

# Attorneys-at-Law: Financial Guardians or Police Officers?



Prof. Shazeeda Ali  
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# DEFINING MONEY LAUNDERING?

Money laundering is the process by which money or property that has an illicit origin is made to appear to have a legitimate source by engaging that money or property in a series of financial transactions that are designed to hide its unlawful origin.



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**Money laundering is associated with any crime that generates significant proceeds, including lottery scams, drug trafficking, arms smuggling, human trafficking, extortion, securities fraud, corruption and tax evasion.**



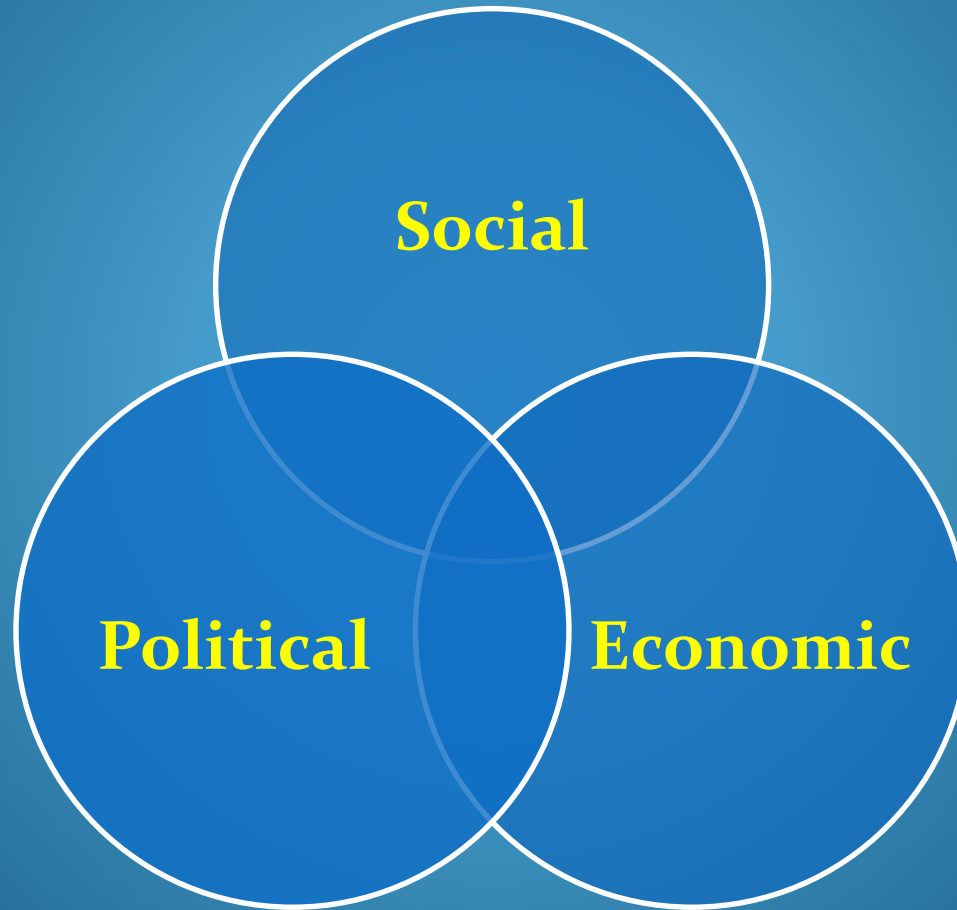
# WHY LAUNDER MONEY?

The purpose of money laundering is to sever the link between the criminal, the crime and the criminally obtained wealth.

It allows criminals to thrive without the risk of being caught so that they can enjoy their ill-gotten gains.

It enables the criminal the means to finance further illicit activity in order to build his criminal enterprise.

# IMPACT OF MONEY LAUNDERING





Imagination

- Money may be laundered by engaging in smuggling, using 'front businesses', dealing in high-value assets as well as employing complex structures such as offshore financial structures.
- Recent trends show that money launderers are also engaging in transactions involving virtual currency and other emerging forms of financial intermediation.

