DRAFT
April 25, 2024

Dear Justice Hood and Justice Berkenkotter:

I write on behalf of the Court's Standing Committee on the Colorado Rules of Professional Conduct. At its October 27, 2023 meeting, the Standing Committee discussed the ABA's recent amendments to Rule 1.16 and comments [1], [2], and [7], which are attached. The ABA House of Delegates adopted these amendments at its 2023 annual meeting after long debate and over significant opposition. We seek the Court's guidance on whether the Standing Committee should consider recommending adoption of these or similar amendments to the Colorado Rules.

The history of these changes can be summarized as follows. Model and Colorado Rule 1.2(d) forbid a lawyer from assisting a client in conduct "that the lawyer knows is criminal or fraudulent." Model and Colorado Rule 1.0(f) define "knows" to require "actual knowledge." Both the ABA and CBA Ethics Committees have issued formal opinions consistent with this definition. Though the two Committees were not in complete agreement, they agreed in relevant part that, while lawyers may sometimes have sufficient knowledge trigging a duty to inquire whether clients are using the lawyers' services to commit a crime or fraud, the Rules do not impose a duty to investigate clients to obtain knowledge the lawyers do not possess.[1]

Against this backdrop, for several years, Congress threatened to impose obligations on lawyers to disclose suspicious transactions to counteract money laundering, terrorist financing, and human trafficking. The Treasury Department explicitly advised the ABA that it would propose and adopt regulations imposing duties on lawyers and requiring disclosures for these same purposes.

To address these concerns, the ABA began a lengthy process of amending the Model Rules. A First Discussion Draft, in December 2021, would have added comments to Rules 1.0, 1.1, and 1.2; a second discussion draft, in June 2022, would have added a duty to investigate to Rule 1.2; and a third discussion draft, in January 2023, changed the focus to Rule 1.16, but did not include a duty to investigate. Finally, in the summer of 2023, the ABA proposed original Resolution 100, which added a duty to "inquire" rather than to "investigate."

As adopted, new Model Rule 1.16(a) imposes on lawyers an ongoing duty to "inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation." It then requires the lawyer to withdraw if, after such an inquiry, "the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud[.]" Model Rule 1.16(a)(4). The new comments provide guidance to lawyers on how to fulfill this new duty.

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[1] These opinions include ABA Formal Opinion 463, *Client Due Diligence, Money Laundering, and Terrorist Financing* (May 13, 2013); ABA Formal Opinion 491, *Obligations Under Rule 1.2(d) to Avoid Counseling or Assisting in a Crime or Fraud in Non-Litigation Settings* (April 29, 2020); and CBA Formal Opinion 142, *A Lawyer's Duty to Inquire when the Lawyer Knows a Client Is Seeking Advice on a Transactional Matter that May Be Criminal or Fraudulent* (July 10, 2021).

Notably, these amendments go beyond current law by requiring lawyers to inquire into clients' use of their services to further crimes or fraud not just at the outset of a representation but throughout the representation. Nor is the new rule limited to money laundering, terrorist financing, and human trafficking; it applies to any crime or fraud. As noted above, the ABA House of Delegates nonetheless adopted Resolution 100 over significant opposition, particularly from the ABA Business Law Section. Opponents expressed concerns about the time and expense involved in complying with this new duty, the potential breach of client trust, and lawyers' increased exposure to discipline.

We are unaware of any state having adopted these changes. We seek the Court's guidance on whether the Standing Committee should move forward and consider adopting these or similar changes to the Colorado Rules of Professional Conduct or wait to see how the law develops.

