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Confidentiality v justice: The effect of the No Tipping Off rule

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Abstract

The "no tipping off" (NTO) rule prevents legal practitioners from disclosing to their clients that they have filed a suspicious transaction report (STR) with the Financial Information Centre. In terms of professional conduct, this creates a dilemma between, on the one hand, fulfilling the duty to report possible money laundering and other suspicious activity and, on the other, the duty to maintain trust with the client and act in good faith.

This dilemma means attorneys face possible consequences from both sides of the situation by choosing one over the other. Full transparency between legal practitioners and clients is paramount. This article examines this underexplored question and provides recommendations for potential solutions.

Keywords: money laundering; FICA; certainty; reporting; priority; ethics

1 INTRODUCTION*

In society, there are a multitude of fields that need to operate in tandem with each other in order for a community to flourish.[1] In this regard, there needs to be a certain level of synergy between the different fields. Where this synergy is lost or distorted due to shortcomings, there is a gap from which chaos and misconduct may arise. At present, such a gap exists in regard to an aspect of law known as the "no tipping off" rule (NTO rule). The gap exists as two legislative requirements are mutually exclusive despite their both being of the utmost importance – the gap exists as neither requirement is deemed a priority over the other.

The NTO rule is a requirement in law that states that when certain parties, including legal practitioners and financial institutions, report suspicious transactions to the Financial Information Centre (FIC), as is required by the Financial Intelligence Centre Act (FICA), they are prohibited from informing their client that they have reported the said alleged suspicious activity.[2] This is done to combat money-laundering attempts that seek to exploit the sanctity of trust accounts.[3]

The trust account is integral to this discussion due to the close relationship it has with the suspicious transaction report (STR). A trust account is an account opened for a trust account practice due to an arrangement by the Legal Practitioners Fidelity Fund Board,[4] and is operated by a legal practitioner. The purpose of the trust account is to hold funds and monies for the benefit of a third party, that is, the client. Trust accounts are often susceptible to money laundering, which is why STRs are required. The sanctity of the trust account may be exploited under the guise of requiring legal assistance, thereby making it the object of a relationship borne of criminal intent.

However, while reporting suspicious activity may assist the FIC in its investigations and pursuit of justice, it could also negatively impact the relationship between the client and the obligated legal practitioner. This relationship can be negatively affected where the legal practitioner, after reporting the client, has to continue advising and assisting the client without informing them

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* The article originated from my research paper in the final year of my LLB. I would like to acknowledge and express my sincere gratitude to my supervisor, Prof Abe Hamman, for his inspiration and assistance in guiding me through my research paper.

1 "The bodies of law in SA" *Lawyer.co.za* (date unknown) available at https://www.lawyer.co.za/faq/The%20bodies%20of%20law%20is%20SA.html (accessed 20 October 2024).

2 Section 29 of the Financial Intelligence Centre Act 38 of 2001 ("FICA").

3 Section 29 of FICA.

4 Legal Practice Act 28 of 2014.

that they have been reported and are possibly being investigated.[5] This puts the legal practitioner in the position of a "wolf in sheep's clothing", often against his or her intentions. In other words, this ethical dilemma would be burdensome to an innocent practitioner, who, if discovered by the client, might lose the client's trust.

Against the backdrop above, this article examines the effect of the NTO rule on legal practitioners, with specific reference to the issue of money laundering. There are conflicting rules that leave legal practitioners in a legal and moral grey area. The general rule requires legal practitioners to operate in good faith and prioritise their clients' well-being.[6] This rule conflicts with the NTO rule, as the latter requires practitioners to remain silent,[7] leaving clients unaware of the reported alleged suspicious activity, thereby limiting and/or tainting the good faith that exists between client and legal practitioner. As will be argued, this demonstrates a clear conflict and uncertainty (a grey area) in the legal fraternity between the NTO rule which prioritizes reporting of suspicious and potential money laundering activities; and on the other hand, the obligations of support and maintenance of good faith towards the client, who may be completely innocent in their activities.