# PATH OF LEAST RESISTANCE

less regulated  
sector

wide range of  
legal services

confidentiality  
obligations

legal  
professional  
privilege



ORIGINAL MOTION PICTURE SOUNDTRACK

ORIGINAL MUSIC BY  
DAVE GRUSIN

TOM CRUISE

STYLING BY JENNIFER WILSON  
THE  
FIRM



**“...without their lawyers,  
the only place the mafia  
can launder their money  
is in a washing  
machine.”**



# TERRORIST FINANCING

Refers to money/property used to fund terrorist organisations/groups or terrorist activities

Unlike money laundering the source of the funds may be lawful, for example, from a charity or a business

What is key is the destination of the money!!!

The methods used to commit terrorist financing are similar to those used in money laundering

Likewise the majority of the devices used to prevent and detect terrorist financing are similar to those used to control money laundering



# VULNERABILITY OF ATTORNEYS

creation and management of trusts

creation and management of companies

use of client accounts

drafting or exercising a power of attorney

creation of legal documentation

purchase or sale of real property





FINANCIAL ACTION TASK FORCE

- International standards require each country to implement certain essential AML/CFT measures:
  1. To identify money laundering/terrorist financing risks
  2. To criminalise money laundering/terrorist financing and recover the proceeds of crime
  3. To implement preventative measures for the regulated sector

# NSP TIER 1 THREAT

National Security Policy identified money laundering amongst the Tier 1 threats that present a clear and present danger to Jamaica. In this regard, it noted that:

**“Lawyers...assist the criminals by protecting them, laundering the proceeds of crime (which lawyers can conceal by claiming ‘client confidentiality’), creating shell corporations, operating offshore bank accounts, establishing front businesses to conceal illegal activity, creating a façade of respectability for these businesses by serving as proxy directors, and investing criminal profits in legitimate enterprises, real estate and other assets and holdings.”**

# CFATF - MER

“...given the large size of the legal profession, this sector (is) considered to be sufficiently important in determining effectiveness, particularly given the ability of lawyers to act as TCSPs, as well as the current injunction against the enforcement of the AML/CFT regime, when considered against their recognition as a Tier threat.”