Attachment 1

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
STANDING COMMITTEE ON PROFESSIONAL REGULATION

REPORT TO THE HOUSE OF DELEGATES

REVISED RESOLUTION

RESOLVED, That the American Bar Association amends ABA Model Rule of Professional Conduct 1.16 and its Comments [1], [2], and [7] as follows (insertions underlined, deletions struck through):

Rule 1.16: Declining or Terminating Representation

(a) A lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation. Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; ~~or~~

(3) the lawyer is discharged; or

(4) the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud, despite the lawyer's discussion pursuant to Rules 1.2(d) and 1.4(a)(5) regarding the limitations on the lawyer assisting with the proposed conduct.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

~~(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;~~

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

[1] Paragraph (a) imposes an obligation on a lawyer to inquire into and assess the facts and circumstances of the representation before accepting it. The obligation imposed by Paragraph (a) continues throughout the representation. A change in the facts and circumstances relating to the representation may trigger a lawyer's need to make further inquiry and assessment. For example, a client traditionally uses a lawyer to acquire local real estate through the use of domestic limited liability companies, with financing from a local bank. The same client then asks the lawyer to create a multi-tier corporate structure, formed in another state to acquire property in a third jurisdiction, and requests to route the transaction's

funding through the lawyer's trust account. Another example is when, during the course of a representation, a new party is named or a new entity becomes involved. A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.1, 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. Under paragraph (a)(4), the lawyer's inquiry into and assessment of the facts and circumstances will be informed by the risk that the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud. This analysis means that the required level of a lawyer's inquiry and assessment will vary for each client or prospective client, depending on the nature of the risk posed by each situation. Factors to be considered in determining the level of risk may include: (i) the identity of the client, such as whether the client is a natural person or an entity and, if an entity, the beneficial owners of that entity, (ii) the lawyer's experience and familiarity with the client, (iii) the nature of the requested legal services, (iv) the relevant jurisdictions involved in the representation (for example, whether a jurisdiction is considered at high risk for money laundering or terrorist financing), and (v) the identities of those depositing into or receiving funds from the lawyer's client trust account, or any other accounts in which client funds are held. For further guidance assessing risk, see, e.g., as amended or updated, Financial Action Task Force Guidance for a Risk-Based Approach for Legal Professionals, the ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing, A Lawyer's Guide to Detecting and Preventing Money Laundering (a collaborative publication of the International Bar Association, the American Bar Association and the Council of Bars and Law Societies of Europe), the Organization for Economic Cooperation and Development (OECD) Due Diligence Guidance for Responsible Business Conduct, and the U.S. Department of Treasury Specially Designated Nationals and Blocked Persons List.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may

be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. ~~Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it~~. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

REVISED REPORT

Introduction

The Standing Committee on Ethics and Professional Responsibility (the "Ethics Committee") and the Standing Committee on Professional Regulation (the "Regulation Committee") propose amendments to the Black Letter and Comments to ABA Model Rule of Professional Conduct 1.16, Declining or Terminating Representation.

This Resolution constitutes another piece of the ABA's longstanding and ongoing efforts to help lawyers detect and prevent becoming involved in a client's unlawful activities and corruption, as described in this Report. In February 2023, the ABA House of Delegates adopted Resolution 704 proposed by the Working Group on Beneficial Ownership. Resolution 704 updates ABA policy on entities providing the federal government with information about the identity of the entity's beneficial owners. Resolution 704, like this Resolution, represents a compromise among those with diverse and strongly held views. This Resolution presents a balanced approach to ensuring that lawyers conduct inquiry and assessment ~~client due diligence~~ - appropriate to the circumstances - to detect and prevent involvement in unlawful activities and corruption.

The proposed amendments to the Black Letter clearly state for lawyers their ~~client due diligence~~ obligations to inquire about and assess the facts and circumstances when considering whether to undertake a representation and their ongoing obligations throughout the representation. The amendments further state that the lawyer must decline the representation or withdraw when the prospective client or client seeks to use or persists in using the lawyers' services to commit or further a crime or fraud after the lawyer has advised of the limitations on the lawyer's services.

These are not new obligations. Lawyers already perform these inquiries and assessments ~~client due diligence~~ every day to meet their ethical requirements. For example, they do so to identify and address conflicts of interests. They also do so to ensure they represent clients competently (Rule 1.1); to develop sufficient knowledge of the facts and the law to understand the client's objectives and to identify means to meet the client's lawful interests (Rule 1.2(a)); and, if necessary, to persuade the client not to pursue conduct that could lead to criminal liability or liability for fraud (Rule 1.2(d)).[1] Implicit duties – like unwritten rules – do not serve lawyers or the public well. Therefore, the Committees present these amendments to the Black Letter of Model Rule 1.16 from which both lawyers and the public will benefit.

