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Ethical Duty to Investigate Your Client?

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ARTICLE

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Abstract. Lawyers have been implicated in corporate scandals and other client crimes or frauds all too often, and the complicity of some lawyers is troubling both to the public and to members of the legal profession. This is especially true when the crime involved is money laundering. As a response to attorney involvement in crimes or frauds, some legal commentators have called for changes to the ethics rules to require lawyers to investigate their clients and client transactions under some circumstances rather than remaining "consciously" or "willfully" blind to what may be illegal or fraudulent conduct. The commentators argue that such changes are needed because current ethics rules require proof of a lawyer's actual knowledge of a client's crime or fraud. It is surprising, then, that the American Bar Association Committee on Ethics and Professional Responsibility (CEPR) recently issued a formal ethics opinion holding that a duty to investigate currently exists in the ethics rules even though this is contrary to the plain text of the rules upon which the CEPR relied. In finding a duty to investigate, was the CEPR interpreting the ethics rules or was it legislating a new ethical duty? If it was interpreting the rules, is there substantial support for such an interpretation? If the CEPR was, in effect, legislating a new ethical duty, does it have the authority to do so? Regardless of whether the CEPR was interpreting the ethics rules or attempting to create a new duty under the ethics rules, should there be a duty to investigate? And, if there is to be a duty to investigate, how should it be structured and adopted? This Article explores these questions as it closely analyzes and evaluates the CEPR's ethics opinion.

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The author thanks Kevin McMunigal, with whom he explored some of these issues for an ethics column in *ABA Criminal Justice*. Professor McMunigal contributed greatly to the author's thinking about many of the issues.

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I. INTRODUCTION

When there is corporate malfeasance or nonfeasance, we often hear the familiar question: "Where were the lawyers?" We heard this question time and time again concerning corporate scandals; for example, the savings and loan banking failure of the 1980s,[1] resulting in losses to taxpayers of approximately $124 billion;[2] the Enron scandal that emerged in 2001, which led to huge losses to Enron's employees and investors;[3] the General Motors (GM) cover-up of its ignition switch failures, which killed 124 persons and led to hundreds of additional injuries before the 2014 recall of the defective switches;[4] and the opioid crisis,[5] which resulted in approximately 450,000

1. Judge Stanley Sporkin, presiding over the collapse of Lincoln Savings & Loan stated:

> Where were these professionals . . . when these clearly improper transactions were being consummated? Why didn't any of them speak up or disassociate themselves from the transactions? Where also were the outside accountants and attorneys when these transactions were effectuated? What is difficult to understand is that with all the professional talent involved (both accounting and legal), why at least one professional would not have blown the whistle to stop the overreaching that took place in this case.

Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901, 920 (D.D.C. 1990); Ed Hendricks & Mary Berkheiser, *Where Were the Lawyers?*, LITIGATION, Summer 1992, at 30, 30.

2. Kenneth J. Robinson, *Savings and Loan Crisis, 1980-1989*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/savings_and_loan_crisis [https://perma.cc/646Q-PBFR].

3. *See* Richard Acello, *Enron Lawyers in the Hot Seat*, ABAJOURNAL (June 1, 2004), https://www.abajournal.com/magazine/article/enron_lawyers_in_the_hot_seat [https://perma.cc/EZ9N-MADS] (reporting on potential claims of $10 billion in the Enron bankruptcy); Christine Dugas, *Employees' Faith in Enron Cost Them Dearly*, USA TODAY, Jan. 21, 2002, at B1 [https://perma.cc/TLY3-LUAG] (reporting on individual employee retirement losses exceeding $1 million in some cases).

4. Chris Isidore, *Death Toll for GM Ignition Switch: 124*, CNN BUS. (Dec. 10, 2015), https://money.cnn.com/2015/12/10/news/companies/gm-recall-ignition-switch-death-toll/index.html [https://perma.cc/H4PD-NG49]; *see also* Michele Benedetto Neitz, *Where Were the Lawyers? The Ethical Implications of the General Motors Recall Scandal in the United States*, 18 LEGAL ETHICS 93, 93 (2015) ("GM's wrongful actions allegedly cost over sixty lives and hundreds of injuries.").

5. Howard Udell, then general counsel for Purdue Pharma, pled guilty in federal court to "a misdemeanor criminal charge related to misleading patients and doctors about the addictive nature of OxyContin." David Armstrong, *Inside Purdue Pharma's Media Playbook: How It Planted the Opioid "Anti-Story"*, PROPUBLICA (Nov. 19, 2019), https://www.propublica.org/article/inside-purdue-pharma-media-playbook-how-it-planted-the-opioid-anti-story [https://perma.cc/8FYM-4R8Q]. Judges and lawyers—both those suing and those defending opioid makers, distributors, and retailers—have routinely hidden evidence of the epidemic by sealing evidence. Benjamin Lesser et al., *How Judges Added to the Grim Toll of Opioids*, REUTERS INVESTIGATES (June 25, 2019), https://www.reuters.com/investigates/special-report/usa-courts-secrecy-judges/ [https://perma.cc/TVU4-ZC78].

people dying of overdoses from 1999 to 2018.[6] In each instance, lawyers were complicit in some way, often for what they failed to do rather than what they did.[7]

Another area drawing attention to the role of lawyers is the global problem of "money laundering," in which some lawyers have been complicit.[8] Based on the enormity of this problem, concerns about the role of lawyers in money laundering may be even greater than concerns of lawyer involvement in corporate scandals. Money laundering accounts for 2–5% of global gross national product, or "$800 billion [to] $2 trillion in current U.S. dollars."[9] Not only are the amounts staggering, but laundered money

6. *Understanding the Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/epidemic/index.html [https://perma.cc/6TRX-7H8J].

7. In the savings and loan collapse, charges against the law firm Kaye, Scholer, Fierman, Hays & Handler (Kaye Scholer) included making factual representations during the bank examination of Lincoln Savings and Loan "that contained either material omissions or misstatements of fact." Harris Weinstein, *Attorney Liability in the Savings and Loan Crisis*, 1993 U. ILL. L. REV. 53, 53, 57 (1993). In the Enron scandal, the complaint against the law firm of Vinson & Elkins alleged that "Vinson & Elkins engaged and participated in . . . contrivances and manipulations to help inflate Enron's reported financial results." Acello, *supra* note 3 (omission in original). With regard to the GM ignition switch failures, some GM lawyers entered into a series of personal injury secret settlements related to the ignition switch defect but did not report this to GM's general counsel and did not report the safety defect to regulators. Peter J. Henning, *How G.M.'s Lawyers Failed in Their Duties*, DEAL BOOK, N.Y. TIMES (June 9, 2014), https://dealbook.nytimes.com/2014/06/09/how-g-m-s-lawyers-failed-in-their-duties/ [https://perma.cc/NXY7-CJ4J]. The full extent of lawyer complicity in the opioid crisis is still not known, but the former general counsel to Purdue Pharma pled guilty to misleading patients and doctors about the addictive nature of OxyContin, and other lawyers and judges are implicated for keeping evidence of the opioid epidemic hidden. *See supra* note 5 and accompanying text.

8. Money laundering usually involves three steps. First, illicit "dirty" cash, usually proceeds of crime, are placed into the financial system in what is known as the placement stage. Next, there is the layering or structuring phase in which funds are usually electronically transferred from one country to another and divided into investments in overseas markets. Finally, there is the integration stage in which the criminal recovers the money from a legitimate source, such as in the form of property, jewelry, or other high-end goods, so the illicit source of the money is hidden. *Money Laundering: A Three Stage Process*, ABOUT BUS. CRIME SOLS. INC., https://www.moneylaundering.ca/public/law/3_stages_ML.php [https://perma.cc/K7B9-R6BU]. For examples of attorney misconduct regarding money laundering, see United States v. Farrell, 921 F.3d 116, 122–23, 147 (4th Cir. 2019) (affirming the conviction of a lawyer for laundering drug money); Laura Ernde, *Escrow, Money Laundering Cases Draw Attention to the Perils of Handling Client Money*, CAL. BAR J. (Feb. 2017), http://www.calbarjournal.com/February2017/TopHeadlines/TH1.aspx [https://perma.cc/Y334-PD7Q] (listing five lawyers convicted of money laundering).

9. *Money-Laundering*, UNITED NATIONS OFF. ON DRUGS & CRIME, https://www.unodc.org/unodc/en/money-laundering/overview.html [https://perma.cc/Q3WV-LGMB].

often funds terrorists, the global drug trade, sex trafficking, and finances dictators and oligarchs.[10]

The role of some lawyers in money laundering, corporate fraud, and cover-ups has led to public criticism and scrutiny of the legal profession.[11] Although we do not know how extensive lawyer involvement is in undiscovered client crimes or frauds, the publicized scandals, indictments, and the complicity of some lawyers is troubling both to the public and to members of the legal profession.[12]

In response to attorney involvement in clients' crimes or frauds, some legal commentators have called for changes to the ethics rules to require lawyers to investigate their clients and client transactions under some circumstances, rather than remain "consciously" or "willfully" blind to a client's possibly illegal or fraudulent conduct.[13] Such a change is necessary, critics contend, because the present ethics rule prohibiting a lawyer from assisting his or her client in fraud or a crime requires that "the lawyer *knows* [the client's conduct] is criminal or fraudulent . . . ."[14] The question of what

10. Richard Malish, *Are Lawyers Facilitating Money Laundering*?, NICE ACTIMIZE (Apr. 14, 2017), https://www.niceactimize.com/blog/are-lawyers-facilitating-money-laundering-534/ [https://perma.cc/P642-DRKL].

11. *See* Opinion, *Enron and the Lawyers*, N.Y. TIMES, Jan. 28, 2002, at A14, https://www.nytimes.com/2002/01/28/opinion/enron-and-the-lawyers.html [https://perma.cc/6WDF-P7VY] (calling on the ABA to change the ethics rules to require lawyers to prevent clients from committing fraud); Robert Thomason, *Lawyers, Real Estate Professionals Not Subject to Adequate US Money Laundering Rules, Treasury Says*, MLEX (Feb. 6, 2020), https://mlexmarketinsight.com/insights-center/editors-picks/area-of-expertise/anti-bribery-and-corruption/lawyers-real-estate-professionals-not-subject-to-adequate-us-money-laundering-rules-treasury-says [https://perma.cc/THE9-6LFS] (discussing a U.S. Treasury Department report that lawyers are assisting in money laundering).

12. Donald Langevoort made this same observation concerning lawyer involvement in financial scandals. *See* Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibilities for Clients' Fraud*, 46 VAND. L. REV. 75, 76–77 (1993) (stating the potential for incidents of complicity is troubling to the public and the profession).

13. *See* George M. Cohen, *The State of Lawyer Knowledge Under the Model Rules of Professional Conduct*, 3 AM. U. BUS. L. REV. 115, 147 (2014) (arguing that the drafters of the Model Rules "should explicitly adopt Judge Friendly's definition of willful blindness in the definition of knowledge . . . in Model Rule 1.0"); Rebecca Roiphe, *The Ethics of Willful Ignorance*, 24 GEO. J. LEGAL ETHICS 187, 220 (2011) ("One way the ABA can embrace a more complex role for lawyers in the American system is by explicitly forbidding them from avoiding their accepted public function by remaining willfully ignorant of their clients' wrongdoing.").

14. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (AM. BAR ASS'N 2020) (emphasis added). In full, the rule provides:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course

a lawyer knows is critical because the ethics rules state "'knows' denotes *actual knowledge* of the fact in question."[15] The general consensus among legal commentators is "knows" or "knowledge" in the American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules) refers to actual knowledge without a duty to investigate.[16] The Restatement (Third) of the Law Governing Lawyers (Restatement) reiterates this majority view that "[u]nder the actual knowledge standard [in the Model Rules] . . . *a lawyer is not required 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."[17] These legal commentators and the Restatement take a textual approach consistent with the definition of knowledge in the Model Rules.[18] However, at least one commentator has taken a different position that in some instances a lawyer may not avoid knowledge by "averting one's eyes or turning one's back" and failing to investigate a client.[19]

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of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Id.; *see* Cohen, *supra* note 13, at 147 ("The actual knowledge standard pervades the Model Rules and applies to lawyers in all areas of practice, whether transactional, litigation, or criminal."); Roiphe, *supra* note 13, at 220 ("[C]ourts, legislatures, and administrative agencies are insisting that lawyers act as regulators by refusing to accept their clients' version of events when it is obviously distorted.").

15. MODEL RULES OF PROF'L CONDUCT R. 1.0(f) (emphasis added).

16. *See* Mike Donaldson, *Lawyers and the Panama Papers: How Ethical Rules Contribute to the Problem and Might Provide a Solution*, 22 L. & BUS. REV. AMERICAS 363, 374 (2016) ("There is no question that the lawyers recorded by Global Witness *should have* known something fishy was going on, but there is no proof they *actually knew*—and the ABA Rules did not explicitly require them to find out."); Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1247 (2003) ("The ethics rules prohibit 'knowing' assistance of illegality. Can lawyers ever 'know' that *x* behavior will violate the law?"); David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957, 976–79 (1999) ("The ethics rules prohibit lawyers from knowingly counseling or assisting a client in fraud, but there's no duty to investigate the client and no willful blindness doctrine . . . . Perhaps, then, the legal ethics rules should be modified so that willful and knowing ignorance count as knowledge.").

17. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 94 cmt. g (AM. L. INST. 2020) (emphasis added).

18. The Model Rules define "[k]nowingly," "known," and "knows" as "actual knowledge of the fact in question." MODEL RULES OF PROF'L CONDUCT R. 1.0(f). The Model Rules additionally state that as a method for providing actual knowledge, "[a] person's knowledge may be inferred from circumstances." *Id.*

19. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.3.3, at 696 (1986). Charles Wolfram applied the criminal law concept that willful blindness can be equated to knowledge in Model Rule 1.2(d), and he contended that while a lawyer generally has no duty to investigate and seek knowledge about a client, "some situations or known facts will be sufficiently suspicious that a reasonable lawyer would want to know more." *Id.*

With this context, it is puzzling and troubling that the ABA Standing Committee on Ethics and Professional Responsibility (CEPR) recently issued an advisory ethics opinion in which it found that a lawyer has an ethical duty to investigate, primarily under Model Rule 1.2(d),[20] when a client or prospective client tries to retain a lawyer for a transaction that could be legitimate but which further inquiry may reveal to be criminal or fraudulent.[21] In ABA Formal Opinion 491 (2020),[22] the CEPR opined that a lawyer has a "duty to inquire further" and investigate when "a lawyer . . . has knowledge of facts that create a high probability that a client is seeking the lawyer's services in a transaction to further criminal or fraudulent activity."[23] In finding a duty to investigate, was the CEPR interpreting the Model Rules or was it legislating a new ethical duty? If it was interpreting the Model Rules, is there substantial support for such an interpretation? If the CEPR was, in effect, legislating a new ethical duty, does it have the authority to do so? Regardless of whether the CEPR was interpreting the Model Rules or attempting to create a new duty under the Model Rules, should there be a duty to investigate? And, if there is to be a duty to investigate, how should it be structured and adopted? This Article explores these questions. But first, it is important to place the CEPR in context by understanding the authority of the Model Rules, the role of the CEPR, and the influence of the CEPR's legal ethics opinions on regulating lawyer conduct.

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20. ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 2 (2020).

21. *Id.* at 1–2. The CEPR's opinion explicitly referred to a duty to inquire, *id.* at 1, and relied on authorities that discuss a duty to inquire interchangeably with a duty to investigate. *See* N.Y.C. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2018-4, at 3 (2018) ("In general, assisting in a suspicious transaction is not competent where a reasonable lawyer prompted by serious doubts would have refrained from providing assistance or *would have investigated* to allay suspicions before rendering or continuing to render legal assistance." (emphasis added)); Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 590 (9th Cir. 1983) (finding against a law firm in an antitrust suit because the firm was aware of a high probability that a client made illegal payments and *failed to investigate*); Harrell v. Crystal, 611 N.E.2d 908, 914 (Ohio Ct. App. 1992) (affirming a finding of liability in a malpractice action for a lawyer's *failure to investigate* sham tax shelters). This Article uses a duty to inquire interchangeably with a duty to investigate.

22. ABA Comm. on Ethics & Pro. Resp., Formal Op. 491 (2020).

23. *Id.* at 1–2. The CEPR stated that "'transaction' refers both to transactions and other non-litigation matters unless otherwise indicated," and its "opinion does not address the application of rules triggering a duty to inquire where a client requests legal services in connection with litigation." *Id.* at 2 n.6. As will be discussed later in Part III.B of this Article, unless specifically indicated in a rule of professional conduct, the rules apply equally to all lawyers in all settings. *See infra* note 248 and accompanying text. The CEPR does not have the authority to constrain how disciplinary authorities may apply the CEPR's opinion. *See infra* note 177 and accompanying text.

The ABA Model Rules of Professional Conduct serve as the basis for the mandatory lawyer ethics rules in every state, the District of Columbia, and the U.S. territories.[24] Although the Model Rules set forth the various duties and obligations a lawyer has to clients, the court, opposing parties and their lawyers, and to the public, the CEPR issues formal and informal ethics opinions interpreting the Model Rules and provides guidance to lawyers concerning proper professional conduct in various circumstances.[25] In terms of the volume of ABA formal opinions, the CEPR has issued an average of 3.6 opinions per year from 2000 through 2020.[26]

In addition to providing guidance to lawyers, the ABA ethics opinions are important in several ways. For example, bar disciplinary authorities, regulatory agencies, and courts considering discipline against a lawyer, motions to disqualify, and fee requests often rely upon and cite to ABA ethics opinions.[27] State and local ethics committees also frequently cite to and follow ABA ethics opinions,[28] and in a number of jurisdictions state

24. *Alphabetical List of Jurisdictions Adopting Model Rules*, ABA, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ [https://perma.cc/XT9P-3WWZ]. The highest court, usually the supreme court in each state, has the authority and power to adopt the ethics rules for lawyers. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 1 cmt. b (AM. L. INST. 2020).

25. ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT vii (9th ed. 2019); Lawrence K. Hellman, *When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions*, 10 GEO. J. LEGAL ETHICS 317, 324–25 (1996). "[T]he ABA created the Standing Committee on Professional Ethics" in 1913 and appended "and Grievances" to its name in 1919. Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 349 n.201 (2002). Subsequently, the ABA gave the Standing Committee on Professional Ethics and Grievances the authority "to issue advisory ethics opinions" in 1922. *Id.* In 1958, "the ABA changed the Committee's name to the Standing Committee on Professional Ethics," and then finally to its current name, "the Standing Committee on Ethics and Professional Responsibility (CEPR)" in 1971. *Id.* The CEPR consists of ten members and is empowered "by the concurrence of a majority of its members, [to] express its opinion on proper professional or judicial conduct, either on its own initiative or when requested to do so by a member of the bar or the judiciary." AM. BAR ASS'N, 2020–2021 CONSTITUTION AND BYLAWS: RULES OF PROCEDURE HOUSE OF DELEGATES art. 31, § 31.7, at 37 (2020). The CEPR also has the authority to "recommend amendments to, or clarification of, the Model Rules of Professional Conduct or the Model Code of Judicial Conduct." *Id.* art. 31, § 31.7, at 38.

26. From January 1, 2000, through December 31, 2020, the CEPR issued 76 formal opinions, which averages out to 3.6 opinions per year. *Index by Issue Dates*, ABA, https://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions/index_by_issue_dates/ [https://perma.cc/BZN5-UL2R].

27. Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67, 84–86 (1981).

28. *Id.* at 82–83.

ethics opinions are binding upon courts and lawyer disciplinary bodies interpreting duties created by the ethics rules.[29] Legal ethics opinions can also serve as a source of bargaining leverage in negotiations "between lawyers and their clients or their employers."[30] Finally, legal ethics "treatises and law school casebooks" cite to ABA ethics opinions,[31] thus helping to inform a law student's understanding of a lawyer's ethical obligations. For legal ethics opinions to serve these functions effectively, they must be well reasoned, rely upon the appropriate ethics rules and authorities interpreting the rules, be free from authors' self-interest, and be able to stand up to critical review.

Most commentators considering legal ethics opinions, especially ABA formal opinions, criticize them for being of poor quality and based on flawed reasoning;[32] further, some claim the ethics committees issuing the opinions are dysfunctional.[33] My own position, which I have stated in the past based on an in-depth study of legal ethics opinions,[34] is that because they play an important role for bar discipline and matters before courts and agencies involving legal ethics,[35] steps should be taken to improve "the quality and integrity of the opinions."[36] Because legal ethics opinions are so important, it is necessary to examine them carefully and to identify those that strain to reach a conclusion not supported by the Model Rules. As this Article will demonstrate, ABA Formal Opinion 491 is one such opinion.

In offering this critique, I am not necessarily asserting that a lawyer should not have a duty to investigate under circumstances such as the ones the CEPR sets out, but rather that such a duty does not currently exist in the

29. *See* Joy, *supra* note 25, at 337 (identifying the jurisdictions where following an ethics opinion issued at the state level will serve as a bar against discipline or failing to follow the ethics opinion will be the basis for discipline).

30. Finman & Schneyer, *supra* note 27, at 90–91.

31. *Id.* at 71.

32. *See id.* at 97–105 (finding several ABA ethics opinions to be "clearly wrong" and the reasoning in many to be "deficient in one or more respects"); Hellman, *supra* note 25, at 336 (finding "four ABA formal opinions that have taken positions not supported by the text of the ABA model provisions they purported to interpret").

33. Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 HOFSTRA L. REV. 731, 740 (2002) ("Most commentators have concluded that the ethics committees are dysfunctional.").

34. *See* Joy, *supra* note 25, at 340–49 (discussing qualitative and quantitative analyses of ethics opinions).

35. *See supra* notes 27–31 and accompanying text.

36. Joy, *supra* note 25, at 382 (recommending that state high courts delegate to disciplinary counsel the authority to issue ethics opinions and that there be a review process for the opinions).

plain language of the Model Rules.[37] The CEPR opinion is flawed because it is contrary to the majority view of Model Rule 1.2(d),[38] conflicts with many of the authorities the CEPR relied upon,[39] is at odds with the text of other Model Rules,[40] and ignores the legislative history surrounding Model Rule 1.2(d).[41] Moreover, if there is going to be a duty to investigate, the ABA should deliberately consider the pros and cons and craft an amendment to the Model Rules that sets forth the duty clearly and completely.[42]

This Article proceeds in three parts. Part II discusses the circumstances that the CEPR identified as the reasons why it issued the opinion. Part III includes discussion and development of criteria for evaluating CEPR formal opinions, which include (1) the opinion's textual analysis of relevant Model Rules, (2) the opinion's identification and analysis of relevant authorities, (3) any problems of interpretive choice in the opinion, (4) rigor of the opinion's analysis, and (5) its clarity. Finally, Part IV explores whether there should be a duty to investigate and, if so, what process should lead to creating such a duty in the Model Rules.

II. WHY THE OPINION?

The role of lawyers in money laundering underlies Formal Opinion 491, and the CEPR began its opinion by referring to media reports,[43] disciplinary proceedings,[44] and criminal prosecutions of lawyers involved in client money laundering and other criminal activities.[45] In light of these

37. *See infra* Part III.B.1.

38. *See supra* notes 16–17 and accompanying text.

39. *See infra* Part III.B.2.

40. *See infra* Part III.B.3.

41. *See infra* notes 194–99 and accompanying text.

42. *See infra* Conclusion.

43. ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 1 (2020) (citing Debra Cassens Weiss, *Group Goes Undercover at 13 Law Firms to Show How US Laws Facilitate Anonymous Investment*, ABAJOURNAL (Feb. 1, 2016, 5:00 PM), https://www.abajournal.com/news/article/group_goes_undercover_at_13_law_firms_to_show_how_us_laws_facilitate [https://perma.cc/65QR-68A2]; Louise Story & Stephanie Saul, *Stream of Foreign Wealth Flows to Elite New York Real Estate*, N.Y. TIMES (Feb. 7, 2015), https://www.nytimes.com/2015/02/08/nyregion/stream-of-foreign-wealth-flows-to-time-warner-condos.html [https://perma.cc/9ENC-2LSZ]).

44. The CEPR cited one disciplinary case wherein a lawyer was disbarred "for assisting [a] client in money laundering." ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 1 (citing *In re* Albrecht, 42 P.3d 887, 898–900 (Or. 2002)).

45. The CEPR cited two federal criminal cases in which attorneys were convicted of participating in money laundering and money laundering conspiracy. *Id.* (citing United States v. Farrell, 921 F.3d 116 (4th Cir. 2019); United States v. Blair, 661 F.3d 755 (4th Cir. 2011)). The CEPR also

developments, the CEPR stated that its opinion addressed a lawyer's ethical "obligation to inquire when faced with a client" seeking the lawyer's assistance in "a transaction or other non-litigation matter that could be legitimate but" investigation could "reveal to be criminal or fraudulent."[46]

The first media account the CEPR cited was a story in the *ABA Journal* about a *60 Minutes* broadcast in which Global Witness recorded an undercover investigator going to thirteen law firms posing as the representative of a governmental official from a poor country who wanted to move millions of dollars in suspicious funds into the U.S. without triggering an investigation as to the source of the funds.[47] Fifteen of the sixteen lawyers filmed—including the "then-ABA president[48]—offered advice on how" the funds could be used to purchase real estate and high-value personal property using shell companies without revealing the identity of the government official, including two lawyers at one law firm who suggested how they could use their law firm accounts to help move the money between overseas accounts and the United States.[49] Another lawyer discussed how overseas bank accounts could be set up using a straw person to hide the government official's identity.[50]

Two professors who teach legal ethics, William Simon at Columbia School of Law and John Leubsdorf at Rutgers School of Law, opined that if any of the lawyers had used their law firm accounts to move money or

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cited the State Bar of California, which discussed several discipline cases in which lawyers misused their escrow accounts, including using their escrow accounts to assist in money laundering. *Id.* (citing Ernde, *supra* note 8).

46. *See id.* at 1–2 ("[A] client might propose an all-cash deal in large amounts and ask that the proceeds be deposited in a bank located in a jurisdiction where transactions of this kind are commonly used to conceal terrorist financing or other illegal activities. On the other hand, further inquiry may dispel the lawyer's concerns." (footnote omitted)).