Anti-money laundering  
and counter-terrorist  
financing measures

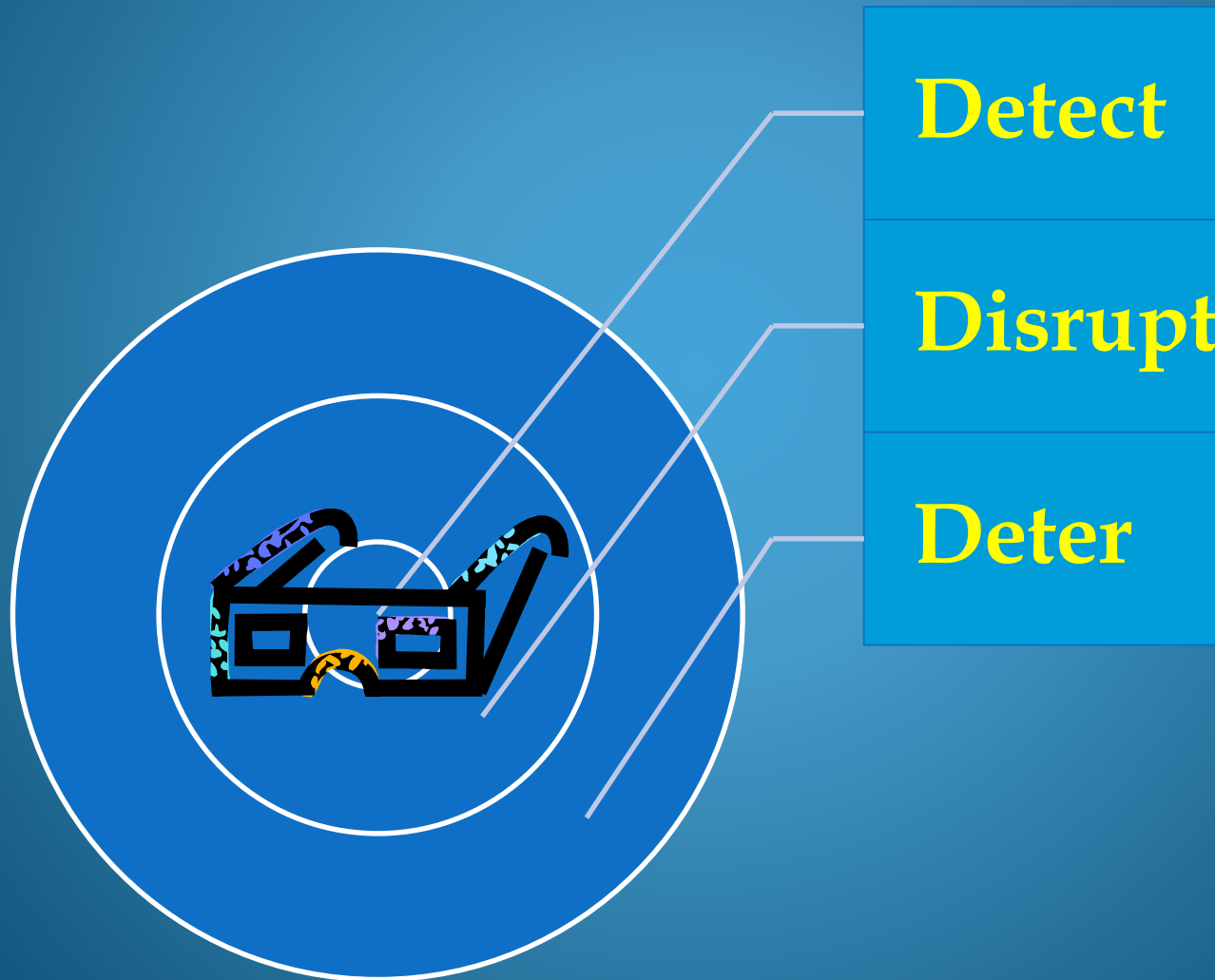
**Jamaica**

Mutual Evaluation Report

January 2017



# “ 3D” GLOBAL AML OBJECTIVES



# AML/CFT Legislation

**Proceeds of Crime Act  
Terrorism Prevention Act (Jamaica)**

**Money Laundering and Terrorism  
(Prevention) Act (Belize)**

**Proceeds of Crime Act and  
Anti-Terrorism Act (St. Kitts & Nevis)**

**Money Laundering (Prevention) Act  
Prevention of Terrorism Act  
(Antigua & Barbuda)**

**Money Laundering and Financing of  
Terrorism (Prevention) Act  
(Barbados)**

**Proceeds of Crime Act and Anti-  
Money Laundering Terrorism  
Financing Regulations (St. Vincent)**

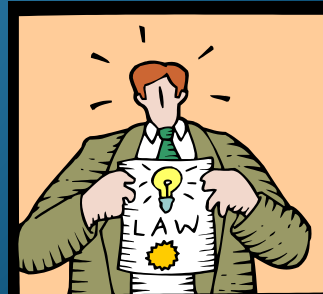
# Key AML/CFT Provisions

**Offence of Money  
Laundering/Terrorist  
Financing**

**Reporting  
Obligations**

**Investigative Tools**

**Asset Recovery**





# Offence of Money Laundering

engaging in a transaction that involves criminal property

concealing, disguising, disposing of or bringing criminal property into the jurisdiction

converting, transferring or removing criminal property from the jurisdiction

acquiring, possessing or using criminal property

entering into an arrangement to facilitate another person's acquisition, retention, use or control of criminal property