In addition to the proposed changes to the Black Letter of Rule 1.16, proposed new language in Comment [1] elaborates on the duty to inquire about and assess the facts

[1] *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 463 (2013) & 491 (2020).

and circumstances of the representation. The Comment makes clear that the duty is one that continues throughout the course of the representation.[2]

New language proposed in Comment [2] explains that under new Black Letter paragraph (a)(4) of Rule 1.16, the scope of the lawyer's inquiry and assessment ~~client due diligence~~ is informed by the risk that the prospective client or current client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud. The use of a risk-based inquiry and assessment of the facts and circumstances of each representation set forth in Comment [2] ensures that the scope and depth of the inquiry and assessment a lawyer must make will be based on the unique facts and circumstances presented by each client or prospective client. There is no "one-size-fits-all" ~~client due diligence~~ obligation. Proposed amendments to Comment [2] provide examples for lawyers to consider in assessing the level of risk posed to determine whether lawyers must decline the representation or withdraw from an ongoing representation.

While the impetus for these proposed amendments was lawyers' unwitting involvement in or failure to pay appropriate attention to signs or warnings of danger ("red flags") relating to a client's use of a lawyer's services to facilitate possible money laundering and terrorist financing activities, it is clear that lawyers' ~~client due diligence~~ existing obligations to inquire and assess apply broadly to all lawyers. The proposed amendments will help lawyers avoid entanglement in criminal, fraudulent, or other unlawful behavior by a client, including tax fraud, mortgage fraud, concealment from disclosure of assets in dissolution or bankruptcy proceedings, human trafficking and other human rights violations, violations of U.S. foreign policy sanctions and export controls, and U.S. national security violations.

In developing this Resolution, the Standing Committees on Ethics and Professional Responsibility and Professional Regulation circulated widely for comment, inside and outside the ABA, three Discussion Drafts of possible amendments to the Model Rules of Professional Conduct addressing ~~lawyers' client due diligence~~ these obligations. The Committees held four public roundtables to obtain testimony regarding the Discussion Drafts.[3] The Committees are grateful to all who commented. Their comments and testimony informed the substance of this Resolution and Report.[4]

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[2] GEOFFREY C. HAZARD JR., W. WILLIAM HODES & PETER R. JARVIS, LAW OF LAWYERING § 21.02 (4th ed. 2021) ("Rule 1.16 often plays a role *during* representation of a client as well. By focusing attention on situations in which the lawyer either may or must withdraw, it serves as a reminder to lawyers and clients alike that they must continually communicate with each other and monitor their relationship, to minimize the likelihood that such withdrawals will occur.").

[3] These meetings were held in February and August 2022 and February 2023.

[4] Comments received and recordings of the public roundtables are available on the Center for Professional Responsibility website for public viewing at: www.americanbar.org/groups/professional_responsibility/discussion-draft-of-possible-amendments-to-model-rules-of-profes/ (last visited Apr. 28, 2023).

Background

Concerns Underlying This Resolution

As noted, the impetus for this Resolution related to lawyers' unwitting involvement in money laundering and terrorist financing or their failure to pay appropriate attention to "red flags" relating to the proposed course of action by a client or prospective client. Money laundering occurs when criminals obscure the proceeds of unlawful activity (dirty money) using "laundering" transactions so that the money appears to be the "clean" proceeds of legal activity. Terrorist financing is just that, providing funds to those involved in terrorism.[5] The proceeds of money laundering are used to facilitate terrorism and other illegal activities, including human trafficking, drug trafficking, and violations of U.S. government sanctions.

