CHANCERY BAR ASSOCIATION

MONEY LAUNDERING NOTE PART 2

APPENDIX 1

THE BAR COUNCIL

MONEY LAUNDERING GUIDANCE [January 2008]

Money Laundering

1. Money laundering is the process whereby assets which are the proceeds of crime and the true ownership of those proceeds are changed or disguised so that they appear to come from a legitimate source.

2. There are three recognized phases to money laundering:

> (1) Placement: when cash generated from crime is introduced into the financial system
> (2) Layering: the money passes through a series of transactions, in order to obscure its origins
> (3) Integration: once the origin of the funds has been obscured, they are invested in legitimate funds and assets.

3. Professionals are often targeted by criminals to assist them, whether wittingly or unwittingly, in money laundering schemes. There are several reasons for this:

> (1) Most money laundering schemes will inevitably require the assistance of professionals of one type or another somewhere along the way: for example in the formation of corporate vehicles or trusts (through whose hands the proceeds of crime are then made to flow); or in the purchase of real estate; or in the drawing up of false accounts, to disguise the true nature of money flows or underlying transactions. For this purpose real estate and "real property" should be widely interpreted as including all interests in land and should not be given their technical English Law meaning, which would exclude leasehold property or interests in leaseholds..

(2) Many professionals, including solicitors and accountants, will operate client bank accounts through which the proceeds of crime can potentially be laundered. Monies passing through such client accounts, managed by firms of ostensibly reputable professionals, may appear to have an air of legitimacy and authenticity that they would not otherwise deserve.

(3) Some criminals appear to believe (quite wrongly) that the professional's duties of client confidentiality may throw a cloak of secrecy around illicit transactions, which the state's watchful gaze will be unable to penetrate.

4. Barristers need to be aware of the risk that they may find themselves caught up in money laundering schemes: and understand their legal responsibilities in such circumstances.

The legal framework

5. The background to the UK's anti-money laundering legislation is two-fold:

(1) The 40+9 Recommendations published by the Financial Action Task Force ("FATF"). FATF is an inter-governmental body, created in 1989, whose purpose is the development and promotion of national and international procedures to combat money laundering and terrorist financing. The 40 Recommendations are concerned with anti-money laundering measures; the additional 9 Recommendations are concerned with anti-terrorist finance measures.

(2) The EU Money Laundering Directives. The First Money Laundering Directive was issued by the EU in 1991, and required member states to make money laundering a criminal offence. The Second Money Laundering Directive was issued in 2001. The Third Money Laundering Directive was issued in 2005.

6. The First Money Laundering Directive was incorporated into UK law by: (i) the Criminal Justice Act 1991; (ii) the Drug Trafficking Act 1994; and (iii) the Money Laundering Regulations 2003.

7. The Second Money Laundering Directive was incorporated into UK law by: (i) the Proceeds of Crime Act 2002; and (ii) the Money Laundering Regulations 2003.

8. The Third Money Laundering Directive has been incorporated into UK law by the Money Laundering Regulations 2007 ("the Regulations") which came into force on **15 December 2007**. The Regulations replace and repeal the Money Laundering Regulations 2003.

9. The Proceeds of Crime Act 2002 (as amended) ("POCA") remains in force. The Bar Council has issued new guidance on POCA, which takes into account the important decision of the Court of Appeal in *Bowman v Fels* [2005] EWCA Civ 226, of which barristers should be aware and further amendments to POCA which came into force on **26 December 2007**. You should read the POCA guidance as well as this guidance.

10. This guidance focuses on the responsibilities imposed on barristers pursuant to the new Regulations.

Potential application of the Regulations to barristers

11. Regulation 3(1) of the Regulations provides:

> "…these Regulations apply to the following persons acting in the course of business carried on by them in the United Kingdom ("relevant persons")-
>
> (a) credit institutions;
> (b) financial institutions;
> (c) auditors, insolvency practitioners, external accountants and **tax advisers**;
> (d) **independent legal professionals**;
> (e) trust or company service providers;
> (f) estate agents;
> (g) high value dealers;
> (h) casinos."

