

# Why States Should Adopt ABA's 'Duty To Inquire'

By **Deborah Winokur** (November 20, 2024)

On Aug. 23, the American Bar Association released Formal Opinion 513 on a lawyer's duty to inquire into and assess the facts and circumstances of each representation. This opinion serves as a companion piece to the ABA's Aug. 8, 2023, changes to the text and comments of Model Rule 1.16 on declining or withdrawing from a representation.



Deborah Winokur

States need to begin the review and adoption process of similar rule changes in their jurisdictions for the benefit of lawyers, the reputation of the legal profession and the welfare of U.S. citizens.

The ABA's rule changes, which were hotly contested, are intended to dissuade lawyers from involvement in a client's money laundering and other illegal or fraudulent schemes. Roughly a year before the issuance of Formal Opinion 513, the ABA voted to pass Revised Resolution 100, which recognized a lawyer's duty to take necessary evaluative measures to avoid assisting a client with committing or furthering a crime or fraud.

The accompanying report clarifies that the impetus for the amendments was to help prevent lawyers from becoming involved, perhaps unwittingly, in their clients' participation in money laundering and terrorist financing activities.[1] Both the report and formal opinion reiterate that the changes do not create new obligations for lawyers, but rather are intended to assist lawyers in avoiding "entanglement in criminal, fraudulent, or other unlawful behavior by a client."

Formal Opinion 513 provides illustrative examples of how the duty to inquire functions and is intended to assist lawyers with compliance with the obligations expressed in revised Rule 1.16. The hypotheticals center on situations in which a lawyer is working with a non-U.S. citizen or funding is originating outside the U.S. The opinion stresses the need for the lawyer to perform a risk-based inquiry to make a determination if the representation is likely to involve assisting in a crime or fraud.

Changes to the model rules are aspirational in nature and do not have the force of law unless and until a state's regulatory authority enacts a concomitant change. Some states, including Colorado, Massachusetts and Oregon, are actively considering the proposed changes.[2] Nevertheless, a year has passed since the ABA implemented its rule change and no state has revised its rule.[3] The time is now for lawyers, bar associations and judicial authorities to follow suit and take the necessary steps to implement similar rules in their jurisdictions.

One of the motivating factors for the ABA to take action was to hold off the U.S. Department of the Treasury from proceeding with directives that would require lawyers to share their clients' privileged and confidential information under circumstances where it appears that a lawyer's services are being used to perpetuate a crime or fraud.

Regulators have been targeting lawyers since the discovery of lawyers' participation in money laundering and other illegal schemes. The Pandora Papers released in 2021 by the International Consortium of Investigation Journalists exposed leaked financial records that pertained to high-profile politicians, public officials, billionaires and international fugitives

who were using a worldwide network of offshore accounts to facilitate the illicit flow of money.[4]

The ICIJ's investigation particularly emphasized the complicity of lawyers in propping up, and profiting from, the shadowy worldwide movement of funds meant to avoid reporting and accounting.

Laws requiring lawyers to report their clients' activities to the government upend the bedrock principle of the attorney-client privilege and the sanctity of the attorney's duty to keep client confidences. In order to keep the privileged status of a self-regulating profession, the Rules of Professional Conduct need to reflect and keep pace with current events and should adopt a version of the revised model rule.

Further, as illustrated in Opinion 513, the revisions to Rule 1.16 ultimately can save lawyers from themselves. The revised rule outlines measures lawyers must take to prevent becoming entangled in a client's illegal scheme. Using a risk-based inquiry model can prevent significant exposure for a lawyer in the long run.

In addition, lawyers can respond to clients who bristle at a lawyer's request for independent verification of a client's identity, or the underlying facts and circumstances of a matter, by stating that they have a professional duty to do so.

Seasoned lawyers may argue that their years of experience have taught them how to spot a phony or a fraudster. However, while those instincts may have protected them through much of their careers, rapid technological changes may make it more difficult to rely on gut instinct.

Major firms have fallen victim to schemes involving wire fraud transfers and cryptocurrency.

Increased use of generative artificial intelligence may exacerbate the problem by making it more difficult to authenticate the client's identity. Finally, because lawyers now clearly have a duty to inquire into and assess the circumstances of an existing representation, lawyers who discover that their services are being used to perpetuate a crime or fraud have a direct escape route to withdraw from the representation.

Enacting a version of revised Model Rule 1.16 benefits the public at large and lawyers. The commonsense measures set forth in the revised rule and explained in detail in Opinion 513 provide guardrails for lawyers, prevent incursion into the regulation of the legal profession by the executive branch, and help prevent money laundering and other crimes in the U.S.

As stated in the preamble to the Rules of Professional Conduct, lawyers are officers of the legal system and have "special responsibility for the quality of justice." Acting to prevent participation in money laundering and other illegal schemes falls squarely within this responsibility.

In our highly charged political environment, there is a lot of focus on being on the right side of history. For too long, money launderers and fraudsters have used American lawyers to facilitate their activities. Taking a stand as a profession to enact these rule changes moves the profession decidedly in the right direction.

---

*Deborah A. Winokur is an associate general counsel at Cozen O'Connor.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] <https://www.americanbar.org/content/dam/aba/administrative/news/2023/am-res/100.pdf>.

[2] [https://www.courts.state.co.us/userfiles/file/Court\\_Probation/Supreme\\_Court/Committees/Standing\\_Committee\\_on\\_Family\\_Issues/2024\\_4\\_26%20Colo\\_%20RPC%20Standing%20Committee%20-%20Letter%20re\\_%20ABA%20Rule%201\\_16%20\(4\\_25\).pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Standing_Committee_on_Family_Issues/2024_4_26%20Colo_%20RPC%20Standing%20Committee%20-%20Letter%20re_%20ABA%20Rule%201_16%20(4_25).pdf); <https://www.mass.gov/doc/summary-of-proposed-revision-to-rule-116-of-the-rules-of-professional-conduct-and-related-comments-comments-due-by-june-21-2024/download#:~:text=In%20August%202023%2C%20the%20American,the%20text%20of%20Model%20Rule> and [https://www.osbar.org/\\_docs/resources/BOGResolutionNo2-AmendRPC1.16.pdf](https://www.osbar.org/_docs/resources/BOGResolutionNo2-AmendRPC1.16.pdf).

[3] [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc-1-16.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-1-16.pdf).

[4] [https://www.icij.org/investigations/pandora-papers/frequently-asked-questions-about-the-pandora-papers-and-icij/?gclid=Cj0KCQiAgribBhDkARIsAASA5bvK8R4BN6YbzndMhk7GPZZNpyFGg4U3A5XS3uxZkKdZ-djaGXJDZdkaAsyAEALw\\_wcB](https://www.icij.org/investigations/pandora-papers/frequently-asked-questions-about-the-pandora-papers-and-icij/?gclid=Cj0KCQiAgribBhDkARIsAASA5bvK8R4BN6YbzndMhk7GPZZNpyFGg4U3A5XS3uxZkKdZ-djaGXJDZdkaAsyAEALw_wcB).