Lawyers' services can be used for money laundering and other criminal and fraudulent activity. One common way to do so is by asking a lawyer to hold money in a client trust account pending completion of the purchase of real estate or equipment, or to fund another transaction. After a period of time, the client asks the lawyer to return the funds because the "transaction" has fallen apart. By holding money in a law firm trust account then disbursing the money back to the client when the transaction does not close, the money has been laundered through the lawyer's client trust account. Of course, more sophisticated means exist by which individuals seek to use lawyers' services to launder money, either with or without the lawyer's knowledge. It is illegal and unethical for lawyers to knowingly launder money, finance terrorism, or knowingly assist another in doing so. It is also unethical for a lawyer to ignore facts indicating a likelihood that the client intends to use the lawyer's services to assist the client in engaging in illegal or fraudulent conduct.

Domestic and international laws and regulations are designed to prevent, detect, and prosecute money laundering. Anti-money laundering and counter terrorism financing laws and regulations applicable to lawyers are a complex subject.[6] Generally, the issues can be divided into three overarching topics: (1) client due diligence; (2) disclosure of entity beneficial ownership information; and (3) suspicious activity reporting.

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[5] The U.S. Department of Treasury's 2018 National Money-Laundering Risk Assessment estimated that $300 billion is laundered every year in the U.S. alone, with that amount growing and methodologies of money-launderers ever evolving and becoming more sophisticated according to the Department's 2022 National Money-Laundering Risk Assessment. *See* U.S. DEPARTMENT OF THE TREASURY NATIONAL MONEY LAUNDERING RISK ASSESSMENT (2018), https://home.treasury.gov/system/files/136/2018NMLRA_12-18.pdf and U.S. DEPARTMENT OF THE TREASURY NATIONAL MONEY LAUNDERING RISK ASSESSMENT (Feb. 2022), https://home.treasury.gov/system/files/136/2022-National-Money-Laundering-Risk-Assessment.pdf.

[6] Additional resources may be found at ABA TASK FORCE ON GATEKEEPER REGULATION AND THE PROFESSION, https://www.americanbar.org/groups/criminal_justice/gatekeeper/ (last visited Apr. 19, 2023); ABA GATEKEEPER REGULATIONS ON ATTORNEYS, https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/bank_secrecy_act/ (last visited Apr. 19, 2023).

In the U.S., the primary anti-money laundering laws are the Bank Secrecy Act ("BSA") and the Money Laundering Control Act. The U.S. Department of Treasury created the Financial Crimes Enforcement Network ("FinCEN") to implement, administer, and enforce compliance with the BSA. Most recently, Congress enacted the Corporate Transparency Act ("CTA") to enhance the identification and disclosure of certain beneficial ownership information. The CTA is part of the Anti-Money Laundering Act of 2020, which is part of the National Defense Authorization Act for Fiscal Year 2021.[7]

Outside the U.S., the Financial Action Task Force ("FATF") is a powerful inter-governmental entity that coordinates efforts to prevent money laundering or terrorism financing among and between its member countries. The U.S. is a charter member of the FATF. The FATF exerts tremendous pressure on member countries, even though it has no "official" legislative or enforcement power. A primary way in which it does so is through its Mutual Evaluation Reports of countries' compliance with the FATF Recommendations.[8] The most recent Mutual Evaluation Report of the U.S. was in 2016, and the FATF found the US. noncompliant in four areas, including the lack of sufficient client due diligence by the legal profession and lack of enforceable obligations in that regard.[9]

The Organization for Economic Cooperation and Development ("OECD") is another international organization that has been active in this arena. The OECD is not a standard-setting entity like the FATF. While a primary focus of the OECD is fighting international tax evasion, it is supportive of the FATF's critiques of the legal and other professions on the subjects of money laundering and other white-collar crime.

