

2010

Lawyer Independence: From Ideal to Viable Legal Standard

Kevin H. Michels

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

Recommended Citation

Kevin H. Michels, *Lawyer Independence: From Ideal to Viable Legal Standard*, 61 Case W. Res. L. Rev. 85 (2010)
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol61/iss1/8>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

LAWYER INDEPENDENCE: FROM IDEAL TO VIABLE LEGAL STANDARD

Kevin H. Michels[†]

ABSTRACT

When, if ever, does a lawyer have an obligation to exercise independent judgment? While the question drives at the deepest commitments of the profession, it has been left largely unexplored in our leading treatises on legal ethics and lawyering. Lawyers, scholars, and judges have waxed eloquent on the ideal of independence, and have despaired of its prospects of renewal in a competitive, market-driven profession. The courts, however, have offered limited guidance on the question of lawyer independence. Indeed, the impression that one might gain from a review of the case law and treatises is that lawyer independence—whatever its virtues—is more a lost ideal than a legal requirement.

In fact, however, Rule 2.1 of the Model Rules of Professional Conduct (adopted by nearly every state) requires that lawyers “exercise independent professional judgment” in “representing a client.” This demand raises a host of questions about the lawyer’s role. What is lawyer independence? If lawyers are “agents” who seek to carry out client objectives, how can lawyer independence be squared with the notion of the client as decisionmaker and principal? Is lawyer independence enforceable, or does the paucity of cases construing the requirement suggest that it can never be more than an aspiration? Can we frame a standard that is sufficiently precise for lawyers to understand when they may not defer to client directives?

[†] Assistant Professor of Business Law and Ethics, The College of New Jersey. The author wishes to thank Kathryn Hockenjos, John Leubsdorf, Brandon Paradise and Andrew Rothman for their excellent comments on drafts of this article.

This Article seeks to answer those questions. In so doing, it seeks to develop a viable legal standard of lawyer independence grounded in Model Rule 2.1. The Article considers the purpose of lawyer independence, when it applies and when it does not, and what it requires of counsel. It contends that the law of lawyer independence, once understood, will require attorneys to revisit core assumptions about their role and will substantially reduce the incidence of wrongdoing in corporate transactions. The Article invites states to breathe life into a rule that has lain dormant on their books for too long.

CONTENTS

I. INTRODUCTION	86
II. AGENCY: THE ATMOSPHERE OF ASSUMPTIONS.....	92
III. DEPARTING FROM AGENCY: WHY AND WHEN	96
A. <i>Introduction</i>	96
B. <i>Why Lawyer Independence?</i>	97
C. <i>When Must the Lawyer Be Independent?</i>	102
1. <i>Eliminating Advocacy</i>	102
2. <i>Nonadvocacy Assistance</i>	105
D. <i>Agency and Independence Reconciled</i>	108
IV. WHAT DOES INDEPENDENCE REQUIRE?.....	111
A. <i>Introduction</i>	111
B. <i>Advice</i>	111
1. <i>Independence</i>	112
2. <i>Professional Judgment</i>	115
3. <i>Candor</i>	119
C. <i>Transactions</i>	120
V. AN INVITATION TO THE STATES.....	124
A. <i>Introduction</i>	124
B. <i>The Opportunity for Reform</i>	125
C. <i>Attorney Discipline</i>	128
D. <i>Attorney Liability</i>	130
E. <i>Relation to Other Standards</i>	134
VI. CONCLUSION.....	136

I. INTRODUCTION

When, if ever, does a lawyer have an obligation to exercise independent judgment? While the question drives at the deepest commitments of the profession, it has been left largely unexplored in

our leading treatises on legal ethics and lawyering.¹ Lawyers, judges, and scholars have waxed eloquent on the *ideal* of independence and have despaired of its prospects of renewal in a competitive, market-driven profession.² The courts, however, have offered limited guidance on the question of lawyer independence.³ Indeed, the impression that one might gain from a review of the case law and treatises is that lawyer independence—whatever its virtues—is more a lost ideal than a legal requirement.

In fact, however, Rule 2.1 of the *Model Rules of Professional Conduct* (“*Model Rules*”), adopted in nearly in every state,⁴ requires a

¹ See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000) (offering no discussion of lawyer independence); ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT 31:701 to :708 (Mar. 31, 2010) [hereinafter *LAWYERS’ MANUAL*] (providing limited treatment of lawyer independence); 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 23.2 (3d ed. 2001 & Supp. 2005-2) (offering a two-paragraph account of rule requiring independent professional judgment).

² The seminal statement is from Louis Brandeis, who lamented the loss of lawyer “independence” and contended that “[t]he leading lawyers of the United States have been engaged mainly in supporting the claims of the corporations; often in endeavoring to evade or nullify the extremely crude laws by which legislators sought to regulate the power or curb the excesses of corporations.” LOUIS D. BRANDEIS, *The Opportunity in the Law, in BUSINESS—A PROFESSION* 313, 322 (1914). Harold Williams, former Chairman of the U.S. Securities and Exchange Commission, offered a similar critique, arguing that “[t]o correct this tendency, the bar must place greater emphasis on the lawyer’s role as an independent professional—particularly, on his responsibility to uphold the integrity of his profession.” Harold M. Williams, *Professionalism and the Corporate Bar*, 36 *Bus. Law.* 159, 165–66 (1980). Quoting speeches of Brandeis, Chief Justice Stone, and others, Robert Gordon observes, “In these speeches—and hundreds more like them—we hear one of the great epic themes of professional rhetoric: the praise of independence, the fear of its decline. Though lawyers may disagree about what such independence entails and what threatens it, there is a remarkable consistency in the substance and tone of their words.” Robert W. Gordon, *The Independence of Lawyers*, 68 *B.U. L. REV.* 1, 5–6 (1988). Scholars continue to voice concerns about the importance of the loss of lawyer independence. See, e.g., William T. Allen, *Corporate Governance and a Business Lawyer’s Duty of Independence*, 38 *SUFFOLK U. L. REV.* 1, 11–12 (2004) (asking whether “competitive pressures of the last forty years have indeed forced the ideal of lawyer professional independence to the deep, almost unseen, background”); Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 *BUS. LAW.* 143, 173 (2002) (“[T]he professional ideal of ‘independent professional judgment’ does not inform the behavior of some lawyers who represent large corporations in major transactions and high-stakes litigation.”); Samuel J. Levine, *Faith in Legal Professionalism: Believers and Heretics*, 61 *MD. L. REV.* 217, 219 (2002) (discussing scholars’ concerns about the decline of professionalism and lawyer independence).

³ See *infra* notes 61–75 and accompanying text.

⁴ The American Bar Association promulgated the *Model Rules* in 1983, and it has amended them frequently since, including substantial revisions in 2002, based on the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000 Commission”), chaired by Chief Justice E. Norman Veasey. CTR. FOR PROF’L RESPONSIBILITY, AM. BAR ASS’N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, at iii (6th ed. 2007). The *Model Rules* are the subject of our discussion because of their widespread adoption by the states. Forty-nine states have adopted some version of the *Model Rules*, often with amendments. See *LAWYERS’ MANUAL*, *supra* note 1, at 01:11 to :82 (July 27, 2005) (summarizing how the ethics rules adopted in each state differ from the *Model Rules*). California is also considering adoption of the *Model Rules*. See *Commission for the Revision of the Rules of*

lawyer to exercise “independent professional judgment” and provide “candid advice” in “representing a client”⁵—demands that I will refer to collectively as “lawyer independence.”⁶ The Rule raises a host of questions about the lawyer’s role. What *is* lawyer independence? Could a demand for lawyer independence, once fully understood and implemented in practice, change our understanding of the attorney’s role? Is lawyer independence enforceable or does the paucity of cases construing the requirement suggest that it can never be more than an aspiration?⁷ If lawyers are “agents” who seek to carry out client objectives, how can we square a demand of lawyer independence with the notion of the client as decisionmaker and principal?

The stakes are high. Consider the lawyer’s obligations in the following scenarios:

- The client consults the lawyer about consummating a transaction, but provides little business background on the nature and purpose of the transaction and discourages the attorney from learning more, while insisting that the attorney “document” the deal.
- The attorney suspects that the client’s proposed transaction is fraudulent or criminal, but without more information has no way of knowing whether, in fact, it is. The client directs the attorney to consummate the transaction without inquiring into its propriety.

Professional Conduct, STATE BAR OF CALIFORNIA, <http://ethics.calbar.ca.gov/Committees/RulesCommission.aspx> (last visited Nov. 7, 2010). For a review of the few state variations on Rule 2.1, see *infra* note 216.

⁵ MODEL RULES OF PROF’L CONDUCT R. 2.1 (2009) (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”). The second sentence of the Rule permits a lawyer to discuss moral and other considerations with the client as well, a question considered extensively in the legal literature. See, e.g., Larry O. Natt Gantt, II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 367 (2005) (tracing the history and offering an interpretation of the nonlegal-considerations rule); Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 41–48 (1997) (exploring the tension between personal and professional values in advising clients). Our concern in this Article, however, is the mandatory first sentence of the Rule. The first sentence, though largely overlooked by courts to date, may rank among the most important of our ethics rules because it offers a direct challenge to the agency conception of lawyering that dominates our understanding of the profession. The terms “Model Rule 2.1” and “Rule,” as used herein, refer only to the first sentence of Model Rule 2.1, unless otherwise stated.

⁶ This Article considers lawyer independence from clients as distinct from the state. For an interesting discussion of a system that emphasizes lawyer independence from *both* the state and clients, see JOHN LEUBSDORF, *MAN IN HIS ORIGINAL DIGNITY: LEGAL ETHICS IN FRANCE* 1–28 (2001).

⁷ See William H. Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example*, 60 STAN. L. REV. 1555, 1596 (2008) (concluding that bad legal advice undermines enforcement and vindication of the law, but leaving open “the question of whether formal, coercive enforcement would be desirable”).

- The client wants to engage in an action and asks the lawyer whether it is lawful. The lawyer sets out to find a way to characterize the behavior as lawful in order to help the client proceed as he wishes, perhaps with minor changes in the proposed behavior to make it at least “arguably” satisfactory.

- The client wishes to undertake a transaction that violates the law. He asks the lawyer to find a way to structure the transaction to satisfy the literal dictates of the law at the expense of what the lawyer concludes are the law’s real objectives.

While it may not be immediately apparent, each of these scenarios raises questions of lawyer independence. Each asks, ultimately, whether the attorney is best understood as an agent of the client, or whether her role transcends agency. The first of these examples implicates questions about the deliberative role of the attorney. Can she accept a circumscribed, limited role if the client insists, or does some obligation or larger interest demand a deeper involvement, despite the client’s contrary directive? The second example is complicated by the fact that the lawyer does not *know* that the proposed transaction constitutes a crime or fraud. Does independence require the attorney to inquire more deeply into the facts to determine *whether* the transaction poses problems? In the third example, can the lawyer allow the client’s objectives to shade her assessment of what the law requires? In the fourth example, must the attorney press her concerns on the client, or is the client’s interest in facilitating the transaction and its “literal” compliance reason enough for the lawyer to push forward with the deal?

As the examples above make clear, questions of lawyer independence arise regularly in legal practice, especially in the counseling and transactional settings. They pose delicate questions regarding the balance of power in the attorney-client relationship. These questions have simmered just below the surface of the scandals that have erupted over the last few decades. The refrain “Where were the lawyers?” has echoed through every major business scandal from the savings-and-loan debacle of the 1980s through the corporate scandals in the 2000s.⁸ In many of these cases, the lawyers did not ask questions about transactions that appeared suspicious.⁹ The *Model*

⁸ See, e.g., Report of the New York City Bar Association Task Force on the Lawyer’s Role in Corporate Governance—November 2006, 62 BUS. LAW. 427, 440 (2007) [hereinafter New York City Bar Report] (explaining that these scandals led to federal obligations on lawyers to report evidence of corporate wrongdoing up the corporate ladder).

⁹ See, e.g., SPECIAL INVESTIGATIVE COMM., BD. OF DIRS. OF ENRON CORP., REPORT OF INVESTIGATION 17 (2002), available at <http://news.findlaw.com/wp/docs/enron/specinv020102rpt1.pdf> (citing the absence of “objective and critical professional advice by outside counsel”);

Rules appear to encourage willful blindness by prohibiting a lawyer from furthering a transaction only when she *knows* that the transaction is wrongful.¹⁰ The knowledge standard seeks only to prohibit attorney complicity in a client's crime or fraud—an obligation as obvious as it is insufficient to counter client wrongdoing. The critical, unanswered question is whether attorneys have an obligation to *acquire* knowledge before acting, a question that until now has not been examined through the lens of lawyer independence.

Questions about lawyer independence lie at the center of the recent controversy over the role of Justice Department attorneys in advising the Bush Administration on whether certain interrogation methods violated international prohibitions on torture.¹¹ The questions may appear superficially distinct from the counseling and transactional questions described above, but they trace their origins to the same source—lawyer independence. If, as some have argued, the advice contained in the Justice Department memoranda was biased,¹² may lawyers proceed under a “partisan” view of legal counseling, in which their legal interpretations and advice are influenced by the client's objectives? If not, how can lawyers serve their clients—who, after all, retain and compensate them to fulfill client objectives? As the earlier examples suggest, these issues arise not only or even principally in the government setting. Our purpose here is not to assess the role of lawyers in the Office of Legal Counsel scandals, but to look to the

Ben W. Heineman, Jr., *Caught in the Middle*, CORP. COUNS., Apr. 2007, at 84, 84 (“In this decade's first great wave of scandals, beginning with Enron Corp. and centering on fraudulent financial practices, the question was, ‘Where were the lawyers?’ In-house counsel were either excluded from key decisions, or they failed to ask aggressive questions about whether problematic actions were legal or appropriate.”); *New York City Bar Report*, *supra* note 8, at 431–32 (“[L]awyers, either in-house or outside, appear to have been strategically positioned with respect to a significant number of these scandals. . . . Where questions were not asked or pressed, it is reasonable to believe that more assertive action might have avoided or mitigated wrongdoing in some of these situations.”); William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 *FORDHAM L. REV.* 1453, 1457 (2006) (“There is no indication that these professionals ever asked the question, ‘Is this misleading?’”).

¹⁰ See MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (prohibiting lawyers from assisting a client “in conduct that the lawyer knows is criminal or fraudulent”).

¹¹ See, e.g., Memorandum from David Margolis, Assoc. Deputy Att'y Gen., U.S. Dep't of Justice, to the Att'y Gen. & the Deputy Att'y Gen., U.S. Dep't of Justice 68 (Jan. 5, 2010), available at <http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf> [hereinafter Margolis Memorandum] (finding that memoranda were flawed and the result of poor judgment but that these deficiencies did not rise to the level of professional misconduct).

¹² See, e.g., José E. Alvarez, *Torturing the Law*, 37 *CASE W. RES. J. INT'L L.* 175, 179 (2006) (arguing that the authors twisted international law in their memoranda); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 *J. NAT'L SEC. L. & POL'Y* 455, 462, 463 (2005) (describing the legal analysis in the Bybee memorandum as “indefensible”).

foundational questions posed by lawyer independence in the lawyer-client relationship.

In short, this Article seeks to develop a viable theory and legal standard of lawyer independence grounded in Rule 2.1. While this Rule has been in effect in the overwhelming majority of states for nearly a quarter of a century,¹³ its impact on the courts and bar has been negligible. While a number of reasons explain the courts' neglect of this Rule,¹⁴ one critical barrier to its application is the absence of a viable account of lawyer independence—its underlying rationale; when it applies; what it requires of counsel; how it relates to the traditional role of lawyers as agents of clients; and how courts, disciplinary authorities, practitioners, and civil claimants might apply the Rule. This Article seeks to provide such an account.

Part II sets the stage for the inquiry into independence by sketching the nature of the attorney-client relationship as it is currently conceived—with a minimal commitment to lawyer independence. It argues that the current conception of lawyering is grounded on a principal-agent model that emphasizes client control. Part III begins by considering the tension between the agency conception of lawyering and the call for lawyer independence set forth in Rule 2.1. It next asks *why* Rule 2.1 insists on lawyer independence in a profession otherwise committed to furthering client objectives, drawing on the work of David Luban.¹⁵ Part III then attempts to determine with some precision *when* lawyer independence is required—a critical question if lawyer independence is not to undermine client prerogatives categorically. Finally, Part III seeks to reconcile our commitments to agency and independence.

Part IV leverages the insights developed in Part III into an account of what lawyer independence requires of counsel. It explores the meaning, categories, and challenges of independence, and the procedural and substantive elements of professional judgment. It argues that lawyer independence imposes critical, and heretofore unacknowledged, demands on counsel in the situation that is often at the heart of the scandals of recent decades—when attorneys have reason to suspect that a transaction is wrongful, even though such suspicion does not amount to knowledge.

¹³ By the summer of 1987, the majority of states had adopted the *Model Rules* with variations. See HAZARD & HODES, *supra* note 1, § 1.15. Currently, forty-nine states have adopted Rule 2.1, and all but one have adopted the first sentence of the Rule without varying the ABA's proposed language. See *infra* note 216.

¹⁴ See *infra* Part V.A.

¹⁵ DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 153–57 (2007), discussed *infra* at notes 76, 80 and accompanying text.

Part V invites the states to reconsider the long-overlooked law of lawyer independence in both the disciplinary and liability settings. It also explains how the proposed standards will close a troubling gap in our interpretation of the *Model Rules*. Finally, it describes how and why lawyer independence differs from the law traditionally invoked when questions of client fraud arise—section 307 of the Sarbanes-Oxley Act of 2002¹⁶ and Model Rule 1.13.¹⁷ If states are troubled by the corporate scandals of recent decades and by the passivity of lawyers who counseled these corporations and furthered their transactions, the tools of reform are well within reach. States already insist on lawyer independence in name; it is time to insist on lawyer independence in practice.

