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## The State Of Lawyer Knowledge Under The Model Rules Of Professional Conduct

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SYMPOSIUM ARTICLES:  
TRANSACTIONAL LAW PRACTICE

THE STATE OF LAWYER KNOWLEDGE  
UNDER THE MODEL RULES OF  
PROFESSIONAL CONDUCT

GEORGE M. COHEN\*

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INTRODUCTION

The state of lawyers’ ethical “knowledge” is poor. By that, I mean that the Model Rules of Professional Conduct and the authorities interpreting it do a poor job of defining “knowledge”; of explaining or justifying the use of the knowledge standard in the rules; and of relating the knowledge

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requirement to, and reconciling it with, other ethical and legal requirements. As a result, many lawyers have less “knowledge” of their ethical and legal obligations than they ought to have. Moreover, lawyers who understand the knowledge problem, such as drafters of ethics codes, are apparently unwilling to do anything about it. The reason is that lawyers often view the knowledge standard as an important means of limiting lawyer responsibility. That view, however, is misleading.

The terms “knowingly,” “known,” and “knows” appear in almost every category of ethical rules: those dealing with the lawyer-client relationship,<sup>1</sup> the lawyer’s role as advocate and duties to the court,<sup>2</sup> the lawyer’s obligations to third parties,<sup>3</sup> the lawyer’s responsibilities within law firms,<sup>4</sup> the lawyer’s duties concerning public service,<sup>5</sup> and the lawyer’s obligations to the profession.<sup>6</sup> The Terminology section of the Model Rules defines these terms to mean “actual knowledge of the fact in question,” and then adds: “A person’s knowledge may be inferred from circumstances.”<sup>7</sup> There is no comment explaining this definition.

The problem starts with the meaning of this definition. Its two sentences are in some tension. If actual knowledge may be inferred from circumstances, a lawyer can violate an ethical rule requiring “knowledge” even if the lawyer does not “actually know.” A common resolution is that the two sentences establish an objective rather than a subjective standard of proof for actual knowledge.<sup>8</sup> Thus, as a practical matter, the rules allow a disciplinary authority to prove actual knowledge by circumstantial evidence, rather than solely by a lawyer’s admission of knowledge as part of the disciplinary proceeding, or by the testimony of some third party to whom the lawyer had earlier stated his or her intentions.<sup>9</sup> Moreover, an

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1. See MODEL RULES OF PROF’L CONDUCT RR. 1.2(d), 1.4(a)(5), 1.8(a), 1.9(b), 1.10(a), 1.11(b), 1.11(c), 1.12(c), 1.13(b), 1.18(c) (2013).

2. See *id.* RR. 3.3, 3.4(c), 3.8(a), (d), (g), (h).

3. See *id.* RR. 4.1, 4.2.

4. See *id.* RR. 5.1(c), 5.3(c).

5. See *id.* RR. 6.3, 6.4, 6.5(a).

6. See *id.* RR. 8.1, 8.3(b), (c), 8.4(a), (f).

7. *Id.* R. 1.0(f).

8. Another way to resolve the tension is to say that “all conclusions about someone else’s state of mind must be derived from circumstantial evidence,” even under a subjective standard. GEOFFREY C. HAZARD, JR., W. WILLIAM HODES, & PETER R. JARVIS, *THE LAW OF LAWYERING* §§ 1-23, 1-50 (3d ed. Supp. 2012). Under this interpretation, the “inferred from circumstances” sentence is a superfluous truism.

9. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 5 cmt. d (2000) (stating that “a finding of knowledge does not require that the lawyer confess or to otherwise admit the state of mind required for the offense”); Rebecca Roiphe, *The Ethics of Willful Ignorance*, 24 GEO. J. LEGAL ETHICS 187, 196 (2011) (arguing that “inferred from circumstances . . . prescribes an objective standard of proof but does not

objective standard of knowledge means that a lawyer cannot disprove knowledge simply by sincerely contending that the lawyer did not believe<sup>10</sup> that some fact was true or that some legal rule existed or would be interpreted in a certain way. This explanation does not completely eliminate the tension. The question remains: what circumstantial evidence is sufficient to find actual knowledge? Put another way, what does the actual knowledge standard intend to exclude?

The most accepted answer is that the actual knowledge standard aims to exclude a duty to inquire. In particular, the Terminology section defines “reasonably should know,” which appears in a number of ethics rules,<sup>11</sup> as denoting “that a lawyer of reasonable prudence and competence would ascertain the matter in question.”<sup>12</sup> The distinction between an actual knowledge standard, which includes no duty of inquiry, and a reasonably should know standard, which includes such a duty, raises a number of questions. First, does the knowledge standard include recklessness or willful blindness, which lies between “know” and “reasonably should know?” Second, how does the knowledge standard apply if a lawyer otherwise has a legal or ethical duty to inquire and fails to satisfy it? Third, how does the knowledge requirement interact with rules of imputation?<sup>13</sup>

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change the substantive rule”).

10. “Belief” under the Model Rules means “that the person involved actually supposed the fact in question to be true.” MODEL RULES OF PROF’L CONDUCT R. 1.0(a). Belief may also “be inferred from circumstances.”

11. See *id.* RR. 1.13(f), 2.3(b), 2.4(b), 3.6(a), 4.3, 4.4(b). Interestingly, the phrase also appears in several comments not accompanying or interpreting a rule in which the phrase appears. See *id.* R. 1.0 cmt. 10 (stating that “screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening”); *id.* R. 1.2 cmt. 13 (stating that “[i]f a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law . . . , the lawyer must consult with the client regarding the limitations on the lawyer’s conduct,” and citing Rule 1.4(a)(5)). The “reasonably should know” standard in comment 13 to Rule 1.2 is inconsistent with the rule to which it refers, Rule 1.4(a)(5), which requires a lawyer to “consult with the client about any relevant limitation on the lawyer’s conduct” only when the lawyer “knows that the client expects” unlawful or unethical assistance. A rule’s text trumps any inconsistent comment, *id.* scope 21, but the comment’s existence creates uncertainty.

12. MODEL RULES OF PROF’L CONDUCT R. 1.0(j). One might also distinguish “know” from “reasonably believes,” R. 1.0(i), but “reasonable belief” is generally used to discourage lawyers from actions they might otherwise be inclined to take based on their subjective belief, see *id.* RR. 1.6(b), 1.7(b)(1), 1.13(c), 1.14(b), 1.16(b)(2), 2.3(a), 3.4(e), 3.4(f)(2), 3.6(c), 3.8(e), 8.5(b)(2), whereas “reasonably should know” is generally used to encourage lawyers to investigate when they might otherwise be inclined not to do so.

13. This Article will not consider a fourth key question about knowledge: in situations of factual or legal uncertainty, what quantum of knowledge is necessary to

I will argue in this Article that the Model Rules should be revised to answer these three related questions and thereby provide clearer guidance to lawyers. First, the Model Rules should expressly incorporate recklessness into the definition of “knowledge” or at least should expressly incorporate this standard whenever a duty to inquire or a duty to communicate otherwise exists under the rules or other law. Second, one way to show recklessness or willful blindness is through a deliberate breach of an otherwise existing duty to inquire. The knowledge requirement should not be interpreted to negate or limit duties of inquiry that otherwise exist.<sup>14</sup> Third, like inquiry, communication is an important means by which lawyers acquire knowledge, and just as lawyers in many situations have duties to inquire, they also often have duties to communicate. The duty to communicate is the basis for rules of imputation. Thus, just as the knowledge standard should not be used to negate otherwise existing duties to investigate, neither should it be used to negate otherwise existing duties to communicate, and thereby defeat imputation.

#### I. RECKLESSNESS OR WILLFUL BLINDNESS

Recklessness is a common scienter standard in the law of intentional torts, as well as criminal law, especially in the law of fraud.<sup>15</sup> Transactional lawyers in particular are familiar with the recklessness standard because it plays an important role in securities fraud and other business crimes and torts. Although authorities define recklessness in various ways, a commonly cited definition is Judge Friendly’s in *United States v. Benjamin*,<sup>16</sup> an important securities fraud precedent. *Benjamin*

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satisfy the knowledge standard? This aspect of knowledge is particularly important for addressing issues such as client perjury.

14. Around the time the Model Rules were drafted, one group proposed the following definition of “knowledge”:

A lawyer knows certain facts, or acts knowingly or with knowledge of facts, when a person with that lawyer’s professional training and experience would be reasonably certain of those facts in view of all the circumstances of which the lawyer is aware. A duty to investigate or inquire is not implied by the use of these words, but may be explicitly required under particular rules. Even in the absence of a duty to investigate, however, a studied rejection of reasonable inferences is inadequate to avoid ethical responsibility.

THE ROSCOE POUND-AMERICAN TRIAL LAWYERS FOUNDATION, THE AMERICAN LAWYER’S CODE OF CONDUCT 12 (1982).

15. See generally RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 98 cmt. c (2000) (“For purposes of common-law damage recovery, reckless as well as knowing misrepresentation by a lawyer may be actionable.”).

16. *United States v. Benjamin*, 328 F.2d 854, 862 (2d Cir. 1964).

holds that a lawyer has the requisite intent for securities fraud if the lawyer “deliberately closed his eyes to facts he had a duty to see . . . or recklessly stated as facts things of which he was ignorant.”<sup>17</sup> Moreover, a corporate lawyer’s “special situation and continuity of conduct” may create an inference that the lawyer “*did* know the untruth of what he said or wrote.”<sup>18</sup>

Whether recklessness satisfies the knowledge standard under the Model Rules is unsettled.<sup>19</sup> Model Rule 1.0 and its comments do not say. Under a textualist or structuralist approach, the answer is straightforward. Recklessness makes an appearance in just one rule, Model Rule 8.2(a).<sup>20</sup> Thus, the fact that the drafters use “recklessness” in this rule while using the actual knowledge standard elsewhere (and even in Model Rule 8.2(a) itself) suggests that “actual knowledge” does not incorporate the recklessness standard.<sup>21</sup>

17. *Id.*

18. *Id.* at 861–62 (quoting *Bentel v. United States*, 13 F.2d 327, 329 (2d. Cir. 1926)) (emphasis in original).