# STATUTORY 'DEFENCES'

**Attorney fee:** an attorney-at-law who receives *bona fide* fees for legal representation

***Bona fide* conduct:** acquiring, using or possessing property *bona fide* and without notice that it is criminal property

**Consent:** prior disclosure of suspicions to the authorities and receipt of the appropriate consent to act

**Reasonable Excuse:** subsequent disclosure of suspicions where a reasonable excuse for failing to make prior disclosure exists

**POCA function:** good faith performance of function under POCA

# A CRIME FOR ALL PERSONS

**the offence of  
money laundering  
applies to all  
persons, not just  
persons in the  
regulated or  
financial sector**



# REGULATED SECTOR



## 1. Financial Institutions

licensed banks, building societies, co-operative societies, insurers, reinsurers, insurance agents/brokers, securities dealers, investment advisers, cambios, remittance operators

or any other person so designated by the Minister of National Security

## 2. Designated Non-Financial Institutions (DNFIs)

Attorneys-at-law, accountants, real estate dealers, casino and gaming operators

# FATF RECOMMENDATIONS

An attorney should establish AML policies and practices if he carries out, on behalf of a client, any of the following activities:

- (a) purchasing or selling real estate;
- (b) managing money, securities or other assets;
- (c) managing bank accounts or savings accounts of any kind, or securities accounts;
- (d) organizing contributions for the creation, operation or management of companies;
- (e) creating, operating or managing a legal person or legal arrangement (such as a trust or settlement); or
- (f) purchasing or selling a business entity.

# IMPLEMENTATION OF FATF RECOMMENDATIONS

Throughout the Caribbean these recommendations have been implemented by the AML legislation.

These laws impose a number of obligations on attorneys in relation to (i) proper client identification (ii) record-keeping and (iii) reporting unusual or suspicious activity by clients.

In Jamaica, these recommendations were given legislative effect by an amendment to POCA in 2013. However, to date, litigation by JAMBAR has delayed the successful implementation of these provisions.

## *The Jamaican Bar Association v. The Attorney General and The General Legal Council [2020]*

The Court of Appeal found that there was a need to implement measures to bring attorneys into the regulated sector as there was ample evidence to show this given the international fight against organized crime.

It also found that the legislative objective had a rational connection with the limits imposed by the Charter of Rights but found that it could not override LPP since it was not shown that the obligations were demonstrably justified within a free and democratic society.

# REGULATED SECTOR OBLIGATIONS

**Persons in the regulated sector are required to establish programmes, policies and controls for the purpose of preventing and detecting money laundering including:**

- KYC/CDD measures
- Establishing a risk-profile
- Record-keeping procedures
- Reporting procedures
- Employee integrity and training
- Management oversight



# CUSTOMER DUE DILIGENCE

identify and verify  
client's identity

- identify and verify identity of beneficial owner
- obtain information on nature and purpose of business relationship
- obtain information on client's business

KYC

Establish a risk profile for each client in relation to the level of money laundering risk posed to the firm

**Know Your Client**

# HIGH-RISK CLIENTS

These include specified persons such as: (i) a head of State (ii) a head of Government (iii) a member of any House of Parliament (iv) a Minister of Government (v) a member of the judiciary (vi) a military official above the rank of Captain (vii) a member of the police of or above the rank of Assistant Commissioner (viii) a Permanent Secretary, Chief Technical Director or chief officer in charge of the operations of a Ministry, department of Government, executive agency or statutory body (ix) a director or chief executive of any company in which the Government owns a controlling interest (x) an official of any political party (xi) an individual who holds or has held a senior management position in an international organization and a relative or close associate of any of the above persons

a person who is not ordinarily resident in Jamaica;

a person acting as a trustee for another in relation to the business relationship or one-off transaction concerned

a company having nominee shareholders or shares held in bearer form

a member of such other class or category of persons as the supervisory authority may specify by notice published in the *Gazette*