Part VI concludes with a summary of our account of lawyer independence and its significance for courts and practitioners.

II. AGENCY: THE ATMOSPHERE OF ASSUMPTIONS

Because lawyer independence has received scant attention in our treatises¹⁸ and case law,¹⁹ we must begin by sketching the central elements of the attorney-client relationship in its absence. The reading hardly seems controversial at first. In fact, the description that follows, which we term the *agency* or *client-autonomy* vision of lawyering, can be understood as the modern conception of the practice of law.²⁰ While the elements of the agency vision described here are not false, Part III will contend that they are dangerously incomplete. As we shall see, the challenge is to integrate an understanding of lawyer independence into a view that is deeply ingrained in our understanding of the profession.

A principal-agent relationship exists when one person agrees to “act on the principal’s behalf and subject to the principal’s control.”²¹ Consistent with this precept, the *Model Rules* provide, with certain

¹⁶ 15 U.S.C. § 7245 (2006) (setting forth professional responsibility rules for attorneys).

¹⁷ MODEL RULES OF PROF’L CONDUCT R. 1.13 (2009) (providing rules for the lawyer whose client is an organization).

¹⁸ See *supra* note 1 and accompanying text.

¹⁹ See *infra* note 61 and accompanying text.

²⁰ See Eugene R. Gaetke, *Expecting Too Much and Too Little of Lawyers*, 67 U. PITT. L. REV. 693, 717–18 (2006) (“[T]he lawyer’s role as the client’s agent is more than a mere legal obligation. It is also fully incorporated in the narrative of the profession. Taught in the law schools of the nation, both consciously and unconsciously, and embraced in frequent public tributes to the legal profession, the notion of loyalty to and zeal on behalf of clients forms the dominant filter through which lawyers view their work.”) (footnotes omitted); see also DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 18 (1991) (emphasizing the client’s self-determination, “autonomy, intelligence, dignity, and basic morality”).

²¹ RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

exceptions, that the “lawyer shall abide by a client’s decisions concerning the objectives of representation.”²² Principal control is a central precept of agency law,²³ and within limits that we shall describe, it is a core precept of the agency conception of lawyering.²⁴

Most of the duties that lawyers owe to clients are mirrored in agency law generally. Lawyers must further the client’s matter with diligence, promptness²⁵ and competence,²⁶ duties that are imposed on all agents.²⁷ The lawyer must keep the client informed about the matter and provide sufficient explanation for the client to make informed decisions about the matter.²⁸ Again, agency law imposes a similar duty of communication.²⁹ Consistent with agency law, lawyers are liable to their clients for failure to perform their services reasonably.³⁰ The attorney-client relationship is likewise suffused with fiduciary duties, which derive from the responsibility and trust afforded to the attorney.³¹ The attorney’s fiduciary duty of loyalty is reflected in the elaborate regulations on conflicts of interest,³² protection of client funds,³³ and prohibitions on using information to harm the client.³⁴ Agency law imposes fiduciary duties as well,³⁵

²² MODEL RULES OF PROF’L CONDUCT R. 1.2(a).

²³ See RESTATEMENT (THIRD) OF AGENCY § 8.09 (requiring agent to comply with principal’s lawful instructions).

²⁴ See *id.* § 1.01 cmt. c (noting that elements of common-law agency are present in the lawyer-client relationship).

²⁵ MODEL RULES OF PROF’L CONDUCT R. 1.3.

²⁶ *Id.* R. 1.1.

²⁷ See RESTATEMENT (THIRD) OF AGENCY § 8.08 (requiring that an agent act with care, competence, and diligence).

²⁸ MODEL RULES OF PROF’L CONDUCT R. 1.4.

²⁹ See RESTATEMENT (THIRD) OF AGENCY § 8.11 (requiring the agent to provide facts to the principal if the principal so wishes or if they are material to the agent’s duties and they can be provided without the agent violating a superior duty to another person).

³⁰ See RESTATEMENT (THIRD) OF AGENCY § 7.01 (imposing liability on agent for breach of the duty of care); 1 RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 8.13 (2009 ed. 2009) (describing the elements of negligence claim against counsel and collecting case law across jurisdictions).

³¹ See, e.g., *In re Hayes*, 183 F.3d 162, 168 (2d Cir. 1999) (“[T]he attorney-client relationship entails one of the highest fiduciary duties imposed by law.”); *In re Cooperman*, 633 N.E.2d 1069, 1071 (N.Y. 1994) (“This unique fiduciary reliance . . . is imbued with ultimate trust and confidence.”); see also MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 2 (noting that trust is the “hallmark of the client-lawyer relationship”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. b (2000) (“A lawyer is a fiduciary . . .”).

³² MODEL RULES OF PROF’L CONDUCT R. 1.7 (providing regulations on lawyers and their representation of current clients).

³³ E.g., *id.* R. 1.15(a) (providing that a lawyer must keep the funds that he is holding for a client separate from her own).

³⁴ *Id.* R. 1.8(b) (stating that unless informed consent is given by a client, or permitted or required elsewhere by the *Model Rules*, a lawyer may not use information relating to representation to the client’s disadvantage).

³⁵ E.g., RESTATEMENT (THIRD) OF AGENCY § 8.01 (requiring agent loyalty to the principal).

requiring protection of the principal's property,³⁶ prohibiting agent conflicts of interests,³⁷ and disallowing wrongful exploitation of the principal's information.³⁸

In some instances, the law of lawyering imposes additional obligations on the lawyer beyond the general constructs of agency law. For example, the lawyer is required, with certain exceptions, to maintain in confidence information she learns from the client.³⁹ While agency law imposes an obligation to protect the confidential information of the principal,⁴⁰ the attorney's obligation is broader to satisfy demands unique to the legal setting.⁴¹ Even the limited exceptions to the attorney-confidentiality rule—allowing, for example, an attorney to disclose confidential information to prevent the client from harming a third party⁴²—are narrowly drawn. Under the *Model Rules* and in the overwhelming majority of states, the exception stops short of *requiring* disclosure to prevent client wrongdoing,⁴³ despite compelling arguments that the personal safety of others should trump the confidentiality rights of clients. Those who opposed expansion of the disclosure exceptions have cited client loyalty—a precept of agency⁴⁴—as a reason for limiting the exception.⁴⁵

³⁶ *Id.* § 8.12 (charging the agent with a duty to ensure the principal's property does not appear to be the agent's, a duty to ensure the principal's property is not mingled with that of others, and to perform an accounting of the principal's property).

³⁷ *Id.* § 8.04 (providing that the agent cannot compete with the principal or assist the principal's competitors).

³⁸ *Id.* § 8.05 (noting that an agent must not use the principal's property for himself or a third party and cannot communicate the principal's confidential information for his own benefit or the benefit of a third party without the principal's consent).

³⁹ MODEL RULES OF PROF'L CONDUCT R. 1.6.

⁴⁰ RESTATEMENT (THIRD) OF AGENCY § 8.05(2).

⁴¹ *See infra* note 79 and accompanying text (explaining the rationale behind attorney confidentiality provisions).

⁴² *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (listing the six exceptions to the attorney confidentiality rule, one of which allows a lawyer to reveal confidential information to the extent she reasonably believes necessary to prevent reasonably certain death or substantial bodily harm).

⁴³ *See id.* (stating that an attorney *may* reveal confidential information in one of six situations). A small minority of states *require* an attorney to disclose information to prevent a client from committing a criminal act likely to result in death or bodily harm to another, although these remain the exception to the majority rule. *See, e.g.*, CONN. RULES OF PROF'L CONDUCT R. 1.6(b) (2010), *available at* http://www.jud.ct.gov/Publications/PracticeBook/PB_2010.pdf; ILL. RULES OF PROF'L CONDUCT R. 1.6(c) (2010), *available at* http://www.state.il.us/court/supremecourt/rules/art_viii/ArtVIII_NEW.htm#1.6; N.J. RULES OF PROF'L CONDUCT R. 1.6(b) (1998), *available at* <http://www.judiciary.state.nj.us/rpc97.htm#1.6>; WIS. SUP. CT. R. 20:1.6(b) (2010), *available at* <http://www.wicourts.gov/sc/scrule/DisplayDocument.html?content=html&seqNo=45322#Confidentiality>.

⁴⁴ *See* WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 4, at 13–14 (3d ed. 2001) (discussing nature of the duty of loyalty under agency law).

⁴⁵ *See, e.g.*, LEGAL ETHICS COMM., AM. COLL. OF TRIAL LAWYERS, REPORT ON DUTIES OF CONFIDENTIALITY 18 (2001), *available at* <http://www.actl.com/AM/Template.cfm?Section>

One might argue that certain restrictions imposed on attorney behavior render it unfair to characterize the modern conception of lawyering as essentially an agency role. For example, lawyers cannot knowingly further a client crime or fraud⁴⁶ or knowingly deceive a court or a third party.⁴⁷ Again, however, each of these limitations has analogues in the general conception of agency. Agents are not given license by dint of their agency role to commit wrongful acts.⁴⁸ Thus, lawyers' obligations to courts and third parties are best understood not as departures from the core commitments of agency, but as limits that are imposed on all agents (including the principal) not to behave wrongfully.

Even the so-called "gatekeeping" reforms to the law of lawyering, including Sarbanes-Oxley,⁴⁹ are narrowly framed not to intrude unduly on the loyalty that grounds the agency conception of lawyering. Under Sarbanes-Oxley, an attorney who discovers evidence of the company's "material violation of securities law or breach of fiduciary duty or similar violation" must report it to the company's chief legal counsel or the chief executive officer and, failing an adequate response, to an audit or independent committee of the board of directors or the entire board.⁵⁰ Thus, the attorney reports the wrongdoing to the *client*, not the government. And if the reporting attorney fails to receive an "appropriate response," he must report higher *within* the client organization.⁵¹

The *Model Rules* likewise require an attorney to report to a higher-up within an organization when an officer of a corporation engages or is about to engage in wrongful conduct.⁵² Interestingly, the *Model Rules* allow counsel to disclose the information beyond the

=All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=69.

⁴⁶ MODEL RULES OF PROF'L CONDUCT R. 1.2(d).

⁴⁷ *Id.* R. 3.3 (court); *id.* R. 4.1 (third parties).

⁴⁸ See RESTATEMENT (THIRD) OF AGENCY § 8.09 cmt. c (2006) ("[A]n agent has no duty to comply with a directive to commit a crime or an act the agent has reason to know will be tortious.").

⁴⁹ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

⁵⁰ Sarbanes-Oxley Act of 2002 § 307, 15 U.S.C. § 7245 (2006); see also 17 C.F.R. § 205.2(e) (2010) (defining "evidence of material violation").

⁵¹ If the attorney does not believe that the response is appropriate, the attorney must then report the material violation to the audit committee of the board of directors, to a committee of independent directors, or to the entire board of directors. See 17 C.F.R. § 205.3(b)(3). The attorney is permitted to, but need not, report beyond the corporation in certain instances. See generally William H. Volz & Vahe Tazian, *The Role of Attorneys Under Sarbanes-Oxley: The Qualified Legal Compliance Committee as Facilitator of Corporate Integrity*, 43 AM. BUS. L.J. 439, 443 (2006) (devising a structure and procedure for monitoring corporations).

⁵² MODEL RULES OF PROF'L CONDUCT R. 1.13(b).

corporation only if an actor is about to engage in activity that will harm the *client*.⁵³ Thus, the organization-disclosure provisions of the *Model Rules* pose no challenge to the agency vision of lawyering; they allow disclosure beyond the organization only in furtherance of client loyalty.

In sum, an agency or client-autonomy vision characterizes much of the law governing lawyers. The client controls the goals of the representation, and the attorney owes duties of loyalty and care in fulfilling those goals. The constraints on lawyer behavior are likewise generally consistent with agency principles, and prevent the attorney from doing what the principal could not do on her own behalf. Even those rules that appear to challenge the agency conception, such as those allowing disclosure to prevent client wrongdoing and the “reporting up” provisions of Sarbanes-Oxley and Rule 1.13, are narrowly framed so as not to undermine the loyalty element that grounds the agency conception.

Into this symphony of provisions establishing a principal-agent relationship, however, the *Model Rules* inject the seemingly dissonant requirement of lawyer independence. Under Rule 2.1, the lawyer must “exercise independent professional judgment”⁵⁴ in representing the client—a stark departure from agency law, which contains no such requirement.⁵⁵ Perhaps it is not surprising that lawyers, courts, and commentators have yet to grasp the full significance of Rule 2.1, given its curious presence amid the torrent of agency obligations. Together, these agency principles form the “atmosphere of assumptions”⁵⁶ that are so embedded in the lawyer’s self-understanding that they are rarely held up to the light of inspection. We will do so next.

III. DEPARTING FROM AGENCY: WHY AND WHEN

A. Introduction

Model Rule 2.1 provides that “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”⁵⁷ In requiring that the lawyer reason independently of the

⁵³ *Id.* R. 1.13(c).

⁵⁴ *Id.* R. 2.1.

⁵⁵ See generally RESTATEMENT (THIRD) OF AGENCY (2006).

⁵⁶ The phrase is from Franklin Burroughs, *Compression Wood*, 67 AM. SCHOLAR 123, 134 (1998). In this masterful essay, Burroughs contends that regions take on an “atmosphere of assumptions”—in their history, economics, families, language and so on—that “gradually becomes invisible.” *Id.*

⁵⁷ MODEL RULES OF PROF’L CONDUCT R. 2.1.

client, this Rule heralds a fundamental departure from the agency conception of lawyering described in Part II. The law of agency does not require the agent to exercise “independent” judgment—professional or otherwise—and it does not require disclosure to the principal of information that the agent does not wish to receive.⁵⁸ Under agency principles, the principal may “manifest a lack of interest in receiving some or all information from the agent” and bear the risk that her decision will be worse for such lack of interest.⁵⁹ Rule 2.1, by contrast, requires the attorney to provide information that the client is, in the language of the official comment, “disinclined to confront.”⁶⁰

Why *does* Model Rule 2.1 require the independent judgment of counsel and the provision of information to the client over the client’s protestations when agency law requires neither? The reasons for requiring independence of counsel are hardly self-evident, especially for those who subscribe to the agency view of lawyering described in Part II. A client on the agency view hires a lawyer, pays for legal service, and presumably has a right to direct the representation as she wishes. This tension with agency lies at the core of our inquiry in this Part. We will ask *why* our ethics rules depart from agency law to insist on independence and *when* counsel may no longer serve strictly as an agent, and instead must exercise such independence. The answers to each of these questions will set the stage for our inquiry in Part IV into what lawyer independence requires of counsel.

B. Why Lawyer Independence?

What is the purpose of the lawyer-independence requirement set forth in Rule 2.1? A review of the limited case law citing this Rule⁶¹ suggests that the courts are far from a clear, consistent understanding of the Rule or its purpose. The cases that cite Model Rule 2.1 can be grouped into four categories. First, a number of cases (often in the bankruptcy setting) cite the Rule in support of the notion that an attorney has an obligation to provide advice that will enable the client

⁵⁸ See RESTATEMENT (THIRD) OF AGENCY § 8.11 cmt. b (“An agent owes the principal a duty to provide information to the principal that the agent knows or has reason to know the principal would wish to have.”).

⁵⁹ *Id.*

⁶⁰ MODEL RULES OF PROF’L CONDUCT R. 2.1 cmt. 1.

⁶¹ In total, the lawyer-independence language of Rule 2.1 has been cited in fewer than forty reported decisions in the state and federal courts, often as dicta or as additional authority rather than as the central theory in the case. For a discussion of why Rule 2.1 has to date been largely ignored by courts and disciplinary authorities (and, by extension, lawyers), see *infra* notes 218–21 and accompanying text.

to make an informed decision.⁶² The second concerns conflicts of interest, often based on the attorney's personal interest.⁶³ The third arises in attorney-disciplinary matters, disqualification motions, or ineffective-assistance-of-counsel claims arising from the attorney's sexual relationship with the client.⁶⁴ The fourth category, which need not divert us here, concerns allegations that the attorney has harmed the client through a wrongful action—claims unrelated to Model Rule 2.1 and rejected accordingly.⁶⁵

Let us consider the first interpretation—that Rule 2.1 is designed to ensure that the client receives the best possible advice with respect to her options before making a decision. The proposition alone is hardly objectionable; it is, as discussed earlier, a staple of the agency relationship.⁶⁶ An agent owes a fiduciary duty to the principal, which includes disclosure of information material to the principal.⁶⁷ That duty to disclose allows the principal to manage the agency

⁶² See, e.g., *In re Count Liberty, LLC*, 370 B.R. 259, 281–83 (Bankr. C.D. Cal. 2007) (“The attorney must render candid advice, so the client can make informed decisions regarding the representation.” (footnote and internal quotation marks omitted)); *In re Engel*, 246 B.R. 784, 792 (Bankr. M.D. Pa. 2000) (noting that lawyer cannot “blithely allow a client to casually complete *or review* the official schedules and statements without guidance as to the consequences of such action”); *In re Pinkins*, 213 B.R. 818, 822–23 (Bankr. E.D. Mich. 1997) (finding that attorneys who did not meet with their client until after the case was filed did not adequately represent the client); *In re Consupak, Inc.*, 87 B.R. 529, 550–52 (Bankr. N.D. Ill. 1988) (“[A]n attorney is to facilitate informed decision-making by his client.”).

⁶³ See, e.g., *Cunningham v. Hamilton Cnty.*, 527 U.S. 198, 207 (1999) (noting that while attorney may have personal interest in appealing a discovery sanction, the decision to appeal should “turn entirely on the client’s interest”); *Evans v. Jeff D.*, 475 U.S. 717, 728 n.14 (1986) (noting that attorney rendered independent professional judgment when he recommended a settlement and agreed to waive the statutory fee award and that he did not allow his own interests to influence his professional advice); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 435 (1985) (noting that an attorney who is disqualified for misconduct may have “a personal interest” in an appeal, but that the “decision to appeal should turn entirely on the client’s interest”); *In re Key*, 582 S.E.2d 400, 402 (S.C. 2003) (disciplining attorney who represented parties on both sides of the transaction).

