Lögmannafélag Íslands
Álftamýri 9
108 Reykjavík

Sími: 568-5620
Bréfsími: 568-7057
Netfang (E-mail): lmfi@tv.is

SÍMBRÉF:
(TELEFAX)

Dagsetning: 18. febrúar 1999

Fjöldi blaðsíðna: 1+5

Móttakandi: **Efnahags- og viðskiptanefnd Alþingis**
b.t. Gunnars Jakobssonar, nefndarritara

Efni: Umsögn LMFÍ.

Með vísun til bréfs efnahags- og viðskiptanefndar Alþingis frá 12. febrúar s.l. sendi ég með símbréfi þessu umsögn Lögmannafélags Íslands um frv. til laga um breytingar á lögum um aðgerðir gegn peningaþvætti.

Með kveðju

Marteinn Másson

Umsögn Lögmannafélags Íslands um frumvarp til laga um breytingar á lögum um aðgerðir gegn peningaþvætti.

Reykjavík, 8. febrúar 1999

Eftirfarandi umsögn Lögmannafélags Íslands er unnin sameiginlega af stjórn og laganefnd félagsins. Niðurstaða umsagnarinnar er sú að þó félagið sé sammála því höfuðmarkmiði að spornað sé af alefli gegn peningaþvætti og annarri glæpastarfsemi, leggst félagið eindregið gegn frumvarpi þessu, eins og það hljóðar nú. Niðurstaðan byggist á því að verði frumvarpið samþykkt óbreytt sé vegið alvarlega að trúnaðarskyldum lögmanna gagnvart skjólstæðingum þeirra, en telja verður hættu á að slíkt dragi verulega úr réttaröryggi þjóðfélagsþegnanna.

Verða hér á eftir færðar fram röksemdir fyrir þessari afstöðu.

I.

Núgildandi lög um aðgerðir gegn peningaþvætti, nr. 80/1993, voru sett í kjölfar aðgerða á alþjóðavettvangi í baráttu gegn peningaþvætti, en í því sambandi var byggt á tillögum hins svokallaða FATF-vinnuhóps á vegum OECD-ríkjanna í 40 liðum um hvernig berjast mætti gegn peningaþvætti með samræmdum aðgerðum á alþjóðavísu.

Lögin gilda í dag um fyrirtæki og stofnanir sem veita almenningi fjármálaþjónustu, sbr. 1. gr. laganna. Þar á meðal eru viðskiptabankar og sparisjóðir, verðbréfafyrirtæki og verðbréfasjóðir, líftryggingafélög og séreignalífeyrissjóðir.

Á vegum FATF-vinnuhópsins hefur undanfarin ár verið unnið að endurskoðun á upphaflegu tilmælunum og settar hafa verið fram tillögur um enn frekari aðgerðir í baráttunni gegn peningaþvætti. Eru þær tillögur byggðar á þeirri reynslu sem þegar hefur fengist. Kjarninn í hinum nýju tillögum er að færa mjög út gildissvið núgildandi reglna og láta þær ná til allra, einstaklinga og lögaðila, sem hafa að atvinnu að veita fjármálaþjónustu, þ.e. þjónustu sem talin er hætta á að verði notuð til peningaþvættis.

Frumvarp það, sem hér liggur fyrir, er samið með hliðsjón af þessum tillögum FATF-vinnuhópsins. Eru önnur OECD-lönd að undirbúa setningu svipaðra reglan, þar sem fylgt er tillögum FATF-vinnuhópsins að einhverju leyti.

II.
Nánar um frumvarpið.

Eins og fram kemur í athugasemdum með frumvarpinu er stefnt að því að lögin nái meðal annars til starfa lögmanna, sem tengjast einhverri þeirri þjónustu, sem talin er upp í 1. gr. frumvarpsins. Mun þar aðallega vera átt við 7., 9. og 11. tölulið 1. mgr., þ.e. viðskipti fyrir eigin reikning eða fyrir viðskiptavini með ýmis konar verðbréf, móttöku fjármuna í tengslum við uppbyggingu höfuðstóls í fyrirtækjum eða í tengslum við kaup, yfirtöku eða samruna atvinnufyrirtækja eða geymslu, umsjón og ávöxtun verðbréfa, þar með talinna rafbréfa.

Samkvæmt 2. gr. verður öllum þeim, sem falla undir lögin, skylt að veita alla nauðsynlega aðstoð til að ákvæðum laganna verði framfylgt.

Samkvæmt 7. gr. ber þeim, sem fellur undir ákvæði 1. gr., að láta athuga gaumgæfilega öll viðskipti sem grunur leikur á að rekja megi til brots sem lýst er í 2. gr. og tilkynna til lögregluyfirvalda um slík viðskipti þar sem slík tengsl eru talin vera fyrir hendi. Viðkomandi á jafnframt að láta í té allar upplýsingar, sem nauðsynlegar eru taldar vegna rannsóknar.

Samkvæmt frumvarpinu verður nýrri grein, sem verður 8. gr., bætt inn í lögin. Samkvæmt henni ber þeim, sem lögin ná til, að tilnefna einhvern einstakling sem sérstakan ábyrgðarmann sem á að sjá um tilkynningar í samræmi við ákvæði 7. gr.

Samkvæmt 9. gr. frumvarpsins verður þeim, sem falla undir lögin, skylt að sjá til þess að viðskiptamaður eða annar utanaðkomandi aðili fái ekki vitneskju um tilkynningu skv. 7. gr. eða að rannsókn sé hafin vegna gruns um brot gegn 2. grein.

Samkvæmt 13. gr. frumvarpsins, sbr. 11. gr. núgildandi laga, telst veiting upplýsinga samkvæmt lögunum ekki fela í sér brot á lögbundinni þagnarskyldu eða annars konar þagnarskyldu.

III.
Afstaða evrópskra lögmannafélaga.

Lögmannafélög víða um heim og alþjóðleg samtök þeirra hafa fylgst náið með undirbúningi að þessu löggjafarstarfi, en á vettvangi lögmannafélaganna hafa menn haft miklar áhyggjur af því í hvaða stöðu lögmenn verða settir gagnvart viðskiptamönnum sínum með hinum nýju reglum og, það sem miklu alvarlegra er, þeirri hættu sem réttarörygginu almennt er búin með því að gera lögmenn skylduga að tilkynna lögregluyfirvöldum um hagi viðskiptamanna þeirra.

Samtök lögmannafélaga á EES-svæðinu (CCBE), sem Lögmannafélag Íslands á aðild að, hafa fylgst lengi með þessu máli á vettvangi Evrópusambandsins. Hefur CCBE í þessu skyni sent frá sér ályktun um þagnarskyldu lögmanna og löggjöf um peningaþvætti (15. nóvember 1997). Þá hefur CCBE sent frá sér ályktun til írsku ríkisstjórnarinnar þar sem lýst er þungum áhyggjum yfir fyrirhugaðri lagasetningu á

Írlandi, en samkvæmt henni hefði írskum lögmönnum verið gert skylt að tilkynna lögregluyfirvöldum um grunsemdir um peningþvætti viðskiptamanna þeirra. Að lokum skal hér sérstaklega nefnt að CCBE sendi Framkvæmdastjórn Evrópusambandsins, þann 21. desember 1998, ítarlega umsögn sína um tillögur Framkvæmdastjórnarinnar að tilskipun um peningaþvætti. Fylgir afstaða CCBE með umsögn þessari.

IV.
Um hlutverk og störf lögmanna.

Nauðsynlegt er hér að greina í stuttu máli frá hlutverki lögmanna í þjóðfélaginu í dag, en skilningur á því hlutverki skiptir afar miklu máli í umfjöllun um þetta frumvarp.

Störfum lögmanna í samfélaginu má lýsa þannig að þeir veiti einstaklingum, fyrirtækjum, félagasamtökum og stofnunum lögfræðilega ráðgjöf og aðstoð, bæði utan og innan réttar. Lögmenn gæta hagsmuna skjólstæðinga sinna og sækja og verja rétt þeirra fyrir stjórnvöldum og dómstólum, í innbyrðis deilum þeirra og deilum við ríkisvaldið.

