounts of their clients. The financial institutions already have the obligation to investigate suspicious activities and keep tabs on the accounts of their clients before any transaction is made. As such by subjecting lawyers to investigate the accounts of their clients that are also being investigated by the financial institutions is mere duplicity and complicates the process.

In addition, the legislation would impose burdensome, costly, and unworkable reporting requirements on small businesses and their attorneys and raises serious privacy concerns. Businesses would be required to disclose information and then continuously update that information, with harsh civil and criminal penalties for non-compliance. This would then be costly, impose onerous burdens on legitimate businesses, and would be almost impossible to comply with. Sharing the data with other government agencies and financial institutions also increases the potential for cybersecurity breaches, misuse, and unauthorised disclosure.

Attempting to transfer enforcement obligations from the enforcement agents to Advocates is a clear abdication of responsibility by government agencies that is bound to lead to volumes of reports that would be unnecessary. By making law firms to be a reporting institution the government is enacting laws and putting the burden of enforcement of the laws on the citizens, as it is the law firms and advocates who have to bear the costs that are associated with the reporting of clients. It is unfair for legislation to increasingly transfer the enforcement obligations from the government to private persons. By allowing this, the government is privatising law enforcement and lawyers have to assume the role of policemen.

Finally, the same would lead to a conflict of interest. This is because the reporting of clients leads to conflict between the reporting advocate and the law firm that he works at. An advocate has a fiduciary duty towards his law firm, and as such these provisions lead to a matter of gross conflict of interest. The client would lose faith in the reporting law firm, and justice would be at risk.

5. Comparative study

The FATF is the universal code for anti-money laundering, and as such various jurisdictions have either taken up the recommendation by the FATF for legal practitioners to be reporting institutions, or have strongly advocated against the same. In Malaysia (Hamin *et al.*, 2015) since September 2004 lawyers are bound by Part 4 of the AMLATFA³². All the reporting institutions including legal practitioners in Malaysia have an obligation to report any suspicious transactions (STR), which fall under Section 14 of AMLATFA 2001.

Now it has become mandatory for Malaysian advocates and solicitors to promptly report any suspicious transactions encountered in the course of preparing for, or carrying out, transactions involving them acting as formation agents of legal entities and acting as directors or secretaries of companies. Making law firms reporting institutions has raised uproar and in Malaysia. For instance, it has been reported that firms faced a lot of challenges complying with the laws. It was also found that the compliance by legal firms as part of the designated non-financial businesses and professions (DFNBPs) was rather weak. This was further supported by the Compliance Report in 2011, which showed that out of 4,585 legal firms in West Malaysia, only 1810 firms had responded and complied with the AML/ATF guidelines³³.

Similarly, in the United Kingdom, the legal imposition of the obligation to report suspicious transactions by lawyers commenced in 2002, with the adoption of international instruments into the national law, the Proceeds of Crime Act 2002, which was supplemented by the Money Laundering Regulations 2003 and now replaced by the Money Laundering Regulations 2007. Under POCA 2002 solicitors, accountants, tax advisers and insolvency practitioners who suspect as a consequence of information received in the course of their work that their clients (or others) have engaged in tax evasion or other criminal conduct, from which a benefit has been obtained, are required to report their suspicions to the authorities, since these entail suspicions of money laundering [34].

In addition, in Australia, subject only to a client's legal professional privilege, lawyers will be obliged to report suspicious matters to Australian Transaction Reports and Analysis Centre (AUSTRAC) without being permitted to advise their clients that such a report is made or is even contemplated. AUSTRAC's AML/CFT rule effectively exempts legal practitioners from obligations in relation to designated remittance services provided in the ordinary course of legal practice. In 2009, AUSTRAC made a further rule that exempts legal practitioners from obligations in relation to custodial, depository or deposit box services provided in the ordinary course of legal practice. The Law Council of Australia issued guidelines in 2009, which highlighted that the major issue for the legal profession in complying with the AML/CTF reporting obligations is that the obligations are directly contrary to their attorney-client confidentiality and legal professional privilege ([Law Council of Australia, 2016](#)).