Some barristers (and particularly members of the Chancery and Tax Bar) may fall within the category of "tax advisers". to which reference should be made. It is conceivable that some barristers may also be "insolvency practitioners" or "trust or company service providers" as those terms are defined in the Regulation 3(6) and (10) but those activities would not form part of their practices as barristers and this guidance is not intended to cover any work done in any such capacity.

12. Most barristers in independent practice potentially fall within the category of independent legal professionals. However, this category is defined further in Regulation 3(9) as follows:

" 'Independent legal professional' means a firm or sole practitioner who by way of business provides legal or notarial services to other persons, when participating in financial or real property transactions concerning -

> (a) **the buying and selling of real property or business entities**;
> (b) the managing of client money, securities or other assets;
> (c) the opening or management of bank, savings or securities accounts;
> (d) the organisation of contributions necessary for the creation, operation or management of companies; or
> (e) **the creation, operation or management of trusts, companies or similar structures**,

and, for this purpose, a person participates in a transaction by assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction."

13. The European Court of Justice has now confirmed that this list is intended to be exhaustive: see *Ordre des barreaux francophones et germanophone v Conseil des Ministres* Case C-305/05, 26th June 2007.

14. It follows from this that many barristers will NOT find themselves falling within the definition of "relevant persons" for the purpose of the Regulations. In particular:

> (1) Members of the employed bar are not "relevant persons", since they are neither "independent"; nor do they offer their legal services "by way of business".

(2) Since barristers in independent practice are not permitted to undertake the management or conduct of their clients' affairs, or handle client money (see the Bar Council's Code of Conduct, Rules 401(b)(i) and 307(f)), they will not fall within the definition of "independent legal professional" pursuant to Regulation 3(9)(b), (c) or (d).

(3) It follows that it is only barristers in independent practice who "assist in the planning or execution" of the types of transaction listed in Regulation 3(9)(a) and (e) who will be caught: i.e. those barristers who are asked to advise (at the planning or execution stage) in transactions which involve either:

(i) the buying or selling of real property / business entities;
(ii) the creation, operation, or management of trusts, companies or similar structures.

(4) Moreover, given the emphasis in Regulation 3(9) on professionals "assisting in the planning or execution" of these transactions, barristers in independent practice who provide advice to clients AFTER a transaction has taken place, will not be "relevant persons" for the purposes of the Regulations.

(5) In particular, barristers conducting litigation on behalf of clients arising out of the transactions referred to in Regulation 3(9)(a) and (e) will therefore fall outside the ambit of the Regulations. This is expressly confirmed (in the case of customer due diligence) by Regulation 11(2); and also (more generally) by the decision of the European Court of Justice in the *Ordre des barreaux francophones et germanophone* case referred to above.

15. It follows that, in practice, the members of the bar most likely to find themselves falling within the ambit of the Regulations are members of the Chancery bar involved in non-contentious advisory work: and in particular, those barristers in independent practice who are instructed to advise clients at the planning/execution stage of real property / business transactions; or in relation to setting up companies, trusts or similar structures. Whilst many contentious matters will conclude with a negotiated settlement that could arguably be considered to be transaction, the Bar Council considers that having regard to the reasoning of the courts in *Bowman v Fels* and *Ordre des barreaux francophones et germanophone*, advising or otherwise acting in connection with an agreement that is intended to compromise a genuine dispute will not fall within regulation 3(9)

Obligations imposed on barristers falling within the ambit of the Regulations

16. The requirements upon barristers who conduct relevant business are as follows :

- Customer due diligence - Regulations 5 - 9
- Record-keeping procedures - Regulation 19
- Procedures to forestall money laundering and training of staff - Regulations 20 - 21

17. These requirements are considered separately below. Failure to comply with these requirements is a criminal offence, punishable by way of fine or up to two years imprisonment: see Regulation 45.