Hér er rétt að geta þess sérstaklega að hlutverk lögmanns er meðal annars að veita skjólstæðingi sínum upplýsingar um hvort tiltekin háttsemi sé refsiverð og veita honum ráðleggingar um gildandi lög og rétt. Þá er einnig rétt að fram komi að í mörgum tilvikum geta störf lögmanns að einstaka verkefnum verið margþætt og lotið samtímis m.a. að ráðgjöf á sviði kröfuréttar, félagaréttar, skaðabótaréttar og refsiréttar.

Í öllum störfum sínum eru lögmenn bundnir ýmsum grundvallarskyldum, en ein sú veigamesta og mikilvægasta er trúnaðarskyldan, þar með talin þagnarskyldan, gagnvart skjólstæðingum þeirra.

Þau störf lögmanna, sem athyglin beinst hér sérstaklega að eru störf þeirra í opinberum málum, **sakamálum**, sem handhafar ákæruvaldsins höfða gegn þjóðfélagsþegnunum fyrir meinta refsiverða háttsemi. Hlutverk lögmanna í þessum málaflokki er meðal annars að halda uppi vörnum fyrir sakborningana, veita þeim upplýsingar og ráð um réttarstöðu þeirra og sjá til þess að grundvallarreglum um málsmeðferð í sakamálum sé fylgt og að skjólstæðingar þeirra, sakborningarnir, fái réttláta og skjóta málsmeðferð, í samræmi við innlend lög og alþjóðlega mannréttindasáttmála.

Í starfi sínu ber lögmanni að gæta þagmælsku um hvaðeina sem hann kemst að og leynt á að fara. Í sakamálunum er þessi skylda lögmanns sérstaklega mikilvæg og í raun einn af hornsteinunum að því réttarríki, sem við viljum búa við. Sakborningur verður að geta treyst því óhikað að það, sem hann trúir réttargæslumanni sínum eða verjanda fyrir, verði ekki uppljóstrað við fulltrúa ákæruvaldsins eða við einhvern, sem kemur þeim upplýsingum til ákæruvaldsins. Þagnarskyldan nær ekki einungis til starfa lögmanns eftir að leitað hefur verið til hans eftir að rannsókn í sakamáli er hafin eða ákært hefur verið. Lögmanni kann að hafa verið trúað fyrir ýmsum upplýsingum, athöfnum og athafnaleysi á fyrri stigum, oft í því augnamiði að fá ráðgjöf um hvort um löglegar athafnir sé að ræða eða ekki. Alls ekkert má draga úr eða veikja þetta trúnaðarsamband lögmanns og skjólstæðings hans.

V.
Athugasemdir LMFÍ.

Lögmannafélag Íslands gerir nokkrar athugasemdir við frumvarpið í heild sinni.

Eins og áður greinir er eða getur þjónusta lögmanna verið margþætt. Í einu og sama verkefninu getur verið veitt ráðgjöf og lögfræðileg aðstoð á sviði fjármunaréttar, félagaréttar o.fl. auk þess sem viðskiptavini er ráðlagt um skaðabóta- og/eða refsiábyrgð. Þá safnast margvíslegar upplýsingar og gögn saman hjá lögmönnum um stöðu og hagi skjólstæðinga þeirra þegar um föst viðskiptasambönd er að ræða, oft um margra ára skeið. Vegna þess trúnaðarsambands, sem ríkir milli lögmanns og skjólstæðings hans, kann skjólstæðingurinn að trúa lögmanninum fyrir ýmsu, sem hugsanlega varðar hann bóta- eða refsiábyrgð, í því skyni að fá ráð um hvaða athafnir eða athafnaleysi eru lögum samkvæmt eða refsiverð.

Ef frumvarpið verður að lögum leiðir það til þess að lögmönnum verður skylt að tilkynna til lögregluyfirvalda ef þeir, í störfum sem falla undir skilgreiningu 1. gr., verða varir við meint peningaþvætti eða fá grunsemdir um slíkt brot. Jafnframt verður þeim gert skylt að veita alla nauðsynlega aðstoð til að ákvæðum laganna verði framfylgt. Þá bæri þeim að stofna til sérstakra tengsla við lögregluyfirvöld í landinu með tilnefningu sérstaks ábyrgðarmanns skv. 8. grein.

LMFÍ telur tillögur þessar, verði þær að lögum, skapa hættu á því að réttaröryggissjónarmið verði fyrir borð borin. Þó svo þau störf eða verkefni, sem talin eru upp í 7., 9. og 11. tölulið 1. gr., teljist ekki meðal hefðbundinna eða algengra lögmannsstarfa, skapar tilkynningarskylda til lögregluyfirvalda skv. 7. gr. og samstarfsskylda skv. öðrum ákvæðum laganna vegna þessara starfa hættu á að traust manna á trúnaðarskyldum lögmanna almennt minnki verulega. Ef skjólstæðingurinn getur ekki treyst fullkomlega á þagnarskyldu lögmannsins, veikir það réttarstöðu skjólstæðingsins og kemur í veg fyrir að hann leiti ráða fyrirfram um hvort athafnir hans séu innan laga eða utan. **Það er alveg ljóst að áhrif laganna að þessu leyti takmarkast ekki við þann ramma sem settur er í 1. gr. Um leið og dregið er úr trúnaðartrausti á einu sviði hefur það sams konar áhrif á öðrum sviðum.**

Með hliðsjón af því hlutverki sem lögmannastéttin gegnir í þjóðfélaginu í dag, samkvæmt réttarfarslöggjöf landsins, innlendum og alþjóðlegum siðareglum lögmanna og alþjóðlegum mannréttindasáttmálum, og með hliðsjón af þeim breytingum, sem ráðgerðar eru í frumvarpinu, er veruleg hætta á að menn missi trú á að þeir fái réttláta málsmeðferð í réttarkerfi landsins, geti þeir ekki treyst á þagnarskyldu lögmanna sinna og trúnaðarsambandið við þá.

VI.
Samstarf um breytingar á frumvarpinu.

Lögmannafélag Íslands lýsir því yfir að það sé fúst til samstarfs um breytingar á frumvarpinu, þannig að gætt sé ýtrustu réttaröryggissjónarmiða. Bendir félagið í því

sambandi á þau sjónarmið og hugmyndir, sem fram koma í áðurnefndum yfirlýsingum samtökum evrópskra lögmannafélaga. Jafnframt tekur félagið fram að siðareglur þess sæta nú endurskoðun og verður í þeirri vinnu meðal annars tekið tillit til stefnu CCBE í þessum málum.

VII.
Niðurstaða.

Með vísun til þeirra sjónarmiða, sem hér hafa verið rakin, telur LMFÍ frumvarpið, eins og það er nú, geta valdið miklum skaða fyrir réttaröryggið í landinu. Félagið leggst því eindregið gegn samþykkt frumvarpsins eins og það er nú.

Virðingarfyllst
f.h. Lögmannafélags Íslands

Marteinn Másson, framkv.stj.

Fylgiskjöl:

a) Ályktun CCBE um þagnarskyldu lögmanna og löggjöf um peningaþvætti.
b) Umsögn CCBE um tillögur Framkvæmdastjórnar ES að tilskipun um peningaþvætti.
c) Siðareglur CCBE.
d) Leiðari Jakobs R. Möller, hrl., formanns LMFÍ, í Lögmannablaðinu, 3. tbl. 1998.

Adopted at the plenary session of 14 and 15 November 1997

CCBE POLICY STATEMENT
CONCERNING PROFESSIONAL SECRECY OF LAWYERS AND LEGISLATION ON MONEY LAUNDERING

---

1. Introduction

Lately, the European countries have in conjunction with many other countries made a great effort in fighting criminal activities related to money laundering. While the CCBE has a great respect for the important aims of that effort, amongst other things leading to much legislation, CCBE is at the same time anxious of some of the consequences.

