

## LET SLEEPING LAWYERS LIE: ORGANIZED CRIME, LAWYERS AND THE REGULATION OF LEGAL SERVICES

DAVID MIDDLETON and MICHAEL LEVI\*

*The study examines the range of crimes in which solicitors become involved as primary offenders (mainly fraud) or on behalf of others (criminal planning and money laundering) and critically reviews the factors in their personal and working environment that may promote or inhibit such crimes and the ways that criminologists and socio-legal scholars have accounted for deviance and the regulation of the profession. It ends by discussing trends in contemporary lawyering and its regulation—ethics, discipline, ownership and surveillance—that could plausibly affect rates of crime by solicitors, focusing on England and Wales but also giving some comparative context with the United States.*

**Keywords:** lawyers, organized crime enablers, fraud, money laundering, professional regulation

### *Introduction*

It is broadly accepted that explanations of crime that focus solely on the motivations of ‘primary offenders’ are too narrow. In academic, policy and practitioner circles, there is increasing interest in the hinterland of crime commission, which now goes under the generic name of organized crime ‘enablers’ (World Economic Forum 2012; Serious Organised Crime Agency 2013: para 5.20). This includes lawyers as crime facilitators on a spectrum from active conspirators through wilfully blind to unwitting actors. The UK Home Office expects that between 100 and 200 ‘enablers’, including lawyers and accountants, not currently caught by conspiracy laws, would be jailed each year under a new offence of participating in an organized crime group in the Serious Crime Bill 2014 (Travis 2014). A Europol Threat Assessment shares the view of the Australian Crime Commission (2013) when it notes: ‘Certain enablers...provide opportunities for different OCGs.... These horizontal crime enablers include...corruption, legal business structures (LBS) and professional expertise’ (Europol 2013: 10). So there is broad enforcement consensus that lawyers can and do help ‘organized crime’.

An early manifestation of this ‘crime enabler’ approach was in situational crime prevention models of ‘organized crime’ (Levi and Maguire 2004; Bullock *et al.* 2010). However, there has developed a substantive interest also in the mechanics of crime commission and how networks facilitate or inhibit the pathways to particular sorts of crime (Morselli 2009; see also Levi 2012; Paoli 2014). Lawyers both commit fraud for themselves and facilitate crimes committed by others, including acts under the rubrics of ‘white-collar’ and ‘organized’ crime. Middleton and Levi (2004) reviewed the role of solicitors in crime commission, especially when they were under pressure from declining business turnover or demanding partnership performance, but also when they

David Middleton, Solicitors Regulation Authority, The Cube, 199 Wharfside Street, Birmingham B1 1RN, UK (The opinions expressed do not necessarily represent SRA policy).; \*Michael Levi, School of Social Sciences, Cardiff University, Glamorgan Building, King Edward VII Avenue, Cardiff CF10 3WT, UK; [Levi@Cardiff.ac.uk](mailto:Levi@Cardiff.ac.uk).

developed unsustainable gambling and sex habits. Their status and special protections for Legal Professional Privilege (which do not apply where solicitors are reasonably suspected of actively facilitating crime) make surveillance and seizure of documents more difficult than they are for other enforcement targets. We revisit the issues because of shifts in economic pressures and in the legal profession and its regulation. Thus, we examine the range of crimes in which—as far as anyone reasonably knows—a small minority of solicitors become involved and critically review factors in their personal and professional environment that may promote or inhibit such crimes. We end by discussing trends in contemporary lawyering and its regulation that could plausibly affect rates of crime by solicitors, focusing on England and Wales but also giving some comparative context.

### *The Context of Lawyer Misconduct*

A legacy of the Labour government ousted in May 2010 is the 380 plus pages of the Legal Services Act 2007 which created an oversight regulator, the Legal Services Board (LSB), and allowed non-lawyers to own and control law firms. The level of understanding of the implications for fraud and organized crime control at a political level was neatly encapsulated by a Labour minister's comment (BBC News 2005):

I don't see why consumers should not be able to get legal services as easily as they can buy a tin of beans.

This fits nicely with the devaluation of the professions generally, begun under the Thatcher government, treating them as simply trade associations lobbying for their own economic interests (Abel 2003: 472; Boon 2011). In an era when financial services 'success' and 'innovation' were naively celebrated, the legal profession became an easy target for neo-liberals to open up the legal market to non-lawyers (Clementi 2004: para 37), implemented in 2011. Thus, 'legal services providers' now include non-lawyers. The likely impacts of non-lawyer ownership of law firms, known by the lifeless phrase *Alternative Business Structures* (ABS), are not our main subject here. Our primary purpose is to review the current landscape of such facilitation and inhibition of wrongdoing.

The academic disciplinary silos mentioned in passing in 2004 have been eroded only slightly. Mainstream criminology has paid little attention to professional misconduct (Simpson and Weisburd 2009: 6). Seeking 'to produce a "virtuous profession"' (Economides and Rogers 2009: 17), legal ethics scholarship in the United Kingdom has shown little interest in lawyers who facilitate serious wrongdoing, other than the miners' compensation scandal (Boon 2012). The highly developed legal ethics literature in the United States remains mostly focused on lawyerly propriety rather than on the interaction of lawyers and crime. Langevoort (2010; 2012) followed up his seminal work on lawyer involvement in the savings and loans scandal (Langevoort 1993; 1998), asking 'Where were the lawyers?' The financial services disaster of the noughties might lead one to ask 'where are the white-collar criminal defendants?' (Sanctions on senior individuals were hard to find before 2014. However, the main focus of critics of the financial crisis has been on bankers, regulators and—on corporate tax—accounting firms, rather than on lawyers.)

Abel's work focuses not on lawyers' crimes but on cases of 'neglect, excessive fees and over-zealous advocacy' (2008: 56), though it applies learning from white-collar

criminals' rationalizations (Abel 2008: 508; and see Hall and Holmes 2008). His second book on the subject comments 'I excluded... misappropriation... because the behaviour is straightforward' (Abel 2011: viii), a view we consider to be mistaken. Occasionally, there are investigations by journalists and Congressional Committees into lawyers, one of which accused the Conn Law Firm of scheming with administrative law Judge David B. Daugherty (and doctors) to approve more than 1,800 disability cases from 2006 to 2010 at an extraordinarily high rate. When this was exposed by the *Wall Street Journal*, the judge then retired (and was reported as having attempted suicide) (US Senate 2013).