47. Cassens Weiss, *supra* note 43. Global Witness is a not-for-profit and describes itself as "[c]hallenging abuses of power to protect human rights and secure the future of our planet." *About Us*, GLOBAL WITNESS, https://www.globalwitness.org/en/about-us/ [https://perma.cc/K3K5-3FT8]. Global Witness states that it focuses on investigations into "who is stealing the money, where they are hiding it, and how they are spending it. We track and expose the path of corruption, pushing for global change to end it." *Id.*

48. The ABA President was James Silkenat. GLOBAL WITNESS, LOWERING THE BAR 9 (2016), http://www.globalwitness.org/documents/18208/Lowering_the_Bar.pdf [https://perma.cc/2FEB-CSUC]. During the meeting with the investigator, "Silkenat and his colleague, Hugh Finnegan, made" it clear that before accepting the foreign "minister as a client they would need to know more about him and all the facts." Further, they would have "to make sure that no crimes had been committed in the U.S. or elsewhere," and "if crimes had been committed, they would have to report" the crimes. *Id.*

49. Cassens Weiss, *supra* note 43.

50. GLOBAL WITNESS, *supra* note 48, at 7.

assisted in "setting up overseas bank accounts using a straw man," such lawyers would have violated ethics rules.[51]

In fact, two of the lawyers featured in the *exposé* faced professional discipline and agreed to public censures.[52] One of the lawyers disciplined met with the Global Witness investigator posing as a potential client seeking to purchase real estate, "an airplane, and a yacht" on behalf of an unnamed minister of a foreign country, saying that the fund would be "gray money" or "black money."[53] In response, the lawyer offered ideas on how to move the money from other countries into the United States in a way that would shield the minister's name as the owner.[54] The second lawyer met with the investigator, who again discussed making purchases with money the man suggested came from questionable sources that "[he] wouldn't name [a] bribe; [but rather] facilitation money."[55] The lawyer informed the man that he could hide the true source of the money by setting up shell corporations to own the properties and that attorney-client privilege would protect everyone involved because "[t]hey don't send the lawyers [in the United States] to jail because we run the country."[56] In both discipline cases, the lawyers stipulated that their conduct included counseling a client to engage in conduct they *knew* was illegal or fraudulent.[57]

Only one lawyer refused outright to be involved during his meeting with the undercover agent,[58] and another law firm sent an email after the meeting indicating that they could not help.[59] Most of the lawyers were silent on whether they would assist in apparently illegal conduct, and most did not seek the type of information necessary to determine if the client's plans were

51. Cassens Weiss, *supra* note 43.

52. Si Aydiner, *Money Laundering, Lawyers, and Escrow: The Case for Voluntary Due Diligence*, N.Y. L.J. (Apr. 1, 2020, 11:45 AM), https://www.law.com/newyorklawjournal/2020/04/01/money-laundering-lawyers-and-escrow-the-case-for-voluntary-due-diligence/ [https://perma.cc/FVK4-GT7A].

53. *In re* Jankoff, 81 N.Y.S.3d 733, 734 (App. Div. 2018) (discussing the attorney meeting with persons posing as clients to purchase certain assets); *see also* GLOBAL WITNESS, *supra* note 48, at 5 (noting an attempted bribe of the attorney by the Global Witness agent).

54. *Jankoff*, 81 N.Y.S.3d at 734.

55. *In re* Koplik, 90 N.Y.S.3d 187, 188 (App. Div. 2019).

56. *Id.* (alteration in original).

57. *See Jankoff*, 81 N.Y.S.3d at 734; *Koplik*, 90 N.Y.S.3d at 188.

58. This attorney was Jeffrey Herrman. He refused to provide any suggestions on how to move the money, saying: "[Representing the foreign minister is] not for me, it's, it's too grey for me," and asked the investigator to leave his office. GLOBAL WITNESS, *supra* note 48, at 6; *see* Cassens Weiss, *supra* note 43 (explaining Global Witness's process of investigating thirteen law firms).

59. GLOBAL WITNESS, *supra* note 48, at 1.

legal.[60] All the meetings were preliminary, and none of the firms agreed to represent the government official,[61] but what if they had?

As a practical matter, if a lawyer knowingly assists a client in committing a crime, the government is able to charge the lawyer with the underlying crime the same as the client committing the crime under well-established accomplice criminal liability doctrine.[62] If it is a civil fraud and not a crime, the lawyer may be subject to civil liability for assisting the client in the fraud.[63]

Similarly, the lawyer will be subject to professional discipline if the lawyer knowingly assists or counsels a client to engage in a crime or fraud. Model Rule 1.2(d) states:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer *knows* is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[64]

The plain language of the prohibition in this rule is limited to "counsel[ing] a client to engage, or assist[ing] a client, in conduct that the lawyer *knows* is criminal or fraudulent . . . ."[65] As will be discussed in more depth later in this Article, what a lawyer knows or does not know, what constitutes

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60. *Id.* at 2.

61. *Id.* at 1.

62. Under the common law concept of aiding and abetting, one may be charged for the crime and punished as a principal for aiding, abetting, or counseling the commission of a crime. *See* Rosemond v. United States, 572 U.S. 65, 72 (2014) ("The common law imposed aiding and abetting liability on a person (possessing the requisite intent) who facilitated any part—even though not every part—of a criminal venture."). The common law principles are codified in the federal aiding and abetting statute, which provides:

> (a) Whoever commits an offense against the United States or aid, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2.

63. *See, e.g.*, Eugene J. Schiltz, *Civil Liability for Aiding and Abetting: Should Lawyers Be "Privileged" to Assist Their Clients' Wrongdoing?*, 29 PACE L. REV. 75, 77 (2008) (discussing "a number of cases, [in which] . . . courts have applied civil aiding and abetting principles to lawyers . . .").

64. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (AM. BAR ASS'N 2020) (emphasis added).

65. *Id.*

knowledge in the Model Rules, and what a lawyer must do to investigate are key aspects in evaluating the CEPR's opinion.[66]

Because some lawyers were involved in money laundering or other illegal activities of their clients, the CEPR emphasized lawyers must be alert to the possibility that certain clients or potential clients may be requesting legal assistance for money laundering, terrorism, or other illegal activities.[67] For example, a client requesting legal assistance for transactions such as arranging a series of sales and purchases of properties may be involved in money laundering.[68] Or a prospective client proposing all-cash deals involving large sums of money to be deposited in banks in a jurisdiction where these types of transactions are frequently used to conceal illegal activities, such as terrorist financing, may be seeking to employ a lawyer to facilitate a crime.[69]

In such situations that may involve a crime or fraud, the CEPR stated "further inquiry may dispel the lawyer's concerns" or lead the lawyer to conclude that assisting the client or prospective client would be providing legal assistance to further criminal or fraudulent activity.[70] This is good advice, but was the CEPR correct in concluding that a lawyer who fails to investigate the client proposing such transactions has violated the Model Rules?[71] The following section examines and evaluates the CEPR's opinion.

III. AN ANALYSIS OF FORMAL OPINION 491

Commentators have criticized some ABA formal ethics opinions for, among other reasons, not citing the relevant ethics rules and authorities, not addressing conflicting and ambiguous ethics rules, and for lacking clarity.[72]

66. *See infra* notes 186–92 and accompanying text.

67. ABA Comm. on Ethics & Pro. Resp, Formal Op. 491, at 1–2 (2020).

68. *Id.* at 2.

69. *Id.* The CEPR refers to an ABA task force report that lists institutions such as the International Monetary Fund, a credible source of information for identifying countries where there is a higher risk of money laundering or funding of terrorist activities. *See* AM. BAR ASS'N TASK FORCE ON GATEKEEPER REGUL. & THE PRO., VOLUNTARY GOOD PRACTICES GUIDANCE FOR LAWYERS TO DETECT AND COMBAT MONEY LAUNDERING AND TERRORIST FINANCING 15–16 (2010) (noting organizations that provide information on corrupt sources of money).

70. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 2 (noting lawyers should ensure they are not assisting in committing unlawful acts).

71. *See supra* notes 20–23 and accompanying text.

72. *See* Finman & Schneyer, *supra* note 27, at 104–09 (providing examples of various ABA ethics opinions attempting to address ambiguous ethics rules).

Another commentator has focused his criticisms on ABA formal opinions "not supported by the text of the ABA model provisions they purported to interpret."[73] Given these criticisms, how does ABA Formal Opinion 491 stack up against other opinions that commentators have critically examined?

A. *Criteria for Evaluating ABA Formal Opinions*

1. Finman/Schneyer Criteria

Ted Finman and Theodore Schneyer wrote the first serious examination of ABA formal opinions analyzing all of the opinions issued in a ten-year period.[74] They analyzed twenty-one opinions containing forty-eight distinct holdings analyzing the ABA Model Code of Professional Responsibility (Model Code) from the time the Model Code went into effect in 1970 until the end of their study in 1979.[75] The Model Rules replaced the Model Code in 1983.[76]

Finman and Schneyer developed a system for analyzing the opinions in which they measured if the opinion reached the correct result. In evaluating the opinions, Finman and Schneyer considered the following factors: "(a) identification of a tenable, rule-based rationale; (b) identification of relevant authorities; (c) identification of problems of interpretive choice; (d) careful analysis of problems of interpretive choice; and (e) clarity."[77] In their system, they labeled an opinion "to be correct if . . . [the holding] follow[ed] . . . the unambiguous meaning of the Code or, where the Code is ambiguous, from interpretations based on generally accepted value choices."[78] They judged an opinion to be wrong if the opinion was "illogical or based on value judgments not likely to be widely accepted."[79]

Finman and Schneyer explained their criteria and how they applied them. They stated the "tenable rationale" criterion required the opinion to refer to the ethics rule that supports the holding for which the rule is cited, and the

73. Hellman, *supra* note 25, at 336.

74. *See* Finman & Schneyer, *supra* note 27, at 92–93. During the period in question, the CEPR issued both formal and informal ethics opinions. Finman and Schneyer confined their study to the formal ethics opinions because the formal opinions address matters of widespread importance and they presumed the CEPR put more care and attention into preparing them. *See id.* at 92 (stating the Committee issued hundreds of opinions over the decade, but only issued twenty-one formal opinions).

75. *Id.* at 72, 92.

76. *See* Joy, *supra* note 25, at 316 n.7 (detailing adoption of the Model Rules).

77. Finman & Schneyer, *supra* note 27, at 95.

78. *Id.*

79. *Id.*

text of the rule appears to support the opinion.[80] "[I]dentification of relevant authorities" required the opinion cite to relevant ethics rules and earlier ethics opinions, and focused on the pertinent portions of the rules or opinions cited.[81] "[P]roblems of interpretive choice" referred to whether the opinion addressed when different ethics rules led to conflicting results, when an ethics rule was ambiguous, and whether the opinion noted the problems and "considered the implications of relevant values, precedents, and legislative history."[82]

In terms of "clarity," Finman and Schneyer referred to the fact that the Model Code contained legal binding Disciplinary Rules (DRs) and aspirational Ethical Considerations (ECs).[83] For there to be clarity in an ethics opinion, it had to state clearly if it was based on DRs, which would be asserting a legal duty, or upon ECs, which would lead to a debatable conclusion.[84] In interpreting the Model Code, such clarity was important to provide clear guidance for a lawyer's conduct both to avoid engaging in unethical conduct and to prevent unwarranted disciplinary proceedings against a lawyer when the conduct was not clearly prohibited.[85] Finman's and Schneyer's definition of clarity is no longer useful in evaluating ABA formal opinions because the Model Rules no longer consist of DRs and ECs. However, clarity is still a useful criterion when it refers to an ethics opinion that is explicit and clearly defined.

Based on their system of evaluating the holdings in the ethics opinions, Finman and Schneyer identified twenty-one as "correct" and seven as "clearly wrong."[86] They also classified twenty holdings as being based on "debatable" value choices some reasonable lawyers might reject.[87]

At the end of their groundbreaking study of ABA formal opinions, Finman and Schneyer called for more critical review of the formal opinions as a way to improve the work of the CEPR and to provide for some level

80. *Id.*

81. *Id.* at 95–96.

82. *Id.* at 96.

83. *See id.* (noting the place of DRs and ECs in the structure of opinions).

84. *See id.* (providing DRs create a legal duty while ECs are goals).

85. *See id.* (illustrating the negative impact of opinions lacking clarity).

86. *Id.* at 97, 101.

87. *Id.* at 102. Examples of opinions that are debatable include those opinions reaching conclusions not supported by the language in an ethics rule. *Id.* at 102 n.128.

of accountability.[88] They noted such critical reviews were rare,[89] and such reviews have remained rare in the decades following their study.[90]

2. Hellman Textual Approach

Lawrence Hellman responded to the call by Finman and Schneyer to examine critically ABA formal opinions by identifying and critiquing four formal opinions not supported by the text of the ABA model provisions the CEPR claimed it interpreted.[91] His analysis was straightforward and textual, and he identified two formal opinions based on the Model Code,[92] and two formal opinions based on the Model Rules,[93] where the CEPR's conclusions were not supported by the plain text of the model provisions.