The legislation represents yet another threat to the protection of the professional secrecy of lawyers, obliging them or proposing to oblige them to report suspicious activities related to money laundering. CCBE sees that as a typical example we have seen several of in later years where the reference to important aims of our societies has been used to reduce the scope of the fundamental professional secrecy of lawyers.

This is the background for the issue of this policy statement of CCBE.

2. General

2.1 The principle of professional secrecy

CCBE would like to emphasise the fact that the professional secrecy of lawyers is not first and foremost a privilege for the lawyer or the client. It is a necessity for the functioning of a free and democratic society.

A citizen, an organisation or a company in such society must be sure that what is confided in the lawyer by his client remains a secret by the lawyer. Otherwise the client cannot trust the lawyer and will often refrain from taking professional advice when it is most needed. The client must be able to discuss freely with his lawyer whether a certain activity is legal or not. The free and trustful discussion prevents each

day a lot of illegal activities. Many of those activities might have been committed had the client not dared to take the lawyer's advice because he could not trust the total professional secrecy as a consequence of the lawyer's duty to report what he heard.

A free democratic society can be measured in how far it protects this important feature of such society. The right to have a lawyer defending your interest and only having your interests in mind, is one of the fundamental human rights of such a society.

It is therefore of fundamental importance that the lawyer's professional secrecy is protected, not only as concerns lawyers acting as defenders in criminal cases, but in all activities of a lawyer in and out of courts.

The modern society does not have a reduced need for such protection of the professional secrecy. On the contrary, in the modern society where the citizens are controlled and followed electronically in a way unheard of a few years ago, the lawyer's office is among the few remaining sanctities. The protection of this sanctity is more important than ever. The countries face here a choice of the type of society wanted in Europe of today and in the future. It is a political choice of maintaining and supporting one of the best features of the European social and democratic way of life.

2.2 *The infringements of the principle*

For a long time the professional secrecy had a general application where only the lawyer in his own conscience decided when to break the secrecy. The general rule was that it could be broken only when necessary to avoid a serious crime directly endangering a person's life.

For a number of years now, however, legislation in different European countries has infringed or tried to infringe upon the protection of this secrecy. Each time it has been done with reference to crimes that everyone agrees should be fought, like incest, serious tax frauds and money laundering. While not at all in opposition to need of promoting such good causes, CCBE is growing more and more anxious concerning the consequences of the legislation on the lawyer's professional secrecy. A person, an organisation or a company being uncertain about the legality, legitimity and other parts of such activities, cannot ask the lawyer's advice for fear of having the information divulged to the police or other authorities. This may very often occur at the moment where advice is most needed and quite often prevent crimes from being

committed. These consequences of the legislation are regrettable and may lead to a destruction of the protection of the professional secrecy.

CCBE would emphasize that the organisation does not in any way want a protection of the criminal activities of any lawyer behind the shield of professional secrecy. All lawyers are under oath not to enter into any criminal activities. They act under stricter codes of ethics than other professions, codes which are enacted through a tough disciplinary system. CCBE has therefore nothing against actions against lawyers suspected themselves of partaking in criminal activities, provided, however, that the legislation does not make ordinary advice given by the lawyer a criminal activity.

What the CCBE does feel, however, is that there is a lack of understanding of the consequences of the piecemeal legislation framed with good intentions on the professional secrecy of lawyers.

3. The internal rules of the lawyers

CCBE does not see any real danger in weakening the fight against money laundering or other criminal activities by upholding the widest possible protection of the lawyer's professional secrecy.

As pointed out above, the lawyers act under their code of conduct which is stricter than any other profession's. It is a standard part of such codes that the lawyer should avoid criminal activities and avoiding in any way aiding such activities.

A consequence of this it is any lawyer's right and obligation to withdraw from a case when he seriously suspects that the transactions of the case would lead to a money laundering operation. One must distinguish between where the lawyer participates in a suspicious legal operation, from which he must withdraw and abstain, and the situation where the lawyer do not participate in such an operation, but is defending individuals charged with being guilty of money laundering. In the latter situation it is his duty to ensure and maintain the defence of the accused while respecting strictly his ethical rules.

The problems concerning money laundering have led to a new rule being proposed in the revision of the CCBE Code of Conduct. The new rule obliges the lawyer to identify his client or for whom his immediate client is working.

4. Practical devices

The protection of the professional secrecy of the lawyer must also extend to his files. The lawyers are in need of a minimum procedure of protection when required by the police or other authorities to afford access to the lawyers' files.

There should be no possibility for even requiring access unless the suspicion is described in precise and - above all - specific terms. No "fishing expedition" should be allowed in any manner, however indirectly.

If the files are required on such basis, it is of paramount importance that a neutral person is present to be the judge of whether any document required is protected by professional secrecy. Such person may in certain legal systems preferably be a judge except the judge being in charge of the criminal investigation. In other legal systems the neutral person may be a local bar leader, his deputy or an independent lawyer.

The present legislative state shows that there are great variations between the European countries concerning how this situation should be tackled. A common European legislation on such general basis would be of great help.

5. Recommendation

CCBE aims to work for a harmonized attitude amongst its member organisations. It therefore recommends that national lawyer's organizations of the CCBE member States to include, if not already included, in their codes of conduct the following obligations :

1) In whichever case submitted to a lawyer, he or she should check the identity of the client or the intermediary of the client for which the lawyer is acting;
2) To prohibit, when lawyers are asked to handle funds, for any lawyer to receive or handle any fund that do not strictly correspond to a file known by name.
3) For lawyers participating in a legal transaction to withdraw if they seriously suspect that the planned operation will result in money laundering and the client is not prepared to abstain from this operation.

CCBE also aims at including these provisions in its own Code of Conduct for transnational legal business.

6. Conclusion

The CCBE emphasizes that the protection of the lawyer's professional secrecy is of fundamental importance in a free and democratic society. It is also a principle of EU law; indeed the confidentiality requires that every person subject to trial must be entitled to talk freely (cfr. AMES decision of 18.05.1982).

This professional secrecy is under threat by legislation that is based on worthy purposes but overlooks the bad consequences for the professional secrecy and the functioning of a free and democratic society.

There is therefore a clear need for a far more careful analysis and focus on this aspect of the legislation. For this reason the lawyers' profession should not have to be submitted to the provisions of Directive 91/308/CEE of the Council of 10.6.1991, in particular article 12 of this directive.

The CCBE warns the legislators against sweeping legislative actions against money laundering. Such legislative actions often prove counter productive to the goals they try to achieve.

Finally the CCBE emphasizes strongly the importance of a common European legislation protecting the professional secrecy in an appropriate way commensurate to its social importance.

CCBE

RESPONSE OF CCBE TO THE EUROPEAN COMMISSION REGARDING PROPOSED DIRECTIVE ON MONEY LAUNDERING

1. INTRODUCTION

1.1 The following paper is in response to an invitation to the CCBE from the European Commission regarding the proposals of the European Commission to introduce a new Directive whereby the obligations contained in Directive 91/308/EEC ("the Directive") will be extended to the legal professions. At the time of the preparation of this paper, the text of a draft new directive has not been furnished to the CCBE. It is difficult therefore, for the CCBE to comment in the absence of a draft directive. Thus the contents of this paper are provisional only pending sight of the draft text of the proposed new directive.

1.2 It will be further noted that at its Plenary Session of 14th and 15th November, 1997, the CCBE issued a Policy Statement concerning professional secrecy of lawyers and legislation on money laundering. A copy of this Policy Statement is attached hereto. The Plenary Session held on 27th/28th November, 1998, adopted the three recommendations contained at paragraph 5 of the CCBE Policy Statement and the CCBE Code of Conduct has been amended accordingly. Consequently, the member Bars and Law Societies of the CCBE are obliged to incorporate these anti-money laundering provisions into their respective Codes of Conduct.

1.3 Independently of these measures, the CCBE has set itself the task of fighting against money laundering, organised crime and bribery, which is why it has undertaken the proactive step of developing a "CCBE programme for

participation in the fight against organised crime, money laundering and bribery". The decision was taken to start such a programme at a meeting of the Standing Committee in Brussels on 16th October 1998, with the objective of defining what action Bars, Law Societies and lawyers themselves, should take to join the fight against the above mentioned scourges.

