

TOWARD MORE ROBUST SELF-REGULATION  
WITHIN THE LEGAL PROFESSION

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TABLE OF CONTENTS

Introduction .....	242
I. The Legal “Profession” .....	244
<i>A. The Hallmarks of a Profession</i> .....	244
<i>B. What is “The Public Good”?</i> .....	246
II. Personal Interests over the Public Good .....	250
<i>A. The President’s Personal Lawyer—Rudy Giuliani</i> .....	250
<i>B. The Country’s Lawyer—U.S. Attorney General William Barr</i> .	255
III. Toward More Robust Self-Regulation. ....	260
<i>A. The Legal Profession’s Response</i> .....	261
<i>B. Official Disciplinary Interventions are Needed</i> .....	266
Conclusion .....	272

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## INTRODUCTION

Federal judge for the U.S. Court of Appeals for the D.C. Circuit, Harry T. Edwards, once said that “lawyers have a positive duty to serve the public good” and while “a lawyer seeks to serve his clients *and* the public good . . . these commitments are not seen as mutually exclusive.”<sup>1</sup> And yet, despite this responsibility, Judge Edwards recognized this duty has too often failed to be achieved. Addressing New York University School of Law, Judge Edwards suggested the cause of the legal profession’s decline in promoting the public good may be due to “a nexus between the changes in the nation’s social and political mores and an increasingly popular view among lawyers about the character of their professional role . . . and its defense of professional amorality.”<sup>2</sup>

Though his comments sought to address the climate of the legal profession during the 1990s, the sentiment aptly describes the legal profession today. Indeed, Vice-Chancellor Travis Laster of the Delaware Court of Chancery recently explained that “[clients] have a goal they want to achieve, and they want a lawyer to help them achieve it. That is how the lawyer adds value. The role of the lawyer as conscience, as a wise counsellor, has been de-emphasized. The role of the advocate, the enabler, has been accentuated.”<sup>3</sup> Laster’s comments were directed at the conduct of lawyers within large law firms representing large, multinational firms, but the tenor of his message has applicability throughout the legal profession.

Lawyers today should take Edwards’s, Laster’s, and other legal commentators’ concerns seriously given the frequency by which we see lawyers throughout the profession failing to comply with a myriad of rules, standards, and norms in a very public manner. For example, when one examines the actions taken by lawyers—both public and private—associated with former President Donald J. Trump, one finds a set of individuals who appeared willing to do whatever their client, or perceived client, asked of them. Undoubtedly, there are those who might believe that

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1. Harry T. Edwards, *A Lawyer’s Duty to Serve the Public Good*, 65 N.Y.U. L. REV. 1148, 1148–50 (1990) (emphasis added).

2. *Id.* at 1152.

3. Sujeet Indap, *Delaware Judge Sends Warning to Zealous Lawyers*, FIN. TIMES (Dec. 13, 2021), <https://www.ft.com/content/d5a7e86a-a654-4ef0-970c-89788c756a7b> [<https://perma.cc/KN4J-TSBA>].

the job of the lawyer is to do just that—to fulfill the demands and wishes of their clients. They are, however, greatly misguided.

While it is true that the client is the principal in the attorney-client relationship and has the power to set the goals and objectives of the representation,<sup>4</sup> this does not mean that the lawyer should blindly follow the directions of their client. Lawyers are members of the legal profession. The word “profession” is a term of art. There are many hallmarks and indicators to identify when something does or does not qualify as a profession.<sup>5</sup> This Essay will focus on two of those indicators: (i) that the members of the profession seek to serve the public good, and (ii) that the members of the profession regulate themselves. Recent activity by a range of lawyers, including those who were acting on behalf of former President Trump, suggests that when assessed against those two metrics, signs of professionalism failure is apparent throughout the legal profession.

For instance, whether it was attempting to influence and overturn a presidential election or undercutting the legitimacy of the nation’s primary agency that enforces federal law and oversees the administration of justice, many of the attorneys involved with the Trump Administration engaged in activities that illustrate a devotion to something other than the profession’s ideals of advancing and promoting the public good. The source of these lawyers’ failures to adhere to the tenets of the profession are, as are most things, likely multifaceted. Yet, if as Judge Edwards suggested so long ago, these actions can be traced back to “changes in the nation’s social and political mores” and a “popular view among lawyers about the character of their professional role,”<sup>6</sup> the question then becomes what, if anything, can be done to change this pattern within our profession.

This Essay argues that to ensure members of the legal profession are unwavering in their pursuit of the public good, state bars’ regulation of those within the legal profession must become much more stringent. Part I looks at why attorneys are categorized as being part of a profession and the ways in which that view has shifted and changed over time. Part I then discusses how the concept of the “public good” matters for discussions about attorney-professionalism. Part II demonstrates how certain lawyers

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4. See MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS’N 2021) [hereinafter M.R.P.C.].

5. See James Fanto, *The Professionalization of Compliance: Its Progress, Impediments, and Outcomes*, 35 NOTRE DAME J.L. ETHICS & PUB. POL’Y 183, 186 (2021).

6. Edwards, *supra* note 1, at 1148.

associated with former President Trump put fidelity to the client over their commitment to pursuing the public good. Part III looks at responses from those within the legal profession to the failures of the lawyers discussed in Part II. Part III then urges the legal profession to turn towards much more robust regulation of its members through formal, disciplinary sanctions. There can be no collective pursuit of the public good by the legal profession without the collective will to sanction those who fail to adhere to its pursuit.

### I. THE LEGAL “PROFESSION”

Virtually every law student and practicing attorney in America understands they are members of the legal profession. What is less clear, however, is how many of those individuals have wrestled with what it means to be a professional, as opposed to someone who has entered an occupation that does not have the designation of a professional. This Part briefly discusses some of the hallmarks of what it means to be a member of a profession. In doing so, this Part explains that some scholars include “the pursuit of the public good” when discussing how to identify a group as a member of a profession. For clarity, this Part then defines what this Essay is referring to when it focuses on the concept of the public good for those engaged in legal practice.

#### *A. The Hallmarks of a Profession*

There are a number of professions recognized today within the United States. For instance, accountants, broker-dealers, doctors, and, of course, lawyers are all considered to be members of professions. For years, the basic characteristics of what constitutes a profession has been discussed by scholars both within and outside of the legal academy. Recently, Professor James Fanto summarized the key qualities of what it means for persons to be a member of a profession—namely that these individuals are

- (i) engaging in a distinct set of activities requiring the exercise of judgment and discretion, (ii) having training for the profession that is in institutions of higher learning but that is controlled by the profession, (iii) having practitioners with a shared sense of engaging in a common

occupation who have established organizations for the sharing of knowledge and practices, and (iv) receiving from state governments exclusive control over the professional activities in the form of licensing requirements.<sup>7</sup>

One characteristic of a profession not outlined in Fanto's definition, however, is the idea that members of a profession should pursue the public good. Professor Rebecca Roiphe has explained:

An older form of professionalism, which [she calls] social professionalism, conceives of the professions as groups of individuals who have mastered an area of knowledge through special training. Because they gain their power through knowledge—not wealth or political prestige—professionals are uniquely suited to ascertain what is best for the public as a whole and to suppress their own immediate interests in achieving it.<sup>8</sup>

It is this latter notion of professionalism that Judge Edwards and Judge Laster appear concerned with—the idea that lawyers are not just hired guns, but rather are members of a profession that requires them to take into account concerns other than the wishes of their clients. Roiphe has previously discussed the decline of this view. She “argues that lawyers generally retreated from the prior visions of their role as society’s engineer and instead, equated professionalism with the delivery of legal services and loyalty to clients.”<sup>9</sup>

Scholarly conversations about the tension lawyers face in trying to pursue ideals like professionalism while also recognizing the business practicalities of law practice are not new. Indeed, Professor Russell G. Pearce once argued for moving beyond what he termed the “professionalism paradigm,” toward one that incorporates business models, or a “[m]iddle [r]ange” paradigm.<sup>10</sup> Importantly, however, Pearce’s argument centered

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7. *Id.* at 188.

8. Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J.L. ETHICS 649, 651 (2021).

9. *Id.* at 672.

10. Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1230–32 (1995). Pearce defined the professional paradigm as one that rested “on a purported bargain between the profession and society in which the profession agreed to act for the good of clients and society in exchange for autonomy.” *Id.* at 1231. The business paradigm, on the other hand, “does not assert that

around increasing access to legal services by allowing (i) nonlawyers to practice law and (ii) discarding self-regulation from state bars for the market and government regulation that oversees businesses. These suggestions have largely—although not completely—gone unrealized.<sup>11</sup>

The upshot is the legal profession, through the American Bar Association and other avenues, continues to tout the importance of self-regulation by and for lawyers, even as the profession's members have become increasingly concerned with business concerns. One question this shift leaves, however, is what, if any, role should a concern about the public good have within the legal profession today. Both Judge Edwards and Judge Laster—almost thirty years apart—have asked this basic question. A fulsome answer is beyond the scope of this Symposium contribution, and yet it does seem important to broadly define what this Essay means when referring to the term “public good.”

### B. What is “The Public Good”?

It is, perhaps, easy to argue that members of the legal profession should pursue the public good—however, it is much more difficult to define what should be meant by those terms. Roiphe acknowledges this challenge, noting that “[w]hen one says that lawyers pursue the public good, it sounds like a platitude. The concept unravels if we seek consensus or shared values.”<sup>12</sup> The legal profession is comprised of a diverse set of individuals with varied experiences and values, and one can imagine that these

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lawyers automatically place the interests of clients and society above their own. Like other businesspersons, lawyers [under this model] place a significant emphasis on maximizing their own financial and other self-interests.” *Id.* at 1268.