19. Compare Roiphe, *supra* note 9, at 190, 196 (arguing that “[d]eliberately turning a blind eye to relevant facts . . . would not meet” the knowledge requirement under the ethics rules and advocating for a change in the definition of knowledge, but acknowledging a “less persuasive interpretation” that “willful ignorance” could be viewed as incorporated in the definition of “knowledge”), and Carl A. Pierce, *Client Misconduct in the 21st Century*, 35 U. MEM. L. REV. 731, 801 (2005) (arguing that “it appears as if the Kutak Commission [which drafted the original version of the Model Rules] did not want lawyers to be subject to discipline for making statements of fact or law with reckless disregard for the truth or falsity of the statement except as specifically provided in the rules” but then advocating for a recklessness standard), with Nancy J. Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 GEO. J. LEGAL ETHICS 11, 24 (2010) (arguing that the “willful blindness” doctrine “is available in disciplinary actions”), and Roger C. Cramton, George M. Cohen & Susan P. Koniak, *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 756 n.137 (2004) (arguing that the Model Rules “appear to adopt the ‘willful blindness’ standard” based on the comments to Rules 1.13 and 4.2), and HAZARD, JR., HODES, & JARVIS, *supra* note 8, §§ 1-23, 1-50, 1-51 (stating that disciplinary authorities will “infer” actual knowledge from “circumstances” when they conclude that a lawyer “*must* have known” and stating that “it will sometimes be impossible to believe that a lawyer lacked the requisite knowledge, unless he deliberately tried to evade it,” but in that case the lawyer “already knows too much”) (citing *Benjamin*, 328 F.2d at 854), and CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 696 (1987) (stating that a lawyer “may not avoid the bright light of a clear fact by averting [his or her] eyes or turning [his or her] back”).

20. MODEL RULES OF PROF’L CONDUCT R. 8.2(a) (2013) (stating that a lawyer “shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory or public legal officer, or of a candidate for election or appointment to judicial or legal office”).

21. Of course, the justification for giving more priority to deterring a lawyer from lying about the qualifications or integrity of judges, *see id.* R. 8.2(a), than to, say, deterring a lawyer from assisting a client in committing fraud against ordinary people, *see, e.g., id.* R. 1.2(d) (using an actual knowledge standard) is not immediately obvious.

On the other hand, the comments to several Model Rules seem to support a version of the recklessness standard. For example, the comment to Model Rule 3.3, Candor Toward the Tribunal, states that “although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.”<sup>22</sup> Reliance on these comments raises several difficulties, however.

First, the comments are not authoritative,<sup>23</sup> and not all states adopt them. Second, the comments do not clearly endorse the *Benjamin* standard of recklessness or willful blindness. Ignoring an “obvious falsehood” is arguably not quite the same as closing one’s eyes to “facts [one] ha[s] a duty to see.”<sup>24</sup> The “obvious falsehood” standard in the comment to Model Rule 3.3. may simply mean that a lawyer may not ignore information that appears to be false on its face, as opposed to meaning that a lawyer may not ignore suspicious and readily available facts that might reveal or lead to discovery of falsity if examined.<sup>25</sup> Third, not every Model Rule including a knowledge standard has an accompanying comment admonishing lawyers not to ignore the obvious. This difference might suggest that the drafters intended their version of the recklessness standard to apply only to those knowledge-based rules with a specific comment endorsing that standard.<sup>26</sup>

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22. See MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 8. The Model Rules include similar comments accompanying two other rules. See *id.* R. 1.13 cmt. 3 (stating that “knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.”); *id.* R. 4.2 cmt. 8 (stating that a lawyer “cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious”). It is not clear what to make of the fact that the comments have slightly different wording. In particular, the comments to Rule 1.13 and 4.2 simply refer to ignoring or closing eyes to the “obvious,” whereas the comment to Rule 3.3 adds the qualifier “falsehood.” Notably, the ABA adopted the three comments at different times: the comment to Rule 4.2 in 1995 (following the publication of ABA Op. 95-396, which used similar language), the comment to Rule 3.3 in 2002, and the comment to Rule 1.13 in 2003 (following the recommendations of the ABA Task Force on Corporate Responsibility). See generally A.B.A., A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005 (2006).

23. MODEL RULES OF PROF’L CONDUCT scope 21 (“The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.”). Somewhat ironically, that statement itself is a comment (though not one accompanying a rule), and so arguably is itself not authoritative.

24. *Benjamin*, 328 F.2d at 862.

25. See William Wernz, An Attorney’s Ethics Duty to Ascertain and Other State of Mind Issues – Thoughts and Cases (draft on file with author) (emphasis added) (arguing that the comments “do not impose a duty to ‘ascertain’ even that which could be known with small effort”).

26. The “lawyer cannot ignore the obvious” comment to Model Rule 3.3 does not even clearly apply to all parts of the rule; the comment is directed only to the Rule 3.3(a)(3), which prohibits a lawyer from “offer[ing] evidence the lawyer knows to be false,” or rectifying the previous submission of evidence when the lawyer “comes to

Otherwise, one would have expected the drafters to add a recklessness comment to the definition of knowledge in Model Rule 1.0. But there is none. In particular, if the recklessness standard applies only to those rules for which there is a comment referencing that standard, the primary ethics rules dealing with transactional fraud, Model Rules 1.2(d) and 4.1, would not incorporate the recklessness standard.<sup>27</sup> That interpretation would raise important issues of inconsistency among ethical obligations. For example, fraud on the court would be governed by the recklessness standard (Model Rule 3.3), but not fraud in transactions, unless Model Rule 1.13 (which includes a recklessness comment) applied. That interpretation also would mean that the recklessness standard is conspicuously absent from the ethics rules dealing with an area of law—transactional fraud—in which recklessness is the generally accepted standard.

Drawing on the general legal standard, reported cases in several jurisdictions have held that “a reckless state of mind, constituting scienter, [is] equivalent to ‘knowing’ for disciplinary purposes.”<sup>28</sup> Similarly, other

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know of its falsity.” See MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 8. Does that mean that the comment is inapplicable to Rules 3.3(a)(1) (prohibiting a lawyer from “knowingly” making a false statement of fact or law to a tribunal), 3.3(a)(2) (prohibiting a lawyer from “knowingly” failing to disclose legal authority “known” to be adverse), 3.3(b) (requiring a lawyer who “knows” that a person commits fraud on a tribunal to take remedial action), and 3.3(d) (requiring a lawyer in an ex parte proceeding to reveal material facts “known” to the lawyer)? The comment to the parallel provision in the Restatement, § 120, endorses the willful blindness standard. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 120 cmt. c (2000) (stating that under the actual knowledge requirement of the rule “a lawyer may not ignore what is plainly apparent, for example, by refusing to read a document”).

27. Rule 1.2(d) says that a “lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.” MODEL RULES OF PROF’L CONDUCT R. 1.2(d). Rule 4.1 says that a lawyer representing a client “shall not knowingly: (a) make a false statement of fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.” *Id.* R. 1.6 A Reporter’s Note and comment to the parallel provisions in the Restatement endorse the recklessness standard. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 94 & reporter’s note to cmt. g (stating the Reporter’s view that “the preferable rule is that proof of a lawyer’s conscious disregard of facts is relevant evidence, which, together with other evidence bearing on the question, may warrant a finding of actual knowledge”); *id.* § 98 & cmt. c (“For purposes of professional discipline, the lawyer codes generally incorporate the definition of misrepresentation employed in the civil law of tort damage liability for knowing misrepresentation, including the element[] of . . . scienter . . . .”); see also ILL. RULES OF PROF’L CONDUCT R. 4.1(a) (2010) (adopting “reasonably should know” standard); KY. RULES OF PROF’L CONDUCT R. 4.1(b) (1989) (omitting knowledge requirement); *Nebraska ex. Rel. Neb. State Bar Ass’n v. Holscher*, 230 N.W.2d 75, 84 (Neb. 1975) (finding predecessor to Rule 4.1 violated by conduct that is “careless and recklessly negligent”).

28. *People v. Small*, 962 P.2d 258, 260 (Colo. 1998) (citing cases from several jurisdictions where courts equated a reckless state of mind with ‘knowing’ in a



jurisdictions have interpreted actual knowledge to incorporate “willful blindness,” in some cases distinguishing that standard from recklessness (and thereby avoiding the textualist conflict with Model Rule 8.2).<sup>29</sup>

The uncertain status of Model Rule 8.4(c) adds to the confusion. Model Rule 8.4(c), which has no express knowledge requirement, makes it unethical for a lawyer to “engage in conduct . . . involving fraud,”<sup>30</sup> and Model Rule 1.0(d) specifically incorporates the substantive and procedural law of fraud into the term “fraud” under the Model Rules.<sup>31</sup> Because the law of fraud generally uses a recklessness standard of intent, Model Rule 8.4(c) may thus incorporate recklessness via other law. A number of jurisdictions have taken this approach and applied the recklessness standard

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disciplinary context). *Small* recognizes an exception to the recklessness standard for the misappropriation of client funds on the ground that the usual discipline for violating that rule is disbarment and so a stricter standard of knowledge is appropriate. *Id.* For other cases adopting a recklessness standard in disciplinary matters, see *Office of Disciplinary Counsel v. Wrona*, 908 A.2d 1281, 1288 (Pa. 2006) (approving recommendation of disciplinary board applying recklessness standard to find violations of several rules, including Model Rule 3.3(a)(1), which includes a “knowing” requirement) and *Fla. Bar v. Calvo*, 630 So.2d 548, 550 n.3 (Fla. 1993) (disbarring lawyer for knowingly assisting in a client’s securities fraud and finding that his “acts or omissions at a minimum constituted reckless misconduct”).

29. See *In re Goldstone*, 839 N.E.2d 825, 830 (Mass. 2005) (finding that even if lawyer “did not have actual knowledge that the billings he sent [to the client] were false and that he was not entitled to the fees and costs claimed, he consciously avoided obtaining readily available information that would have put him on actual notice, and thus his actions constituted willful blindness and intentional misconduct”); *In re Skevin*, 517 A.2d 852, 857 (N.J. 1986) (upholding discipline of a lawyer for misappropriation of client funds under knowledge standard, and holding that knowledge can be established by demonstrating “willful blindness,” defined as a “situation where the party is aware of the highly probable existence of a material fact but does not satisfy himself that it does not in fact exist”); *Ga. Formal Advisory Op. 05-10* (2006) (applying “willful blindness” standard to Model Rule 5.1(c)); *cf. In re Wines*, 370 S.W.2d 328, 334 (Mo. 1963) (stating that even though the lawyer had “no specific intent to deceive . . . , there was nevertheless an independent representation [of facts] by [the lawyer] . . . when he knew no such facts and had made no effort whatever to investigate,” and concluding that even if the lawyer was not ‘knowingly a party to an attempted fraud,’ . . . his acts in so carelessly dealing with the truth did not constitute that ‘candor and fairness’ required of lawyers, and that such conduct was also contrary to ‘honesty’ in its true sense”).

30. MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (stating that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation”).

31. *Id.* R. 1.0(d) (defining “fraud” or “fraudulent” to mean “conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive”). An accompanying comment clarifies that the “purpose to deceive” language is meant to exclude negligent misrepresentation or negligent failure to apprise a person of relevant information, but makes no mention of recklessness. *Id.* R. 1.0 cmt. 5. Note that the reference to “procedural law” means that Model Rule 8.4(c) governs fraud on the court as well as transactional fraud.

to Model Rule 8.4(c).<sup>32</sup> Does that indirect incorporation of recklessness unreasonably conflict with the expressly stated actual knowledge standard in Model Rules 1.2(d) and 4.1?<sup>33</sup>

One might try to resolve the Model Rule 8.4(c) problem by suggesting that Model Rule 8.4(c) is limited in application to situations in which a lawyer is not representing a client.<sup>34</sup> Nothing, however, in the text or comments of the rule so limits it, and a number of authorities apply it more broadly.<sup>35</sup> Moreover, if Model Rule 8.4(c) is limited only to lawyer conduct apart from the representation of clients and the recklessness standard is not included as part of the actual knowledge standard contained in other rules, that creates an embarrassing possibility: the Model Rules, by adopting a stricter standard of knowledge, endorse a more lenient standard for fraud than do tort and criminal law. Model Rule 8.4(b) addresses this problem with respect to criminal law by making it unethical for a lawyer to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” On the other hand, at least in theory, a lawyer could face liability in tort for fraud under a

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32. See *Romero-Barcelo v. Acevedo-Vila*, 275 F. Supp. 2d 177, 206 (D.P.R. 2003) (holding that a violation of Rule 8.4(c) can be found if a lawyer makes a statement “with reckless ignorance of the truth or falsity thereof”); Office of Disciplinary Counsel v. Anonymous, 714 A.2d 402, 407 (Pa. 1998) (applying a standard of “reckless disregard to the truth or falsity” of a statement to discipline of a lawyer for knowingly making a false statement); Comm. on Prof’l Ethics & Conduct of the Iowa State Bar Ass’n v. Ramey, 512 N.W.2d 569, 569 (Iowa 1994) (applying to predecessor to Rule 8.4(c) a “reckless disregard of the true facts” standard to suspend lawyer for knowingly making a false statement); Att’y Grievance Comm’n v. Sliffman, 625 A.2d 314, 321 (Md. 1993) (applying predecessor to Rule 8.4(c) and upholding a finding that lawyer “must have known” of client fraud even though there was not “clear and convincing evidence” that he actually knew); *In re Dobson*, 427 S.E.2d 166, 168 (S.C. 1993) (finding that lawyer violated predecessor to Rule 8.4(c) by “deliberately evad[ing] knowledge of facts which tended to implicate him in a fraudulent scheme”); *People v. Rader*, 822 P.2d 950, 953 (Colo. 1992) (holding that lawyer violated predecessor to Rule 8.4(c) by engaging in conduct “so careless or reckless that it must be deemed to be knowing”).

33. In one case in which federal prosecutors were disqualified because of violations of Rule 4.1(a), the Government unsuccessfully raised the discrepancy between the “knowledge” standard of Rule 4.1(a) and the absence of a knowledge standard in Rule 8.4(c) to argue that precedent finding recklessness sufficient scienter under Rule 8.4(c) could not apply to Rule 4.1(a). *United States v. Whittaker*, 201 F.R.D. 363, 366–67 (E.D. Pa. 2001). The court rejected that argument and instead applied the recklessness standard to both rules. *Id.*

34. See MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. 1 (“For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representation a client, see Rule 8.4.”).

35. See, e.g., N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 956 (2013); see also MODEL RULES OF PROF’L CONDUCT pmb. 3 (referencing Model Rule 8.4 as an example of a rule that applies “even when [lawyers] are acting in a nonprofessional capacity”).

recklessness standard, while escaping discipline under the actual knowledge standard, unless Model Rule 8.4(c) applied.<sup>36</sup>

Perhaps the response to all of this confusion is that it is much ado about nothing.<sup>37</sup> The combination of the “inferred from circumstances” language of Model Rule 1.0(f), the comments endorsing a willful blindness standard, Model Rule 8.4(c), and case interpretations of both the ethics rules and other law are arguably enough to make recklessness for all intents and purposes the true standard of knowledge under the Model Rules. If that is the case, however, why not clear up all ambiguity and just write recklessness or willful blindness into Model Rule 1.0, or at least its comment? The answer, in part, is that the knowledge standard is the key marker in a contentious struggle over the scope of a lawyer’s duty to investigate.<sup>38</sup>

## II. KNOWLEDGE AND THE DUTY TO INVESTIGATE

Recklessness is merely a doctrinal label. The more pragmatic question is what must a lawyer do to avoid risking discipline or other consequences when confronted with Model Rules whose duties are triggered by a

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36. The Restatement makes this disparity clear in § 94, which contains two different provisions addressing aiding and abetting by a lawyer, § 94(1) dealing with liability and § 94(2) dealing with professional discipline. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 94(1), (2) (2000). In comment a to that section, the drafters call specific attention to the fact that other law “may define scienter . . . differently from” the disciplinary rules. *Id.* cmt. a.

37. See Moore, *supra* note 19, at 23–24 (suggesting that once sufficient circumstantial evidence is developed, proving that a lawyer “must have known” will generally not be difficult and will be sufficient to satisfy the actual knowledge standard); see also Roiphe, *supra* note 9, at 212 (noting that some might argue that given Model Rule 8.4(b), “it does not really matter whether the knowledge requirement explicitly forbids [criminal] conduct” but rejecting that argument because of the “symbolic function” that the Model Rules serve).

38. Professor Roiphe sees the struggle as reflecting different conceptions of the lawyer’s role. She argues:

The bar’s persistent refusal to adopt a willful ignorance standard, except when reacting to threats of more extensive external regulation, confirms that at least in this instance, the bar is acting to ward off greater regulation by making a nod toward its public function without in fact altering the zealous nature of its constituents’ practice. . . . The actual knowledge standard serves to mask a fundamental disagreement. It papers over the real issues by allowing the profession to articulate and publicly espouse a devotion to communal ends while in reality encouraging lawyers to pursue the interests of their clients without regard to the consequences.

Roiphe, *supra* note 9, at 221–22; see also Susan Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1422–23 (1992) (describing the bar’s use of ethics rules to “trump other law (or qualify it or render it ambiguous)”).

lawyer's "knowledge?" The lawyer might reason as follows. Model Rule 1.0(f)'s "actual knowledge" standard rejects a duty to investigate; in fact, the absence of such a duty is what distinguishes "know" from "reasonably should know" in the Model Rules. Thus, a lawyer faced with a suspicious fact that is not sufficient along with other circumstances to impart actual knowledge need not do anything further. In fact, investigating would be a bad idea because that would put the lawyer at risk of violating the knowledge-based rule.

Statements that the knowledge requirement implies the absence of a duty to investigate are common. For example, when interpreting the knowledge requirement of Rule 3.3, one court rejected a duty of inquiry even if a lawyer has clear information indicating crime or fraud by the client, stating that "the ethical rules, as written, [do not] require a lawyer to take affirmative steps to discover client fraud or future crimes," and adding that "imposing a duty to investigate the client would be incompatible with the fiduciary nature of the attorney-client relationship."<sup>39</sup> Similarly, several Restatement comments state that knowledge does not "assume" or "require" a duty of inquiry, even when a "reasonable" or "prudent" lawyer might have discovered certain facts.<sup>40</sup>

Stated that way, the proposition is too broad. A more defensible formulation is: the inclusion of a knowledge requirement in an ethics rule expresses an intention not to create a duty of inquiry *where one does not otherwise exist*. For example, Model Rule 8.3, which requires a lawyer to report the misconduct of another lawyer when the first lawyer knows of it, operates against a background in which the first lawyer has no general obligation to inquire about the behavior of other lawyers or even to follow up suspicions, unless it somehow benefits the lawyer's client.<sup>41</sup> By contrast, Model Rules that include a "reasonably should know" standard implicitly

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39. *United States v. Del Carpio-Cotrino*, 733 F. Supp. 95, 99–100 n.9 (S.D. Fla. 1990). Despite the quoted statement, the court found that the lawyer actually knew that his client had jumped bail and therefore had an obligation to report this fact to the court.

40. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 51 cmt. h, illus. 6 (stating that "knowledge" for purposes of that section "neither assumes nor requires a duty of inquiry"); *id.* § 94 cmt. g (stating that for purposes of § 94(2), the actual knowledge standard does not require a lawyer "to make a particular kind of investigation in order to ascertain more certainly what the facts are, although it will often be prudent for the lawyer to do so"); *id.* § 120 cmt. c ("Actual knowledge does not include unknown information, even if a reasonable lawyer would have discovered it through inquiry.").

41. See MODEL RULES OF PROF'L CONDUCT R. 8.3(a) cmt. 2 (2013); see also Ill. State Bar Ass'n on Prof'l Conduct, Advisory Op. 90-28 (1991) (stating that a lawyer who receives hearsay information about another lawyer's ethics violation has no duty to investigate further, because "Rule 8.3 does not cast the members of the legal profession in the role of investigators").

create a duty to investigate that does not otherwise exist, usually to protect some third party interest.<sup>42</sup>

Most duties to investigate, however, are created by substantive rules, not by the scienter standard. In many situations, the Model Rules or other regulations impose duties on a lawyer to investigate.<sup>43</sup> Duties of inquiry are of particular importance for business lawyers engaged in transactional practice, though similar duties exist for lawyers involved in civil litigation as well as criminal prosecutors and defense lawyers<sup>44</sup>. The remainder of this Section discusses a number of examples, focusing on duties imposed on business lawyers.