This ad hoc Committee intends to work in close collaboration with the Commission, so as to consider all practical measures which should be taken by lawyers, involving dealing with funds.

1.4 At its Plenary Session held in Lyon on 27th/28th November, 1998, the proposal of the European Commission to extend the Directive to the legal professions was fully discussed. In consequence a task force comprising John Fish (Ireland), Bernard Vatier (France), Henrik Rothe (Denmark) and Peter Baauw (the Netherlands) was appointed to examine the relevant issues and to put forward proposals on behalf of the CCBE which, whilst recognising the need of the legal professions to play their part in the combat against money laundering, would not infringe the principles of lawyer/client confidentiality which is a fundamental right of clients common to all the legal professions in the European Union.

1.5 For the purposes of this paper, it has been assumed that, having regard to the provisions of the Second Commission Report to the European Parliament and the Council on the implementation of the Directive (the "Second Report"), the obligations contained in the Directive:-

- to inform the appropriate authorities responsible for combatting money laundering on their own initiative of any fact which might be an indication of money laundering; and

- to identify clients and the use of relevant materials as evidence in any

investigation into money laundering,

will be extended to the legal profession.

Accordingly, this paper addresses the issues which are likely to concern the Bars and Law Societies if such provisions are indeed extended to the legal professions.

2. REPORTING SUSPICIOUS TRANSACTIONS

2.1 Article 6 of the Directive imposes an obligation on Member States to ensure that the persons to whom the Directive applies, shall cooperate fully with the authorities by reporting suspicious transactions and by furnishing all necessary information requested by such authorities.

2.2 The extension of these obligations to members of the legal profession will give rise to serious concerns on the part of the Bars and Law Societies on essentially three grounds of principle, namely:-

- client's rights to professional secrecy
- clients' rights to access to justice and rights against self-incrimination
- the confidential role of lawyers in the prevention of crime

2.3 Clients' Rights to Professional Secrecy

2.3.1 It would appear from the meeting held between Commission representatives and the CCBE on the 29th October, 1998 that the Commission recognises that the right of clients to the protection of professional secrecy could never be infringed where a lawyer is acting

on behalf of a person charged with a criminal offence. The CCBE wishes to make it clear that the right of clients to professional secrecy is an absolute right and for the reasons described in this paper, should not be limited only to a case where the lawyer is acting on behalf of a person charged with a criminal offence..

The CCBE agrees with the statement made by a number of delegations in the Second Report (Section 111, paragraph 4) that it is impossible:-

> "... to make any distinction between the different services which members of the legal professions might provide to their clients and pointed out that in their countries these (and other) professions' obligation of discretion and client confidentiality was absolute; certain Member States also insisted that they would wish to fully explore the possibilities offered by self-regulation before contemplating making these professions subject to the anti-money laundering legislation".

2.3.2 Whilst the position of the CCBE in relation to professional secrecy is clearly set out in the Policy Statement referred to at 1.3 above, nevertheless, the CCBE would wish to re-emphasise that in its fundamental view, it is not in the interests of the administration of justice that lawyers, whose duty it is to act in the best interest of their clients, should be placed in the position whereby they would be compelled under penalty of prosecution, to act as informers on their clients without the knowledge or consent of their clients. The CCBE can do no more than quote from Case 155/79 AM&S where the European Court of Justice spoke in the following terms regarding lawyer/client relationship:-

"That confidentiality serves the requirements, the importance of which is recognised in all Member States, that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of an independent legal advice to all those in need of it".

2.3.3 The CCBE also wishes to draw the Commission's attention to the United Nations document entitled 'Basic Principles on the Role of Lawyers (1990)' adopted at the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders in August/September, 1990 and, in particular to the following principles referred to therein:-

"15. Lawyers shall always loyally respect the interests of their clients"; and

"22. Governments shall recognise and respect that all communications between lawyers and their clients within their professional relationship are confidential".

2.3.4 It is highly unlikely therefore that a limitation on the clients' rights to professional secrecy as referred to at paragraph 2.3.1 would be acceptable to the Bars and Law Societies having regard to the fundamental principles referred to above and the principles of professional secrecy described in the CCBE Policy Statement.

2.4 Clients' right of access to justice and rights against self-incrimination

2.4.1 Apart from any issues concerning clients' rights to professional secrecy, the CCBE would be concerned that if, during the course of taking instructions from a client, a lawyer became aware that a client might

have committed a money laundering offence which required the lawyer to inform the appropriate authorities without the consent of the client, that this could effectively result in the client unwittingly incriminating himself. The mere fact that, by consulting a lawyer, potential clients became aware that matters disclosed within the sanctity of the lawyer's office could be reported to the appropriate authorities, would inevitably result in clients being fearful of taking legal advice, thus denying the right of such clients to legal advice in the first instance.

2.4.2 The Commission will be aware that the interlocking principles of access to a lawyer and the privilege against self-incrimination have been reinforced by judgments of the European Court of Human Rights. The CCBE does not see how it would be possible to reconcile a mandatory reporting scheme by lawyers, as envisaged by the Directive, with Member States' obligations under the European Convention of Human Rights.

If, for example, a lawyer was obliged to disclose to the appropriate authorities records which the lawyer had maintained following a disclosure in confidence by a client, there would be little left of either the privilege of self-incrimination or the right of access to a lawyer. A key feature of the latter right is that any person is entitled to disclose his circumstances in confidence to a lawyer so that he may be properly advised of his legal rights.

2.5 The Confidential Role of Lawyers in the Prevention of Crime

The CCBE considers that the lawyer performs an important and significant role in the administration of justice by ensuring that clients who seek their advice and assistance, will not engage in an activity which would otherwise constitute a criminal offence. This can only be achieved where information is made fully

available by the client to the lawyer in the strictest confidence, thus enabling the lawyer as a member of an independent and self-regulated profession to provide advice which cannot be obtained from any other source.

3. IDENTIFICATION OF CLIENTS AND USE OF RELEVANT MATERIALS

3.1 Articles 3 and 4 of the Directive impose obligations on Member States to ensure that the persons to whom the Directive applies shall take appropriate steps to identify their customers and to keep materials for use as evidence in any investigation into money laundering. As previously stated, the Bars and Law Societies are obliged to incorporate certain anti-money laundering provisions into their Respective Codes of Conduct including the recommendation that lawyers should check the identities of clients or the intermediaries of clients. It may be anticipated however, that member Bars and Law Societies would have a difficulty in accepting that any such information in the lawyer's possession (including materials) could be used as evidence in the course of an investigation for the reasons spelt out in Section 2 of this paper.

3.2 No person could properly or fairly exercise the right to disclose all his circumstances in confidence to a lawyer if his legal adviser was obliged to turn over information or records to the appropriate authorities in respect of a mere suspicion of an offence.

3.3 The problem would be particularly acute if, based on the present provisions in the Directive, lawyers having supplied information to the authorities, found that they were as a consequence compelled to give evidence against their clients during the course of subsequent proceedings brought against their clients.

3.4 Furthermore, if a lawyer is obliged to report suspicious transactions to the authorities under the threat of prosecution, then there is a significant risk that,

in order to protect himself, the lawyer may feel compelled to report transactions which are perfectly legitimate thus jeopardising the innocent client.

4. DEFINITION OF MONEY LAUNDERING

4.1 It is noted from the Commission's announcement of 13th July, 1998 that in addition to a proposal to extend the Directive's obligations to activities and professions outside the financial services sector, the Commission has also proposed that the definition of "suspicious transactions" should be extended to cover the proceeds of other serious crimes besides drug trafficking.

4.2 Although Article 1 of the Directive defines "criminal activity" as a crime specified in Article 3(1)(a) of the Vienna Convention, and any other criminal activity designated as such for the purpose of the Directive by each Member State, the CCBE believes, that in the interest of clarity, and in order to avoid Member States exercising powers whereby the requirements of the Directive might be extended to criminal activities not generally associated with the concept of money laundering, that such criminal activities should be clearly defined.

