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Old is New Again: Recent Revisions to Model Rule 1.16(a) and the Duty to Inquire

When you agree to take on a new client, understanding all that you can about the individual(s) or entity is imperative for effective representation. The client intake process provides you with your first opportunity to decide whether this is the right client, at the right time, on the right matter and for the right amount of money. You can also eliminate and examine potential red flags such as conflicts of interest, whether the client has unreasonable expectations, the impact of impending deadlines, and whether the client has the financial means to pay your fee. Answering all of these questions, or performing the requisite due diligence, assists you in commencing the attorney-client relationship appropriately.

But what does conducting due diligence on a client really mean? What are the limits? Is it necessary to do a "deep dive" into every aspect of a prospective client's background to see if there are any skeletons in the closet? At its recent Annual Meeting, the American Bar Association [ABA] House of Delegates provided some guidance on this process. It adopted a new version of Rule 1.16(a) of the ABA Model Rules of Professional Conduct and its Comments which require lawyers to expressly screen or "inquire into and assess the facts and circumstances of each representation [of a client] to determine whether the lawyer may accept or continue the representation."[1]

Why Now? Background on the Revisions

These revisions were undertaken by the ABA for a myriad of reasons. Two specific goals were (1) to preempt possible federal legislation by the U.S. Department of Treasury that might burden or regulate lawyers more stringently than the revisions; and, (2) in an effort to diminish concerns about the use of lawyers to assist in a client's criminal or fraudulent conduct, including money laundering, terrorist financing, human trafficking and human rights violations, tax-related crimes, sanctions evasion, and other illicit activity. Money laundering refers to a client attempting to use a lawyer's services to "clean" illegally obtained funds. For example, a client requests that the lawyer hold funds in the lawyer's client trust account pending completion of a real estate transaction or as the funding source for another purchase. The client later advises the lawyer that the transaction failed to materialize and requests a refund of the funds being held. Often, the schemes are highly sophisticated, involve the creation of blind corporations, and the money is "laundered" through the lawyer's trust account without the lawyer's knowledge. However, on other occasions, the lawyer is an active and knowing participant or is "willfully blind," i.e., has ignored the red flags indicating that the client intends to use the lawyer's services to assist the client in engaging in illegal or fraudulent conduct.

1 ABA Model Rule of Professional Conduct Rule 1.16(a)(2023).

While the federal government has enacted rules and regulations designed to prevent, detect, and prosecute money laundering[2], the Financial Action Task Force ("FATF"), an inter-governmental entity that coordinates efforts to prevent money laundering or terrorism financing among and between its member countries, has determined that the United States is noncompliant in four areas, including the lack of sufficient client due diligence by the legal profession and lack of enforceable obligations in that regard.[3]

Changes Are Nothing New

At the outset, it is important to note that the ABA Model Rules of Professional Conduct are templates or model provisions and are not binding until they are adopted by a governing state or federal jurisdiction. In the near future however, most jurisdictions will be studying the revisions to the Rule and determine whether to recommend that their state adopt the Model Rule as is, with some revisions, or not at all.

These obligations are not new. Rather, the revisions incorporate processes which lawyers in various practice settings have utilized for years. Certain intake best practices and risk management strategies have always encouraged this type of due diligence when examining a prospective new client. In fact, the proponents of the revisions averred that lawyers already perform these inquiries and assessments on a routine basis in order to fulfill their ethical requirements.[4] Lawyers have always been required to perform some due diligence and think twice before taking on, or continuing to represent, a client who exhibits dishonesty, fails to communicate, is litigious, argumentative, or presents a financial risk.

Further, other ABA Model Rules of Professional Conduct have required this type of factual inquiry into a client, which applies both before the representation begins and throughout the course of the representation. These obligations are already implicit in the following Model Rules:

- Rule 1.1 and the lawyer's duty to provide competent representation. Comment [5] explains, that "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem."[5]
- Rule 1.2(a) and (d) pertaining to the lawyer's duty 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, and, if necessary, to persuade the client not to pursue conduct that could lead to criminal liability or liability for fraud.
- Rule 1.3 and the lawyer's duty of diligence which "requires that a lawyer ascertain the relevant facts and law in a timely and appropriately thorough manner."[6]
- 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."[7]
- Rule 1.13 which requires "further inquiry to clarify any ambiguity about who has authority and what the organization's priorities are."[8]
- Rule 1.16(b)(2) and the permissive duty to withdraw when the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent."[9]
- Rule 8.4(b) and (c) addressing the prohibition against committing a criminal act or engaging in dishonesty, fraud, deceit, or misrepresentation.