11. Private law practice has taken on many key features of more typical businesses, with the most recent development being allowing non-lawyers to share profits with lawyers in law practices. Roger E. Barton, *Changing the Stakes: How Evolving Law Firm Ownership Rules Could (or Could Not) Re-Shape the Legal Industry*, REUTERS (Aug. 19, 2021, 11:07 AM), <https://www.reuters.com/legal/legalindustry/changing-stakes-how-evolving-law-firm-ownership-rules-could-or-could-not-re-2021-08-19/> [<https://perma.cc/84TG-NW5X>]. Many argue that this change will not alter the practice of law or lawyer independence, but given the trend away from professionalism and towards business within the legal profession over the past three decades, the suggestion that allowing non-lawyers to have ownership interest in law firms seems unwise. Karen E. Rubin, *Non-Lawyer Ownership of Law Firms Is Trending—But Is it a Good Idea?*, OHIO BAR ASSOC. (Mar. 22, 2021), <https://wwaw.ohiobar.org/member-tools-benefits/practice-resources/practice-library-search/practice-library/2021-ohio-lawyer/non-lawyer-ownership-of-law-firms-is-trending--but-is-it-a-good-idea/> [<https://perma.cc/42VV-MDTH>].

12. Roiphe, *supra* note 8, at 678.

individuals' impressions on what it might mean to pursue the public good would vary to a great extent.

There is value in thinking through what the term should mean and whether its meaning should evolve over time.<sup>13</sup> As society evolves, so too might society's expectations and needs regarding certain professions. It is important for scholars and leaders within the profession to wrestle with the proper boundaries and limits of the question of how, and to what extent, the legal profession should encourage its members to pursue the public good.

For purposes of this Essay, however, it is sufficient to focus on the most limited definition of the public good that one can find—namely, one derived from the regulatory floor of state bars' Rules of Professional Conduct, which are often an outgrowth of the Model Rules of Professional Conduct ("M.R.P.C.") promulgated by the American Bar Association ("ABA").<sup>14</sup> While lawyers at their core "should further the public's understanding of and confidence in the rule of law . . . because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority,"<sup>15</sup> other various rules under the ABA system require attorneys to prioritize the public or society over the needs and directives of their clients. And these rules serve as the foundation by which we expect attorneys to pursue the public good over their clients' interests.

For example, M.R.P.C. 2.1 discusses the lawyer's role as an "advisor," explaining that ". . . a lawyer *shall* exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation."<sup>16</sup> One can interpret this rule to suggest that the lawyer is not simply meant to blindly follow their client's every whim. In fact, in some instances, it may be

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13. Roiphe suggests that it should. *Id.* at 679 ("The idea that lawyers should seek the public good should mean something different now than it did half a century ago but it need not be meaningless.")

14. While no state bar has wholly adopted every rule under the ABA's model rules, all have used these rules as guidance for developing and adopting their own. *See* A.B.A. CTR. FOR PROFESSIONAL RESPONSIVITY, STATE ADOPTION OF THE MODEL RULES OF PROFESSIONAL CONDUCT AND COMMENTS (June 15, 2017), [www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/adoption\\_M.R.P.C.\\_comments.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/adoption_M.R.P.C._comments.pdf).

15. M.R.P.C., *supra* note 4, at Preamble.

16. *Id.* at r. 2.1 (emphasis added).

important for the lawyer to push back, to challenge the client,<sup>17</sup> and to conceptualize the concerns of the client within the context of larger societal realities. And given that it is “proper for a lawyer to refer to relevant moral and ethical considerations in giving advice,”<sup>18</sup> it would, for instance, be completely appropriate for an attorney to explain to a client that the path they are hoping to go down could be bad for the country and democratic norms more generally. As the ABA points out, “rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.”<sup>19</sup> Accordingly, the lawyer is not providing advice to their clients in a vacuum, and their advice should reflect that reality.

Additionally, M.R.P.C. Rule 4.1 instructs that lawyers must be truthful in statements to individuals other than their client. Specifically, the rule states “in the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.”<sup>20</sup> The rule draws a hard line in preventing a lawyer from making false statements that the he or she knows to be related to material facts or the law. Similarly, M.R.P.C. 3.3 requires a lawyer to refrain from making false statements of fact or law to a tribunal or offering evidence that the lawyer knows to be false.<sup>21</sup> Undoubtedly, “preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.”<sup>22</sup> Yet, lawyers also have “special duties . . . as officers of the court to avoid conduct that undermines the integrity of the adjudicative process.”<sup>23</sup> The upshot is that a lawyer is allowed to engage in a certain amount of posturing while advocating for their client, but there are a number

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17. Indeed, “a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.” *Id.* at r. 2.1 cmt. 1.

18. *Id.* at r. 2.1 cmt. 2.

19. *Id.* at Preamble ¶ 16.

20. *Id.* at r. 4.1

21. *Id.* at r. 3.3. The term “‘tribunal’ denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity.” *Id.* at r. 1.0(m). The emphasis that lawyers must remain honest to tribunals is further emphasized in the M.R.P.C. by requiring lawyers to disclose legal authorities and holdings in the controlling jurisdiction that are directly adverse to their client’s position. M.R.P.C., *supra* note 4, r. 3.3(a)(2).

22. *Id.* at Preamble ¶ 8.

23. *Id.* at r. 3.3 cmt. 2.



of limits on how far the lawyer can go before posing a threat to the public and rule of law.

A lawyer is also expected to treat others with dignity. For instance, under M.R.P.C. 4.4, a lawyer is expected to respect the rights of third persons. The rule explains that: “[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such person.”<sup>24</sup> The explanatory comments go even further. “Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons.”<sup>25</sup> This rule is, admittedly, restricted to legal rights, but it, again, demonstrates that a lawyer’s fidelity to their client has real limits. As explained in the M.R.P.C., lawyers must be “guided by personal conscience and the approbation of professional peers” in order to exemplify the legal profession’s ideals.<sup>26</sup>

As these rules and others demonstrate, the M.R.P.C. make plain that a lawyer’s duties might begin with the interests of their client, but they do not end there. The rules set a floor of minimum conduct with regards to the expectations of lawyers to pursue courses of conduct that will promote the public good. The upper limit of when and how a lawyer should seek to pursue the public good is much more difficult to articulate, but the most recent concerns regarding the actions of some members of the legal profession seemed to violate even the minimal expectations one might have regarding the lawyer’s pursuit of the public good.

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Scholars, judges, and others seem to recognize the decline in professionalism within the legal field in favor of a business model, while still engaging in a regulatory scheme that relies on the hallmarks of a profession. The larger question of whether it is best to frame the work being done by lawyers as a profession or as a business is beyond the scope of this Symposium contribution, but the actions by lawyers associated with former President Trump provide a window into what can happen when fidelity to

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24. *Id.* at r. 4.4(a).

25. *Id.* at r. 4.4(a) cmt. 1.

26. *Id.* at Preamble ¶ 7.

client supersedes a lawyer's duties to others—whether that be to the courts,<sup>27</sup> third-parties,<sup>28</sup> or the public-at-large.<sup>29</sup> And more specifically, the actions undertaken by lawyers within the next Part demonstrate how the loss of the “public good” framing to help reign in attorney conduct can be harmful to the actual lawyer, the profession more generally, and, in some instances, to the entire legal system and country.

## II. PERSONAL INTERESTS OVER THE PUBLIC GOOD

At various points during the Trump administration, the country witnessed lawyers serving the former President prioritize private interests over the interests of the legal profession and of the country at large. The actions of two such individuals are ripe for consideration; one who served as the president's personal attorney and one who served as a government attorney. Interestingly, at different points in their careers, both Rudy Giuliani and William Barr were lauded for their commitment to the legal profession and upholding the rule of law. Yet, in their legal roles during the Trump administration, both Giuliani's and Barr's actions suggest they elevated the interest of their client (or perceived client) over their duties to the public good and profession.

### *A. The President's Personal Lawyer—Rudy Giuliani*

In many ways, former mayor of New York City and one-time presidential candidate for the Republican party, Rudy Giuliani, has had a decorated and praiseworthy legal career. After graduating New York University School of Law magna cum laude,<sup>30</sup> Giuliani entered the legal profession clerking for a federal judge on the U.S. District Court for the Southern District of New York.<sup>31</sup> Rather than pursue a career in the private

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27. M.R.P.C., *supra* note 4, at r. 3.3.

28. See Leslie C. Griffin, *Whose Duties and Liabilities to Third Parties?*, 37 S. TEX. L. REV. 1191 (1996), <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1757&context=facpub>; William J. Wernz, *Duties to Third Parties*, J. BENCH & BAR OF MINN. (May/June 1992), [http://prb.mncourts.gov/articles/Articles/Duties%20to%20Third%20Parties%20\(analysis%20of%20Rule%204.3\).pdf](http://prb.mncourts.gov/articles/Articles/Duties%20to%20Third%20Parties%20(analysis%20of%20Rule%204.3).pdf) [<https://perma.cc/22JW-LET9>].

29. M.R.P.C., *supra* note 4, at Preamble ¶¶ 9–13.

30. *Nominee for U.S. Attorney Giuliani, Rudolph William.*, N.Y. TIMES, Apr. 13, 1983, at A25.