4.3 In this context it is noted that in the Commission statement referred to above, that it is intended to extend the Directive to the proceeds of all offences connected with serious crime other than drug trafficking. In order to obtain a balance between the powers necessarily required by the authorities to combat money laundering activities, and the civil liberties of citizens, the CCBE believes that having regard to principles of proportionality, such powers should only be exercised where the specific nature of such serious crimes are clearly defined.

4.4 There is a danger that Member States may be tempted to apply the powers envisaged by the Directive to much lesser crimes than those which relate to the proceeds of drug trafficking or organised crime. On the basis that the original

purpose of the Directive is to prevent criminal money from entering the financial system, care should be taken to ensure that the exercise of such powers which are appropriate only in exceptional circumstances, should not extend to crimes relating to monies which are already legitimately within the financial system. Examples of the latter would include tax related offences, breaches of corporate related laws and other similar offences. Insofar as the exercise of such powers have a significant effect on the civil liberties of citizens, it would, in the view of the CCBE, be perverse to apply such powers where the ordinary domestic laws of the Member State are adequate to deal with any such breaches.

5. DRAFT CHARTER OF THE EUROPEAN PROFESSIONAL ASSOCIATIONS

The CCBE recognises the need for and the importance of the Charter and notes that the implementation of the provision of the Charter is based upon the principle of professional self-regulation in line with the views of the CCBE referred to in this paper.

The CCBE is currently awaiting the views and comments of the Bars and Law Societies regarding the contents of the draft Charter.

6. CONCLUSION

The CCBE is more than anxious to play its part in the fight against money laundering and, in particular, that the legal professions should not be used by criminal elements to conceal the proceeds of crime. Of course, any lawyer who actively and knowingly participates in assisting such criminal elements in so doing, would be subject to the full rigours of the law.

However, for the reasons set out in this paper, the CCBE opposes the introduction of

legislation which would require lawyers to report suspicious transactions to the authorities.

Given the increasing globalization of legal services which, together with the recognition of qualifications throughout the European Union thus enabling lawyers to provide services and to establish practices under home title in jurisdictions other then their own, the CCBE submits that a uniform approach should be adopted so that similar and effective anti-money laundering measures can, in turn, be adopted by the legal professions in each Member State.

Having regard to the need to ensure that, the legal profession cannot be used by criminal elements to conceal the proceeds of crime, the CCBE recommends that any measures to be adopted by Member States in the implementation of anti-money laundering procedures should, in the case of the legal professions, be based upon the self-regulating and disciplinary role of the respective Bars and Law Societies, taking into account that the CCBE and its Member Bars and Law Societies have already taken action by adopting the recommendations referred to in paragraph 5 of the CCBE Policy Statement.

The ad hoc Committee "CCBE programme for participation in the fight against organised crime, money laundering and bribery" will have the task of defining, in collaboration with the Commission, the Bars and the Law Societies, a measure which these should adopt, as well as each lawyer, to participate in the struggle against these scourges.

The CCBE would welcome therefore further discussions with the Commission with a view to ascertaining how, having regard to the special status of the legal professions within the European Union, the likely concerns of the Bars and Law Societies identified in this paper may be dealt with in the proposed new Directive, Furthermore, the opportunity could also be taken to discuss any points raised by member Bars and Law Societies in relation to the Charter.

FINAL TEXT OF REVISED CODE

1. PREAMBLE

1.1 The Function of the Lawyer in Society

In a society founded on respect for the rule of law the lawyer fulfils a special role. His duties do not begin and end with the faithful performance of what he is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he is trusted to assert and defend and it is his duty not only to plead his client's cause but to be his adviser.

A lawyer's function therefore lays on him a variety of legal and moral obligations (sometimes appearing to be in conflict with each other) towards:

- the client;
- the courts and other authorities before whom the lawyer pleads his client's cause or acts on his behalf;
- the legal profession in general and each fellow member of it in particular; and

the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society.

1.2 The Nature of Rules of Professional Conduct

1.2.1 Rules of professional conduct are designed through their willing acceptance by those to whom they apply to ensure the proper performance by the lawyer of a function which is recognised as essential in all civilized societies. The failure of the lawyer to observe these rules must in the last resort result in a disciplinary sanction.

1.2.2 The particular rules of each Bar or Law Society arise from its own traditions. They are adapted to the organisation and sphere of activity of the profession in the Member State concerned and to its judicial and administrative procedures and to its national legislation. It is neither possible nor desirable that they should be taken out of their context nor that an attempt should be made to give general application to rules which are inherently incapable of such application.

The particular rules of each Bar and Law Society nevertheless are based on the same values and in most cases demonstrate a common foundation.

1.3 The Purpose of the Code

1.3.1 The continued integration of the European Union and European Economic Area and the increasing frequency of the cross-border activities of lawyers within the European Economic Area have made necessary in the public interest the statement of common rules which apply to all lawyers from the European Economic Area whatever Bar or Law Society they belong to in relation to their cross-border practice. A particular purpose of the statement of those rules is to mitigate the difficulties which result from the application of «double deontology» as set out in Article 4 of the E.C. Directive 77/249 of 22nd March 1977.

1.3.2 The organisations representing the legal profession through the CCBE propose that the rules codified in the following articles:

- be recognised at the present time as the expression of a consensus of all the Bars and Law Societies of the European Union and European Economic Area;
- be adopted as enforceable rules as soon as possible in accordance with national or EEA procedures in relation to the cross-border activities of the lawyer in the European Union and European Economic Area;
- be taken into account in all revisions of national rules of deontology or professional practice with a view to their progressive harmonisation.

They further express the wish that the national rules of deontology or professional practice be interpreted and applied whenever possible in a way consistent with the rules in this Code.

After the rules in this Code have been adopted as enforceable rules in relation to his cross-border activities the lawyer will remain bound to observe the rules of the Bar or Law Society to which he belongs to the extent that they are consistent with the rules in this Code.

1.4 Field of Application Ratione Personae

The following rules shall apply to lawyers of the European Union and the European Economic Area as they are defined by the Directive 77/249 of 22nd March 1977.

1.5 Field of application Ratione Materiae

Without prejudice to the pursuit of a progressive harmonisation of rules of deontology or professional practice which apply only internally within a Member State, the following rules shall apply to the cross-border activities of the lawyer within the European Union and the European Economic Area. Cross-border activities shall mean:

(a) all professional contacts with lawyers of Member States other than his own; and

(b) the professional activities of the lawyer in a Member State other than his own, whether or not the lawyer is physically present in that Member State.

1.6 Definitions

In these rules:

"Home Member State" means the Member State of the Bar or Law Society to which the lawyer belongs.

"Host Member State" means any other Member State where the lawyer carries on cross-border activities.

"Competent authority" means the professional organisation(s) or authority(ies) of the Member State concerned responsible for the laying down of rules of professional conduct and the administration of discipline of lawyers.

2. GENERAL PRINCIPLES

2.1 Independence

2.1.1 The many duties to which a lawyer is subject require his absolute independence, free from all other influence, especially such as may arise from his personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore avoid any impairment of his independence and be careful not to compromise his professional standards in order to please his client, the court or third parties.

2.1.2 This independence is necessary in non-contentious matters as well as in litigation. Advice given by a lawyer to his client has no value if it is given only to ingratiate himself, to serve his personal interests or in response to outside pressure.

2.2 Trust and Personal Integrity

Relationship of trust can only exist if a lawyer's personal honour, honesty and integrity are beyond doubt. For the lawyer these traditional virtues are professional obligations.

2.3 Confidentiality

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

The lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the state.

2.3.2 A lawyer shall respect the confidentiality of all information that becomes known to him in the course of his professional activity.

2.3.3 The obligation of confidentiality is not limited in time.

2.3.4 A lawyer shall require his associates and staff and anyone engaged by him in the course of providing professional services to observe the same obligation of confidentiality.