Despite 'regulators' of lawyers in the United States seldom holding them to account for their role, particularly if they are from large firms (Abel 2008: 54), the role of lawyers as 'gatekeepers' has been examined (Coffee 2006: 192)—a role which they dislike and refuse to accept (*pace* obligations in many countries to report suspicions of their clients under money laundering regulations and Garland's view of the trend towards 'responsibilization' of civil society in crime control).<sup>1</sup> 'Gatekeeping' has been employed by the Financial Action Task Force (FATF) to describe and prescribe the role of lawyers and other professionals in controlling access to corporate secrecy, et cetera (FATF 2004; see also American Bar Association 2003; IBA 2014). The focus of the FATF and of anti-Grand Corruption campaigners against disguised beneficial ownership of business vehicles for crime makes this a battleground for some time to come, especially since G8 and G20 adoption of this transparency in 2013 as a key theme in the regulation of global 'bads' (FATF 2013).

Little has been written about lawyer wrongdoing in the United Kingdom, and the largest of the approved regulators, the Solicitors Regulation Authority (SRA), has not historically published much analysed data. However, it has now published its risk framework, risk index and its (intended to be annual) Risk Outlook. There is also raw information available such as web access to the findings of the Solicitors Disciplinary Tribunal (SDT); and many regulatory decisions by the SRA previously kept private are now published on its website.

Some legal ethics scholars might counter that the facilitation of serious wrongdoing simply renders the lawyer a party to crime, taking the issue out of legal ethics and into that of 'clear' criminality (and a job for law enforcement rather than for professional regulators). Middleton (2005) has critiqued this view but Abel's comment—'The problem is that if the threat of criminal punishment does not deter, professional discipline is unlikely to do so' (Abel 2011: 456)—indicates a need to look closely at the balance between regulation and criminal prosecution in different jurisdictions, taking into account speed and preventative effects as well as symbolism. But law enforcement is unlikely ever to have sufficient resource to investigate and prosecute more than a tiny proportion of serious fraud and money laundering. Since obtaining evidence against lawyers sufficient to lead to their conviction is very difficult for them (despite examples in the 'Direct facilitation of crime' section below), this disincentivises criminal investigations, since modern managerial and austerity policing regards it as a waste of resources to investigate where the chances of conviction or 'significant disruption' are not high. Pragmatically, regulatory action such as closing down a law firm or controlling how a lawyer may practise provides

<sup>1</sup> The UK legal profession is by far the most likely in the world to report suspicions of money laundering by their clients, though there are no serious studies rigorously analysing either outputs or outcomes from these reports (see FATF 2013).

more direct public protection and indeed disruption, at less social cost, than does prosecution. About 69 per cent of solicitors surveyed considered that the prospect of enforcement action provides credible deterrence (Law Society 2013).

Middleton and Levi (2004: 141) noted that the risks of organized criminal groups using law firms as ‘fronts’ for their criminal activities ‘could be a particularly dangerous scenario since the criminals then have access to all of the privileges and protections available to lawyers, including receiving legal aid money, transferring money through confidential client accounts, and conducting litigation’. However, the risks of non-lawyer control of law firms were summarily dismissed by Clementi (2004: 116), writing before the financial crisis led most people to question the net social benefits of ‘light touch regulation’:

Opening up ownership brings the risk of inappropriate owners of a legal practice. A few have given short answers as to why only lawyers should be ‘fit to own’ a legal practice; this has been to refer to whoever they regard as the villain of the moment or, in default, ‘Robert Maxwell Legal’.<sup>2</sup> There is a point to be addressed on the issue of ‘fit to own’. But the short answer is an insufficient one, just as the words ‘South Sea Bubble’ would not have been a sufficient reason for our forefathers to have prevented all new public share offers.

Such bullish attitudes are less celebrated today, but it is doubtful if reckless lawyers could do as much harm as bankers to the public, though they facilitate the behaviours of ‘predicate criminals’ and could damage confidence in the legal profession.

Lawyer misconduct needs to be seen within the evolving social construction of ‘organized crime’. The UK government’s previous organized crime strategy (HM Government 2011: 5) states:

Organised crime involves individuals, normally working with others, with the capacity and capability to commit serious crime on a continuing basis, which includes elements of planning, control and coordination, and benefits those involved.

Its revised strategy heralds both a broader and looser construction when it states (HM Government 2013: paras 2.5 and 2.6):

[O]rganised crime is serious crime planned, coordinated and conducted by people working together on a continuing basis. Their motivation is often, but not always, financial gain....organised criminals very often depend on the assistance of *corrupt, complicit or negligent* professionals, notably lawyers, accountants and bankers. [Italics not in original].

This is the rationale for a deterrence/disruption/incapacitation approach to reducing the ability and willingness of lawyers to help ‘serious criminals’.

### *Previous Categorizations of Solicitors Facilitating Wrongdoing*

Middleton and Levi (2004) identified various categories and settings: *mortgage fraud, high-yield investment fraud or bank instrument fraud, legal aid fraud, immigration law practice, fraudulent claims for financial loss, theft of client money, tax fraud and financial schemes*. In this section, we will review most of these categories (although tax fraud requires more space than we have available here). In the next section, we will look at some other or emerging threats.

<sup>2</sup> Named after the litigation-prone deceased fraudulent entrepreneur.

The overall picture has changed significantly. The forms of wrongdoing have changed, and economic pressures led the SRA to issue dire warnings about 150 firms facing ‘financial instability’ problems (Baksi 2013), while long-established law firms have failed (The Lawyer 2013). Major government legal aid cuts have reduced legal aid fraud, and problems with immigration law practice are less evident but have not disappeared (e.g. Legal Futures 2013a). Fraudulent claims for loss against the SRA Compensation Fund (SCF) have not become common but have been superseded by theft of law firms’ identities (Legal Futures 2012b). Theft of client money has continued and now appears to take the form of theft of the mortgage advance rather than the acquisition of property for longer term gain in a rising market.

### *High-yield investment fraud*

High-yield investment fraudsters stopped targeting the legal services sector on the scale seen in the late 1990s and early 2000s: but a sharp rise in 2013 led the SRA to issue a new warning (SRA 2013a). Two drivers of change seem salient: collective memory loss by law firms or perhaps even by older/new fraudsters about tough regulation; and banks’ reluctance to lend to business may have led some law firms to pursue high risk lending or investment schemes to keep themselves afloat.