31. Alexa Pipia, *9 of the Most Successful People to Attend NYU Law*, BUS. INSIDER (Aug. 6, 2016), <https://www.businessinsider.com/famous-nyu-law-students-2016-7> [<https://perma.cc/PTJ3-65UB>].

sector upon completing his clerkship, Giuliani instead chose to enter government service working as an Assistant U.S. Attorney for the Southern District of New York.<sup>32</sup> Within a few years, Giuliani's success as a federal prosecutor led to his elevation as Chief of the Narcotics Unit within the office.<sup>33</sup>

Some observers have noted that as U.S. Attorney for New York, "Giuliani was perhaps the most effective prosecutor in the country, locking up Mafia bosses, crooked politicians and Wall Street inside traders, though his vindictiveness and thirst for publicity led to troubling excesses."<sup>34</sup> In fact, when he decided to leave the U.S. Attorney's office, political officials on both sides of the aisle celebrated Giuliani as a lawyer who "'helped to affirm the rule of law and the public's faith in the law.'"<sup>35</sup> There were, of course, those who remained skeptical of Giuliani's decisions and motives while serving in this role. For instance, Gerald Stern, former administrator of the State of New York's Commission on Judicial Conduct, believed that Giuliani "often violated ethical standards on pretrial publicity at his 'circus like' press conferences"<sup>36</sup> while others "accuse[d] him of trying cases in the press in order to launch that political career."<sup>37</sup>

Following his short stint in the private sector, Giuliani was elected mayor of New York City in 1994. Giuliani's time as mayor, while not without controversy,<sup>38</sup> led to him being named "America's Mayor" following the 9/11 terrorist attacks on the city.<sup>39</sup> He ended his mayoral

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32. *Id.*

33. JAMES B. JACOBS & KERRY T. COOPERMAN, *BREAKING THE DEVIL'S PACT: THE BATTLE TO FREE THE TEAMSTERS FROM THE MOB* 3 (2011), [https://web-a-ebsscohost-com.proxy.library.nd.edu/ehost/ebookviewer/ebook/ZTcwMHhuYV9fMzg3ODk1X19BTg2?sid=e7bd e3a8-848a-438e-ac69-d72409a22718@sessionmgr4008&vid=0&format=EB&lpid=lp\\_1&rid=0](https://web-a-ebsscohost-com.proxy.library.nd.edu/ehost/ebookviewer/ebook/ZTcwMHhuYV9fMzg3ODk1X19BTg2?sid=e7bd e3a8-848a-438e-ac69-d72409a22718@sessionmgr4008&vid=0&format=EB&lpid=lp_1&rid=0); News 9, *Rudy Giuliani*, NEWS ON 6 (Jan. 14, 2008), <https://www.newson6.com/story/5e350bb6e0c96e774b3719ea/rudy-giuliani> [<https://perma.cc/DP5H-TDF3>].

34. Eric Pooley, *Mayor of the World*, TIME (Dec. 31, 2001), <http://www.time.com/time/poy2001/poyprofile.html> [<https://perma.cc/4QGG-GS2D>].

35. William Glaberson, *Giuliani Resigns as U.S. Attorney; Still Undecided on a Mayoral Bid*, N.Y. TIMES, Jan. 11, 1989, at A-1 (quoting then-New York Governor, Mario C. Cuomo).

36. Philip Weiss, *The Toughest Weenie in America*, SPY MAG., at 107 (Nov. 1988).

37. Michael Winerip, *High-Profile Prosecutor*, N.Y. TIMES MAG., June 9, 1985, at 37.

38. James Moliterno, *Where's Rudy?*, 67 LOY. L. REV. 415, 421-22 (2021) ("On one hand, he did succeed in cleaning up the streets and attacking crime. On the other hand, he sacrificed "the civil rights of a generation of young black men" in order to do so. Some of the policing tactics that were implemented during Giuliani's tenure were later ruled as racially discriminatory and unconstitutional.").

39. Winerip, *supra* note 37; Pooley, *supra* note 34.

career as “a national hero.” Up until this point, Giuliani had a reputation that demonstrated a strong commitment to public service and the public good, even if imperfectly executed. Giuliani eventually launched a career in the “private sector . . . market[ing] his crime-fighting and management expertise through a firm called Giuliani Partners.”<sup>40</sup>

Following the 2016 election, President Donald Trump hired Giuliani to serve as his personal attorney. While Giuliani worked to defend and advocate on the President’s behalf on various issues, two particular matters deserve special attention for the purposes of this Essay—Giuliani’s representation of Trump leading into the 2020 election cycle and his representation of the Trump campaign immediately following the results of the 2020 election. As personal attorney for the president, Giuliani faced significant criticism, particularly regarding both his professional ethics and professional conduct. But despite public backlash, Giuliani repeatedly elevated the concerns of the President’s agenda at the public’s expense. In short, Giuliani, a man who at one time touted his career of service to the public, failed to pursue the public good.

First, there was Giuliani’s role during the early stages of the 2020 election. In July of 2019, prior to the infamous phone call between President Trump and Ukrainian President Volodymyr Zelensky, Giuliani made a different call with U.S. diplomat Kurt Volker and Senior Adviser to Ukrainian President Volodymyr Zelensky, Andriy Yermak.<sup>41</sup> During this conversation, Giuliani sought to have the Ukrainian government investigate then-candidate Joe Biden regarding possible corruption by Biden and Burisma, a Ukrainian energy company that placed Hunter Biden, Joe Biden’s son, on its board.<sup>42</sup> Giuliani went on to say that that if President Zelensky were

to make some statement at the right time . . . [then] it would make it possible for me to come and make it possible, I

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40. Steve Inskeep, *Giuliani: The Lawyer at the Center of the Ukraine Affair, and the Path that Led There*, NPR (Dec. 13, 2019, 5:08 AM ET), <https://www.npr.org/2019/12/13/787204619/giuliani-the-lawyer-at-the-center-of-the-ukraine-affair-and-the-path-that-led-th>.

41. Clara Hill, *New Audio of Rudy Giuliani ‘Pressuring Ukraine to Investigate Biden’ Emerges*, INDEPENDENT (June 8, 2021, 18:19), <https://www.independent.co.uk/news/world/americas/us-politics/rudy-giuliani-ukraine-audio-phone-biden-b1861646.html>.

42. See Kenneth P. Vogel & Michael S. Schmidt, *Trump Envoys Pushed Ukraine to Commit to Investigating Biden*, N.Y. TIMES (Oct. 3, 2019), <https://www.nytimes.com/2019/10/03/us/politics/trump-ukraine.html> [<https://perma.cc/XZB7-PETW>].

think, for me to talk to . . . President [Trump] to see what I can do about making sure that whatever misunderstandings are put aside . . . I kinda think that this could be a good thing for [Ukraine and the U.S] having a much better relationship.<sup>43</sup>

Despite “multiple nonpartisan Trump Administration officials [testifying] . . . that Giuliani was the main driver behind Trump’s efforts to force Ukraine to investigate the Bidens” as a way to distance Trump from Giuliani’s actions,<sup>44</sup> Giuliani reiterated his professional relationship to the President, stating that his actions were “100 percent in my role as the defense lawyer of the president.”<sup>45</sup>

Giuliani’s attempts to solicit Ukraine in helping to illegally influence the 2020 election was shocking given that the Mueller investigation into Russian inference in the 2016 election had only just recently concluded. Tellingly, Giuliani’s call to Ukraine occurred only one day after Special Counsel Bob Mueller testified before the House Judiciary Committee and the House Intelligence Committee on Trump’s possible obstruction of justice and Russian election interference.<sup>46</sup>

Following the news declaring Joe Biden the next President of the United States, the Trump campaign hired Giuliani to serve as its lead lawyer in challenging the validity of the 2020 results.<sup>47</sup> In this role, Giuliani put forth countless unsubstantiated claims of widespread voter fraud,<sup>48</sup> and alleged

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43. Matthew Chance & Marshall Cohen, *New Audio of 2019 Phone Call Reveals How Giuliani Pressured Ukraine to Investigate Baseless Biden Conspiracies*, CNN (June 8, 2021, 1:52 PM), <https://www.cnn.com/2021/06/07/politics/rudy-giuliani-ukraine-call-investigate-biden/index.html> [<https://perma.cc/L6DS-GDWH>].

44. Vera Bergengruen & Briand Bennet, *How Rudy Giuliani’s Pursuit of Money & Power May Cost Donald Trump Dearly*, TIME (Oct. 31, 2019, 6:33 AM), <https://time.com/5714722/rudy-giuliani-transformation/> [<https://perma.cc/JM2C-VRXS>].

45. Jim Dwyer and Eric Lipton, *A Great Big Gift Not on Trump’s Disclosure Form: Giuliani’s Legal Advice*, N.Y. TIMES (Dec. 13, 2019), <https://www.nytimes.com/2019/12/13/us/politics/giuliani-trump-financial-disclosure.html> [<https://perma.cc/JU5R-DUNE>].

46. Marshall Cohen & Will Houpp, *What Happened on July 25, the Most Important Day in the Impeachment Scandal*, CNN (Dec. 3, 2019), <https://www.cnn.com/interactive/2019/12/politics/july-25-timeline/> [<https://perma.cc/JU5R-DUNE>].

47. Tal Axelrod, *Trump Puts Giuliani in Charge of Election Lawsuits: Report*, THE HILL (Nov. 13, 2020), <https://thehill.com/homenews/campaign/525962-trump-puts-giuliani-in-charge-of-election-lawsuits-report/> [<https://perma.cc/TH65-FDEF>].

48. See, e.g., Brett Samuels, *Trump, Attorneys Step Up Efforts to Reverse Election’s Outcome*, THE HILL (Nov. 19, 2020), <https://thehill.com/homenews/administration/526752-trump-attorneys-step-up-efforts-to-reverse-elections-outcome> [<https://perma.cc/JU5R-DUNE>] (“Giuliani alleged that the

voting machines used in the election were “corrupted and hackable.”<sup>49</sup> Not only did Giuliani make these false statements of massive election fraud and corruption during “press conferences, state legislative hearings, radio broadcasts (guest and host), podcasts, [and] television appearances,”<sup>50</sup> but he also stated them while representing the Trump campaign in court, which raise concerns about possible violations of M.R.P.C. Rules 3.3 and 4.1.<sup>51</sup> More alarming, however, was Giuliani’s statement on January 6, 2020, the day of the capitol insurrection. In addressing thousands in the crowd, Giuliani proclaimed that there should be “trial by combat” to resolve disputes over the 2020 election.<sup>52</sup>

Politicians on both sides of the aisle condemned the press conferences and public statements by “Rudy Giuliani and other lawyers representing the Trump campaign” noting that the remarks were “erod[ing] public trust.”<sup>53</sup> But despite Giuliani’s efforts, court after court dismissed the Trump campaign’s lawsuits,<sup>54</sup> emphasizing that “[v]oters, not lawyers, choose the

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president was a victim of a scheme by dozens of Democratic election officials from Detroit, Philadelphia, Pittsburgh and other major cities that contributed to Biden getting more votes[.]”). *See also* Lisa Lerer, *Giuliani in Public: “It’s a Fraud.” Giuliani in Court: “This Is Not a Fraud Case,”* N.Y. TIMES (Nov. 18, 2020), <https://www.nytimes.com/2020/11/18/us/politics/trump-giuliani-voter-fraud.html> [<https://perma.cc/ST2S-3KMJ>].