In terms of the opinions that purported to interpret the Model Rules, Hellman contended that, by disregarding the text of the model provisions, the CEPR issued opinions that concluded the ethics rules do not mean what they say.[94] Hellman maintained when the CEPR issues opinions reaching conclusions not supported by the language in the rules, the opinions create uncertainty and undermine respect for the ethics rules in general.[95]

To illustrate Hellman's point, it is helpful to consider his critiques of the two ABA formal opinions interpreting provisions of the Model Rules.[96]

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88. *See id.* at 150 (noting the valuable nature of criticism and finding it regrettable that there is not more criticism of the CEPR).

89. *See id.* (depicting the lack of legal scholarship over CEPR opinions).

90. There have been only five critical law journal examinations of ABA formal ethics opinions since Finman's and Schneyer's article was published in 1981, and four of the five articles examined and critiqued only one opinion. *See* Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 247–48 (1996) (criticizing ABA Formal Op. 94-389); Susan Saab Fortney, *Professional Responsibility and Liability Issues Related to Limited Liability Law Partnerships*, 39 S. TEX. L. REV. 399, 405 (1998) (criticizing ABA Formal Op. 96-401); Hellman, *supra* note 25, at 336, 342, 347, 351 (criticizing ABA Formal Ops. 339, 342, 95-394, and 95-396); Jack L. Sammons, *Giving Advice: ABA Formal Advisory Opinion 90-358*, 12 MISS. C. L. REV. 143, 144 (1991) (criticizing ABA Formal Op. 90-358); Kirsten M. Schimpff, *Rule 3.8, The Jencks Act, and How the ABA Created a Conflict Between Ethics and the Law on Prosecutorial Disclosure*, 61 AM. U. L. REV. 1729, 1729 (2012) (criticizing ABA Formal Op. 09-454).

91. *See* Hellman, *supra* note 25, at 336 (noting a contradiction between what a rule means versus what it says).

92. *Id.* at 336–45 (critiquing Formal Ops. 339 and 342).

93. *Id.* at 347–59 (critiquing Formal Ops. 95-394 and 95-396).

94. *Id.* at 336.

95. *Id.*

96. The focus of this Article is solely on the formal ethics opinions interpreting the Model Rules because the Model Rules are the basis for ethics rules currently in place. *See supra* note 24 and accompanying text.

First, Hellman analyzed ABA Formal Opinion 95-394,[97] which concluded a lawyer is prohibited from entering into a settlement agreement restricting the lawyer's right to undertake other representations against a government agency.[98] Hellman found the opinion was in direct conflict with the express language of Model Rule 5.6, which, at the time, stated: "A lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy *between private parties*."[99] Hellman pointed out this limitation on settlement agreements applied only to those involving *private parties* and not *public entities* such as governmental agencies or units.[100]

In explaining why the CEPR interpreted Model Rule 5.6(b) contrary to its express language, the CEPR's opinion stated that "the phrase in question [between private parties] is sensibly to be read as merely descriptive . . . [and not] prescriptive: i.e., as referring to the circumstances where such a provision, as a condition of settlement, is most likely to be proposed; rather than as limiting the kinds of settlements to which the prohibition is applicable."[101] Hellman noted that the CEPR's reasoning was largely based on the fact the predecessor rule, DR 2-108(B),[102] contained no language limiting the prohibition to settlements "between private parties[,]" and because there was no explanation in the legislative history or official commentary for the language change, "Model Rule 5.6(b) must be interpreted as if it had not been changed."[103]

While Hellman did not argue with the principle that Model Rule 5.6(b) should apply to settlements with governmental entities, he did object to the CEPR giving a strained reading of the rule rather than requesting the language of the rule be amended to reach the result the CEPR wanted.[104]

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97. ABA Comm. on Ethics & Pro. Resp., Formal Op. 95-394 (1995).

98. Hellman, *supra* note 25, at 347–48; ABA Comm. on Ethics & Pro. Resp., Formal Op. 95-394, at 3.

99. MODEL RULES OF PROF'L CONDUCT R. 5.6(b) (AM. BAR ASS'N 1983) [hereinafter 1983 Model Rules] (emphasis added); *see also Ethics 2000—February 2002 Report*, ABA, https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_56_202/ [https://perma.cc/2TWF-CC8U] (illustrating the changes made to Rule 5.6 in February 2002).

100. Hellman, *supra* note 25, at 349.

101. ABA Comm. on Ethics & Pro. Resp., Formal Op. 95-394, at 3.

102. *See* MODEL CODE OF PROF'L RESP. DR 2-108(B) (AM. BAR ASS'N 1980) ("In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.").

103. Hellman, *supra* note 25, at 350.

104. *See id.* at 351 (noting the desire for an amendment to fix the problems with the Model Rule).

He noted, and I agree, claiming the express language in a Model Rule really means something it does not explicitly state will lead to confusion among both lawyers and disciplinary authorities.[105]

Next, Hellman analyzed and critiqued ABA Formal Opinion 95-396,[106] which addressed whether the version of Model Rule 4.2 in effect at the time of the opinion prohibited a lawyer representing a client from communicating with another represented "person" or only another represented "party."[107] The heading of Model Rule 4.2 was "Communication with *Person* Represented by Counsel," but the text of Model Rule 4.2 stated: "In representing a client, a lawyer shall not communicate about the subject of the representation with a *party* the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."[108]

This conclusion, that "party" really meant "person" was not without controversy. Six of the ten members of the CEPR believed "party" should be construed to mean "represented person," because the term "party" in the text of Model Rule 4.2 was unexplained.[109] Two committee members wrote a concurrence to address concerns they had with the majority opinion and two committee members wrote separate dissents.[110] The two concurring members of the CEPR characterized the dissent of one other member as "flawed" for concluding that Model Rule 4.2 is limited to "parties" and not "persons" because they found the member's literal reading of the rule to be at odds with the purpose of the rule.[111]

As with his critique of ABA Formal Opinion 95-394, Hellman was not taking issue with what *should* be the scope of the rule in question, but rather with the CEPR's strained reasoning to find that the express language in an

105. *Id.* The ABA did amend Model Rule 5.6, which now reads: "A lawyer shall not participate in offering or making: . . . (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy." MODEL RULES OF PROF'L CONDUCT R. 5.6(b) (AM. BAR ASS'N 2020).

106. ABA Comm. on Ethics & Pro. Resp., Formal Op. 95-396 (1995). The ideas and text at notes 106–11 are also used and explored in Joy, *supra* note 25, at 353.

107. Hellman, *supra* note 25, at 351–353.

108. MODEL RULES OF PROF'L CONDUCT R. 4.2 (AM. BAR ASS'N 1983) (emphasis added).

109. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 95–396, at 6 n.15 ("The comprehensive record of the deliberations of the Kutak Commission [which drafted the Model Rules] casts no light on the reason why the word 'person' was used in the caption of the Rule while 'party' was used in its text.").

110. *Id.* at 21–30.

111. *Id.* at 23.

ethics rule did not mean what it stated.[112] Hellman also agreed with the dissent that the CEPR should not have issued the opinion, but rather it should have waited because the CEPR had a proposal pending with the ABA House of Delegates to amend Model Rule 4.2 to replace the word "party" with "person."[113] Hellman noted that shortly after the CEPR issued its opinion, the ABA House of Delegates amended Model Rule 4.2 to replace "party" with "person" in the text of the rule.[114]

Though he did not say so, Hellman's textual analysis focused largely on the first criterion Finman and Schneyer used: whether an ABA formal ethics opinion referred to the ethics rule that supported the holding for which the rule was cited, and that the text of the rule appeared to support the opinion.[115] Each of the opinions that Hellman identified failed to satisfy this requirement because, in each instance, the CEPR's opinion stated that the language in an ethics rule did not mean what it said.

B. *Evaluating ABA Formal Opinion 491*

Two questions any lawyer representing a client in a transaction should want answered after reading the CEPR's opinion are: What is the basis for the duty to investigate, and when must a lawyer investigate a client? As this following analysis demonstrates, the CEPR loosely answered these questions, but in the process raised and left a number of other questions unaddressed.

The CEPR began its analysis from the vantage point that clients "are generally entitled to be believed rather than doubted, and in some contexts investigations can be both costly and time-consuming."[116] But, the CEPR continued, stating: "A lawyer's obligation to inquire when faced with circumstances addressed in this opinion is well-grounded in authority interpreting Rule 1.2(d) and in the rules on competence, diligence, communication, honesty, and withdrawal."[117] The CEPR stated the duty to investigate is triggered when "a lawyer . . . has knowledge of facts that create a high probability that a client is seeking the lawyer's services in a

112. Hellman, *supra* note 25, at 353–54.

113. *Id.* at 356–57. The ABA House of Delegates is the legislative body of the ABA and has the authority to formulate policy. AM. BAR ASS'N, 2020–21 CONSTITUTION AND BYLAWS: RULES OF PROCEDURE HOUSE OF DELEGATES art. 6, § 6.1, at 4 (2020).

114. Hellman, *supra* note 25, at 357.

115. *See supra* note 80 and accompanying text.

116. ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 2 (2020).

117. *Id.*

transaction to further criminal or fraudulent activity" so that the lawyer may "avoid assisting that activity under Rule 1.2(d)."[118] According to the CEPR, failure to inquire under such circumstances "is willful blindness punishable under the actual knowledge standard of the Rule."[119]

But how well-grounded is the duty to investigate in Rule 1.2(d) and the other rules? Does the CEPR provide lawyers sufficient guidance about what triggers this duty to investigate one's own client or potential client? And how would disciplinary authorities determine a lawyer engaged in willful blindness that establishes actual knowledge under the ethical rules?

The following analysis evaluates ABA Formal Opinion 491 by incorporating elements of the test developed by Finman and Schneyer along with Hellman's focus on the textual analysis. The criteria I use are:

(a) Identification of a tenable, rule-based rationale—textual analysis;

(b) Identification of relevant authorities;

(c) Problems of interpretive choice;

(d) Rigor; and

(e) Clarity.

As the criteria indicate, I am incorporating Hellman's focus on the text of the Model Rules with the identification of a tenable, rule-base rationale. Identification of relevant authorities includes not only the Model Rules and prior ABA ethics opinions, but also cases and secondary authorities, especially those the CEPR relied upon in ABA Formal Opinion 491. I analyze problems of interpretive choice using the Finman/Schneyer definition.[120] Regarding rigor, I analyze the opinion to see if it sufficiently addressed all of the questions that lawyers—and bar disciplinary authorities—would want addressed. Finally, clarity refers to whether the opinion's holding is explicit and clearly defined.

1. Identification of a Tenable, Rule-Based Rationale—Textual Analysis

The first criterion requires that a correct ABA formal ethics opinion must be based on a tenable, rule-based rationale supported by the text of the

118. *Id.*

119. *Id.*

120. *See supra* note 82 and accompanying text.

Model Rules. As the following analysis indicates, Formal Opinion 491 does not meet this criterion.

The CEPR claimed the duty to investigate primarily arises out of Model Rule 1.2(d)'s admonition that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer *knows* is criminal or fraudulent."[121] The language of Model Rule 1.2(d), though, speaks only of a *prohibition* on counseling or assisting. It says nothing about a *mandate* to inquire of the client or the other aspects of the proposed transaction. The CEPR's analysis somehow derives a duty to investigate from the knowledge element in Rule 1.2(d) and the definition of knowledge in Model Rule 1.0(f), which states that "'knows' denotes actual knowledge of the fact in question."[122]

To support its conclusion, the CEPR quoted the concluding phrase in Rule 1.0(f), which states "knowledge may be inferred from circumstances."[123] This portion of Rule 1.0(f) states nothing more than the obvious evidentiary reality that an internal mental state, such as knowledge, purpose, or premeditation, to name just a few, can be and often is proven through the use of circumstantial evidence—evidence that is "based on inference and not on personal knowledge or observation."[124] Thus, the fact that "knowledge may be inferred from circumstances" is not relevant to *what knowledge means*, but rather *how knowledge may be proven*. The definition of knowledge in the Model Rules does not support either the use of the willful blindness doctrine or the imposition of a duty to investigate. Here, the CEPR's analysis confuses *what* must be proven (the mental state of knowledge) with *how* it may be proven, which includes circumstantial (as well as direct) evidence.[125]

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121. ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 3 (emphasis added) (quoting Model Rule 1.2(d)).

122. MODEL RULES OF PROF'L CONDUCT R. 1.0(f) (AM. BAR ASS'N 2020) ("'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.").

123. *Id.*

124. *See Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "circumstantial evidence" as "[e]vidence based on inference and not on personal knowledge or observation," also referred to as "indirect evidence" or "oblique evidence").

125. *See id.* (defining "direct evidence" as "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption," also referred to as "positive evidence").

By ignoring the plain meaning of "knows" as defined in the Model Rules, the CEPR is doing exactly what Hellman decried. The CEPR is saying Model Rule 1.2(d) does not mean what it says.

2. Identification of Relevant Authorities

ABA Formal Opinion 491 relied heavily on authorities in addition to the Model Rules and prior ABA ethics opinions. My analysis encompasses those additional authorities as well as the Model Rules and prior ethics opinions.