Customer due diligence - Regulations 5 - 9

18. Pursuant to Regulation 7(1), where a barrister (a) is establishing a business relationship with a new client for the first time; (b) is carrying out a transaction to which the regulations apply and which involves a payment of more than 15,000 Euros by or to the client; (c) suspects money laundering or terrorist finance is taking place; or (d) has doubts about any prior identity checks that have been carried out on a particular client, then the barrister must conduct customer due diligence. Where the barrister suspects money laundering or terrorist financing then the barrister must also consider whether the reporting obligations such as those arising under section 330 POCA 2002 apply. Alternatively, he may wish to make an authorized disclosure in order to obtain the appropriate consent, and so avoid liability for the money laundering offences created by sections 327 and 328 POCA.

19. Customer due diligence checks should be carried out on a risk sensitive basis: see Regulation 7(3). The litmus test as to what is appropriate, is that a barrister will have to be able to demonstrate to the Bar Council that the extent of the measures adopted were commensurate to the perceived risks in any given case.

20. Ordinary customer due diligence involves (see Regulations 5, 8 and 9 for the full detail):

(i) Identifying the client or beneficial owner (if different from the client) prior to the establishment of the business relationship, or the execution of the transaction
(ii) Obtaining information about the business relationship or transaction
(iii) Monitoring the business relationship on an ongoing basis

21. The meaning of "beneficial owner" is set out in Regulation 6, to which close attention should be paid in appropriate cases (namely cases where the client is a company, partnership or trust).

22. Sometimes the barrister need only carry out simplified due diligence, as set out in Regulation 13. This obviates the need for an initial client identity check, and instead simply requires the barrister to monitor the relationship on an on-going basis in the course of the barrister's retainer to guard against the risk of money laundering. Simplified due diligence will apply whenever the client is: (i) a credit or financial institution, itself subject to the money laundering directive or an equivalent regulatory code; (ii) a publicly listed company, listed on an exchange within Europe or one which is similar to similar disclosure requirements; (iii) the beneficial owner of a pooled account held by an independent lawyer subject to similar anti-money laundering requirements; or (iv) a public authority in the UK.

23. Sometimes the barrister will need to carry out enhanced due diligence, as set out in the Regulation 14: and will need to do so particularly in the context of politically exposed persons (as defined under Schedule 2, para 4 of the Regulations); or when the client has not been physically present when identification checks were allegedly carried out (by the barrister or the person he is relying upon).

24. Helpfully, given the Bar's nature as a referral profession, Regulation 17 confirms that a barrister may rely on certain third parties to carry out the relevant customer due diligence checks: always provided that the third party consents to this course of action. For practical purposes, relevant third parties are: (i) instructing solicitors; (ii) external accountants; and

(iii) tax advisers. These third parties have to be based in the UK, EU or a country which imposes similar anti-money laundering measures on these professionals (such as another FATF member state). **It should be noted that, pursuant to Regulation 17(1)(b), the barrister will however remain liable for any failure by the third party to apply the relevant customer due diligence checks. Barristers accepting instructions from overseas solicitors etc need to take steps to satisfy themselves (i) as to what anti money laundering measures operate in the jurisdiction where the solicitor is based and (ii) that those measures are adequate for the purposes of Regulation 17 (i.e they at least comply with the requirements of the Third Money Laundering Directive and that the person on whom reliance is being placed is supervised for compliance in a manner equivalent to the requirements of the Directive.**

25. A suggested form of words has been provided for the purpose of asking instructing solicitors to confirm that they have carried out the relevant customer due diligence checks, and will maintain appropriate records: and is annexed to this guidance at Appendix 1. **It should be noted that unlike the 2003 regulations the Regulations do not contain any exemption in respect of a solicitors' established clients (although solicitors will no doubt take a risk based approach in relation to such clients)**

26. If those instructing the barrister (i) do not fall within the categories of third party referred to above; (ii) are not prepared to consent to the barrister relying on their checks; and/or (iii) are not considered by the barrister to be trustworthy, the barrister should carry out his own customer due diligence checks before starting to act. Suggested methods for carrying out customer identification checks for various types of client can be found at Appendix 2 to this guidance.