A solicitor was convicted after a loan of £17m was obtained on the basis of false claims that £76m was held in bank accounts. Grandiose claims included that money was ‘to fund the development of a luxury Turkish resort’ and that famous sportsmen had bought villas. ‘Investor’ scepticism can be disarmed by support from an accredited professional; ‘undertakings’ from a law firm can provide this validation (Middleton and Levi 2004: 139). Here, the lawyer provided false letters and an undertaking from three (unsuspecting) ‘fellow ... partners guaranteeing’ that the fraudster was a wealthy and successful businessman (Daily Mail 2011; see Steele SDT 10956/2012; see also Farmiloe SDT 10257-2009 and Yildiz SDT 10997-2012).

In 2011, a solicitor pleaded guilty to fraud and was jailed for 17 months (Serious Fraud Office [SFO] 2011a). The SFO indicated that it had been contacted by numerous would-be commercial borrowers, but none had received the promised loans, although over £4m in fees were taken from over a hundred of them (SFO 2011b). His involvement was also fairly standard:

[He] was a practising [sic] solicitor who ran a small conveyancing firm ... from an office above a shoe shop in Godalming... used ... to provide written and oral re-assurance as a supposedly independent professional, to concerned or uncommitted applicants that the company was substantial and could meet its financial obligations.

Investors are not usually in a position to test the value of professional assurances, though in this case, Google Street View might have given them a clue about the size of the law firm.

### *Financial schemes*

Some law firms did not heed lessons from the action taken against those who promoted high-yield investments and became over-involved in boiler room frauds, bringing firms to the attention of the then Financial Services Authority (FSA) as well as the SRA. One



firm's overseas operations used promotions to sell shares to 670 investors in the United Kingdom for US\$21m (FSA 2009). Eventually, the FSA decided on a penalty of just over £450,000 (FSA 2011). Perhaps because they had already been punished, the SDT ordered that one partner be suspended for 12 months, one was modestly fined and others were reprimanded.<sup>3</sup> A solicitor who signed off misleading advertisements for boiler room scams operating from Spain was permanently banned from working in financial services. He and his firm were fined £400,000. The advertisements offered free research reports to get hold of consumers' telephone numbers, leading to 'pressurised selling of high-risk illiquid shares in unlisted small companies' (FSA 2010a). At least 130 consumers lost most of their investments totalling over £3m. He was then suspended for 18 months but not banned by the SDT (Hyde 2014; see also Private Eye 2014).<sup>4</sup>

Some solicitors have been involved in land-banking scams, in which promoters buy land to sell on in small parcels to 'investors' on the false expectation that if and when planning permission is obtained to develop it, they will make substantial profits. The SRA and FSA published warnings about these scams, the former providing a case study in which a solicitor was struck off (SRA 2011b). In another case, partners in a substantial firm were fined.<sup>5</sup> The seriousness of the penalty is largely driven by whether the solicitor could be shown to have acted dishonestly or recklessly.

### *Mortgage fraud*

The economic crisis of 2008 onwards flushed out substantial losses incurred by lenders, and (as after the 1989 property crash) they sought to recover some of those losses from the transaction lawyers. It was reported in November 2011 that there 'are now 770 open claims against the SCF relating to mortgage fraud, worth a massive £173m, compared to 323 a year ago, when they were worth £103m' (Legal Futures 2011c). Such figures need to be treated with caution because of the wide range of behaviours which are described as mortgage fraud and because lenders notify the SCF of losses to comply with time limits but are required to pursue other remedies first. Clearly, however, substantial losses were incurred by lenders.

Middleton and Levi (2004) reported the coded irritation of the courts at claims against solicitors. The Court of Appeal in late 2012 made a direct policy decision to allocate loss to a lender rather than to the law firm it had sued.<sup>6</sup> The law firm had negligently released mortgage monies to complete buying a property but it was stolen by the recipients. To term such lawyers 'enablers' might be technically correct but morally mistaken. There are other contested attempts in which insurers try to shift the burden of losses away from themselves (Baksi 2011; Hyde 2012).

Mortgage fraud appears still relatively easy to commit. A foreign lawyer registered with the SRA to work in a law firm was sentenced to seven years in prison as being 'at the helm of a criminal gang that defrauded high street banks out of almost £8m by taking out mortgages on properties they did not own' and indeed for consequential money laundering when 'the stolen money was quickly transferred from the solicitor's account

<sup>3</sup> *Manning and others* SDT 10105-2008.

<sup>4</sup> *Greystoke* SDT 11014-2012.

<sup>5</sup> *Baptist and others* SDT 10494-2010.

<sup>6</sup> *Davisons v Nationwide Building Society* [2012] EWCA Civ 1626. See also *Santander UK Plc v RA Legal Solicitors* [2014] EWCA Civ 183. See also *Lloyds TSB Bank plc v Markandan & Uddin* [2012] 2 All ER 884 and *AIB Group (UK) plc v Mark Redler & Co* [2013] EWCA Civ 45.

into a network of bank accounts, controlled by {Y} and the rest of the gang. The money was then withdrawn in cash' ([Legal Futures 2012a](#)). The SRA had already closed down the firm in February 2009, and Y was struck off the register of foreign lawyers in 2010.

The organized, determined and alarmingly simple nature of this fraud is evidenced by the opening description of the facts of a case in which the SRA sought to recover losses of over £6m in respect of two law firms it had closed down, S and PN. S 'would complete all of the conveyancing forms necessary to procure the payment of the mortgage advance by the lender to [S] and its lodgement in [S's] client account in readiness for completion. The conveyancing transaction would then be abandoned' and the money paid away. PN was doing the same. A judge noted that over £1m was paid out of the S client account and £5.2m from the PN account.<sup>7</sup> Rather than acrimonious civil suits, a more indirect and forward looking approach is action by lenders to control the law firms who act for them ([Legal Futures 2011b](#); [Smithers 2012](#)).

