



**To: ABA Entities, Courts, Bar Associations (state, local, specialty, and international),
Individuals, and Entities**

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

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

**Re: For Comment: Second Discussion Draft of Possible Amendments to Model Rules of
Professional Conduct Concerning Lawyers' Client Due Diligence Obligations**

Date: June 28, 2022

Introduction

The Standing Committee on Ethics and Professional Responsibility and Standing Committee on Professional Regulation are pleased to release for comment their Second Discussion Draft of possible amendments to the Model Rules of Professional Conduct relating to lawyers' client due diligence obligations, including when and how that duty is triggered. The Committees are grateful for all of the written comments and testimony received in response to the First Discussion Draft, which can be viewed [here](#).

The Committees carefully reviewed those submissions and the testimony. After further analysis, discussion, and consideration of possible unintended impact on other Model Rules, the Committees developed the accompanying Second Discussion Draft amendments to Model Rule 1.2 and its Comments.

The Committees will hold two public roundtables relating to this Second Discussion Draft. An in-person roundtable will be held in conjunction with the ABA Annual Meeting on Saturday, August 6, 2022, from 2:00 p.m. to 4:00 p.m. Central. To register to attend, please contact Natalia Vera, Center for Professional Responsibility Senior Paralegal at natalia.vera@americanbar.org by Thursday, August 4, 2022.

The Committees will also host a Zoom public roundtable on Wednesday, August 31, 2022, from 12:00 p.m. to 2:00 p.m. Central. To register to attend, please contact Natalia Vera, at natalia.vera@americanbar.org by Thursday, August 25, 2022. She will send a Zoom link to registrants no later than Monday, August 29, 2022, with the list of those registered to testify and the times for their testimony.

We request both general comments as well as responses to the specific questions posed below. Comments may be provided verbally at the public roundtables noted above or in writing. Written comments of course are most useful for the Committees and the public.

Please submit all written comments to Natalia Vera at natalia.vera@americanbar.org by August 31, 2022. We may post written comments online.

Brief Background on Anti-Money Laundering & Terrorism Finance Regulation¹

We provide here only a brief summary of the impetus for the Committees' possible proposed changes to Model Rule 1.2, related to concerns about lawyers facilitating money laundering and terrorism financing.

As noted in the memo accompanying the Standing Committees' First Discussion Draft, the application of anti-money laundering and counter terrorism financing laws and regulations to lawyers is a complex subject that can generally be divided into three overarching topics:

- a lawyer's responsibility to know the client -- essentially to conduct client due diligence -- to ensure that the lawyer is not being used to assist a client in a crime or fraud;
- whether, when, and how a lawyer might be required to disclose to the government information about the beneficial ownership of an entity the lawyer forms on behalf of a client or otherwise represents; and
- whether, when, and how a lawyer might be required to report to the government "suspicious activity" of a client.

As noted in the Committees' December 2021 First Discussion Draft, money laundering occurs when criminals hide the proceeds of unlawful activity (dirty money) using "laundering" transactions so that the money appears to be the "clean" proceeds of legal activity. Money laundering often occurs with the knowing and unknowing assistance of others. Money laundering can be used by criminals to facilitate other illegal and corrupt behavior such as human trafficking and human rights violations. Terrorism financing is just that, providing funds to those involved in terrorism. Money laundering is often used to facilitate financing of terrorism.

It is both illegal and unethical for lawyers to knowingly launder money, finance terrorism, or knowingly assist another in doing so.²

¹ For a robust discussion of anti-money laundering and the ABA's participation in the effort, please read the December 15, 2021 memo from the Committees released in conjunction with the First Discussion Draft of proposed amendments to the Model Rules of Professional Conduct available [here](#).