Record-keeping Procedures - Regulation 19

27. Pursuant to Regulation 19, a barrister must maintain records for at least five years, relating to both the business relationships and transactions which are the subject of customer due diligence; and, where evidence of client identity has been obtained, either a copy of that evidence, or information as to where a copy of that evidence may be obtained.

Evidence of client identity

28. As regards evidence of client identity, in most cases, as set out above, a barrister will have sought confirmation from his instructing solicitor, using the certificate set out in Appendix 1. In such cases, retention of the certificate by the barrister for the requisite 5 year period should constitute the retention of information as to where a copy of the evidence of identity may be obtained.

29. Where no such confirmation from an instructing solicitor has been obtained, but the barrister has carried out his own independent identity checks, the barrister should retain those records for the relevant period.

Evidence of the business relationship / transaction

30. As regards records of the business relationship and transactions themselves, the certificate set out in Appendix 1 also requires the instructing solicitor to confirm that his or her firm has

adopted a policy designed to achieve compliance with the record-keeping obligations imposed by the Money Laundering Regulations.

31. If a solicitor has given such confirmation, then the barrister can rely on it: and return any papers to his instructing solicitor for the latter to retain for the relevant period.

32. However, where no such confirmation from an instructing solicitor is forthcoming, the barrister must maintain procedures to ensure retention of relevant records: and these should include a copy of the instructions; any written advice provided or notes of any conference held; and a full fee note detailing all work carried out.

Procedures to forestall money laundering, and training staff - Regulations 20 - 21

Procedures to forestall money laundering

33. Regulation 20 provides that:

"A relevant person must establish and maintain appropriate and risk-sensitive policies and procedures relating to -

(a) customer due diligence measures and ongoing monitoring;
(b) reporting;
(c) record-keeping;
(d) internal control;
(e) risk assessment and management;
(f) the monitoring and management of compliance with, and the internal communication of, such policies and procedures,

in order to prevent activities related to money laundering and terrorist finance."

34. Barristers who are relevant persons for the purposes of the Regulations must ensure that they adopt such policies and procedures as part of their personal practices. In particular Chambers staff, including clerks, should be told that if they know or suspect or have reasonable grounds to suspect that a transaction involves money laundering, they must report it to the individual barrister instructed in the case who must then take such action as is appropriate.

35. Where a number of barristers who are relevant persons are working together as part of a team, those barristers should try to reach agreement as to the relevant anti-money laundering policies and procedures that they will adopt in relation to a particular transaction.

36. Regulation 20(2)(d) also requires a "nominated officer" to be appointed within the professional's organisation to receive disclosures under Part 7 of POCA, or Part 3 of the Terrorism Act 2000. However, Regulation 20(2)(d) is expressly disapplied (by Regulation 20(3)) where the professional is an individual who neither employs nor acts in association within any other person.

37. Although barristers (through Chambers) employ clerks, and may work alongside other barristers as part of a team, nonetheless the Bar Council takes the view that barristers do not have an organisation within the terms envisaged by this part of the Regulations: and are

instead individually responsible for their own professional practice. In those circumstances, although the wording of the exemption in Regulation 20(3) is not particularly felicitous when applied in the context of a barristers' set of Chambers, it is not thought to be necessary for barristers within a Chambers to appoint a nominated officer, to whom other barristers must report any money laundering suspicions. Rather each barrister within a set of Chambers should consider for himself or herself whether or not to make any report directly to the state authorities.

Staff training

38. Regulation 21 provides:

"A relevant person must take appropriate measures so that all relevant employees of his are -

> (a) made aware of the law relating to money laundering and terrorist financing; and
> (b) regularly given training in how to recognise and deal with transactions and other activities which may be related to money laundering or terrorist financing."

39. Although, as noted above, barristers in independent practice tend to operate as individuals, nonetheless all barristers employ clerks: and it is therefore recommended that all Chambers' clerks should be trained in the respects outlined in Regulation 21.