The substantial losses arising from mortgage fraud led insurers to largely welcome the proposal to exclude claims by financial institutions from compulsory professional indemnity cover ([SRA 2011a](#): para 5.11). The Law Society in its representative role ([Legal Futures 2011a](#)) and brokers and financial institutions opposed this move ([SRA 2011a](#): para 5.2). An independent review commissioned by the SRA showed that 'conveyancing claims represent by far and away the largest proportion of claims compared to all other categories' ([Malcolm et al. 2010](#): 38). The SRA decided not to proceed for the time being but to conduct further research including 'consideration of which parts of the process are most susceptible to negligence and fraud, whether there should be explicit authorization to conduct conveyancing, whether the conveyancing process itself should be altered; or whether alternative approaches could be used to provide protection to clients' ([SRA 2011a](#): para 5.20). That represents a welcome recognition of the need to address situational prevention by regulatory tools, the most interesting being the potential for positive licensing for those firms that wish to conduct conveyancing. But efforts continue to reduce potential claims ([Legal Futures 2014](#); [SRA 2014a](#); [2014b](#)).

### *Money laundering or improper use of client account*

The extent and nature of the facilitation of money laundering by lawyers is disputed ([IBA 2014](#)). Professionals insist allegations of such involvement are in reports which comprise either lightly analysed lists of cases in multiple jurisdictions ([FATF 2013](#)) or assertions citing closed source material which cannot be tested. A striking example was the publication in June 2010 of the United Nations Office on Drugs and Crime ([UNODC 2010a](#)) report on transnational organized crime. The then Executive Director asserted in a press release that law enforcement against mafia groups would not be effective while 'the underlying markets remain unaddressed, including the army of white-collar criminals—lawyers, accountants, realtors and bankers—who cover them up and launder their proceeds' ([UNODC 2010b](#)).

Yet in the report itself, remarkably, neither 'lawyer' nor 'accountant' appears, nor does the report say anything about professionals laundering money, nor have any underlying data been published elsewhere for independent review. Regrettably, such evidence-free headline metaphors can still drive or be used to 'justify' control policies.

<sup>7</sup> *The Law Society of England & Wales v Isaac & Isaac International Holdings Limited and others* [2010] EWHC 1670 (Ch).

UNODC did not cite our previous review or the evidence provided of laundering by solicitors in England and Wales, disclosing at least £240 million laundered and a further US\$557 million moved through law firms in connection with high-yield investment frauds (Middleton 2008). Although the FATF (2013: 8) cite Middleton and Levi (2004), they have not included studies that set out empirical evidence more analytically, preferring simply to list lawyer malefactions.

A case that contributed to 'our' total of £240 million has been appealed<sup>8</sup> since a commentary by Middleton (2008). It arose from wrongdoing involving many millions of dollars and the former Zambian President Chiluba, bravely but unsuccessfully prosecuted in Zambia by one of our ex-students, the late Maxwell Nkole, who was sacked by the then President when he insisted on appealing against the acquittal. One of the solicitors was found dishonest in the High Court and was struck off<sup>9</sup> in relation to particular payments from client account, including turning 'a blind eye to the glaringly obvious' concern that Chiluba was suspected of dishonesty.<sup>10</sup>

He was also found grossly reckless for permitting money to pass through client account when there was no underlying legal transaction and failing to be alert to the very substantial sums of money passing through client account and circumstances which should have put him on inquiry as to their authenticity or legitimacy. On related facts, another solicitor, Mr M, was found dishonest by the High Court but that was overturned on appeal. At least US\$7m had been paid into his firm's client account.<sup>11</sup> Although Mr M's 'conduct showed serious failings in terms of professional conduct', the Court of Appeal did 'not agree that his misunderstanding of the original [Law Society] Blue Card warnings, and his failure to take on board the significance of them or of later versions of the same guidance, are supportive of a finding of dishonesty'. He was held to be 'much less knowledgeable and experienced, in relevant matters, than he may have thought himself to be, or held himself out as being'. Ignorance can be a defence to a dishonesty allegation, it seems. Mr M was found by the SDT to have been grossly reckless and was suspended for three years.<sup>12</sup> It is often very difficult to prove both that money was stolen and that the solicitor knew it. To avoid that difficulty providing a free pass to laundering by professionals, situational prevention is critical.

One such preventative effort was the principle that solicitors should not transfer money through their client account unless it is in connection with a genuine transaction in which they are acting.<sup>13</sup> It thus prohibits the risky *behaviour* without having to prove what the client may be up to. One case, where no allegation of impropriety was made against the *client*, involved over £13m being transferred through a client account, of which little or nothing related to legal advice.<sup>14</sup> The SRA Accounts Rules 2011 now include a specific rule, 14.5, to deter this behaviour (arising from a consultation paper: SRA 2010a), belatedly reflecting comments of the Court of Appeal in the Zambia case:

<sup>8</sup> *Attorney General of Zambia v Meer Care & Desai* [2008] EWCA Civ 1007.

<sup>9</sup> *Thaker* SDT 9697-2007. See Judgment dated 17 April 2012 after the re-hearing following the solicitor's appeal, the latter reported as *Thaker v Solicitors Regulation Authority* [2011] EWHC 660 (Admin).

<sup>10</sup> *Thaker* SDT 9697-2007, Judgment dated 17 April 2012

<sup>11</sup> *Attorney General of Zambia v Meer Care & Desai* [2008] EWCA Civ 1007, paragraph 7.

<sup>12</sup> *Meer* SDT 9575-2005.

<sup>13</sup> See *Wilson-Smith* SDT findings 8772/2003.

<sup>14</sup> *Barth, Jenkins and O'Dowd* SDT 10150-2008.



...almost none of the payments through the client account ... related to any legal work done by the firm. It is equally plain that this was not a proper thing for a firm of solicitors to do.<sup>15</sup>

The need to supplement criminal justice with regulatory action is also evidenced by the lack of convictions or indeed prosecutions of lawyers for breach of the local regulations arising from the EU Third Money Laundering Directive.<sup>16</sup> The FSA did eventually seek to bring criminal prosecutions for substantive money laundering offences (though not against lawyers), and the Supreme Court noted that it needed first to consult with HM Treasury.<sup>17</sup> The FSA (now replaced by the Financial Conduct Authority—FCA) has also imposed civil financial penalties for breach of the regulations ([FSA 2010b](#)).<sup>18</sup>

Nevertheless, improper use of client account without evidence of laundering for self or others continues. A solicitor was struck off after passing £7m through client account for a client who had already been to prison.<sup>19</sup> Another firm and two partners were fined a total of £75,000 after £10m was moved through client account for a football club, and their appeal was dismissed by a strong judgment in the High Court.<sup>20</sup> It was reported that the solicitors ‘used the [firm’s] account containing their clients’ money to help to pay football creditors and non-football creditors’ ([Palmer 2012](#)).