#### A. *Duties to Investigate in the Model Rules*

Consider first duties of inquiry in the Model rules. The very first Model Rule, stating the lawyer's fundamental duty of competence "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"<sup>45</sup> of a client, which in turn requires "inquiry into and analysis of the legal and factual elements of the problem."<sup>46</sup> In a recent opinion on Client Due Diligence, Money Laundering, and Terrorist Financing, the ABA reaffirmed that a lawyer's duty of competence includes an obligation to investigate:

It would be prudent for lawyers to undertake Client Due Diligence ("CDD") in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity. This admonition is consistent with Informal Opinion 1470 (1981), where we stated that "[a] lawyer cannot escape responsibility by avoiding inquiry. A lawyer must be satisfied, on the facts before him and readily available to him, that he can perform the requested services without abetting fraudulent or criminal conduct and without relying on past client crime or fraud to achieve results the client now wants." Further in that opinion we stated that, pursuant to a lawyer's ethical obligation to act competently, a duty to inquire further may also arise.

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42. See *supra* note 11 (listing ethics rules using the "reasonably should know" standard).

43. See, e.g., Roiphe, *supra* note 9, at 199–202. But cf. HAZARD, JR., HODES, & JARVIS, *supra* note 8, §§ 1-23, 1-52 (arguing that for many of the duties of investigation imposed on lawyers, "the inquiry is in the nature of a 'probable cause hearing' rather than an endeavor to establish personal knowledge on the lawyer's part").

44. For criminal defense lawyers, a separate set of rules promulgated by the ABA impose a much more detailed duty to investigate than that found in Model Rule 1.1. A.B.A., ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 119–20 (3d ed. 1993).

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

46. *Id.* R. 1.1 cmt. 5.

An appropriate assessment of the client and the client's objectives, and the means for obtaining those objectives, are essential prerequisites for accepting a new matter or continuing a representation as new facts unfold. Rule 1.2(d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. A lawyer also is subject to federal laws prohibiting conduct that aids, abets, or commits a violation of U.S. . . . laws . . . .

The level of appropriate CDD varies depending on the risk profile of the client, the country or geographic area of origin, or the legal services involved.<sup>47</sup>

Although the opinion does not discuss when a breach of the duty of inquiry might support a finding of "knowledge," the reference to Model Rule 1.2(d) and other law suggests some connection.

Other ethical duties that a lawyer owes to a client may also imply a duty to investigate in certain circumstances. These duties include the duty to communicate with the client,<sup>48</sup> to seek a client's informed consent,<sup>49</sup> to avoid conflicts of interest,<sup>50</sup> to "exercise independent judgment and render candid advice,"<sup>51</sup> or to determine a non-frivolous basis in fact and law for bringing or defending against a civil claim.<sup>52</sup> Other Model Rules and comments recognize that lawyers may voluntarily undertake duties of investigation.<sup>53</sup>

47. ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 13-463 (2013) (footnotes omitted).

48. See MODEL RULES OF PROF'L CONDUCT R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

49. See *id.* R. 1.0(e) (defining "informed consent" as "the agreement by a person to a proposed course of action after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct"); *id.* R. 1.0(e) cmt. 6 ("The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision.").

50. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 3 ("To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. . . . Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this rule.").

51. *Id.* R. 2.1.

52. See *id.* R. 3.1 & cmt. 2 ("What is required of lawyers . . . is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions.").

53. See *id.* R. 1.11(e)(1) (including "investigation" as "matter" in which government lawyer might be involved); *id.* R. 1.13(d) & cmts. 2, 7 (recognizing lawyer

It is true that any duty to investigate that the lawyer owes to the client under the Model Rules is not boundless. The duty to investigate is subject to a reasonableness requirement.<sup>54</sup> Thus, a lawyer must calculate whether the likely value of the investigation exceeds the costs.<sup>55</sup> The scope of the duty to investigate can also be limited by the nature and duration<sup>56</sup> of the representation, as well as by specific agreements between the client and the lawyer concerning the scope of the representation<sup>57</sup> or the type of advice sought.<sup>58</sup> Of course, these limits themselves have limits. A lawyer and client cannot define the lawyer's responsibilities so narrowly as to abrogate the lawyer's duty of competence.<sup>59</sup>

### B. Duties to Investigate in Other Law

In addition to the Model Rules, other law may impose on lawyers a duty to investigate. Most notably, malpractice law<sup>60</sup> and agency law<sup>61</sup> mirror

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for an organization asked to investigate wrongdoing); *id.* R. 3.6 (imposing limits on public speech for a lawyer who is participating or has participated in the "investigation" of a matter; *id.* R. 4.2 cmt. 5 (discussing investigative activities of government lawyers).

54. Model Rule 1.0(h) defines "reasonable" as "the conduct of a prudent and competent lawyer." MODEL RULES OF PROF'L CONDUCT R. 1.0(h).

55. *Id.* R. 1.1 cmt. 5 (stating that the "required attention and preparation are determined in part by what is at stake").

56. *See, e.g.*, Mich. Ethics Op. RI-13 (1989) (opining that a lawyer has no duty to investigate the truth of a client's testimony once the lawyer is discharged for purposes of complying with Rule 3.3).

57. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

58. *Id.* R. 2.1 cmt. 5 ("A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwarranted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.").

59. *See id.* R. 1.2(c) (noting that the limit on the representation must be "reasonable"); *id.* R. 1.2(c) cmt. 7 ("Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation necessary for the representation.").

60. *See, e.g.*, RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 52 cmt. c (2000) (stating that a "lawyer must perform tasks reasonably appropriate to the representation, including, where appropriate, inquiry into facts"); *see also* Tush v. Pharr, 68 P.3d 1239 (Alaska 2003) (stating that investigation into facts other lawyers would customarily investigate is a professional duty).

61. *See* RESTATEMENT (THIRD) OF AGENCY § 8.11(1) (2006) (imposing on an agent "a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know or should know when . . . the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal"); *id.* § 8.11(1) cmt. d ("An agent's duty of care may require the agent to obtain information that is material to the principal's interests. If an agent's

the duty of inquiry noted in the comment to Model Rule 1.1.<sup>62</sup> Rule 11 of the Federal Rules of Civil Procedure includes a duty of inquiry parallel to that stated in the comment to Model Rule 3.1.<sup>63</sup> Lawyers engaged in writing tax opinions<sup>64</sup> and other opinions<sup>65</sup> often have duties to investigate the underlying facts.

Legal duties of inquiry imposed are perhaps most developed for securities lawyers. A well-known case discussing the duty of inquiry is *FDIC v. O'Melveny & Myers*, which held that securities lawyers retained to draft an offering document owe a duty "to protect the client from the liability which may flow from promulgating a false or misleading offering to investors" by conducting a "reasonable, independent investigation to detect and correct false or misleading materials."<sup>66</sup> An older case

inquiry or investigation has been limited in some respect, the agent has a duty so to inform the principal."). Of particular relevance to lawyers is the agent's duty to provide information to the principal, including "information [that] may prove beneficial to third parties because it may enable the principal to take action to avoid harm that otherwise would be inflicted on third parties." *Id.* §. 8.11(1) cmt. b.

62. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5.

63. *Compare* FED. R. CIV. P. 11(b) (2010) (requiring a lawyer who files a pleading in a civil case to certify to certain representations "to the best of the [lawyer's] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances"), with MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 2 (requiring lawyers to "inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions").

64. 31 C.F.R. § 10.35(c)(1)(i) (2012) (Circular 230) (requiring tax practitioners who issue "covered opinions" to "use reasonable efforts to identify and ascertain the facts, which may relate to future events if a transaction is prospective or proposed, and to determine which facts are relevant. "); *see also* ABA Formal Op. 346 (1982) ("The lawyer who accepts as true the facts which the promoter tells him, when the lawyer should know that a further inquiry would disclose that these facts are untrue, also gives a false opinion.").

65. *See, e.g.*, *Excalibur Oil Inc. v. Sullivan*, 616 F. Supp. 458, 463 (N.D. Ill. 1985) ("Necessarily implicit in [a contract by a lawyer to prepare a title opinion] is the lawyer's duty to investigate the title with reasonable diligence and to report his findings accurately."); *cf.* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 95(3) cmt. c (stating that a lawyer giving an opinion does not usually have a duty of investigation unless the opinion "is stated to be predicated upon a factual investigation by the lawyer").

66. *FDIC v. O'Melveny & Myers*, 969 F.2d 744, 749 (9th Cir. 1992), *rev'd on other grounds*, 512 U.S. 79 (1994). More recently, in *Facciola v. Greenberg Traurig, LLC*, No. CV-10-1025-PHX-FJM, 2011 WL 2268950, at \*5 (D. Ariz. June 9, 2011), the court, in rejecting a motion to dismiss a claim of violation of state securities laws by a law firm, stated that the law firm, "as the primary drafter of the language in the [private offering memoranda] had a duty to exercise reasonable care to ensure that the statements it made, or substantially participated in making, were not false or misleading." The court did not rely solely on the breach of the duty of care, but found other alleged facts supporting knowledge.



discussing what counts as a reasonable investigation is *Escott v. BarChris Constr. Corp.*, in which the court stated:

It is claimed that a lawyer is entitled to rely on the statements of his client and that to require him to verify their accuracy would set an unreasonably high standard. This is too broad a generalization. It is all a matter of degree. To require an audit would obviously be unreasonable. On the other hand, to require a check of matters easily verifiable is not unreasonable. Even honest clients can make mistakes.<sup>67</sup>

A more recent example is *In re Brooke Corp.*,<sup>68</sup> in which a group of related entities selling financial products through franchisees retained a law firm to act as securities counsel for several stock offerings and to advise the client about the propriety of declaring dividends. After the entities went bankrupt, the trustee sued the law firm for malpractice and aiding and abetting a breach of fiduciary duty by the client's board. In rejecting the law firm's motion to dismiss the malpractice claim, the court found that as a result of information the law firm acquired during the representation, it "became aware or should have become aware that [the client] improperly recognized . . . revenue and . . . therefore . . . knew or should have known [the client] was insolvent."<sup>69</sup> In rejecting the motion to dismiss the aiding and abetting claim, the court relied on several allegations, including that the law firm "knew or should have known [that] improper accounting policies made [the client] appear solvent when it was not."<sup>70</sup>

In addition, in-house corporate counsel and outside counsel who serve as a company's "chief legal officer" for purposes of securities law compliance are subject to a duty of inquiry imposed by the Sarbanes-Oxley rules governing lawyers. That duty, triggered by the receipt of a report by another lawyer of "evidence of a material violation," requires the chief legal officer to "cause such inquiry into the evidence of a material violation as he or she reasonably believes is appropriate to determine whether the material violation described in the report has occurred, is ongoing, or is about to occur."<sup>71</sup>

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67. *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643, 690 (S.D.N.Y. 1968).

