

## MEMORANDUM

**To:** Lynda Shely, Chair, ABA Standing Committee on Ethics and Professional Responsibility; and Justice Daniel J. Crothers, Chair, ABA Standing Committee on Professional Regulation  
**From:** Professor Emerita Laurel Terry (LTerry@psu.edu)\*  
**Date:** Aug. 31, 2022  
**Re:** Comments on the Second Discussion Draft of Possible Amendments to Model Rules of Professional Conduct [MRPCs] Concerning Lawyers' Client Due Diligence Obligations

Thank you for the opportunity to provide comments on the Committees' Second Discussion Draft of a Client Due Diligence rule. I will summarize these remarks on August 31, 2022, but I am happy to discuss these matters at greater length with any interested individuals.

1. **Why this is Important:** As I noted in my Feb. 15, 2022 comments [<https://perma.cc/SJU7-4TJR>] and oral Roundtable [remarks](#), I commend the ABA for addressing the topic of lawyers' due diligence obligations. I continue to believe that developing an explicit lawyer due diligence obligation: 1) is the right thing to do; AND 2) is necessary if the ABA wants to forestall federal AML legislation applicable to lawyers that could include suspicious activity reporting [SARS/STR] requirements.
2. **My Recommended 1-sentence Change to Rule 1.1:** I believe that it is critically important that the ABA amend the comment of MRPC Rule 1.1. My February 15, 2022 submission proposed a new Comment [6]. If the Committees want to consider a more modest change to Rule 1.1, I recommend adding to Rule 1.1, Comment [5] the underlined red sentence that appears below:

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c). Competent handling of a particular matter also includes inquiry into, and analysis of, the factual and legal elements related to the lawyer's compliance with the rules of professional conduct.

3. **The Proposed Rule 1.1[5] Change Would Aid Future AML Education Efforts:** I believe the idea underlying my proposed addition currently is implicit in Rule 1.1. For example, I don't believe that competent lawyers can avoid their RPC 1.7 and 1.9 conflict of interest obligations by simply failing to find out who their law firm's former clients were, or by failing to inquire into the identity of opposing parties. In other words, lawyers *currently* have an obligation to "inquire into, and analyze the factual and legal elements" related to their RPC obligations. However, if Rule 1.1, Comment [5] included the sentence I have proposed, it would make it much easier for regulators and others to educate lawyers about their AML client due diligence obligations (similar to the education efforts that took place after Rule 1.1 added a reference to technology).

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\* Professor of Law, Emerita, and H. Laddie Montague Jr. Chair in Law, Emerita, Penn State Dickinson Law. Affiliation is provided solely for identification purposes. I am a former member of the ABA's Task Force on Gatekeeper Regulation and the Legal Profession. I am a current member of various International Bar Association committees that address lawyer-AML issues. I have served on ABA committees that address all three stages of lawyer regulation – admissions, conduct, and discipline. In addition to my academic articles and CLE materials on lawyer AML issues, I participated in the development of the IBA/ABA/CCBE publication entitled "[A Lawyer's Guide to Detecting and Preventing Money Laundering](#)" and I prepared a [two-page summary](#) of the "red flags" set forth in the ABA's *Voluntary Good Practices Guidance For Lawyers To Detect And Combat Money Laundering and Terrorist Financing* (Guidance adopted Aug. 2010 in ABA [Resolution 116](#)). All views expressed in this submission are my own. To see my AML scholarship, select "AML" from the "Jump to Category" dropdown menu at [https://works.bepress.com/laurel\\_terry/](https://works.bepress.com/laurel_terry/). (Note: the permalinks in this submission open in Chrome, but not Firefox.)

4. **Why a Rule 1.1[5] Change is Necessary in Addition to Any Rule 1.2(d) changes:** The Committees have proposed adding a new sentence to the black letter of Rule 1.2(d) that states: “*To avoid counseling or assisting a client in conduct the lawyer knows is criminal or fraudulent, a lawyer **who reasonably believes** a client seeks to use the lawyer’s services to engage or assist in such conduct **shall make a reasonable inquiry** into the facts and circumstances of the representation.*” Proposed new Comment 13 explains that “Factors that may give rise to a reasonable belief warranting further inquiry under paragraph (d) regarding whether a client is seeking the lawyer’s assistance in criminal or fraudulent activity such as money-laundering, ...include: [the comment cites four risk-based factors and the 40-page ABA *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing*].