These groups, along with U.S. and international governments, continue to focus in very public ways on lawyers as facilitators of money laundering, terrorism financing, and other related illegal and fraudulent conduct. They point to the 2016 FATF Report's recommendations, and events like the Paradise Papers, the Panama Papers, and the more recent Pandora Papers and FinCEN Files, as necessitating further and enforceable action by the legal profession.[10]

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[7] The full name of the NDAA is the WILLIAM M. (MAC) THORNBERRY NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2021, Pub. L. No. 116-283 (H.R. 6395), *available at* https://www.congress.gov/116/plaws/publ283/PLAW-116publ283.pdf. 116th Cong. 2d Sess. Congress' override of the President's veto was taken in Record Vote No. 292 (Jan. 1, 2021). The CTA consists of §§ 6401-6403 of the NDAA. Section 6402 of the NDAA sets forth Congress' findings and objectives in passing the CTA and § 6403 contains its substantive provisions, primarily adding § 5336 to Title 31 of the United States Code.

[8] *See* THE FATF RECOMMENDATIONS, https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html (last visited Apr. 28, 2023).

[9] FATF UNITED STATES' MEASURES TO COMBAT MONEY LAUNDERING AND TERRORIST FINANCING (2016), https://www.fatf-gafi.org/en/publications/Mutualevaluations/Mer-united-states-2016.html.

[10] *See, e.g.,* PARADISE PAPERS: SECRETS OF THE GLOBAL ELITE, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://www.icij.org/investigations/paradise-papers/ (last visited Apr. 28, 2023); THE PANAMA PAPERS: EXPOSING THE ROGUE OFFSHORE FINANCE INDUSTRY, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://www.icij.org/investigations/panama-papers/ (last visited Apr. 28, 2023); PANDORA PAPERS, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://www.icij.org/investigations/pandora-papers/ (last visited Apr. 28, 2023); and FINCEN FILES,

The ABA has long supported state-based judicial regulation of lawyers and the practice of law and opposed federal legislative or executive branch efforts to regulate the practice of law at the federal level.[11] National and international concerns about lawyers unwitting involvement in client crimes like money laundering and terrorism finance greatly raise the risk of federal legislative and regulatory action.

The U.S. Congress has demonstrated its willingness to act in this regard. For example, initial versions of the Corporate Transparency Act ("CTA") would have required lawyers to disclose beneficial ownership information relating to their clients to the federal government, in contravention of their ethical obligations under ABA Model Rule 1.6. Additionally, various Members of Congress have sought enactment of the ENABLERS Act, which would have regulated many lawyers and law firms as "financial institutions" under the BSA.[12] Such regulation could require those lawyers and law firms to report to the federal government information protected by the attorney-client privilege or Model Rule 1.6 by requiring them to comply with some or all of the BSA's requirements for financial institutions, such as submitting Suspicious Activity Reports (SARs) on clients' financial transactions and establishing due diligence policies.[13]

To date, the ABA has successfully advocated against such incursion on the regulatory authority of state supreme courts. In response to concerns raised by the ABA and others, the sponsors of the final version of the CTA that became law omitted the language from previous versions of the bill that would have directly regulated lawyers. Therefore, the final version of the CTA passed by Congress in early 2021 only requires

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INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://www.icij.org/investigations/fincen-files/ (last visited Apr.19, 2023).

[11] *See, e.g.*, COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS'N, LAWYER REGULATION FOR A NEW CENTURY 2 (1992) [hereinafter MCKAY REPORT], *available at* http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html; AM. BAR ASS'N COMM'N ON MULTIJURISDICTIONAL PRACTICE REPORT TO THE HOUSE OF DELEGATES Report 201A (2002), *available at* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_migrated/201a.pdf; and JUDICIAL OVERSIGHT OF THE LEGAL PROFESSION, https://www.americanbar.org/advocacy/governmental_legislative_work/letters_testimony/independence/ (last visited Apr. 19, 2023).

[12] The original ENABLERS Act legislation, introduced on October 8, 2021, by Rep. Tom Malinowski (D-NJ) as H.R. 5525, is available at https://www.congress.gov/bill/117th-congress/house-bill/5525/text?s=1&r=1. A revised version of the ENABLERS Act, sponsored by Rep. Maxine Waters (D-CA) and included in the House-passed version of the FY 2023 National Defense Authorization Act (H.R. 7900) as Section 5401, is available at https://amendments-rules.house.gov/amendments/GATEKEEPERS_NDAA_xml%20v3220711190941114.pdf. A third version of the ENABLERS Act, sponsored by Sen. Sheldon Whitehouse (D-RI) and offered as an amendment to the Senate version of the FY 2023 National Defense Authorization Act (H.R. 7900 and S. 4543) as SA 6377, is available at https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/whitehouse-enablers-act-amendment-to-ndaa-september2022.pdf.