⁶⁴ See, e.g., *Horaist v. Doctor’s Hosp. of Opelousas*, 255 F.3d 261, 267 (5th Cir. 2001) (denying motion to disqualify counsel due to conflict of interest arising from prior sexual relationship with client); *In re Ryland*, 985 So. 2d 71, 75–76 (La. 2008) (disciplining attorney for consensual sexual relations with client); *In re DeFrancesch*, 877 So. 2d 71, 77 (La. 2004) (disciplining attorney for attempt to coerce client into sexual relations); *In re Ashy*, 721 So. 2d 859, 867 (La. 1998) (reasoning that attorney who engages in sexual relationship with a client risks losing “the objectivity and reasonableness that form the basis of the lawyer’s independent professional judgment” (internal quotation marks omitted)); *State ex rel. Okla. Bar Ass’n v. Groshon*, 82 P.3d 99, 105–06 (Okla. 2003) (disciplining counsel for inappropriate sexual advance to client); *In re Halverson*, 998 P.2d 833, 841 (Wash. 2000) (finding that attorney violated Rule 2.1 by engaging in sexual relationship with client); *State v. Stough*, 980 P.2d 298, 301–02 (Wash. Ct. App. 1999) (holding that defendant was denied effective assistance of counsel because of sexual relationship with counsel).

⁶⁵ See, e.g., *Holy Loch Distribs., Inc. v. Hitchcock*, 531 S.E.2d 282, 285–86 (S.C. 2000) (rejecting cause of action against counsel for breach of express guarantee).

⁶⁶ See RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006) (stating the general proposition of agency law that an agent has a duty to act for the benefit of the principal).

⁶⁷ *Id.* § 8.11.

relationship and to make and revise decisions regarding how his agent should proceed.⁶⁸

While this rationale for lawyer independence has superficial appeal, it does not square with a reading of the other *Model Rules*. The lawyer is *already* expressly required by other provisions of the *Model Rules* to provide competent representation⁶⁹ and to provide the client with all information needed to make an informed decision.⁷⁰ The care that attended the drafting of the *Model Rules* makes redundancy unlikely.⁷¹ Therefore, a reading of the Rule as nothing more than a restatement of client-protection provisions set forth elsewhere in the ethics rules appears invalid.⁷²

The second and third categories described above can be combined under one conceptual rubric: a lawyer's personal interests must not color her advice or representation.⁷³ That proposition, standing alone, is beyond question, and it too is embraced by agency law.⁷⁴ Again, however, the *Model Rules* expressly regulate such conflicts of interest elsewhere, prohibiting representation of clients when the personal interests of the attorney would materially limit the attorney's effort.⁷⁵

Thus, it appears that the independent-professional-judgment and candor requirements of Rule 2.1 call for something other than a restatement of the agency principles of competence, communication, and loyalty described in Part II. These rationales seek to explain lawyer independence from a principal-agency standpoint, when in fact lawyer independence is a *departure* from it. If we are to identify

⁶⁸ See *id.* § 8.11 cmt. b (stating that the agent's duty to provide information to the principal allows the principal to exercise control in the agency relationship).

⁶⁹ MODEL RULES OF PROF'L CONDUCT R. 1.1 (2009).

⁷⁰ *Id.* R. 1.4.

⁷¹ See HAZARD & HODES, *supra* note 1, § 1.12 (discussing the multiple drafts and widespread circulation, commentary, and revision that preceded ABA approval of the *Model Rules*). See generally Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989) (providing an account of the process that led to the adoption of the *Model Rules*).

⁷² The comments to Model Rule 2.1 impliedly affirm this reading by noting that a duty to inform the client of the adverse consequences "to the client" may arise under Model Rule 1.4, which requires communication with the client. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 5.

⁷³ Occasionally, a court will cite Rule 2.1 to support a finding that the attorney's personal interests (or the interests of other clients) conflict with the interests of the client. *E.g.*, Scheffler v. Adams & Reese, LLP, 950 So. 2d 641, 651 (La. 2007) (noting that Rule 2.1 requires an attorney's "undivided loyalty"). As discussed in the text, Rule 2.1 is best understood as addressing concerns other than loyalty.

⁷⁴ See *supra* note 37 and accompanying text.

⁷⁵ *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (prohibiting representation when "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer"); see also *id.* R. 1.8 (regulating specific conflicts of interest between lawyer and client).

the core interest served by Rule 2.1, we need to look beyond client interests—the preoccupation of the agency conception of lawyering.

David Luban offers critical insight here. Rule 2.1, he argues, places special importance on the lawyer's role in advising the client—not to protect the client's interest in receiving competent advice or sufficient information, but to increase the prospect that the client will refrain from acting when the proposed behavior is wrongful.⁷⁶ Suppose, for example, that a client seeks the advice of counsel about whether the client's proposed action is legal. Model Rule 1.6 affords confidentiality to client conversations with counsel⁷⁷ because:

The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.⁷⁸

Thus, Model Rules 2.1 and 1.6 must be read in tandem. A central rationale for the confidentiality obligation of Model Rule 1.6 is to enable lawyers to advise the client on the correct state of the law to ensure that the client complies with the law.

The shield of confidentiality, of course, extracts a considerable societal cost. Third parties who may have been the victim of client wrongdoing lose an important source of information: the attorney who learns incriminating information from the client.⁷⁹ As Luban

⁷⁶ LUBAN, *supra* note 15. Luban argues that “if the lawyer doesn’t tell the client that what he plans is unlawful, in many instances nobody will.” *Id.* at 154. Luban borrows this argument from Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161 (1958), who caution that, in the counselor role, the attorney “must be at pains to preserve a sufficient detachment from his client’s interests so that he remains capable of sound and objective appraisal of the propriety of what his client proposes to do.”

⁷⁷ MODEL RULES OF PROF’L CONDUCT R. 1.6 (providing, with exceptions, that “[a] lawyer shall not reveal information relating to the representation of a client”). The confidentiality obligations set forth in the *Model Rules* should not be confused with the attorney-client privilege, typically codified in evidence rules, and applicable when the attorney is called to testify. *See, e.g.*, FED. R. EVID. 501 (federal privilege rule).

⁷⁸ MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 2; *see also id.* pmb1. para. 13 (“Lawyers play a vital role in the preservation of society.”).

⁷⁹ The *Restatement (Third) of the Law Governing Lawyers* offers an illustration based on the famous and troubling Lake Pleasant Bodies Case. *See People v. Belge*, 50 A.D.2d 1088 (N.Y. App. Div. 1975), *aff’d*, 359 N.E.2d 377 (N.Y. 1976), *cited in* RESTATEMENT (THIRD) OF

notes, Model Rule 2.1 solves a puzzle that has long vexed ethics law: how to justify confidentiality given this considerable societal cost. Confidentiality “is a good bet for society only because we can count on lawyers to give good advice on compliance (and on clients to take that advice). If the lawyer doesn’t give independent, candid advice, this entire argument, and indeed the whole edifice of confidentiality, comes tumbling down.”⁸⁰

Model Rule 2.1, therefore, imposes conditions on counseling that will enhance its accuracy: the lawyer’s advice must be grounded on independent professional judgment and must be relayed candidly to the client.⁸¹ Without these elements, the advice is less likely to be “legal and correct,”⁸² the client is less likely to desist from his wrongful plans, and the cost of confidentiality will have been unjustified.⁸³

Rule 2.1 does not specify the precise type of harm or “wrongful conduct”⁸⁴ that it seeks to prevent through independent professional judgment. A narrow construction of the Rule would limit such concerns to criminal wrongdoing, a troubling approach since clients can perpetrate vast tortious harm on third parties, as the corporate scandals of recent decades have made all too clear.⁸⁵ A sweeping construction of the terms “wrongful conduct” might include any legal wrongdoing, civil or criminal, that could be visited on society or a third party through the client’s wrongdoing. The latter view would have an anomalous effect, however, of extending the reach of Model

THE LAW GOVERNING LAWYERS § 60 reporter’s note (2000). A client admitted to killing two people whose bodies had not yet been discovered. The lawyer was barred under the confidentiality rules from disclosing the location of the bodies to the families of the likely victims. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. b, illus. 1. The *Restatement* notes that the cost of confidentiality includes “persons whose personal plight and character are much more sympathetic than those of the lawyer’s client or who could accomplish great public good or avoid great public detriment if the information were disclosed.” *Id.* § 60 cmt. b.

⁸⁰ LUBAN, *supra* note 15, at 156 (emphasis omitted) (footnote omitted).

⁸¹ MODEL RULES OF PROF’L CONDUCT R. 2.1.

⁸² *Id.* R. 1.6 cmt. 2 (noting that clients, “[a]lmost without exception,” seek lawyers to determine their rights, as well as what is “legal and correct”).

⁸³ Inaccurate advice from counsel may also frustrate criminal prosecution or the imposition of liability based on intentional or malicious conduct because an attorney’s advice that the conduct is proper may be admissible as evidence with respect to the client’s mens rea. See *infra* note 144 and accompanying text.

⁸⁴ MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 2.

⁸⁵ See, e.g., Mark Sherman, *High Court Will Review Skilling Case: Appeal of Former Enron Leader Imprisoned Ex-CEO Serving 24-Year Term*, SEATTLE TIMES, Oct. 14, 2009, at A10, available at 2009 WLNR 26370000 (“[A]ccounting tricks and shady business deals . . . led to the loss of thousands of jobs, more than \$60 billion in Enron stock value and more than \$2 billion in employee pension plans after the company imploded in 2001.”) For an analysis of the role of counsel in various Enron transactions, see generally Cramton, *supra* note 2.

Rule 2.1 beyond the “criminal or fraudulent” client activities that counsel is prohibited from *knowingly* assisting under Model Rule 1.2(d).⁸⁶ Thus, we will confine our understanding of the “wrongful conduct” that Model Rule 2.1 seeks to prevent to “criminal or fraudulent,” with the further limitation that “fraudulent” conduct have a “purpose to deceive.”⁸⁷

By demanding lawyer independence to protect the interests of those other than the client, Rule 2.1 presents a stark departure from the agency conception of lawyering. As a result, it is critical that we understand when it applies. We turn to that question next.

C. When Must the Lawyer Be Independent?

Rule 2.1 is certainly not modest in its demands or reach, if its literal terms are controlling: in representing the client, the lawyer must “exercise independent professional judgment” and provide “candid advice.”⁸⁸ Whatever “independent professional judgment” requires of counsel,⁸⁹ it is clear that the demand poses a direct challenge to the agency conception of the attorney-client relationship.⁹⁰ Thus, a critical threshold question is *when* must the lawyer act with such independence.

1. Eliminating Advocacy

By its terms, Model Rule 2.1 must be satisfied “in representing a client.”⁹¹ Thus, on a literal reading, it would appear that counsel must exercise independent professional judgment and render candid advice to the client in all phases of the attorney-client relationship—an interpretation that threatens to overturn entirely the agency view of lawyering. (We will term this interpretation the *expansive* view.) On the other hand, the title of Rule 2.1, “Advisor,”⁹² suggests that the Rule applies less expansively, i.e., when the attorney is advising or counseling the client (the *advisory* view)—a view that poses challenging interpretive questions of its own.

The evolution of Rule 2.1 suggests that the demand of independent professional judgment does not extend to the lawyer’s role as an advocate.⁹³ The *Model Code of Professional Responsibility* (“*Model*

⁸⁶ MODEL RULES OF PROF’L CONDUCT R. 1.2(d).

⁸⁷ *Id.* R. 1.0(d) (defining “fraud” or “fraudulent” to require “a purpose to deceive”).

⁸⁸ *Id.* R. 2.1.

⁸⁹ *See infra* Part IV.

⁹⁰ *See supra* notes 58–60 and accompanying text.

⁹¹ MODEL RULES OF PROF’L CONDUCT R. 2.1.

⁹² *Id.*

⁹³ The *candor* requirement of Model Rule 2.1 would not attach to court-directed

Code”), which predated the *Model Rules*,⁹⁴ declared that the attorney’s roles of “advocate or advisor” are “essentially different,” and that the advocate should resolve doubts about the law in favor of the client.⁹⁵ “[I]n appropriate circumstances,” the advisor, by contrast, “should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.”⁹⁶ The *Model Code*’s comments elaborated on the disjunction between the advocate and advisor roles, noting that “partisan advocacy” provides counsel latitude that cannot be justified in the advisor or counselor setting.⁹⁷

Moreover, the reasons for allowing attorneys wide expanse in their presentation of arguments apply only in the advocacy setting; they have no force in the advice or counseling role.⁹⁸ The adversary system allows opposing counsel to counter faulty arguments and expose their deficiencies, reducing the risk that an erroneous argument will carry the day.⁹⁹ Moreover, the disposition of the case lies with the judge or jury, who render their own independent judgment to distinguish the faulty from the valid.¹⁰⁰ Thus, counsel’s faulty argument is just that—an *argument*, not a call for action as it might be in the counseling role. In addition, as Daniel Markovits has argued, political principles support the unbridled role of the advocate: if the parties to a contested matter are to accord legitimacy to the verdict, which binds them and may deprive them of liberty and property, it is critical that their attorney’s voice be unconstrained in presenting nonfrivolous

communications because the Rule clearly limits candor to the client advisory role. *See id.* The attorney’s obligation of candor to the tribunal is set forth Model Rule 3.3. *See id.* R. 3.3.

⁹⁴ The *Model Code of Professional Responsibility* was adopted by the American Bar Association in 1969, effective in 1970. Nearly every American jurisdiction adopted the *Model Code* within a few years. HAZARD & HODES, *supra* note 1, § 1.11. The *Model Code* was superseded by the *Model Rules* in the 1980s. *See supra* note 4 and accompanying text.

⁹⁵ MODEL CODE OF PROF’L RESPONSIBILITY EC 7-3 (1980).

⁹⁶ *Id.*

⁹⁷ *Id.* EC 7-3 n.9.

⁹⁸ *See* Fuller & Randall, *supra* note 76, at 1161 (“The reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal advisor in a line of conduct that is immoral, unfair, or of doubtful legality.”). For a summary and a powerful critique of the reasons advocates are afforded license in the advocacy setting, see LUBAN, *supra* note 15, at 62–64; *see also id.* at 153–54 (offering a summary account of the distinction between attorney advocacy and advisory roles). William Simon has likewise identified an array of lawyer excesses in the adversary system and questioned whether they are required to further the objectives of justice. *See* WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* (1998).

⁹⁹ *See* LUBAN, *supra* note 15, at 154 (“Adversarial ideology maintains that judges can do their interpretive job properly only if they hear the most forceful arguments on all sides, in an unvarnished form.”)

¹⁰⁰ *See* W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1182 (2005) (discussing the importance of a fully informed tribunal in an adversarial setting).

arguments that precede the verdict.¹⁰¹ Thus, while the attorney must not lie about a matter of fact or law in communications to courts and third parties,¹⁰² and may not proffer frivolous arguments to the court,¹⁰³ she need not independently assess and agree with each interpretation or argument that she makes to the court to further the representation.¹⁰⁴

Thus, we can dismiss the expansive interpretation of Rule 2.1: the Rule does *not* apply to the attorney's advocacy role, notwithstanding the Rule's purported application when the attorney is "representing the client."¹⁰⁵ A contrary interpretation is inconsistent with the title of the Rule, the distinction between advocacy and counseling first offered by the *Model Code*, and the special reasons for affording counsel wide berth in the advocacy role.¹⁰⁶

While lawyers certainly distinguish the advocacy and counseling role in practice, they may be less sensitive to their critical *ethical* differences. The legal profession, of course, understands that much of its work is outside the courtroom because counseling and furthering client transactions are central functions of the profession. Nonetheless, the transactional lawyer still harbors much of the advocacy ethos of her courtroom colleagues,¹⁰⁷ a perception that can

¹⁰¹ DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE 171–211 (2008).

¹⁰² See MODEL RULES OF PROF'L CONDUCT R. 3.3 (2009) (prohibiting knowingly making misstatements of fact or law to the court); *id.* R. 4.1 (prohibiting knowingly making false statement of fact or law to third parties).

¹⁰³ *Id.* R. 3.1 (providing a lawyer must ground all issues and defenses in proceedings in nonfrivolous law and fact).

¹⁰⁴ MARKOVITS, *supra* note 101, at 53 (stating that advocates have "enormous leeway to promote accounts of the law that they privately reject"). Markovits further states, "[A]n argument . . . is not frivolous even though the lawyer believes that the client's position ultimately will not prevail." *Id.* (quoting MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 2). For an early statement of this view, see GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 84 (5th ed. 1884). "The lawyer, who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury." *Id.*, quoted in LUBAN, *supra* note 15, at 20.

¹⁰⁵ This is not to suggest that lawyer independence is beyond discussion in the advocacy setting. See generally SIMON, *supra* note 98 (arguing that the advocate is subject to independence constraints). The claim here is narrower, that the sweep of Model Rule 2.1 does not extend to advocacy.

¹⁰⁶ While the distinction between the advocacy and advisory roles is crucial to understanding the sweep of Rule 2.1, we must apply the distinction carefully. In the course of a litigated matter, the lawyer frequently communicates with the client about the client's prospects in the case. The attorney, though engaged in a litigation matter for the client, is not acting as an advocate in his client communications. Rule 2.1, therefore, requires the lawyer to advise the client about advocacy matters with independent professional judgment and candor.

¹⁰⁷ See, e.g., WENDEL, *supra* note 100, at 1182 ("Ask a securities lawyer why she opposes a requirement to report out evidence of client fraud, and she is likely to mention the principle of zealous representation, seemingly unaware that this phrase, as originally stated in the Model Code, applied only to representation in litigation.").

be explained in part by the failure of ethics codes to honor this distinction until 1970.¹⁰⁸ If we understand all of lawyering through the prism of advocacy, however, then the demands of independent professional judgment will be marginalized. It is therefore critical to be clear that: (1) advocacy and counseling are ethically distinct; and (2) lawyer independence—whatever it entails—controls the critical domain *beyond* advocacy, where attorneys counsel their clients.