2 BACKGROUND OF THE NTO RULE

The NTO rule can be described as the visible symptom of the conflict between practitioners' duty to their clients and their legislative duty to report suspicious activity.[8] This rule takes effect when a practitioner launches an STR or mandatory cash threshold report (CTR) to the Financial Information Centre (FIC).[9] These are governed by sections 28 and 29 of the Financial Information Centre Act. Practitioners are required to do so if they receive an amount, or a series of amounts, that total R50,000 or more. The reason for this is to allow the FIC to be informed and investigate any suspicious activity, thus enabling it to identify possible economic crime, specifically money laundering. While the FIC proceeds with the investigation upon receiving a report, it may likely compromise the investigation by the FIC if the subject of it were to

[5] Section 29 of FICA.
[6] Section 3(3) of the Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities General Notice 168 of 2019 ("Code of Conduct").
[7] Section 29(3) of FICA.
[8] Section 29 of FICA.
[9] Sections 28 and 29 of FICA.

become aware of the investigation, thus possibly allowing them to evade further investigation and custody if they are indeed guilty of the crimes.

In order to prevent this from happening, the NTO rule takes effect. Section 29(3) and (4) of FICA reads as follows:

> (3) No person who made or must make a report in terms of this section may disclose that fact or any information regarding the contents of any such report to any other person, including the person in respect of whom the report is or must be made, otherwise than –
>
> (a) within the scope of the powers and duties of that person in terms of any legislation
>
> (b) for the purpose of carrying out the provisions of this Act;
>
> (c) for the purpose of legal proceedings, including any proceedings before a judge
>
> (d) in terms of an order of court.
>
> (4) No person who knows or suspects that a report has been or is to be made in terms of this section may disclose that knowledge or suspicion or any information regarding the contents or suspected contents of any such report to any other person, including the person in respect of whom the report is or is to be made, otherwise than –
>
> (a) within the scope of that person's: powers and duties in terms of any legislation;
>
> (b) for the purpose of carrying out the provisions of this Act;
>
> (c) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or
>
> (d) in terms of an order of court.[10]

The rule merely states that upon reporting the activity as required, a practitioner is prohibited from informing the client thereof. It should be noted that the rule does not, however, prohibit informing the client of the NTO rule prior to the legal practitioner's being required to report the suspicious transaction.[11] If practitioners were to inform their clients of FICA and the NTO rule prior to becoming suspicious or reasonably suspicious, they would not be in contravention of FICA, as they have no grounds on which the report would be necessary as yet.

A significant observation is that in achieving its objects set out in section 4(a), the latter applies to any legislation. This is relevant because section 36 of the Legal Practice Act stipulates that the Legal Practice Council must set out a code of conduct and that all legal practitioners must abide by it.[12] Section 3(1) of this code of conduct clearly states that one must "*maintain the*

[10] FICA 38 of 2001.
[11] Section 29 of FICA.
[12] Legal Practice Act 28 of 2014. Emphasis added.

highest standards of honesty and integrity". Section 3(3) goes further by clarifying that the practitioners must

> treat the interests of their clients as paramount, provided that their conduct shall be subject always to:
>
> 3.3.1 their duty to the court;
> 3.3.2 the interests of justice;
> 3.3.3 observance of the law; and
> 3.3.4 the maintenance of the ethical standards prescribed by this code, and any ethical standards generally recognised by the profession …[13]

Additionally, in setting out the foundations of a lawyer-client relationship, the Horizon Institute points out that client care is one of multiple aspects in maintaining this relationship.[14] In other words, lawyers are required to treat their clients fairly and protect their interests.

In the light of the above provision, it is evident that the NTO rule prevents certain parties from disclosing to their clients that they have launched an STR with the FIC.[15] This rule is especially problematic for attorneys, who are expected to uphold a relationship of trust with their clients. In view of the expectations set out in the NTO rule, demonstrated above in section 29(3) and (4) of FICA, attorneys may find themselves in a precarious situation in which violations of the said provisions and non-adherence to section 3(1) of the abovementioned code of conduct yield undesirable consequences on both fronts. Additionally, the public perception of a violation of confidentiality may erode the trust that members of the public should have in the attorneys who are meant to protect and assist them.[16]

In examining the issues presented by the NTO rule, Hamman and Koen observe that this predicament is unexplored, despite its potential for misuse.[17] Although money laundering has been a global criminal enterprise for decades, especially since the 1980s, the authors at the time noted that there had only been two cases concerning money laundering schemes. As was noted, this may be due to the purity and honesty of South African legal practitioners, though it could also just as well be due to their proficiency at concealing their illegal activities.