The SRA identified ‘inadequate systems and controls over the transfer of money’ as an ‘emerging risk’ in its 2013 Risk Outlook ([SRA 2013b](#): 7) (though such phraseology risks being tautological, being identified whenever laundering occurs). Its 2014 Risk Outlook identified misuse of money or assets, inadequate systems and controls over the transfer of money, and bogus firms as principal (crime) risks, alongside other ethical risks and information insecurity ([SRA 2014c](#)). It assessed money laundering as a rising risk and bogus firms as a new one. However, as usual also in crime threat assessments, these rely on forward projections of existing identified trends rather than identifying problems that are in their very early stages.

### *Newer Categories of Risky Conduct by Lawyers*

#### *Financial instability*

We would not yet claim that the autonomy given to the professions because of the social value of their work is a thing of the past. But the social legitimacy of lawyers is far more threatened than National Health Service doctors ([Case 2013](#); [Middleton 2014](#)), and governments are continually seeking to undermine or remove its foundations, though Abel (above) has shown how hard they are to shift, at least in America. High incomes and jobs for most qualified lawyers can no longer be taken for granted, but precise impacts of economic strain on wrongdoing by those in employment are unknown. Such strains have become socially mainstream. The Chapter 11 bankruptcy of a fictional Chicago law firm became a recurring theme in a season of a television series (with

<sup>15</sup> *Attorney General of Zambia v Meer Care & Desai* [2008] EWCA Civ 1007, paragraph 234.

<sup>16</sup> 2005/60/EC Directive... on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

<sup>17</sup> *R v Rollins* [2010] UKSC 39, see, e.g., paragraph 23.

<sup>18</sup> The FCA and other designated authorities can impose civil penalties rather than bringing a prosecution: regulation 42 of the Money Laundering Regulations 2007. Penalties for financial misconduct have been rising in size and frequency since that date, as increasingly egregious revelations about banker and other professional behaviour emerge.

<sup>19</sup> *Wong*, SDT 10791-2011.

<sup>20</sup> *Fuglers v SRA* [2014] EWHC 179 (Admin).

viewing figures of between 11m and 13m according to Wikipedia) including reference in one scene to the failure of a real law firm, Dewey LeBoeuf (King and King 2013), three of whose senior personnel subsequently have been indicted for fraud, seven others having pleaded guilty to civil charges in 2014 (Goldstein 2014).

In the United Kingdom, after regulatory engagement with failing firms, resulting in managed closure or forcible intervention by the SRA, serious alleged misconduct of different types was uncovered. This suggests that (as in banking and securities offending), there is a bigger risk from larger firms than was previously thought, whereas most enforcement work is against small firms (Abel 2008: 54). This was newsworthy (Legal Futures 2013b). The SRA disclosed that some substantial law firms were ‘very naïve in their financial management’, that well-run firms tend to have a high-quality finance director, and that troubled practices simply failed to accept their situation or engage with the SRA (Middleton and Soon 2013; 2014).

In addition to extreme cases such as former US lawyer Marc Dreier who ‘sold more than \$700 million worth of fake promissory notes to hedge funds and other investors, and stole more than \$46 million from clients...’ (Weiser 2009), there is a more insidious problem of senior partners who—as in the broader commercial world—over-dominate and may affect firm culture. The SRA paper has already warned that ‘the temptation to be economical with the truth with funders is a very serious risk for firms’ in financial difficulty. SRA cases may provide wider empirical evidence of the attitude to ethical behaviour in larger firms, and fear of loss is a major driver of corporate fraud.

### *Abusive litigation*

Abel comments that ‘Excessive Zeal... for me, is the most troubling category of lawyer misconduct’ (Abel 2011: 456). He states that the victim is ‘the legal system, not individuals’—the opponents of the over-zealous lawyer were presumably large businesses. However, experience in England & Wales indicates that the victims could be individual consumers. Two partners in a large law firm were suspended and fined after they were involved in the sending of “intimidating letters” to individuals they accused of illegal file-sharing. In 2006–09, acting on behalf of various clients, more than 6,000 letters were sent to individuals claimed to have been involved in unlawful file-sharing in breach of copyright law (Dowell 2011). These letters demanded damages and costs and warned of more if the claim was not urgently settled. The lawyers denied impropriety, stating that they were merely acting in the client’s best interests, provided the letters’ contents were lawful. It was just an unfortunate consequence when one sends a letter relating to pornography that there would be additional pressure on the person!<sup>21</sup>

The SRA’s *Risk Outlook 2013* identifies ‘improper or abusive litigation’ as a ‘potential risk’ and uses the file-sharing case and miners’ compensation cases as examples (subsequent to that, payday lender Wonga—often criticized for its high-interest rates—was forced in 2014 to pay £2.6m in compensation to 45,000 customers for sending them threatening letters from non-existent firms ‘Barker and Lowe’ and ‘Chainey, D’Amato and Shannon’, to induce them to pay their real debts to it [Jones 2014]). There is scope for criminals to threaten litigation to extort money from individuals, particularly in the context of the comment about pornographic material quoted above.

<sup>21</sup> *SRA v Miller and Gore*, SDT findings 10619-2010, p. 62.

Finally, there is arguably unethical litigation, such as acting for ‘vulture funds’ which buy up debt owed by foreign, developing country governments for a small percentage of its face value and then sue the government for the full sum (Blackman and Mukhi 2010). Some lawyers refuse to act for ‘vultures’ but others assert ethical neutrality or even duty to act (Margolis, undated; Clifton 2014).

### *Direct facilitation of crime by lawyers*

Here, the primary response has been by law enforcement rather than regulators, mainly because of investigation techniques only available to the police. Prosecuted cases are considerably less common than allegations of misconduct. A solicitor was convicted of five counts of use of a mobile phone from prison and one of conspiracy to pervert the course of justice. The conspiracy was the classic worry, namely the concoction of a false defence:

The conspiracy had involved the agreement with others that Samuel Ogunro, a person charged with a serious firearms offence, should plead guilty on a false basis; the false basis being that he should take the full blame for the possession of a handgun and so ease the position of his co-defendants.<sup>22</sup>

A distressing aspect of this case not evident from the disciplinary findings is that Samuel Ogunro was 17 years old and eventually refused to go along with the scheme, following which he was murdered (The Voice 2012).