2. *Nonadvocacy Assistance*

If we can safely eliminate advocacy from the sweep of Rule 2.1, our next question is whether independent professional judgment is required in all or only certain attorney efforts outside the advocacy role. As the ABA's official comments to the *Model Rules* make clear, Rule 2.1 applies when the attorney provides advice to the client.¹⁰⁹ The more challenging question is whether the Rule is implicated *only* when the attorney provides advice to the client, or whether it also applies when the attorney assists the client to effect a transaction or other objective outside the litigation role (which we will term *nonadvocacy assistance*). The ABA's reference to advice could be construed to suggest that the drafters contemplated a narrow, advice-only application of the Rule. On the other hand, the comments may imply only that advice is the archetypal, but not the sole setting in which the issue of independence arises outside the advocacy setting. In addition, the second sentence of Rule 2.1 limits its application to the advice instances only, suggesting that the "representation" language of the first sentence has reach beyond the advice role.¹¹⁰

Moreover, if the framers of the Rule were intent on limiting its nonadvocacy reach only to instances of advice, why require the "exercise [of] independent professional judgment" in "representing [the] client"?¹¹¹ Why not require instead independent judgment "in advising the client"?¹¹² One possible answer is that advice and

¹⁰⁸ MODEL CODE OF PROF'L RESPONSIBILITY EC 7-3 n.9 (1980) (effective in 1970) ("Today's lawyers perform two distinct types of functions, and our ethical standards should, but in the main do not, recognize these two functions. Judge Philbrick McCoy recently reported to the American Bar Association the need for a reappraisal of the Canons in light of the new and distinct function of counselor, as distinguished from advocate, which today predominates in the legal profession." (quoting E. Wayne Thode, *The Ethical Standard for the Advocate*, 39 TEX. L. REV. 575, 578 (1961)) (internal quotation marks omitted)).

¹⁰⁹ Model Rules OF PROF'L CONDUCT R. 2.1 cmt. 1.

¹¹⁰ Model Rule 2.1 provides in its entirety: "*In representing a client*, a lawyer shall exercise independent professional judgment and render candid advice. *In rendering advice*, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." *Id.* R. 2.1 (emphasis added).

¹¹¹ *Id.*

¹¹² In fact, sentence two of the Rule does precisely that. See *supra* note 110 and

independent professional judgment are, as a practical matter, inextricably linked: independent professional judgment, one might contend, can have no practical effect on a representation outside the advocacy setting unless it affects the advice provided to the client. However, there are critical instances outside the advocacy setting when counsel engages in activities other than advising the client and independent professional judgment will affect her actions. For example, when an attorney structures or effects a transaction on behalf of a client, the behavior of an attorney guided by independent professional judgment may differ profoundly from that of an attorney guided only by client interest.¹¹³

Moreover, an attorney's actions to effect the nonadvocacy ends of his or her clients may well be tantamount to advice, in that the attorney's actions imply as much about the merits of the transaction to the client as an express statement. If nonadvocacy assistance is tantamount to advice, then even under a narrow advice-only view of Model Rule 2.1, attorneys must exercise independent professional judgment in providing such assistance. And even if we choose not to construe assistance as the equivalent of advice, it is curious to require independent judgment of counsel in one instance and not the other, especially given that counsel's advice *and* actions are affected by its exercise.

The evolution of the Model Rule 2.1 offers an additional reason to conclude that the Rule requires independent professional judgment not only when providing advice, but in the nonadvocacy-assistance role generally. The predecessor provision to Model Rule 2.1, contained in the *Model Code*, is the first ethical rule to suggest that attorneys have distinct obligations in the advisory setting.¹¹⁴ Ethical Canon 7-3 provides:

A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships. . . . In serving a client as adviser, a lawyer in appropriate circumstances should give his professional

accompanying text.

¹¹³For an extended discussion of the transaction setting and the role of lawyer independence, see *infra* Part IV.C.

¹¹⁴MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-3 (1980).

opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.¹¹⁵

If the Canon intended to divide lawyering into two categories, advocate and advisor, then the latter category presumably included all nonadvocacy efforts of counsel. Moreover, by characterizing the advisor role as assisting the client in determining “future conduct and relationships,”¹¹⁶ the Canon implied that attorney actions that determine such future relationships—i.e., the attorney-transaction role—should be subject to the demands of lawyer independence as well.

The purpose of lawyer independence discussed earlier¹¹⁷ also suggests that Rule 2.1 should apply in the transaction setting as well. Recall that Rule 2.1 is intended to protect society and third parties from client wrongdoing by ensuring that attorney advice is independent and professional. When the lawyer carries out a transaction on behalf of a client without exercising independent professional judgment, the risks are comparable to a client who does not receive the benefit of the lawyer’s independent professional judgment about whether a transaction is wrongful. In the latter case, we are concerned that the client will be insufficiently informed that her proposed action is wrongful, thereby increasing the prospects that she will behave wrongfully. In the former, we are concerned that the lawyer will serve the client’s objective without assessing its propriety, again increasing the risk of wrongful behavior. It would be curious, at best, to require counsel to exercise independent professional judgment so that the *client’s* actions are informed, but allow the *attorney to act* on behalf of the client unrestrained by such judgment. In each case, the absence of independent professional judgment poses a substantial risk to society and to third parties.

Thus, the language, history, and purpose of Rule 2.1 support the nonadvocacy-assistance interpretation of the Rule. The Rule applies when the attorney provides advice or assists the client in furthering a transaction or other nonadvocacy objective. Our next question is how this understanding of the Rule and its application relates to the agency view of lawyering described in Part II.

¹¹⁵ *Id.* (footnote omitted).

¹¹⁶ *Id.*

¹¹⁷ *See supra* Part III.B.

D. Agency and Independence Reconciled

Our understanding of the rationale underlying Rule 2.1 allows us to explore another threshold question: how lawyer independence can be reconciled with the client-autonomy or agency principles described in Part II. As we shall see in Part IV, when Rule 2.1 applies, it often requires counsel to undertake special efforts, including the attorney's inquiry into the factual circumstances and research regarding the legal standards implicated by the facts.¹¹⁸ The client, however, effectively has the right under Rule 1.2(a) to establish reasonable limits on the nature and extent of the services performed by counsel.¹¹⁹ Thus, if the client does not wish counsel to examine a particular issue, the client and attorney can agree to such limitations, which are generally enforced by the courts.¹²⁰ In this Section, we will examine the relationship between lawyer independence and client autonomy embodied by these two provisions of the *Model Rules*.

When the client expressly or impliedly requests the advice of counsel on the propriety of a transaction, the client presumably will not object to the efforts of counsel to develop information sufficient to answer the question properly.¹²¹ When the *attorney* raises questions about the propriety of a client's proposed transaction, however, the client may not wish counsel to undertake efforts to examine the issue—for reasons of expense or because he plans to consummate the transaction regardless of its propriety. If the attorney has not been asked to further the transaction, the client can direct counsel not to examine the issue.¹²² The more challenging questions arise when the

¹¹⁸ See *infra* Part IV.B.2.

¹¹⁹ MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2009) ("Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation . . ."); accord RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 19 (2000) (discussing the requirements a lawyer must fulfill before a lawyer may limit representation). Although Model Rule 1.2 appears to vest in counsel the right to limit the scope of the representation, it is in fact indifferent to whether the client or the attorney proposes the limitation, provided that both attorney and client agree. In practice, the client has considerable authority under this provision, since the client can terminate the representation if the attorney is unwilling to agree to the client's proposed limitation. See MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(3) (requiring a lawyer to withdraw from matter when discharged by client).

¹²⁰ See, e.g., *Fitzgerald v. Linnus*, 765 A.2d 251, 258–59 (N.J. Super. Ct. App. Div. 2001) (upholding attorney-client agreement that attorney would administer estate but would not provide tax planning).

¹²¹ Moreover, the client cannot waive competent representation. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 7 (noting that although client and lawyer have substantial latitude to limit representation, "an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation"); see also Cramton, *supra* note 2, at 146 n.12 (concluding that a client may not waive lawyer competence).

¹²² MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 5 (noting that generally there is no requirement to provide advice when not requested by client).

attorney is working on the transaction about which the attorney identifies a question or concern. If the client asks the lawyer not to examine the issue under Model Rule 1.2(c), must the lawyer exercise independence under Model Rule 2.1? Two examples will allow us to clarify the issue.

First, suppose that an attorney working on the client's transaction raises the question of whether the tax-allocation scheme specified in the transaction documents is the most favorable for the client. The attorney tells the client that, while she is concerned about the question, she cannot answer it without conducting legal research and analysis. The client responds that he wishes to minimize cost and directs counsel not to examine the issue. In effect, the client seeks to limit the scope of the representation under Model Rule 1.2(c). The question then becomes whether counsel is obligated under the lawyer independence requirements of Model Rule 2.1 to reject such limitation.

While the tax allocation and countless other planning questions and opportunities of a similar kind arise in the transaction context, they do not—standing alone—trigger the demands of independent professional judgment under Model Rule 2.1. Their distinguishing characteristic is that they are concerned with protection of the client's interests, which—as noted earlier—is not the objective of independent professional judgment.¹²³ Protection of client interests is, of course, central to the lawyering role, but the attorney's responsibilities in this regard are captured by the competency provision of the attorney ethics rules¹²⁴ and by the attorney's duty of care to the client.¹²⁵ The duties under both competency and the duty of care are owed to the *client*.¹²⁶ A failure to satisfy either obligation harms the client and not a third party or a societal interest in avoiding crime or fraud. The interest at issue belongs to the client, and within the bounds of competency, it is the client's interest to waive. In the tax-planning example, therefore, the client could, pursuant to Rule 1.2(c), agree with the attorney to a limitation on the scope of the representation under which the latter will not research the tax

¹²³ See *supra* notes 69–82 and accompanying text.

¹²⁴ MODEL RULES OF PROF'L CONDUCT R. 1.1.

¹²⁵ See *supra* note 30 and accompanying text.

¹²⁶ See MODEL RULES OF PROF'L CONDUCT R. 1.1 ("A lawyer shall provide competent representation to a client."); MALLEN & SMITH, *supra* note 30, § 19.3 (describing the duty of competence owed to a client as part of the standard of care in a malpractice claim). Although attorneys can owe duties of care to nonclients in some jurisdictions and circumstances, in this example the duty to protect client interests is owed strictly to the client. For a discussion of when courts might extend attorney duties of care to third parties, see *infra* notes 231–50 and accompanying text.

question or devise a means by which to reduce the tax burden posed by the transaction.¹²⁷ The attorney could honor such limitation and consummate the transaction without violating Model Rule 2.1.

Now suppose instead that the attorney raises the question of whether the tax-allocation scheme constitutes a criminal tax evasion. Again, the attorney states that she will need to conduct legal research and analysis to answer the question, and again suppose that the client directs her not to do so, either for reasons of cost or because the client wishes to effect the transaction regardless of its legality. Here, the question is not what will serve the client best, but whether the transaction is wrongful. As discussed earlier, Rule 2.1 is designed to further the *societal and third-party* interests in reducing wrongful behavior, not to advance a client interest.¹²⁸ Societal and third-party interests are not the client's to waive. Therefore, when the issue expressly or impliedly implicates wrongful behavior, the client's voice in controlling the scope of the representation under Rule 1.2(c) gives way to the demands of lawyer independence under Rule 2.1. The very nature of "independent" judgment suggests that it is not subject to the direction (or caprice) of the client, including the client's insistence that it not be exercised.¹²⁹

Rule 2.1 is implicated when, in the course of (1) providing advice to the client; or (2) effecting nonadvocacy ends for the client, including attorney efforts to structure and effect client transactions, an attorney has (3) reason to suspect that the client's proposed conduct is criminal or fraudulent. With respect to the third element, the test is an objective one: when the facts and circumstances present reasonable grounds for concern or suspicion that the behavior in question might be wrongful, the attorney's obligations under Rule 2.1 attach.¹³⁰ In such cases, the lawyer must employ her independent professional judgment to assess the propriety of the proposed client conduct and report her conclusions candidly to the client. When the lawyer is required to exercise independent professional judgment under Rule 2.1, the client cannot waive compliance with the Rule, although he

¹²⁷ *Fitzgerald v. Linnus*, 765 A.2d 251, 258–59 (N.J. Super. Ct. App. Div. 2001) (upholding attorney-client agreement that attorney would administer estate but would not provide tax planning).

¹²⁸ Because our definition of wrongful conduct includes criminal or intentionally fraudulent behavior, our example could instead have concerned the attorney's suspicion that the transaction would defraud a third party. See *supra* notes 84–87 and accompanying text. For a discussion of the lawyer's transaction role when questions of client fraud arise, see *infra* Part IV.C.

¹²⁹ MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 1 (noting that advice required under the *Rule* may include information that the client is "disinclined to confront").

¹³⁰ For examples of situations in which counsel should have reason for suspicion of client wrongdoing, see *supra* note 185 and accompanying text.

retains the right to terminate the representation.¹³¹ In each instance, if the client refuses to allow counsel to undertake the actions necessary to satisfy Rule 2.1, then counsel must withdraw from the matter.¹³²

Lawyer independence, therefore, does not abolish the client-autonomy or agency notions that form the bedrock of modern legal practice. On the contrary, our interpretation preserves the basic notions of principal control and identifies those narrowly circumscribed instances when client autonomy must give way to a larger interest—protection of society and third parties from criminal or fraudulent conduct. Exactly what Rule 2.1 requires of counsel in such instances is the subject of our next inquiry.

IV. WHAT DOES INDEPENDENCE REQUIRE?

A. Introduction

Armed with an understanding of why and when Model Rule 2.1 departs from the agency vision of lawyering, we can now turn to our central question: what does the Rule require of lawyers? Building on our earlier findings that the Rule applies when the attorney advises the client and when she provides nonadvocacy assistance to the client, we will explore the implications of Rule 2.1 for counsel in advising and effecting transactions for clients.

B. Advice

Suppose that the client asks the attorney either expressly or by implication, for advice about the legal propriety of the client's proposed action. As discussed earlier, if the client's proposed action is criminal or fraudulent, and the attorney advises the client of this fact, the client typically will not undertake the action.¹³³ The accuracy of the lawyer's advice is the sine qua non of this protective enterprise: the lawyer must accurately assess the propriety of the transaction if the client is to be diverted from his wrongful design.¹³⁴

This commitment to accuracy in counseling is a sharp departure from the truth-finding theory of the adversary system. It is conducted

¹³¹ Although the lawyer may charge for her services in conducting such inquiry, a client who opposes the inquiry for expense or any other reason may choose to terminate the representation. See MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(3) (requiring counsel to withdraw from a matter when discharged by the client).

¹³² See MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1) (requiring counsel to withdraw from a matter when continued service will result in violation of the *Model Rules*).

¹³³ That, at least, is the supposition of the *Model Rules*. See *id.* R. 1.6 cmt. 2 ("[L]awyers know that almost all clients follow the advice given, and the law is upheld.").

¹³⁴ See *supra* notes 81–83 and accompanying text (noting also that accurate advice is necessary if we are to justify the societal costs of affording confidentiality to the consultation).

outside the adversary setting, and thus cannot take refuge in the theory that truth will emerge from the clash of viewpoints.¹³⁵ To enhance accuracy, Model Rule 2.1 imposes conditions on the counseling role: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”¹³⁶ Rule 2.1, in other words, is committed to its own theory of truth finding: accuracy will be enhanced if its conditions are satisfied. While the elements of Rule 2.1 are inextricably linked, for discussion purposes we will parse the Rule into three demands—*independence*, *professional judgment*, and *candor*—and consider each in turn.

1. Independence

As we have discussed, in requiring independence, Rule 2.1 is not concerned with the lawyer’s potential conflicts of interest with other client matters or the lawyer’s personal interests.¹³⁷ These concerns are expressly addressed by other ethics rules.¹³⁸ As the drafters’ comments note, the Rule calls for the lawyer’s “straightforward advice” and “honest assessment,” even when the advice involves “unpleasant facts and alternatives that a client may be disinclined to confront.”¹³⁹ The danger then is servility—the lawyer’s unwillingness to tell the client what he does not want to hear. In their brief discussion of the Rule, Hazard and Hodes note that a client may want to have his “preconceptions confirmed” and that the lawyer who wishes to maintain employment “may be tempted to play sycophant to such client.”¹⁴⁰ Rule 2.1, therefore, insists on attorney independence from the *client*: if it is to be accurate, an assessment of the legal propriety of the proposed activity must not be unduly influenced by the client’s desire for a favorable answer.

A variety of factors—ranging from economic, to psychological, to internalized perceptions of the lawyer’s role—can conspire to undermine the attorney’s exercise of independent judgment. The attorney is, of course, interested in establishing or maintaining a strong client relationship. For clients committed to lawful and ethical

¹³⁵ See, e.g., *Scotsas v. Citizens Ins. Co. of N.J.*, 253 A.2d 831, 833 (N.H. 1969) (“It is the philosophy of the adversary system that the truth will more likely be reached if both sides of the issue are fully presented . . .”). For sources critiquing the adversary theory of truth finding, see *supra* note 98.

¹³⁶ MODEL RULES OF PROF’L CONDUCT R. 2.1.

¹³⁷ See *id.* R. 1.7(a)(2) (prohibiting representation due to conflicts of interest); see also *id.* R. 1.8 (regulating specific conflicts of interest).

¹³⁸ E.g., *id.* R. 1.7; *id.* R. 1.8.

¹³⁹ MODEL RULES OF PROF’L CONDUCT R. 2.1 cmt. 1.