2.4 Respect for the Rules of Other Bars and Law Societies

Under the laws of the European Union and the European Economic Area a lawyer from another Member State may be bound to comply with the rules of the Bar or Law Society of the Host Member State. Lawyers have a duty to inform themselves as to the rules which will affect them in the performance of any particular activity.

Member organisations of CCBE are obliged to deposit their codes of conduct at the Secretariat of CCBE so that any lawyer can get hold of the copy of the current code from the Secretariat.

2.5 Incompatible Occupations

2.5.1 In order to perform his functions with due independence and in a manner which is consistent with his duty to participate in the administration of justice a lawyer is excluded from some occupations.

2.5.2 A lawyer who acts in the representation or the defence or a client in legal proceedings or before any public authorities in a Host Member State shall there observe the rules regarding incompatible occupations as they are applied to lawyers of the Host Member State.

2.5.3 A lawyer established in a Host Member State in which he wished to participate directly in commercial or other activities not connected with the practice of the law shall respect the rules regarding forbidden or incompatible occupations as they are applied to lawyers of that Member State.

2.6 Personal Publicity

2.6.1 A lawyer should not advertise or seek personal publicity where this is not permitted.

In other cases a lawyer should only advertise or seek personal publicity to the extent and in the manner permitted by the rules to which he is subject.

2.6.2 Advertising and personal publicity shall be regarded as taking place where it is permitted, if the lawyer concerned shows that it was placed for the purpose of reaching clients or potential clients located where such advertising or personal publicity is permitted and its communication elsewhere is incidental.

2.7 The Client's Interest

Subject to due observance of all rules of law and professional conduct, a lawyer must always act in the best interests of his client and must put those interests before his own interests or those of fellow members of the legal profession.

2.8 Limitation of Lawyer's Liability towards his Client

To the extent permitted by the law of the Home Member State and the Host Member State, the lawyer may limit his liabilities towards his client in accordance with rules of the Code of Conduct to which he is subject.

3. RELATIONS WITH CLIENTS

3.1 Acceptance and Termination of Instructions

3.1.1 A lawyer shall not handle a case for a party except on his instructions. He may, however, act in a case in which he has been instructed by another lawyer who himself acts for the party or where the case has been assigned to him by a competent body.

The lawyer should make reasonable efforts to ascertain the identity, competence and authority of the person or body who instructs him when the specific circumstances show that the identity, competence and authority are uncertain.

3.1.2 A lawyer shall advise and represent his client promptly, conscientiously and diligently. He shall undertake personal responsibility for the discharge of the instructions given to him. He shall keep his client informed as to the progress of the matter entrusted to him.

3.1.3 A lawyer shall not handle a matter which he knows or ought to know he is not competent to handle, without co-operating with a lawyer who is competent to handle it.

A lawyer shall not accept instructions unless he can discharge those instructions promptly having regard to the pressure of other work.

3.1.4 A lawyer shall not be entitled to exercise his right to withdraw from a case in such a way or in such circumstances that the client may be unable to find other legal assistance in time to prevent prejudice being suffered by the client.

3.2 Conflict of Interest

3.2.1 A lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.

3.2.2 A lawyer must cease to act for both client when a conflict of interests arises between those clients and also whenever there is a risk of a breach of confidence or where his independence may be impaired.

3.2.3 A lawyer must also refrain from acting for a new client if there is a risk of a breach of confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client.

3.2.4 Where lawyers are practising in association, paragraphs 3.2.1 to 3.2.3 above shall apply to the association and all its members.

3.3 Pactum de Quota Litis

3.3.1 A lawyer shall not be entitled to make a pactum de quota litis.

3.3.2 By «pactum de quota litis» is meant an agreement between a lawyer and his client entered into prior to final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter.

3.3.3 The pactum de quota litis does not include an agreement that fees be charged in proportion to the value of a matter handled by the lawyer if this is in accordance with an officially approved fee scale or under the control of competent authority having jurisdiction over the lawyer.

3.4 Regulation of Fees

3.4.1 A fee charged by a lawyer shall be fully disclosed to his client and shall be fair and reasonable.

3.4.2 Subject to any proper agreement to the contrary between a lawyer and his client fees charged by a lawyer shall be subject to regulation in accordance with the rules applied to members of the Bar or Law Society to which he belongs. If he belongs to more than one Bar or Law Society the rules applied shall be those with the closest connection to the contract between the lawyer and his client.

3.5 Payment on Account

If a lawyer requires a payment on account of his fees and/or disbursements such payment should not exceed a reasonable estimate of the fees and probable disbursements involved.

Failing such payment, a lawyer may withdraw from the case or refuse to handle it, but subject always to paragraph 3.1.4 above.

3.6 Fee Sharing with Non-Lawyers

3.6.1 Subject as after-mentioned a lawyer may not share his fees with a person who is not a lawyer except where an association between the lawyer and the other person is permitted by the laws of the Member State to which the lawyer belongs.

3.6.2 The provisions of 3.6.1 above shall not preclude a lawyer from paying a fee, commission or other compensation to a deceased lawyer's heirs or to a retired lawyer in respect of taking over the deceased or retired lawyer's practice.

3.7 Cost Effective Resolution and Availability of Legal Aid

3.7.1 The lawyer should at all times strive to achieve the most cost effective resolution of the client's dispute and should advise the client at appropriate stages as to the desirability of attempting a settlement and/or a reference to alternative dispute resolution.

3.7.2 A lawyer shall inform his client of the availability of legal aid where applicable.

3.8 Clients Funds

3.8.1 When lawyers at any time in the course of their practice come into possession of funds on behalf of their clients or third parties (hereinafter called «client's funds») it shall be obligatory:

3.8.1.1 That client's funds shall always be held in an account of a bank or similar institution subject to supervision of Public Authority and that all clients' funds received by a lawyer should be paid into such an account unless the client explicitly or by implication agrees that the funds should be dealt with otherwise.

3.8.1.2 That any account in which the client's funds are held in the name of the lawyer should indicate in the title or designation that the funds are held on behalf of the client or clients of the lawyer.

3.8.1.3 That any account or accounts in which client's funds are held in the name of the lawyer should at all times contain a sum which is not less than the total of the client's funds held by the lawyer.

3.8.1.4 That all funds shall be paid to clients immediately or upon such conditions as the client may authorise.

3.8.1.5 That payments made from client's funds on behalf of a client to any other person including:

a) payments made to or for one client from funds held for another client and

b) payment of the lawyer's fees,

be prohibited except to the extent that they are permitted by law or are ordered by the court and have the express or implied authority of the client for whom the payment is being made.

3.8.1.6 That the lawyer shall maintain full and accurate records, available to each client on request, showing all his dealings with his client's funds and distinguishing client's funds from other funds held by him.

3.8.1.7 That the competent authorities in all Member States should have powers to allow them to examine and investigate on a confidential basis the financial records of lawyer's client's funds to ascertain whether or not the rules which they make are being complied with and to impose sanctions upon lawyers who fail to comply with those rules.

3.8.2 Subject as aftermentioned, and without prejudice to the rules set out in 3.8.1 above, a lawyer who holds client's funds in the course of carrying on practice in any Member State must comply with the rules relating to holding and accounting for client's funds which are applied by the competent authorities of the Home Member State.

3.8.3 A lawyer who carries on practice or provides services in a Host Member State may with the agreement of the competent authorities of the Home and Host Member State concerned comply with the requirements of the Host Member State to the exclusion of the requirements of the Home Member State. In that event he shall take reasonable steps to inform his clients that he complies with the requirements in force in the Host Member State.

3.9 Professional Indemnity Insurance

3.9.1 Lawyers shall be insured at all times against claims based on professional negligence of an extent which is reasonable having regard to the nature and extent of the risks which each lawyer may incur in his practice.

3.9.2 When a lawyer provides services or carries out practice in a Host Member State, the following shall apply:

3.9.2.1 The lawyer must comply with any Rules relating to his obligation to insure against his professional liability as a lawyer which are in force in his Home Member State.