49. *See* Jane C. Timm, *Rudy Giuliani Baselessly Alleges ‘Centralized’ Voter Fraud at Free-Wheeling News Conference*, NBC NEWS (Nov. 19, 2020), <https://www.nbcnews.com/politics/donald-trump/rudy-giuliani-baselessly-alleges-centralized-voter-fraud-free-wheeling-news-n1248273>.

50. *In re Giuliani*, 197 A.D.3d 1, 3 (N.Y. App. Div. 2021).

51. *See, e.g.*, Pete Williams, *Appeals Court Deals Trump-Giuliani Pennsylvania Lawsuit Yet Another Blow*, NBC NEWS (Nov. 27, 2020, 1:22 PM CST), <https://www.nbcnews.com/politics/2020-election/appeals-court-deals-trump-giuliani-pennsylvania-lawsuit-yet-another-blow-n1249144> [<https://perma.cc/G3BP-NY36>] (The Third Circuit Court of Appeals’s order highlighted Giuliani’s lack of evidence in its decision. Specifically, it emphasized that “[c]alling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.”).

52. Alan Feuer, *A State Senator Referred Rudy Giuliani for Disbarment*, N.Y. TIMES (Jan. 14, 2021), <https://www.nytimes.com/2021/01/11/us/giuliani-disbarment.html>.

53. Jordain Carney, *Sasse Condemns Giuliani’s ‘Wild Press Conferences’: They ‘Erode Public Trust,’* THE HILL (Nov. 19, 2020, 09:02 PM EST), <https://thehill.com/homenews/senate/526819-sasse-condemns-giulianis-wild-press-conferences-they-erode-public-trust> [<https://perma.cc/TAC4-8HYW>].

54. *See, e.g.*, Alison Durkee, *Nevada Supreme Court Rejects Trump Campaign’s Election Lawsuit And Voter Fraud Claims*, FORBES (Dec. 9, 2020, 8:44 AM), <https://www.forbes.com/sites/alisondurkee/2020/12/09/nevada-supreme-court-rejects-trump-campaign-election-lawsuit-and-voter-fraud-claims/?sh=1d8ef90f6f48>; Kevin Breuninger & Dan Mangan, *Trump Campaign Loses 3 Cases Challenging Ballots after Dropping its Lawsuit in Michigan*, CNBC (Nov. 19, 2020), <https://www.cnn.com/2020/11/19/trump-campaign-drops-michigan-election-lawsuit-rudy-giuliani-says.html> [<https://perma.cc/AJ98-68UW>]; *Georgia High Court Rejects Latest Trump Election Appeal*, ASSOC. PRESS (Dec. 13, 2020), <https://apnews.com/article/election-2020-donald-trump-georgia-elections-electoral-college-3e59015ec63cfd38920380248ae7caad>.

President . . . [Indeed,] the public must have confidence that our Government honors and respects their votes.”<sup>55</sup> Thus, while the legal system itself appears to have provided some safeguards in mitigating the impact of Giuliani’s actions while serving as the president’s personal attorney, the profession itself is forced to reckon with the realities that lawyers like Giuliani appear willing to put the interests of their client over the interests of the country.

*B. The Country’s Lawyer—U.S. Attorney General William Barr*

Like Giuliani, William Barr’s early legal career can outwardly be viewed as a commendable one given his repeated government service. Upon graduating George Washington Law University School in 1977, Barr clerked for one year on the U.S. Court of Appeals for the District of Columbia Circuit for Judge Malcolm Wilkey.<sup>56</sup> Thereafter, he joined a law firm until 1982, when he left to serve as Deputy Assistant Director for Legal Policy under the Reagan Administration.<sup>57</sup> A few years later, under President George H.W. Bush, Barr was appointed to serve as Assistant Attorney General of the Office of Legal Counsel from 1989 to 1990, Deputy Attorney General from 1990 to 1991, and then the 77th Attorney General of the United States from 1991 to 1993.<sup>58</sup> Barr’s government career during this time received mixed reactions. On the one hand, then-senator Joe Biden in 1995 stated that Barr was “one of the best [attorneys general] [he] ha[d] ever worked with.”<sup>59</sup> Others, however, criticized Barr’s first stint as Attorney

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55. Donald J. Trump for President, Inc. v. Sec’y of Pennsylvania, No. 20-3371, 2020 WL 7012522 (3d Cir. 2020).

56. Attorney General of the United States Bios - William Pelham Barr, DEP’T OF JUST. (last updated Apr. 23, 2021), <https://www.justice.gov/ag/bio/barr-william-pelham> [<https://perma.cc/8YWC-Z2HZ>] [hereinafter *DOJ Barr Bio*].

57. Libby Cathey & Ryan Shepard, *William Barr: Everything You Need to Know About Trump’s Controversial Attorney General*, ABC NEWS (Feb. 13 2020), <https://abcnews.go.com/Politics/william-barr-trumps-attorney-general/story?id=59661840> [<https://perma.cc/ANL7-HQZK>]. Barr would hold this position for a year and would then go on to return back to his previous law firm.

58. *DOJ Barr Bio*, *supra* note 56.

59. Bo Erikson, *In the 1990s, Joe Biden said William Barr was “One of the Best” Attorneys General*, CBS NEWS (June 11, 2019, 6:02 AM), <https://www.cbsnews.com/news/in-the-1990s-joe-biden-said-william-barr-was-one-of-the-best-attorney-generals/> [<https://perma.cc/3PZF-FCMR>].

General on account of his flouting the law for political ends and his longtime criticisms of the DOJ's independent counsel statute.<sup>60</sup>

It is important to note that unlike other members of the legal profession who serve as private lawyers or career attorneys working within federal agencies, the U.S. Attorney General has a unique responsibility to balance the dynamics of being a presidential appointee while being the country's most senior lawyer and lead prosecutor. Specifically, the

U.S. Attorney General is not the President's personal lawyer. That role is served by the White House counsel. The Attorney General is more properly considered the people's lawyer. *His allegiance must be to the public; he must protect and enforce the rights of all Americans. . . . [W]hile working to serve the President, the Attorney General has the unique responsibility to the public that requires him to maintain independence from the President's personal and political interests.*<sup>61</sup>

Such a view regarding the Attorney General aligns with the M.R.P.C. 3.8, which notes that a "prosecutor has the responsibility of a minister of justice and not simply that of an advocate."<sup>62</sup> Thus, in examining Barr's actions, it is important to consider these duties with the actions he undertook.

Following Jeff Sessions' resignation (largely due to his recusal from the Russia investigation),<sup>63</sup> Matthew G. Whitaker's short, interim tenure,<sup>64</sup> and

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60. Op-Ed, *Dole v. Walsh*, WASH. POST (Dec. 14, 1992), <https://www.washingtonpost.com/archive/opinions/1992/12/14/dole-v-walsh/18987772-0fcb-42f4-a99b-d04a48fabf8f/> [<https://perma.cc/XGE2-6FB5>] ("[A]ttorney [G]eneral [Barr] is known to dislike the independent counsel process and has refused to appoint others when requested. But here he had an additional and conclusive reason: the law applies only to certain members of the executive branch and cannot be used to investigate the office of the independent counsel at all."); see also Frank Sneep, *Barr None: Attorney General William Barr Is the Best Reason to Vote for Clinton*, VILLAGE VOICE (Oct. 27, 1992) (noting that Bill Barr has "argued that Justice officials are professional enough to investigate themselves and their own masters.").

61. *Confirmation Hearings – Federal Appointments William Pelham Barr, Hearing before the S. Comm. on the Judiciary*, 102nd Cong. 2 (1991) (statement of Sen. Joe Biden, Chairman, S. Judiciary Comm.) (emphasis added).

62. M.R.P.C., *supra* note 4, at r. 3.8 cmt. 1.

63. Peter Baker, Katie Benner & Michael D. Shear, *Jeff Sessions is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html>.

64. Sarah N. Lynch, *Whitaker, Former Acting U.S. Attorney General, Leaves Justice Dept.*, REUTERS (Mar. 4, 2019, 1:22 PM), <https://www.reuters.com/article/us-usa-justice-whitaker/whitaker->



Rod Rosenstein's time performing the duties and responsibilities of the vacant position,<sup>65</sup> Trump put forth Barr's name to return to the Office of Attorney General.<sup>66</sup> However, Barr's nomination to return to this post was controversial from its start. Months before his nomination, Barr wrote several op-eds about the investigation into the Trump campaign and possible collusion with Russia. Specifically, Barr played down Trump's firing of James Comey, suggesting that the former FBI Director had "no relevance to the integrity of the Russian investigation."<sup>67</sup> Moreover, in June of 2018, Barr wrote a memo to then-Deputy Attorney General Rod Rosenstein and then-Assistant Attorney General Steve Engel criticizing the Mueller investigation and called parts of the inquiry—namely obstruction of justice—"fatally misconceived."<sup>68</sup> Barr also advocated that "Mueller's theory should be rejected," suggesting that "if a DOJ investigation is going to take down a democratically-elected President, . . . any claim of wrongdoing [must be] solidly based on evidence of a *real* crime—not a debatable one."<sup>69</sup> Barr sought to clarify his statements during his confirmation hearing, offering assurances that he would maintain the Department's independence,<sup>70</sup> but such

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former-acting-u-s-attorney-general-leaves-justice-dept-idUSKCN1QL1WD [https://perma.cc/HC7W-28GU].

65. See Carrie Johnson & Philip Ewing, *Rod Rosenstein, Face Of Russia Probe, To Step Down As Deputy Attorney General*, NPR (Apr. 29, 2019, 5:34 PM), <https://www.npr.org/2019/04/29/601484448/rod-rosenstein-face-of-russia-probe-to-step-down-as-deputy-attorney-general> [https://perma.cc/SWK3-UNHE].