¹⁴⁰ HAZARD & HODES, *supra* note 1, § 23.2, at 23–3.

behavior,¹⁴¹ the attorney's accurate declaration that the transaction is improper will pose no threat to the relationship, and should in most instances enhance it.¹⁴² With clients less concerned about propriety than profit, however, the attorney may perceive that a negative answer will weaken or threaten the relationship.¹⁴³ Some clients may even press for a favorable opinion from counsel before acting in the hope that it will lessen the legal sanctions if the behavior is later challenged.¹⁴⁴ With these clients, the attorney may feel economic pressure to tell the client what she wants to hear.¹⁴⁵ Even when professionals try to rise above such economic concerns, bias can work below the level of cognition.¹⁴⁶

The attorney may also be subject to a more subtle strain. The attorney *wants* to help the client reach his objective; after all, she was hired to assist the client in some way. Loyalty and client trust in the

¹⁴¹ See ETHICS RES. CTR., 2009 NATIONAL BUSINESS ETHICS SURVEY: ETHICS IN THE RECESSION 38 (2009), available at <http://www.ethics.org/nbes/files/nbes-final.pdf> (reporting that eighty-nine percent of employees surveyed said that "top management talks about the importance of workplace ethics and 'doing the right thing'").

¹⁴² For example, the former General Counsel of General Electric has urged lawyers to "think about the ethical, reputational, and enlightened self-interest of their client." Ben W. Heineman, Jr., *Law and Leadership*, 56 J. LEGAL EDUC. 596, 599–600 (2006) (emphasis omitted).

¹⁴³ See Rutheford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers*, 56 RUTGERS L. REV. 9, 38–39 (2003) ("[A] corporation's lawyer has a personal, financial interest in currying favor with senior managers by facilitating any corporate transaction that enhances their wealth, even if the transaction is not wealth enhancing for corporate shareholders."); Milton C. Regan, Jr., *Teaching Enron*, 74 FORDHAM L. REV. 1139, 1220 (2005) (noting that a corporation's lawyers do not want to be perceived as "obstructionists who tell the client what it cannot do").

¹⁴⁴ The advice of counsel may be admissible when the client's mens rea, such as malice or intentionality, is at issue. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 29(1) (2000); see also SIMON, *supra* note 7, at 1557 (noting instances in which attorneys' "bad advice made life easier for the clients because, regardless of its merit, it conferred on them a significant measure of immunity from liability or public criticism").

¹⁴⁵ See Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1006 (2005) ("[I]nside counsel feels unremitting pressure to justify herself and her department as a corporate cost center. . . . The best way to do so is to facilitate, not interfere with, corporate transactions favored by management."); TASK FORCE ON CORPORATE RESPONSIBILITY, AM. BAR ASS'N, REPORT 14–15 (2003), available at http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf ("The competition to acquire and keep client business, or the desire to advance within the corporate executive structure, may induce lawyers to seek to please the corporate officials with whom they deal rather than to focus on the long-term interest of their client, the corporation."). In his seminal work, sociologist Robert Nelson found a lack of autonomy in large-firm practice in part because power within the firm is reposed in partners with the strongest client associations, who internalize client perceptions. See ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 227–228 (1988).

¹⁴⁶ See Don A. Moore et al., *Conflicts of Interest and the Case of Auditor Independence: Moral Seduction and Strategic Issue Cycling*, 31 ACAD. MGMT. REV. 10, 16 (2006) ("Evidence on unconscious bias suggests that people are not very good at disregarding their own self-interest and evaluating information impartially, even when they try to do so.").

attorney are bedrocks of the relationship.¹⁴⁷ These are the virtues, however, of the agency vision of lawyering described in Part II, which, as noted, captures only a portion of the lawyer's ethical commitment.¹⁴⁸ The goal of independent professional judgment is not to serve the client's interest, but to provide an objective analysis of whether a proposed action is wrongful and, therefore, a risk to society and third parties.¹⁴⁹ This presents no minor intellectual or emotional challenge for an attorney who sees himself as the facilitator of the client's objectives.¹⁵⁰ The attorney who understands herself principally as the agent of the client's objectives can easily transmute this understanding into a desire to find a way to say yes to the client's inquiry into whether she can proceed as planned.¹⁵¹ Rule 2.1 requires that counsel resist the gravitational pull of the client in analyzing the propriety of proposed conduct.

The independence required by Rule 2.1 should be distinguished from another form of lawyer independence, what might be termed *client-protection* independence. Lawyers serve the client well by challenging the client (or, in the corporate setting, management) who ignores or underestimates the civil and criminal perils of wrongdoing.¹⁵² In addition to simple greed, profit pressures, group think, rationalization, the difficulty in visualizing the victim, and scores of other cognitive distortions can confound management's assessment of the propriety or risk posed by their behavior.¹⁵³ Thus, for many attorneys, the skills of argument are not deployed solely to persuade courts and third parties of the client's cause; they are also

¹⁴⁷ See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2009) (stating that trust is the "hallmark of the client-lawyer relationship").

¹⁴⁸ See *supra* Part III.D.

¹⁴⁹ See *supra* Part III.B.

¹⁵⁰ See Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 1 (2009) (analyzing the "cognitive biases arising from partisan kinship between lawyer and client"). Two decades earlier, Robert Nelson found strong client identification that made it unlikely that large-firm lawyers "will act as an independent voice that checks the self-interest of clients." NELSON, *supra* note 145, at 5-6.

¹⁵¹ Robertson, *supra* note 150, at 30 ("[A]ttorneys with role identities closely aligned to the client's goals may be subject to the same cognitive distortions suffered by the client, him or herself. Thus, clients may face a conundrum in which the most dedicated attorneys are the worst positioned to offer independent counsel."). For a discussion of how close association with management can affect the judgment of inside counsel, see Kim, *supra* note 145, at 1004. Kim describes inside counsel's relationship with its management as a "psychological contract." *Id.* For a discussion of how cognitive distortions can affect lawyering, see generally David Luban, *Integrity: Its Causes and Cures*, 72 FORDHAM L. REV. 279 (2003).

¹⁵² See HAZARD & HODES, *supra* note 1, § 17.7 (noting that counsel may have to exercise independent professional judgment to determine what is in the corporation's best interest).

¹⁵³ For an excellent discussion of how these and other "traps" can distort the reasoning of businesspersons, see generally ROBERT HOYK & PAUL HERSEY, *THE ETHICAL EXECUTIVE: BECOMING AWARE OF THE ROOT CAUSES OF UNETHICAL BEHAVIOR: 45 TRAPS THAT EVERY ONE OF US FALLS PREY TO* (2008).

the tools to persuade the *client* that she will be harmed by the proposed wrongful action.¹⁵⁴

At some point, however, the client may demur and insist that the attorney further the transaction despite the lawyer's concerns, perhaps because the client is unmoved by the attorney's arguments about the client's self interest.¹⁵⁵ When the attorney knows that the proposed conduct is wrongful, she has no choice but to refuse a directive to further the client's transaction.¹⁵⁶ When the attorney does not have knowledge but has reason for concern about the propriety of the transaction, however, she may mistakenly conclude that she can proceed without further inquiry if the client insists. After all—the attorney might reason—if her gadfly efforts are designed to protect the *client*, then the client should have the right, at some point, to refuse such protection. The premise, however, is incorrect: the independence required by Rule 2.1 is designed to protect *society and third parties* rather than the client, and, therefore, the client does not control its exercise¹⁵⁷—as we will see in our discussion of transaction practice.¹⁵⁸

2. Professional Judgment

It is not enough that counsel differentiate from the client's goals and independently assess the client's proposed action. If Rule 2.1 demanded only independence, then the lawyer could provide her own subjective "take" on the issue. In fact, however, the Rule seeks to ensure that the client receives an *accurate* assessment of the propriety of the proposed action, so that the client will refrain from the act if the lawyer advises that it is wrongful.¹⁵⁹ Rule 2.1, therefore, couples independence with a demand of *professional judgment*, imposing an

¹⁵⁴ See E. Norman Veasey & Christine T. Di Guglielmo, *The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation*, 62 BUS. LAW. 1, 30 (2006) (discussing attorney efforts to persuade the client to do the right thing).

¹⁵⁵ See Milton C. Regan, Jr., *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1, 39 (1999) (noting that "there will be cases in which promoting [the client's] enlightened self-interest will be at odds with achieving justice.")

¹⁵⁶ MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2009) (providing that a lawyer may not assist or counsel a client to engage in criminal or fraudulent conduct).

¹⁵⁷ See *supra* Part III.D.

¹⁵⁸ See *infra* Part IV.C.

¹⁵⁹ See *supra* notes 80–84 and accompanying text. Brad Wendel argues that professional judgment serves a caretaker role. Law establishes normative positions on contested matters, and thereby allows for the "coordinated activity" of a society. Only a professional, rather than a partial, interpretation of the law will enable the law to accomplish its goals. Wendel, *supra* note 100, at 1184. Wendel has recently developed these and other arguments into a book-length account. W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010) [hereinafter, Wendel, *FIDELITY TO LAW*]. See also Gordon, *supra* note 2, at 20–21 (arguing that lawyers who look for loopholes in the law undermine its purpose).

additional, critical restraint on the advice provided by counsel.¹⁶⁰ Professional judgment consists of a procedural and substantive component, as we shall describe below.

Rule 2.1 demands the independent professional judgment of counsel in order to increase the prospects that the attorney's advice will be accurate.¹⁶¹ Uninformed advice is unlikely to be accurate. Thus, when the attorney provides advice, it must be grounded on sufficient information if it is to be "professional," as required by Model Rule 2.1. This is the procedural condition of professional judgment.¹⁶² When the attorney advises a client that a client's proposed act is lawful, that advice must be grounded on sufficient inquiry into the specifics of the client's proposed transaction, together with all other facts rendered relevant by the applicable law, as well as sufficient review of the law itself.¹⁶³ As a result, in some instances, the attorney who is asked to advise the client on the propriety of the proposed action may be required to learn considerably more about the transaction than the client has originally disclosed.¹⁶⁴ If the client refuses to provide such information then, under our proposed construction of Rule 2.1, the attorney will be barred from providing the advice.

The substantive element of professional judgment concerns the attorney's interpretation of the facts that she has learned and her analysis of the legal significance of those facts. With respect to the former, the goal is to develop an accurate account of the facts that will ground the legal analysis.¹⁶⁵ With respect to the legal analysis,

¹⁶⁰ For a discussion of the relationship between professional judgment and the accuracy of an attorney's analysis in a related context, see Kevin H. Michels, *Internal Corporate Investigations and the Truth*, 40 SETON HALL L. REV. 83, 104 (2010).

¹⁶¹ See *supra* notes 81–93 and accompanying text.

¹⁶² In other settings, courts have questioned the value of a decision that is not informed. For example, a patient's medical consent is not valid unless it is "informed," which generally requires sufficient understanding of the facts on which the decision is to be based. *E.g.*, *Cobbs v. Grant*, 502 P.2d 1, 11 (Cal. 1972) ("[The patient's right of self decision] can be effectively exercised only if the patient possesses adequate information to enable an intelligent choice."). The *Model Rules* will not accept a client decision to waive a conflict of interest without "informed" consent, which requires a communication of "adequate information" prior to such decision. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2009) (requiring "informed consent"); *id.* 1.0(e) (defining "informed consent").

¹⁶³ With respect to the latter, one can draw an analogy to the competency standard of Model Rule 1.1, which would be breached by the lawyer's "failure to ascertain readily accessible precedents." HAZARD & HODES, *supra* note 1, § 3.2, at 3–5.

¹⁶⁴ When the client seems less than forthcoming or her answers less than credible, the attorney may need to inquire more deeply. See *infra* note 190 and accompanying text. If such inquiry proves impracticable, then the attorney must withdraw from the matter because she is unable to satisfy Rule 2.1. See MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1) (requiring withdrawal if representation will violate the *Model Rules*).

¹⁶⁵ Here, as elsewhere, the "independence" and "professional judgment" elements of Rule 2.1 overlap. In developing an accurate account, the lawyer must not only exercise professional

the goal—again—is accuracy. In some instances, the law will be patently clear on the issue implicated by the facts, and the propriety of the client’s proposed conduct will be obvious to the lawyer.¹⁶⁶ At other times, assessment of the client’s proposed conduct will require interpretation of laws or court decisions that are less than clear, either in their language or in their application to the client’s factual particulars.¹⁶⁷ This interpretive element is not license for the attorney to offer her own idiosyncratic take on the propriety of the client’s conduct. Rule 2.1 calls for the lawyer’s professionally grounded, objective assessment of the propriety of the proposed conduct.

In exercising independent professional judgment, the lawyer’s role is analogous to that of the judge whose “choice is constrained by a set of rules (or norms, standards, principles, guides, etc.) that are authorized by the professional community of which the judge is part.”¹⁶⁸ Thus, the lawyer must employ accepted professional standards of legal interpretation and reasoning to interpret the law and apply it to the client’s facts to form the conclusions that will ground her legal advice. Professional judgment does not require a literal reading of a legal authority when “a myopic fixation on the literal language of the statute would cause an interpreter to miss [the] apparent meaning of the text.”¹⁶⁹ As Robert Gordon has argued:

[L]awyers who *recommend* only the most literal forms of compliance and widen every loophole far enough to drive a truck through . . . will end up effectively frustrating the purposes of their clients as well as the legal rules. The lawyer under such an ethical regime is by vocation someone who helps clients find ways around the law.¹⁷⁰

Rule 2.1 affords confidentiality to attorney-client discussions at great societal cost in order to encourage attorney consultation and enhance

judgment, but must resist the client’s insistence on a more favorable interpretation at the expense of such accuracy. *See supra* Part IV.B.1.

¹⁶⁶ Lawrence B. Solum, *Indeterminacy*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 488, 489–90 (Dennis Patterson ed., 1996). The discussion in this and the following three paragraphs draws in part on my analysis of professional judgment in Michels, *supra* note 160, at 104–10.

¹⁶⁷ *Id.*

¹⁶⁸ Owen M. Fiss, *Conventionalism*, 58 *S. CAL. L. REV.* 177, 183 (1985) (footnote omitted). Brad Wendel argues persuasively that legal interpretation can and must transcend the subjective assessment of the attorney. The interpretive effort instead seeks to honor the purpose of the rule in question and is grounded in the interpretative standards of the relevant community. Wendel, *FIDELITY TO LAW*, *supra* note 159, at § 6.3.

¹⁶⁹ Wendel, *supra* note 100, at 1187.

¹⁷⁰ Gordon, *supra* note 2, at 20–21.

legal compliance.¹⁷¹ Thus, the Rule requires counsel to use the accepted tools of interpretation to determine the accurate meaning of the statute or other legal authority uninfluenced by the client's objectives.

When the client asks her attorney whether she may undertake a proposed action, the attorney may reach one of three conclusions after she has learned the facts and analyzed the legal propriety of a transaction. First, she may conclude that the transaction is proper. Second, she may conclude that the transaction is wrongful, i.e., criminal or fraudulent.¹⁷² The attorney should qualify these conclusions when there is genuine risk that a court will disagree with the attorney's conclusion.¹⁷³ This qualification allows the client to understand the limits of the attorney's advice, and to govern his behavior mindful of the risk that a court may judge it differently than the lawyer.¹⁷⁴ The qualification does not eliminate the attorney's ethical obligation to exercise independent professional judgment under Rule 2.1, however. The lawyer's advice, even when qualified, may prove decisive in the client's assessment of whether to undertake or refrain from the proposed action. Thus, the advice (and its qualification or absence) must be guided and constrained by professional judgment.¹⁷⁵

¹⁷¹ See *supra* Part III.B.

¹⁷² For an explanation of why term "wrongful" is limited to these instances, see *supra* notes 84–87 and accompanying text.

¹⁷³ See Margolis Memorandum, *supra* note 11, at 68–69 (finding that "Yoo and Bybee exercised poor judgment by overstating the certainty of their conclusions and underexposing countervailing arguments," but concluding that the deficiencies did not rise to the level of professional misconduct). Under the interpretation of Rule 2.1 offered here, advice that claims or implies certainty when professional judgment dictates otherwise would violate Rule 2.1.

¹⁷⁴ Moreover, if there is a genuine risk that a court will disagree with the lawyer's interpretation, the ethical duties of competency and communication owed to the client require disclosure of such information to the client. See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2009) (requiring competent representation of clients); *id.* R. 1.4(b) (requiring that a lawyer explain the matter to a client to the extent reasonably necessary to allow the client to make informed decisions).

¹⁷⁵ Some attorneys prefer to couch their advice as an evaluation of the probability or likelihood that the proposed act will be deemed wrongful, rather than offering a conclusion about the propriety of the conduct coupled with qualifications. Both approaches are likely to influence the client's behavior and thus both are subject to the strictures of Model Rule 2.1 discussed here; that is, regardless of its form, the attorney's advice must be guided and constrained by professional judgment. In regulating attorneys who render certain opinions that taxpayers use to avoid penalties, the Department of Treasury's regulations offer an interesting example outside the *Model Rules* context of the "likelihood" approach. The regulations require that an attorney set forth "the likelihood that the taxpayer will prevail on the merits" for each significant federal tax issue addressed in the opinion. 31 C.F.R. § 10.35(c)(3)(ii) (2009). Moreover, if a practitioner "fails to reach a conclusion at a confidence level of at least more likely than not" on a given issue, then the opinion cannot be relied on by the taxpayer to avoid penalties. *Id.*

A third possibility is indeterminacy;¹⁷⁶ that is, in the professional judgment of counsel, it cannot be determined whether the transaction is criminal or fraudulent. A law is not indeterminate, however, simply because it requires interpretation or because the attorney's assessment is less than certain. Indeterminacy for our purposes signifies that the attorney cannot, by employing the interpretative standards that comprise professional judgment, determine which interpretation is correct.¹⁷⁷

Because professional judgment is an act of constrained interpretation, lawyers may disagree in their assessment of the propriety of a proposed act and still be within the boundaries of professional judgment.¹⁷⁸ Moreover, the test of compliance with the professional judgment element of Rule 2.1 is not an exercise in hindsight. The question is whether the attorney's interpretation was grounded in the standards of the professional community,¹⁷⁹ not whether the attorney got the "right" answer as measured by a subsequent court decision or other ruling on the matter.¹⁸⁰ The converse, however, is equally true and critically important for our purposes here: while there may be more than one legitimate assessment of the client's proposed conduct, some assessments are unacceptable because they are beyond the boundaries of professional judgment.