# ENHANCED DUE DILIGENCE


obtaining senior management approval to commence or continue the business relationship or one-off transaction

verification of the source of funds or wealth held by the applicant for business and all other persons concerned in the business relationship or one-off transaction

enhanced monitoring throughout the course of the business relationship or one-off transaction including obtaining more detailed information

the first payment in the transaction must be carried through an account, in the name of the applicant for business, with a financial institution

**A** ALWAYS  
**S** SEEK  
**K** KNOWLEDGE



# RECORD-KEEPING OBLIGATIONS

**Make and retain for a prescribed time period a record of all:**



**complex, unusual or large business transactions carried out by its clients**



**unusual patterns of transactions which appear to be inconsistent with the normal transactions carried out by that client**

# LISTED COUNTRIES



**Pay special attention to all business relationships and transactions with any clients domiciled or resident in a territory listed by the supervisory authority in the *Gazette***

**The findings are to be kept in writing in accordance with the prescribed procedures and provided on request to the designated authority, the competent authority or the supervisory.**

# REPORTING OBLIGATIONS

Reporting obligations refer to the duties imposed on either the regulated sector or the general public to make certain disclosures.

The 3 main types of reports :

STR – “suspicious” transaction report

TTR – cash threshold transaction report

CBR - cross border reports

The purpose of the reporting obligations is to enable law enforcement to obtain information about possible money laundering activity.

These reports may form the basis of an investigation or support an existing investigation

# CROSS-BORDER REPORTS

**This reporting obligation applies to the general public.**

- It is the duty to report the transportation, either into or out of the jurisdiction, of cash in excess of US\$10 000 or its equivalent.
- For the purpose of this provision, cash includes bearer-negotiable instruments.

**Failure to comply may result in a person being fined and/or being imprisoned, if convicted.**



# THRESHOLD TRANSACTION REPORTS

Under the Proceeds of Crime (Money Laundering Prevention) Regulations 2007 (Ja.), the threshold amount for the reporting of cash transactions is set at:

- Money transfer and remittance agents - US\$5 000
- Cambios and *bureaux de change* - US\$ 8 000
- Banks and other financial institutions - US\$15 000
- (or the equivalent in Jamaican or any other currency)

In this context, cash means coins or paper money only



Once a report is made, the financial institution is precluded from disclosing the existence of the report and must comply with any directions given by the FID

Failure to comply with these provisions may result in the financial institution being subject to a fine of up to \$400 000 if convicted in a Parish Court



# PAY ATTENTION TO TRANSACTIONS

**obligation to pay attention to all complex, large and unusual patterns of transactions to determine if they appear to be inconsistent with the transactions carried out by that client**



# “SUSPICIOUS” TRANSACTION REPORTS

Where a person has the relevant *mens rea* that another person is engaged in a transaction that could constitute money laundering and the information on which that state of mind is based came to him in the course of his business, that person has a duty to make a report of that “suspicion” to the firm’s nominated officer, who must then assess the report, and other available information, and then file a STR with the FID/FIU.



# 'REPORTS TO NOMINATED OFFICER

All persons in the regulated sector must make an internal report to the entity's Nominated Officer where they have knowledge or belief, or where there are reasonable grounds for having knowledge or belief, that another person has engaged in money laundering.

This means that if a transaction or activity does not produce a money laundering concern at the time it is conducted, but reasonable grounds for knowing or believing it does are later aroused, an obligation to file a STR report arises.

# OBLIGATION TO REPORT

The knowledge or belief must have come to the person in the course of business in the regulated sector.

Information that comes to the person in other circumstances does not come within the scope of the regulated sector obligation to make a report.

The report must be made as soon as is reasonably practicable but no later than the prescribed time period after discovery of the transaction giving rise to the money laundering concern.

Failure to do so could result in criminal liability for the person failing to make the report.

