

## MEMORANDUM

**DATE:** June 6, 2024

**TO:** The Honorable Patricia Guerrero, Chief Justice, Supreme Court of California

**FROM:** California State Bar Committee on Professional Responsibility and Conduct (“COPRAC”)

**SUBJECT:** Consideration of Amendments to American Bar Association Model Rule 1.16 (“Declining or Terminating Representation”)

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### Summary:

The working group assigned to study recent amendments to Rule 1.16 of the American Bar Association Model Rules of Professional Conduct (“MR 1.16”) recommends that similar changes should not be made to the California Rules of Professional Conduct at this time.

### Background:

On August 8, 2023, the ABA House of Delegates adopted Resolution 100, approving amendments to the text of MR 1.16 and comments 1, 2, and 7 to the rule. See Exhibit A hereto. The amendments to the rule and comments “clarify a lawyer’s responsibility to inquire into and assess the facts and circumstances of a matter before accepting a new recommendation [sic] and, under some circumstances, before continuing the representation. The inquiry is required to determine whether the lawyer’s services would be used to commit a crime or fraud.” October 6, 2023 Letter from American Bar Association to Honorable Patricia Guerrero.

On October 6, 2023, American Bar Association representatives reported on these recent amendments to the Supreme Court of California, requesting that the Court “review these changes and consider integrating them into your jurisdiction’s rules of professional conduct.” October 6, 2023 Letter from American Bar Association to Honorable Patricia Guerrero. The Court subsequently directed the California State Bar to consider the request, and the Bar delegated review to COPRAC.

The working group assigned to consider this request met on December 21, 2023, and presented its recommendation to COPRAC on March 1, 2024.

### Discussion:

COPRAC does not recommend that the California State Bar adopt similar amendments to the California Rules of Professional Conduct. We make this recommendation for two reasons.

*First*, the Report accompanying Resolution 100 notes that the amendments “make explicit that which is already implicit” in Rule 1.16. Report p. 7. See *also* Report p. 11 (“The proposed amendments make explicit that which has long been implicit.”).

Like MR 1.16, the California Rules of Professional Conduct also contain an implicit requirement that attorneys assess the facts and circumstances of each representation—as appropriate to the circumstances—to detect and prevent the attorney’s involvement in a client’s unlawful activities. See, e.g., California RPC 1.16 (Exhibit B hereto). As to the

addition of subsection (a)(4) to MR 1.16, COPRAC observes that the prohibition set forth in that new subsection to the Model Rule is also reflected in the existing language of MR 1.16(a)(1), and is reflected in California Rules of Professional Conduct Rule 1.2.1 and Rule 1.16(a)(2). It is COPRAC's view that the existing language in the rules provide sufficient guidance and notice to attorneys of their ethical obligation to conduct due diligence prior to accepting a client representation, and during the duration of a representation, to ensure that the client does not use or seek to use the attorney's services to commit or further a crime or fraud.

*Second*, COPRAC expresses its concern with the lack of a limiting principle on the scope of the inquiry required by the amendments to MR 1.16.

The Report indicates that Resolution 100 responded to concerns raised by governmental entities regarding a lack of sufficient clarity on attorneys' due diligence obligations. The amendments to the rule offer additional clarity on the fact of that obligation, but they do not offer additional clarity on the scope of the inquiry required under the rules beyond an acknowledgement that the extent of the inquiry is necessarily fact-specific. The amended rules do not indicate when or at what point an attorney may accept as true a client or prospective client's representation of fact in response to the attorney's due diligence inquiry, which could have a resulting chilling effect on the attorney-client relationship. If the California State Bar believes that additional guidance is required beyond that provided by the California Rules of Professional Conduct, COPRAC proposes providing that guidance in the form of an advisory ethics opinion rather than in the form of an amendment to the rules.

**Conclusion:**

In accordance with the foregoing, COPRAC recommends that the California State Bar should not adopt amendments to the California Rules of Professional Conduct which reflect the changes recently made to MR 1.16.

## **EXHIBIT A**

ABA Model Rule 1.16, as amended

## **EXHIBIT B**

California Rule of Professional Conduct 1.16