3. Candor

The obligation under Rule 2.1 to report candidly to the client flows naturally from the requirement of independent professional judgment. Again, the goal is to ensure that the client receives an accurate assessment and refrains from activities that counsel has advised are wrongful. If independence and professional judgment increase the prospects that the attorney will make the correct assessment, then

¹⁷⁶ But see Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) (suggesting that the term "underdeterminate" may better capture the instance in which more than one, but not necessarily any, interpretation is legitimate).

¹⁷⁷ For a discussion of the significance of these three findings in the transactional context, see *infra* notes 198–200 and accompanying text.

¹⁷⁸ See Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 748 (1982) (noting that "objectivity is compatible with a measure of disagreement").

¹⁷⁹ See Fiss, *supra* note 168, at 183 (noting in connection with legal decisions that "[a]dherence to the rules authorized by the professional community . . . provides the standards for evaluating the correctness of the judgment as a legal judgment").

¹⁸⁰ See Wendel, *supra* note 100, at 1195 ("An observer might disagree with B, and believe that A was the better result, but nevertheless concede that B was within the range of plausible, justifiable results."). For discussion of how courts might apply this standard in the disciplinary or liability setting, see *infra* Part V.C–D.

candor ensures that the assessment is accurately transmitted to the client. The attorney must resist the temptation to report what the client wants to hear rather than the findings of her independent professional assessment.¹⁸¹

The attorney need not limit her advice to a conclusion, of course. The attorney should explain how she reached the conclusion that she presents to the client.¹⁸² As noted earlier, when the law could legitimately be interpreted to support a contrary view, the attorney should disclose this fact to the client so the client understands that the attorney does not claim certainty in her conclusion.¹⁸³ Of course, in the advisory role, the attorney typically does not dictate what action the client takes once he has the benefit of the attorney's accurate assessment of the propriety of the proposed action.¹⁸⁴ As we shall see next, however, when the attorney takes steps to further the client's goals in the nonadvocacy setting, lawyer independence imposes even greater demands on counsel.

C. Transactions

As we have seen, the attorney must satisfy a number of lawyer-independence obligations in advising the client on a question concerning the legal propriety of the client's proposed behavior. When the attorney *further*s a transaction for the client, however, the attorney moves from advisor to facilitator of the client's actions. In the latter role, for reasons we shall discuss, lawyer independence is even more demanding of counsel. Properly understood, these demands can fundamentally change the role of the transactional lawyer.

Suppose that an attorney for a corporation is retained to handle a real-estate syndication. Although the corporation's prior law firm and auditor recently resigned, the attorney accepts the financial information provided by the client, which she includes in the offering materials to investors.¹⁸⁵ Suppose further that, based on the curious

¹⁸¹ See MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 1 (2009) ("[A] lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.").

¹⁸² See Wendel, *supra* note 100, at 1190 (transparent justification "defends the judgment's objectivity against the critique that the interpreter is simply imposing her own policy preferences on the law.")

¹⁸³ See *supra* notes 166–67.

¹⁸⁴ The attorney may have obligations to "report up" within the organization, however. See *infra* notes 259–64.

¹⁸⁵ The fact pattern is inspired by, but is not intended as an accurate summary of, *FDIC v. O'Melveny & Meyers*, 969 F.2d 744, 746–47 (9th Cir. 1992), *rev'd*, 512 U.S. 79 (1994), in which the Ninth Circuit analyzed the investors' claims under the duty of care, *without considering* Rule 2.1.

nature of the events, the lawyer has reason to suspect but does not know that the transaction is criminal or fraudulent. On the traditional understanding of the *Model Rules*, a lawyer—unencumbered by the demands of lawyer independence—would face no barriers under the attorney ethics rules to providing such assistance. Under Rule 1.2(d), the lawyer may not *knowingly* assist a client in conduct is criminal or fraudulent.¹⁸⁶ The *Model Rules*, in turn, define “knowingly” as “actual knowledge of the fact in question.”¹⁸⁷ Therefore, while the attorney on our example harbors well-founded suspicions, they do not amount to the knowledge necessary to preclude his participation under Rule 1.2(d).¹⁸⁸

In this situation, the attorney may choose not to ask the client about her suspicions. If knowledge of wrongdoing is the test of whether the attorney can proceed, the attorney’s ignorance here is a blessing of perverse kind. It rewards indifference or willful blindness of counsel. Why learn more, one might ask, when the client has not asked counsel to do so? Such knowledge is not necessary to fulfill the client’s ends (on the client’s reckoning, at least), and knowledge of wrongdoing—once gained—could preclude the attorney from assisting the client.¹⁸⁹ In the corporate scandals of recent history, a regular defense—and not coincidentally a source of sharp criticism—of transactional counsel was that they did not inquire into the bona fides of the transactions they furthered.¹⁹⁰

Now let us consider whether lawyer independence under our proposed construction of Rule 2.1 demands a different response. First, we concluded earlier that Rule 2.1 requires that counsel exercise independent professional judgment in providing nonadvocacy assistance to the client, which includes furthering client

¹⁸⁶ MODEL RULES OF PROF’L CONDUCT R. 1.2(d).

¹⁸⁷ *Id.* R. 1.0(f).

¹⁸⁸ See *New York City Bar Report*, *supra* note 8, at 453–54 (noting that the *Model Rules* contain no provision requiring further investigation when a lawyer suspects client wrongdoing). A central claim of this Article is that this reading of the *Model Rules* is correct as a general matter, but false when the lawyer is furthering a transaction that he has reason to suspect is wrongful. In the latter instance, the lawyer-independence demand of Model Rule 2.1 requires inquiry.

¹⁸⁹ One answer is that the client may benefit from input of counsel who is well informed about a transaction. As we have discussed, however, the protection of client interests is not the goal of lawyer independence and, therefore, can be waived by the client. See *supra* Parts III.D and IV.B.1.

¹⁹⁰ See, e.g., *New York City Bar Report*, *supra* note 8, at 431–32 (“[L]awyers, either in-house or outside, appear to have been strategically positioned with respect to a significant number of these scandals. . . . Where questions were not asked or pressed, it is reasonable to believe that more assertive action might have avoided or mitigated wrongdoing in some of these situations.”); Simon, *supra* note 9, at 1457 (noting, with respect to Enron, that “[t]here is no indication that these professionals ever asked the question, ‘Is this misleading?’”).

transactions.¹⁹¹ Second, we have concluded that, when there is reason for concern about the propriety of a transaction, an attorney must obtain sufficient information before furthering the transaction in order to satisfy the procedural element of professional judgment.¹⁹² Thus, in our example, the circumstances require the attorney to inquire more deeply into the facts and circumstances before acting. A reasonable inquiry presumably would seek the reasons for the auditor and law firm's resignations, and, if their responses do not assuage the lawyer's suspicion that the proposed transaction is fraudulent, further inquiry into the bona fides of the financial statements that will ground the offering.¹⁹³ Our concern here, however, is less with the particulars of the lawyer's inquiry, which necessarily vary with circumstance, than with the underlying principle: Rule 2.1 requires sufficient inquiry of counsel before furthering a transaction that counsel has reason to suspect is criminal or fraudulent. The lawyer may also need to conduct research sufficient to determine the legal standards implicated by the facts and circumstances before acting.¹⁹⁴

The lawyer's obligation under Rule 2.1 to inquire into the facts and propriety of the transaction is not a general obligation of inquiry; it is, in fact, precisely contoured. The lawyer is obligated to inquire under the Rule only if she has reason for suspicion that the client's proposed transaction is wrongful *and* the attorney plans to assist the client in furthering the matter.¹⁹⁵ Moreover, the client is free to refuse the lawyer's efforts to investigate the facts and research the law.¹⁹⁶ Adequate factual and legal knowledge remains, however, a condition of the lawyer's services prior to consummating a transaction that she

¹⁹¹ See *supra* Part III.C.2.

¹⁹² See *supra* notes 162–64 and accompanying text.

¹⁹³ Although the context differs, ABA opinions considering the nature and extent of investigation necessary to offer an opinion letter are instructive here. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 335 (1974) ("If any of the alleged facts, or the alleged facts taken as a whole, are incomplete in a material respect; or are suspect; or are inconsistent; or either on their face or on the basis of other known facts are open to question, the lawyer should make further inquiry."); ABA Comm. on Legal Opinions, *Legal Opinion Principles*, 53 BUS. LAW. 831, 833 (1998) (requiring further inquiry if information "appears irregular on its face or has been provided by an inappropriate source").

¹⁹⁴ See *supra* notes 163–64 and accompanying text.

¹⁹⁵ For this reason, Model Rule 2.1 as interpreted here is entirely consistent with the ABA's comment that the Rule does not require the attorney to initiate investigation of the client. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 5 (2009). When the client has asked the attorney to further a client transaction, he has asked the attorney to "represent" him in the matter. Thus, the attorney is not investigating the client "out of the blue" or on her own initiative; she is gaining the information necessary to exercise independent professional judgment in a matter in which she is already representing the client. See *id.* R. 2.1 (requiring independent professional judgment in "representing a client"). For an analysis of why Rule 2.1 applies in the transaction setting generally, see *supra* Part III.C.2.

¹⁹⁶ See *supra* Part III.D.

has reason to suspect is criminal or fraudulent. Thus, while the client has a right to refuse counsel's efforts to learn more, the lawyer who is denied such access has no choice but to withdraw from the matter, since to proceed in ignorance would violate Rule 2.1.¹⁹⁷

After counsel has exercised independent professional judgment to (1) determine the facts, and (2) access the legal propriety of a transaction that posed reason for concern, she may reach one of three conclusions as discussed in Part IV(B)(2). First, if counsel concludes that the transaction is proper, i.e., not criminal or fraudulent, the attorney can consummate the transaction. Second, if counsel concludes that the transaction is criminal or fraudulent, she may not assist the client in the transaction.¹⁹⁸ In this instance, Rule 2.1 plays a critical role in the transactional setting: it eliminates willful blindness by insisting that an attorney gain knowledge before furthering a suspect transaction. That knowledge, in turn, triggers an obligation that can no longer be circumvented through ignorance—to withhold complicity in a transaction that the lawyer now knows is wrongful.¹⁹⁹

Third, if counsel concludes that, despite employing the interpretative standards that comprise independent professional judgment, she cannot determine whether the transaction is criminal or fraudulent (“indeterminate” or “indeterminacy”),²⁰⁰ the attorney's role is governed by Rule 1.2(d). Rule 1.2(d), while prohibiting knowing assistance of a client's criminal or fraudulent behavior, permits attorneys to “counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”²⁰¹

A lawyer who consummates a criminal or fraudulent client transaction without knowledge of its wrongful nature is subject to three challenges under the construction of lawyer independence offered here. First, did the proposed transaction present reasonable grounds for the lawyer to suspect that it was wrongful? If not, then Rule 2.1 does not impose a barrier to furthering the transaction. If the

¹⁹⁷ MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1) (requiring counsel to withdraw from representation that will result in violation of the *Model Rules*).

¹⁹⁸ *Id.* R. 1.2(d) (prohibiting attorney from assisting client in transaction that lawyer knows is “criminal or fraudulent”). A more delicate question is whether the lawyer can assist the client when she believes that the law prohibiting the proposed action is invalid. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94 cmt. e (2000) (discussing the standards for testing the legal validity or applicability of a law).

¹⁹⁹ MODEL RULES OF PROF'L CONDUCT R. 1.2(d).

²⁰⁰ See *supra* note 176 and accompanying text (noting that a matter is not indeterminate simply because it requires interpretation).

²⁰¹ MODEL RULES OF PROF'L CONDUCT R. 1.2(d); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94(2)(b) (prohibiting knowing assistance of crime or fraud but allowing the lawyer to “counsel or assist a client in conduct when the lawyer reasonably believes . . . that the client can assert a nonfrivolous argument that the client's conduct will not constitute a crime or fraud or violate a court order”).

transaction presented such grounds, however, our next question is whether the attorney gained the requisite factual and legal information to assess the bona fides of the transaction? If not, then the attorney has perforce failed to exercise the professional judgment required by Rule 2.1, since the judgment—to the extent it was exercised at all—was insufficiently informed.²⁰² Third, was the attorney's conclusion that the transaction was proper independent of the client and within the boundaries of professional judgment?²⁰³ If not, then the attorney has violated Rule 2.1.

This construction of the independence requirement of Model Rule 2.1 would represent a significant change in the attorney's responsibilities in furthering transactions. Absent our proposed reading of Model Rule 2.1, attorneys would be free to consummate such transactions under the ethics rules, even when they have reason to suspect client wrongdoing, because such suspicion does not rise to the level of knowledge that requires withdrawal.²⁰⁴ On the interpretation of Model Rule 2.1 offered here, however, counsel can no longer remain uninformed or agnostic about the propriety of the transaction she furthers: with respect to the transaction's propriety, her participation is, in an important sense, her imprimatur.

V. AN INVITATION TO THE STATES

A. Introduction

Our final question is how the states can implement the new understanding of lawyer independence developed in this Article. We will begin with a discussion of the role of the states in advancing the law of lawyering and how that role relates to the interpretation of lawyer independence offered here.²⁰⁵ Next, we consider how our proposed interpretation would play out in the two theaters that address attorney conduct—discipline and liability. Finally, we explore how the lawyer-independence standard proposed here relates to the

²⁰² For a discussion of this procedural element of professional judgment, see *supra* notes 162–64.

²⁰³ For a discussion of how this standard should be applied by courts, see *infra* Part V.

²⁰⁴ See *supra* note 9 and accompanying text (collecting sources objecting to the passive role of counsel in transactions resulting in crimes or fraud).

²⁰⁵ Reform by the states of the law of lawyer independence will also have a substantial effect on the federal courts, which typically apply the attorney ethics rules of the state in which they sit. *E.g.*, W.D. WASH. G.R. 2(e), available at <http://www.wawd.uscourts.gov/documents/HomePageAnnouncements/2009%20Local%20Rules/Final%20Local%20General%20Rules%20for%20website.pdf> (requiring compliance with the “Washington Rules of Professional Conduct, as promulgated, amended, and interpreted by the Washington State Supreme Court . . . and the decisions of any court applicable thereto”). See generally HAZARD & HODES, *supra* note 1, § 1.17 (providing background on attorney ethics in federal courts).

lawyer's duties under other lawyering standards, including Sarbanes-Oxley and Model Rule 1.13.

B. The Opportunity for Reform

Attorney regulation is generally the province of the states.²⁰⁶ Nearly every state has adopted an attorney ethics code grounded on the *Model Rules* drafted by the American Bar Association.²⁰⁷ The states typically construe these ethics rules in four settings: through committee opinions that guide the day-to-day practice of attorneys;²⁰⁸ in the attorney-disciplinary setting, where attorneys are sanctioned for violations of the rules and the decisions interpreting them;²⁰⁹ in the litigation setting, where ethics rules that bear on the conduct of counsel are interpreted and applied;²¹⁰ and in liability cases against counsel as evidence of the standard of care.²¹¹ Each of these committee or court interpretations of the *Model Rules* establishes precedent that can shape the behavior of attorneys in the jurisdiction.

The state-based nature of attorney regulation offers a special opportunity for reform of the law of lawyer independence. In the years since the states adopted their own versions of the *Model Rules*,²¹² each has imposed its own interpretive imprint on the law of lawyer conduct—through its committee and court interpretations of the rules in the advisory, disciplinary, and litigation settings.²¹³ Thus,

²⁰⁶ See HAZARD & HODES, *supra* note 1, § 1.3 (cataloging the sources of the law of lawyering). In recent years, the federal government has increasingly regulated attorneys, often in specialized areas. See John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 961 (2009) (describing the growth of federal regulation of attorney ethics). Part V.E., *infra*, will consider an important instance of federal attorney regulation, Sarbanes-Oxley, and its relation to the interpretation of Model Rule 2.1 proposed herein.

²⁰⁷ See LAWYERS' MANUAL, *supra* note 1, at 01:11 to :82 (July 27, 2005) (describing how the ethics rules adopted in each state differ from the *Model Rules*). In this Part V, we will continue our discussion of the *Model Rules* because they are in effect in nearly every jurisdiction. See *supra* note 4. In actual court cases, however, a committee or court would apply the ethics rule in effect in its jurisdiction. The states have for the most part adopted Model Rule 2.1 without substantial change. See *infra* note 216 and accompanying text.

²⁰⁸ See, e.g., *In re Goldstein*, 560 A.2d 1166, 1167 (N.J. 1989) (holding that lawyers can be disciplined for failure to comply with committee opinions construing the *Model Rules*).

²⁰⁹ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. b (2000) (discussing enforcement of ethics rules).

²¹⁰ See generally LAWYERS' MANUAL, *supra* note 1, at 799:201 to :310 (May 26, 2010) (collecting court cases construing attorney ethics rules across jurisdictions in litigated matters).

²¹¹ MODEL RULES OF PROF'L CONDUCT pmb1. para. 20 (2009) ("[A] lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."); see also *Developments in the Law: Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1567 (1994) (noting that most courts allow discussion of ethics violation as evidence of negligence by counsel).

²¹² See *supra* note 4 and accompanying text.

²¹³ See *supra* notes 207–11 and accompanying text.

the law governing lawyers, although uniform in its general outline, is subject to considerable variation among the states in its particulars.