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[13] Code of Conduct.
[14] "Ethics for Lawyers," Horizon Institute available at https://www.thehorizoninstitute.org/usr/library/documents/main/booklet-on-ethics-for-lawyers.pdf (accessed 31 March 2025).
[15] Section 29 of FICA.
[16] Section 35 of the Constitution.
[17] Hamman AJ & Koen RA "Cave pecuniam: Lawyers as launderers" (2012) 15(5) *Potchefstroom Electronic Law Journal* 68.

While Hamman and Koen's article highlights the ethical standards that practitioners seem to have for the profession, it is still an unknown how accurate that view of legal practitioners is. Until it is confirmed which side South African practitioners fall on, whether as willing participants in crime or as unknowing tools for criminal persons, a pessimistic approach in assuming the worst when searching for possible solutions may be necessary. The article of Hamman and Koen also notes various other issues, which will be compared to the thinking of other scholars below. The article calls on legal practitioners to be vigilant of potential money launderers.

3 THE NTO RULE AND ITS EFFECT

Subsection 3(3) of the Code of Conduct leads to circular reasoning. FICA stipulates that one must report one's client but not inform them of this, as per legislation.[18] The Legal Practice Act and the code of conduct stipulates that one must maintain honesty and integrity and treat the interests of one's client as paramount, also as per legislation as well as the interests of justice.[19] This is a grey area that legal practitioners find themselves in and where a clear path is required for the sake of legal certainty beneficial not just to society and clients, but to legal practitioners as well. The absence of such a path would leave legal practitioners to their own devices. Many may struggle with the dilemma of not knowing which choice is the "right" one.

As mentioned above, the NTO rule does not prevent legal practitioners from informing their clients of the "trap" prior to them making a potentially suspicious transaction.[20] If the client is innocent, then the trap is harmless in theory, but in actuality, the legal practitioner is required to maintain the illusion of regularity while being fully aware that she may be leading their client into this very trap. In addition, the legal practitioner is in the best possible position to know if her client is attempting to launder money through the trust account, in addition to committing any other possible crimes. This is primarily due to the trust, faith and openness that exists, or is supposed to exist, between practitioner and client; this trust, however, appears to be exploited by the requirement of STRs and the NTO rule.

In respect of the client-and-legal practitioner relationship, the latter is required to represent a client who may factually appear guilty; however contradictory, the NTO rule requires the

[18] Section 29(3)(a) of FICA.
[19] Section 3(3) of the Code of Conduct.
[20] The word "trap" is used figuratively whereby the trust accounts entice criminals, however through FIC investigations, they are likely to be exposed.

practitioner to report the client without informing the client and to proceed with the relationship without disclosure of the reported activities. It would appear that while legal practitioners must defend their clients from prosecution in court, they simultaneously assist in the FICA investigation that may lead to their client's being accused, arrested or detained. Thus, in favouring any one duty over the other, the legal practitioner is foregoing the other, placing her in a "damned-if-you-do, damned-if-you-don't" scenario.

It may thus be deduced that the NTO rule presents an ethical dilemma for the legal practitioner. In other words, it creates an all-or-nothing situation for practitioners, as tipping off their clients after reporting will lead to similar consequences as not reporting at all. Therefore, they will either have to report the transactions and keep their client in the dark or omit reporting all together. As with all things, investigations take time, as does litigation. A practitioner may have a client for any period ranging from days and weeks to months and years. During this extended period, the fact of non-disclosure may present difficulty for practitioners in their dealings with their clients. One may surmise that continuous engagement with a client who has placed complete faith in the legal practitioner may cause mental and emotional strain for this practitioner, strain that could extend to affecting even his or her physical well-being.[21]

4 SANCTITY OF CONFIDENTIALITY AND TRUST ACCOUNTS

Legal professional privilege in terms of section 201 of the Criminal Procedure Act[22] provides a means to protect the confidentiality and confidence between the parties referred to in the NTO rule. When considering the requirements of compliance with the laws that bind them, such as the NTO rule, it would be improper for legal representatives to attempt to call on the legal professional privilege that in other circumstances they would. In the *Thint* case,[23] the court held that the right must be claimed by either the right-holder, that is, the client, or the right-holder's legal representative. This means that the client is restricted by ignorance as he or she is unaware of the process, while the legal practitioner is restricted by the NTO rule. As the NTO rule prevents legal practitioners from informing their clients of the report and possible investigation, they would not know how to claim the privilege from their side in order to protect themselves and their interests.[24]

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[21] "Physical health and mental health" (date unknown) *Mental Health Foundation* available at https://shorturl.at/F3A77 (accessed 21 October 2024).
[22] Criminal Procedure Act 51 of 1977.
[23] *Thint (Pty) Ltd v National Director of Public Prosecutions and Others* [2008] ZACC 13 (hereafter *"Thint"*).
[24] *Thint* para 184.