[13] *See* ABA URGES SENATORS TO OPPOSE ENABLERS ACT AMENDMENT TO DEFENSE AUTHORIZATION BILL, ABA WASHINGTON LETTER (Oct. 31, 2022), *available at* https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/oct22-wl/enablers-1022wl/.

"reporting companies"—not their lawyers or law firms—to report the companies' beneficial ownership information to the government.[14] Similarly, in response to objections by the ABA[15], numerous state and local bar associations, and many small business groups, Congress declined to include the ENABLERS Act in the final version of the FY 2023 National Defense Authorization Act (P.L. 117-263, H.R. 7776) or the FY 2023 Consolidated Appropriations Act (P.L. 117-328, H.R. 2617) that were signed into law in December 2022.

ABA Responses in the Context of the Model Rules of Professional Conduct

2013 Ethics Opinion

In 2013, the Ethics Committee issued ABA Formal Ethics Opinion 463 focusing on efforts to require U.S. lawyers to perform "gatekeeping" duties to protect the domestic and international financing system from criminal activity arising out of worldwide money-laundering and terrorism financing activities. Opinion 463 explained that "[i]t would be prudent for lawyers to undertake Client Due Diligence ("CDD") in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity. . . . [16] An appropriate assessment of the client and the client's objectives, and the means for obtaining those objectives, are essential prerequisites for accepting a new matter or continuing a representation as new facts unfold."[17]

2020 Ethics Opinion

In 2020, the Ethics Committee issued Formal Ethics Opinion 491 in response to ongoing concerns regarding lawyers' ~~client due diligence~~ obligations to inquire and assess. As explained in the Formal Opinion, a lawyer's duty to inquire into and assess the facts and circumstances of each representation is not new and is applicable before the representation begins and throughout the course of the representation. This obligation already is implicit in the following Rules:

- Rule 1.1 and the duty to provide competent representation. Comment [5] explains, "Competent handling of a particular matter requires inquiry into and analysis of the factual and legal elements of the problem."

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[14] *See* Corporate Transparency Act (CTA), available at H.R.6395 - 116th Congress (2019-2020): William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 | Congress.gov | Library of Congress (contained in Title LXIV of the National Defense Authorization Act for FY 2021, P.L. 116-283) (Jan. 1, 2021). Division F of the FY 2021 National Defense Authorization Act is the Anti-Money Laundering Act of 2020, which includes the CTA.

[15] *See* ABA letter to Senate leaders opposing the ENABLERS Act amendment to the FY 2023 National Defense Authorization Act and urging them not to include it in the final version of the legislation. Letter to Majority Leader Schumer, et al. re: Opposition to ENABLERS Act Amendment to the FY 2023 National Defense Authorization Act (H.R. 7900 and S. 4543) (Oct. 5, 2022), *available at* https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-letter-to-senate-leaders-opposing-enablers-act-amendment-to-ndaa-october52022.pdf.

[16] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 463 (2013).

[17] *Id.*

- Rule 1.2(d) and the prohibition against knowingly assisting a client in a crime or fraud.
- Rule 1.3 and the duty to be diligent which "requires that a lawyer ascertain the relevant facts and law in a timely and appropriately thorough manner."
- Rule 1.4 and the duty to communicate which requires "consultation with the client regarding 'any relevant limitation on the lawyer's conduct' arising from the client's expectation of assistance that is not permitted by the Rules of Professional Conduct or other law."
- Rule 1.13 which requires "further inquiry to clarify any ambiguity about who has authority and what the organization's priorities are."
- Rule 1.16(a) and the duty to withdraw when the representation will result in a violation of the law or the Rules.
- Rule 8.4(b) and (c) in the prohibition against committing a criminal act or engaging in dishonesty, fraud, deceit, or misrepresentation.