Unlike corporation law, states are not engaged in a “race to the bottom” in lawyer regulation.²¹⁴ In fact, states visualize themselves more as gatekeepers of the bar to protect the public, by administering the bar exam, imposing character and fitness checks, and having continuing-legal-education requirements.²¹⁵ In many ways, the state-by-state approach to lawyer regulation offers the long-claimed opportunity of federalism: the states serve as laboratories to experiment and change the law governing lawyers.

The lawyer-independence reforms presented in this Article require no revision of the state-specific *Rules of Professional Conduct* because nearly every state has adopted Rule 2.1.²¹⁶ Instead, this Article proposes that states analyze and apply the Rule in a manner that is consistent with: its text and history, the Rule’s relationship to the other *Model Rules*, and our understanding of the profession and its commitments. It is a call, therefore, for courts and ethics committees to breathe life into Rule 2.1 and lawyer independence, not through wholesale change, but by reasoned interpretation and construction of a Rule that is already on their books. If states are troubled by the corporate scandals of recent decades and the passivity of lawyers who

²¹⁴Corporation-law scholars do not universally accept the implication of the phrase “race to the bottom.” See Mark J. Roe, *Delaware’s Shrinking Half-Life*, 62 STAN. L. REV. 125, 130 (2009) (noting that corporation law can be viewed as a race to the bottom if corporate statutes are directed at managers who make reincorporation decisions, and a race to the top if the goal is to satisfy shareholders).

²¹⁵See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 2 (2000) (discussing admission to the practice of law).

²¹⁶The language of the ABA’s Model Rule 2.1 has been adopted verbatim by forty-four states. Three states have adopted it with additional language concerning alternative dispute resolution (Alaska, Colorado and Hawaii). See *Links to Other Legal Ethics and Professional Responsibility Pages*, A.B.A., <http://www.abanet.org/cpr/links.html> (last visited Nov. 7, 2010) (providing links to ethics rules of each state). Georgia and Texas have adopted versions of Model Rule 2.1 with slight modifications. Texas’s version reads in its entirety: “In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.” TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 2.01 (2005), available at http://www.texasbar.com/AM/Template.cfm?Section=Grievance_Info_and_Ethics_HelpLine&Template=/CM/ContentDisplay.cfm&ContentFileID=96. The version of Rule 2.1 adopted in Georgia reads: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. A lawyer shall not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client. The maximum penalty for a violation of this Rule is disbarment.” GA. RULES OF PROF’L CONDUCT R 2.1 (2001), available at http://www.gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/rule_21_advisor. And finally, the California State Bar Board of Governors recommended the adoption of Model Rule 2.1 in September 2009. However, the proposal has not yet been approved by the Supreme Court of California. *Proposed Rules of Professional Conduct*, STATE BAR OF CALIFORNIA, <http://ethics.calbar.ca.gov/Committees/RulesCommission/ProposedRulesofProfessionalConduct.aspx> (last visited Nov. 7, 2010).

counseled these corporations and furthered their transactions,²¹⁷ the tools of reform are well within reach. The states already insist on lawyer independence in name; it is now time to insist on it in practice.

It is worth reflecting on why Rule 2.1 has been largely moribund for ethical and liability purposes;²¹⁸ and why the Rule—once understood—will require the close attention of courts, disciplinary authorities, practitioners, and harmed third parties. By assuming that Rule 2.1 is simply another means to protect clients,²¹⁹ the courts have marginalized its disciplinary and liability significance. The client is not likely to file a disciplinary action against a lawyer for providing advice or furthering a transaction that is consistent with the client's wishes but risks harming third parties through wrongful conduct. Thus, a lack of lawyer independence is rarely a source of client grievance. For a client who is aggrieved by the lawyer's failure to provide accurate advice with respect to the state of the law or to handle a matter properly, the ethical breach—if any—is a failure of competence,²²⁰ not independence. Moreover, the client's principal liability remedy for inaccurate advice is a malpractice claim against the lawyer for breach of the duty of care, a claim unrelated to lawyer independence.²²¹

When we replace the faulty agency-based conception of Rule 2.1 with its real purpose—the protection of society and third parties against client wrongdoing²²²—the disciplinary and liability implications of the Rule come into bold relief. Third parties and society can be harmed by an absence of lawyer independence. Third parties and society, not clients, have reason and incentive to invoke the Rule in the disciplinary and liability setting. We will consider next how our proposed interpretation of Rule 2.1 plays out in such settings.

²¹⁷ See *supra* note 9 and accompanying text.

²¹⁸ See *supra* note 61 and accompanying text.

²¹⁹ See *supra* notes 61–74 and accompanying text.

²²⁰ See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2009) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); see also *In re Odman*, 687 P.2d 153, 156 (Or. 1984) (per curiam) (disciplining lawyer for incompetent handling of estate).

²²¹ See LUBAN, *supra* note 15, at 155 (suggesting that there are no cases of discipline on attorneys for violating Rule 2.1 because clients are more interested in malpractice damages than in pursuing ethical grievances); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 (2000) (treating incompetent representation principally as a breach of duty of care); 2 MALLEN & SMITH, *supra* note 30, § 19.1 (discussing competency and its relation to duty of care).

²²² See *supra* notes 76–85.

C. Attorney Discipline

If Model Rule 2.1 is designed to protect society and third parties against client harm through the exercise of lawyer independence, our next question is how the disciplinary system can protect either interest under the Rule. Consider two scenarios. First, suppose that a client's criminal or fraudulent transaction harms a third party. Prior to acting, the client sought the advice of counsel. Let us assume that the attorney had no knowledge of the fraud but failed to exercise independent professional judgment in advising the client that the transaction was wrongful. For our second scenario, assume that the attorney was not asked about the propriety of the transaction described above, but furthered it without inquiry despite reasonable grounds to suspect client wrongdoing.

On either scenario, the harmed third party could file an ethics complaint against counsel for breach of Rule 2.1. If these complaints have not been filed thus far, it is likely because few have understood the third-party-protection rationale of the Rule, and ethics committees and courts have not explored the implications of the third-party-protection purpose of the Rule to determine when the Rule applies or what it requires of counsel, the subjects of Parts III and IV above. Given that Rule 2.1 is designed to protect third parties, it follows that disciplinary authorities should recognize the grievance of a third party who was harmed by its breach.²²³

Parts III and IV have offered an analysis of when Rule 2.1 applies and what it requires of counsel. These standards should be applied by a disciplinary tribunal in assessing an alleged violation of the Rule. In the each of the scenarios described above, under our proposed construction of Rule 2.1, counsel is required to exercise independent professional judgment. The requirements of the Rule are triggered not only when counsel provides advice, but also when she has reason to suspect wrongdoing in a transaction that she is furthering.²²⁴

The next question posed by these scenarios is how a disciplinary tribunal can determine whether counsel has exercised the independent professional judgment required by the Rule. Professional judgment,

²²³ Some states generally allow any person to file a disciplinary grievance against an attorney, regardless of their personal stake in the case. *E.g.*, N.H. SUP. CT. R. 37A(II)(a)(2)(A)–(B), available at <http://www.courts.state.nh.us/rules/scr/scr-37a.htm> (“Any person may file a grievance with the attorney discipline office to call to its attention the conduct of an attorney that he or she believes constitutes misconduct which should be investigated by the attorney discipline office.”). In states that consider the grievances only of those personally affected by the alleged violation, the grievance of a third party who is harmed by the alleged violation of Model Rule 2.1 would qualify for consideration.

²²⁴ See *supra* Part IV.B.2.

we have determined, has both a procedural element—requiring inquiry to gain sufficient factual and legal information—and a substantive element—requiring counsel’s conclusions to be within the bounded range of professional judgment.²²⁵ The first question poses few substantive concerns; it asks only whether the attorney’s inquiry into the facts and law was sufficient to render an informed judgment in the scenarios described above.²²⁶

The more difficult question is how a disciplinary tribunal or court can evaluate compliance with the independent-professional-judgment standard when the lawyer has satisfied the procedural requirements of the Rule, but reached an incorrect conclusion about the propriety of the proposed conduct or transaction. An incorrect assessment is not tantamount to a failure to exercise independent professional judgment. On the other hand, independent professional judgment is not a subjective exercise for which any answer is acceptable.²²⁷

Although law often requires interpretation, there is typically a limit on the range of legitimate interpretations to any given question. As noted earlier, the term “professional” constrains the attorney’s judgment, and provides the standard by which to evaluate the judgment of the attorney. The remaining question is whether the attorney’s interpretation is within the acceptable boundaries of the professional community at the time the advice was given.²²⁸

Ultimately, a disciplinary proceeding addressing an attorney’s failure to exercise independent professional judgment is committed to the notion that the law is sufficiently objective to evaluate when an attorney has strayed beyond professional limits in assessing the propriety of the client’s conduct. The fact that judgment is at issue is not reason to deem the question irretrievably subjective. Even a more basic allegation of wrongdoing under the ethics rules, a grievance alleging that counsel provided incompetent advice to the client in violation of Rule 1.1, requires judgment regarding what advice the lawyer *should* have provided the client.²²⁹ Just as incorrect advice of counsel is not a stand-alone basis for a finding that the attorney

²²⁵ See *supra* Part III.C.

²²⁶ See *supra* notes 155–58.

²²⁷ See *supra* notes 178–80.

²²⁸ See *supra* note 179 and accompanying text. States typically refuse to admit expert testimony on whether the attorney violated an attorney ethics rule in an attorney disciplinary proceeding. *E.g.*, *In re McKechnie*, 657 N.W.2d 287, 290 (N.D. 2003) (viewing the expert testimony as unnecessary to assist the trier of fact). An open question is whether expert testimony on the interpretive standards of the legal community would fall within this proscription.

²²⁹ See Model Rules of Prof’l Conduct R. 1.1 (2009) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

advice was incompetent,²³⁰ disagreement among counsel or even disagreement between the attorney's advice and a subsequent court finding, is not sufficient for a finding that an attorney breached Rule 2.1. Under both rules, however, some advice is objectively beyond the acceptable range of under the circumstances.

D. Attorney Liability

Unlike a disciplinary proceeding, a civil claim may result in financial recompense for the victim of the crime or fraud that lawyer independence could have prevented. Thus, third parties have an even greater incentive to seek civil recovery for a failure of lawyer independence. The question, however, is whether attorneys can be held liable to third parties who are harmed by the lawyer's failure to exercise independence that could have prevented the wrongdoing. In this Section, we will explore whether third parties have a claim for such failing, how the claim relates to Rule 2.1, and how a failure of lawyer independence can be evidenced in such a claim.

Whether and when an attorney owes a duty of care to a third party are questions that have generated substantial disagreement among the states.²³¹ Courts have adopted a variety of different approaches.²³² Some have denied such claims altogether based on an absence of privity.²³³ Others allow claims under third-party-beneficiary law²³⁴ or the invitation-to-rely standard of the *Restatement*.²³⁵ Still others have

²³⁰ See HAZARD & HODES, *supra* note 1, § 3.2, at 3–5 (noting in connection with the competency requirement of Model Rule 1.1 that a “thoughtful opinion on a difficult or unsettled question is not incompetent even if it later proves to have been wrong”).

²³¹ Kevin H. Michels, *Third-Party Negligence Claims Against Counsel: A Proposed Unified Liability Standard*, 22 GEO. J. LEGAL ETHICS 143, 148 (2009). In order to prevail on a duty of care claim, the plaintiff must prove that (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached such duty; (3) such breach was the proximate cause of the plaintiff's harm; and (4) the plaintiff suffered damages. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164–65 (5th ed. 1984). The first of these elements is the subject of our inquiry here.

²³² For a detailed discussion and critical analysis of each of these approaches, see Michels, *supra* note 231, at 150–59.

²³³ See, e.g., Bryant v. Robledo, 938 So. 2d 413, 422 (Ala. Civ. App. 2005) (holding that an essential element of a malpractice claim is the existence of an attorney-client relationship); Alpert v. Shea Gould Climenko & Casey, 559 N.Y.S.2d 312, 316 (App. Div. 1990) (finding lack of privity and, therefore, denying claims of investors against law firm that prepared tax opinion letters). See generally MALLEEN & SMITH, *supra* note 30, § 7.7 (collecting decisions that require privity).

²³⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 304 cmt. b (1981) (“[T]he parties to a contract have the power, if they so intend, to create a right in a third person.”). A leading case applying this standard to the question of whether an attorney owes a duty to a nonclient is *Guy v. Liederbach*, 459 A.2d 744, 752–53 (Pa. 1983) (weighing the increased concern over liability for lawyers with the lack of recourse for nonclients).

²³⁵ A lawyer owes a duty to a nonclient if the lawyer or client “invited” the nonclient to rely on the lawyer's opinion or provision of other legal services and the third party is not too

applied a more expansive approach, such as California's balancing test, which asks whether the balance of factors justifies an extension of the duty to a third party.²³⁶ An insistence on privity would, of course, eliminate the attorney's liability to a nonclient who suffers harm as a result of the attorney's failure to exercise independent judgment in advising the client or furthering a transaction. Moreover, a court applying either the third-party-beneficiary or the *Restatement's* invitation-to-rely standard is not likely to recognize such a third-party claim because, in most cases, neither attorney nor client will have intended to benefit the third party or extended an invitation to such third party to rely on any statement or services related to the harm.

Under the California balancing approach, however, the courts consider a variety of factors in determining whether the attorney owes a duty to a third party, including:

the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.²³⁷

Although the court originally applied these factors to defendants other than attorneys, the courts now apply the test to determine whether attorneys owe a duty to third parties if liability will not "impose an undue burden on the profession."²³⁸

Courts that incline toward the California balancing approach²³⁹ or some version of a negligence standard,²⁴⁰ may extend a duty of care

remote to warrant such protection. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(2) (2000).

²³⁶ *E.g.*, *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958) (balancing of various factors to determine whether a lawyer will be liable to a third person not in privity).

²³⁷ *Id.*

²³⁸ *Lucas v. Hamm*, 364 P.2d 685, 688 (Cal. 1961).

²³⁹ *E.g.*, *Goldberger v. Kaplan, Strangis & Kaplan, P.A.*, 534 N.W.2d 734, 738 (Minn. Ct. App. 1995) (using a balancing of factors in determining whether an attorney owes a duty to a third party); *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 534 N.W.2d 734, 627 (Mo. 1995) (explaining the use of the balancing test as a means of determining "whether non-client beneficiaries of a will could maintain a legal malpractice action").

²⁴⁰ In an earlier work, I have argued that an "ethical differentiation" standard represents the better approach to determining when to recognize third-party duties of care: attorneys should owe duties to third parties when negligence standards would generally recognize such duties and the attorney ethics rules do not impose a countervailing obligation on counsel. Michels, *supra* note 231, at 147.

from the attorney to a third party who is harmed by an attorney's failure to exercise independent professional judgment in counseling the client. Consider the earlier example in which an attorney has reason to suspect that a corporate client's transaction is wrongful but closes the transaction without a deeper inquiry. Although counsel would not "know" of any wrongdoing, her actions in furthering the transaction under these circumstances would violate the independent-professional-judgment standard developed herein. If the transaction proves to be criminal or fraudulent and a third party commences an action against the attorney for damages caused by the wrongful transaction, a court would have to determine whether the attorney owed a duty of care to the third party.

A number of factors support extension of such duty under the California balancing standard in this example.²⁴¹ First, the plaintiff was party to the transaction that harmed her, so the transaction was intended to "affect" her. Second, harm to a third party is foreseeable based on the attorney's efforts to consummate a transaction without inquiring into circumstances that reasonably suggested that the transaction was criminal or fraudulent.²⁴² The attorney's failure to inquire is "closely" linked with the harm, since the suspected wrongdoing would, if true, directly harm the third party. There is, moreover, a troubling moral indifference implicated by an attorney's actions to further a transaction that she reasonably suspects is criminal or fraudulent. Finally, if we believe that some of the corporate scandals of recent decades could have been prevented had counsel not closed transactions while ignoring signs of their wrongful nature, then for policy reasons alone, courts have ample incentive to enforce the duty of lawyer independence.

Moreover, the recognition of counsel's duty to a third party under these circumstances would not conflict with any ethical obligation of the attorney.²⁴³ First, Model Rule 2.1 *requires* the lawyer to exercise independent professional judgment, and therefore the attorney's ethical obligations are entirely consistent with the duty of care to the third party. Second, this duty would not undermine the attorney's confidentiality obligation because the attorney is allowed to disclose client information to "respond to allegations in any proceeding

²⁴¹ See *supra* notes 236–238.

²⁴² While it is not certain that the transaction would prove wrongful and harm the third party, given the attorney's reasonable suspicion the prospects of such harm are quite high. The California test requires foreseeability, not certainty. See *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958).

²⁴³ See *supra* note 238 and accompanying text.

concerning the lawyer's representation of the client."²⁴⁴ Thus, under the "balancing" test of whether a duty is owed to third parties, a court has a basis to extend a duty of care to a third party who was harmed by an attorney's failure to exercise independent professional judgment.²⁴⁵

In addition, when an attorney's alleged negligence stems from an omission or failure to act, as here, professional standards creating a duty to a third party support the imposition of a duty of care on counsel.²⁴⁶ In the hypothetical, this Article's proposed construction of Rule 2.1 requires counsel to undertake further inquiry to assess the propriety of the transaction when there is reason for suspicion of wrongdoing. Thus, the attorney ethics rules impose a professional obligation on counsel to take affirmative action that, in turn, can support imposition of a duty of care to third parties.²⁴⁷

In the example offered above, the attorney's failing was procedural: she neglected to inquire into the suspicious facts and circumstances before furthering the transaction.²⁴⁸ Suppose, however, that the failing was substantive—that the attorney gained the requisite information but concluded that the transaction was not criminal or

²⁴⁴ MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2009). The Official Comments to the Model Rules affirm, moreover, that the right to disclose client information in response to a claim of lawyer wrongdoing applies in the civil, disciplinary, and criminal setting, and extends to instances in which the attorney responds to an allegation of wrongdoing by a third party. *Id.* R. 1.6 cmt. 10. The *Restatement (Third) of the Law Governing Lawyers* likewise permits a lawyer to disclose "otherwise confidential client information" in response to an assertion by a nonclient that the lawyer "engaged in wrongdoing in the course of representing a client." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. g (2000) (allowing such disclosure "despite the fact that the client involved has not waived confidentiality or had any role in threatening or making the charges"). In order to preserve the confidentiality of the client's consultation with counsel regarding the propriety of the client's proposed conduct, the attorney's advice should not, absent special circumstances, be admissible in a criminal or third-party civil action against the client. *See supra* notes 76–80 and accompanying text (explaining why confidentiality is afforded to such discussions).