# WHAT IS A SUSPICIOUS TRANSACTION?

A transaction which appears unusual is not necessarily suspicious.

A 'suspicious' transaction will often be one which is inconsistent with the customer's known legitimate business or source of funds.

# UNUSUAL OR SUSPICIOUS INDICATORS

An excessively obstructive or secretive client;

**Unusual instructions: that is, instructions that are unusual in themselves, or that are unusual for the firm or the client;**

Instructions that change unexpectedly might be suspicious, especially if there seems to be no logical reason for the changes;

**A client deposits funds into the client account but then ends the relationship for no apparent reason;**

A client states that funds are coming from one source and at the last minute the source changes;

**Complex or unusually large transactions for that client;**

# UNUSUAL OR SUSPICIOUS INDICATORS

Unusual patterns of transactions which have no apparent economic purpose;

Buying and selling property with no discernible reason or in circumstances which appear unusual;

Large cash transactions;

Structuring cash transactions;

If the client is based far away from the firm's offices;

If the client or funds are from a "high risk" category such as a jurisdiction where the production of drugs, drug trafficking, terrorism or corruption is prevalent.

# DEFENCES FOR FAILING TO FILE STR

1. he has a reasonable excuse for not making the disclosure



3. he is an attorney and the information came to him in privileged circumstances

2. he lacked the knowledge or suspicion of money laundering in circumstances where he did not receive the relevant compliance training from his employer



# PRIVILEGED CIRCUMSTANCES

**Privileged circumstances means information communicated:**

- By a client, or a representative of a client, in connection with the giving of legal advice to the client;
- By a client, or by a representative of a client, seeking legal advice from the attorney; or
- By a person in connection with legal proceedings or contemplated legal proceedings



**However,**

1. The client may waive privilege, either implicitly or explicitly
2. The client may 'lose' privilege if the information is communicated or given to the attorney with the intention of furthering a criminal purpose.



# Investigative Tools

**Customer Information orders**

**Disclosure (production/inspection) orders**

**Search orders**

**Monitoring orders**



# SAFE HARBOUR

where a person makes a disclosure or submits a report in accordance with the legislation, that person would be exempt from liability for breach of any obligation of confidentiality that may otherwise occur as a result of the disclosure of such information, including exemption from liability for professional misconduct under the canons/codes of Professional Ethics) Rules



**In Jamaica, where a person carries out an obligation under POCA, in good faith, that person enjoys immunity from any action, suit or other proceeding being brought against him in relation to that act or omission**



# NO TIPPING ALLOWED

## Tipping-Off

- **Unauthorised disclosure of STR that may prejudice consequential investigation or**
- **Disclosure relating to pending or ongoing money laundering investigation**

## Prejudicing Investigation

- **Disclosure of information prejudicial to investigation or**
- **Destruction, concealment or falsification of documents relevant to investigation**

*Shhhh!*

*No Talking!*

# LIMITS ON CASH TRANSACTIONS



**A person shall not engage in a financial transaction involving cash exceeding the prescribed amount (JA\$1 million) unless he is an exempted person or a permitted person or the transaction has been exempted**



**A person shall not structure a cash transaction so that it falls below the prescribed amount where the aggregate would exceed that amount**



**A permitted person includes a bank, a deposit-taking financial institution and a licensed exchange bureau**



**Failure to comply with this prohibition will result in criminal liability**

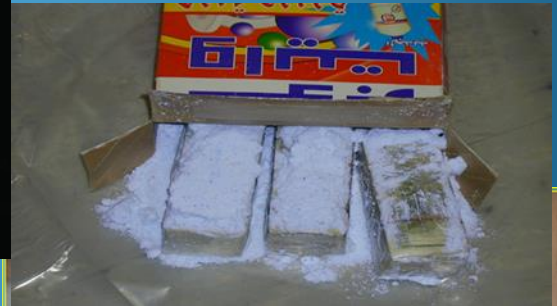


# CASH SEIZURES

- civil recovery of cash intended for use in crime
- civil recovery of cash that is obtained from unlawful conduct
- wide definition of cash includes currency and bearer negotiable instruments