3.9.2.2 A lawyer who is obliged so to insure in his Home Member State and who provides services or carries out practice in any Host Member State shall use his best endeavours to obtain insurance cover on the basis required in his Home Member State extended to services which he provides or practice which he carries out in a Host Member State.

3.9.2.3 A lawyer who fails to obtain the extended insurance cover referred to in paragraph 3.9.2.2 above or who is not obliged so to insure in his Home Member State and who provides services or carries out practice in a Host Member State shall in so far as possible obtain insurance cover against his professional liability as a lawyer whilst acting for clients in that Host Member State on at least a basis equivalent to that required of lawyers in the Host Member State.

3.9.2.4 To the extent that a lawyer is unable to obtain the insurance cover required by the foregoing rules, he shall inform such of his clients as might be effected.

3.9.2.5 A lawyer who carries out practice or provides services in a Host Member State may with the agreement of the competent authorities of the Home and Host Member States concerned comply with such insurance requirements as are in force in the Host Member State to the exclusion of the insurance requirements of the Home Member State. In this event he shall take reasonable steps to inform his clients that he is insured according to the requirements in force in the Host Member State.

4. RELATIONS WITH THE COURTS

4.1 Applicable Rules of Conduct in Court

A lawyer who appears, or takes part in a case before a court or tribunal in a Member State, must comply with the rules of conduct applied before that court or tribunal.

4.2 Fair Conduct of Proceedings

A lawyer must always have due regard for the fair conduct of proceedings. He must not, for example, make contact with the judge without first informing the lawyer acting for the opposing party or submit exhibits, notes or documents to the judge without communicating them in good time to the lawyer on the other side unless such steps are permitted under the relevant rules of procedure. To the extent not prohibited by law a lawyer must not divulge or submit to the court any proposals for settlement of the case made by the other party or its lawyer without the express consent by the other party's lawyer.

4.3 Demeanour in Court

A lawyer shall while maintaining due respect and courtesy towards the court defend the interests of his client honourably and fearlessly without regard to his own interests or to any consequences to himself or to any other person.

4.4 False of Misleading Information

A lawyer shall never knowingly give false or misleading information to the court.

4.5 Extension to Arbitrators Etc.

The rules governing a lawyer's relations with the courts apply also to his relations with arbitrators and any other persons exercising judicial or quasi-judicial functions, even on an occasional basis.

5. RELATIONS BETWEEN LAWYERS

5.1 Corporate Spirit of the Profession

5.1.1 The corporate spirit of the profession requires a relationship of trust and co-operation between lawyers for the benefit of their clients and in order to avoid unnecessary litigation and other behaviour harmful to the reputation of the profession. It can, however, never justify setting the interests of the profession against those of the client.

5.1.2 A lawyer should recognise all other lawyers of Member States as professional colleagues and act fairly and courteously towards them.

5.2 Co-operation Among Lawyers of Different Member States

5.2.1 It is the duty of a lawyer who is approached by a colleague from another Member State not to accept instructions in a matter which he is not competent to undertake. He should in such case be prepared to help his colleague to obtain the information necessary to enable him to instruct a lawyer who is capable of providing the service asked for.

5.2.2 Where a lawyer of a Member State co-operates with a lawyer from another Member State, both have a general duty to take into account the differences which may exist between their respective legal systems and the professional organisations competences and obligations of lawyers in the Member States concerned.

5.3 Correspondence Between Lawyers

5.3.1 If a lawyer sending a communication to a lawyer in another Member State wishes it remain confidential or without prejudice he should clearly express this intention when communicating the document.

5.3.2 If the recipient of the communication is unable to ensure its status as confidential or without prejudice he should return it to the sender without revealing the contents to others.

5.4 Referral Fees

5.4.1 A lawyer may not demand or accept from another lawyer or any other person a fee, commission or any other compensation for referring or recommending the lawyer to a client.

5.4.2 A lawyer may not pay anyone a fee, commission or any other compensation as a consideration for referring a client to himself.

5.5 Communication with Opposing Parties

A lawyer shall not communicate about a particular case or matter directly with any person whom he knows to be represented or advised in the case or matter by another lawyer, without the consent of that other lawyer (and shall keep the other lawyer informed of any such communications).

5.6 Change of Lawyer

5.6.1 A lawyer who is instructed to represent a client in substitution for another lawyer in relation to a particular matter should inform that other lawyer and, subject to 5.6.2 below, should not begin to act until he has ascertained that arrangements have been made for the settlement of the other lawyer's fees and disbursements. This duty does not, however, make the new lawyer personally responsible for the former lawyer's fees and disbursements.

5.6.2 If urgent steps have to be taken in the interests of the client before the conditions in 5.6.1 above can be complied with, the lawyer may take such steps provided he informs the other lawyer immediately.

5.7 Responsibility for Fees

In professional relations between members of Bars of different Member States, where a lawyer does not confine himself to recommending another lawyer or introducing him to the client but himself entrusts a correspondent with a particular matter or seeks his advice, he is personally bound, even if the client is insolvent, to pay the fees, costs and outlays which are due to the foreign correspondent. The lawyers concerned may, however, at the outset of the relationship between them make special arrangements on this matter. Further, the instructing lawyer may at any time limit his personal responsibility to the amount of the fees, costs and outlays incurred before intimation to the foreign lawyer of his disclaimer of responsibility for the future.

5.8 Training Young Lawyers

In order to improve trust and co-operation amongst lawyers of different Member States for the clients' benefit there is a need to encourage a better knowledge of the laws and procedures in different Member States. Therefore, when considering the need for the profession to give good training to young lawyers, lawyers should take into account the need to give training to young lawyers from other Member States.

5.9 Disputes amongst Lawyers in Different Member States

5.9.1 If a lawyer considers that a colleague in another Member State has acted in breach of a rule of professional conduct he shall draw the matter to the attention of his colleague.

5.9.2 If any personal dispute of a professional nature arises amongst lawyers in different Member States they shouid if possible first try to settle it in a friendly way.

5.9.3 A lawyer shall not commence any form of proceedings against a colleague in another Member State on matters referred to in 5.9.1 or 5.9.2 above without first informing the Bars or Law Societies to which they both belong for the purpose of allowing both Bars or Law Societies concerned an opportunity to assist in reaching a settlement.

CCBE aims to work for a harmonized attitude amongst its member organisations. It therefore recommends that national lawyer's organization of the CCBE Member States to include, if not already included, in their codes of conduct the following obligations:

1. In whichever case submitted to a lawyer, he or she should check the identity of the client or the intermediary of the client for which the lawyer is acting;

2. To prohibit, when lawyers are asked to handle funds, for any lawyer to receive or handle any fund that do not strictly correspond to a file known by name.

3. For lawyers participating in a legal transaction to withdraw if they seriously suspect that the planned operation will result in money laundering and the client is not prepared to abstain from this operation.

CCBE also aims at including these provisions in its own Code of Conduct for transnational legal business.

p:\blj\hjk\ccbe declaration money laundering.doc

\\srvo1_vok\public\blj\hjk\ccbe final code.doc
(1/25/99)

Jakob R. Möller, hrl.

Peningaþvætti, þagnarskylda lögmanna og samstarf við aðrar stéttir

Meðferð persónulegra trúnaðarupplýsinga hefur verið mjög umrædd á síðustu mánuðum, einkum í sambandi við frumvarp um gagnagrunn. Minni gaumur hefur verið gefinn undirbúningi breytinga á löggjöf um peningaþvætti. Það mál hefur nánast ekki verið rætt opinberlega, en hópur embættismanna hefur unnið að undirbúningnum, þótt fulltrúar þeirra sem vinnunni tengjast hafi fengið færi á að fylgjast með.

Skipulögð glæpasamtök um víða veröld sækjast eftir því að koma illa fengnu fé í „þvottavélar" þaðan sem taka megi það út, hvítþvegið.