66. Charlie Savage & Maggie Haberman, *Trump Will Nominate William Barr as Attorney General*, N.Y. TIMES (Dec. 7, 2018), <https://www.nytimes.com/2018/12/07/us/politics/trump-barr-kelly.html> [https://perma.cc/WS2T-GRCT].

67. See, e.g., William Barr, Opinion, *Former Attorney General: Trump Made the Right Call on Comey*, WASH. POST (May 12, 2017), [https://www.washingtonpost.com/opinions/former-attorney-general-trump-made-the-right-call-on-comey/2017/05/12/0e858436-372d-11e7-b4ee-434b6d506b37\\_story.html?utm\\_term=.644b5b603a82](https://www.washingtonpost.com/opinions/former-attorney-general-trump-made-the-right-call-on-comey/2017/05/12/0e858436-372d-11e7-b4ee-434b6d506b37_story.html?utm_term=.644b5b603a82) [https://perma.cc/5JBZ-MECL].

68. Letter from William Barr, to Rod Rosenstein, Deputy Att'y Gen., U.S. Dep't of Just., & Steve Engel, Asst. Att'y Gen., U.S. Dep't of Just., at 1 (June 8, 2018), <https://www.documentcloud.org/documents/5638848-June-2018-Barr-Memo-to-DOJ-Muellers-Obstruction.html> [https://perma.cc/KKF3-D9G4] [hereinafter Barr Recommendation Memo].

69. *Id.* at 3 (emphasis in original).

70. *Confirmation Hearing on the Nomination of Hon. William Pelham Barr to be Attorney General of the United States, Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 9 (2019) (statement of Hon. William Pelham Barr, Nominee to be Attorney General of the United States) ("If confirmed, I will serve with the same independence I did in 1991 . . . I have not given [President Trump any assurances, promises, or commitments] other than that I would run the Department with professionalism and integrity. As Attorney General, my allegiance will be to the rule of law, the

statements gave skeptics little hope to hold on to. Indeed, soon after, Barr was asked about recusing himself from Mueller's Russia investigation, at which point he "inexplicably opined that 'under the regulations, I make the decision as the head of the agency as to my own recusal.'"<sup>71</sup> It does not appear Barr was swayed or influenced by how his actions and statements may have impacted the Department's perception with the public, which has traditionally been a concern of those serving as Attorney General.

A few months after Barr's confirmation, Special Counsel Robert Mueller submitted his *Report on the Investigation into Russian Interference in the 2016 Presidential Election*.<sup>72</sup> Barr quickly undercut Mueller's findings. Roughly two days after receiving the Special Counsel's report, Barr sent leaders of the House and Senate Judiciary Committees a letter stating that it was "in the public interest" for him to summarize "the principal conclusions reached by Special Counsel Robert S. Mueller III" and provided his own initial view of the report.<sup>73</sup> What made Barr's decision notable was that he chose to forego using the Special Counsel's own prepared summaries of findings, and instead provided his own. This prompted concerns by members of the Special Counsel team, who believed "their findings [were] potentially more damaging" than what Barr suggested.<sup>74</sup> In fact, after Barr sent Congress his March 24th letter, Mueller quickly contacted him to express his concerns about Barr's characterization of the report. Specifically, Mueller's letter to Barr emphasized that:

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Constitution, and the American people. This is how it should be, this is how it must be, and if you confirm me, this is how it will be.").

71. Richard Painter & Virginia Canter, *William Barr's View of Russia Recusal Could Undermine All Government Ethics Programs*, USA TODAY (Jan. 29, 2019, 4:00 AM), <https://www.usatoday.com/story/opinion/2019/01/29/attorney-general-nominee-william-barr-wrong-mueller-recusal-trump-column/2702636002/> [<https://perma.cc/V57L-QWBZ>].

72. ROBERT S. MUELLER, SPECIAL COUNSEL, U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019).

73. Letter from William Barr, Att'y Gen., U.S. Dep't of Just., to Lindsey Graham, Chairman, Senate Comm. on the Judiciary, Dianne Feinstein, Ranking Member, Senate Comm. on the Judiciary, Jerrold Nadler, Chairman, House Comm. on the Judiciary, and Doug Collins, Ranking Member, House Comm. on the Judiciary, at 1 (Mar. 24, 2019), <https://www.nytimes.com/interactive/2019/03/24/us/politics/barr-letter-mueller-report.html> [<https://perma.cc/8V9Q-EPSL>].

74. Nicholas Fandos, Michael S. Schmidt & Mark Mazzetti, *Some on Mueller's Team Say Report Was More Damaging Than Barr Revealed*, N.Y. TIMES (Apr. 3, 2019), <https://www.nytimes.com/2019/04/03/us/politics/william-barr-mueller-report.html> [<https://perma.cc/YJH4-EBVL>].

the introductions and executive summaries of our two-volume report accurately summarize this Office's work and conclusions. The summary letter the Department sent to Congress and released to the public late in the afternoon of March 24 did not fully capture the context, nature, and substance of this Office's work and conclusions. . . . There is now public confusion about critical aspects of the results of our investigation. *This threatens to undermine a central purpose for which the Department appointed the Special Counsel: to assure full public confidence in the outcome of the investigations* . . . Release [of the Special Counsel's summaries] at this time would alleviate the misunderstandings that have arisen and would answer congressional and public questions about the nature and outcome of our investigation.<sup>75</sup>

Unsurprisingly, many saw Barr's move as an attempt to use his office to bypass the Special Counsel to hold "that the President had not obstructed justice despite Mueller's carefully reasoned choice not to opine on the question."<sup>76</sup> And even as the Justice Department's own Inspector General, Michael Horowitz began investigating whether political bias tainted the overall investigation into the office's Russian interference probe, "Barr launched a parallel probe of the FBI, . . . raising the obvious question of what, exactly, he hoped to find that he feared an independent investigation would not."<sup>77</sup>

In addition to undermining the Special Counsel's findings, Barr appeared to confuse his position as one of the profession's legal leaders by promoting former President Trump's interests over that of the country's interest in impartial justice. Specifically, Barr cemented himself as someone

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75. Letter from Robert S. Mueller, III, Special Counsel, U.S. Dep't of Just., to William P. Barr, Att'y Gen., U.S. Dep't of Just. (Mar. 27, 2019), <https://apps.npr.org/documents/document.html?id=5984399-Mueller-Letter-to-Barr> [<https://perma.cc/432N-X6YS>] (emphasis added).

76. See Rebecca Roiphe, *A Typology of Justice Department Lawyers' Roles and Responsibilities*, 98 N.C. L. REV. 1077, 1123 (2020); David A. Graham, *Barr Misled the Public—And It Worked*, ATLANTIC (May 1, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/barr-misled-the-public-and-it-worked/588463> [<https://perma.cc/5FYG-3FZ8>].

77. Jay Willis, *William Barr is Undermining His Own Justice Department to Protect Trump*, GQ (Dec. 3, 2019), <https://www.gq.com/story/william-barr-undermining-his-own-justice-department> [<https://perma.cc/6LN2-HXWL>].

dedicated to defending former President Trump by directly involving himself to override the “prosecutors’ sentencing recommendation in Trump’s 2016 campaign chairman Roger Stone’s case . . . and mov[ed] to dismiss charges to which Michael Flynn, the President’s first National Security advisor, had twice pled guilty.”<sup>78</sup> As a result of Barr’s actions, the public’s faith in the accountability and the legitimacy of the Department was perceived by many as significantly damaged.<sup>79</sup>

### III. TOWARD MORE ROBUST SELF-REGULATION

The conduct of Giuliani and Barr was considered by many within the legal profession to be improper. The question, of course, was whether there would be any consequences for their actions; whether the legal profession would respond to this sort of conduct or let it stand unchecked. The reality is that if the legal profession wants to have the power to regulate itself, then it must actually be willing to do the difficult work of regulating its members.<sup>80</sup>

This Part begins by recounting the legal profession’s response to the conduct by Giuliani, Barr, and others who appear to have violated the Rules of Professional Conduct in their attempt to adhere to former President Trump’s wishes and demands. The Part then moves on to present arguments in favor of more robust self-regulation within the legal profession. The upshot is that if the legal profession wants to have the privilege of regulating its members, it should do so effectively and in a manner where misconduct is properly deterred.

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78. Bruce A. Green & Rebecca Roiphe, *Who Should Police Politicization of the DOJ?*, 35 NOTRE DAME J.L. ETHICS & PUB. POL’Y 671, 675 (2021).

79. See Ruth Marcus, *Why is This Justice Department Fighting More Oversight?*, WASH. POST (Nov. 23, 2021, 12:54 PM), <https://www.washingtonpost.com/opinions/2021/11/20/why-is-this-justice-department-fighting-more-oversight/> [https://perma.cc/528E-72K3].

80. There are other examples of the legal profession failing to properly regulate its members. For example, a study recently commissioned by the California legislature found that the disciplinary authorities in the state were failing to properly oversee and sanction lawyers with repeated complaints levied against them. See REPORT OF THE ACTING CALIFORNIA STATE AUDITOR, THE STATE BAR OF CALIFORNIA’S ATTORNEY DISCIPLINE PROCESS (Apr. 14, 2022), <https://www.auditor.ca.gov/reports/2022-030/index.html>.

### A. The Legal Profession's Response

#### 1. Giuliani's Consequence

Giuliani's actions while serving as the President's personal election lawyer led several groups to file professional misconduct complaints against him with the New York State Bar.<sup>81</sup> The complaints commonly cited Giuliani's efforts to "knowingly propagate[] a false narrative of election fraud to de-legitimize . . . Biden's presidential victory and to undermine public confidence in the national electoral process."<sup>82</sup> These allegations prompted New York Bar Association President Scott M. Karson to "launch[] an inquiry . . . to determine whether Mr. Giuliani should be removed from the membership rolls of the Association."<sup>83</sup> Two months later, following an eleven-page, five-part report, the bar found that the allegations against Giuliani "require[d] a serious investigation, a hearing, and, if the allegations are substantiated, the imposition of appropriate discipline."<sup>84</sup>

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81. Rebecca Davis O'Brien, *New York State Bar Association Weighs Stripping Giuliani of Membership*, WALL ST. J. (Jan. 11, 2021, 1:59 PM), <https://www.wsj.com/articles/new-york-state-bar-association-weighs-stripping-giuliani-of-membership-11610382286> [https://perma.cc/B5DT-Z75K] ("The bar association said it had received hundreds of complaints in recent months about Mr. Giuliani stemming from his 'baseless efforts' to cast doubt on the presidential election and overturn its results.").