# SMUGGLING CASH



# CIVIL RECOVERY



**Civil suit against any person who holds property obtained from unlawful conduct**



**Order vests the property in the Asset Recovery Agency (ARA)**

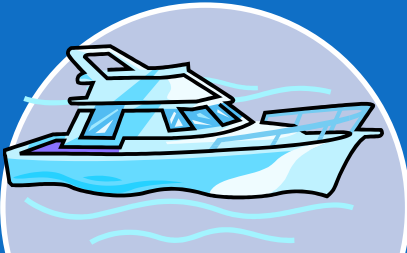


**Victims can seek restitution**





# POST-CONVICTION ASSET RECOVERY ORDERS



forfeiture of property  
used in, or in  
connection with,  
criminal conduct



forfeiture of property  
that represents the  
defendant's benefit  
from criminal conduct



pecuniary penalty  
order requiring the  
defendant to pay an  
amount equal to the  
value of the benefits  
obtained from his  
criminal conduct



# PROPERTY PRESERVATION

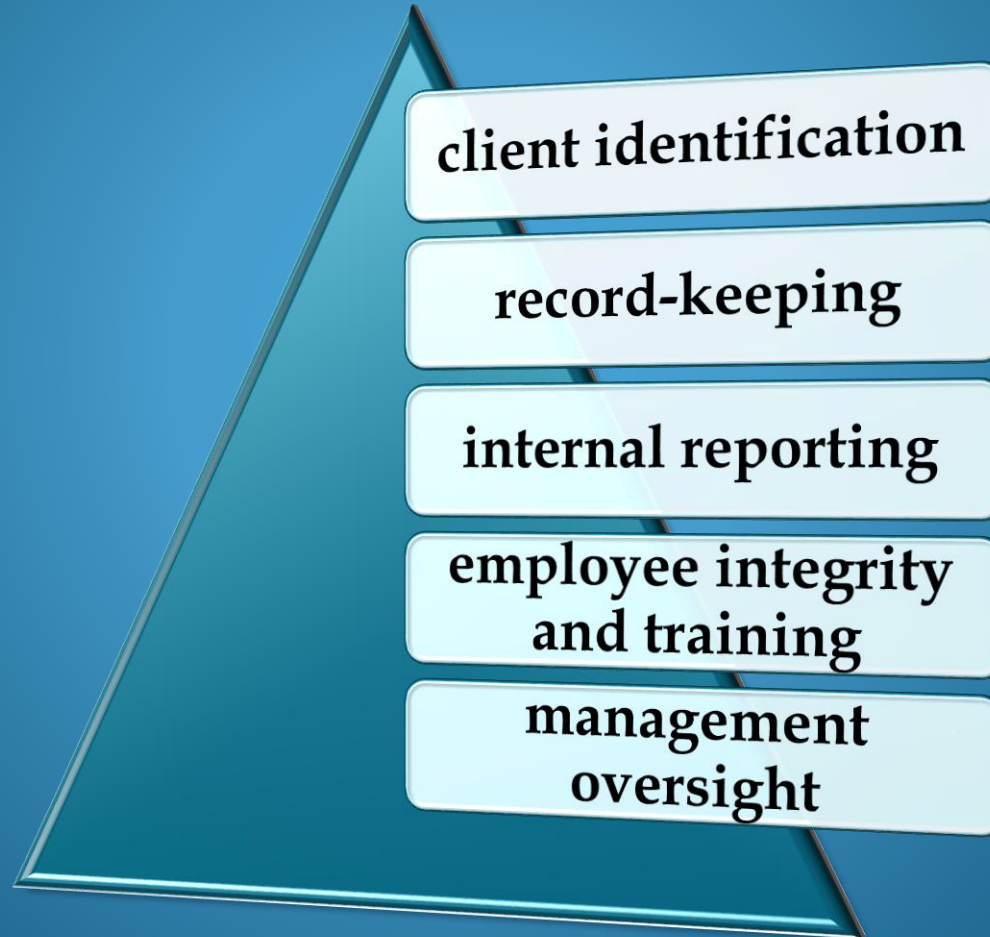
**Restraint  
Orders**

**Seizure of  
Property**

**Appointment of  
a Receiver**



# INTERNAL CONTROLS



# KYE

**Strict screening of new employees**

**Random monitoring of employee activities**

**Rotate personnel within the firm**

**Restrict access of former employees**



# Importance of Training

**Ignorance  
is NOT  
bliss!**

**Important  
for  
attorneys to  
learn:**

**1. How to  
spot dirty  
money**

**2. What to  
do when  
they detect  
a  
suspicious  
client or  
transaction**

**KNOWLEDGE IS  
POWER.**

FRANCIS BACON

INSPIRATIONEVERLASTING.COM

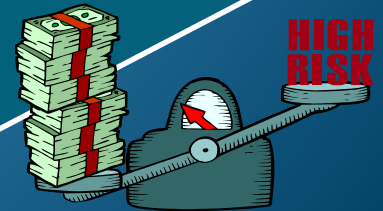
# RISK BASED APPROACH

assessing the most cost effective and proportionate way to manage and mitigate the money laundering risks

identify the money laundering risks that are relevant to the firm

assess the risks presented by the firm's clients, services and delivery channels

decisions on allocation of compliance and audit resources are risk-based



# RISK ASSESSMENT

The firm's risk assessment is comprehensive

Risk assessment is a continuous process based on the best information available from internal and external sources