In the text of its opinion, the CEPR relied heavily on *In re Blatt*[126] as authority for interpreting Model Rule 1.2(d) to include a duty to investigate.[127] In *Blatt*, the New Jersey Supreme Court disciplined Martin Blatt for, among other reasons, participating in a fraudulent real estate transaction.[128] At the direction of two clients, both real estate brokers, Blatt prepared two contracts for sale of property where a husband and wife were selling the property to an individual.[129] The first contract listed the husband and wife as the sellers with a purchase price of $95,000 and the purchaser's line was left blank; the second contract left the seller's line blank with a purchase price of $120,000 and the purchaser's line contained the name of the intended purchaser.[130] The CEPR quoted from *Blatt* that the lawyer participated in a transaction where "*[o]n their face* the [transaction] documents suggest[ed] impropriety if not outright illegality."[131] The CEPR also quoted a passage from the decision that a lawyer must be satisfied that a client is seeking a legitimate goal and that Blatt had a duty to "learn all the details of the proposed transaction" and, only if satisfied that the clients' proposed course of conduct was proper, to then proceed.[132] While the language the CEPR quoted is consistent with the CEPR's position about a duty to investigate, the court in *Blatt* did not cite to any ethical rule or case as authority for its reasoning. In disciplining the lawyer, the court appeared primarily motivated not by Blatt's failure to investigate but rather by his

126. *In re Blatt*, 324 A.2d 15 (N.J. 1974).

127. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 3 (2020) (utilizing *Blatt* as the way to interpret Rule 1.2(d)).

128. *Blatt*, 324 A.2d at 18.

129. *Id.*

130. *Id.*

131. ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 3 (alteration in original) (emphasis in original) (quoting *Blatt*, 324 A.2d at 18).

132. *Id.*; *Blatt*, 324 A.2d at 18–19.

participation in a transaction that was, on its face, fraudulent or illegal[133] and by a conflict of interest Blatt had in drafting the contracts.[134]

The CEPR also cited in a footnote, as authority consistent with *Blatt*, three discipline cases and one state bar ethics opinion.[135] Each discipline case involved a lawyer taking a course of action the lawyer *knew* to be fraudulent or illegal, and in one of the discipline cases the lawyer stipulated he had actual knowledge he was engaging in fraudulent conduct.[136] In none of these cases did the lawyer claim ignorance of the client's plans, and there was no discussion about a lawyer having a duty to inquire or a discussion of willful blindness. Similarly, the ethics opinion involved questions in which the proposed conduct, putting excess tax stamps on a deed to inflate the property's value to mislead the public and inserting in a purchase agreement for property a higher purchase price than the amount of money to be exchanged at closing, were on their face explicitly fraudulent.[137] Similar to the discipline cases, this ethics opinion neither contained a discussion of a duty to investigate nor a discussion of willful blindness.

Additionally, the CEPR stated "[s]ubstantial authority confirms that a lawyer may not ignore the obvious,"[138] and cited two secondary

133. *Blatt*, 324 A.2d at 18–19.

134. *See id.* at 19–20 (noting the sale of the property was contingent on the transfer of a liquor license, and Blatt served as the solicitor for the city whose approval was necessary for the transfer of the liquor license. Further, the court found that Blatt had a conflict of interest because Blatt gave advice to the city council that ultimately approved the transfer of the liquor license "knowing the agreement providing for the transfer of license was his own work product").

135. ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 3 n.12.

136. *See In re* Evans, 759 N.E.2d 1064, 1064 (Ind. 2001) (finding the lawyer agreed that "[b]y filing a client's federal tax return containing information he *knew* to be false, the respondent violated Ind. Professional Conduct Rule 1.2(d)" among other ethics rules (emphasis added)); *In re* Harlow, 2004 WL 5215045, at *2 (Ma. State Bar. Discip. Bd. Dec. 14, 2004) (finding the lawyer engaging in several fraudulent actions in connection with an escrow fund "assisted [his client] in conduct that [the lawyer] *knew* was a fraud . . . in violation of MASS. R. PROF['L] C[ONDUCT] 1.2(d)" (emphasis added)). *See generally* State *ex rel.* Counsel for Discip. of Neb. Sup. Ct. v. Mills, 671 N.W.2d 765 (Neb. 2003) (finding a lawyer acted knowingly by participating in an illegal scheme to avoid estate taxes by preparing false documents, notarizing signatures without witnessing the persons signing the documents, backdating documents, and lying about the documents).

137. N.C. State Bar, Formal Op. 12, 2001 WL 1949450 (2001). The opinion states that "such conduct involves dishonesty and misrepresentation" in violation of Rules 1.2(d) and 8.4(c) of the North Carolina Rules of Professional Conduct. *Id.* at *1. Rule 8.4(c) states that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer." N.C. RULES OF PROF'L CONDUCT R. 8.4(c) (2020).

138. ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 4.

authorities.[139] One of the authorities the CEPR cited, the *Annotated Model Rules of Professional Conduct*,[140] contains the three additional discipline cases the CEPR referred to in a footnote as supporting a duty to investigate or adopting a willful blindness standard for knowledge.[141] There is no discussion of a duty to investigate or willful blindness in one of the discipline cases.[142] The remaining two cases shed additional light on the CEPR's inadequate analysis of the authorities it cited because the holdings in the cases do not support the CEPR's opinion.

One of the cases involves Florida's version of Rule 1.2(d), which differs from the Model Rule by incorporating an explicit duty to investigate.[143] Consider Model Rule 1.2(d), which states: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."[144] In contrast, Florida's version states: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows *or reasonably should know* is criminal or fraudulent."[145] The Model Rules define "reasonably should know" to include a duty to

139. *Id.*; *See* WOLFRAM, *supra* note 19, at 696 ("[A] lawyer's studied ignorance of a readily accessible fact by consciously avoiding it is the functional equivalent of knowledge of the fact."); BENNETT & GUNNARSSON, *supra* note 25, at 47 ("A lawyer's assistance in unlawful conduct is not excused by a failure to inquire into the client's objectives.").

140. *See generally* BENNETT & GUNNARSSON, *supra* note 25.

141. ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 4 n.13 (citing to the *Annotated Model Rules*).

142. The case is *In re Bloom*, in which the Supreme Court of California disbarred a lawyer, Edward Bloom, after he was convicted of several felony offenses arising out of his involvement in transporting plastic explosives to Libya. *In re* Bloom, 745 P.2d 61 (Cal. 1987). Bloom admitted that he knew the explosives could not legally be transported to Libya and that he mislabeled them in an effort to conceal what they were. *Id.* at 62. Bloom claimed, however, that he acted in good faith because he believed his client, who allegedly told Bloom that the transaction had been ordered by the National Security Council. *Id.* His client denied that he told Bloom that the National Security Council had authorized the shipment. *Id.* at 62–63. In disbarring Bloom, the court adopted the disciplinary hearing panel's findings, which included rejecting his good faith belief defense by resolving Bloom's credibility on this point against Bloom. *Id.* at 63. In other words, the hearing panel did not believe Bloom because of his conduct and the contrary testimony of his client. There is no mention of any duty to investigate or willful blindness.

143. *See generally* Fla. Bar v. Brown, 790 So. 2d 1081 (Fla. 2001) (referencing Florida's Rules of Professional Conduct).

144. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (AM. BAR ASS'N 2020).

145. FLA. RULES OF PROF'L CONDUCT R. 4-1.2(d) (2020) (emphasis added). The Florida Supreme Court summarized Florida's Rule 4-1.2(d) as a "lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent." *Brown*, 790 So. 2d at 1084.

investigate,[146] which is distinct from "know."[147] Unsurprisingly, the Florida Supreme Court upheld discipline against a lawyer for violating Florida's Rule 1.2(d) because the lawyer "should have known [the client's request] was criminal or fraudulent."[148]

The final case, *In re Tocco*,[149] is an Arizona discipline case that explicitly rejected a duty to investigate and is contrary authority to the CEPR's position. In *Tocco*, the Arizona Supreme Court rejected a disciplinary commission's finding that discipline was warranted because the lawyer, Alicia Tocco, *should have known* her conduct was aiding clients in criminal or fraudulent conduct in violation of Arizona's Rule 1.2(d),[150] which tracks the language in Model Rule 1.2(d).[151] The court stated "knows" in Rule 1.2(d) "denote[s] '*actual knowledge* of the fact in question.'"[152] The Arizona Supreme Court drew the distinction between "knows" and "reasonably should have known" by stating: "While actual knowledge can be proven by circumstantial evidence, a mere showing that the attorney reasonably *should have known* her conduct was in violation of the rules, without more, is insufficient."[153] Based on the disciplinary commission's finding, the court determined Tocco was, at most, negligent, which was an insufficient basis to find a violation of Arizona's Rule 1.2(d).[154]

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146. MODEL RULES OF PROF'L CONDUCT R. 1.0(j) ("'Reasonably should know' when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.").

147. *Id.* at R. 1.0(f) ("'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."). The distinction between know and reasonably should know is discussed *infra* at notes 190–92.

148. *Brown*, 790 So. 2d at 1088.

149. *In re* Tocco, 984 P.2d 539 (Ariz. 1999) (en banc).

150. *Id.* at 543. The Arizona Supreme Court summarized the Arizona rule by stating "ER 1.2(d) prohibits an attorney from counseling or assisting a client in behavior which the lawyer *knows* is criminal or fraudulent." *Id.* at 542.

151. Model Rule 1.2(d) provides:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

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

152. *Tocco*, 984 P.2d at 543 (emphasis in original).

153. *Id.*

154. *Id.*

The CEPR also stated ABA Informal Opinion 1470 (1981),[155] which was issued prior to the adoption of the Model Rules, established that a lawyer has a duty to inquire or investigate.[156] ABA Informal Opinion 1470 stated: "No Disciplinary Rule of the Model Code of Professional Responsibility specifically addresses a duty of factual inquiry as a predicate to undertaking representation."[157] The Model Code contained DR 7-102(A)(7), which stated: "In his representation of a client, a lawyer shall not . . . [c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."[158] This is the same prohibition with the same requirement of actual knowledge found in Model Rule 1.2(d).[159]

While Informal Opinion 1470 acknowledged DR 7-102(A)(7) did not directly address a duty to investigate, the opinion discussed circumstances where it claimed such a duty existed. The opinion stated that "[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"[160] and "should not undertake representation in disregard of facts suggesting that the representation might aid the client in perpetrating a fraud or otherwise committing a crime."[161] These admonitions may be read as consistent with the provision in the Model Rules that "knowledge may be inferred from circumstances."[162] In other words, the lawyer should not proceed when the facts known to the lawyer suggest assisting the client would further fraudulent or criminal conduct.

Informal Opinion 1470 stated when the circumstances infer fraudulent or criminal conduct, "the lawyer has a duty of further inquiry."[163] The opinion did not cite any legal ethics authority for this proposition, but rather quoted from a federal criminal case involving securities fraud, *United States v. Benjamin*,[164] and stated: "Lawyers have an obligation not to 'shut their

155. ABA Comm. on Ethics & Pro. Resp., Informal Op. 1470 (1981).

156. ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 4 (2020).

157. ABA Comm. on Ethics & Pro. Resp., Informal Op. 1470, at 1.

158. MODEL CODE OF PROF'L RESP. DR 7-102(A)(7) (AM. BAR ASS'N 1980).

159. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (AM. BAR ASS'N 2020) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer *knows* is criminal or fraudulent[.]" (emphasis added)).

160. ABA Comm. on Ethics & Pro. Resp., Informal Op. 1470, at 1.

161. *Id.* at 1.

162. MODEL RULES OF PROF'L CONDUCT R. 1.0(f).

163. ABA Comm. on Ethics & Pro. Resp., Informal Op. 1470, at 1–2.

164. United States v. Benjamin, 328 F.2d 854 (2d Cir. 1964).

eyes to what was plainly to be seen . . . ."'[165] In *Benjamin*, the court found there was sufficient evidence Benjamin's work for his client "gave him actual knowledge" of various false and fraudulent acts in which he was complicit.[166] Thus, the *Benjamin* case supplied a helpful quote used in Informal Opinion 1470, but the case turned on the sufficiency of the evidence to prove actual knowledge.[167]

The CEPR decided Informal Opinion 1470 after Finman and Schneyer concluded their study, so the opinion was not available for them to evaluate. In addition, Finman and Schneyer confined their study to ABA formal opinions because those opinions were ones that addressed matters of widespread importance, had greater precedential weight, and presumably were prepared more carefully.[168] Applying the Finman and Schneyer criterion that a "correct" opinion must be based on a tenable, rule-based rationale,[169] Informal Opinion 1470 would fail that test. Consequently, the CEPR's reliance on Informal Opinion 1470 as authority for finding a duty to investigate is misplaced.

In adopting a duty to investigate, the CEPR's opinion is in direct conflict with the position of the Restatement that there is no duty to investigate.[170] The Restatement's counterpart to Model Rule 1.2(d) provides, in pertinent part: "For purposes of professional discipline, a lawyer may not counsel or assist a client in conduct that the lawyer knows to be criminal or fraudulent or in violation of a court order with the intent of facilitating or encouraging the conduct."[171] A comment explains that "[u]nder the actual knowledge standard [in the Model Rules] . . . *a lawyer is not required 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."[172]

Additional comments in the Restatement state, for purposes of lawyer liability or discipline, "knowledge" does not include a duty to investigate.[173] For example, a lawyer owes a duty of care to a nonclient when "the lawyer *knows* that appropriate action by the lawyer is necessary" in order to "prevent

165. ABA Comm. on Ethics & Pro. Resp., Informal Op. 1470, at 1 (quoting *Benjamin*, 328 F.2d at 863).

166. *Benjamin*, 328 F.2d at 863.