82. Letter from Laws. Defending American Democracy, to Att'y Grievance Comm., Sup. Ct. of the State New York App. Div., First Jud. Dep't, at 2 (Jan. 20, 2021) <https://dad.org/wp-content/uploads/2021/05/LDAD-Attorney-Grievance-Committee-Complaint.pdf> [https://perma.cc/9662-JUEG] ("A lawyer who lies to the public and abuses the court system to undermine democracy and the rule of law is not fit to practice law. . . . Mr. Giuliani not only lent his stature and status as a lawyer to the venture . . . but also deployed his election fraud strategy to convince Republican legislators in battleground states to certify Trump electors, rather than Biden electors . . . succeed[ing] in Georgia, Pennsylvania, Michigan, Wisconsin, and Nevada."). *See also, e.g.*, Letter from Ronald Minkoff, Counsel to Matthew Miller et al., to Jorge Dopico, Chief Counsel Attorney, Grievance Comm. First Jud. Dep't. (Jan. 21, 2021), <https://images.law.com/contrib/content/uploads/documents/389/125082/Rudy-Complaint-Past-Presidents.pdf> [https://perma.cc/G7NX-GF43]; Brad Holyman, *NY Senate Judiciary Chair Brad Holyman to File Formal Complaint Asking New York Appellate Division to Consider Revoking Rudy Giuliani's License to Practice Law* (Jan. 11, 2021), <https://www.nysenate.gov/newsroom/press-releases/brad-hoylman/ny-senate-judiciary-chair-brad-hoylman-file-formal-complaint> [https://perma.cc/8SGR-WWYH] ("The profession of law is a sacred and noble one. And there can be no room in the profession for those who seek to undermine and undo the rule of law.").

83. Susan DeSantis, *New York State Bar Association Launches Historic Inquiry Into Removing Trump Attorney Rudy Giuliani From Its Membership*, N.Y. STATE BAR ASS'N (Jan. 11, 2021), <https://nysba.org/new-york-state-bar-association-launches-historic-inquiry-into-removing-trump-attorney-rudy-giuliani-from-its-membership/> [https://perma.cc/4QW8-KK7Z].

84. Jason Grant, *NYC Bar Details Complaints, Calling for 'Full' Attorney-Discipline Investigation of Giuliani*, N.Y. L.J. (Mar. 3, 2021),

In its decision, the court emphasized that Giuliani's "broad dissemination of false statements, casting doubt on the legitimacy of thousands of validly cast votes, [wa]s corrosive to the public's trust in our most important democratic institutions."<sup>85</sup> Consequently, given the gravity of his actions, the New York State Bar suspended Giuliani's law license, with the D.C. Bar following suit soon after.<sup>86</sup> Other election lawyers representing Trump or pro-Trump organizations<sup>87</sup> faced various other repercussions for their actions in this endeavor. For instance, one federal judge in Michigan who presided over one of the baseless election lawsuits imposed sanctions on former Trump campaign lawyer Sidney Powell and seven other lawyers "for abusing the legal system with unfounded conspiracy theories."<sup>88</sup> An Indiana-based law firm is also fending off "\$145,000 in sanctions for filing a lawsuit challenging the November 2020 election results in Wisconsin."<sup>89</sup> But in nearly every case, attorneys who challenged the results of the election faced some type of complaint against them with their respective state bars.<sup>90</sup>

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<https://www.law.com/newyorklawjournal/2021/03/03/nyc-bar-details-complaints-calling-for-full-attorney-discipline-investigation-of-giuliani/> [<https://perma.cc/6KWY-NMCQ>].

85. *In re Giuliani*, 197 A.D.3d 1, 25–26 (N.Y. App. Div. 2021).

86. Jaclyn Diaz, *An Appeals Court Has Suspended Rudy Giuliani's Ability To Practice Law In D.C.*, NPR (July 8, 2021, 1:15 AM), [npr.org/2021/07/08/1014047881/an-appeals-court-has-suspended-rudy-giulianis-ability-to-practice-law-in-d-c](https://www.npr.org/2021/07/08/1014047881/an-appeals-court-has-suspended-rudy-giulianis-ability-to-practice-law-in-d-c) [<https://perma.cc/53UX-FPK7>].

87. Note that while some lawyers like Sidney Powell did formally represent Trump in court, others represented third-party groups which simply sought to assist Trump independently in overturning the 2020 election.

88. Erik Larson, *Sidney Powell Hit With \$175,250 in Fees Over 'Frivolous' Michigan Election Lawsuits*, B.L. (Dec. 3, 2021, 10:32 AM), <https://www.bloomberg.com/news/articles/2021-12-02/lawyers-who-sued-to-oveturn-michigan-election-must-pay-175-250> [<https://perma.cc/5UXE-NZJT>]; King v. Whitmer, No. 20-13134, 2021 WL 3771875, at \*40 (E.D. Mich. Aug. 25, 2020) ("Sanctions are required to deter the filing of future frivolous lawsuits designed primarily to spread the narrative that our election processes are rigged and our democratic institutions cannot be trusted.")

89. Marilyn Odendahl, *Indy lawyers Argue They Should Not Be Penalized for Representing Trump in Wisconsin Election Challenge*, IND. LAWYER (July 13, 2021), <https://www.theindianalawyer.com/articles/indy-lawyers-argue-they-should-not-be-penalized-for-representing-trump-in-wisconsin-election-challenge> [<https://perma.cc/SNF6-RFNV>].

90. See, e.g., Joe Dana, *Bar Complaint Filed Against Trump Attorneys in Arizona*, KPNX-TV (Dec. 17, 2020), <https://www.12news.com/article/news/politics/bar-complaint-filed-against-trump-attorneys-in-arizona/75-857a2dd9-9e96-47b1-83f5-f9782bd875fb>; Liz Dye, *Trump Land Lawyers Face Bar Complaints After Engaging In Some Light Coup-ing*, ABOVE THE L. (Oct. 5, 2021, 2:14 PM), <https://abovethelaw.com/2021/10/trumpland-lawyers-face-bar-complaints-after-engaging-in-some-light-coup-ing/> [<https://perma.cc/R5MG-VRPN>]; Jacqueline Thomsen, *'A Disgrace': Hundreds of Lawyers Call for Bar Condemnations of Trump Election Lawyers*, LAW.COM (Dec. 7, 2020, 4:07 PM), <https://www.law.com/nationallawjournal/2020/12/07/a-disgrace-hundreds-of-lawyers-call-for-bar-condemnations-of-trump-election-lawyers/>.

Some members of the profession have expressed concerns regarding the possible implications of the New York Bar suspending Giuliani's law license. Specifically, they worry about "how and when [bar] suspensions will be imposed against lawyers in public controversies . . . [especially those] attorneys who straddle the line of legal and political advocacy."<sup>91</sup> Such a concern may not be unfounded, particularly given that the M.R.P.C. acknowledges a "lawyer's obligation [to] zealously . . . protect and pursue a client's legitimate interests."<sup>92</sup> Others saw Giuliani's suspension as a win for "[those] who care[] about the integrity of the law profession."<sup>93</sup>

There are, however, those within the legal community who remain skeptical about the prospect of similar judicial responses for other attorneys engaging in related behavior in the future, as well as the possible professional fallout for attorneys moving forward. For instance, John Dean, former Nixon White House counsel who was disbarred and imprisoned due to his role in the Watergate cover-up, has argued that Trump, his associates, and his appointees have "pushed legal ethics into the trash can and today lawyers get away with whatever they think they can."<sup>94</sup> Because of this, Dean suggests that while the law was once an effective self-regulating profession, that perspective may no longer be the case today.<sup>95</sup> The upshot is that if state bars fail to act in situations such as these, where lawyers publicly act outside the Rules of Professional Conduct, there may be attorneys that perpetuate similar violations, which could have damning effects for the profession at large.

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91. Jonathan Turley, *Politics by Other Means? Giuliani Suspension Should Worry All Lawyers*, THE HILL (June 26, 2021, 10:00 AM), <https://thehill.com/opinion/judiciary/560366-giuliani-suspension-should-worry-all-lawyers> [<https://perma.cc/3RCL-CGWD>].

92. M.R.P.C., *supra* note 4, Preamble ¶ 9. Of course, what constitutes "legitimate interests" of a client under these circumstances is subject to great debate.

93. Teri Kanefield, *Rudy Giuliani's New York Suspension Proves Dangers of Trump's Lies*, NBC NEWS (June 26, 2021, 8:07 AM), <https://www.nbcnews.com/think/opinion/rudy-giuliani-s-new-york-suspension-proves-dangers-trump-s-ncna1272422> [<https://perma.cc/7YU7-NTF9>].

94. Melissa Heelan, *Election Fraud Cases Sow Doubts About Legal Profession's Future*, BLOOMBERG L. (Sept. 14, 2021, 5:45 AM), <https://news.bloomberglaw.com/us-law-week/election-fraud-cases-sow-doubts-about-legal-professions-future> [<https://perma.cc/T348-D4L9>].