Jakob R. Möller, hrl., formaður L.M.F.Í.

til almenns brúks. Hópur sérfræðinga á vegum OECD hefur mörg undanfarin ár unnið að gerð og endurskoðun reglna um hvernig ríki heims geti varið sig fyrir því,

Þagnarskylda lögmanna er í þágu réttaröryggis og liður í vernd persónulegra upplýsinga.

að glæpasamtök nái að þvo fé sitt og koma því í almenna umferð. Íslenzku lögin um peningaþvætti, nr. 80/1993, eru afrakstur þessa starfs. Endurskoðun laganna er einnig reist á vinnu OECD-hópsins. Með endurskoðuninni er markmiðið að loka leiðum til peningaþvættis, sem enn eru taldar opnar. Kjarni laga 80/1993 er að skylda fjármálastofnanir til þess að tilkynna ríkissaksóknara um viðskipti sem ætla má að stafi frá brotum á almennum hegningarlögum eða lögum um ávana- og fíkniefni og fjármálastofnunin **má ekki láta viðskiptamann sinn vita, að ríkissaksóknara hafi verið sendar upplýsingar.** Við endurskoðun laganna er markmiðið m.a. að loka öðrum leiðum til þvottar en um fjármálastofnanir. Hafa sérfræðingarnir þar m.a. beint sjónum að viðskiptamönnum lögmanna og endurskoðenda, það er þegar t.d. lögmenn annast fjármálaþjónustu af einhverju tagi fyrir viðskiptamenn sína, taka við peningum vegna þeirra o.s.frv. Í slíkum störfum ættu þá venjulegar reglur um þagnarskyldu lögmanna að víkja fyrir reglum laga um tilkynningarskyldu vegna peningaþvættis.

Þagnarskylda lögmanna er í þágu réttaröryggis og liður í vernd persónulegra upplýsinga. Yfirleitt hefur verið talið, að þrjár stéttir skæru sig frá öðrum í mikilvægi þess, að verndaðar væru upplýsingar um einkahagi sem fram kæmu í starfi. Þessar stéttir eru prestar, læknar og lögmenn. Í ýmsum löndum er þagnarskylda presta og verjenda í sakamálum algjör, það er hún verður ekki rofin nema til þess að forða því að mjög alvarlegir, yfirvofandi, glæpir gegn lífi og limum verði framdir. Samkvæmt 22. gr. lögmannalaganna nr. 77/1998 ber lögmaður þagnarskyldu um hvaðeina sem honum er trúað fyrir í starfi sínu. Fleiri stéttir bera lögum samkvæmt einnig þagnarskyldu, auk presta og lækna. Í dönsku réttarfarslögunum eru prestar, læknar og lögmenn settir í sérstaka stöðu um, að þeir verði ekki krafðir vitnisburðar um það, sem þeim hefur verið trúað fyrir, móti vilja þess, sem hefur hag af leynd. Undantekning er svo gerð um lækna og lögmenn, aðra en verjendur, þegar vitnisburður þeirra er talinn algjörlega nauðsynlegur til upplýsingar í viðkomandi máli og það varðar mjög mikilsverða einstaklings- eða samfélagshagsmuni. Þó verður lögmaður ekki krafinn vitnisburðar um það, sem hann hefur orðið áskynja um í dómsmáli, sem hann hefur rekið eða ráðgjafar hans verið leitað. Af þessu sést, að í Danmörku er

Lögmannafélag Íslands
Álftamýri 9, 108 Reykjavík
sími (telephone): 568-5620
bréfsími (telefax): 568-7057
tölvupóstur (E-mail): lmfi@tv.is
heimasíða: www.lmfi.is

Stjórn L.M.F.Í.
Jakob R. Möller, hrl., formaður
Ásgeir Thoroddsen, hrl. varaformaður
Kristinn Bjarnason, hrl., ritari
Sif Konráðsdóttir, hdl., gjaldkeri
Sigurbjörn Magnússon, hrl., meðstjórnandi

Starfsfólk L.M.F.Í.
Marteinn Másson, framkvæmdastjóri
Hildur Pálmadóttir, ritari

Blaðið er sent öllum félagsmönnum.
Ársáskrift fyrir utanfélagsmenn: kr. 1.500 + vsk.
Verð pr. tölublað kr. 300 + vsk.

Prentun: Ísafoldarprentsmiðja

Umsjón auglýsinga:
Öflun ehf., sími 561-4440

þagnarskylda presta og verjenda algjör, lögmanna nær algjör og lækna mjög rík. Aðrar stéttir, þar á meðal t.d. endurskoðendur og félagsráðgjafar, hafa svo þagnarskyldu, en verða auðveldlegar skyldaðir til að bera vitni um það, sem þeir hafa orðið áskynja í störfum sínum.

Annar bragur er á íslenzku einkamálalögunum. Þar eru í einum flokki margar stéttir, þar á meðal prestar og lögmenn, endurskoðendur og félagsráðgjafar, læknar og lyfsalar, og enginn greinarmunur gerður á milli, sjá 2. og 3. mgr. 53. gr. laga nr. 91/1991. Þýðing þess, að ekki hvílir sérstaklega rík þagnarskylda á prestum og lögmönnum kom svo fram í dómi Hæstaréttar H 1996.3575, en þar voru prestur og lögmaður skyldaðir til að bera vitni um atvik, sem þeir höfðu komizt að í starfi sínu við annarsvegar sálgæzlu og sáttaumleitan á milli hjóna og hinsvegar gerð skilnaðarsamnings. Því verður ekki haldið fram hér, að túlkun Hæstaréttar á ákvæðum einkamálalaganna hafi verið röng, heldur hinu að dómurinn sýni, að á lögunum sé brotalöm, alveg sérstaklega með vísan til vitnaskyldu prestsins.

Borgararnir verða að geta treyst því, þegar þeir leita ráða hjá lögmanni, að honum beri ekki skylda til að skýra opinberum yfirvöldum frá aðstæðum.

Fitjað er upp á þessu til að minna á, að þagnarskylda lögmanna er liður í réttaröryggi. Borgararnir verða að geta treyst því, þegar þeir leita ráða hjá lögmanni, að honum beri ekki skylda til að skýra opinberum yfirvöldum frá aðstæðum. Benda má á, að þótt endurskoðendur hafi þagnarskyldu um það, sem fram fer í starfi þeirra, ber þeim einnig að skýra t.d. félagsfundi frá því, hafi þeir komizt að misjöfnu í endurskoðunarstarfi sínu, þar á meðal með áritun á ársreikning. Þagnarskylda þeirra er því ekki nærri jafnrík og lögmanna.

Ákvæði 4. mgr. 19. gr. lögmannalaganna, sem banna að aðrir en lögmenn eigi lögmannsstofur eða félög um þær, eru til þess gerð að koma í veg fyrir svokölluð Multi Disciplinary Partnerships, það er sameignar-samstarf lögmanna og t.d. endurskoðenda. Ekki er talið að unnt sé að vera með mismunandi ríkar kröfur um þagnarskyldu til manna, sem starfa á sömu starfsstöð. Eina leiðin til þess að tryggja vernd trúnaðarupplýsinga, sem lögmenn búa yfir, er því að banna sameignar-samstarf þeirra við aðrar stéttir sem ekki hafa jafnríkar trúnaðarskyldur.

Minna má á, að viðskiptamenn lögmanna þurfa þá helzt á trúnaði lögmannsins að halda, þegar þeir hyggja á nýjar brautir í viðskiptum. Sé trúnaðarskylda lögmannsins ekki nánast algjör er hætt við að viðskiptamaðurinn láti vera að leita ráðgjafar og gæti af þeim sökum leiðzt út í ólöglegt athæfi. Trúnaðarskylda lögmanna vinnur því gegn ólöglegri starfsemi.

Mjög brýnir þjóðfélagslegir hagsmunir eru bundnir því að koma í veg fyrir skipulega glæpastarfsemi og það peningaþvætti, sem henni fylgir. Gæta þarf þó vandlega að því, að með reglum um tilkynningarskyldu um grun um ólöglegt athæfi sé ekki grafið undan öðrum stoðum lýðræðislegs þjóðfélags, þar á meðal réttarörygginu.