The “**if-then**” structure of the Committees’ proposed Rule 1.2(d) arguably means that the MENS REA requirement of “reasonably believes” must be satisfied **in order to trigger the obligation to conduct a “reasonable inquiry.”** In other words, **if** a lawyer has failed to inquire and thus does not know enough to “reasonably believe” that the lawyer is counselling or assisting a client in a crime or fraud, **then there is NO duty of inquiry or due diligence under the Committees’ proposed Rule 1.2(d).**

In my view, a rule such as this that makes client due diligence **conditional** is **not** what FATF Recommendation 22(d) re lawyer due diligence requires. <https://perma.cc/8B8Z-7S5C>. Nor do I think that a conditional due diligence obligation is likely to satisfy the U.S. Congress or FinCEN. On the other hand, if Model Rule 1.1, Cmt. [5] were amended as proposed, it should be satisfactory. Rule 1.1 is – in essence – a due diligence provision. It focuses on the PROCESS to be used and currently requires “inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.” The weakness of the current RPC 1.1[5] language is that it does not **explicitly** state that a lawyer must be competent with respect to the exercise of the lawyer’s **professional** obligations. It should do so. If Rule 1.1, Comment [5] stated this explicitly, it would make it clear – as the Committees said on p. 3 of the 6/28/22 memo - that the Model Rules include an enforceable client due diligence obligation.

The Dec. 2021 Federal Register [notice](#) I previously cited helps explain why Congress and FinCEN might not be satisfied if the ABA adopts **only** the proposed 1.2(d) **conditional** duty of inquiry. FinCEN explained that §6216 of Congress’ AML law requires “FinCEN to identify regulations and guidance that do not conform to commitments of the United States to meet international standards to combat money laundering, financing of terrorism, serious tax fraud, or other financial crimes.” A 2020 FATF report shows that three of the four FATF recommendations for which U.S. “regulations and guidance” are defective are those that involve “DNFBPs,” which includes lawyers.<sup>2</sup> As the Committee knows, the House of Representatives recently voted in favor of the omnibus 2023 National Defense Authorization Act; it amends the Enablers Act and Bank Secrecy Act and would require lawyers to file SARS/STR reports, as well as comply with due diligence obligations.

I favor lawyer AML due diligence requirements, but oppose lawyer SARS/STR and no-tipping off provisions because of the rule of law implications of such provisions. Adding my proposed sentence to Rule 1.1, cmt. [5] would create an explicit unconditional AML due diligence/duty of inquiry rule for lawyers. In my view, if lawyers can point to this type of explicit due diligence/duty of inquiry obligation, then a strong argument can be made to Congress that including lawyers in the Enablers & Bank Secrecy Acts is unwise and unnecessary. As I have argued elsewhere, [e.g., at <https://perma.cc/E9RW-WQ8S> at p. 714 et. seq.], I believe that RPC Rules 1.16(a) and RPC 1.2(d) [even in its current form] go further than FATF Recs. 20&21 on STR/NTD. In my view, if Rules 1.2(d) and 1.16(a) are combined with a Rule 1.1 AML duty of inquiry, these rules are likely to be more effective in reducing money laundering than federal legislation would be, especially if these rules are combined with a robust education program similar to what accompanied the Rule 1.1 technology amendments. Thus, regardless of what the CPR Committees decide with respect to proposed Rule 1.2(d), I submit that it is imperative to add a sentence to Rule 1.1’s comment that is similar to the new sentence that I have proposed.

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<sup>2</sup> For cites related to this paragraph, see p. 6 of my Feb. 15, 2022 submission, <https://perma.cc/SJU7-4TJR>. The 2020 FATF follow-up report stated that the United States will “remain in enhanced follow-up” and that “the U.S. will report back to the FATF on progress to strengthen its implementation of AML/CFT measures.” See <https://perma.cc/HCSB-5825>. One of the three U.S. noncompliant ratings was for Recommendation 22 on and DNFBP due diligence. The fourth noncompliant rating concerned beneficial ownership rules, rather than DNFBPs. This topic has now been addressed in U.S. federal legislation.