The police presumably used their power to identify telephone activity in that case. Covert recording was used to investigate a solicitor called Marray, described as a ‘leading underworld lawyer’, who was sentenced to two years in prison for ‘doing an act intended to pervert the course of justice’ by giving advice on how best to escape the country (Siddle 2013).

A solicitor called Ditta was imprisoned for three years. It was reported that he was a cocaine addict and ‘tipped off drug dealers with information about a police investigation’ (Hyde 2013). Another solicitor, Souleiman, was jailed for 10 years for a sophisticated immigration conspiracy: ‘An estimated 1,800 men, including members of the Albanian mafia, were able to live in Britain by taking part in sham marriages over eight years. Women from eastern European countries were flown to Britain to marry men from outside the EU’ (BBC News 2013). Yet another was sentenced to six years for immigration law offences after evidence of women being used for sham marriages and prostitution, at least one of whom was also sexually abused by the solicitor (Greenwood 2014).

### *Explaining Solicitor Misconduct: Opportunity and Routine Activities Approaches*

Classificatory exercises are an important prelude to making sense of solicitor misconduct which we go on to sketch out in this section. Levels of motivation can shift with lifestyle and the difficulty of meeting career development and financial aspirations legally, especially for acts that can be readily rationalized as acceptable and are not challenged at the time. A theoretical approach to opportunity in the context of white-collar crime

<sup>22</sup> Naik SDT 11116-2013.

has been set out by [Benson \*et al.\* \(2009\)](#). Opportunity/prevention assessment requires a high degree of specificity ([Crawford 2007: 878](#); [Benson \*et al.\* 2009: 177 and 184](#)) and a case study approach ([Abel 2008: 36, 53 and 56](#); [Benson \*et al.\* 2009: 187](#)). This article seeks to provide that within its space constraints. Regulatory structures aim at situational prevention: regulated industries impose ‘fit and proper’ tests on admission and in the aftermath of public sanctions such as criminal and disciplinary convictions; many professionals who are subject to (or think they are subject to) oversight will be dissuaded from wrongdoing unless they think they can outwit surveillance or are truly desperate. Crawford reminds us that policing was originally a much wider conception, encompassing ‘regulation’ ([Crawford 2007: 867](#); [Newburn and Peay 2012](#)), and that a masculine subculture of ‘action orientation’ inhibits prevention-oriented policing (868). It is moot whether austerity policing leads to a sharper focus on prevention and/or to more symbolic reactions to ‘signal crimes’ ([Innes 2014](#)). The UK National Crime Agency aims to do both.

Benson *et al.* discuss three theories: routine activity, crime pattern and situational prevention. Routine activities theory (or perspective) foregrounds the way crime reflects victim and third party conduct, downplaying motivation ([Crawford 2007: 877](#)), though [Felson \(2009\)](#) has stressed the importance of the search for co-offenders in transforming crime opportunities. The key fact that white-collar professionals have the opportunity to commit crime every day and most of them do not do so at all shows that opportunity is not a sufficient factor (*cf.* [Abel 2008: 52](#); for recent discussions of this in ‘the fraud triangle’, see [Schuchter and Levi, 2013](#), in press).

In crime pattern theory, ‘awareness of white-collar crime opportunities arise out of their employment or occupation’ ([Benson \*et al.\* 2009: 180](#)). When a lawyer conducts a land purchase transaction funded by a mortgage, the nodes would include the client (often the lead or co-conspirator), the lender of the mortgage funds, the valuer of the premises, the seller and the seller’s lawyers, perhaps the firm in which the lawyer operates, and the land registry. In a fraudulently structured transaction such as a ‘back-to-back’ or ‘land-flip’ ([Middleton and Levi 2004: 132](#)), there would be an intermediate buyer or seller or indeed various parties. A study of US doctors concluded that ‘more physician-related crimes occur within larger networks and by means of more commonly practiced procedures’ ([Benson \*et al.\* 2009: 181](#)). We can see how this may apply to the setting up of companies as components of fraud or money laundering schemes, but we find more value in the concept of the ‘edge’. Benson *et al.* argue that edges are presented to white-collar criminals and evolve over time:

whenever (1) two nodes intersect using a particular path and (2) verification systems or regulatory oversight is absent or ineffective at identifying criminal activity along that path. When a regulatory system embraces only some nodes and their associated networks, white-collar deviance will form along the paths connecting the regulated nodes to unregulated nodes. ([Benson \*et al.\* 2009: 182](#))

The third aspect of opportunity theory discussed by Benson *et al.* is situational crime prevention. They set out the dimensions of criminal opportunity, strongly influenced by the assumption of rational choice on the part of the offender (which we consider must include the attempt to avoid significant economic and status loss), citing [Cornish and Clarke \(2003\)](#).

Benson *et al.* note that white-collar wrongdoing is ‘the intersection of at least two processes’, namely a legitimate process in the business world and an illegitimate process

that is parasitical on the first. Lawyers similarly provide the same service, such as transferring real estate, to the honest and the dishonest (Middleton 2012). Benson *et al.* (2009: 185) recommend ‘making adjustments to the legitimate process that thwart the ability of individuals to act parasitically in relation to the legitimate process’—bringing to mind requirements for lawyers to verify the identity of their clients and report suspicions of money laundering. But this is not an easy social design problem.

It is useful to populate the Clarke/Crawford framework of situational crime prevention with our view of how it might apply to lawyers and money laundering (based on Crawford 2007: 874, table 26.1.s.) (Table 1).

