

## **SUMMARY OF PROPOSED AMENDMENTS TO RULE 1.16 OF THE MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT AND RELATED COMMENTS**

The Supreme Judicial Court Standing Advisory Committee on the Rules of Professional Conduct is publishing for public comment proposed amendments to Rule 1.16 of the Massachusetts Rules of Professional Conduct and related comments.

### **Background**

In August 2023, the American Bar Association adopted Revised Resolution 100, which amended Rule 1.16(a) of the ABA's Model Rules of Professional Conduct by adding a continuing duty to inquire into the facts and circumstances of a representation, sometimes referred to as client due diligence, to the text of Model Rule 1.16(a). The new language reads:

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.

The Resolution also added a new subsection (4) to Model Rule 1.16(a) that instructs lawyers on how to proceed when a client tries to use a lawyer's services to commit a crime or fraud. The new subsection requires that a lawyer decline a representation or, if the representation has begun, withdraw if:

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.

Comments 1 and 2 to Rule 1.16 were amended to provide guidance about how these new provisions should be applied in practice.

The impetus for these amendments was continuing concern about lawyers' involvement, often unwitting, in money laundering, terrorist financing and similar misconduct. These serious crimes have attracted increased attention from law enforcement and from Congress, most recently in the form of the Corporate Transparency Act adopted by Congress in 2021. To avoid assisting in these crimes, lawyers must inquire into and understand who their clients are and what they are trying to achieve and must also be prepared to revise their assessment when new information comes to light over the course of a representation.

Prior to the 2023 amendments to Rule 1.16, the ABA's Committee on Ethics and Professional Responsibility had concluded that a continuing obligation to inquire into the facts and circumstances of a representation was implicit in several of the Model Rules, including Rules 1.1, 1.2(d), 1.4 and 1.16. ABA Formal Opinion 20-491. But, as the Committee observed in recommending amendments to Rule 1.16, it is useful to state important duties explicitly in the text of the Rules.

The amendments also provide guidance about what lawyers must do if they discover that their clients seek to use their services to engage in money laundering, terrorist financing, or any other crime or fraud. When a client or prospective client suggests a course of action that may be

criminal or fraudulent, current law requires a lawyer to “hunt for guidance” among Rule 1.2, Rule 1.4, and 1.16. Model Rule 1.16(a)(4), as revised in 2023, provides lawyers with a road map on how to proceed in the text of one Rule.

### **Proposed Amendments to Massachusetts Rule 1.16**

The Standing Advisory Committee recommends adoption of the ABA’s revisions to Rule 1.16, with the modifications noted below.

Proposed Massachusetts Rule 1.16(a) is new and is based on the first sentence of Model Rule 1.16(a). The Standing Committee recommends that the duty to inquire into the facts and circumstances be stated in a separate paragraph (a) and that the remaining paragraphs of the Rule be re-lettered.

Proposed Massachusetts Rule 1.16(b)(4) is new. This provision adopts Model Rule 1.16(a)(4) but adds references to a lawyer’s knowledge that the client is engaged in criminal or fraudulent conduct in order to make it clear that the amendments effect no change in the principle that lawyers face discipline only when they know about the client’s planned or ongoing misconduct. See Rule 1.2(d) and the definition of “knows” in Rule 1.0(h).

The revisions to the initial phrase of Rule 1.16(b) are to make it clear that it is the representation of a client in a matter that is addressed, and not unrelated representations of the client.

The revisions to paragraphs (d) and (e) of the Rule are stylistic clarifications.

Comment 1 is amended to recognize that lawyers have a duty to inquire into and assess the facts and circumstances of a representation before accepting it and that this duty continues throughout the representation. The revised Comment includes two examples of circumstances that might trigger a lawyer’s duty to make further inquiry and assessment. The Committee has added language to provide further guidance on how a lawyer should address the situations described in the two examples. The Comment is otherwise unchanged except to add an omitted cross-reference to Rule 1.1.

Comment 2 is amended to provide a risk-based approach to assessing whether a client may be using the lawyer’s services to further a crime or fraud and to provide a list of non-exclusive of factors the lawyer should consider in performing the assessment. Comment 2 is otherwise unchanged.

The Model Rule version of Comment 2 includes a list of some publications that a lawyer might consult for guidance in assessing risk. While the publications are helpful in identifying money laundering schemes, the list is partial, and the publications are subject to revision. The Committee has not included the list in the proposed amendments to Comment 2.