95. *Id.*

## 2. Barr's Backlash

Following Barr's attempts to undermine the Russia investigation, the public backlash was fierce. When Bill Barr released his own memo regarding the Special Counsel's report on the Russia investigation, hundreds of federal prosecutors signed onto a letter refuting Barr's assessment, arguing that "the conduct of former President Trump described in Special Counsel Robert Mueller's report would, in the case of any other person not covered by the Office of Legal Counsel policy against indicting a sitting President, result in multiple felony charges for obstruction of justice."<sup>96</sup> Other members of the profession also filed complaints with relevant state bars, alleging that "Mr. Barr ha[d] consistently made decisions and t[aken] action[s] to serve the personal and political self-interests of President Donald Trump, rather than the interest of the United States. . . . [and] ha[d] been dishonest, misrepresenting facts and law to Congress and the public."<sup>97</sup> Indeed, in 2021, Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia held Attorney General Barr was "untruthful to Congress and the public . . . about the Mueller investigation," and ruled the Department had to "turn over a range of documents related to how top law enforcement officials cleared Mr. Trump of wrongdoing."<sup>98</sup> Furthermore, when Barr chose to involve himself in the cases involving Trump allies Roger Stone and Michael Flynn, over 1,000 former U.S. Justice Department officials called for Barr's resignation. Specifically, within their letters, they argued that "Attorney General Barr openly and repeatedly flouted th[e] fundamental principle [of the Department's] . . . sacred obligation to ensure equal justice under the law,"<sup>99</sup> and that his actions were an "assault[] on the

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96. DOJ Alumni, *Statement by Former Federal Prosecutors* (May 6, 2019), <https://medium.com/@dojalumni/statement-by-former-federal-prosecutors-8ab7691c2aa1>.

97. Letter from Gary Ratner, *Laws. Defending Amer. Democracy*, et al., to Office of Disciplinary Couns., Bd. on Pro. Resp. (July 22, 2020).

98. Michael S. Schmidt, *Judge Says Barr Misled on How His Justice Dept. Viewed Trump's Actions*, N.Y. Times (May 4, 2021), <https://www.nytimes.com/2021/05/04/us/politics/barr-trump-obstruction-russia-inquiry.html> [<https://perma.cc/P4J3-NKCP>].

99. DOJ Alumni, *DOJ Alumni Statement on the Events Surrounding the Sentencing of Roger Stone* (Feb. 16, 2020), <https://medium.com/@dojalumni/doj-alumni-statement-on-the-eventssurrounding-the-sentencing-of-roger-stone-c2cb75ae4937>.



rule of law in doing the President's personal bidding rather than acting in the public interest."<sup>100</sup>

However, unlike Giuliani, the disciplinary complaint against Bill Barr was dismissed by the D.C. Bar.<sup>101</sup> The dismissal may give credibility to the concerns by those worried about the future role of state bars in pursuing matters with political undertones. Specifically, in dismissing the complaint, the disciplinary committee noted that it "will not intervene in matters that are currently and publicly being discussed in the national political arena."<sup>102</sup> The upshot was that while public backlash held strong, discipline within the profession remained largely absent.

Professors Bruce A. Green and Rebecca Roiphe have noted that political accountability is not an effective tool against the types of transgressions conducted by Barr.<sup>103</sup> Indeed, while the "[P]resident can fire the Attorney General when DOJ is mismanaged . . . [the President has] no incentive to do so when DOJ acts to further the [P]resident's own political ambitions or allegiances."<sup>104</sup> Thus, they argue that "court[s] or other public bod[ies] [must be able to] thoroughly investigate[] and credibly reveal[] that federal prosecutors used their power for political advantage . . . . [or alternatively], some institution must have authority, tools, and motivation both to investigate potential and apparent abuses and ultimately to resolve whether abuses occurred."<sup>105</sup>

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When examining the public and the profession's collective reaction to Giuliani's and Barr's actions, one finds broad support for the notion that a

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100. DOJ Alumni, *DOJ Alumni Statement on Flynn Case*, (May 11, 2020), <https://medium.com/@dojalumni/doj-alumni-statement-on-flynn-case-7c38a9a945b9>; see also Pete Williams, *2,000 former DOJ, FBI Officials Call on Barr to Resign over Michael Flynn Case*, NBC NEWS (May 11, 2020, 2:52 PM), <https://www.nbcnews.com/politics/justice-department/2-000-former-doj-fbi-officials-call-barr-resign-over-n1204601> [<https://perma.cc/CL2A-VVHP>].

101. Jacqueline Thomsen, *An Ethics Complaint Against Bill Barr Was Rejected, and It Has Lawyers Worried*, NAT'L L.J. (June 09, 2021, 05:13 PM), <https://www.law.com/nationallawjournal/2021/06/09/an-ethics-complaint-against-bill-barr-was-rejected-and-it-has-lawyers-worried/> [<https://perma.cc/9JL8-DUPQ>].

102. *Id.*

103. Bruce A. Green & Rebecca Roiphe, *Who Should Police Politicization of the DOJ?*, 35 NORTE DAME J.L. ETHICS & PUB. POL'Y 671, 676.(2021).

104. *Id.*

105. *Id.* at 676–77.

lawyer's duty spans beyond merely being a zealous advocate for their client, and that this duty requires more stringent self-regulation. The question then becomes what types of structures and enforcement mechanisms can satisfy this demand.

*B. Official Disciplinary Interventions are Needed*

There is something heartening about the efforts taken by members of the legal profession in response to the conduct of lawyers like Barr, Giuliani, and others who abandoned their fidelity to the public good in favor of the whims of their client or perceived client.<sup>106</sup> And the actions of the New York State Bar to intervene swiftly regarding allegations of professional misconduct levied against Giuliani appear to be sensible, brave, bold, and necessary. It would, however, be naïve to think that Barr, Giuliani, and the other attorneys who sacrificed their professional obligations in favor of former President Trump's desires are outliers. As intimated by Judge Laster, the work of Professor Roiphe, and others, the divergence from certain professional ideals like the pursuit of the public good in favor of the business-centric, hired-gun model has been occurring for decades. The actions by Barr, Giuliani, and others are notable, in part, because they occurred so publicly and with blatant disregard for adhering to certain professional norms and standards—but other lawyers are engaged in similar types of behavior. And these lawyers, who act with much higher levels of anonymity than those discussed in this Essay, are actively harming the profession and the public when they put the desires of their clients above their responsibilities, as professionals, to pursue the public good at all times.

When one looks critically at the self-regulatory oversight of lawyers within the United States, however, it is, perhaps, not surprising that lawyers feel comfortable enough to ignore certain aspects of their professional obligations. There are a variety of reasons for this current state of affairs within the self-regulatory regime for lawyers—some of which were discussed in Part I—but this Part will focus on three specific examples. First,

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106. Trump was not in actuality Barr's client. The Attorney General of the United States is a government attorney who represents the United States. As a member of the executive branch, the Attorney General takes direction from the President, but that does not mean the Attorney General is the President's personal lawyer. Barr's client obligations and duties ran to the country and the office of the presidency, not to Trump personally.

state bars do not appear to purposefully engage in the actions required to achieve deterrence from misconduct, which focus on increasing either the probability of sanction, the size of sanction, or both to achieve optimal deterrence. Second, and relatedly, lawyers are not afraid of their self-regulatory organization in the same ways that members of other professions are, which means that the bar is neither deterring misconduct nor promoting adherence to the Rules of Professional Conduct as well as it could be. Third, the bar has failed to sufficiently implement predictable tools for determining when a sanction should be levied, tools which would help guard against the ways in which capture might disincentivize those in charge of self-regulatory activities from issuing sanctions.

#### 1. Elements to Achieve Deterrence

Law and economics models concerned with deterrence time and time again rely on Gary Becker's insight that if you want to deter misconduct, you have one of two potential levers to pull: (i) the probability of detection or (ii) the severity of the sanction.<sup>107</sup> One's policy choices regarding these two levers should, if calibrated properly, result in deterring misconduct. In examining the current actions of state bars, it does not appear as though they are taking into account these levers when approaching the design of their disciplinary regimes.

On the detection front, state bars rely almost entirely on complaints—whether from clients or members of the bar or the judiciary. To be fair, state bars are probably not in a position where they can effectively increase the number of complaints, which would then give the state bar an improved ability to detect potential misconduct. State bars do not know the identity of each lawyer's clients and without that sort of information, it would be challenging for the bar to attempt to nudge additional complaints from clients and the public. State bars could, however, potentially nudge other lawyers or members of the judiciary to levy formal complaints more often. For example, in the annual questionnaire that is filled out to renew one's law license, the bar could ask members to alert them to those within the profession who they believe are violating the Rules of Professional Conduct.

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107. Gary S. Becker, *Crime and Punishment: An Economic Approach*, J. OF POL. ECON. 76, 169–217 (1968).

State bars could also send annual or semiannual correspondence to all the judges within the state and ask them whether there are any attorneys who practice before them who have engaged in questionable conduct. These two interventions, however, would likely be limited in their efficacy, because lawyers and judges are unlikely to report a colleague to disciplinary authorities—despite guidance in the Model Rules of Professional Conduct to do so in certain circumstances<sup>108</sup>—as the report could have devastating results for the person reported. In short, one is unlikely to tattle on one's friends or colleagues. As a result, it seems unlikely that state bars are likely to increase deterrence in a meaningful way by pulling the probability of detection lever.

State bars could, however, increase the severity of sanctions levied by bar disciplinary authorities, which should have a positive deterrent impact on lawyers within their jurisdictions. For example, state bars could eliminate the use of private reprimands altogether and require all decisions regarding bar discipline to be issued publicly. Currently, it is impossible to know how often, and in what manner, lawyers are sanctioned, in part because private discipline is permitted.<sup>109</sup> Moving to an entirely public regime, however, might have drawbacks, particularly when the bar is intervening due to concerns related to disability or other matters that some consider to be personal, as opposed to professional, impediments to the effective practice of law. State bars could nevertheless look at other tools for increasing the severity of sanctions. For example, they could think systematically about deterrence when deciding what sanction to levy and in what manner. Disciplinary authorities focused on deterrence might opt for longer suspensions or more disbarments. If disciplinary authorities were to take deterrence into account when contemplating what sort of discipline to impose, it might prompt them to use bar discipline in a way that would increase deterrence among other members of the profession from engaging in attorney-misconduct.

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108. See, e.g., M.R.P.C., *supra* note 4, r. 8.3(a) (“A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”).

109. The authors concede that eliminating private reprimands and moving to an entirely public regime might have the secondary effect of giving the impression that the probability of detection is higher than what is currently signaled today.

