

BOG Resolution No. 2

Amend Oregon RPC 1.16(a) to address suspected usage of the lawyer's services for crime, fraud, or money laundering.

Whereas, the Legal Ethics Committee and the Board of Governors formulated the following amendment to the Oregon Rule of Professional Conduct 1.16(a);

Whereas, the House of Delegates must approve any changes in the rules of professional conduct before they are presented to the Oregon Supreme Court for adoption pursuant to ORS 9.490(1); now, therefore, be it

Resolved, that the amendment of Oregon Rule of Professional Conduct 1.16(a) as set forth below is approved and shall be submitted to the Oregon Supreme Court for adoption:

Rule 1.16: Declining or Terminating Representation

(a) A lawyer shall reasonably inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation.

Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; ~~or~~

(3) the lawyer is discharged; or

(4) the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud, despite the lawyer's discussion pursuant to Rules 1.2(c) regarding the limitations on the lawyer assisting with the proposed conduct.

Background

The American Bar Association (ABA), in August 2023, adopted changes to the ABA Model Rule of Professional Conduct (MR) 1.16 regarding withdrawal. The amendments require an attorney to determine whether the lawyer's legal services would be used to commit a crime or fraud. Specifically, these changes focused on withdrawal based on suspected usage of the lawyer's services for crime, fraud, or money

laundering. The ABA amended Model Rule 1.16 as a response to growing concerns about the use of lawyer services for money laundering and other criminal activity. The 2016 Financial Action Task Force United States' Measures to Combat Money Laundering and Terrorist Financing urged that additional guidance was needed to curb the substantial risks within several professions, including the legal profession, for money laundering to occur. The confidentiality in client relations and virtual universality of attorney-client privilege makes attorneys an attractive target for money laundering operations.

The amendment to ABA MR 1.16 clarify a lawyer's responsibility to inquire into and assess the facts and circumstances of a matter before accepting a new representation, and, under some circumstances, before continuing the representation. This is not a new obligation, but provides more guidance on obligations already entwined within the Rules of Professional Conduct. Lawyers are already required to develop sufficient knowledge of the facts and the law to understand the client's objectives and the means to pursue them under ABA MR 1.2(a), and ABA MR 1.2(d) requires that lawyers "not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent[.]"

This new language helps to educate lawyers to be vigilant about potential misuse of their services, protecting both the integrity of the legal profession and public trust. Lawyers need to inquire about the facts and circumstances at the outset and throughout the representation. They need to identify any red flags or changes in the client's behavior that may indicate misuse of legal services. The focus of these proposed amendments utilizes a risk-based approach, where the level of inquiry and assessment depends on various reasonable factors, such as the nature of the client's business, the jurisdictions involved and the lawyer's familiarity with the client. For instance, a lawyer's obligations to inquire about a longtime client would not be as extensive as the lawyer's duty to inquire about a new client who happened to be an international holding corporation which the lawyer has never interacted with.

The LEC reviewed the proposed language by the ABA, and recommends the following amendments to Oregon's RPC 1.16(a) to mirror the ABA's changes. The LEC adjusted the language to add "reasonably" to further clarify the risk based approach at the level of inquiry undertaken by an attorney. As Oregon does not have comments, lawyers may not immediately understand that they are not required to undertake a complex scope of inquiry about a client's intent for all clients, but that the inquiry is dependent on the representation. The addition of reasonable helps to clarify the level of inquiry required.

Financial Impact

None stated.