The Proposed Amendments to Model Rule 1.16 and Its Comments

After careful consideration over several years of concerns raised by ABA members and outside groups that the ABA Model Rules of Professional Conduct lacked sufficient clarity on lawyers' ~~client due diligence~~ obligations to inquire about and assess the facts and circumstances relating to a matter, the Committees concluded that Model Rule of Professional Conduct 1.16 should be amended to make explicit that which is already implicit.

Amendments to Paragraph (a)

The proposed amendments to the Black Letter of Rule 1.16(a) include a statement addressing the nature and scope of lawyers' inquiry and assessment ~~client due diligence~~ obligations when the lawyer is deciding whether to accept a representation, deciding whether to terminate the representation, and considering the matter throughout the course of a representation. The following statement is added to the beginning of Rule 1.16(a):

> A lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation.

In addition to the proposed change to the Black Letter of Rule 1.16(a), new language in Comment [1] provides guidance on the duty to inquire about and assess the facts and circumstances of the representation. The addition to Comment [1] reads:

> Paragraph (a) imposes an obligation on a lawyer to inquire into and assess the facts and circumstances of the representation before accepting it. The obligation imposed by Paragraph (a) continues throughout the representation. For example, a client traditionally uses a lawyer to acquire

> local real estate through the use of domestic limited liability companies, with financing from a local bank. The same client then asks the lawyer to create a multi-tier corporate structure, formed in another state to acquire property in a third jurisdiction, and requests to route the transaction's funding through the lawyer's trust account. Another example is when, during the course of a representation, a new party is named or a new entity becomes involved.

This additional language in Comment [1], that the obligation continues throughout the representation, helps lawyers understand that if changes in the facts and circumstances occur during a representation, lawyers must inquire and evaluate whether they can continue the representation. A new cross-reference to Model Rule 1.1 (Competence) also is added.

Creating a new provision for mandatory withdrawal in paragraph (a)(4)

Current Model Rule 1.16(a)(1) requires a lawyer to decline or withdraw from a representation if "the representation will result in violation of the Rules of Professional Conduct or other law."

Current Comment [2] explains: "A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation." Model Rule 1.4(a)(5), regarding communications obligations, explains that lawyers must consult with the client about any relevant limitation on the lawyer's conduct. Rule 1.2(d) tells lawyers that one of those limitations on what a lawyer may do is counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent.

But these statements appear in three different Rules and their respective Comments. As a result, lawyers must hunt for this guidance – that when a client suggests a course of conduct that is criminal, fraudulent, or otherwise illegal or violates the Rules, a lawyer must consult with the client about the limits of the lawyer's representation and that the lawyer is prohibited from engaging or assisting a client in a crime or fraud. After the conversation, if the client is not deterred from the suggested conduct, the lawyer must decline the representation or withdraw if already in the matter.

The Committees believe that lawyers deserve clear direction regarding inquiry about and assessing the facts and circumstances ~~conducting client due diligence~~, and have clear advice on what to do when concerns or questions arise about the scope, goals, and objectives of the representation. Therefore, the Committees recommend clarifying the Black Letter of Rule 1.16(a) to provide that the lawyer must decline or withdraw from the representation if:

(4) the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud, despite the lawyer's discussion pursuant to Rules 1.2(d) and 1.4(a)(5) regarding the limitations on the lawyer assisting with the proposed conduct.

Expanding the guidance provided in Comment [2]

New language proposed for Comment [2] explains that the lawyer's obligation to inquire and assess ~~client due diligence requirement~~ is informed by the risk that the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud. The use of a risk-based inquiry and assessment of the facts and circumstances of each representation set forth in Comment [2] ensures that the scope and depth of the inquiry and assessment a lawyer must perform will be based on the unique facts and circumstances presented by each client or prospective client. There is no "one-size-fits-all" ~~client due diligence~~ obligation, and this risk-based approach is the least burdensome for lawyers. The proposed amendments take a balanced approach to the issue.

