21 Lippman

June 6 , 2003

FinCEN
P.O. Box 39
Vienna, Virginia 22183-0039

Attention: Section 352 "Real Estate Settlements"

Dear Sir/Madam:

The Committee On Real Property Law of the Association of the Bar of the City of New York (the "Committee") submits this letter in response to the advance notice of proposed rulemaking by the United States Department of the Treasury, Financial Crimes Enforcement Network (FinCEN), relating to the requirement that financial institutions establish anti-money laundering programs pursuant to Section 352 of the USA Patriot Act of 2001. Included in the term "financial institutions" are "persons involved in real estate closings and settlements".

The Committee takes the position that although lawyers are involved in real estate closings and settlements, lawyers should not be deemed "financial institutions" under Section 352.

Lawyers are bound by certain ethical obligations which, if violated, may result in disciplinary action (including disbarment). The Committee is concerned that subjecting lawyers to the proposed rules may unintentionally cause violations of ethical canons and disciplinary rules. Confidential communications between the lawyer and client made in the course of legal representation are privileged and may not be revealed without the client's consent. Disciplinary Rule 4-101(B) of the New York Lawyer's Code of Professional Responsibility, for example, prohibits a lawyer from knowingly revealing a confidence or secret of a client. Disciplinary Rule 4-101(A) defines "confidence" as "information protected by the attorney-client privilege". "Secret" is defined as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client". Although Disciplinary Rule 7-102(B) requires a lawyer to attempt to convince a client to take action to correct prior criminal acts, if the lawyer's knowledge is based on a confidential communication made during the course of the professional relationship, then the information is protected by the attorney-client privilege, and the lawyer is not at liberty to reveal it

unless the client waives the privilege. (On the other hand, Disciplinary Rule 7-102(A)7 prohibits a lawyer from representing a client in situations where the lawyer knows that the client intends to commit future illegal or fraudulent acts.)

Furthermore, no useful purpose is likely to be served by requiring lawyers to perform functions that are best performed by those entities (such as banks) that are clearly "financial institutions" in the usual meaning of the term. Any benefit to be derived from the possible increased flow of information is far outweighed by the burden of compliance since the typical structure and operation of a law practice does not readily lend itself to the establishment of an anti-money laundering program. The commendable goals of preventing, detecting and prosecuting money laundering are perhaps best achieved by placing the responsibility in the hands of those who - in the ordinary course of their business - are more likely to encounter the types of information that would indicate the conduct targeted by the legislation, and who are already under federal reporting mandates.

In sum, while the Committee supports efforts to address criminal activities in connection with real estate transactions, it strongly believes that including lawyers in the definition of "financial institutions" would be inappropriate and counterproductive.

Sincerely,

William J. Lippman
Chair