40. All barristers and sets of chambers must ensure that they have in place and operate such general systems and procedures for ensuring compliance with the Regulations as may be appropriate to their areas of practice having regard to the likelihood that the barrister or a member of chambers will be instructed to carry out work that falls within the scope of the Regulations. Where no general procedure or system is adopted then barristers must always bear the requirements of the Regulations in mind and give consideration to whether any particular instruction is or may be caught by the Regulations.

Supervision

41. The Bar Standards Board is the relevant supervisory body for the purposes of monitoring barristers' compliance with the Regulations: and will monitor Chambers' and barristers' compliance on a periodic basis, by way of questionnaires and/or audits.

42. The Bar Council expects all barristers to co-operate fully and effectively with it when carrying out such supervisory checks.

Professional Practice Committee
General Council of the Bar
January 2008

Appendix 1

Suggested form of words for inclusion in Counsel's instructions from a UK solicitor or other regulated professional

We [name of firm], being subject to the Money Laundering Regulations 2007, confirm that:-

1. We have established the identity of our client [name] in accordance with Part 2 of the Regulations.

2. With regard to record-keeping and other procedures, it is the policy of this firm to maintain procedures which comply with Regulations 8, 19 and 20 of the Regulations.

3. We consent to your reliance on us to carry out the customer due diligence required under the Regulations

Signed:

Position within firm:

Appendix 2

Individuals

1. For these purposes an individual's identity comprises his/her name, date of birth and current address. Accordingly Counsel should obtain documentary evidence verifying all of these elements. Wherever possible verification should be carried out in a face to face meeting with the client, although it is recognised that this will not always be possible.

2. At a face to face meeting, Counsel should ask to see:

a. A current passport, official national identity card or driving licence with a photograph; and

b. A recent utility bill, council tax bill, bank or building society statement.

3. In all cases original documents should be examined. Counsel must then retain copies of the documents which have been produced to verify identity.

4. In the event that a face to face meeting is not possible prospective clients should not be asked to send original passports, national identity cards or driving licences with photographs through the post. Instead legally certified copies should be requested. Original documents, as set out in paragraph 2(b) above must be provided.

5. It is acknowledged that there may be cases where the prospective client has no official identity document such as a passport. In such cases some flexibility will be required and it is for Counsel to decide on the appropriate method of verification. In such cases one solution would be for an original photograph accompanied by a certificate from a professional such as a lawyer, accountant, doctor or a justice of the peace stating that he/she has known the client

personally for at least 5 years and that the photograph is a true likeness of the person using the name of the client.

6. In cases falling within paragraph 5 above Counsel should keep a full note of the steps taken to verify identity and the reasons why he/she was satisfied as to the client's identity.

Clients acting in a representative capacity

7. Frequently, prospective clients will be acting on behalf of a company, partnership, unincorporated association or a trust. Where the client is effectively representing another person or entity Counsel will have to take additional verification procedures in order to comply with the Regulations.

8. Experience has shown that corporate entities, and in particular offshore companies with nominee directors, are popular vehicles for money laundering. The principal requirement therefore is to look behind the corporate identity to identify those who have control over the company's assets with particular reference to shareholders or others who have injected significant capital or provided financial support.

UK Registered Companies, LLPs etc

9. Counsel should ask for:

(i) A certified copy of Certificate of Incorporation;

(ii) Evidence (such as an appropriate resolution) that the individual has the authority to act on behalf of the company.

10. No further steps need to be taken in cases where the company is quoted on the London Stock Exchange, another UK recognised investment exchange, is a member of a UK recognised investment exchange or a subsidiary of such a company: and simplified due diligence will then apply pursuant to Regulation 13.