167. *Id.* at 863–64.

168. Finman & Schneyer, *supra* note 27, at 92–93.

169. *See supra* note 80 and accompanying text.

170. *See infra* notes 172–76 and accompanying text.

171. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 94(2) (AM. L. INST. 2000).

172. *Id.* § 94 cmt. g (emphasis added).

173. *See infra* notes 174–76 and accompanying text.

or rectify the breach of a fiduciary duty owed by the [lawyer's] client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach[.]"[174] A comment explains that, as used in this section of the Restatement, "'knows' neither assumes nor requires a duty of inquiry."[175] Another comment explains: "Actual knowledge does not include unknown information, even if a reasonable lawyer would have discovered it through inquiry."[176]

Accordingly, there is now a conflict between the CEPR's ethics opinion and the Restatement that is likely to create confusion among lawyers and regulators as to which position should be followed. Neither the Restatement nor ABA ethics opinions are binding authority, but both are persuasive secondary authority.[177] For the sake of prudence, a lawyer should follow the ABA ethics opinion, but should a lawyer who does not follow the ethics opinion face professional discipline? Until this conflict between ABA Formal Opinion 491 and the Restatement is resolved, the CEPR has interjected more uncertainty about Model Rule 1.2(d) rather than providing useful interpretive guidance.

In sum, the CEPR cited to and relied upon several authorities that are either contrary to or not entirely consistent with the CEPR's finding that under Model Rule 1.2(d) a failure to investigate under certain circumstances "is willful blindness punishable under the actual knowledge standard of the Rule."[178] In reaching this conclusion, ABA Formal Opinion 491 is also at odds with the majority view of commentators and the Restatement that Model Rule 1.2(d) does not contain a duty to investigate.[179]

3. Problems of Interpretive Choice

"Problems of interpretive choice" refers to whether ABA Formal Opinion 491 considered if different ethics rules would lead to conflicting

174. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 51(4)(b) (emphasis added).

175. *Id.* § 51 cmt. h.

176. *Id.* § 120 cmt. c.

177. *See* A v. B., 726 A.2d 924, 928 (N.J. 1999) (stating the Restatement (Third) of the Law Governing Lawyers is "[p]ersuasive secondary authority"); Daniel C. Bitting & Cynthia L. Saiter, *Litigation Strategies for In-House Counsel*, 36 CORP. COUNS. REV. 117, 127 (2017) (stating, while it is not binding, the Restatement (Third) of the Law Governing Lawyers is "persuasive authority"); Finman & Schneyer, *supra* note 27, at 83 n.65 (stating that some state ethics committees consider the ABA ethics opinions "as highly persuasive precedent"); WOLFRAM, *supra* note 19, at 67 (stating courts show deference to ethics opinions, especially in connection with disciplinary proceedings).

178. ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 2 (2020).

179. *See supra* notes 16–17 and accompanying text.

results, whether there is an ambiguity in a rule the opinion relied upon, and whether the opinion identified the problems and considered relevant precedents, values, and legislative history.[180] As the following analysis indicates, ABA Formal Opinion 491 also does not fulfill this criterion.

The drafters of the Model Rules specify the mental state, or mens rea, required to prove a breach of ethical duties in many, but not all, of the Model Rules.[181] As Nancy Moore points out, some courts have held Model Rules without a specified mental state have no scienter requirements, while other courts have either considered such rules to require a mental state of negligence or consider such rules as creating strict liability duties.[182]

The Model Rules specifying a mental state usually require some form of knowledge.[183] In addition to specifying the mental state of knowledge, one Model Rule also specifies the alternative mental state of "reckless,"[184] but the Model Rules do not define reckless.[185]

In addition to "know" being the required mental state in Model Rule 1.2(d), "know," "knows," or "knowingly" is also the mental state in many of the other Model Rules.[186] As discussed previously, the Model Rules define "know," "knows," or "knowingly" as requiring actual

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180. *See supra* note 82 and accompanying text.

181. Nancy J. Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 GEO. J. LEGAL ETHICS 1, 1 (2010).

182. *Id.* at 3.

183. *See infra* notes 186–87 and accompanying text.

184. Model Rule 8.2(a) instructs:

> 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 officer or public legal officer, or a candidate for election or appointment to judicial or legal office.

MODEL RULES OF PROF'L CONDUCT R. 8.2(a) (AM. BAR ASS'N 2020).

185. The terminology section does not define reckless. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.0. The Model Penal Code defines "recklessly" as follows:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST. 1985).

186. *See* MODEL RULES OF PROF'L CONDUCT RR. 1.9(b), 1.11(b), 1.12(c), 1.13(b), 1.18(c), 3.3, 3.4(c), 3.8(d) & (g)–(h), 4.1, 4.2, 5.1(c)(1), 5.3(c)(1), 6.4, 6.5(a), 7.3(a) & (c)–(d), 8.1, 8.3, and 8.4(a) & (f) (using the mental state of "knowledge," "know," "knows," or "knowingly").

knowledge.[187] In contrast, several other Model Rules impose a different mental state that does create a duty to investigate by using the standard "knows or *reasonably should know*."[188] For example, Model Rule 4.4(b) states a lawyer "shall promptly notify the sender" when the lawyer "receives a document or electronically stored information relating to the representation of the lawyer's client and [the lawyer] *knows or reasonably should know* that the document or electronically stored information was inadvertently sent."[189] The Model Rules state "'[r]easonably should know' when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question."[190] The fact the Model Rules have these two separate definitions demonstrates "knows" is a distinct mental state from "reasonably should know."[191] As Roy Simon explains: "In essence, the definition of 'reasonably should know' imposes a duty of inquiry on a lawyer—a duty to 'ascertain' whatever a lawyer of 'reasonable prudence and competence' would ascertain."[192]

ABA Formal Opinion 491 failed to identify and note that a duty to investigate exists when a lawyer "reasonably should know" something, which is different from the Model Rule definition that "knows" means actual knowledge. The CEPR did not discuss this distinction nor did the CEPR explain why, in its view, the distinction did not matter. By imposing a duty to investigate grounded in Model Rule 1.2(d), the CEPR read the rule as if it stated: "A lawyer must not counsel a client to engage, or assist a client, in conduct that the lawyer knows *or reasonably should know* is criminal or fraudulent." If the drafters of the Model Rules meant to have Model Rule 1.2(d) read that way, they would have drafted it differently. This is exactly what the drafters of Florida's Rule 1.2(d) did when they included "or reasonably should know" in the state's Rule 1.2(d).[193]

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187. *See supra* notes 15–18 and accompanying text.

188. MODEL RULES OF PROF'L CONDUCT RR. 1.13(f), 2.3(b), 2.4(b), 3.6(a), 4.3, 4.4(b), and 8.4(g) (emphasis added).

189. *Id.* at R. 4.4(b) (emphasis added). Model Rule 4.4(b) states: "A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and [the lawyer] knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender." *Id.*

190. *Id.* at R. 1.0(j).

191. Donaldson, *supra* note 16, at 374.

192. ROY SIMON & NICOLE HYLAND, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED § 1.0:49 (2019 ed.). Roy Simon and Nicole Hyland's treatise analyzes New York's version of Model Rule 1.2(d), which tracks the language in the Model Rule.

193. *See supra* note 145 and accompanying text.

The CEPR also failed to consider the history of the ABA's concern over lawyer involvement in Enron and other corporate scandals and whether there should be changes to the Model Rules. In the *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility* (*Preliminary Report*),[194] the Task Force stated that "knowing" conduct in Model Rule 1.2(d) and other rules "presumably does not reach conduct covered by the term 'reasonably should know.'"[195] In light of this distinction, the *Preliminary Report* included a proposal to amend the Model Rules to "[e]xpand Rules 1.2(d), 1.13, and 4.1 to reach beyond actual knowledge to circumstances in which the lawyer *reasonably should know* of the crime or fraud."[196] Unlike the CEPR, the Task Force recognized amending Model Rule 1.2(d) would be necessary to require a duty to investigate.

After receiving comments on the proposals in the *Preliminary Report*, the Task Force issued the *Report of the American Bar Association on Corporate Responsibility* (*Report*).[197] The *Report* dropped the proposal to amend Rules 1.2(d), 4.1, and 1.13 to change "know" to "reasonably should know."[198] The *Report* noted the draft proposal had received "substantial criticism" and that such a change "may impose a duty, of uncertain extent, to investigate that could only be evaluated after the fact with the benefit of hindsight."[199] ABA Formal Opinion 491 introduced the uncertain duty to investigate that the Task Force wanted to avoid.

4. Rigor

The CEPR also took what looks like a "kitchen sink" approach in finding a duty to investigate. The CEPR cited seven different Model Rules as supporting its imposition of a duty to investigate, but it did not clearly, thoroughly, or reliably explain how each rule supposedly supports its conclusion.[200]

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194. ABA TASK FORCE ON CORP. RESP., PRELIMINARY REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON CORPORATE RESPONSIBILITY (2002) [hereinafter ABA TASK FORCE, PRELIMINARY REPORT], *reprinted in* 58 BUS. LAW. 189 (2002).

195. *Id.* at 33.

196. *Id.* at 45–46 (emphasis added).

197. ABA TASK FORCE ON CORP. RESP., REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON CORPORATE RESPONSIBILITY (2003) [hereinafter ABA TASK FORCE, REPORT], *reprinted in* 59 BUS. LAW. 145 (2003).

198. *Id.* at 166–67 n.76.

199. *Id.*

200. The CEPR discussed Model Rule 1.2(d) for four pages and the other six rules for a total of two and one-half pages. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 3–9 (2020).

The CEPR somehow found the duty to investigate in the knowledge element of Model Rule 1.2(d) by invoking the criminal law doctrine of willful blindness.[201] Criminal statutes often "require proof that a defendant acted knowingly or willfully," and "the doctrine of willful blindness," also referred to as willful ignorance, provides that a defendant cannot avoid criminal liability under such statutes "by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances."[202]

For criminal cases, willful blindness is defined in criminal codes and applied through jury instructions. For example, the Model Penal Code provides, in pertinent part: "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."[203] The federal jury instruction incorporates this concept of willful blindness or ignorance, but notes a jury must also "find beyond a reasonable doubt that the defendant acted with . . . a conscious purpose to avoid learning the truth . . . . However, guilty knowledge may not be established by demonstrating that the defendant was merely negligent, foolish or mistaken."[204]

All Circuits that have considered how willful blindness may satisfy the knowledge element agree a defendant must meet at least these two

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201. ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 6.

202. Glob.-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 766–67 & n.7 (2011) (referring to willful ignorance in criminal law).

203. MODEL PENAL CODE § 2.02(7) (AM. L. INST. 1985).

204. 1 LEONARD SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL ¶ 3A.01, at 3A-2 (2020). The instruction, in its entirety, states:

> In determining whether the defendant acted knowingly, you may consider whether the defendant deliberately closed his eyes to what would otherwise have been obvious to him. If you find beyond a reasonable doubt that the defendant acted with (*or* that the defendant's ignorance was solely and entirely the result of) a conscious purpose to avoid learning the truth (e.g., that the statement was false), then this element may be satisfied. However, guilty knowledge may not be established by demonstrating that the defendant was merely negligent, foolish or mistaken.
>
> If you find that the defendant was aware of a high probability that (e.g., the statement was false) and that the defendant acted with deliberate disregard of the facts, you may find that the defendant acted knowingly. However, if you find that the defendant actually believed that (e.g., the statement was true), he may not be convicted.
>
> It is entirely up to you whether you find that the defendant deliberately closed his eyes and any inferences to be drawn from the evidence on this issue.

Id. at 1 (emphasis in original).

conditions: (1) "subjectively believe that there is a high probability that a fact exists"; and (2) "take deliberate actions to avoid learning of that fact."[205] At least three Circuits also require a third condition—that the defendant have a motive for remaining ignorant of the facts, such as to preserve a defense in the event of prosecution.[206]

In its opinion, the CEPR did not address many of the issues surrounding the doctrine of willful blindness it grafted onto the Model Rules from criminal law. For example, should disciplinary authorities refrain from disciplining a lawyer who unwittingly assists a client in a crime or fraud? In a federal criminal case, the jury is instructed not to find a lawyer guilty for "merely [being] negligent, foolish or mistaken."[207] Should not the unwitting lawyer have the same safe harbor from professional discipline? The Arizona Supreme Court determined Alicia Tocco deserved such a safe harbor because the disciplinary commission found "Tocco was, at worst, negligent. Thus, there could be no determination that she violated Ethical Rules 1.2, 3.3, and 4.1."[208]

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205. *Glob.-Tech Appliances*, 563 U.S. at 769.