However, which is the most applicable aspect of this right, it is not absolute and unrestricted.[25] There may be circumstances in which the right will not apply, as each instance will have its own specific facts.[26] The requirements for claiming legal professional privilege are set out in the case of *A Company v Commissioner of SARS*:

> The requirements are (i) the legal advisor must have been acting in a professional capacity at the time; (ii) the advisor must have been consulted in confidence; (iii) the communication must have been made for the purpose of obtaining legal advice; (iv) the advice must not facilitate the commission of a crime or fraud; and (v) the privilege must be claimed.[27]

This demonstrates that despite the importance of confidentiality, the law is willing to consider other aspects as being above it. The *Avontuur* case further states that "[i]It is trite that legal professional privilege may be lost by the person holding it, by a waiver, which may be express or implied, or by imputation of law irrespective of the person's intention".[28] This is an important point in considering a path forward, as it speaks to legal jurisprudence, which is essential in consideration of how legislation may be developed in future in order to address the issues presented throughout this paper.

Regarding trust accounts, they are an integral component in the relations between the legal practitioner, firm and client, and require assiduous care and consideration. There are certain regulations that govern how trust accounts should be managed. These accounts need to be audited regularly and kept completely separate from the other books and accounts of the firm.[29] The trust account, and the trust monies within it, does not belong to the firm that holds it but to the client.[30] Due to the nature of business, there is a strong likelihood that a single client's trust monies will not be the only monies in the trust account at any given time.[31] This is the central point where money laundering takes place and therefore, where the opportunity for misconduct may arise

The grey area created by the NTO rule and the code of conduct on honesty and integrity opens the possibility of money laundering. For instance, prior to a scheduled consultation with a legal

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[25] *Thint* para 184.
[26] *Thint* para 184.
[27] *A Company and Others v Commissioner for the South African Revenue Services* 2014 (4) SA 549 (WCC) (hereafter "*A Company*") para 1.
[28] *Avontuur & Associates Inc and Another v Chief Magistrate, Outshoorn: Magistrate Court and Others* 2013 (1) SACR 615 (WCC).
[29] Section 63(1)(g) of the Legal Practice Act 28 of 2014; Code of Conduct.
[30] Section 86(2) of the Legal Practice Act 28 of 2014.
[31] Section 86(2) of the Legal Practice Act 28 of 2014.

practitioner or as an advance fee, a client may pay funds into a trust account.[32] Prior to the performance of the service for which the fees were paid, the client may cancel the service and request a refund, or instruct that the funds be paid to his or her account or that of a third party.[33] Simply put, the funds paid must be reversed. If the funds were obtained unlawfully, transferring them into another account, to the client or a third-party account, would conceal their illicit origin, which subsequently may be construed as money laundering.[34]

The application of the NTO rule is tied to trust accounts as it is the trust account that may be deemed to present opportunities for misconduct and criminality (and hence explains why STRs are required). In other words, one may deduce that without the trust account, there would be no money laundering and, as such, no need for STRs on the part of the legal practitioner – and therefore no need for the application of the NTO rule.

Aside from this, there are other instances in which practitioners might assist clients in their money-laundering ways in return for some form of compensation, be it monetary or otherwise. For example, a practitioner may assist by accepting ill-gotten funds into the trust account, under the guise of providing legal assistance, only to return the funds after claiming disbursements for acts and events that may never take place.

The NTO rule is not exclusive to the South African context. For example, the International Bar Association,[35] referring to the Financial Action Task Force (FATF) Forty Recommendations, emphasises the protection of legal practitioners and avoidance of tipping off clients. To be precise, Recommendation 21 acknowledges how problematic the issue is, but offers no clear solution beyond giving a nudge in what is hopefully the right direction. Despite the promise of protection for those who report their clients, it does not speak to those practitioners who may seek to partake and benefit from the opportunity for misconduct.