The fourth column, ‘reduce provocations’ is likely to be less relevant than others to white-collar crime. Benson *et al.* do not refer to provocation but to ‘conditions that may encourage criminal action’. Discussing doctors improperly charging for Medicaid or Medicare, they speculate that a ‘condition that might encourage the offense would be the physician’s knowledge that his or her peers have engaged in similar activities’ (we would qualify this with ‘knowledge or belief’, since in behavioural economics [Thaler and Sunstein 2008], it is beliefs about what others are doing that influence behaviour, and these beliefs may be mistaken). In addressing the last dimension, excuses, they say that the doctors think they are underpaid and so ‘excuse the offense as simply making up for what they should have received in the first place’ (Benson *et al.* 2009: 183–4). Improper legal aid claims by lawyers offer a similar situation. Anger at underpayment may in fact be better placed within ‘provocation’ since it is likely to be a causal factor, at least among those who perceive themselves to be honest. Excuses for over-claiming and indeed for other forms of white-collar wrongdoing are more likely to be technical—it was a mistake, the system is too complex to understand, the money laundering regulations are unclear, and so on (Abel 2008: 33; Abel 2011: 463). We would add that although these ranges of self-exculpation are cultural, they are also individual: human ingenuity subconsciously can usually find some way of matching self-interested behaviour to available excuses, so abstract norms may not be strong constraints, and explanations of why they sometimes constrain and at other times do not (for the same people over time and for different people) has so far defeated criminological theory.

Some prevention strategies may seem attractive to a regulator or industry but may generate partial displacement. For example, preventing solicitors from acting for both buyer and lender in the same transaction might remove a conflict of interest and reduce the ability of lawyers to facilitate mortgage fraud: but it might not actually reduce the incidence of mortgage fraud, transferring prevention and loss costs elsewhere. The transfer of costs might concentrate some minds, itself a possible ‘diffusion of benefits’ of prevention, but silos protecting their members’ interests may produce broader market failure (Crawford 2007: 888, citing Clarke and Weisburd 1994).

### *The regulatory system and the sanctioning of solicitors*

Since 1 January 2010, regulation of lawyers in England and Wales has been overseen by the LSB which licenses ‘approved regulators’ such as the Law Society (in effect the SRA), the Bar and so on. Its powers effectively cover all of the approved regulators’ ‘regulatory arrangements’, changes to which require LSB approval. Because the LSB remains focused on market issues, it is still too early to say what impact this will have on the inhibition of serious wrongdoing. The LSB assessed the SRA’s enforcement



TABLE 1 *Techniques of situational crime prevention – money laundering by lawyers*

Increase the perceived effort	Increase the perceived risk	Reduce the anticipated reward	Reduce provocations	Remove excuses
Money Laundering Regulations 2007 require checking of identity of client and other record-keeping	Criminal sanction for breach of Money Laundering Regulations	Loss of professional status with consequent financial loss	By information campaigns and professional rules, enable lawyer to point client to clear prohibition and therefore reduce pressure to comply with dubious instructions	Information campaigns such as the publication of warnings Simplify laws and rules to enhance legitimacy of rules. Reduce ease of neutralization and rationalization
Need to construct a 'genuine' transaction because professional rules require money to be transferred by lawyer only in normal course of a solicitor's business	Professional sanction or protective action for breaches, particularly failure to keep proper records	Disruption: 1. Take dishonest clients' assets <sup>23</sup> 2. Close down law firm, taking possession of all money and documents	Deal promptly with misconduct to reduce perception that others are 'getting away with it'—by direct action or clear public statements	Inclusion in professional rules  Publicize regulatory action against offenders
	Extend guardianship by: 1. Requiring law firms to have compliance partner 2. Tasking lawyers' own accountants with monitoring compliance 3. Back up monitoring of compliance by regulator Study more rigorously methodologies to understand how laundering is facilitated—and publicize results regularly, since individual and corporate memories may be short Criminalize or make it misconduct for a lawyer wrongfully to claim that legal professional privilege applies			Educate lawyers on legal professional privilege and ethics

<sup>23</sup> For an unsuccessful attempt by a client to recover funds from the SRA because of concerns about fraud, see *Halley v Law Society* [2003] EWCA Civ 97.

function but without substantive (as opposed to managerial) comment (LSB 2013a). Despite the SRA's work and law enforcement's continual complaints about professional enablers, this early assessment showed no comprehension of the dangers of the facilitation of fraud by legal services providers.

Though we anticipate a stronger political and National Crime Agency focus on 'enablers' of the elastic term 'organized crime', the regulatory/criminal justice interface as we described in 2004 is likely to continue, at least in serious cases. The SRA (2011c) has moved to a classic pyramid enforcement strategy based on 'constructive engagement and credible deterrence': within resources available, serious misconduct will be met with a strong response, whilst firms that both can comply and are (or appear to be) willing to comply with regulatory requirements will be supervised rather than investigated (SRA 2010b).

Activity by regulators provides a primary form of situational prevention, including standard-setting, practice support functions and ultimately disciplinary and preventative action. We reported in 2004 that between 1994 and 2003, an average of 182 solicitors annually were subject to sanction at the SDT, averaging 72 struck off, 33 suspended and 77 fined. Updating the figures from SDT Annual Reports to 2012 shows modest change: an increase to a total of 195 such outcomes, but a lower average figure for strike offs of 68, a higher figure of 38 solicitors being suspended and an increase to an average of 89 fined. If we exclude the earlier period, we find that the number of fines increased substantially in the five years from 2008, which show an average of 125 per year. The same trend is true of suspensions, averaging 48 for the last five years. The evidence (and the lack of sound models connecting enforcement dose to criminal behaviour) does not enable us to deduce whether this active approach of UK regulators leads to less misconduct by UK solicitors than before or to less than in other European countries. It is intriguing to note that UK solicitors made 3,935 suspicious activity reports to the UK Financial Intelligence Unit in 2013, compared with 180 by lawyers and notaries (from 354 'unusual transaction reports') in the Netherlands, a highly active international economy (both criminal and licit), albeit with far fewer lawyers. But absent knowledge of what is done with these reports, such activity indicators are poor indicators of system efficiency or effectiveness (see Halliday *et al.* 2014).