206. *See* United States v. Willis, 277 F.3d 1026, 1032 (8th Cir. 2002) ("A willful blindness or deliberate indifference instruction is appropriate when there is evidence to 'support the inference that the defendant was aware of a high probability of the existence of the fact in question and *purposely contrived to avoid learning all of the facts in order to have a defense'* against subsequent prosecution." (emphasis added) (quoting United States v. Barnhart, 979 F.2d 647, 652 (8th Cir. 1992))); *see also* United States v. Delreal-Ordones, 213 F.3d 1263, 1268 (10th Cir. 2000) ("[T]he district court may tender a deliberate ignorance instruction when the Government presents evidence that the defendant '*purposely contrived to avoid learning all of the facts' in order to have a defense* in the event of prosecution." (emphasis added) (quoting United States v. Hanzlicek, 187 F.3d 1228, 1233 (10th Cir. 1999))); United States v. Puche, 350 F.3d 1137, 1149 (11th Cir. 2003) ("An instruction on deliberate ignorance is appropriate only if it is shown that the defendant was aware of a high probability of the fact in question and that the defendant *'purposely contrived to avoid learning all of the facts in order to have a defense* in the event of a subsequent prosecution.'" (emphasis added) (quoting United States v. Rivera, 944 F.2d 1563, 1571 (11th Cir. 1991))).

207. *See supra* note 204 and accompanying text.

208. *In re* Tocco, 984 P.2d 539, 543 (Ariz. 1999) (en banc). The reference to possible violations of Arizona's Rule 3.3 and 4.1 related to an allegation that Tocco violated Rule 3.3(a) ("requiring candor toward [the] tribunal") and Rule 4.1 ("prohibiting false statements of material facts") by failing to amend bankruptcy filings after she became aware "that they contained false information." *Tocco*, 984 P.2d at 542–43. *Tocco* is not the only case in which disciplinary authorities have refused to equate "know" with "should have known" and have rejected a duty to investigate. For example, the Iowa Supreme Court Board of Professional Ethics and Conduct did not recommend discipline and the Iowa Supreme Court did not discipline a lawyer, Oscar Jones, for failing to investigate his client's story about a $25,300,000 contract to build a pipeline in Nigeria. Iowa Sup. Ct. Bd. of Pro. Ethics & Conduct v. Jones, 606 N.W.2d 5, 6–8 (Iowa 2000) (per curiam). Taking his client's story at face value, Jones persuaded a former client to loan his current client with the Nigerian deal $5,000 as part of $25,300 supposedly to purchase risk insurance to secure the Nigerian pipeline payment. *Id.* at 6–7. The Iowa

Also, which of the criminal law tests is the CEPR adopting for its willful blindness standard? Is the CEPR adopting a standard that requires only a two-factor test—that the lawyer (1) have suspicions about the fact for which knowledge is required, and (2) deliberately refrain from investigating the fact?[209] Or, is the CEPR also adopting the third factor, as some Circuits have, that the lawyer have a motive for remaining ignorant of the facts?[210]

These questions are not answered by the CEPR's opinion, which simply states to prevent possible "criminal charges or civil liability, in addition to bar discipline . . . a lawyer must inquire further when the facts before the lawyer create a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity."[211] Without providing guidance as to a possible defense of negligence and which definition of willful blindness disciplinary authorities should use, the CEPR's opinion leaves two important questions unanswered that would likely lead to different outcomes in disciplinary matters.

In addition to looking to Model Rule 1.2(d) as the primary source for a duty to investigate, the CEPR stated "[a] lawyer may be obliged to inquire further in order to meet duties of competence, diligence, communication, honesty, and withdrawal under Rules 1.1, 1.3, 1.4, 1.13, 1.16, and 8.4."[212] The CEPR then discussed each of these other duties briefly and why there may be a duty to inquire.[213]

None of the additional Model Rules the CEPR identified expressly states there is a duty to investigate or inquire of a client. For example, the duty of competence in Model Rule 1.1 states that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[214] Nothing in the text of the rule discusses a duty to investigate. To support finding a duty to investigate in Model Rule 1.1, the CEPR quoted from a comment to the rule that "[c]ompetent handling of a particular matter requires inquiry into and

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Supreme Court, like its disciplinary commission, found "the record does not establish that Jones . . . knew that the Nigerian transaction was fraudulent," although the court noted that "the story sounds incredible." *Id.* at 7–8.

209. *See supra* note 205 and accompanying text.

210. *See supra* note 206 and accompanying text.

211. ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 6 (2020).

212. *Id.* at 7.

213. *Id.* at 7–9.

214. MODEL RULES OF PROF'L CONDUCT R. 1.1 (AM. BAR ASS'N 2020).

analysis of the factual and legal elements of the problem."[215] The reference to "inquiry" in the comment is connected to analyzing the factual and legal elements of the client's "problem." In other words, competent representation requires the lawyer understand and analyze the relevant facts and law necessary to represent the client.[216]

While the CEPR relied on a comment for the duty to inquire in Model Rule 1.1, the Model Rules state the "[c]omments are intended as guides to interpretation, but the text of each Rule is authoritative."[217] In other words, it is the text of Model Rule 1.1 and the other Model Rules that create and define the scope of the various duties, and none of the rules refer to a duty to investigate.[218] The CEPR appeared to be bootstrapping the comment's reference to "inquiry" into a duty to investigate in Model Rule 1.1, and engaged in similarly strained readings of the other Model Rules it claimed require a duty to investigate.[219]

With respect to the other Model Rules the CEPR cited as sources of the duty to investigate, the CEPR stated the duty of diligence in Model Rule 1.3 "requires that a lawyer ascertain the relevant facts and law in a timely and appropriately thorough manner."[220] However, the CEPR's opinion does not clearly explain how this creates a duty to investigate.

The CEPR also cited language from Model Rule 1.4(a)(5), the duty of communication, that the lawyer shall "[consult] with the client regarding 'any relevant limitation on the lawyer's conduct' arising from the client's expectation of assistance that is not permitted by the Rules of Professional Conduct or other law."[221] As the language of Model Rule 1.4(a)(5) makes clear, such a duty exists when the lawyer *knows* the client expects assistance contrary to the ethics rules or law. Although Formal Opinion 491 did not

215. ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 7 (quoting MODEL RULES OF PROF'L CONDUCT R. 1.1. cmt. 5). The quote in the opinion uses the word "requires" instead of "includes," which is the original word used in the comment.

216. *See* BENNETT & GUNNARSSON, *supra* note 25, at 25 ("The interrelated obligations of thoroughness and preparation require a lawyer to investigate all relevant facts and research applicable law.").

217. MODEL RULES OF PROF'L CONDUCT Scope 21 (AM. BAR ASS'N 2020). George Cohen points out "that statement itself is a comment (though not one accompanying a rule), and so arguably is itself not authoritative." Cohen, *supra* note 13, at 120 n.23.

218. *See infra* notes 220–26 and accompanying text.

219. *See supra* note 117 and accompanying text.

220. ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 8 (2020).

221. *Id.* at 8 (quoting Rule 1.4(a)(5) of the Model Rules).

say so explicitly, it appears as though the CEPR read "knows" as "knows or reasonably should know," again contrary to the plain language in the rule.[222]

With regard to a lawyer's duties while representing an entity, the CEPR addressed a lawyer's duty under Model Rule 1.13, which contains the provision that "[i]f a lawyer for an organization *knows* that an officer, employee or other person associated with the organization is engaged in action . . . that is a violation of a legal obligation 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."[223] Again, there is an actual knowledge element in Model Rule 1.13, which the CEPR did not address.

Additionally, the CEPR found a duty to investigate in Model Rule 8.4, which makes it professional misconduct for a lawyer to participate in criminal or fraudulent conduct, noting criminal or fraudulent conduct may be found "without proof of actual knowledge."[224] This observation is correct—it does not independently create a duty to investigate. The CEPR is merely noting that some crimes or frauds may be proven without proving the mental state of actual knowledge.[225]

Finally, the CEPR concluded when a lawyer seeks to investigate and "the client or prospective client refuses to provide information necessary to assess the legality of the proposed transaction, the lawyer must *ordinarily* decline the representation or withdraw under Rule 1.16."[226] This is a curious statement because one wonders under what circumstances it would be permissible not to decline the representation or withdraw, given the CEPR stated that withdrawal was *ordinarily* required, suggesting withdrawal was not *always* required.

As appellate judges considering a myriad of arguments on appeal for reversal in criminal cases have noted, the kitchen sink approach usually results—as it did in the CEPR's opinion—in lack of a thorough and reliable analysis of any of the arguments.[227] The kitchen sink approach may also

222. *See supra* notes 186–92 and accompanying text.

223. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (AM. BAR ASS'N 2020) (emphasis added); ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 8 (emphasis added) (quoting Rule 1.13(b) of the Model Rules).

224. ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 7.

225. *See supra* notes 62–65 and accompanying text.

226. ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 13 (emphasis added).

227. *Cf. generally id.* (analyzing and applying a plethora of rules rather than conducting a more focused analysis). *See* Commonwealth v. Perez, 93 A.3d 829, 837 (Pa. 2014) ("Appellant raises twenty-five lettered issues, nearly exhausting the alphabet, and causing us to reiterate that volume does not

suggest that CEPR members were not confident that the duty to investigate is firmly grounded in any one rule.

5. Clarity

One hallmark of confused and confusing mental state analysis is failure to distinguish between mental state elements and conduct elements. In its opinion, the CEPR does precisely this, failing to distinguish between and thus conflating issues involving mental states, such as knowledge and willful blindness, and issues involving conduct, such as inquiring of the client and refraining from providing assistance to the client.

The CEPR also did not provide sufficient guidance to lawyers about when the duty to investigate arises. The CEPR stated the duty to investigate is triggered when there is a "high probability" the client is seeking services to further criminal or fraudulent activity.[228] What level of probability of illegality qualifies as "high"? In other words, what level of risk of illegality is required to trigger the duty? How does a lawyer's past interactions with a client or lack of interactions with a new potential client figure into this risk calculation? For example, what is the significance of the client being a new client about whom the lawyer knows little or a client with whom the lawyer has had a long-term relationship involving legitimate business transactions?

The CEPR stated a lawyer must make "reasonable inquiry."[229] How much inquiry a "reasonable inquiry" requires is not clear. Just as there is lack of clarity about what level of probability of illegality *triggers* the duty to inquire, it is also unclear what level of probability of legality is required to *satisfy* the duty to investigate. Must the lawyer be completely certain a project is legal (i.e., a 100% probability of legality) in order to proceed with the project? Or does some lower level of certainty satisfy the duty to investigate, such as "more likely legal than not"?

The CEPR concluded a lawyer violates Model Rule 1.2(d) if a lawyer assists a client when the lawyer is *willfully blind* about or *consciously disregards* a project's illegality.[230] The CEPR did not define either of these two phrases, and treated them as synonymous.

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equal quality."); Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 LEGAL WRITING: J. LEGAL WRITING INST. 257, 282 n.43 (2002) (noting judges want law students to be taught "not to throw in the kitchen sink" because "sharper arguments are more likely to be winners").

228. ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 3.

229. *Id.* at 2.

230. *Id.* at 13.

Another uncertainty attends the use of willful blindness. Is willful blindness a *type* of knowledge? Or is it an *alternative* mental state to knowledge the CEPR views as equally blameworthy, one that involves a combination of (1) *lack* of actual knowledge (i.e., the "blindness" or "disregard"), (2) *purpose* to avoid knowledge (i.e., being "willful" or "conscious"), and (3) *awareness* of some probability less than certainty (i.e., less than knowledge) of the fact at issue? The CEPR neither addressed nor resolved this issue. The CEPR merely stated in a footnote that "the standard of actual knowledge set out in the text of Model Rules 1.2(d) and 1.0(f) is met by appropriate evidence of willful blindness,"[231] thereby equating "willful blindness" with "actual knowledge."

IV. SHOULD THERE BE A DUTY TO INVESTIGATE?

I am not necessarily opposed to lawyers having a duty to inquire into the legality of client transactions in which they provide legal services, but the CEPR's attempt to create such a duty through an ethics opinion leaves too much unclear. I believe the duty to investigate in Formal Opinion 491 is ill-defined because the CEPR did not engage the legal profession in considering the framing of a duty to investigate, and the lack of process in adopting its duty to investigate calls into question validity of such a duty.

A. *The House of Delegates Should Consider Whether to Amend the Model Rules*

If there is to be a duty to investigate, such a duty should be established by the ABA House of Delegates amending the Model Rules. The CEPR has requested changes to the Model Rules several times in the past,[232] and I believe it should do so with regard to amending Model Rule 1.2(d) or establishing a duty to investigate in a new rule.

For example, the CEPR filed a motion with the ABA House of Delegates to amend Model Rule 8.4 (defining professional misconduct), and the House of Delegates adopted the amendment in August 2016.[233] The new provision, Model Rule 8.4(g), makes it professional misconduct to "engage

231. *Id.* at 5 n.22.

232. *See, e.g.*, Hellman, *supra* note 25, at 357 (discussing the CEPR recommendation to the ABA House of Delegates to amend Model Rule 4.2).