² In the U.S., the primary AML laws are the Bank Secrecy Act and the Money Laundering Control Act. The Money Laundering Control Act made money laundering a federal crime. The Bank Secrecy Act requires U.S. financial institutions to help U.S. government agencies detect and prevent money laundering. This occurs in several ways, including requiring financial institutions to report and keep records of certain cash transactions, and to report other suspicious activity often involved in money laundering, tax evasion, or other crimes. The U.S. Department of Treasury created the Financial Crimes Enforcement Network (FinCEN) to implement, administer, and enforce compliance with the Bank Secrecy Act. The USA PATRIOT Act also made financing of terrorism a federal crime, amended the Bank Secrecy Act, and authorized the Treasury Department to issue rules governing financial institutions' AML regimes.

A lawyers' services also can be used by criminals without the knowledge of those lawyers. To address the issue of inadvertent lawyer aid to these clients, the ABA has issued guidance in the form of formal ethics opinions, recommended good practices, and has engaged in ongoing continuing legal education programming.

For example, the ABA urges lawyers to engage in a risk-based analysis to determine whether to accept a client or a matter as set forth in the ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering.³ The ABA Voluntary Good Practices Guidance (ABA Good Practices Guidance) provides lawyers with practice pointers for implementing a risk-based analysis that includes a suggested protocol for client intake to avoid engaging in the type conduct prohibited by Model Rule 1.2.

ABA Formal Ethics Opinion 463 further explains 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... 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.” ABA Formal Ethics Opinion 491 notes that the Rules require that a lawyer “who has knowledge of facts that create a high probability that a client is seeking the lawyer’s services in a transaction to further criminal or fraudulent activity has a duty to inquire further to avoid assisting that activity.”

Many of the federal anti-money laundering (AML) legislation and regulations have and continue to seek to cover lawyers. However, depending on how the legislation and regulations are written, subjecting lawyers to the AML requirements could conflict with a lawyers’ obligations under Model Rule 1.6, the attorney-client privilege, and the ABA’s longstanding policy supporting state-based regulation of the legal profession. Therefore, the ABA has advocated to ensure that the legal profession is not, generally, subject to such federal legislation, rules, and regulations.

Despite the ABA Good Practices Guidance, the two Ethics Opinions, and the current text of the black letter and Comments to the Model Rules, some governmental and non-governmental entities, domestically and internationally, continue to urge that the legal profession create an enforceable client due diligence obligation in the Model Rules. The Committees believe that the Model Rules already include such an obligation, but that additional clarity will be helpful. The Committees respectfully disagreed with commenters who suggested creating a separate due diligence rule in the Model Rules.

Second Discussion Draft - Possible Amendments to Black Letter of Model Rule 1.2 and to Comments

The First Discussion Draft was limited to possible amendments to Model Rule 1.2’s Comments. In this Second Discussion Draft, the Committees suggest amending the black letter of Model Rule 1.2 as follows:

Most recently, Congress enacted the Corporate Transparency Act to enhance the identification and disclosure of certain beneficial ownership information.

³ *Supra* note 2.

Model Rule 1.2: Scope of Representation and Allocation of Authority between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. 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. ~~but a~~ A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

The Committees also suggest modifying Comment [13] to Model Rule 1.2. Below we present both the suggested amendments to Comment [13], and the full text of Comments [9] through [12] so the possible Comment amendments can be read in context.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by

suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] ~~If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5). 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, terrorism financing, human rights violations, human trafficking, or tax crimes, include: (i) the identity of the client, (ii) the lawyer's familiarity with the client, (iii) the nature of the requested legal services, and (iv) the relevant jurisdictions involved in the representation (for example, whether a jurisdiction is considered at high risk for fraudulent or other criminal activity). For further information, see ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing. If after inquiry into the facts and circumstances of the representation a lawyer learns the client expects assistance not permitted by the Rules of Professional Conduct or other law, consultation with the client regarding the limitations on the lawyer's conduct is required under Rule 1.4(a)(5). If continuing the representation will result in violation of the Rules of Professional Conduct or other law, the lawyer is required to withdraw from the representation under Rule 1.16(a). A lawyer should also be mindful of the lawyer's obligations to both the court and client under Rules 3.3 and 1.6.~~

Specific Questions to Commenters

1. *Do these possible amendments to the black letter of Model Rule 1.2(d) and Comment [13] provide lawyers with the appropriate level of guidance as to when a lawyer must make a reasonable inquiry into the facts and circumstances of the representation to avoid counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent?*

Please note that, in a different context, Comment [5] to Rule 2.1 reads, “A lawyer ordinarily has no duty to initiate investigation of a client’s affairs.”