To assist lawyers, new language in Comment [2] provides examples for lawyers to consider in assessing the level of risk posed to determine whether they must decline the representation or withdraw from an ongoing representation. This risk-based approach differs from a rules-based approach that requires compliance with every element of detailed laws, rules, or regulations irrespective of the underlying quantum or degree of risk. As noted in ABA Formal Ethics Opinion 463, implementing risk-based control measures helps a lawyer avoid being caught up in a client's illegal activities, while decreasing the burden on lawyers whose practice does not expose them to the problems sought to be addressed.

In addition to these exemplary factors, new language in Comment [2] provides lawyers with a range of additional resources to guide their inquiry and assessment. For example, the new language references the 2010 ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing, which provides excellent practice examples that help lawyers using the risk-based approach better identify situations that should be considered "red flags" and provides "practice pointers" to offer further insight.

The U.S. Department of Treasury's Specially Designated Nationals and Blocked Persons List is another sample resource to assist lawyers in conducting their inquiry and assessment ~~due diligence~~, which is comprised of "individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries. It also lists

individuals, groups, and entities, such as terrorists and narcotics traffickers designated under programs that are not country-specific."[18]

~~**Deleting permissive withdrawal under (b)(2) and applicable guidance in Comment [7]**~~

~~The recommended amendments to Model Rule 1.16(a) and the creation of Model Rule 1.16(a)(4) on mandatory withdrawal make the provisions on permissive withdrawal under Rule 1.16(b)(2) unnecessary for two reasons. Therefore, the Committees recommend deleting Model Rule of Professional Conduct 1.16(b)(2) and its corresponding guidance in Comment [7].~~

~~Current Model Rule 1.16(b)(2) provides that a lawyer may withdraw from the representation if the client "persists in a course of conduct involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent." With the addition of the now explicit duty to conduct a risk-based inquiry and assessment, the lawyer who reasonably believes that a client seeks to use or is using the lawyer's services to commit or further a crime or fraud will have the facts necessary to decide whether withdrawal is mandatory under new paragraph (a)(4). Therefore, paragraph (b)(2) is no longer necessary.~~

~~Additionally, deleting the permissive withdrawal under current Rule 1.16(b)(2) does not remove the option for a lawyer to withdraw from a representation. This is true because Model Rule 1.16(b)(4) allows a lawyer to withdraw when the client "insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement" or because Model Rule 1.16(b)(7) allows the lawyer to withdraw "when other good cause for withdrawal exists." Both exceptions can be used by lawyers who withdraw from the representation when the client "persists in a course of conduct involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent." Therefore, paragraph (b)(2) is no longer necessary.~~

Conclusion

The proposed changes to Model Rule 1.16 will benefit lawyers and the public by making explicit the nature and scope of lawyers' existing ~~client due diligence~~ obligations to inquire about and assess the facts and circumstances regarding a matter in the enforceable Black Letter of the Rule. Doing so will help lawyers avoid unwittingly becoming involved in clients' criminal and fraudulent conduct and will help them better identify and respond to "red flags." In doing so, this Resolution also will demonstrate to the U.S. Government, entities like the FATF, and the public that the profession takes seriously its obligations to ~~perform client due diligence to~~ avoid becoming involved in a client's criminal and fraudulent conduct, including money laundering, terrorist financing,

[18] *See* OFFICE OF FOREIGN ASSETS CONTROL, SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS LIST (SDN) HUMAN READABLE LISTS (last updated Apr. 27, 2023), https://ofac.treasury.gov/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists.

human trafficking and human rights violations, tax related crimes, sanctions evasion, and other illicit activity.

The ABA Standing Committees on Ethics and Professional Responsibility and Professional Regulation respectfully request that the House of Delegates approve this Resolution to amend the Black Letter of Model Rule 1.16 and its Comments.

Respectfully submitted,

Lynda C. Shely, Chair
ABA Standing Committee on Ethics
and Professional Responsibility

Justice Daniel J. Crothers, Chair
ABA Standing Committee on
Professional Regulation

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