The firm assesses where risks are greater and concentrates its resources accordingly

This would depend on the firm's size, type of clients and the services it provides.

The firm actively considers the impact of crime on clients

Assess individual client risk

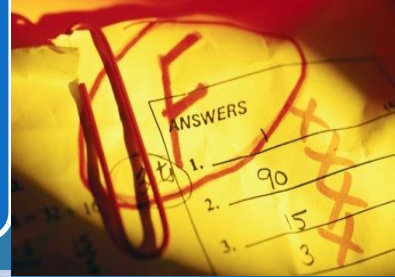
Consider:

- - client demographic
- - services offered



# EXAMPLES OF POOR PRACTICE

little evidence that AML is taken seriously by senior management



AML is seen as a legal or regulatory necessity rather than a matter of true concern for the firm

management concentrates on narrow compliance with minimum regulatory standards and has little engagement with the issues

financial crime issues are dealt with on a purely reactive basis



# COST OF COMPLIANCE



*“An ounce of prevention is worth a pound of cure, particularly in the sphere of AML-compliance ... Yes, it is costly to establish an effective AML-control structure, but non-compliance costs can be much more (costly)...”*



# RISKY BUSINESS

**Criminal  
Penalties**

**Forfeiture of  
Unlawful  
Wealth**

**Retaliation**

**Financial  
Loss**

**Civil  
Liability**

**Reputational  
damage**

**Regulatory  
Action**



# WHO LOSES?

Clients

Employees

The Firm

Legal  
Profession

Jurisdiction



# Tips for Reducing Risks

**be wary of large cash transactions**

**adopt stringent know your client (“KYC”) measures**

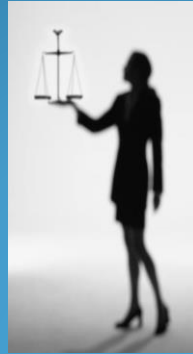
**implement rigorous screening of staff (“KYE”)**

**ensure a high level of professionalism and objectivity**

**when in doubt, report your suspicions to the relevant authorities**



# Attorneys as Custodians of the Threshold



**Duty to protect integrity and  
reputation of the legal profession**

**Obligation to safeguard the  
financial system and the jurisdiction**