Aside from the above, what may be the most distressing in regard to potential misconduct can be found in the March 2024 report by the FIC.[36] It notes that even though 16,480 legal practitioners were registered with the FIC as at March 2023, between 2016 and 2023 an average

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[32] Hamman & Koen (2012) at 15.
[33] Hamman & Koen (2012) at 3.
[34] Hamman & Koen (2012) at 3.
[35] "A lawyer's guide to detecting and preventing money laundering" *International Bar Association et al*. (October 2014) available at https://www.advocatenorde.nl/document/a-lawyers-guide-to-detecting-and-preventing-money-laundering (accessed 03 July 2025).
[36] Financial Intelligence Centre *Assessment of the inherent money laundering and terrorist financing risks legal practitioners* (2024).

of only 281 STRs were filed per year. The report concludes that the number of reports is very low and that the risk of money laundering in the legal profession is regarded as high.[37]

5 THE ETHICAL IMPLICATIONS OF THE CONFLICT

Ethics are difficult to define due to their subjective nature. One may refer to the generally accepted ethics of society,[38] such as treating others with respect and dignity, or treating others as equals, but even those undergo change over time. A clear example of a change in societal ethics is South Africa's transition from apartheid to its 1996 constitutional dispensation.[39] As regards the legal profession, there are duties that a legal practitioner has to a client. According to Van Zyl and Visser, an ethical compass has four components.[40] These are wisdom, courage, temperance and justice, which should serve as guidelines in dealing with ethical problems in practice. In the legal fraternity, ethics may refer to the professional regulations governing legal practitioners, but it also includes the moral principles that exist.[41] The Code of Conduct sets out traits that are required in the legal profession for a person to be considered fit and proper and in alignment with the Code.[42] These include honesty and integrity, fairness, and cordiality with colleagues, and maintaining the ethical standards held by the profession.[43]

In the light of this, and in respect of the NTO rule, Dowman presents an argument on reporting obligations and their challenges for South African lawyers.[44] Whilst covering numerous factors, including money laundering, Dowman emphases the NTO rule and the dilemma it raises in seeking to prevent tipping off. As mentioned previously and supported by Hamman and Koen, attorneys who find themselves in a situation where suspicious activity is allegedly present are required by law to report it, yet must knowingly maintain a professional relationship with their clients despite their non-disclosure of the FIC investigation.[45] Thus, it is ironic that

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[37] Financial Intelligence Centre (2024).
[38] Respect, dignity and equality.
[39] "A history of apartheid in South Africa" *South African History Online* (date unknown) available at *https://www.sahistory.org.za/article/history-apartheid-south-africa* (accessed 9 December 2024).
[40] Van Zyl IV, Christoffel H & Visser JM "Legal ethics, rules of conduct and the moral compass: Considerations from a law student's perspective" (2016) 19(1) *Potchefstroom Electronic Law Journal* 1.
[41] Van Zyl *et al.* (2016) at 6.
[42] Code of Conduct.
[43] Code of Conduct.
[44] Dowman N *Reporting obligations: A challenge for South African lawyers* (unpublished LLM thesis, University of the Western Cape, 2019) at 54.
[45] Dowman (2019) at 54.

the very law that they champion requires them to betray the trust and integrity they are meant to strive for and protect.[46]

This cruel paradox would undoubtedly impact on the moral and ethical obligations – the moral compass – of attorneys. In fact, one may argue that the expectation to adhere to the law and not tip off compromises the ethical obligations towards that client. A legal practitioner who chooses to violate their legal duty faces a similar guilt and reproach should their actions come to light. Consequently, the reality for practitioners is that they are torn in two different directions. Uphold their legal duty to FICA and stain the relationship with their client by betraying their trust, or reject their legal duty to report the suspicious transaction in favour of their obligations, ethical or otherwise, towards their client at the risk of injustice. Lessening the pull from either side would lessen the ethical and emotional baggage attached to the decision of which way to pull themselves. In doing so, it may provide a clearer path forward for legal practitioners and ease the burden placed on them.

Regardless of the outcome of the FIC investigation, there is no denying the initial betrayal involved in holding information back; this non-observance of trust and confidence between the legal professional and the client taints the relationship, even if the client might not be aware of it. The genuine desire to help and assist one's clients and society is muddied by the very law that the practitioner is meant to use and support. To be placed in such a position speaks to the ethical standards of the profession itself. To expect legal practitioners, especially young and inexperienced legal practitioners, to contend with the ethical dilemma that the absence of certainty presents can be considered unethical in and of itself. To say the legal profession is unethical contravenes what it is meant to stand for and represent and yet, one may deduce that very conclusion from the dilemma that this paper seeks to highlight.