233. *See Standing Committee on Ethics and Professional Responsibility: Past Events*, *Resolution 109 Adopted by ABA HOD*, ABA, [hereinafter *Resolution 109 Adopted by ABA*], https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/ [https://perma.cc/Q7QS-KVP7] (providing information regarding the process to amend Model Rule 8.4).

in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."[234] A new comment to the rule explains such harassment or discrimination "undermine[s] confidence in the legal profession and the legal system."[235]

At the time the CEPR recommended the amendment, Model Rule 8.4 already contained a provision, 8.4(d), which defined professional misconduct to include "engag[ing] in conduct that is prejudicial to the administration of justice."[236] In 1998, a comment to Model Rule 8.4—which has since been largely incorporated into the current Model Rule 8.4(g)—explained: "A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status violates paragraph (d) when such actions are prejudicial to the administration of justice."[237] While this comment stated such discrimination and harassment would violate Model Rule 8.4(d) only when a lawyer acted while representing a client and when the actions would be "prejudicial to the administration of justice," the comment provided interpretive guidance and was not binding.[238] I believe a reasonable person would view a lawyer engaging in harassment or discrimination on the basis of race, sex, religion, or the other categories listed to be engaging in conduct prejudicial to the administration of justice even without the amendment. If the CEPR has the type of authority to interpret the Model Rules broadly, such as it asserted by attempting to create a duty to investigate through Formal Opinion 491, the CEPR surely could have interpreted harassment or discrimination based on race, sex, religion, or other characteristics to be prejudicial to the administration of justice without seeking to amend Model Rule 8.4.

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234. MODEL RULES OF PROF'L CONDUCT R. 8.4(g) (AM. BAR ASS'N 2020).

235. *Id.* at R. 8.4 cmt. 3; *see Resolution 109 Adopted by ABA*, *supra* note 233 (providing information on the amendment process regarding Comment [3] to Model Rule 8.4).

236. MODEL RULES OF PROF'L CONDUCT R. 8.4(d).

237. *Compare* Kristine A. Kubes et al., *The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, ABA (Mar. 12, 2019), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4/ [https://perma.cc/S37D-KUXS] (delving into the evolution of the Rule), *with* MODEL RULES OF PROF'L CONDUCT R. 8.4(g) (providing the current version).

238. *See supra* notes 217–18 and accompanying text.

Instead of finding harassment or discrimination to be prejudicial to the administration of justice in Model Rule 8.4(d), the CEPR engaged in a full airing of the issue.[239] I believe this was the better choice because to interpret Model Rule 8.4(d) broadly, especially given the limiting language in the comment to the rule, the CEPR would be attempting to actually amend it. Instead, the CEPR took several steps to obtain input on the issue: it released a working draft of the proposed rule and comment amendments in July 2015; held a roundtable discussion of the draft rule and comment amendments at the ABA Annual Meeting; issued a draft proposal to amend Model Rule 8.4 and its comments in December 2015; held a public hearing in February 2016; and released a revised proposal for the amendments prior to the House of Delegates voting on them in August 2016.[240] This process provided multiple opportunities for input from the legal profession. Creating a duty to investigate would benefit from such a process. Moreover, if the ABA House of Delegates adopted an investigative duty, the CEPR could issue an ethics opinion providing additional guidance, just as it did in issuing ABA Formal Opinion 493,[241] which discussed the purpose, scope, and application of Model Rule 8.4(g).[242]

Even though the CEPR has issued Formal Opinion 491, it is not too late for it to recommend an amendment to Model Rule 1.2(d) or another rule to locate the duty to investigate squarely in the explicit language of a rule. At the same time the CEPR issued Formal Opinion 95-396, which interpreted the word "party" in Model Rule 4.2 to mean "person" for the anti-contact rule,[243] the CEPR also proposed an amendment to Rule 4.2 to the House of Delegates to "replace the word 'party' with the word 'person,'" which would make it explicit how Rule 4.2 should be applied.[244] Subsequent to the CEPR issuing its opinion, the House of Delegates acted on the CEPR's recommendation and amended Rule 4.2 to substitute "person" for "party."[245] At a minimum, I believe the CEPR should similarly petition the House of Delegates to consider whether and how the Model Rules should

239. *See infra* note 240 and accompanying text.

240. *Resolution 109 Adopted by ABA*, *supra* note 233.

241. ABA Comm. on Ethics & Pro. Resp., Formal Op. 493, at 2 (2020). The CEPR issued Formal Opinion 493 in July 2020. *Id.* at 1. The ABA House of Delegates Amended Model Rule 8.4 to include Model Rule 8.4(g) in August 2019. *Id.* at 1 n.1.

242. *Id.* at 1.

243. *See* Hellman, *supra* note 25, at 356–57.

244. *Id.* at 357.

245. *Id.*

be amended to create a duty to investigate into the legality of client transactions they assist. Only a change to the language of the Model Rules will bring clarity to such a duty.

If there is a change to the Model Rules to include a duty to investigate, serious consideration should be given to whether and to what extent such a duty should be imposed in litigation settings. To illustrate just a few of the issues that could arise, consider the following scenarios drawn from criminal and employment law.

B. *A Duty to Investigate in Litigation Settings*

The CEPR stated it was addressing the duty to inquire in non-litigation settings,[246] and Formal Opinion 491 did not address a client's request for legal assistance in connection with litigation.[247] But nothing in the cited Model Rules would limit such a duty to non-litigation settings because the rules the CEPR cited as the sources of the duty to investigate apply equally to lawyers doing transactional work, litigation, or other lawyering unless the Model Rules specifically limit the rule to a certain group of lawyers.[248] For example, some Model Rules are limited to different types of lawyers, such as government lawyers in Model Rule 1.11,[249] lawyers for organizations in Model Rule 1.13,[250] lawyers serving as a third-party neutral in Model Rule 2.4,[251] and prosecutors in Model Rule 3.8.[252] Presently, one of the Model Rules imposes a duty for a lawyer acting as an advocate in non-adjudicative proceedings, such as appearing "before a legislative body or

246. *See generally* ABA Comm. on Ethics & Pro. Resp., Formal Op. 491 (titling the opinion: *Obligations Under Rule 1.2(d) to Avoid Counseling or Assisting in a Crime or Fraud in Non-Litigation Settings*).

247. "This opinion does not address the application of rules triggering a duty to inquire where a client requests legal services in connection with litigation." ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 2 n.6.

248. The Model Code made explicit that "the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities." MODEL CODE OF PROF'L RESP. Preliminary Statement (AM. BAR ASS'N 1980). Although the Model Rules do not state this explicitly, commentators agree that unless a rule's language limits it to a certain type of lawyer or legal service, it is applicable to all lawyers. *See* Marshall J. Breger, *Disqualification for Conflicts of Interest and the Legal Aid Attorney*, 62 B.U. L. REV. 1115, 1122 (1982) ("It has been generally argued that present ethical doctrine constitutes a unified code of ethics which applies to the entire [legal] profession."); Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101, 1129 (1990) ("Current professional responsibility authority does not distinguish the role obligations of legal services lawyers from those of private lawyers representing private clients.").

249. MODEL RULES OF PROF'L CONDUCT R. 1.11 (AM. BAR ASS'N 2020).

250. *Id.* at R. 1.13.

251. *Id.* at R. 2.4.

252. *Id.* at R. 3.8.

administrative agency."[253] Several other Model Rules address a lawyer's duties as an advocate in adjudicative proceedings, such as bringing only meritorious claims and contentions,[254] expediting litigation,[255] exhibiting candor toward the tribunal,[256] and maintaining fairness to opposing parties and counsel.[257] None of the Model Rules are limited to representing clients in transactional matters, such as those described in Formal Opinion 491.

Without language in a Model Rule limiting a duty to investigate for non-litigation matters, what is to stop disciplinary authorities from applying a duty to investigate in all litigation settings? For example, if an unemployed prospective client charged with felonious assault wants to pay his lawyer a large fee in cash, is the defense lawyer required to inquire into the fee's source before accepting the cash?[258] There is a federal law requiring the reporting of the receipt of cash in excess of $10,000.[259] A lawyer can be disciplined for failing to report their receipt of more than $10,000 cash from a client to the Internal Revenue Service (IRS).[260] Pursuant to Model Rule 8.4(b), such a lawyer may be disciplined for "commit[ting] a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."[261] If a duty to investigate applies equally to litigation settings, a lawyer would not only have to report the receipt of the cash but perhaps investigate how the client obtained the funds. Would such

253. *Id.* at R. 3.9.

254. *Id.* at R. 3.1.

255. *Id.* at R. 3.2.

256. *Id.* at R. 3.3.

257. *Id.* at R. 3.4.

258. A lawyer may not accept the fruits of a crime because to do so would be a form of aiding and abetting. GEOFFREY C. HAZARD, JR., ET AL., THE LAW OF LAWYERING § 10.49, at 10-234–35 (4th ed. 2020). For this reason, some commentators argue that a defense lawyer has an obligation to "audit" the source of fees in certain criminal cases such as theft crimes, sales of narcotics, and other crimes where the fee is the fruit of the crime. *Id.*

259. Federal law requires that anyone engaged in a trade or business must report cash payments in excess of $10,000 to the Internal Revenue Service (IRS), and to reveal the identity of the persons making such payments. 26 U.S.C § 6050I. Courts have held the federal common law of attorney-client privilege and a state's rules of professional conduct do not permit a lawyer to withhold a client's identity in filing the required form with the IRS. *See, e.g.*, U.S. v. Sindel, 53 F.3d 874, 877 (8th Cir. 1995) (holding neither the federal common law of attorney-client privilege nor a state's rules of professional conduct protect a client's identity from being revealed in the reporting requirement of 26 U.S.C. § 6050I).

260. *See, e.g.*, *In re* Chung, 230 A.D.2d 300, 301–02 (N.Y. App. Div. 1997) (suspending a lawyer from the practice of law for one year after he pleaded guilty to failing to file the required IRS form following receipt of over $10,000 in cash from a client).

261. MODEL RULES OF PROF'L CONDUCT R. 8.4(b).

a duty to investigate exist if the amount of cash is less than $10,000? If so, would such inquiries, regardless of the amount in question, undermine a client's Sixth Amendment right to loyal counsel free from conflicts?[262]

Consider a lawyer representing an immigrant client who entered the United States lawfully but used a fraudulent Social Security number to gain employment, and whose employer failed to pay her for hours worked.[263] As Christine Cimini explains: "It is a crime to use a false Social Security number to obtain benefits, but the crime is completed when the false representation is made"—i.e., when the client seeks legal assistance in obtaining the wages owed.[264] But, if the lawyer represents the client and the client's claim is successful, would the lawyer be assisting the client in a crime or fraud if the client used the money recovered to stay in the United States?[265] If so, before taking the case, would the duty to investigate require the lawyer to ask the client what the client would do with the money if the lawsuit is successful? As Cimini points out, interpreting Model Rule 1.2(d) in such a way would run contrary to the important role that lawyers play in providing access to justice.[266] Still, a duty to investigate in a litigation context may lead some lawyers to refrain from representing such a client if the client responded that he or she would use any money recovered to remain in the United States.

As these two examples point out, whether there should be a duty to investigate in litigation settings needs to be carefully considered. If there is such a duty, it should be clearly explained, something Formal Opinion 491 does not do.[267]

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262. "A concurrent conflict of interest" would exist if "there is a significant risk that the representation of [the client] will be materially limited" by the personal interests of the lawyer. *Id.* at R. 1.7(a)(2).

263. Christine Cimini developed this hypothetical in an article discussing ethical issues involving undocumented workers. Christine N. Cimini, *Ask, Don't Tell: Ethical Issues Surrounding Undocumented Workers' Status in Employment Litigation*, 61 STAN. L. REV. 355, 371–72 (2008).

264. *Id.* (footnotes omitted).

265. Cimini pointed out that under federal law, unlawful presence in the United States is not a crime, but it may be a fraud. *Id.* at 372.

266. *Id.*

267. *See supra* Part III.B.5.

V. CONCLUSION

As I stated at the outset, I am not necessarily opposed to lawyers having a duty to investigate the legality of client transactions in which they provide legal services. The CEPR's attempt to create such a duty through its ethics opinion, however, leaves too much unclear. The CEPR stated it was addressing the duty to inquire in non-litigation settings, but without such a duty being clearly limited to non-litigation settings in the Model Rules, disciplinary authorities may conclude that a duty exists in litigation settings as well. As the criminal and employment law examples indicate, an ill-defined duty to investigate in litigation settings could run counter to important client rights and some policy objectives of the legal profession.[268]

If a lawyer should have a duty to investigate, such a duty should be created through the regular Model Rule amendment process rather than the CEPR interpreting rules that do not say anything about such a duty. The amendment process should allow for full consideration of the following: (1) the pros and cons of imposing such a duty; (2) whether a duty to investigate should be limited to non-litigation matters; (3) when and how such a duty is triggered; (4) when and how such a duty is satisfied; and (5) how the duty should be expressed. A process such as the one the CEPR and the ABA House of Delegates engaged in to amend Model Rule 8.4 to include provision 8.4(g) would help answer these and perhaps other issues.[269] The procedure outlined above would also hopefully do a better job than the CEPR did in addressing the other unclear aspects of the opinion.

268. *See supra* notes 262, 266 and accompanying text.

269. *See supra* notes 239–42 and accompanying text.