

Proposed revision of Alaska Professional Conduct Rule 1.2(d) and its accompanying Comment

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

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(d) Except as provided in paragraph (f), a lawyer shall not counsel or assist a client to engage in conduct ~~that~~ if the lawyer knows that the conduct is criminal or fraudulent or if the lawyer chooses to remain deliberately ignorant as to whether the conduct is criminal or fraudulent. For purposes of this Rule, a lawyer is “deliberately ignorant” if the lawyer (1) is aware of a high probability that the client is using or plans to use the lawyer’s services to accomplish or facilitate a crime or fraud and, acting with this awareness, (2) the lawyer deliberately chooses not to pursue readily available means of investigating this matter (3) for the purpose of avoiding confirmation of the lawyer’s suspicions. A lawyer is not “deliberately ignorant” if the lawyer’s failure to investigate is the result of the lawyer’s honest belief, despite reasons to suspect otherwise, that the client is not using or planning to use the lawyer’s services to accomplish or facilitate a crime or fraud. ~~but~~ This paragraph does not prohibit a lawyer ~~may discuss the legal~~ from discussing the legality or the potential legal consequences of any proposed course of conduct with a client, nor does it prohibit a lawyer and may counsel or assist from counseling or assisting a client to make a ~~good-faith~~ good-faith effort to determine the validity, scope, meaning, or application of ~~the~~ any law.

COMMENT

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Criminal, Fraudulent, and Prohibited Transactions

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent does not, of itself, make a the lawyer a party to the course of action. ~~However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct.~~ There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. But a lawyer must not assist a client in conduct that is criminal or fraudulent when the lawyer knows that the conduct is criminal or fraudulent or when the lawyer chooses to remain deliberately ignorant of this fact.

As defined in paragraph (d), a lawyer is "deliberately ignorant" of a client's criminal or fraudulent conduct if the lawyer (1) is aware of a high probability that the client is using (or plans to use) the lawyer's services to accomplish or facilitate a crime or fraud and, acting with this awareness, (2) the lawyer deliberately chooses not to pursue readily available means of investigating this matter (3) for the purpose of avoiding confirmation of the lawyer's suspicions.

To constitute "deliberate ignorance", the lawyer's decision not to investigate must be motivated by the lawyer's conscious goal of avoiding further knowledge that might confirm the lawyer's suspicions that the client is engaged in a crime or fraud. This means that a lawyer is not "deliberately ignorant" if the lawyer's failure to investigate is the result of the lawyer's honest belief, despite reasons to suspect otherwise, that the client is not using or planning to use the lawyer's services to

accomplish or facilitate a crime or fraud. Likewise, a lawyer does not act with “deliberate ignorance” if the lawyer *does* undertake a reasonable investigation and, based on this investigation, the lawyer concludes in good faith that the client is not using the lawyer’s services to commit or to further a crime or fraud.

The concept of deliberate ignorance differs in important ways from the lesser standards of negligence and recklessness.

To constitute deliberate ignorance, the lawyer’s duty of inquiry must be triggered by the lawyer’s awareness of a “high probability” — a high likelihood — that the client is using the lawyer’s services (or planning to use the lawyer’s services) to accomplish or facilitate a crime or fraud. A lawyer is not “deliberately ignorant” if the lawyer simply acts negligently — *i.e.*, if the lawyer fails to perceive a substantial risk of illegal activity that a reasonable lawyer would have perceived.