The American Bar Association has opposed a move in the United States that leads to advocates reporting about their clients. The association opposes legislation and regulations that would impose burdensome and intrusive gatekeeper requirements on small businesses or their attorneys or undermine the attorney-client privilege, the confidential attorney-client relationship, or the right to effective counsel. The ABA comments also expressed concerns that such a proposal would impose unreasonable and excessive burdens on many attorneys and law firms could have undermined both the confidential attorney-client relationship and traditional state court regulation of attorneys ([Anti-Money Laundering Forum Website, 2019](#)).

A similar stance has been taken by Japan with regard to the law firms being reporting institutions. The position taken by Japan was that the duty of confidentiality is of utmost importance. As such the laws of Japan do not impose the obligations of reporting institutions on legal practitioners. It is asserted that consultation with lawyers with confidence should be fundamental to the attainment of justice. As such lawyers are excluded from the reporting obligations by Japanese laws ([Revell, 2011](#)).

In Canada, the requirement by lawyers to report has been challenged by the Law Society on the grounds of the curtailing the independence of the bar and erosion of lawyer-client privilege. The Court held that money laundering law violated Section 7 of the Charter of Rights. Section 7 of the Canadian Charter of Rights and Freedoms is a constitutional

provision that protects an individual's autonomy and personal legal rights from actions of the government in Canada. There are three types of protection within the section: the right to life, liberty and security of the person. As such the relevant aspect of the anti-money laundering law undermined the lawyer-client relationship and eroded solicitor-client privilege. In *Federation of Law Society of Canada v Canada Attorney General* [35], the Supreme Court held that the legislation for reporting threatened fundamental Canadian constitutional principles, where lawyers are required to be loyal to their clients to ensure consistent independence of the bar and the integrity of the administration of justice [36].

The same was echoed in Hong Kong when the Law Society of Hong Kong issued Guidelines for legal professionals and the courts upheld that legal professional privilege was a ground for not disclosing suspicious transactions. The Mutual Evaluation Report conducted by the FATF showed that Hong Kong was not compliant with the FATF Recommendation because of the weak and non-existence of regulations with regard to designated non-financial businesses and professions which includes lawyers (Satpal and Leo, 2019). Further, the 2009 AML/CFT legislation in New Zealand exempts law firms from carrying on some of the activities in the ordinary course of their business from the requirements of a "reporting entity" under the Act [37].

6. Conclusion

The subject of advocate-client confidentiality versus disclosure is a controversial one. According to legal professionals, the duty of confidentiality is absolute, and confidentiality is seen as the bedrock principle of legal ethics. The importance of confidentiality in the legal profession is for the encouragement of full and frank communication between attorneys and their clients. However, this explanation has been challenged by many who believe that the encouragement of full and frank communication is not of utmost importance as opposed to disclosure and the truth. The borderline is to rid crimes off society, and it is asserted that confidentiality furthers crimes as it harms the innocent. Jeremy Bentham who advocates for utilitarianism asserted that privilege actually protects the guilty and the society is not benefited by the notion of privilege [38].

It has also been asserted that the only beneficiaries of this duty are the advocates who want to further their profession, and that the larger society would benefit from the wavering of this duty of confidentiality more than maintaining the duty of confidentiality. If advocates are directly prone to being facilitators of such crimes, then there should be a duty imposed on them thereby justifying the attempt to amend the laws. It would be more important for morality (that which is good) to win, rather than protect the profession. Furthermore, various other professions also practice confidentiality, but the duty is wavered in such matters, so what makes the legal profession so special as to maintain their confidentiality? It can be argued that professions such as doctors, priests and therapists all are on the same level, and favouring advocates and maintaining their duties and wavering the duty of confidentiality of the rest is undermining all other professions and maintaining that they are of a lesser value than advocates. This reasoning would promote advocates being reporting institutions (Shavell, 1988).