11. In the case of a UK private company whose directors are not already known to Counsel the steps in paragraph 9 above should be taken but in addition the identity of sufficient of the directors/company secretary/shareholders should be verified in accordance with the procedures for personal clients in order to satisfy the barrister as to the identity of the persons by or on behalf of whom instructions are given. It may also be necessary to identify the "beneficial owner" of the company to the satisfaction of the barrister. Note, in this regard, the definition of beneficial owner given in Regulation 6(1). It may be necessary to carry out this exercise in relation to several companies or other bodies before the ultimate beneficial owner is sufficiently identified

Non-UK Companies

12. In the case of a company that is:

(i) Quoted on a Recognised, Designated or Approved Investment Exchange in a country with equivalent legislation to the UK; or
(ii) A subsidiary of such a company;

(iii) A member of a UK Recognised Investment Exchange; or
(iv) A private company whose Directors are already known to Counsel;

comparable documents to those required in paragraph 9 above will suffice; and simplified due diligence will then apply pursuant to Regulation 13 in the case of publicly listed companies falling within 12(i) above.

13. Where the company does not fall under paragraph 12 above, in addition to obtaining comparable documents to those listed in paragraphs 9 and 11, Counsel should obtain identification of the beneficial owner, having regard to the definition given in Regulation 6(1).

14. In the case of offshore companies with nominee directors, Counsel should seek to ascertain whether the company forms part of a trust structure. If so, Counsel must obtain details of the structure and for whose ultimate benefit the company is operated. Further, Counsel should take reasonable steps to ascertain that the company exists for a legitimate purpose. In such cases Counsel will need to consider the matters set out under TRUST structures in paragraph 15.

Trusts

15. Trusts, nominee and fiduciary structures are vehicles often used by criminals seeking to avoid identification procedures and to conceal the origin of the money they wish to launder. Particular care needs to be exercised when the structure has bank accounts in offshore localities with strict bank secrecy or confidentiality rules.

16. In cases covered by Regulation 17, (i.e. where Counsel has reasonable grounds to believe that the trustee is an independent legal professional in the UK / EU or a country whose law contains comparable provisions to those contained in the Money Laundering Directive), it is reasonable to accept a written assurance from the trustee, fiduciary or nominee that the beneficiary's identity has been recorded under procedures maintained by them. In such cases a certificate from the entity or person concerned will suffice.

17. In addition, Counsel should also obtain sight of the original trust deed or other document of appointment (or a legally certified copy) and any subsequent deed confirming the appointment of the trustees, fiduciary or nominee

18. An important factor to avoid laundering via trust nominee and fiduciary accounts is information as to the identity of the settlor and/or beneficial owner of the funds, who provided the funds, and of any controller or similar person having power to appoint or remove the trustees or fund managers. Counsel should therefore obtain written confirmation from the trustees/managers of the trusts that they are themselves aware of the true identity of the settlor, controller or similar person. Note the wide definition of beneficial owner given in Regulation 6(3).

19. In cases falling outside Regulation 17, Counsel will need to go further and verify the identity of all the trustees, settlors and named beneficiaries as well as obtaining sight of the documents set out in paragraph 18. Once again, note the wide definition of beneficial owner given in Regulation 6(3).

Unincorporated Businesses/Partnerships

20. Where the prospective client is representing a partnership or unincorporated association, the identity of at least two of the partners, controllers or principals should be verified in line with the requirements for individual clients. Not also the definition of beneficial owner as regards partnerships given in Regulation 6(2).

21. The nature of the partnership or business should be ascertained to ensure that it has a legitimate purpose. If there is a formal partnership arrangement Counsel should obtain sight of the relevant agreement. In addition formal confirmation that the prospective client is authorised to act on behalf of the business will be required.

Clubs and Societies

22. In the case of a prospective client representing a club or society, Counsel should verify the identity of the client and at least one other member of the committee or board running the club or society. Counsel should ascertain the nature of the organisation and be satisfied that it exists for a legitimate purpose by, for example, examining the constitution or the rules. In addition, formal confirmation that the prospective client is authorised to act on behalf of the club or society will be required.

Local Authorities

23. In such a case Counsel will need confirmation that the prospective client is authorised to act on behalf of the authority in addition to establishing the identity of the person concerned. If there is a resolution or direction for legal advice to be taken Counsel should obtain a copy of such a document. Simplified due diligence will then apply.