Finally, similar revisions to the ABA Model Rules have been adopted in the past. More than twenty years ago, in the wake of the Enron and Arthur Andersen scandals, Congress enacted the Sarbanes-Oxley Act, and the Securities & Exchange Commission adopted rules requiring reporting by lawyers for public companies of certain insider misconduct. At that time, the ABA amended Model Rules 1.6 (Confidentiality) and 1.13 (Organization as Client) to permit, and in some instances require, lawyers to report fraud and other misconduct by clients and their representatives.

2 See 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. Additional resources may be found on the ABA's Task Force on Gatekeeper Regulation and the Profession and the ABA Gatekeeper Regulations on Attorneys.
3 See FATF United States' Measures to Combat Money Laundering & Terrorist Financing (2016).
4 *Revised Report to the House of Delegates* (Aug. 2023) at 6.

5 ABA Model Rule of Professional Conduct 1.1.
6 ABA Model Rule of Professional Conduct 1.3.
7 ABA Model Rule of Professional Conduct 1.4.
8 ABA Model Rule of Professional Conduct 1.13.
9 ABA Model Rule of Professional Conduct Rule 1.16(b)(2).

About CNA Professional Counsel

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What This Means for You: Examination of the Revised Model Rule and Its Comments

In addition to the change in the Black Letter Rule set forth in Rule 1.16(a) (see supra), Comment [1] provides additional guidance on a lawyer's duty to inquire about and assess the facts and circumstances of the representation. The Comment clarified that the duty continues throughout the course of the representation. If changes in the facts and circumstances occur during a representation, lawyers must inquire and evaluate whether they can continue to represent the client or must terminate the representation. This evaluation may include when a new party is named or a new entity becomes involved in a case.

The Comments further clarify that a lawyer's due diligence will vary for every prospective client or current client, depending upon the level of potential risk. The use of this "risk-based" inquiry and assessment of the facts and circumstances of each representation emphasizes that there is no "one-size-fits-all" vetting process. Lawyers may consider several factors when determining risk, including the identity of the client, the nature of the requested services and the jurisdictions involved in the representation. For further guidance, Comment [2] references several publications, such as the ABA *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing*.

Ultimately, the Rule also requires lawyers to terminate or withdraw from the representation of any client seeking to use the lawyer's professional services to commit a crime. Once the lawyer advises the client or prospective client of the limitations on the lawyer's services, the lawyer is compelled to withdraw/terminate the representation if the prospective client or client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud. However, this Rule does not take the next step and require lawyers to report suspicious activity by existing or prospective clients.

Conclusion

The recent changes to Model Rule 1.16 expressly codify what was heretofore implicit. They benefit lawyers and the public by clarifying the nature and scope of lawyers' existing due diligence obligations to inquire about and assess the facts and circumstances regarding the representation. This affirmative obligation will help lawyers avoid becoming involved in client criminal and fraudulent conduct of the client and will help them better identify and respond to "red flags."

This article was authored for the benefit of CNA by:
Tracy L. Kepler
Tracy L. Kepler is a Risk Control Consulting Director for CNA's Lawyers' Professional Liability program. In this role, she designs and develops content and distribution of risk control initiatives relevant to the practice of law. Prior to joining CNA, Tracy previously served as the Director of the American Bar Association's Center for Professional Responsibility (CPR) and has over 20+ years of experience in attorney regulation through her positions as an Associate Solicitor for the U.S. Patent & Trademark Office and as Senior Litigation Counsel for the Illinois Attorney Registration and Disciplinary Commission. She also teaches Legal Ethics and Professional Responsibility at Georgetown University Law Center, American University – Washington College of Law and Loyola University School of Law (Chicago).

For more information, please call us at 866-262-0540 or email us at lawyersrisk@cna.com