²⁴⁵ Likewise, the extension of a duty of care to the third party would satisfy the ethical-differentiation test that I have proposed elsewhere. *See supra* notes 231 and 240. The client would likely also share liability for the wrongdoing, and the attorney's liability would therefore be reduced under comparative liability principles. *See generally* RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 7 (2000) (explaining the basic rules of comparative liability).

²⁴⁶ *E.g.*, *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185, 193 (D. Neb. 1980) ("[T]he relationship between a psychotherapist and his patient gives rise to an affirmative duty for the benefit of third persons."); *Turner v. Jordan*, 957 S.W.2d 815, 820–21 (Tenn. 1997) ("[A] duty of care may exist where a psychiatrist, in accordance with professional standards, knows or reasonably should know that a patient poses an unreasonable risk of harm to a foreseeable, readily identifiable third person.")

²⁴⁷ While ethical duties can *inform* a court's extension of duties of care for omissions that foreseeably harm third parties, they do not provide a cause of action, which remains tort based. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 scope [20] ("Violation of a Rule should not itself give rise to a cause of action against a lawyer.")

²⁴⁸ *See supra* notes 162–64.

fraudulent and thereafter consummated the transaction. The question on these facts is whether an attorney applying the interpretive standards and norms of the legal community could have reached that conclusion.²⁴⁹ The latter question is no more open-ended than the standards that accompany malpractice claims against counsel generally. Malpractice asks whether the attorney's advice or conduct was consistent with what an ordinarily skilled lawyer would have done in the circumstances.²⁵⁰ Both questions therefore require expert testimony of other professionals to describe the professional standards accepted by the community and their application to the circumstances faced by counsel.

E. Relation to Other Standards

We have already discussed the relation of Rule 2.1 to other ethics rules designed to protect the client. Rule 2.1, properly understood, is designed to protect third parties and society against client wrongdoing that lawyer independence could prevent.²⁵¹ Thus, courts must resist the temptation to interpret Rule 2.1 as a call for competency and avoidance of conflicts of interest, each of which is addressed expressly by other ethics rules.²⁵²

Our next question is how our proposed interpretation of Rule 2.1 relates to the "reporting up" rules traditionally invoked when questions of client fraud arise. Specifically, we will address how Rule 2.1 interacts with Sarbanes-Oxley,²⁵³ a federal statute adopted in the wake of Enron and the other corporate scandals of the 2000s;²⁵⁴ and Model Rule 1.13, an ethics rule modified in part as a response to these scandals and in part for consistency with the changes wrought by Sarbanes-Oxley.²⁵⁵

The most basic requirement of Rule 2.1—that an attorney exercise independent professional judgment in advising the client—is simply not addressed by Sarbanes-Oxley or any other ethics rule. As we have argued in Part II, legal ethics without lawyer independence is

²⁴⁹ See *supra* notes 166–79.

²⁵⁰ *E.g.*, *Smith v. Lewis*, 530 P.2d 589, 593 (Cal. 1975) (looking to the law that was available to the lawyer at the time he performed legal services for his client).

²⁵¹ See *supra* notes 77–86 and accompanying text.

²⁵² See *supra* notes 62–76.

²⁵³ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

²⁵⁴ See S. REP. No. 107-146, at 2 (2002) (explaining the background and need for legislation in the wake of corporate scandals).

²⁵⁵ See generally Thomas G. Bost, *Corporate Lawyers After the Big Quake: The Conceptual Fault Line in the Professional Duty of Confidentiality*, 19 GEO. J. LEGAL ETHICS 1089 (2006).

essentially agency law tailored to fit the particulars of the legal setting. If we are to honor the third-party and societal-protection concerns of lawyer independence, however, agency principles must give way when lawyer independence is required. In practice, this means that the client's general right to control the scope of the representation under Rule 1.2(d) is superseded by the independence demands of Rule 2.1.²⁵⁶ Conversely, if we are not to intrude unjustifiably on the client's right to shape the representation, courts must establish clear standards for when Rule 2.1 applies and when it does not.²⁵⁷ In the transactional setting, under our proposed interpretation of Rule 2.1, the attorney has a special obligation of further factual inquiry and legal assessment when the client asks her to assess the propriety of a proposed action or further a transaction that counsel has reason to suspect is wrongful.²⁵⁸ No other ethics rule demands this of counsel, which leaves a troubling lacuna if we ignore the demands of lawyer independence.

The "reporting up" rules likewise address issues distinct from Rule 2.1, properly understood. The regulations promulgated by the U.S. Securities and Exchange Commission under Sarbanes-Oxley impose obligations on counsel for a publicly held company who discovers evidence of the company's "material violation of securities law or breach of fiduciary duty or similar violation."²⁵⁹ Under Sarbanes-Oxley and its regulations, the lawyer is required to report such wrongdoing to certain company officials or a committee within the company, and in some instances is permitted to report it beyond the company.²⁶⁰ Similarly, Model Rule 1.13 requires reporting within the organization and, in limited circumstances, beyond the organization when the attorney "knows" of certain types of wrongdoing.²⁶¹

Sarbanes-Oxley and Model Rule 1.13 are thus designed to eliminate attorney silence when the attorney is aware of past, present, or ongoing client wrongdoing. Neither addresses the central concerns of lawyer independence, however. Rule 2.1, as proposed here, insists that an attorney: accurately assess the propriety of the client's proposed transaction when asked, and ask questions, learn more, and accurately assess a transaction that counsel has reason to suspect is wrongful before providing assistance on such transaction.²⁶² Rule

²⁵⁶ See *supra* Part III.D.

²⁵⁷ See *supra* Part III.C.

²⁵⁸ See *supra* Part IV.C.

²⁵⁹ 15 U.S.C. § 7245(1) (2006).

²⁶⁰ 17 C.F.R. § 205.3(d)(2) (2009).

²⁶¹ Model Rules OF PROF'L CONDUCT R. 1.13(e) (2009).

²⁶² See *supra* Part V.B.

1.13, by contrast, requires no action of counsel unless the attorney “knows” of client wrongdoing. The attorney’s obligations under Sarbanes-Oxley are triggered when counsel “becomes aware of evidence of a material violation” of the client,²⁶³ a standard more demanding than knowledge but substantially less demanding than the “reasonable suspicion” that triggers further inquiry by the transaction lawyer under Rule 2.1.²⁶⁴

Although lawyer independence differs in kind from the reporting-up rules of Sarbanes-Oxley and Model Rule 1.13, the standards are complementary.²⁶⁵ Sarbanes-Oxley and Rule 1.13 explain what counsel should do when she is aware or has knowledge of client wrongdoing.²⁶⁶ The lawyer-independence standard proposed here addresses the prior question: when do attorneys have an obligation to *gain* such awareness or knowledge?

VI. CONCLUSION

It is easy to see how lawyers might be confused about the positive law of lawyer independence, which is our shorthand term for the “independent professional judgment and candor” required of counsel by Rule 2.1. We have identified three assumptions about legal practice that run against the grain of independence. First, under the traditional understanding of legal practice, the client is the principal and the lawyer the agent—an understanding that emphasizes

²⁶³ See 17 C.F.R. § 205.3(c); see also *id.* § 205.2(e) (“Evidence of a material violation means credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.”). Thus, Sarbanes-Oxley is implicated when the attorney becomes “aware” that what has occurred is about to occur is evidently wrongful, rather than the proposed standard’s insistence on further inquiry by counsel when the attorney has reason for concern about the propriety of a proposed transaction, but does not yet have credible evidence that it is wrongful. See *Selective Disclosure and Insider Trading*, 65 Fed. Reg. 51,715, 51,727 n.105 (Aug. 24, 2000) (codified at 17 C.F.R. pts. 240, 243, and 249) (“‘Aware’ is a commonly used and well-defined English word, meaning ‘having knowledge; conscious; cognizant.’”).

²⁶⁴ In addition, Sarbanes-Oxley applies only to attorneys for publicly held companies, 17 C.F.R. § 205.3(b)(1) (2009), whereas MODEL RULES OF PROF’L CONDUCT R. 2.1 (2009) applies to attorneys regardless of client type, including public and private corporations.

²⁶⁵ Sarbanes-Oxley does not preempt our proposed interpretation of Model Rule 2.1 because the latter does not affect or diminish any obligation under Sarbanes-Oxley. See *Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer*, 68 Fed. Reg. 6,320, 6,320 (Feb. 6, 2003) (codified at 17 C.F.R. pt. 205) (noting that regulations are “not intended to limit the ability of any jurisdiction to impose additional obligations on an attorney not inconsistent with the application of this part”).

²⁶⁶ In addition, Model Rule 1.2(d) prohibits counsel from assisting a client transaction that counsel knows is wrongful. MODEL RULES OF PROF’L CONDUCT R. 1.2(d). Under Model Rule 1.16(a), counsel must withdraw from a client matter that “will result in violation of the Rules of Professional Conduct or other law.” *Id.* at R. 1.16(a).

fulfillment of client objectives as the central task of counsel. On this agency understanding, the lawyer sees herself as dedicated to assisting the client without imposing restraints on that representation. As a second consequence of the agency paradigm, an attorney sees her duty to provide accurate advice to the client as part of the lawyer's obligation to serve the client competently—not to differentiate from client goals in service of some other interest. Third, advocacy casts a long shadow over the legal profession, and there are valid reasons why lawyers should *not* limit the client's claim to only those arguments that the attorney, in her independent professional judgment, deems valid.

In treating advocacy as the defining metaphor for the profession, however, the third assumption deceives us into assuming that professional judgment cannot constrain our actions outside the advocacy role. An underappreciated insight, however, of the 1970 reforms of the attorney ethics rules is that the attorney as counselor should not be bound by the same ethical standards as her litigation counterpart. Advocacy is founded on a different rationale, serves different objectives, and has protections against wrongdoing that counseling does not. Thus, Rule 2.1 is addressed to the nonadvocacy roles of counsel.

Although the lawyer-as-agent paradigm captures an important aspect of lawyering and accounts for much of our vision of the profession, it does not explain attorney independence. Rule 2.1 provides that in “representing a client, counsel shall exercise independent professional judgment and render candid advice.” The Rule on its face is a departure from general agency principles, which do not ask that the agent exercise independent judgment. The text, context, history, and rationale of Model Rule 2.1 suggest that the attorney's independent professional judgment is not simply a superfluous restatement of the attorney's obligations to represent the client competently, to provide the client with full information to make informed decisions, and to avoid conflicts of interest. Each of these requirements is addressed expressly and with greater precision by other provisions in our *Model Rules*. Model Rule 2.1 is not an inelegant reiteration of the agency principles of lawyering; it is an express departure from them.

Rule 2.1 departs from agency principles because of the unique societal role of attorneys. When a client seeks advice about the criminal or civil propriety of his actions, the attorney's response often determines the client's behavior. The societal interest in preventing client wrongdoing warrants a departure from agency norms. Counsel

must advise clients accurately about the state of the law, without being swayed by the client's interest in a particular outcome. We afford confidentiality to such discussions—at a considerable cost to society—to encourage clients to seek legal advice about the propriety of their proposed actions. Rule 2.1 requires that counsel exercise independent professional judgment in order to enhance the prospects that such advice will be *accurate*. Lawyer independence insists on accurate legal advice, not to ensure competent representation of the client, but to prevent the client from engaging in criminal and fraudulent acts that harm society and third parties.

The client has a general right to control the representation unless and until an issue arises under Rule 2.1. The Rule is implicated when in the course of (1) providing advice to the client, or (2) effecting nonadvocacy ends for the client, including attorney efforts to structure and effect client transactions, an attorney should have (3) reason for concern that the client's proposed conduct is criminal or fraudulent. With respect to the third element, the test is an objective one: when the facts and circumstances present reasonable grounds for concern or suspicion that the behavior in question might be wrongful, the attorney's obligations attach under Rule 2.1. In such cases, the lawyer must employ her independent professional judgment to assess the propriety of the proposed client conduct and report her conclusions candidly to the client. When the lawyer is required to exercise independent professional judgment under Rule 2.1, the client cannot waive compliance with the Rule, although he retains the right to terminate the representation. Lawyer independence, therefore, does not abolish the client-autonomy or agency notions that form the bedrock of modern legal practice. On the contrary, our interpretation preserves the basic notions of principal control and identifies those narrowly circumscribed instances when client autonomy must give way to a larger interest—protection of society and third parties from criminal or fraudulent conduct.

Because the stakes are so high when questions of wrongful conduct arise, Rule 2.1 imposes three special conditions—*independence, professional judgment, and candor*—on the attorney's assessment of the proposed conduct. Independence requires analysis uninfluenced by client loyalty, and—despite the pull and tradition of the agency understanding of legal practice—not a search for ways to say yes to the client's objectives. For cultural, economic, and psychological reasons, independence can present a real challenge for counsel.

Professional judgment has procedural and substantive elements. First, the attorney must gain the information necessary to form a judgment about the matter in question, which requires inquiry into the facts and circumstances as well as research into the law implicated by the facts. Second, the attorney must exercise professional judgment in analyzing the facts and law, which consists in developing an interpretation that is consistent with the standards accepted by the legal community. The attorney can fail on one or both elements. The first failing is procedural: a judgment that is factually or legally uninformed breaches Rule 2.1. The second standard acknowledges that there may be more than one legitimate interpretation of the legal authorities that bear on the client's proposed conduct. On the other hand, the standard is committed to the notion that law is objective enough to deem some interpretations unacceptable because they are beyond the boundaries of professional judgment. Candor requires that the attorney accurately report the product of this independent professional judgment to the client.

Rule 2.1 thus has important implications for transactional lawyers. Absent a viable understanding of lawyer independence, the principal constraint in the transactional setting is Rule 1.2(d), which prohibits counsel from "knowingly" assisting the client in criminal or fraudulent behavior. The standard allows, and in some cases encourages, willful blindness on the part of counsel, since ignorance—even when there is reason for concern about the propriety of the act in question—allows counsel to avoid gaining the knowledge that would prevent client assistance under Model Rule 1.2(d). Rule 2.1, on the approach developed here, instead insists that an attorney accurately assess the propriety of the client's proposed transaction when asked, and ask questions, learn more, and accurately assess a transaction that counsel has reason to suspect is wrongful before providing assistance on such transaction. No other rule of lawyering requires this, and Rule 2.1—once understood as a departure from agency principles—closes this troubling gap in the law governing lawyers.

In the transactional setting, the lawyer's obligation under Rule 2.1 to inquire into the facts and circumstances is not a general obligation of inquiry; it is precisely contoured. The lawyer is obligated to inquire under the Rule only if she has reason for suspicion that the client's proposed transaction is wrongful *and* the attorney plans to assist the client in furthering the matter. Moreover, the client is free to refuse the lawyer's efforts to investigate the facts and research the law. Adequate factual and legal knowledge remains, however, a condition

of the lawyer's services prior to consummating a transaction that she has reason to suspect is criminal or fraudulent. Thus, while the client has a right to refuse counsel's efforts to learn more, the lawyer who is denied such access has no choice but to withdraw from the matter, since to proceed in ignorance would violate Rule 2.1.

The refrain "Where were the lawyers?" asks why lawyers allow and sometimes further corporate transactions that are wrongful. The "reporting up" provisions of Model Rule 1.13 and Sarbanes-Oxley—the supposed answers to this rhetorical question—solve the problem only partially. They require attorney action when the attorney has knowledge or awareness of wrongful client behavior. The lawyer-independence standard proposed here addresses the critical, prior question: when do attorneys have an obligation to *acquire* such knowledge?

The proposed interpretation of Rule 2.1 presents an opportunity for states to reform their law on lawyer independence. Nearly every state has adopted Rule 2.1, although—if the paucity of court attention is any indication—the Rule has had almost no discernable effect on the practice of law. If courts and, by extension, the profession continue to view Rule 2.1 as a client-protection rule (i.e., as another, largely redundant element of the agency vision of lawyering), then the Rule will remain dormant. Clients are not likely to complain about their attorney's lack of independence; third parties are. Lawyer independence does not require adoption of a new ethics rule, or wholesale revision of ethics principles. Courts can breathe life into Rule 2.1 by recognizing the Rule's real aim—to protect society and third parties, not clients.

Once we have identified the real constituents served by Rule 2.1, it is a short step to recognizing their rights under the Rule. Disciplinary authorities should consider grievances against counsel filed by third parties harmed by client crime or fraud that could have been prevented by the lawyer's exercise of independent professional judgment. In addition, the doctrines that extend the duty of care from attorneys to nonclients enable jurisdictions to recognize third-party claims for damages. Questions about whether the lawyer has exercised professional judgment are not irretrievably subjective, and pose no greater practical challenge to enforcement than the judgment standards that inform the competency and duty-of-care standards in the disciplinary and liability settings respectively.

Of course, the greater benefit from changes in the disciplinary and liability settings lies elsewhere: in the law offices across the country where lawyers will exercise independent professional judgment when

2010]

LAWYER INDEPENDENCE

141

required by Rule 2.1. If states are troubled by the corporate scandals of recent decades and the passivity of lawyers who counseled these corporations and furthered their transactions, the tools of reform are well within reach. The states already insist on lawyer independence in name; it is now time to insist on it in practice.