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## The Legal Ethics Project. Supporting professionalism with information.

**Q:** Dear Ethics Lawyer,

I just returned from our firm retreat, where after a time in the hospitality room, my partner and I had a philosophical discussion about whether as a profession lawyers have eroded their usefulness to clients (and competitive advantage over others such as the large accounting firms) by creating exceptions to privilege and non-disclosure of information otherwise protected by Rule 1.6, imposing ever-increasing duties to inquire into the bona fides and intentions of clients even in the absence of red flags of wrongdoing. What do you think about this?

**A:** What a coincidence! We also just had a terrific firm retreat, immediately after I attended a premier loss prevention conference where there was a discussion of troubled and troubling clients and the duties of a lawyer with regard to client intentions and purposes in a representation. I'm not going to bite on your invitation to express a view as to whether the Model Rules [which I believe represent the most comprehensive professional self-regulation in the history of the world; the Annotated Model Rules of Professional Conduct (9th Ed. 2021) runs a biblical 876 pages] are moving too far or not far enough in this direction. But I will discuss the current state of the Rules.

Historically, the principles of attorney-client privilege were fairly strict limitations on a lawyer's ability to disclose anything relating to the representation, and there was no real duty imposed on a lawyer to question a client's intent or purpose in the representation. Over time an exception to privilege developed for disclosures to prevent future crime and fraud. Model Rule 1.6 protection of confidential information relating to the representation also evolved to permit disclosures to prevent reasonably certain death or substantial bodily harm, and eventually also to prevent, mitigate or rectify financial injury "reasonably certain to result" from client crime or fraud involving the lawyer's services.

The Model Rules have also consistently prohibited the lawyer from being involved in a representation that would further criminal or fraudulent conduct of a client. Model Rule 1.16(a) has for many years prohibited a lawyer from representing a client with actual knowledge that the representation would result in violation of the Model Rules or other law, and has required withdrawal from the representation if it has already begun. Rule 1.16(b) has also permitted withdrawal if the client persists in a course of conduct involving the lawyer's services that the lawyer "reasonably believes" is criminal or fraudulent. This covers the circumstance in which the lawyer has a basis for believing, but not actual knowledge of a client's nefarious purpose. These duties have been and are buttressed by Rule 8.4 defining Misconduct, and carried through in other rules. E.g., Rules 1.2(d), 3.1.

But, these duties have been believed to be triggered when "red flag" facts come to the lawyer's attention that raise an issue about the client's purpose or intent. In the absence of a red flag about the matter that would lead

to actual knowledge, or at least a reasonable belief, the Model Rules did not reference an affirmative duty to assess the bona fides of a client or matter (except, of course, in litigation, to determine a reasonable basis for a claim or defense before advancing it.)

This may have changed in August 2023, with the ABA's adoption of amendments to Rule 1.16(a). The new version of Rule 1.16(a), if and where adopted, would require a lawyer to "inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation." The new language does not predicate this duty of inquiry to "red flag" information raising a basis for suspicion. It applies as to each and every representation. It also frames a continuing obligation for a duty of inquiry, an ongoing assessment of facts and circumstances to determine whether the representation should continue. It appears that this changed language was added as an attempt to forestall legislation directed at the legal profession to prevent or punish lawyer involvement in illicit client activity like money laundering, human trafficking, tax crimes and sanctions evasion. Nonetheless, the ABA Standing Committee on Ethics and Professional Responsibility asserted that the change did not reflect any new obligations for lawyers, who "already perform these inquiries every day to meet their ethical requirements." Revised Report to the ABA House of Delegates (Aug 2023), at 6.

An article authored by William J. Wernz for the Minnesota State Bar Assn, addressing potential adoption of the new rule in that state, discusses whether and to what extent the changes actually would impose new affirmative duties on lawyers, and raises several interesting hypotheticals concerning its application. Regarding the lawyer as private investigator: Parsing new ABA Model Rule 1.16(a)—Inquiring Into and Assessing Representations, in Mr. Wernz's view, "words matter," and there are strong indications that the "inquire into and assess" language of new Rule 1.16(a) (and related changes to comments) "would transform the rules." For now, until adopted by the various states and interpreted further, the parameters of this continuing duty to inquire into and assess each matter of representation remain undefined.

To return to the discussion that spawned your question, clearly (whenever it occurred), a lawyer now has a greater duty of awareness (and perhaps affirmative inquiry) about client intention to commit crimes or frauds, and greater latitude to act (remonstration, withdrawal, disclosure, etc.) when that appears to be the case. Will this erode the lawyer's useful role to provide legal advice in an atmosphere of privilege and confidence? I don't think so, at least as to clients whose intent is to comply with or understand the law. Even the most recent Model Rule changes do not preclude a lawyer from advising the lawyer's client what the law requires, discussing the application of the requirements of the law to the client, and advocating compliance. This is particularly the case with regard to organizational clients, when the requirements of Rule 1.13 provide a useful way to guide constituents away from crimes, frauds or other legal choices that would harm the organization. The ability to discuss these issues with clients in confidence and safety remains a uniquely valuable role for us as lawyers to our clients. Whether the recent changes to Rule 1.16(a), where adopted, impose unfair disciplinary and liability risks is a question for further development and a different forum.

***The Ethics Lawyer***

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## About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by Mark Hinderks, former managing partner and counsel to an AmLaw 125 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's Legal Ethics & Professional Responsibility practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.