Even when a lawyer reasonably believes that the client is using (or planning to use) the lawyer’s services to accomplish or facilitate a crime or fraud, this reasonable belief, standing alone, does not mean that the lawyer acts with “deliberate ignorance” if the lawyer decides to continue representing the client. In such situations, Rule 1.16(b)(2) declares that a lawyer has the *right*, but not the *duty*, to terminate the representation. The lawyer’s decision to continue representing the client does not constitute “deliberate ignorance” of the client’s crime or fraud unless (1) the facts giving rise to the lawyer’s reasonable belief are so compelling that the lawyer is aware of a “high probability” that the client is using the lawyer’s services for illegal purposes, and (2) the lawyer’s failure to investigate further is motivated by the lawyer’s conscious goal of avoiding confirmation of the lawyer’s suspicions. In short, “reasonably believes” is the standard that triggers a lawyer’s right of permissive withdrawal under Rule 1.16(b)(2), while “knowledge” or “deliberate ignorance” is the standard that triggers a duty of mandatory withdrawal under Rule 1.16(a)(1).

If a duty of investigation is triggered under paragraph (d) of this Rule, the reasonableness of the lawyer’s investigation will depend on the degree of risk that the client is using or seeking to use the lawyer’s services to commit or further a crime or fraud. In evaluating this level of risk, a lawyer may reasonably consider

- the identity of the client (i.e., whether the client is a natural person or an entity — and, if an entity, the identity of the directors and/or beneficial owners of that entity),
- the lawyer’s experience and familiarity with the client,
- the nature of the legal services that the client is requesting,
- the identity and reputation of the jurisdictions involved in the representation
- (e.g., whether that jurisdiction is known to be linked to money laundering or terrorist financing), and
- the identities of the people or entities who are depositing funds into, or who are receiving funds from, the lawyer’s trust account or other accounts in which client funds are held.

For further guidance in assessing the risk that a client is using a lawyer’s services to commit or further acts of money laundering or a scheme to finance terrorism, a lawyer may consult **resources such as** the *Financial Action Task Force Guidance for a Risk-Based Approach for Legal Professionals*, the American Bar Association’s *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing*, *A Lawyer’s Guide to Detecting and Preventing Money Laundering* (a collaborative publication of the International Bar Association, the American Bar Association, and the Council of Bars and Law Societies of Europe), the Organization for Economic Cooperation and Development’s *Due Diligence Guidance for Responsible Business Conduct*, and the U.S. Treasury Department’s list of “Specially

Designated Nationals and Blocked Persons,” and similar legal resources, as they may be updated and amended.

When the client’s criminal or fraudulent course of action has already begun and is continuing, the lawyer’s responsibility is especially delicate. The lawyer is not permitted to reveal the client’s wrongdoing except where when permitted by Rule 1.6. However, the lawyer is required to avoid furthering the client’s unlawful purpose, — for example, by suggesting how it the crime or fraud might be concealed. A lawyer may must not continue assisting a client in conduct that the lawyer originally supposes is supposed was legally proper [*grammatically, this phrase should be in the past tense — which is the way it is written in the ABA Comment*] but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required by Rule 1.16(a)(1)(A), and remedial measures may be required by Rule 4.1.

Where the client is a fiduciary, the lawyer may have special duties to a beneficiary. See Rule 4.1.

Paragraph (d) of this Rule applies whether or not the defrauded party is a party to the transaction. [*The word “defrauded”, which is part of the ABA Comment, appears to have been inadvertently omitted from the Alaska Comment — because, without this word, the sentence is almost impossible to understand.*] However, paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise.

The last clause of paragraph (d) recognizes that determining the validity or proper interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

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COMMENT

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Criminal, Fraudulent, and Prohibited Transactions

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent does not, of itself, make the lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. But a lawyer must not assist a client in conduct that is criminal or fraudulent when the lawyer knows that the conduct is criminal or fraudulent or when the lawyer chooses to remain deliberately ignorant of this fact.

As defined in paragraph (d), a lawyer is "deliberately ignorant" of a client's criminal or fraudulent conduct if the lawyer (1) is aware of a high probability that the client is using (or plans to use) the lawyer's services to accomplish or facilitate a crime or fraud and, acting with this awareness, (2) the lawyer deliberately chooses not to pursue readily available means of investigating this matter (3) for the purpose of avoiding confirmation of the lawyer's suspicions.