68. *In re Brooke Corp.*, 467 B.R. 513 (D. Kan. 2012).

69. *Id.* at 521.

70. *Id.* at 523.

71. 17 C.F.R. § 205.3(b)(2) (2012).

C. *Implications of Duties to Investigate for Model Rules Including a Knowledge Standard*

The duty to investigate can have several implications for lawyers trying to comply with their ethical obligations and faced with a rule including duties triggered by what a lawyers “knows.” First, the failure to investigate can be an independent ethical violation of a different rule. Most broadly, such a failure would violate the duty of competence in Model Rule 1.1. Although disciplinary authorities generally do not discipline lawyers for isolated negligent acts in the absence of other rule violations, they could view more harshly intentional violations such as deliberately refraining from undertaking a required, reasonable investigation, or deliberately skewing a required investigation to avoid acquiring certain types of knowledge.<sup>72</sup>

Second, the breach of a duty to investigate imposed by other law could result in liability, such as legal malpractice, even for conduct covered by an ethical rule requiring actual knowledge. Less obviously, duties to investigate imposed by other law could turn the Model Rules including knowledge standards from protections to vulnerabilities. Consider, for example, a lawyer sued for malpractice for failure to investigate and uncover a client’s fraud. In such a case, in my view, the Model Rules on fraud, all of which include a knowledge standard, could be relevant to establish causation for the malpractice claim, even in the absence of actual knowledge.<sup>73</sup> That is, the claim may be that if the lawyer had exercised due care and conducted a reasonable investigation, the lawyer would have learned of the fraud. Once the lawyer knew of the fraud, the lawyer would have certain obligations, as set out in Model Rules 1.2(d), 1.13(b), and 4.1, including obligations not to continue in the fraud,<sup>74</sup> to withdraw,<sup>75</sup> to

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72. See MODEL RULES OF PROF’L CONDUCT scope 19 (2013) (stating that “the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of the sanction, depend on the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.”); cf. ABA Formal Op. 335 n.1 (1974) (identifying a duty to investigate in the context of offering an opinion about whether securities need to be registered, but asserting that the duty is not “mandatory” and failure to adhere to the duty does not violate the predecessor to Model Rule 1.1 unless “the lawyer’s conduct in furnishing his opinion involves *indifference* and a *consistent failure* to carry out the obligations he has assured to his client or a *conscious disregard* for the responsibility owed to his client”) (emphasis added).

73. I have made this argument in a legal malpractice case in which I served as an expert witness.

74. MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 10 (“A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent.”).

75. *Id.* RR. 1.16(a), 1.2 cmt. 10, 4.1 cmt. 3.

disavow previously given opinions,<sup>76</sup> and even make a disclosure.<sup>77</sup> These knowledge-based obligations would then be relevant as evidence of the standard of care that would apply had the lawyer exercised the duty to investigate.<sup>78</sup> If a court is willing to assume that the lawyer who had fulfilled the duty to investigate would then have complied with the obligations in fraud rules, the plaintiff can argue that the losses from the fraud would have been avoided, thus establishing causation. As a result, a lawyer who thinks that not knowing would provide a safe harbor against liability might be in for a rude awakening. Precisely the opposite might be true.

Third, a deliberate breach of a duty to investigate, *when one otherwise exists*, could serve as circumstantial evidence supporting actual knowledge. This is one possible meaning of Judge Friendly's statement of the willful blindness rule, that a lawyer cannot close his eyes to facts he has a "duty to see." The recklessness standard does not create this duty; rather, the duty is an otherwise existing duty whose violation may be evidence of recklessness depending on the circumstances. The recklessness is the extreme unreasonableness in failing to satisfy the duty of inquiry when the facts were suspicious enough and the costs of following up low enough.

Thus, when a duty to investigate exists, viewing the knowledge requirement as negating or mitigating a duty to investigate that otherwise exists can easily lead lawyers into trouble.<sup>79</sup> The great risk of the knowledge requirement is that lawyers may view it as trumping an otherwise existing duty of inquiry. Instead of lawyers asking whether a

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76. See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 10 ("In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like."); *id.* R. 4.1 cmt. 3 ("Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like."); *id.* RR. 1.13(c), 1.6(b)(2), (3).

77. MODEL RULES OF PROF'L CONDUCT R. 4.1(b) & cmt. 3 ("In extreme cases, substantive law may require a lawyer to disclose information related to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6."). Model Rules 1.6(b)(2), (3) permit disclosure if a client has used or is using a lawyer's services in furtherance of the crime or fraud. *Id.* RR. 1.6(b)(2), (3).

78. *Cf.* MODEL RULES OF PROF'L CONDUCT scope 20 (stating that "since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct").

79. As Professor Roiphe has recently argued, "it creates an odd and confusing tension to encourage investigation through the substantive standards of attorney conduct while simultaneously discouraging it indirectly through the definition of knowledge." Roiphe, *supra* note 9, at 198-99.

duty of inquiry exists in a situation, what they need to do to satisfy such a duty, and whether the failure to satisfy such a duty may support an inference of knowledge, lawyers instead tend to start with the question of knowledge and never ask the duty of inquiry questions, or view them as afterthoughts.

*D. How Knowledge-Based Model Rules Can Mislead Lawyers: Model Rules 1.13(b) and 3.8 as Examples*

The failure of the Model Rules to recognize and articulate the implications of duties to investigate for Model Rules including duties triggered by lawyer “knowledge” may well contribute to lawyers misunderstanding their ethical responsibilities. Perhaps the most troubling rule in this respect is Model Rule 1.13(b), the up-the-ladder reporting rule.<sup>80</sup> Despite the fact that both the Restatement<sup>81</sup> and the Sarbanes-Oxley lawyer rules<sup>82</sup> abandoned the knowledge requirement for corporate counsel

80. Model Rule 1.13(b) states:

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization . . . .

MODEL RULES OF PROF’L CONDUCT R. 1.13(b); *cf.* OHIO RULES OF PROF’L CONDUCT R. 1.13(b) (2013) (adopting “reasonably should know” standard); TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.12(b) (2013) (duty triggered when lawyer “learns or knows” of wrongdoing).

81. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 96(2) (2000) (requiring a lawyer representing an organization to take steps to protect the organizational client if the lawyer “*knows of circumstances indicating* that a constituent of the organization has engaged in action or intends to act in a way that violates a legal obligation to the organization” under certain additional conditions) (emphasis added).

82. 17 C.F.R. § 205.3(b)(1) (2012) (requiring an attorney appearing and practicing before the SEC who “becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer,” to report such evidence within the organization). Unfortunately, the SEC rules effectively undermine this lower “trigger” for lawyer action through an overly restrictive and convoluted definition of “evidence of a material violation.” *Id.* § 205.2(e) (defining “evidence of a material violation” to mean “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.”). For a critique of this rule, see Cramton, Cohen & Koniak, *supra* note 19, at 751–64.

faced with potential client wrongdoing, the ABA retained it in the post-Enron revisions to Model Rule 1.13(b), perhaps as a political tradeoff for adopting in those revisions the controversial permissive disclosure provisions in Model Rule 1.13(c) and Model Rule 1.6(b).<sup>83</sup> Read literally, Model Rule 1.13(b) says that a lawyer has no obligation to take any action, even action “reasonably necessary in the best interest of the organization,” if a lawyer does not “know” of wrongdoing within the organization, though, as already discussed, the comment to Model Rule 1.13 adds a “willful blindness” interpretation of knowledge.

Moreover, although another comment to Model Rule 1.13 states that the “authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules,” neither this comment nor any other comment to Model Rule 1.13 makes any express reference to Model Rule 1.1 or the lawyer’s duty of competence to the organization under other law,<sup>84</sup> either of which may require the lawyer to act on less

83. The revised text of Model Rule 1.13(c) provides:

Except as provided in paragraph (d), if

- (1) despite the lawyer’s efforts in accordance with paragraph (b) the highest authority that can act on behalf of organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and
  - (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,
- then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

MODEL RULES OF PROF’L CONDUCT R. 1.13(c). The revised text of Model Rule 1.6(b) states in relevant part:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

.....

- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.

.....

MODEL RULES OF PROF’L CONDUCT R. 1.6(b).

84. See MODEL RULES OF PROF’L CONDUCT R. 1.13 cmt. 6 (referencing Rules 1.2(d), 1.6, 1.8, 1.16, 3.3, and 4.1, but not Rules 1.1, 1.4, or 2.1).

than “knowledge.”<sup>85</sup> Nor is this omission likely accidental. The ABA Task Force Report on Corporate Responsibility, which had endorsed relaxing the “knowledge” requirement in Model Rule 1.13(b), nevertheless rejected a “reasonably should know” standard because of criticisms that “this standard may impose a duty, of uncertain extent, to investigate that could only be evaluated after the fact with the benefit of hindsight,” and that “the lawyer may not be able to insist that the client pay for, or even permit, the investigation that may, in the light of hindsight, prove to have been necessary.”<sup>86</sup> The hindsight danger is a legitimate concern, but one that exists for any lawyer subject to a duty of inquiry. It is not obvious why the Model Rules should single out lawyers for organizations for more lenient treatment than other lawyers. Similarly, the fact that a client might not want or be willing to pay for an investigation is a relevant fact, but again, that is true for many actions that might be necessary to satisfy the duty of care. Most importantly, the criticisms seem to start from the premise that a duty to investigate for corporate lawyers does not otherwise exist unless Model Rule 1.13(b) establishes it. That proposition is, in my view, incorrect.

Another Model Rule that runs the risk of misleading lawyers, in a completely different context, is Model Rule 3.8, the ethics rule for prosecutors. Of its eight subsections, four include a knowledge requirement. All of these have to do with evidence or information that would benefit the defense. The starting point for understanding the rule is stated in the first comment to Model Rule 3.8:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.<sup>87</sup>

How does the knowledge requirement affect these obligations? Model Rule 3.8(a) requires a prosecutor to “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.” The use of the

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85. See, e.g., RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 96 cmt. e (stating that the “lawyer . . . must not knowingly or negligently assist any constituent [of the organization] to breach a legal duty to the organization,” and adding that a “lawyer is also required to act diligently and to exercise care by taking steps to prevent reasonably foreseeable harm to a client.”).

86. *Report of the American Bar Association Task Force on Corporate Responsibility*, 59 BUS. LAW. 145, 167 n.76 (2003).

87. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1.

knowledge requirement here is odd. Model Rule 3.8(a) is the parallel to Model Rule 3.1, the rule for civil litigation, which does not include a knowledge requirement and implicitly recognizes a duty of inquiry as a necessary means of satisfying the rule. If the knowledge requirement is supposed to indicate the lack of a duty of inquiry, how does that square with the prosecutor's obligation, stated in the comment, "to see that . . . guilt is decided upon the basis of sufficient evidence," or with the prosecutor's duties under other law? Perhaps the knowledge requirement in Model Rule 3.8(a) is intended simply to identify a quantum of certainty, not to limit the duty of inquiry. But nothing in the comments provides any guidance on this question.

On the other hand, the knowledge requirement in Model Rules 3.8(g) and (h), adopted by the ABA in 2008, operates against a backdrop of no duty of investigation. Both rules have to do with the responsibility of a prosecutor after a defendant's conviction, when the prosecutor's duties to collect and examine evidence have generally ended. Model Rules 3.8(g) and (h) create exceptions to that proposition when the prosecutor "knows" of exculpatory evidence. Under Model Rule 3.8(g), if a prosecutor "knows" of "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit" the crime, and the conviction was obtained in the prosecutor's jurisdiction, the prosecutor has a duty to "undertake further investigation."<sup>88</sup>

Unlike Model Rule 3.8(a), Model Rule 3.8(g) includes the terms "credible" and "reasonable likelihood" to address the level of certainty of knowledge, and the fact that knowledge triggers an expressly stated duty to investigate suggests that one does not otherwise exist. Model Rule 3.8(h) then addresses the outcome of that investigation, requiring that if, as a result of such investigation, the prosecutor "knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction."<sup>89</sup> Here, knowledge combined with a higher level of certainty (clear and convincing evidence) entails a stronger duty to take remedial action.

Lastly, Model Rule 3.8(d) requires a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."<sup>90</sup> Does the knowledge requirement here operate against a

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88. *Id.* R. 3.8(g)(2)(ii).

89. *Id.* R. 3.8(h).

90. *Id.* R. 3.8(d). The rule also requires a prosecutor to "disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor" in

background duty of inquiry? A recent ABA opinion interpreting Model Rule 3.8(d) provides a sensible answer, but its analysis of the knowledge requirement takes an unnecessarily confusing and circuitous path to get there. The opinion's discussion begins with the technically correct, but misleading, point that "Rule 3.8(d) does not establish a duty to undertake an investigation in search of exculpatory evidence."<sup>91</sup> The point is misleading because it suggests, though does not explicitly say, that there is no duty to investigate *apart from* Model Rule 3.8(d). The opinion then compounds the problem by stating that the "knowledge requirement thus *limits* what might otherwise appear to be an obligation substantially more onerous than prosecutors' legal obligations under other law."<sup>92</sup> Although not entirely clear, this statement appears to suggest that the knowledge requirement limits any otherwise existing duty to investigate. Fortunately, the opinion goes on to list several exceptions to the supposed absence of a duty to investigate: when the prosecutor "actually knows or infers from the circumstances, or it is obvious, that the files contain favorable evidence or information," or if the prosecutor "was closing his eyes to the existence of such evidence or information." The opinion's apparent endorsement of the *Benjamin* willful blindness standard—in a rule that actually lacks a willful blindness comment—thus goes beyond what the comments to Model Rules 1.13, 3.3, and 4.2 endorse. In a footnote at the end of the same paragraph, the opinion then finally adds:

Other law *may* require prosecutors to make efforts to seek and review information not then known to them. Moreover, Rules 1.1 and 1.3 require prosecutors to exercise competence and diligence, which would encompass complying with discovery obligations established by constitutional law, statutes, and court rules, and *may* require prosecutors to seek evidence and information not then within their knowledge and possession.<sup>93</sup>

The opinion's tentative and almost grudging acknowledgment of a duty of inquiry takes us almost to the opposite of where the discussion started.

Imagine if the opinion had started the other way. Generally, among their duties to their government clients, which include a public function,

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connection with sentencing. The rule includes an exception if the court relieves the prosecutor of his or her responsibilities.

91. ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009). The opinion repeats this point several times in the same paragraph in case we missed it the first time.

92. *Id.* (emphasis added).

93. *Id.* n.27 (emphasis added).



prosecutors have a duty to reasonably investigate ongoing criminal matters and must at least be attuned during such investigations to the possibility of exculpatory evidence, which if discovered, must be disclosed to the defense. A deliberate and unreasonable failure to investigate may support a conclusion that the prosecutor acted recklessly or with willful blindness, and therefore “knowingly,” in not disclosing exculpatory evidence.<sup>94</sup> The result would be essentially the same as the one in the ABA opinion, but the tone would feel very different.

The point is that when lawyers encounter a knowledge standard in the ethics rules, they should not think of it as negating or limiting a duty of inquiry, but should rather first ask whether such a duty otherwise exists in other ethics rules or law, and then, if it does, consider the scope of that duty, what failures might violate it, and whether a deliberate violation of that duty to avoid knowing certain information might serve as evidence of knowledge. If no duty of inquiry otherwise exists, the knowledge requirement does not create one in the ethics rule in which it appears, and the willful blindness standard should be interpreted in light of that fact. The duty of inquiry, or lack of one, should inform the knowledge standard, not the other way around.

### III. IMPUTED KNOWLEDGE AND THE DUTY OF INTRA-FIRM COMMUNICATION

Apart from adopting an actual knowledge standard to emphasize the lack of intent to create a duty of inquiry, the Model Rule drafters also may have intended the actual knowledge standard to preclude discipline in cases in which a lawyer’s knowledge is not personal, but “imputed” from the knowledge of others. Imputed knowledge is presumptive knowledge, and therefore not actual knowledge.<sup>95</sup> The broad statement that the knowledge standard precludes imputation is, however, as misleading as the statement that the knowledge standard precludes a duty of inquiry.

The doctrine of imputed knowledge is a well-recognized principle of the law of agency, partnership, and other business organizations. Agency law imputes to the principal facts material to the agent’s duties to the principal that an agent knows or has reason to know.<sup>96</sup> Similarly, the law of

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94. Cf. MODEL CODE OF PROF’L RESPONSIBILITY EC 7–13 (1980) (stating that “a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor’s case or aid the accused”).

95. See, e.g., Va. Legal Ethics Op. 1862 (2012) (stating that Rule 3.8(d) differs from *Brady v. Maryland*, 373 U.S. 83 (1963) because *Brady* imputes knowledge of state actors, such as the police, to the prosecutor, whereas Rule 3.8 does not).

96. RESTATEMENT (THIRD) OF AGENCY § 5.03 (2006). The reverse is not true: agency law does not impute a principal’s knowledge to the agent. *Id.* § 5.03 cmt. g. Nor does the law impute the knowledge of one agent to another.

partnership imputes to the partnership a partner's knowledge of any fact relating to the partnership.<sup>97</sup>

The doctrine of imputed knowledge is grounded in the agent's duty to communicate information to the principal,<sup>98</sup> as well as the desire to discourage the principal's own willful blindness. The doctrine is also linked to vicarious liability: when knowledge is an element of an agent's tort, a principal's liability for that tort can be understood either as vicarious or, if the knowledge is imputed to the principal, direct.<sup>99</sup> Imputed knowledge does not generally, however, support criminal liability.<sup>100</sup>

The imputed knowledge doctrine can apply to lawyers in several ways. First, lawyers are agents of their clients and so clients are bound by what their lawyers know. Second, lawyers practicing in firms are agents of those firms, and so a lawyer's knowledge may be imputed to the lawyer's firm. The remainder of this section considers the connection of these rules of imputation to a lawyer's ethical obligations, and the implications of imputation rules and the principles underlying those rules for the ethical definition of knowledge.

#### A. Imputation of a Lawyer's Knowledge to a Client

The law of agency imputes to a principal not only knowledge an agent actually has, but also knowledge that an agent has reason to know.<sup>101</sup> The

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97. REV. UNIFORM PARTNERSHIP ACT § 102(f) (1997). "Knowledge" is defined as "actual knowledge." *Id.* § 102(a). If, however, "notice" to a partnership is sufficient to bind the partnership, then "notice" to the partner of a fact is sufficient, and "notice" is defined to include a situation in which a partner "has reason to know [the fact] exists from all of the facts known to the [partner] at the time in question." *Id.* § 102(b)(3).

98. RESTATEMENT (THIRD) OF AGENCY § 8.11.

99. *See, e.g.*, FDIC v. Braemoor Assocs., 686 F.2d 550, 556 (1982) (finding a joint venture liable for a partner's fraud under either the imputed knowledge or vicarious liability sections of the partnership statute).

100. *See, e.g.*, United States v. Archer, 671 F.3d 149, 159 n.4 (2d Cir. 2011) ("In general, the law does not impute criminal liability to those who are unaware of the criminal activity."); RESTATEMENT (THIRD) OF AGENCY § 5.03 cmt. d(7) (stating that "personal knowledge may be required for some forms of criminal liability . . . and when a statute requires personal knowledge for a particular legal consequence"); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 5 cmt. d (2000) ("A lawyer's knowledge will not be attributed to the client to establish criminal liability, although evidence of the lawyer's knowledge might be admissible to show what the client knew.").

101. RESTATEMENT (THIRD) OF AGENCY § 5.03. According to Comment b: "An agent has reason to know a fact when a reasonable person in the agent's position would infer the existence of the fact, in light of facts that the agent does know." *Id.* § 5.03 cmt. b. The Restatement (Third) of the Law Governing Lawyers accepts this imputed knowledge doctrine, but does not say whether it requires actual knowledge or whether "reason to know" is sufficient. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 28(1) ("Information imparted to a lawyer during and related to the representation of a

imputation rule thus implicitly recognizes yet another version of the duty of inquiry, though it appears to be a duty triggered by more of a recklessness standard than a negligence standard.<sup>102</sup> Thus, if an agent, including a lawyer, intentionally or recklessly fails to know information that could affect the principal's interests, the principal incurs the consequences of imputed knowledge and may have a cause of action against the agent for breach of fiduciary duty. As noted in the previous section, lawyers have an ethical as well as a legal duty to protect their clients from liability, and so must be wary of unreasonably failing to know material facts simply to protect themselves from the ethical consequences of having knowledge, because doing so might disadvantage their clients. In the case of imputing a lawyer's knowledge to a client, then, the actual knowledge requirements of the ethics rules do not supplant the imputed knowledge rule. Rather, the imputed knowledge doctrine of agency law qualifies the actual knowledge requirements of the ethics rules.