However, the other side of the coin is the importance of this duty, not for the protection of lawyers but for the protection of clients and the society as a general. That clients benefit from confidentiality seems obvious. Indeed, the benefit to clients from higher quality legal advice facilitated by confidential communications is the stated justification for confidentiality rules. And the benefit is arguably greatest when confidentiality enables a client to prevent relevant but negative information from reaching a decision maker. Society may lose if its laws and regulations are violated, but the private benefit appears to be

indisputable. Moreover, the contractual nature of the attorney-client relationship must be considered. If the higher quality legal advice facilitated by confidentiality was not worth the cost, clients would simply refuse to pay [39].

The Supreme Court has relied on similar reasoning in justifying confidentiality rules. In *Hickman v Taylor*, the Court stressed how any weakening of confidentiality rules would be “demoralizing” to the legal profession. Justice Jackson in his concurring opinion echoed the same theme, stating that the “primary effect” of disclosure “would be on the legal profession itself [40]”.

According to the Supreme Court in *Upjohn Co v United States*, the attorney-client privilege in the corporate context “promotes broader public interests in the observance of law and administration of justice [41]”

In advocating for confidentiality over disclosure, Article 50 of the Constitution of Kenya embodies the principle of natural justice which provides that every accused person has a right to a fair trial. The parties in court have a right under the Kenyan Constitution to a fair hearing before an impartial court, which reaches its decision on the basis of law alone. Furthermore, an individual also has the right to a legal representative and by waiving privilege a client does not get a fair trial. As such the doctrine of confidentiality is also in line with the Kenyan constitution. This therefore contradicts the Finance Bill, 2019, that seeks to make legal professionals reporting institutions.

As such, in an attempt to maintain the public’s trust in lawyers and afford clients their right to representation and a fair trial, it becomes important that we conform to the doctrine of confidentiality and give it a higher value as opposed to disclosure. The same reasoning can also be backed up by the “confidentiality theory” that explains the relevance of confidentiality and the crying wolf theory that explains how over reporting leads to inefficiencies. Since various other financial institutions are already reporting institutions, it does not make sense to strip lawyers of the confidentiality doctrine, for something that is already being done by banks and other financial institutions. The purpose of the same therefore just becomes repetitive and redundant.

After all is said, legal practitioners are clearly a weak link in the fight against money laundering. The application of the doctrine of advocate-client confidentiality continues being a shield for launderers. The best way to deal with the menace, however, is through self-regulation. The Law Society should make it a key part of its disciplinary processes.

Notes

1. No. 9 of 2009.
2. Section 3 of the Proceeds of Crime and Anti-Money Laundering Act.
3. Section 4 of the Proceeds of Crime and Anti-Money Laundering Act.
4. Section 7 of the Proceeds of Crime and Anti-Money Laundering Act.
5. Sections 44-48 of the Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009.
6. (1876) 2 Ch d 644.
7. Finance Bill 2019, Section 50.
8. Section 50, Finance Bill Kenya 2019
9. Money Laundering Control Act of 1986.

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10. Money Laundering Control Act of 1986, Section 21.
 11. Republic of Haiti v. Duvalier, [1990] 1 Q.B. 202.
 12. Attorney General of Zambia v. Meer Care & Desai (A Firm) and Others, [2008] EWCA Civ 754.
 13. POCAMLA, No. 9 of 2009.
 14. U.S. Supreme Court. Hickman v. Taylor, 329 US 495 (1947).
 15. General Accident Assurance Company v. Chrusz (1999), 45 O.R. (3d) 321(C.A.).
 16. Section 134 of the Evidence Act, Chapter 80 of the Laws of Kenya.
 17. [FATF Recommendations \(2012-2019\)](#), Recommendation 1.
 18. [FATF Recommendations \(2012-2019\)](#), Recommendation 22 (d).
 19. [FATF Recommendations \(2012-2019\)](#), Recommendation 23 (a).
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Corresponding author

Njaramba E. Gichuki can be contacted at: njaramba@njarambagichuki.com