To constitute "deliberate ignorance", the lawyer's decision not to investigate must be motivated by the lawyer's conscious goal of avoiding further knowledge that might confirm the lawyer's suspicions that the client is engaged in a crime or fraud. This means that a lawyer is not "deliberately ignorant" if the lawyer's failure to investigate is the result of the lawyer's honest belief, despite reasons to suspect otherwise, that the client is not using or planning to use the lawyer's services to accomplish or facilitate a crime or fraud. Likewise, a lawyer does not act with "deliberate ignorance" if the lawyer *does* undertake a reasonable investigation and, based on this investigation, the lawyer concludes in good faith that the client is not using the lawyer's services to commit or to further a crime or fraud.

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To constitute deliberate ignorance, the lawyer's duty of inquiry must be triggered by the lawyer's awareness of a "high probability" — a high likelihood — that the client is using the lawyer's services (or planning to use the lawyer's services) to accomplish or facilitate a crime or fraud. A lawyer is not "deliberately ignorant" if the lawyer simply acts negligently — *i.e.*, if the lawyer fails to perceive a substantial risk of illegal activity that a reasonable lawyer would have perceived.

Even when a lawyer reasonably believes that the client is using (or planning to use) the lawyer's services to accomplish or facilitate a crime or fraud, this reasonable belief, standing alone, does not mean that the lawyer acts with "deliberate ignorance" if the lawyer decides to continue representing the client. In such situations, Rule 1.16(b)(2) declares that a lawyer has the *right*, but not the *duty*, to terminate the representation. The lawyer's decision to continue representing the client does not constitute "deliberate ignorance" of the client's crime or fraud unless (1) the facts giving rise to the lawyer's reasonable belief are so compelling that the lawyer is aware of a "high probability" that the client is using the lawyer's services for illegal purposes, and (2) the lawyer's failure to investigate further is motivated by the lawyer's conscious goal of avoiding confirmation of the lawyer's suspicions. In short, "reasonably believes" is the standard that triggers a lawyer's right of permissive withdrawal under Rule 1.16(b)(2), while "knowledge" or "deliberate ignorance" is the standard that triggers a duty of mandatory withdrawal under Rule 1.16(a)(1).

If a duty of investigation is triggered under paragraph (d) of this Rule, the reasonableness of the lawyer's investigation will depend on the degree of risk that the client is using or seeking to use the lawyer's services to commit or further a crime or fraud. In evaluating this level of risk, a lawyer may reasonably consider

- the identity of the client (*i.e.*, whether the client is a natural person or an entity — and, if an entity, the identity of the directors and/or beneficial owners of that entity),
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For further guidance in assessing the risk that a client is using a lawyer’s services to commit or further acts of money laundering or a scheme to finance terrorism, a lawyer may consult resources such as the *Financial Action Task Force Guidance for a Risk-Based Approach for Legal Professionals*, the American Bar Association’s *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing*, *A Lawyer’s Guide to Detecting and Preventing Money Laundering* (a collaborative publication of the International Bar Association, the American Bar Association, and the Council of Bars and Law Societies of Europe), the Organization for Economic Cooperation and Development’s *Due Diligence Guidance for Responsible Business Conduct*, and the U.S. Treasury Department’s list of “Specially Designated Nationals and Blocked Persons,” and similar legal resources, as they may be updated and amended.

When the client’s criminal or fraudulent course of action has already begun and is continuing, the lawyer’s responsibility is especially delicate. The lawyer is not permitted to reveal the client’s wrongdoing except when permitted by Rule 1.6. However, the lawyer is required to avoid furthering the client’s unlawful purpose — for example, by suggesting how the crime or fraud might be concealed. A lawyer must not

continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required by Rule 1.16(a)(1)(A), and remedial measures may be required by Rule 4.1.

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The last clause of paragraph (d) recognizes that determining the validity or proper interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

Rule 1.16 Declining or Terminating Representation.