#### *B. Imputation of a Lawyer's Knowledge to a Lawyer's Firm*

In addition, the imputed knowledge rule applies to lawyers acting in firms. Lawyers are agents of their firms just as they are agents of their clients. Law firms are thus bound by what their lawyers know and have reason to know. The Restatement of the Law Governing Lawyers accepts this imputed knowledge rule for purposes of vicarious liability of a law firm as an entity.<sup>103</sup> The application of this aspect of imputed knowledge in disciplinary cases seems limited, however, because the ethics rules in most jurisdictions apply to individual lawyers, not law firms.<sup>104</sup> Nevertheless, the principles underlying imputed knowledge may still be relevant in several ways.

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client is attributed to the client for the purpose of determining the client's rights and liabilities in matters in which the lawyer represents the client, unless those rights or liabilities require proof of the client's personal knowledge or intentions or the lawyer's legal duties preclude disclosure of information to the client.").

102. *See, e.g.,* Southport Little League v. Vaughan, 734 N.E.2d 261, 265 (Ind. App. 2000) ("This court has long recognized that a principal is charged with the knowledge of that which his agent by ordinary care could have known where the agent has received sufficient information to awaken inquiry."). The Restatement (Third) of Agency is somewhat unclear about the duty of inquiry in this situation. Comment b to § 5.03 states that there is no imputation if "the agent's failure to know the fact is the consequence of the agent's breach of a duty owed to the principal or to a third party." RESTATEMENT (THIRD) OF AGENCY § 5.03 cmt. b. The Reporter's Note to § 5.03, however, cites *Southport* and quotes the above language from the opinion, apparently with approval. *See id.* § 5.03 & reporter's note to cmt. b.

103. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 58 & cmt. c.

104. The exceptions are New York and New Jersey. *See* N.Y. RULES OF PROF'L CONDUCT R. 5.1(a) (2009); N.J. RULES OF PROF'L CONDUCT R. 5.1(a) (2002).

First, even when the imputed knowledge doctrine is not strictly applicable, the lawyer's duty to provide information to the firm,<sup>105</sup> as well as the duty of competence owed to the client, may necessitate that the lawyer communicate with other firm lawyers involved in a representation. Even though the knowledge of one lawyer is not strictly "imputed" to another lawyer in the same firm, a breach of these duties of intra-firm communication may mean that a lawyer "knows." According to the Restatement:

If the facts warrant, a finder of fact may infer that the lawyer gained information possessed by other associated lawyers, such as other lawyers in the same firm, where such an inference would be warranted due to the particular circumstances of the persons working together. Thus, for example, in particular circumstances it may be reasonable to infer that a lawyer who regularly consulted about a matter with another lawyer in the same law firm became aware of the other lawyer's information about a fact.<sup>106</sup>

That is, a lawyer's participation in a firm is part of the "special situation" and "continuity of conduct" Judge Friendly found relevant to the question of lawyer knowledge.

This aspect of imputed knowledge is particularly important in corporate representations involving large numbers of lawyers in a firm who work on different aspects of the representation. For example, many lawyers from Vinson & Elkins LLP represented Enron in a host of transactional matters. If these lawyers had been charged with violating Model Rule 1.2(d) for assisting in Enron's fraud (they were not), some of them would likely have tried to defend by saying they did not know about problems in transactions that they did not personally work on. In response, the disciplinary counsel would probably argue that the lawyers were likely talking to each other and coordinating their activities and that even if they were not, they should have been.<sup>107</sup> The point is that the actual knowledge standard in the Model Rules may provide less protection than lawyers think, even if the imputed knowledge rule does not strictly apply between lawyers in the same firm.

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105. See RESTATEMENT (THIRD) OF AGENCY § 8.11 cmt. b ("The principal may direct that information be furnished to another agent or another person designated by the principal.").

106. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 94 cmt. g.

107. I served as an expert witness for the bankruptcy trustee in the case against Vinson & Elkins alleging that it had violated the securities laws in its representation of Enron. In my expert declaration, I made a similar argument.

A second way the principles of imputed knowledge are potentially relevant to lawyers acting in firms appears in the Model Rules on the supervision of lawyers, Model Rule 5.1, and of nonlawyers, Model Rule 5.3. These rules have similar structures. Subsection (a) of both rules requires partners to “make *reasonable efforts* to ensure that the firm has in effect measures giving reasonable assurance that” the conduct of lawyers and nonlawyers is consistent with the ethics rules.<sup>108</sup> Subsection (b) of both rules requires any lawyer with direct supervisory authority over another lawyer or nonlawyer to “make *reasonable efforts* to ensure that” the conduct of the supervised person is consistent with the ethics rules.<sup>109</sup> Subsection (c) of both rules then describes the conditions under which any lawyer is “responsible” for conduct of another lawyer or nonlawyer who violates the ethics rules. Those conditions are that the lawyer (1) orders the conduct; (2) ratifies “specific conduct” of which he has “knowledge”; or (3) serves as a partner, manager, or supervisor and “fails to take reasonable remedial action” when the lawyer “knows of the conduct at a time when its consequences can be avoided or mitigated.”<sup>110</sup>

Once again, the imputed knowledge doctrine would not apply to supervisory lawyers individually, only to their firms, and the ethics rules are directed at individual lawyers. But the principle underlying imputed knowledge may still apply. One of the rationales for imputed knowledge is that it deters the principal from discouraging the agent to provide the principal with harmful information. Imputation means the principal will be affected by the information whether or not the principal seeks it. The situations governed by Model Rules 5.1 and 5.3 do not involve a principal, but rather a supervisory lawyer, who is in an analogous position. An actual knowledge requirement could discourage the supervisory lawyer from asking too many questions about what the supervised lawyer or nonlawyers is doing.

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108. MODEL RULES OF PROF'L CONDUCT RR. 5.1(a), 5.3(a) (2013) (emphasis added); *see also* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 11(1) (lawyers); *id.* § 11(4)(a)(i) (nonlawyers).

109. MODEL RULES OF PROF'L CONDUCT RR. 5.1(b), 5.3(b) (emphasis added); *see also* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 11(1) (lawyers); *id.* § 11(4)(a)(i) (nonlawyers).

110. MODEL RULES OF PROF'L CONDUCT RR. 5.1(c), 5.3(c); *see also* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §§ 11(3), 11(4)(b). Rules 5.1(c) and 5.3(c) suggest that a lawyer who is not a partner, manager, or supervisor could “order” or “ratify” conduct but it is not clear when that would be the case. In addition, although the agency law of ratification uses an actual knowledge requirement, *see* RESTATEMENT (THIRD) OF AGENCY § 4.06 & cmt. b, it also recognizes ratification when a principal “is shown to have had knowledge of facts that would have led a reasonable person to investigate further, but the principal ratified without further investigation.” *Id.* § 4.06 & cmt. d.

Consider then the structure of Model Rules 5.1 and 5.3. What is the relationship between the first two subsections of both rules, which impose a “reasonableness” standard comparable to a negligent supervision standard in agency law,<sup>111</sup> and the last subsection, which imposes a “knowledge” standard that seems to reject not only imputation, but negligence?<sup>112</sup> At least with respect to a “supervisory lawyer,” it cannot be that the “knowledge” requirement of Model Rules 5.1(c) and 5.3(c) in any way diminishes the duty of reasonable monitoring established by Model Rules 5.1(b) and 5.3(b).<sup>113</sup> That would create the same problem that the imputed knowledge doctrine is meant to solve. The point of the knowledge requirement must therefore be to *enhance* the duty that otherwise exists by effectively creating a presumption of unreasonable monitoring if a supervising lawyer actually knows of a supervised person’s misconduct and does nothing. In addition, because some of the responsibilities in Model Rules 5.1(c) and 5.3(c) are not limited to supervisory lawyers, but apply to any lawyer (or to any partner), the knowledge requirement protects lawyers who do not have specific duties to monitor other lawyers in the firm.

A Connecticut ethics opinion concerning a managing partner’s obligations with respect to a bookkeeper who misuses client trust funds provides a good example of the confusion that these Model Rules can create. The opinion states that “[n]egligent supervision of employees handling trust accounts is not an excuse for violations of Model Rule 5.3(b).”<sup>114</sup> This is a puzzling statement. Why is negligent supervision not itself a violation of Model Rule 5.3(b)? The opinion then adds:

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111. RESTATEMENT (THIRD) OF AGENCY § 7.05(1).

112. Several jurisdictions adopt a “reasonably should know” standard in their version of Rule 5.1(c). See D.C. RULES OF PROF’L CONDUCT R. 5.1(c)(2) (2006); N.Y. RULES OF PROF’L CONDUCT R. 5.1(d)(2)(ii) (2009). Georgia recognizes the willful blindness doctrine in interpreting Rule 5.1(c). See Ga. Formal Advisory Op. 05-10 (2010) (stating that “knowledge could be imputed to local counsel if he or she, suspicious that lead counsel was engaging in or was about to engage in a violation of ethical requirements, sought to avoid acquiring actual knowledge of the conduct”).

113. See MODEL RULES OF PROF’L CONDUCT R. 5.1 cmt. 6 (“Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.”). One commentator acknowledges “that the Rule 5.1(c)(2) duty to rectify misconduct is likely to arise in the wake of Rule 5.1(a) and (b) violations,” but then goes on to stress that “Model Rule 5.1(c)(2) imposes an actual knowledge requirement,” not “constructive knowledge” without explaining the relationship between the rules. Douglas R. Richmond, *Law Firm Partners As Their Brothers’ Keepers*, 96 KY. L.J. 231, 245–46 (2008).

114. Conn. Eth. Op. 97-38 (1997).

Although Rule 5.3(c) appears to limit responsibility to those situations where the lawyer orders or with knowledge ratifies the employees [sic] acts, courts have been unwilling to excuse negligent supervision of employees handling trust accounts. . . . [T]he fiduciary responsibilities involved in maintaining client funds accounts impute knowledge of the state of those accounts to the lawyer. Rule 5.3(c) does not permit negligent supervision of employees handling client fund accounts.<sup>115</sup>

The result is sensible, but the reasoning is muddled. Although the opinion recognizes that Rule 5.3(c) neither prohibits negligent supervision nor imputes knowledge, it nevertheless struggles to find a violation of that rule based on those concepts. Instead, the opinion should have emphasized that the knowledge standard in Rule 5.3(c) does not limit the duty of supervision that otherwise exists under Rule 5.3(b). A supervisory lawyer reading the opinion, however, could be misled into thinking that the opinion creates a special exception to Rule 5.3(c) for trust accounts rather than a general approach for reconciling Rules 5.3(b) and 5.3(c), and that a lack of actual knowledge will protect that lawyer from disciplinary liability given the knowledge requirement of Rule 5.3(c).