2. The requirement to conduct a reasonable inquiry into the facts and circumstances of the representation to avoid counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent is activated when the lawyer reasonably believes that the client seeks to use the lawyer’s services to effectuate a crime or fraud.

“Reasonably believes” is a defined term in the Model Rules. Rule 1.0(i) provides that “when used in reference to a lawyer” reasonable belief “denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.” This standard presents both an objective standard “the circumstances are such that the belief is reasonable” and a subjective standard “the lawyer believes the matter in question.” It is also the same standard used in Model Rule 1.16(b)(2) addressing permissive withdrawal, when “the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent.”

Is this an appropriate standard to trigger a reasonable inquiry into the facts and circumstances?

3. Some have suggested that Rule 1.2(d) should instead include a “reasonably should know” standard and that the Rule should read: A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent.

“Reasonably should know” is defined in Rule 1.0(j) such that when “used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.”

In 1981, the Commission on the Evaluation of Professional Standards recommended a “reasonably should know” standard in Model Rule 1.2(d). However, its inclusion was opposed.

Opponents of the reasonably should know standard argued that such a standard is essentially strict liability for lawyers disguised as a negligence standard. They argue this because when a third party analyzes another’s past conduct, that past conduct -- taken before all of the facts were known -- can too easily be categorized as unreasonable when viewed in the present with the benefit of the knowledge it brings.

Others opposed to the reasonably should know standard explained that a reasonably should know (negligence) standard is lower than the mens rea established in aiding and abetting law – which, usually, is recklessness. As a result, lawyers who have not acted in a reckless manner, only negligently, would be forced to defend an ethics violation for actions that do not rise to the level of aiding and abetting.

Additionally, paragraph [20] of the Preamble and Scope of the Model Rules explains that a violation “of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached ... Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.” As a result, some opponents of the “reasonably should know” standard note that lawyers will become the defendant in civil actions

alleging that the lawyer should have known that the lawyer's client would act in a way that was criminal or fraudulent and that same client conduct injured the plaintiff.

Should Rule 1.2(d) include a "reasonably should know" standard?

4. Should Model Rule 1.2(d) and its Comments be amended, or another Model Rule be created to address lawyers advising and assisting clients concerning the conflict of laws between the federal Controlled Substances Act and state legislation decriminalizing marijuana? Or has state action – i.e., state supreme court adoption of ethics rules, comments, ethics opinions, and policy statements and state legislatures enactment of statutes addressing lawyer counseling and assisting – adequately addressed this issue?

The ABA House of Delegates has adopted policy on state decriminalization of marijuana. ABA Resolution 104 (19 AM 104) urged "Congress to enact legislation to exempt from the Controlled Substances Act any production, distribution, possession, and use of marijuana carried out in compliance with state laws" and to remove it from the list of Schedule I controlled substances. ABA Resolution 103B (20 MM 103B) urged Congress to enact legislation to ensure that it does not constitute a violation of federal law for qualified lawyers to provide legal advice and services to clients regarding marijuana-related activities that are in compliance with local law. ABA Resolution 103D (20 MM 103D) further urged Congress to enact legislation to ensure that it does "not constitute a federal crime for banking and financial institutions to provide services to businesses and individuals, including attorneys, who receive compensation from the sale of state-legalized cannabis or who provide services to cannabis-related legitimate businesses acting in accordance with state, territorial, and tribal laws."

States that have decriminalized marijuana – allowing for recreational and medical use – have addressed the lawyer's role in advising clients on the state-regulated programs. However, some have urged the ABA to amend Model Rule 1.2(d) to specifically address this issue.