## 2. Fear of Self-Regulatory Body

When law students and lawyers think of discipline by the bar, they often joke that the two paths by which discipline is most likely to be levied against an attorney are either (i) improper treatment of a client's property (e.g., comingling of attorney-client funds) or (ii) sexual contact with a client. These sentiments are, of course, grounded in humor, but the background norms behind these jokes suggest that most lawyers believe that disciplinary authorities are uninterested in aggressively overseeing the full scope of requirements contained within the Rules of Professional Conduct. These views are solidified when members of the profession see their colleagues continually violate Rules of Professional Conduct without sanction, as has been highlighted by a recent audit of the California Bar disciplinary system.<sup>110</sup> Lawyers in jurisdiction after jurisdiction often find themselves asking: "how is this person still practicing?" The answer to that question is perhaps a simple one—the state bar continually allows them to practice. Accordingly, if lawyers know it is unlikely that the bar will issue sanctions, it creates a disincentive for other lawyers to report misconduct. And if lawyers know that they can continue to practice in violation of the Rules of Professional Conduct without fear of sanction from the state bar, they have no incentive to change their behavior.

The perception that lawyers have of state bar disciplinary systems— i.e., the self-regulatory organizations for lawyers—is strikingly different than the perception broker-dealers have of their self-regulatory organization, the Financial Industry Regulatory Authority ("FINRA").<sup>111</sup> Broker-dealers fear the sanctions that FINRA might levy against them for engaging in activity that is outside the rules and standards that broker-dealers must comply with. Misconduct by broker-dealers can lead to fines, suspensions, or bars from the industry altogether.<sup>112</sup> These collections of sanctions are not all that different than what is available to state bar disciplinary officials, but the

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110. Joyce E. Cutler, *California Bar's Policies Don't Protect Public, Audit Finds*, BLOOMBERG (Apr. 14, 2022), <https://news.bloomberglaw.com/us-law-week/california-bars-weak-policies-dont-protect-public-audit-finds>.

111. This sentence and paragraph are based on one co-author, Veronica Root Martinez's, experiences and impressions as a member of the legal profession and as a member of FINRA's National Adjudicatory Council, which oversees appeals to discipline levied by FINRA against broker-dealers.

112. *Enforcement*, FIN. INDUS. REG. AUTH. CORP., <https://www.finra.org/rules-guidance/enforcement> (last visited Dec. 19, 2021).

willingness of FINRA to levy sanctions seems much higher than that of bar officials. To be fair, the difference could be related to resources. When academics or members of the profession call on state bars to do more in the way of licensure or discipline, the immediate objection levied is one of resources.<sup>113</sup> In particular, state bars have very limited budgets, so attempts to ramp up their oversight of attorneys may seem unreasonable without a corresponding increase in staff and other resources. FINRA, on the other hand, does not appear to have similar resource constraints.<sup>114</sup>

Disciplinary authorities could, however, improve their use of resources by adopting a disciplinary framework meant to deter misconduct by attorneys as outlined in Part III.B.1. If state bars are unable to investigate and intervene in more instances than they are already engaged in, then they must make sure they levy severe sanctions for the cases that they do choose to pursue. Additionally, bar authorities should ensure the sanctions they levy are across the full spectrum of the Rules of Professional Conduct and not tied to a small subset of areas. In making those two changes, bar authorities can increase deterrence as well as concern by members of the legal profession that if a sanction were to be levied against them for professional misconduct, it would be of significance.

### 3. Predictable Tools for Determining Sanction

The legal profession's use of self-regulation, whereby lawyers regulate other lawyers, has been fraught from its inception. Self-regulation was used for a variety of discriminatory purposes to make it difficult for women,

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113. See, e.g., Cheryl Miller, *State Bar Failed to Stop Repeated Attorney Misconduct, Audit Finds*, LAW.COM (Apr. 14, 2022) <https://www.law.com/therecorder/2022/04/14/state-bar-failed-to-stop-repeated-attorney-misconduct-audit-finds/> [<https://perma.cc/X9JT-76P9>] (despite a state auditor report finding that California's state bar failed to oversee and punish lawyers for ethics violations, the chair of California bar's board of trustees, Rubin Duran, noted that "absent new resources, the state bar's implementation of these recommendations will be limited to what can be done within existing funding parameters").

114. FINRA's enforcement arm is robust and significant. See, e.g., Press Release, FINRA, FINRA Announces Enforcement Structure, Senior Leadership Team (July 26, 2018), <https://www.finra.org/media-center/news-releases/2018/finra-announces-enforcement-structure-senior-leadership-team>; Jessica Hopper, *Working on the Front Lines of Investor Protection – How an Enforcement Action Becomes an Enforcement Action* (June 4, 2020), <https://www.finra.org/media-center/blog/working-on-the-front-lines-of-investor-protection-how-an-enforcement-action-becomes-an-enforcement-action>.

people of color, and non-Protestants to enter the profession.<sup>115</sup> Scholars today continue to lament the ways in which the profession uses its self-regulatory authority in a manner that can make legal services more challenging to access and more expensive.<sup>116</sup> And yet, self-regulation is one of the hallmarks of a profession. Society allows a group of individuals to govern themselves, because they are best suited to oversee their own conduct and ensure that they adhere to robust professional standards.

Within the legal profession, however, self-regulation could lead to capture. Legal communities are small. Even across an entire state, lawyers will often know, or know of, each other. When this sort of community is asked to regulate itself, it is being asked to regulate its friends, colleagues, and perhaps family. The Rules of Professional Conduct lay out the expectations for professional conduct, and disciplinary authorities in each state have the power to issue reprimands, levy suspensions, and, in the most egregious cases, remove individuals from the profession altogether. There is not, however, a sufficient amount of guidance<sup>117</sup> on what sort of sanction should follow from a specific sort of violation.<sup>118</sup> More robust sanctions guidance could be beneficial for a number of reasons. In particular, it could

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115. See William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 J. LAW & SOCIAL INQUIRY 547 (2004); George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 106 (Mar. 2003) (“During the 1920s and 1930s the bar, the courts, and state governments imposed the accreditation system as an intentional means to exclude blacks and other minorities from the profession to reduce competition for existing white lawyers.”).

116. See Joseline Jean-Louis Hardrick, *The Bar Exam Is A Barrier To Access For Legal Services And Access To Justice For Many*, ABOVE THE L. (Dec. 2, 2021, 5:03 PM), <https://abovethelaw.com/2021/12/the-bar-exam-is-a-barrier-to-access-for-legal-services-and-access-to-justice-for-many> [<https://perma.cc/AM6N-2M9G>] (discussing the financial entry barriers imposed by the law’s self-regulating structure).

117. There are standards that have been promulgated by the ABA and adopted by many states. See, e.g., David L. Hudson Jr., *New ABA Annotation May Help Courts and Lawyers Navigate Attorney Sanction Process*, ABA Journal (June 1, 2015), [https://www.abajournal.com/magazine/article/new\\_aba\\_annotation\\_may\\_help\\_courts\\_and\\_lawyers\\_navigate\\_attorney\\_sanction\\_p](https://www.abajournal.com/magazine/article/new_aba_annotation_may_help_courts_and_lawyers_navigate_attorney_sanction_p). Most lawyers, however, do not have a great deal of ease and facility about how those standards might work in particular cases. A key component to creating a properly deterrent sanctions regime is that attorneys would have to have a better understanding of how sanctions would be levied against them for certain types of activity. The standards for discipline, where adopted, are separate than the Rules of Professional Conduct, and are not as well-known by lawyers as the actual rules.

118. Other professions use sanctions guidance. FINRA, for example, has formal Sanctions Guidelines that guide the decisionmaking of those charged with overseeing adjudications of alleged misconduct. SANCTION GUIDELINES, FIN. INDUS. REG. AUTH. CORP. (Oct. 2021), [https://www.finra.org/sites/default/files/Sanctions\\_Guidelines.pdf](https://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf) [<https://perma.cc/27E6-Q3WV>].

allow lawyers to better understand the ramifications of certain types of offenses. Additionally, it might help bar authorities to communicate the types of misconduct that will not be tolerated. These potential benefits could reasonably follow from the adoption and use of sanctions guidance by bar disciplinary authorities that is publicized widely to members of the bar. Perhaps most importantly, more robust and publicly known sanctions guidance could be beneficial, because it would help to guard against capture. To the extent that someone is reluctant to issue a sanction against an attorney because they “know they do such good work” or “their dad was a leader in the state bar,” more robust or binding sanctions guidance would provide a framework for standardizing bar discipline, while also ensuring that the issued sanctions are appropriate given the underlying misconduct that occurred.

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When a member of the legal profession requires professional discipline, it is an unpleasant task for all involved. Discipline can have a significant impact on a person’s life and livelihood. And yet, the perils of failing to discipline lawyers who engage in misconduct are significant. It can cause the public to lose faith in the profession. It can leave clients without recourse when harmed by an attorney. And, perhaps most importantly, it resets the boundaries and expectations about what sort of conduct is acceptable for the lawyer involved and the lawyers around them. Barr, Giuliani, and others involved in representing former President Trump should be investigated and, if found to have violated Rules of Professional Conduct, sanctioned. But more than that, all members of the profession who fail to adhere to their professional duties should be concerned that their failures could lead to formal and serious sanctions from the state bar.

#### CONCLUSION

One of the reasons so many aspire to one day become attorneys is because they understand the opportunity to join the legal profession is an opportunity to do much good in the world. The flipside to this potential, however, is that lawyers also have the capacity to inflict a tremendous amount of harm on society if they fail to adhere to certain standards and



expectations. The scope and breadth of harm that can be aided by legal counsel can be identified in many of the actions lawyers took on behalf of former President Trump.

And yet, the profession can choose to fight back against those within its ranks who have abandoned their responsibility to ensure that they pursue the public good within and throughout all representations. This Essay argues that to ensure that members of the legal profession are unwavering in their pursuit of the public good, self-regulation of those within the legal profession must become much more stringent. The legal profession must turn towards much more robust regulation of its members. There can be no collective pursuit of the public good by the legal profession without the collective will to sanction those who fail to adhere to its pursuit.