### *C. Imputation of a Lawyer's Knowledge in Conflict of Interest Cases*

A special case of imputed knowledge that greatly affects lawyers concerns conflicts of interest. The Model Rules include a number of imputation rules relating to conflicts of interest. The general conflict of interest imputation rule, Model Rule 1.10(a), provides that “[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9,” except in certain circumstances.<sup>116</sup> This rule, under which an individual lawyer’s conflict gets imputed to the lawyer’s firm, is related to imputed knowledge and in part based on it. A lawyer’s exposure to confidential information often results in a conflict of interest, and the conflict imputation rule essentially presumes that all lawyers in the firm are exposed to the confidential information, just as the imputed knowledge rule does. Model Rule 1.10(a) is in one sense more expansive than the imputed knowledge doctrine because the imputation applies to individual lawyers, not the firm as an entity (though courts relying on Model Rule 1.10 in the context of disqualification motions treat it as if it applies to firms). On the

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115. *Id.*

116. MODEL RULES OF PROF'L CONDUCT R. 1.10(a); *see also id.* RR. 1.11(b), 1.12(c), 1.18(c). *But cf. id.* R. 1.8(k) (applying an imputation rule for lawyer-client conflict of interests, but omitting a knowledge requirement). The Restatement imputation rule, § 123, does not include a knowledge requirement.

other hand, Model Rule 1.10(a) includes a provision that seems inconsistent with imputed knowledge. Model Rule 1.10(a) imputes a conflict only if the other lawyers in the firm “knowingly” represent a client when another lawyer in the firm would be prohibited from doing so. As Professor Moore has pointed out, however, the meaning of “knowingly” in this rule is unclear.<sup>117</sup> It could mean that a lawyer must know that the lawyer is representing a client, or it could mean that a lawyer must know that the representation of the client would violate the conflict of interest rules.

A recently decided case demonstrates the difference between imputed conflicts and imputed knowledge, and also reveals some of the mischief that the “actual knowledge” standard can cause. In *Northam v. Virginia State Bar*,<sup>118</sup> a husband and wife separately contacted two different lawyers in the same law firm about representing them in a divorce action. Lewis, the lawyer contacted by the wife, interviewed her and at one point asked who her husband’s lawyer was. She responded that it was Northam, another lawyer in Lewis’s firm. Lewis immediately stopped the interview and the next day told Northam that he had met with the wife. Lewis subsequently told the wife he could not represent her. Northam, however, continued to represent the husband. The wife later filed a disciplinary complaint, alleging that Northam had violated Virginia’s Rule 1.10. The Disciplinary Board agreed, but the Virginia Supreme Court reversed on the ground that the Board had not specifically made a factual finding that Northam “knew” that Lewis was disqualified from representing the husband.<sup>119</sup>

The Virginia State Bar tried to argue that Lewis’s knowledge of the wife’s confidential information should be imputed to his partner, Northam. Alternatively, the Bar argued that there was enough evidence to support a finding of actual knowledge because Lewis had claimed that he told Northam in their meeting that “I think we have a problem and I’m getting out.”<sup>120</sup> Northam, however, claimed he did not recall such a statement. The court ignored the argument about imputed knowledge, probably believing it was not sufficient to satisfy the actual knowledge requirement of Rule 1.10. The court rejected the alternative holding because the Disciplinary Board did not explicitly resolve the conflict in the two partners’ testimony in its factual findings, and because different conclusions could be drawn from the mere fact that Northam knew that

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117. Moore, *supra* note 19, at 2; *see also id.* at 46.

118. *Northam v. Va. State Bar*, 737 S.E.2d 905 (2013).

119. *Id.* at 911. The court thus adopted Professor Moore’s second interpretation of “knowingly.” Northam certainly knew he was representing the husband.

120. *Id.* at 909.



Lewis and the wife had met.<sup>121</sup> A dissenting justice took issue with the sufficiency of evidence point but also ignored the Bar's imputation of knowledge argument.<sup>122</sup> But why should a court interpret the ethics rule on imputation of conflicts, which is based in part on the principles of imputed knowledge, to protect lawyers who fail to investigate, and therefore lack actual knowledge of, a partner's conflict?

Under the facts of the case, a court could have found that Northam had actual knowledge under Rule 1.10(a) based on the fact that Lewis had given him sufficient information (even under his version of the facts) to give rise to a duty to investigate the conflict. Unfortunately, no one raised this argument, or the possibility that Northam's deliberate failure to investigate could have violated Virginia's Rule 1.1 or Rule 1.7,<sup>123</sup> or breached Northam's duty of care under the law of malpractice.<sup>124</sup> *Northam* is thus a striking example of a court ignoring the principle I have advocated in this essay: an actual knowledge requirement does not negate or limit a duty to investigate that otherwise exists. The case sends the potentially dangerous and misleading message to Virginia lawyers that they can avoid discipline for imputed conflicts if they do not ask too many questions.

Perhaps the court's implicit message is that Lewis had the bigger responsibility to make sure that Northam knew there was a conflict problem,<sup>125</sup> though Lewis probably thought he had made sufficient disclosure. What Lewis did not do was take advantage of the ability to set up a screen, which Virginia's Rule 1.18 permits for prospective clients such

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121. *Id.* at 910–11.

122. *Id.* at 912–13 (Powell, J., dissenting).

123. *See supra* notes 49–50, 54. Oregon's version of the "actual knowledge" definition expressly addresses this issue. Its Rule 1.0(h) defines "knowingly" as denoting "actual knowledge of the fact in question, except that for purposes of determining a lawyer's knowledge of the existence of a conflict of interest, all facts which the lawyer knew, or by the exercise of reasonable care should have known, will be attributed to the lawyer. A person's knowledge may be inferred from circumstances." OR. RULES OF PROF'L CONDUCT R. 1.0(h) (2013).

124. RESTATEMENT (THIRD) OF LAW GOVERNING LAW § 123 cmt. a (2000) (noting that "an imputed conflict might be evidence of a negligent breach of duty by each of the lawyers"); *id.* § 121 cmt. g ("For purposes of identifying conflicts of interest, a lawyer should have reasonable procedures, appropriate to the size and type of firm and practice, to detect conflicts of interest, including procedures to determine in both litigation and nonlitigation matters the parties and interests involve in each representation.").

125. *Cf.* Moore, *supra* note 19, at 48 (arguing that "knowing" standard of Model Rule 1.10(a) should apply to "the lawyer's awareness or lack of awareness of facts that cause the associated lawyer to be disqualified under Rule 1.7 or Rule 1.9 because "a lawyer whose conflict is merely imputed . . . relies to a large extent on the associated lawyer to disclose the facts that prohibit that lawyer from undertaking the representation").

as the wife.<sup>126</sup> Neither the court nor the dissent makes any mention of this possibility.

Screening solutions, recognized in a number of other Model Rules,<sup>127</sup> create an additional “knowledge” wrinkle. Screens must be “timely” and the comment to the definition of “screened” requires that lawyers implement screens when they “reasonably should know” that screens are necessary.<sup>128</sup> How does this standard work with the “knowledge” requirement of Model Rule 1.10(a)? One interpretation would give priority to the knowledge requirement. That is, until the other lawyers “know” of a conflict, they need not institute a screen even if they should have known.<sup>129</sup> But that interpretation is troubling. Once the conflict is “known,” the client could already have revealed much information to the lawyer. Moreover, if the rule did not allow screening (as Model Rule 1.10 did not until recently), imputed *disqualification* would occur the moment the conflict was known.<sup>130</sup> In that case, the “knowledge” requirement would not discourage lawyers from discovering the conflict. Rather they would have an incentive to discover the conflict early, to avoid risking disqualification, or to seek a waiver. Adding a screening solution to an imputation rule should not transform the “knowingly” requirement into a free pass for lawyers in the firm until someone points out the conflict, at which point they are allowed to erect a screen.

#### CONCLUSION

The actual knowledge standard pervades the Model Rules and applies to lawyers in all areas of practice, whether transactional, litigation, or criminal. Given the importance of the actual knowledge standard, the Model Rule drafters need to provide better guidance to lawyers about the meaning of knowledge under the Model Rules. They should explicitly adopt Judge Friendly’s definition of willful blindness in the definition of knowledge or its comment to be consistent with other law, in particular the law of fraud. Such a change would clear up the confusion created by the current definition of knowledge in Model Rule 1.0; the comments to some

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126. See MODEL RULES OF PROF’L CONDUCT R. 1.18(d) (2013); VA. RULES OF PROF’L CONDUCT R. 1.18 (2009).

127. See MODEL RULES OF PROF’L CONDUCT RR. 1.10(a)(2), 1.11(b), 1.12(c).

128. *Id.* R. 1.0(k) & cmt. 10.

129. See *Lutron Elecs. Co. v. Crestron Elecs., Inc.*, No. 2:09-CV-707, 2010 WL 4720693, at \*5 (D. Utah Nov. 12, 2010). This case was a motion for disqualification, not a disciplinary matter, and the court relied on other factors besides its conclusion that Utah’s version of Rule 1.10 was not violated because the lawyers did not “know” of the conflict and instituted a screen once they did. *Id.*

130. See Moore, *supra* note 19, at 34.

knowledge-based rules, but not others adopting something like the recklessness standard; and the relationship of the knowledge-based rules to Model Rule 8.4(c). The drafters should further clarify where a duty to investigate or communicate otherwise exists, as a matter of other ethics rules or other law, in comments to rules including a knowledge requirement. Most important, they should add a comment to the definition of knowledge stating that the knowledge requirement does not negate or limit any duty to investigate or communicate that otherwise exists, and that the deliberate breach of these duties can be evidence of willful blindness and therefore knowledge. As the rules stand now, lawyers may be too tempted to conclude that when the rules use an actual knowledge standard, lawyers will be protected if they intentionally fail to acquire actual knowledge. That is a risky position to take, and one that not only exposes lawyers to potential disciplinary and other liability, but can harm clients and third parties as well. Lawyers have a right to know when they risk violating the ethics rules. As things stand today, their knowledge about the knowledge requirement is defective.