(a) Mandatory grounds for declining or terminating a representation.

(1) Except as ~~stated in~~ required by paragraph (c) of this rule, a lawyer shall ~~not represent~~ decline to represent a client or, ~~where~~ if the representation has commenced, shall withdraw from the representation of a client if:

(A) ~~(1)~~ the representation will result in violation of the rules of professional conduct or other law; or

(B) ~~(2)~~ the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client. ~~;~~ or (3) the lawyer is discharged.

(2) Except as required by paragraph (c) of this rule, a retained lawyer shall withdraw from the representation of a client if the lawyer is discharged.

(3) Before accepting a representation or upon appointment, a lawyer shall assess and, if required by the applicable underlying rule, inquire into the facts and circumstances of the proposed representation to determine whether, consistent with subparagraph (a)(1), the lawyer may accept the representation.

(4) If, during the course of a representation, a lawyer becomes aware of information raising a substantial likelihood that the representation violates the rules of professional conduct or other law, the lawyer shall inquire into and re-assess the facts and circumstances of the representation to determine whether, consistent with subparagraph (a)(1), the lawyer may continue to represent the client.

(b) Permissive grounds for terminating a representation. Except as ~~stated in~~ required by paragraph (c), a lawyer may withdraw from representing a client if:

(1) the lawyer's withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

COMMENT

Client-Lawyer Relationship

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest, and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules [1.1. 1.2\(c\) through \(f\), and 6.5](#). [See also the fourth paragraph of the Comment to Rule 1.3](#).

[\[2\] Paragraph \(a\)\(3\) of this rule imposes an obligation on a lawyer to assess the facts and circumstances of a representation before accepting it. Paragraph \(a\)\(4\) of this rule requires a lawyer to inquire further and to re-assess an existing representation if the lawyer later becomes aware of information raising a substantial likelihood that the client is seeking to use the lawyer's services to commit or to further a crime or fraud.](#)

Mandatory Withdrawal

[3] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or that violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[4] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[5] A client has a right to discharge a retained lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[6] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[7] If the client has severely impaired capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[8] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[9] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[10] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

Rule 1.16 Declining or Terminating Representation.

(a) Mandatory grounds for declining or terminating a representation.

(1) Except as required by paragraph (c) of this rule, a lawyer shall decline to represent a client or, if the representation has commenced, shall withdraw from the representation of a client if:

(A) the representation will result in violation of the rules of professional conduct or other law; or

(B) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client.

(2) Except as required by paragraph (c) of this rule, a retained lawyer shall withdraw from the representation of a client if the lawyer is discharged.

(3) Before accepting a representation or upon appointment, a lawyer shall assess and, if required by the applicable underlying rule, inquire into the facts and circumstances of the proposed representation to determine whether, consistent with subparagraph (a)(1), the lawyer may accept the representation.

(4) If, during the course of a representation, a lawyer becomes aware of information raising a substantial likelihood that the representation violates the rules of professional conduct or other law, the lawyer shall inquire into and re-assess the facts and circumstances of the representation to determine whether, consistent with subparagraph (a)(1), the lawyer may continue to represent the client.

(b) Permissive grounds for terminating a representation. Except as required by paragraph (c), a lawyer may withdraw from representing a client if:

(1) the lawyer's withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

COMMENT

Client-Lawyer Relationship

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest, and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.1, 1.2(c) through (f), and 6.5. See also the fourth paragraph of the Comment to Rule 1.3.

[2] Paragraph (a)(3) of this rule imposes an obligation on a lawyer to assess the facts and circumstances of a representation before accepting it. Paragraph (a)(4) of this rule requires a lawyer to inquire further and to re-assess an existing representation if the lawyer later becomes aware of information raising a substantial likelihood that the client is seeking to use the lawyer's services to commit or to further a crime or fraud.

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[3] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or that violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[4] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

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