The changes to the legal services market suggest a need for theories that account for very different organizational contexts for lawyer offending. The profession in England and Wales has witnessed the growth of massive, often international, practices employing hundreds of lawyers, that have little interaction with retail consumers of legal work (though they may be wittingly or unwittingly involved in money laundering and transnational corruption). In contrast, 85 per cent of law firms had four or fewer partners in 2012; 44 per cent of firms were sole owners. Only 2 per cent of firms had 26 or more partners but they employed 31 per cent of all principals and 41 per cent of all solicitors in private practice, namely 36,583 out of a total of 87,768 (Law Society, various, annual *Trends in the Profession*). The 58 largest firms employed a quarter of the total in practice, and all but 8 were London-based. In between are what is known as 'national' firms to distinguish them from the massive 'global' firms gazing down from London skyscrapers. Thus, we may need more sophisticated models of lawyer misconduct and its regulation. As in other fields of white-collar crime, wrongdoing by individuals and small firms may be analysed via, say, individualized strain theory. However, systemic misconduct by the larger firms (and non-lawyer owned companies) may be analysed in the future as

a form of corporate or even ‘organized’ crime, accentuated by intra-firm performance pressures, bonuses and ‘firm culture’: though, like large organizations of all kinds, they may represent the misconduct as ‘rotten apple’ behaviour by lone individuals, and it may take years for evidence to emerge.

### *Conclusions*

While regulation of legal services is now the subject of much study and comment, the relationship between lawyers and both white-collar and organized crime remains under-researched. We have sketched out an opportunity-based framework for interpreting the relationship as well as some relevant data here, while noting that official allegations in the Anglophone world about extensive active lawyer criminality are not yet testable from open source material. Problems associated with solicitors sailing very close to the wind will increase as financial instability and competition become more widespread. In the United States, a recent study suggests that law firms now are becoming little more than temporary bands of mobile teams (Coates *et al.* 2011). Thus, the institutional and reputational constraints on opportunism may have weakened, though this and the decline in business may promote lawyers’ willingness to become involved in ‘pure’ white-collar crime more than in ‘organized crime’. Paradoxically, because of solicitors’ status as officers of the court, upholders of the rule of law and the proper administration of justice, and as being well-organized and rational, getting into financial difficulties is either or all of: unthinkable, shameful, impossible to accept, beyond the expertise and experience of solicitors, etc. This sometimes leads to denial (in the psychoanalytic sense), and sometimes to a naive optimism that things will work out all right if only they can keep trading—e.g. using money from client account to cover the firm’s financial obligations, billing for work that hasn’t been done (particularly where the firm is holding trust moneys), and obediently taking instructions from clients who are offering investors something that is ‘too good to be true’. The scope for delusion and self-deception is higher because of the perceived role of solicitors as custodians of the rule of law and because—unlike most ‘ordinary’ crimes—the crimes are not a clear break from legitimate behaviours that solicitors customarily perform.

We were surprised by how much had changed since the turn of the last century and, as the cliché goes, how much was the same: the archaic conveyancing system is wide open to fraud and highly attractive because of the large sums that can be quickly stolen. High-yield investment fraud was seen off by the early part of the 2000s but has reappeared. Changing social and political conditions have rendered legal aid fraud obsolete or less politically pressing. Lawyers became involved in boiler room scams and have facilitated land-banking fraud. The extent of intentional lawyer involvement in money laundering schemes remains only a little better understood now than a decade ago, and then, it is well evidenced mostly in a few Grand Corruption cases.

The arrival of Alternative Business Structures (ABSs) creates a new environment: the ‘banksters’ and others now can have direct access to the legal system. Law firms will perhaps be increasingly brought within the scope of corporate crime as well as direct (former professional) regulation. The scale of some frauds risks wiping out the SCF. It has been a form of collective reputational insurance for the solicitors’ profession (and hence is out of fashion with market-liberalizing regulation) as well as providing redress for victims of their dishonest colleagues. The SRA has limited those eligible to claim on

the SCF to individuals and small organizations, maintaining it as a source of compensation for the genuinely vulnerable. The public goods of an honest and reliable legal system seem to be under-valued in the continued idolatry of free market competition, despite the financial crisis of 2008. These shifts pose a continuing challenge to regulators and indeed law enforcement. It is too early to assess with confidence the impact on organized and white-collar crime rates of these developments, although we note the apparent determined targeting of legal services by fraudsters and we wonder how this will play out now the circle has turned again, noting the LSB's 2013 'Blueprint for deregulation' (LSB 2013b).

We highlighted earlier that between the opportunity and the actuality of crime by professionals falls the shadow. The shadow comprises not just unperceived and ungrasped opportunities by professionals and by outside criminals who could successfully corrupt professionals if they were bolder in making offers to them (and vice versa), but also the problems of ascertaining if and when professional misconduct has occurred. This is especially so of money laundering for others and for conflicts of interest which are undetected, as frauds by solicitors against their partners and clients and the laundering of the proceeds thereof may be more readily detected. There may also be a significant time lag before problems appear to regulators and to the public, if at all. Changes in the global regulatory apparatus and in national prosecution resources are also part of this complex matrix of controls, raising (like transnational bribery) issues such as whether tighter regulation in England and Wales might simply transfer business to less moral lawyers in lighter regulated foreign jurisdictions. There remain symbolic struggles over the role of criminal law in sanctioning solicitor misconduct. For us, the notion that if crime is committed, the response should be either criminal justice or nothing seems absurd: the licensing and inspection regime for professionals may be expected to have a preventative effect on the scale of criminality, even if *ex post facto* professional sanctions do not deter completely, and especially if professional inspections and sanctions are much more likely than criminal conviction to happen. Measuring these effects remains difficult and has not been seriously attempted. Note that the 2013 *Serious Organised Crime Strategy* targets the very broad range of 'corrupt, complicit or negligent professionals'.

All we have been able to do for the present is to map out some of the changes that have occurred in visible patterns of lawyer misconduct and in their regulatory and criminal environment, which constitutes 'situational opportunity' or 'routine activities' for crime. There is currently a rational and symbolic push by law enforcement bodies to act more firmly and strategically against 'crime enablers', and we have sought to flesh out some of the visible dimensions of this set of social risks which, like all 'crime control' constructs, unintentionally or otherwise de-emphasizes the positive features of lawyering. At this stage, despite international differences in both rules and practices of the regulation of the legal profession, the extent of cross-border arbitrage by those looking for lawyers to help commit or conceal crimes and their proceeds remains more alleged than proven. The extent to which current culture and ethical rules—rather than a crude economic 'rational choice' calculus—constrain lawyer criminality is not easy to test. Those providing legal services sometimes merit the cynical *sobriquet* applied by Al Capone of 'the legitimate rackets': but it remains to be seen what will rise from the current convulsions in the market—and what public goods remain at the end of these processes of economic and professional change and of the public anathematization of lawyers.

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