6 RECOMMENDATIONS

Considering the structure of the law and the ethical duty placed on legal practitioners, it can be argued that the best workable solution would be to enforce the NTO rule above the legal professional privilege. In this regard, there are three main instances in which this can be enforced. There should only be an application of the NTO rule if the client actually exceeds the prescribed amount.[47] For a large majority of citizens, this would not be an issue. The

[46] Hamman & Koen (2012) at 12.
[47] See initial discussion of the prescribed amount.

average salary in South Africa is about R27,200.[48] If clients income exceeds this amount, and therefore they are capable of executing transactions that exceed the prescribed amount, this leaves one with two scenarios: either the client is guilty and attempting to launder money, or they are innocent and genuine in their conduct.[49] If they are innocent, it would not harm them in the slightest for the investigation to proceed, as it would simply confirm their innocence. That is, as it would not harm them or even affect them, there is no practical harm to their ignorance.

The way forward in combatting this would be to limit and curtail the options for defence for those seeking to abuse the sanctity of the trust account, whether that be ill intent clients or dishonest and criminalistic practitioners. This can be done in part, by establishing, for certain, the path that should be followed. The longer this grey area persists, the longer the upstanding paragons of legal practice will suffer – and the longer the underhanded renegades of the profession will hide their actions. By opting for prioritising either the NTO rule or the client, the "grey area" would be replaced by "black and white". In doing so, an underhanded practitioner cannot claim to have been confused, conflicted or ignorant in the circumstances. Legal certainty must be established for both the practitioner and society in general. This certainty requires a definite answer. Regardless of whether an optimistic or pessimistic approach is taken, the lack of address of the topic leaves society at risk. Therefore, it is recommended that legislation be enacted in order to clarify and address the discrepancy and further issues highlighted throughout above. This clarification is required from the parliamentary legislature, the FIC, and the Legal Practice Council as governing bodies.

Furthermore, it is recommended that priority be given to the NTO rule rather than the client-practitioner relationship. As the discrepancy in salaries indicates, the NTO rule will likely not see application for a majority of South African clients. Compare this to the entirety of the South African population which would be affected by the potential damage to the economy and those directly affected by the criminality of money laundering. Considering the public interest and

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[48] "Average salary in South Africa" (13 February 2025) *Arcadia Finance* available at https://www.arcadiafinance.co.za/personal-finance/income/average-salary-in-south-africa/ (accessed 03 July 2025). The reason for considering the average salaries of South Africans lies in their implications for the greater public. It also specifies the category of clients that are likely to be impacted. Additionally, the link between average salaries, legal practitioners and the NTO rule is in the impact of the circumstances. Few South Africans would be impacted by the NTO rule as they are unlikely to reach the monetary reporting threshold. Nevertheless, all South Africans are impacted by the damage to the economy and the criminality of money laundering.

[49] It is not that there is an assumption of suspicion due to earnings, but rather a specification of eligibility. In order to have the necessary disposable funds to meet the monetary threshold that necessitates reporting, a majority of South Africans would need to spend many months saving their disposable income.

the guidance of international standards,[50] it is again recommended that favour be given to the protection of the majority of citizens by giving priority to the NTO rule, over the minority who are eligible to reach the reporting threshold.

7 CONCLUSION

Adherence to the NTO rule and code of conduct of legal practitioners creates a grey area, which if not addressed may negatively affect the moral or ethical compass of a legal professional as well as society at large. This impact is felt irrespective of which obligation a legal practitioner decides to uphold: the NTO rule, on the one hand, or professional privilege, on the other.

On the basis of this finding, it was recommended that the former be adopted as the path forward. Despite the drawbacks of this recommendation, it still seems to outweigh the drawbacks of the contrary and absence of any other recommendation. Clearly establishing a path forward will not only address the risk of lack of legal certainty but also remove the guilt of choice. Regardless of the path taken, the most important step, as has been emphasised above, is for a choice to be made and a path forward to be identified.

While it is recommended that priority be given to the NTO rule, should the alternative of prioritising the client be followed instead, it would still serve society, and specifically legal practitioners, more than the above remaining unaddressed. May the above serve as a call for the development by the legislature of South African law to do so.

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