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Chip Phinney
Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

June 17, 2024

Re: Comments on Proposed Revisions to Rules of Professional Conduct Rule 1.16

Dear Attorney Phinney:

On behalf of the Boston Bar Association ("BBA"), we thank you for the opportunity to submit informal comments on the proposed revisions to Rules of Professional Conduct Rule 1.16.

The invitation to comment was distributed to the BBA Sections and both the Bankruptcy Section and Criminal Law Section discussed it at length and proposed the attached comments. Please note that the attached document does not constitute a position of the BBA as a whole, but rather reflects the views of the individual members of the Section. We hope they may be useful to the Court as it considers the proposed amendments.

Thank you for providing members of the bar with an opportunity to weigh in on these important changes and please feel free to contact me should you have any questions or concerns.

Very truly yours,

Hannah Kilson
President

Comments of the Boston Bar Association's
Bankruptcy and Criminal Law Sections
on Proposed Amendments to Rule 1.16
of the Massachusetts Rules of Professional Conduct

In response to an invitation for comments from the Supreme Judicial Court and the Standing Advisory Committee on the Rules of Professional Conduct, members of the Boston Bar Association's Bankruptcy and Criminal Law Sections reviewed and discussed the proposed changes, and they offer the following comments on proposed changes to Rule 1.16 of the Massachusetts Rules of Professional Conduct, regarding client due diligence.

The proposed amendments to Rule 1.16 state that they are intended to discourage money laundering and support of terrorism. Members of both the BBA's Bankruptcy and Criminal Law sections have concerns, though, about the breadth of the proposed changes. Although apparently aimed at problems (large-scale/cross-border money laundering and terrorist financing) that might arise for only a fraction of a percent of Massachusetts lawyers, the proposed language is phrased in sweeping terms that would potentially impose new duties on all lawyers.

Money laundering is an extremely broad activity that can take on many different forms, and it is by no means clear that an attorney is well-positioned to investigate or determine whether a client is engaging in money laundering except in all but the most blatant cases (which could very well be adequately covered by existing ethical rules). Requiring attorneys to continually investigate their clients in this way may lead to careful lawyers seeking to withdraw as a result of innocent activity and introduce unwarranted friction into the attorney-client relationship, all for very limited benefits given the apparent infrequency of legal representation being used to facilitate support of terrorism or money laundering. The rule change is unnecessary: the rules already require the lawyer to conform her conduct to "the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs." If the lawyer thinks she is contributing to money laundering or some other crime, she has a duty to withdraw already where the client persists in attempting to use her to commit a crime.

The Bankruptcy section believes that the proposed amendments, especially proposed Rule 1.16(a), cast too broad a net in defining which lawyers will be obligated to undertake mandatory investigations on which cases and clients. Those concerns relate to length of time and substance. The relationship between a lawyer and client in a bankruptcy case, especially Chapter 13, could easily extend for five years—the normal lifespan of a Chapter 13 plan, 11 U.S.C., section 1322(d). Consumer debtors in chapter 13 bankruptcy have an obligation to inform the Court of substantial changes in their income or assets during their case. Indeed, the standard Chapter 13 Confirmation Order in Massachusetts contains the following provision: "The Debtor(s) shall promptly inform the Trustee of any material increase in income and/or any acquisition of assets during the case." A willful failure to do so could violate criminal laws. *See, e.g.*, 18 U.S.C. section 152. In that context, consider proposed Rule 1.16(a)'s ongoing duty to inquire and decide to continue a representation.

How often must lawyers reach out to their clients to ask about these things? What is the scope of those inquiries? What burdens might a professional liability carrier impose on a lawyer to establish policies and procedures to ensure adequate compliance?

On the merits, what constitutes a violation of law or ethics under the proposed rule far exceeds the intended purpose of discouraging terrorism and money laundering. For instance, does a lawyer who files, or participates, in a financial restructuring involving marijuana dispensaries, or employees of such dispensaries, fall within the rule's ambit? *E.g., Blumsack v. Harrington*,

BAP MW 23-003 (1st Cir. BAP 3/5/24). Perhaps such activity violates Federal, but not state law. Perhaps not. What about a lawyer who files a case which is later determined to be filed "not in good faith," even though those are words of art, and do not necessarily imply an ethical lapse, or criminal activity. *E.g.*, 11 U.S.C., section 707(b). The Bankruptcy section is mindful of, and concerned about the precedent of, legislation like RICO, 18 U.S.C., section 1961-68, originally intended to discourage organized crime, but now commonly extended far beyond its original goal.

Relatedly, members of the Criminal Law section noted that the rule change does not define the context in which, nor manner by which, the lawyer must investigate her client. Even the comment provides no example of what the lawyer is expected to do to satisfy an ethical duty to inquire. The new rule does not provide a level of knowledge necessary to trigger a duty to inquire. The current rules require withdrawal where the attorney has a "reasonable belief" that the client is using her services for something criminal or fraudulent. Would a lesser quantum of knowledge than reasonable belief prompt the duty to inquire? Additionally, the new rule does not define the investigative steps necessary to satisfy the duty of inquiry. Must the lawyer question the defendant and request inculpatory documents that she wouldn't have otherwise requested in relation to the representation?

In short, the proposed new rule attempts to gather the problems of terrorism and money laundering under the same umbrella as more pedestrian problems, including those which may be neither illegal nor unethical. The resulting language implies that a trier of fact, having invaded the attorney-client relationship to determine the sufficiency of counsel's investigation of its own client and second-guess any such investigation with the benefit of hindsight, could hold counsel strictly liable for a client's misconduct. Perhaps explicit limits within the rule would be helpful; perhaps a separate rule is required altogether, or guidance could be limited to comments on existing rules. Incidentally, the on-line ABA Journal reported that the proposed rule was passed as a Model ABA rule by a vote of the ABA House of Delegates of 216-102 "after a contentious debate" on August 8, 2023.

It is worth noting that members of other BBA sections shared many of the above general concerns about the changes as well. Members of the Criminal Law Section expressed further concerns, specific to their area of practice, including that the rule as amended would interfere with the right to counsel in criminal cases.

Some specific problems that section identified include:

1. The rule's requirement that a lawyer should investigate her client will interfere with the attorney-client relationship and a defendant's constitutional right to effective assistance of counsel.
2. The rule change might upset the delicate balance Rule 3.3(e) sets to limit client perjury while maintaining client autonomy and the right to present a defense.
3. The new rule poses particular risks for criminal-defense counsel who are paid by their clients but may not know the source of those funds. Because prosecutors often decline to provide details about an on-going investigation, and because of the low standard for the government to seize funds, these attorneys may be placed in a very challenging position by the rule.

Generally, members would prefer maintaining the current rules or, if changes are necessary, making clear that the new obligations relate only to the problems of large-scale or border-crossing money laundering or terrorist financing as described.